To Transfer or Not to Transfer: Congress Failed to Stiffen Penalties for Medicaid Estate Planning, but Should the Practice Continue?

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The high cost of long-term health care motivates many middle-class and wealthy individuals to transfer their assets in order to qualify for Medicaid. After Congress repealed an unpopular and short-lived law criminalizing such transfers, it enacted a replacement law prohibiting the counseling of others to make such transfers. This new law criminalizes the actions of attorneys who advise their clients to divest themselves of assets in order to qualify for Medicaid. However, U.S. Attorney General Janet Reno declared she will not enforce the statute, citing a concern that such enforcement would criminalize the counseling of an otherwise lawful estate-planning strategy. Questions remain as to whether attorneys should continue to advise their clients to transfer their assets in order to receive government assistance and whether Congress should continue to legislate in this area.

In this note, Mr. Broderick examines the purposes and costs of Medicaid and discusses the current Medicaid eligibility rules. Mr. Broderick then analyzes the history of asset-transfer regulations and discusses why these measures have ultimately failed. Mr. Broderick suggests a better solution would be to remove the motivation to engage in asset transferring by making long-term health care insurance less expensive and more accessible to the elderly. Moreover, Mr. Broderick advocates a continuation in the practice of transferring assets within the context of estate planning, but only if further legislation is developed that protects the elderly from being coerced by their family into divesting their assets in order to maximize the size of the estate left to the family members.

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I. Introduction

Over the last twenty years, Medicaid eligibility rules have become increasingly restrictive.[1] In 1996, the Health Insurance Portability and Accountability Act of 1996[2] criminalized the transfer of assets made for the purpose of becoming eligible for Medicaid.[3] This provision represented the pinnacle of government involvement in regulating such transfers. Amid a subsequent hailstorm of criticism, Congress amended the provision.[4]

In a seemingly vindictive measure, Congress replaced the provision with a criminal sanction against those who counseled others to make such transfers.[5] However, a federal district court judge has held that a constitutional challenge to this provision will most likely be successful.[6] It appears Congress exercised poor judgment and was manipulated by the insurance industry, an industry that was contending with a stagnant long-term care insurance market.[7]

This note will recommend that the practice of Medicaid estate planning should continue. Although recent attempts to legislate in this area have failed, lawmakers still need to address problems associated with Medicaid estate planning, and, in particular, the problems that arise when children want to institutionalize a parent. Part II gives an overview of the purpose and costs of Medicaid, and discusses current Medicaid eligibility rules. Part III analyzes the history of asset-transfer provisions. Part IV then discusses why recent measures to increase the penalties for asset transfers have failed. Finally, part V concludes that the practice should continue and suggests that further legislation is needed.

1. *See generally* Joshua M. Wiener, *Public Policies on Medicaid Transfer and Estate Recovery: How Much Money to Be Saved?*, GENERATIONS, Sept. 1996, at 72.

2. Pub. L. No. 104-191, 110 Stat. 1936.

3. *See id.* § 217, 110 Stat. at 2008-09.

4. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 706 (codified at 42 U.S.C.A. § 1320a-7b(a) (West 1998)).

5. *See id.*

6. *See* New York State Bar Ass'n v. Reno, 999 F. Supp. 710 (N.D.N.Y. 1998) (granting a preliminary injunction for the bar association to stay Department of Justice enforcement while the bar association pursues its constitutional challenge).

7. *See* Ira Stewart Wiesner, *OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 47 SOC. SEC. REP. SERV. 757, 758 (1995) (discussing the pervasive influence of the insurance industry in this area of legislation).

II. Background

A. Medicare

Created by the Social Security Amendments of 1965,[8] Medicare[9] and Medicaid[10] provide health insurance coverage for most individuals aged sixty-five and older.[11] Medicare is a federal program with uniform eligibility requirements and a standardized benefit structure for the entire nation.[12] The program has three parts: Part A provides for the Hospital Insurance program,[13] Part B provides for Supplemental Medical Insurance which covers such costs as x-rays and physician services,[14] and Part C provides for Medicare+Choice.[15]

Part A coverage is automatically available without cost to all recipients of Social Security Retirement benefits[16] and to all others aged sixty-five and older for a monthly premium.[17] Part A covers ninety consecutive days of hospitalization per episode,[18] subject to a deductible and copayments.[19] Part A partially covers skilled nursing care at an institution for up to 100 days,[20] if that individual was an inpatient for at least three consecutive days before transferring from the hospital to the skilled nursing care facility.[21] Under some circumstances, Part A also covers skilled care at home.[22] Medicare Part B is a non-means-tested program, requiring applicants to be otherwise eligible for Part A coverage, aged sixty-five or older, and to pay a monthly premium.[23] Medicare is intended to cover acute short-term illnesses, most hospitalization costs, and a portion of the costs of physician services.[24]

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8. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.
9. Health Insurance for the Aged Act, Pub. L. No. 89-97, § 100, 79 Stat. 290, 290 (1965) (codified at 42 U.S.C.A. § 1395 (West 1998)).
10. Grants to States for Medical Assistance Programs, Pub. L. 89-97, § 121(a), 79 Stat. 343, 343 (1965) (codified as amended at 42 U.S.C.A. § 1396 (West 1998)).
11. *See* 42 U.S.C.A. §§ 1395c, 1396d(a)(iii).
12. *See* 1 S. REP. NO. 103-403, at 175 (1993).
13. *See* 42 U.S.C.A. §§ 1395c-1395i-4.
14. *See id.* §§ 1395n-j-1395w-4.
15. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 1851(a), 111 Stat. 251, 276 (codified as amended at 42 U.S.C.A. § 1395w-21(a) (West 1998)).
16. *See id.* § 1395c.
17. *See id.* §§ 1395i-2(a), (d).
18. *See id.* § 1395d(a)(1).
19. *See id.* § 1395e(b).
20. *See id.* § 1395d(a)(2)(A).
21. *See id.* § 1395x(i).
22. *See id.* § 1395d(a)(3).
23. *See id.* § 1395o.
24. *See* 1 S. REP. NO. 103-403, at 1, 145 (1993).

B. Medicaid

In order to cover large copayments or extended acute illnesses requiring longer hospital stays, the individual will need either private supplemental coverage, which is referred to as Medigap, or Medicaid.[25] Medicaid is a joint federal-state entitlement program originally intended to give basic medical services only to the poor and disabled.[26] States may develop and administer their own Medicaid programs within federal guidelines.[27] Participating states pay the costs of medical treatment for the needy and are subsequently reimbursed by the federal government.[28]

Medicaid has become a fundamental source of public funds for nursing home care.[29] Approximately one-half of all nursing home residents[30] rely on Medicaid as their primary source of payment.[31] Medicaid reimburses forty-one percent of all elderly nursing home residents, regardless of whether they initially enter the nursing home as eligible, or enter as private payers and subsequently deplete their assets.[32]

Private insurance for long-term care is limited.[33] Insurance is unaffordable for most of the elderly.[34] Thus, estate planning becomes more important for the nation's growing elderly population. However, many individuals do not plan adequately for long-term care because either an unanticipated illness strikes them or they mistakenly rely on Medicare for full coverage.[35]

Medicaid addresses the needs for medical assistance of the medically indigent.[36] Whereas Medicare functions like social insurance,

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25. *See id.* at 149.
26. *See id.* at 173-74.
27. *See id.* at 173.
28. *See generally* 42 U.S.C.A. § 1396b.
29. *See* 1 S. REP. NO. 103-403, at 173. Medicaid pays for 90% of all nursing home costs. *See id.*
30. In 1991, 1.3 million residents in nursing homes were aged 65 and over. *See id.* at 174. Current projections estimate that two out of five of all persons aged 65 and over can expect to spend some time in a nursing home. *See infra* note 250 and accompanying text.
31. *See* 1 S. REP. NO. 103-403, at 173-74.
32. *See* Brenda C. Spillman & Peter Kemper, *Lifetime Patterns of Payment for Nursing Home Care,* 33 MED. CARE 280, 293 (1995).
33. *See* Peter M. Macy, *Medicaid Planning After OBRA '93: Placing the Home in a Revocable Trust,* 79 MASS. L. REV. 1, 2 (1995).
34. *See* Joshua M. Wiener, *Can Medicaid Long-Term Care Expenditures for the Elderly Be Reduced?,* 36 GERONTOLOGIST 800, 801 (1996).
35. *See* 1 S. REP. NO. 103-403, at 173.
36. *See id.*

Medicaid is more akin to a welfare program.[37] Medicaid is a means-tested entitlement program for individuals in certain groups who qualify for coverage if their income and resources are sufficiently low.[38] It covers one-half of the population with income below the federal poverty line.[39] As far as the elderly are concerned, Medicaid covered 32% of the elderly population in 1991, accounting for 33% of Medicaid spending.[40]

C. Medicaid Eligibility Categories

Medicaid covers three categories of individuals. They are: (1) the categorically needy,[41] (2) the optional categorically needy,[42] and (3) the medically needy.[43] The elderly who are covered by Medicaid comprise 54% of the individuals in the categorically needy class, 23% in the optional categorically needy class, and 23% in the medically needy class.[44] Federal law requires states to cover the categorically needy.[45] All persons receiving assistance under a welfare program, such as Aid to Families with Dependent Children (AFDC) and most persons who receive assistance from Supplemental Security Income (SSI) qualify for Medicaid benefits.[46] If an individual qualifies for SSI, she must also meet the income and resource requirements of the state in order to receive Medicaid benefits.[47] However, if an applicant does not meet SSI or AFDC eligibility standards, she will not qualify for Medicaid regardless of her income level.[48]

Congress sets federal guidelines of eligibility for use by the states.[49] The Health Care Finance Association (HCFA) further refines those guidelines.[50] If an applicant is over sixty-five and categorically needy, the individual qualifies for assistance.[51] The criteria for deter-

37. *See* Marshall B. Kapp, *Options for Long-Term Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 724 (1991).
38. *See* 1 S. REP. NO. 103-403, at 175.
39. *See id.* at 176.
40. *See id.*
41. *See* 42 C.F.R. § 435.100 (1995).
42. *See id.* § 435.200.
43. *See id.* § 435.300.
44. *See* S. REP. NO. 103-403, at 176.
45. *See* 42 C.F.R. § 435.110(a).
46. *See id.* §§ 435.110(b), 435.120.
47. *See id.* § 435.121.
48. *See id.*
49. *See, e.g.*, 42 U.S.C.A. § 1396a(a)(10) (West 1998).
50. *See* 42 C.F.R. § 435.
51. *See id.* §§ 435.120-.121.

mining if someone is categorically needy has two components: income and resources.

Income is defined as the amount an individual receives in cash or in kind to pay for food, clothes, or shelter.[52] In contrast, resources are assets that can be converted into cash.[53] For example, Illinois allows a person to hold $2,000 in resources,[54] but certain resources are not counted.[55] Such uncounted resources include the homestead to which a nursing home resident intends to return, any personal effects, and the value of a motor vehicle up to $4,500.[56]

Contrary to the categorically needy group, the optional categorically needy is a class of persons that the state can give assistance to at the state's discretion.[57] These programs extend Medicaid eligibility to applicants who do qualify for welfare or SSI benefits but meet certain other criteria.[58] This category enables many residents in nursing homes to be covered by Medicaid if their income is low enough but, otherwise, would not qualify as categorically needy.[59]

Applicants falling under the third category, the medically needy, are those applicants whose income and resources are large enough to cover daily living expenses, but not large enough to cover medical care.[60] The criteria for determining who is medically needy varies from state to state.[61] A person may be eligible in one state, but not in another.[62]

D. Costs

In 1996, 36.1 million U.S. citizens received Medicaid at a cost of $121.7 billion in vendor payments.[63] Comprising 13% of the Medicaid

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52. *See* 42 U.S.C.A. § 1382a; 20 C.F.R. § 416.1102.
53. *See* 20 C.F.R. § 416.1201.
54. *See* AID FOR THE AGED, BLIND AND DISABLED MANUAL § 505.2 (1996).
55. *See* 42 U.S.C.A. § 1382a(b); 20 C.F.R. § 416.1210.
56. *See* AID FOR THE AGED, BLIND AND DISABLED MANUAL, *supra* note 54, § 505.1.
57. *See* 42 C.F.R. § 435.201.
58. *See id.* § 435.201(a).
59. *See* 1 S. REP NO. 103-403, at 175 (1993).
60. *See* 42 C.F.R. § 435.301.
61. *See* 1 S. REP. NO. 103-403, at 175.
62. *See id.*
63. *See Medicaid Recipients, Vendor, Medical Assistance and Administrative Payments* (visited Sept. 21, 1998) <http://www.hcfa.gov/medicaid/2082-1.htm> [hereinafter *Payments*]. Medicaid has become one of the fastest growing components of both federal and state budgets. *See* S. REP. NO. 103-403, at 132. From 1975 to 1984, Medicaid expenditures increased from $12.2 billion to $34.3 billion—a 180% increase. *See id.* at 133.

population, 4.7 million Medicaid recipients were over the age of sixty-five.[64] However, recipients over the age of sixty-five accounted for 35% of vendor payments, or $40.7 billion.[65]

The 1.7 million recipients in nursing facilities comprised 5% of the Medicaid population.[66] In 1993, nursing home care costs represented 9% of national health-care expenditures.[67] Nursing home costs account for two-thirds of Medicaid payments made on behalf of elderly recipients,[68] representing the most costly and intense long-term care alternative.[69] The typical resident of a nursing home is either frail and requires constant attention or is technologically dependent.[70] States that would like to develop a system to transition residents into other forms of care limit access to nursing homes to Medicaid applicants who require round-the-clock care.[71]

The average annual cost of nursing home care in 1995 was $40,000 per resident.[72] Most of these costs are paid for by either the individual or Medicaid.[73] Approximately half of all elderly nursing home residents rely on Medicaid as their primary source of payment.[74] In 1994, for example, 69% of elderly residents financed at least some part of their nursing home costs through Medicaid.[75]

64. *See Medicaid Recipients and Vendor Payments by Age* (visited Sept. 21, 1998) <http://www.hcfa.gov/Medicaid/2082-6.htm>. The largest percentage of the Medicaid population comprised children ages 0-5 and adults aged 21-44, each of which accounted for 23% of the 36.1 million recipients. *See id.*

65. *See id.* Vendor payments per elderly recipient broke down in terms of age as follows:

Years of Age	Vendor Payments
65–74	$ 5,793
75–84	$ 8,956
85 and over	$12,169

66. *See id.* Illinois had the fifth highest recipient total with 1.5 million residents on Medicaid. The state spent $1.5 billion on recipients in long-term care facilities. *See* ILLINOIS DEP'T OF PUBLIC AID, ANNUAL REPORT: MEDICAL ASSISTANCE PROGRAM FISCAL YEARS 1993, 1994, 1995, LONG TERM CARE FISCAL YEAR 1995, 1, 28 graph 1 (1995). These facilities served 67,540 people per month, of which approximately 51,959 were geriatric. *See id.* at 2.

67. *See* 1 S. REP. NO. 103-403, at 166.

68. *See id.* at 176.

69. *See id.* at 166.

70. *See id.*

71. *See id.*

72. *See* Wiener, *supra* note 34, at 801.

73. *See* 1 S. REP. NO. 103-403, at 172.

74. *See* Kapp, *supra* note 37, at 724.

75. *See* Wiener, *supra* note 34, at 801.

III. Asset Transfer Regulations and Medicaid Eligibility

The history of asset transfer regulation illustrates the tension that exists between competing interests regarding the issue of our nation's long-term care financing. The competing interests include the following: (1) the federal government wanting to limit its expenditures in this area; (2) insurance companies wanting to make long-term care insurance more attractive to consumers; and (3) the individual wanting to conserve personal assets. This section discusses the evolution of asset transfer regulations in Medicaid eligibility requirements.

A. Early Asset Transfer Regulation

Prior to 1980, applicants were able to transfer assets that would have made them ineligible for benefits.[76] The courts enforced this ability to transfer by preventing states from denying Medicaid eligibility to applicants who made asset transfers for less than fair market value.[77] However, Congress responded to the states' efforts to limit the divestiture of resources by applicants.[78]

New legislation added as an amendment to the Parental Kidnapping Prevention Act of 1980[79] prohibited asset transfers made solely for the purpose of qualifying for benefits under the SSI statutes.[80] It allowed states to implement procedures for denying benefits, but did not allow more restrictive procedures than those established by the federal government.[81] The new rule enforced on the states[82] was not applicable to transfers of exempt assets.[83]

Two years later, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[84] which gave states the right to impose liens, recover assets of the applicants for the cost of care, and

76. *See* Timothy N. Carlucci, *The Asset Transfer Dilemma: Disposal of Resources and Qualifications for Medicaid Assistance*, 36 DRAKE L. REV. 369, 372 (1986).

77. *See, e.g.*, Blum v. Caldwell, 446 U.S. 1311 (1980); Fabula v. Buck, 598 F.2d 869 (2d Cir. 1979); Dokos v. Miller, 517 F. Supp. 1039 (N.D. Ill. 1981); Robinson v. Pratt, 497 F. Supp. 830 (D. Mass. 1980); Udina v. Walsh, 440 F. Supp. 1151 (D. Mo. 1977); Buckner v. Maher, 424 F. Supp. 366 (D. Conn. 1976).

78. *See* Social Security Amendments of 1980, Pub. L. No. 96-611, § 5(a), 94 Stat. 3566, 3567 (codified as amended at 42 U.S.C.A. § 1396a(j) (West 1998)).

79. *Id.* §§ 6-10, 94 Stat. at 3568-73.

80. *See* 42 U.S.C.A. § 1396a(j)(1).

81. *See id.*

82. *See, e.g.*, Beltran v. Myers, 677 F.2d 1317, 1320 (9th Cir. 1982).

83. *See* 42 U.S.C.A. § 1382b(a)(1). The exemption included transfers of the family home. *See id.*

84. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 132(d), 96 Stat. 324, 373 (1982) (codified as amended at 42 U.S.C. § 1396p (1994).

punish applicants who disposed of assets to avoid these measures.[85] This Act also prevented the transfer of homes.[86] TEFRA also provided for more elaborate asset transfer regulations than what was originally provided for in the Boren-Long 1980 amendment.[87]

The amendment allowed states to impose a period of ineligibility on an applicant who transferred an asset for less than fair market value and would have otherwise been ineligible because their assets exceeded allowable limits.[88] The amendment also allowed the states to impose a period of ineligibility on applicants based on the uncompensated value of the home in relation to the cost of twenty-four months of Medicaid benefits.[89] The latter provision was primarily directed toward applicants in medical institutions.[90]

B. COBRA '85 and the MQT

In 1985, Congress included trust assets in Medicaid eligibility determinations to respond to the growing use of trusts as devices for Medicaid planning.[91] These provisions were part of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA '85).[92] COBRA '85 provided that assets transferred to a nontestamentary trust that enabled an individual to retain discretion regarding the trust's distribution would be considered available to the individual.[93] Thus, these assets were considered when determining the individual's eligibility for benefits under Medicaid.[94] Such a trust was called a Medicaid Qualifying Trust (MQT).[95] The MQT was an illustrative case of "doublespeak;"[96] the applicant who established an MQT was automatically disqualified for Medicaid.[97]

85. *See* 42 U.S.C. § 1396p (1983).

86. *See* 42 U.S.C. § 1396p(c)(1) (1983).

87. *See* 42 U.S.C. § 1396p(c) (1983).

88. *See* 42 U.S.C. § 1396p(c)(1) (1983).

89. *See* 42 U.S.C. § 1396p(c)(2)(B)(i) (1983).

90. *See* 128 CONG. REC. S8586 (daily ed. July 19, 1982).

91. *See* Shawn Patrick Regan, *Medicaid Estate Planning: Congress' Ersatz Solution for Long-Term Health Care,* 44 CATH. U. L. REV. 1217, 1231 (1995).

92. Pub. L. No. 99-272, 100 Stat. 82 (1986) [hereinafter COBRA '85].

93. *See id.* § 9506(a), 100 Stat. at 210 (codified as amended at 42 U.S.C. § 1396a(k) (1994)).

94. *See id.*

95. *See id.*

96. *See* Link v. Town of Smithtown, 616 N.Y.S.2d 171, 172 n.5 (N.Y. Sup. Ct. 1994).

97. COBRA '85 § 9506(a), 100 Stat. at 210.

Estate planners found ways to circumvent the MQT provisions.[98] One method was to create a "trigger" trust which immediately terminated two provisions in the trust upon an individual's entry into a nursing home.[99] These provisions concerned: (1) "the trustee's discretion to make distributions to the [individual]"; and, (2) "the applicant's ability to revoke the trust."[100] The second method was the use of a "donor" trust, where "an individual transfers" assets to another person who then establishes a trust for the benefit of the donor.[101] MQTs would not be addressed again until 1993.

C. MCCA '88 & OBRA '89

Congress made important changes to the asset transfer rules in the late eighties under the Medicare Catastrophic Coverage Act of 1988 (MCCA '88)[102] and the Omnibus Budget Reconciliation Act of 1989 (OBRA '89).[103] MCCA '88 changed the prior asset transfer restrictions from optional to mandatory for the states.[104] Congress also extended the "look-back" period for asset transfers from twenty-four months to thirty months[105] and exempted noninstitutionalized Medicaid applicants from asset transfer rules.[106] MCCA '88 also made significant changes in the eligibility rules regarding the income and assets of an institutionalized spouse.[107]

Under OBRA '89, Congress restricted asset transfers made by an applicant's spouse.[108] Prior to this restriction, applicants could transfer assets to a third person without being penalized. Applicants did this by first transferring assets to their spouses, who then transferred the assets to a third person.[109]

98. See Regan, *supra* note 91, at 1232.
99. *See id.*
100. *Id.*
101. *See id.*
102. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (1989) [hereinafter MCCA '88].
103. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989) [hereinafter OBRA '89].
104. *See* MCCA '88 § 303(b), 102 Stat. at 760-61.
105. *See* MCCA '88 § 303(b)(C)(1)(A), 102 Stat. at 760-61. For a discussion of the "look back" period, see *infra* notes 116-20 and accompanying text.
106. *See* MCCA '88 § 303(b)(c)(3), 102 Stat. at 761.
107. *See* Louis B. Torch, *Spousal Impoverishment or Enrichment? An Assessment of Asset and Income Transfers by Medicaid Applicants*, 4 ELDER L.J. 459, 465 (1996).
108. *See* OBRA '89 § 6411(e), 103 Stat. at 2271.
109. *See* Regan, *supra* note 91, at 1230 n.60.

D. OBRA '93

The Omnibus Budget Reconciliation Act of 1993[110] (OBRA '93) made comprehensive changes to the Medicaid eligibility rules, changes that are still in effect.[111] The new rules were "designed to restrict individuals from arranging their financial affairs in order to retain the economic benefit of their wealth" while "securing government paid long-term care services."[112] The new rules were more restrictive not for the purpose of making long-term care less accessible to the elderly, but to address perceived abuse of the rules promulgated by MCCA '88.[113]

The structure of the asset transfer rules were the same: if an individual transfers a nonexempt asset to someone other than his spouse for less than fair market value, he will incur a period of ineligibility.[114] The state agency will impose this period of Medicaid ineligibility if the nonexempt transfers were made within a specified time period prior to application.[115] This time period is called the "look-back" period.[116] Currently, the look-back period for most transfers is thirty-six months.[117] If the asset transfer involves certain payments from a trust or portions of a trust that are treated as assets disposed of by the individual, the look-back period is sixty months.[118]

After the state determines that an asset was transferred for less than its fair market value during the look-back period, the state will delay an applicant's eligibility.[119] The period of ineligibility is determined by dividing the uncompensated amount of the assets transferred by the average monthly cost of nursing home care in the recipient's state.[120] Prior to OBRA '93, a state could not impose a pe-

110. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1994) (relevant provisions codified as amended at 42 U.S.C. § 1396p (1994)) [hereinafter OBRA '93].

111. *See* Regan, *supra* note 91, at 1233-34 (listing changes in over 10 sections of Medicaid eligibility rules); *see also* Torch, *supra* note 107, at 472. *See generally* Wiesner, *supra* note 7 (comparing in depth the new rules in OBRA '93 with previous rules).

112. Wiesner, *supra* note 7, at 757.

113. *See id.* at 758 ("A congressional perception was created that MCCA was being inappropriately manipulated and abused.").

114. *See* 42 U.S.C.A. § 1396p(c)(2)(B) (West 1998).

115. *See, e.g.*, AID FOR THE AGED, BLIND AND DISABLED MANUAL, *supra* note 54, § 505.5(c).

116. *See* 42 U.S.C.A. § 1396p(c)(1).

117. *See id.*

118. *See* Wiesner, *supra* note 7, at 766.

119. *See* 42 U.S.C.A. § 1396p(c)(1)(A).

120. *See id.* § 1396p(c)(1)(E).

riod of ineligibility of more than thirty months; however, OBRA '93 eliminated that limitation.[121] Ineligibility begins on the first day of the first month during or after assets have been transferred for less than fair market value.[122] The individual becomes ineligible for medical assistance under Medicaid for (1) nursing facility services; (2) institutional services at a nursing facility; and (3) home or community-based services.[123] If nonexempt transferred assets are returned, the individual does not incur a period of ineligibility.[124] If the spouse of an applicant makes a transfer that results in a period of ineligibility, a state shall apportion the period of ineligibility among the applicant and the spouse if the spouse later becomes eligible for Medicaid.[125] This provision has also been interpreted to mean that if the applicant dies, the applicant's remaining penalty falls on the surviving spouse.[126]

For the purpose of the ineligibility provision, exempt asset transfers are those made to an individual's spouse for the sole benefit of the spouse,[127] to another person for the sole benefit of the spouse, to a disabled child, or a transfer to a trust for the benefit of a disabled child.[128] A special exemption is made for the transfer of homestead property.[129] An individual can transfer his homestead property to his spouse, a minor or disabled child, or a sibling with an equity interest in the home who has resided in it for at least one year prior to the applicant's institutionalization.[130] Also, an individual can transfer her homestead to a caretaker child who provided the applicant with care for two years prior to the applicant's institutionalization, thus permitting the applicant to have resided at home rather than in an institution.[131]

Since OBRA '93 redefined assets to include income and resources, it also closed the loophole for the disposition of windfalls to the recipient.[132] Under the prior definition, an item did not become a

121. *See* OBRA '93 § 13611(a)(1), 107 Stat. at 622-24 (amending 42 U.S.C. § 1396p(c)(1) and codified as subparagraph (B)(i)).
122. *See* 42 U.S.C.A. § 1396p(c)(1).
123. *See id.*
124. *See id.* § 1396p(c)(2).
125. *See id.* § 1396p(c)(4).
126. *See* Wiesner, *supra* note 7, at 779.
127. *See generally* Torch, *supra* note 108 (discussing asset transfers made for the benefit of the spouse of the institutionalized spouse).
128. *See* 42 U.S.C.A. § 1396p(c)(2)(B).
129. *See id.* § 1396p(c)(2)(a)(iii).
130. *See id.* § 1396p(c)(2)(a)(iv).
131. *See id.*
132. *See* Wiesner, *supra* note 7, at 779.

resource until it was owned for longer than one calendar month;[133] thus, the individual could dispose of lottery winnings or inheritances in the same month and not be subject to the transfer rules.[134] Lastly, OBRA '93 modified the way spouses could manipulate their joint accounts as to the spouse's eligibility.[135] If an asset is held in common, such as a joint bank account, the asset is considered transferred if the individual or other holder performs any act that eliminates or reduces the individual's ownership of the asset.[136]

E. New Rules for Trusts and the Comparability Rule

After OBRA '93, a grantor could no longer control his assets without affecting his Medicaid eligibility.[137] This treatment was consistent with the view that trusts were the "single most offensive Medicaid estate planning vehicle."[138]

Under Medicaid, all trusts are classified as either revocable or irrevocable trusts.[139] The definition for "trust" includes any similar legal instrument or device and nondiscretionary trusts established by a court.[140] Therefore, the group that can establish a trust includes the individual, the individual's spouse, a court, an administrative body or other legal entity.[141]

The individual has established a trust for the purposes of Medicaid if assets of the individual or spouse were used to fund all or part of the corpus of the trust.[142] The corpus of a revocable trust is considered available to the applicant, any payments to or for the benefit of the individual are income, and other payments are transfers of assets.[143] In contrast, an individual may be able to fund an irrevocable trust without the principal being counted for Medicaid eligibility purposes depending on the type of interest an applicant retained in an irrevocable trust.[144]

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133. *See id.*
134. *See id.*
135. *See* 1 S. REP. NO. 103-403, at 189 (1993).
136. *See id.*
137. Trusts established before August 10, 1993 were not subject to OBRA '93. *See id.*
138. *See* Wiesner, *supra* note 7, at 771.
139. *See* 42 U.S.C.A. §§ 1396p(d)(3)(A)-(B) (West 1998).
140. *See id.* § 1396p(d)(6).
141. *See id.* § 1396p(d)(2)(A).
142. *See id.*
143. *See id.* § 1396p(d)(3)(A).
144. *See id.* § 1396p(d)(3)(B).

If an individual retains an interest in an irrevocable trust as a permitted beneficiary, the funding of the trust is not considered an asset transfer.[145] When the applicant is no longer a permitted beneficiary, or distributions are made to third parties from the trust, a transfer will be deemed to have taken place.[146] The assets of the trust will be treated as a countable resource and distributions to the applicant from income or principal are considered income.[147] If the individual does not retain an interest as a permitted beneficiary, the funding of the trust is treated as a transfer.[148] Any portion of the trust, or income from the corpus from which no payment could be made to the individual, is a transfer of assets as of the date the trust is established.[149] If the funding of a trust is considered a transfer of assets, the sixty-month look-back period will apply.[150] If the application of the rules results in undue hardship, the state must waive their application.[151] Payments for the benefit of the individual from an irrevocable trust are considered income,[152] and the corpus from which the payments were made is considered an available resource.[153] If payments were not made for the benefit of the individual, they are considered transfers of assets.[154]

A revocable trust, however, may still have some benefit in Medicaid estate planning.[155] Currently, individuals can transfer property to a revocable trust without penalty, but the property is considered a resource available to the individual.[156] However, some states, such as Massachusetts, impose a penalty period for transferring one's home into a revocable trust.[157] Massachusetts also considers the home an available asset because it is in a revocable trust.[158] Treating the transfer in this way seemingly contradicts the federal regulations and thus violates the "comparability rule."[159] The "comparability rule" requires

145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.* § 1396p(d)(3)(B)(ii).
149. *See id.*
150. *See id.* § 1396p(c)(1)(B)(i).
151. *See id.* § 1396p(d)(5).
152. *See id.* § 1396p(d)(3)(B)(i)(I).
153. *See id.* § 1396p(d)(3)(B)(i).
154. *See id.* § 1396p(d)(3)(B)(II).
155. *See* Macy, *supra* note 33, at 5-6.
156. *See* 42 U.S.C.A. § 1396p(d)(3)(A)(i).
157. *See* Macy, *supra* note 33, at 6.
158. *See id.*
159. *See id.* at 7.

state Medicaid eligibility criteria to be no more restrictive than SSI methodology.[160]

The legislative history of the comparability requirement shows that Congress wanted to prevent the states from enacting more restrictive Medicaid methodologies.[161] Congress was concerned with ensuring that all recipients receive equal treatment.[162] The comparability rule is consonant with the original spirit in which Medicaid was created. In order to prevent inconsistent application among the states, the comparability rule would need to be policed with more vigilance before any further penalty is imposed on applicants and their advisors.

IV. Why Criminal Sanctions for Medicaid Asset Transfers Have Failed

A. Manufacturing Consent and Crimes

1. THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

Section 217 of the Health Insurance Portability and Accountability Act of 1996[163] (HIPAA) included an unpopular and short-lived provision that criminalized asset transfers made for the purpose of gaining Medicaid eligibility and caused a period of ineligibility as defined under the rules promulgated under OBRA '93.[164] The general purpose of HIPAA is to make group health insurance plans more accessible for small businesses to purchase for their employees and to make individual health insurance more accessible to those persons who do not possess group insurance.[165] The provision is an example of what Professor Jan Ellen Rein describes as the "wishful thinking, misinformation and self-deception [that] account for this deviation from accommodation to censure of attempts by the disabled elderly to

160. *See* 42 U.S.C.A. §§ 1396a(r)(2)(A)-(B).
161. *See* Macy, *supra* note 33, at 10; *see also* S. REP. No. 89-404, pt. 1, at 78 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2018-19.
162. *See* S. REP. No. 89-404, pt. 1, at 78.
163. Pub. L. No. 104-191, 110 Stat. 1936.
164. *See* Pub. L. No. 104-191, § 217, 110 Stat. at 2008-09. Popularly known as the "granny goes to jail" law, it provided a criminal penalty for whoever "knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c)." *See id.*
165. *See* H.R. REP. No. 104-497(I), at 1 (1996).

preserve sufficient assets for lifetime security and modest transfer at death."[166]

With OBRA '93, the legislature tightened the restrictions on asset transfers based on the perception that nonneedy applicants were gaining benefits through Medicaid eligibility loopholes.[167] In addition, it added a criminal penalty to those restrictions through Section 217.[168] House Speaker Newt Gingrich claimed that a "very common problem" exists in millionaires transferring assets to become eligible for benefits.[169] According to some estimates, the government could save approximately $5 billion per year, or 20% of Medicaid nursing home expenditures, by limiting asset transfers.[170] However, the basis for this perception is anecdotal, not empirical,[171] because no empirical evidence has been evaluated to estimate the impact of estate planning on Medicaid expenditures.[172] In fact, no empirical data exists as to the

166. Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL. 195, 196 (1996). Although she does not discuss section 217 specifically, Professor Rein offers a comprehensive overview of the debate regarding asset transfers, an analysis of the rhetoric from each side, an individual's stake in preserving their property, and the misinformation that formed the basis of the policies which ultimately lead to the passage of section 217. *See generally id.* Regardless, Professor Rein contends that "[n]o matter what happens to the Medicaid program . . . , the issues raised will be debated at the community, state, and federal level for years to come." *Id.* at 195.

167. With OBRA '93, Congress utilized a three-pronged approach toward restricting an individual's ability to arrange finances in order to retain their wealth and still obtain government subsidized long-term care by: (1) increasing the look-back period; (2) restricting an applicant's ability to be a beneficiary of a trust; and (3) enhancing a state's ability to recover payments from estates of deceased recipients. *See* Wiesner, *supra* note 7, at 757.

168. *See id.*

169. *See* Wiener, *supra* note 34, at 802.

170. *See id.*

171. *See* 1 S. REP. NO. 103-403, at 187 (1993) (citing BRIAN BURWELL, MIDDLE CLASS WELFARE, STATE RESPONSES TO MEDICAID ESTATE PLANNING (1993); ARMOND D. BUDISH, AVOIDING THE MEDICAID TRAP: HOW TO BEAT THE CATASTROPHIC COSTS OF NURSING HOME CARE (1989). Much of the anecdotal data consists of interviews with state employees regarding their observations of applicants and conclusions based on thereof about the estate planning practices of the nonpoor elderly. *See, e.g.*, STEPHEN MOSES, THE MAGIC BULLET: HOW TO PAY FOR UNIVERSAL LONG-TERM CARE, A CASE STUDY IN ILLINOIS (1994). It is worth pointing out the limitations of judgments based upon anecdotal evidence versus empirical evidence. People have a tendency to develop misimpressions from easily available information whether it is accurate or not. For instance, if asked which is more common, murder or suicide, one might respond erroneously that murder is more common. However, one selects murder probably because the news media pays more attention to murder than suicide. *See generally* JUDGMENT UNDER UNCERTAINTY: BIASES AND HEURISTICS (Daniel Kahneman & Amos Tversky eds., 1981).

172. *See* 1 S. REP. NO. 103-403, at 187.

extent of such asset sheltering.[173] Furthermore, the congressional agenda with regard to eligibility issues was set by two special interest groups: insurance companies marketing long-term care insurance and state Medicaid authorities.[174]

These special interest groups urged Congress to pass stricter legislation to prevent middle-class and wealthy elderly from transferring their savings and assets to their children so that they may qualify for Medicaid.[175] Their position is summed up in the testimony of Sheldon L. Goldberg, President of the American Association of Homes for the Aging, before the House Energy and Commerce Subcommittee:

> [w]hile Medicaid costs are soaring, attorneys have developed a specialty in helping people legally divest themselves of assets to become eligible for Medicaid . . . yet for every Medicaid dollar spent on someone who has sheltered significant resources, there is one less dollar to spend on those who have no resources but Medicaid.[176]

Goldberg concluded that this situation pressures a state to reimburse a nursing home less for long-term care.[177] In addition, he concluded that restrictions on asset transfers would create an incentive to buy insurance.[178]

Three counter-arguments have been developed to rebut the assertion that transferring assets to become eligible for Medicaid is rampant: (1) studies of asset transfers by Medicaid applicants show that the practice is not widespread, (2) studies of the asset holdings of the elderly show that they do not hold transferrable assets of great value, and (3) analysis of the growth in Medicaid population has not shown a disproportionate increase in comparison to the growth of the elderly population.[179] Elderly nursing home residents who receive Medicaid benefits can be classified in two groups: (1) those who enter the nursing home eligible for Medicaid and (2) those that enter the nursing home as private-pay residents and subsequently deplete their assets paying for medical costs.[180] Twenty-seven percent of the elderly pop-

173. *See* Rein, *supra* note 166, at 234.
174. *See* Wiesner, *supra* note 7, at 758.
175. *See Medicaid: Congress Urged to Close Medicaid Loopholes For Long-Term Care Funding*, BNA'S MEDICARE REP. LEG. & OTHER DEV., Apr. 9, 1993, at 1, 15.
176. *Id.*
177. *See id.*
178. *See id.*
179. *See* Wiener, *supra* note 34, at 863. It should be noted that only a small amount of the Medicaid population actually make transfers. *See id.*; Rein, *supra* note 166, at 255-56.
180. *See* Spillman & Kemper, *supra* note 32, at 282.

ulation living in nursing homes receive Medicaid throughout their stay.[181] Fourteen percent of the elderly population in nursing homes begin as private pay residents and then spend down their assets to receive Medicaid before the end of their stay.[182] Nursing home residents who deplete their assets paying for nursing home costs obviously are not unlawfully transferring assets for Medicaid benefits. Therefore, only twenty-seven percent of all elderly nursing home residents could potentially have transferred assets to gain Medicaid benefits.

One study by the General Accounting Office (GAO) provides some evidence which undermines the perception that a large portion of the elderly who enter a nursing home eligible for Medicaid are transferring large amounts of assets in order to become eligible.[183] The GAO analyzed the applications of a random sample of 403 Medicaid applicants for nursing home care in Massachusetts, where asset transfer schemes were believed to be widespread.[184] Only forty-nine applicants were found to have transferred assets; of those forty-nine, twenty-six of them were denied eligibility or withdrew their application.[185] Most of the assets transferred amounted to less than \$50,000.[186] Asset transfers of larger amounts of money occurred less frequently—seven applicants transferred assets worth more than \$100,000.[187] Of those seven, six of them were denied eligibility.[188]

Most applicants in the study did not possess assets of great value. The average amount of the applicants' assets was \$38,202, including the value of their residence.[189] Excluding the residence, the average plummeted to \$14,875.[190] The applicants averaged an income of \$11,227, but over half of them earned less than \$10,000 and 92% earned less than \$20,000.[191] Clearly, this study indicates that elderly millionaires are not trying to shuffle their portfolios to gain Medicaid benefits.[192]

181. *See id.* at 287.
182. *See id.* at 293.
183. *See* Wiener, *supra* note 34, at 802-03.
184. *See id.* at 802.
185. *See id.* at 803.
186. *See id.*
187. *See id.*
188. *See id.*
189. *See* 1 S. REP. NO. 103-403, at 188 (1993).
190. *See id.*
191. *See id.*
192. The study also suggests that existing asset transfer regulations adequately screen out potential defrauders.

Other studies which analyze the asset holdings of the elderly also undermine the perception that wealthy elderly are transferring assets to receive benefits.[193] The majority of the elderly do not have large amounts of assets to transfer.[194] For instance, approximately one-third of the elderly have incomes below the poverty level.[195] Three-quarters of nursing home residents have nonhousing assets valued at less that $50,000.[196] Almost half of nursing home residents have less than $10,000 in non-house-related assets.[197] Only eleven percent have non-house-related assets valued $100,000 or more, half of which could pay for their nursing home expenses with their income alone.[198]

Furthermore, the population of nursing home residents on Medicaid has grown steadily, not dramatically as might be expected if Medicaid was truly easily accessible. In 1994, over 33 million people were over sixty-five, compared to 28.5 million persons in 1985.[199] Currently, more than two out of five people over sixty-five are expected to spend some time in a nursing home.[200] However, the number of Medicaid participants in nursing homes has increased slowly.[201]

In addition to restricting the "rampant" use of estate planning by millionaires, another important policy behind the enactment of asset transfer restrictions was to motivate the elderly to purchase long-term

193. Existing research, including the GAO study in Massachusetts, only analyze asset transfers that can be known by state property analysts, i.e. transfers made within the look-back period. However, the reasoning behind a long look-back period, such as three years, is to make it burdensome for a potential applicant to do without the transferred assets for a long period of time and to make it difficult to anticipate the need for nursing home care. Hence, the period imposes a great cost on the applicant (and/or the applicant's family) who decides to pursue a course in Medicaid estate planning.

194. *See* Rein, *supra* note 166, at 256 (concluding that there was a "paucity of assets in the nursing home population as a whole").

195. *See* Wiener, *supra* note 34, at 803.

196. *See id.*

197. *See id.*

198. *See id.*

199. *See* Joan F. Van Nostrand, *The Focus of Long-Term Care in the United States: Nursing Home Care*, 15 suppl. CANADIAN J. ON AGING 73, 75 (1996). In fact, the number of Americans age 65 and over "now outnumber the entire population of Canada." *See* Rein, *supra* note 166, at 207.

200. *See* Wiener, *supra* note 34, at 801.

201. *See id.* at 803 ("Between 1990 to 1993, the average annual compound rate of increase in Medicaid nursing home beneficiaries was 3.3% a year, while the increase in the number of nursing home beds was 1.5% a year. All of the excess increase . . . is due to a relatively large increase in Medicaid nursing home residents in one year—1992.").

care insurance.[202] The insurance industry wanted to reinforce the perception that well-to-do elders obtained public subsidies for their nursing home care,[203] in order to argue that the practice undermined the long-term care insurance market.[204] The insurance industry presented health insurance as the proper means for financing long-term care[205] and contended that accessibility to government benefits reduced market pressure to purchase private long-term care insurance.[206] Statistics, however, suggest that fewer individuals are transferring assets than previously thought; therefore, further restrictions on asset transfers will probably not increase demand for long-term care insurance.

Also, long-term care insurance is unaffordable for most older persons.[207] The average annual premium in 1993 for such insurance was $2,137 if the policy was bought at age sixty-five.[208] Studies have shown that no more than 20% of the elderly population can afford long-term care insurance.[209] In the event that all of the elderly who can afford private long-term care insurance purchased it, Medicaid nursing home expenditures would only drop by one to four percent.[210]

When section 217 became effective, Congress came under fire[211] and amended the provision.[212] This self-reversal illustrates the principles at work when a legislative body decides conduct should be treated as criminal and also illustrates the effective utilization of such principles.[213] Generally, whether an act is immoral is not the sole factor in making this decision. The legislature must also consider how people will respond to having a particular aspect of their conduct reg-

202. *See id.* at 801.

203. *See* Wiesner, *supra* note 7, at 758.

204. *See id.* at 761.

205. *See id.* For a detailed and devastating analysis of the claim that long-term care insurance is the cure-all for financing long-term care, see Rein, *supra* note 166, at 278-89.

206. *See* Wiesner, *supra* note 7, at 791.

207. *See* Wiener, *supra* note 34, at 801.

208. *See id.*

209. *See id.*

210. *See id.*

211. The provision became effective on January 1, 1997, and reactions were swift. *See, e.g.*, Henry J. Reske, *A Wider Medicaid Fraud Net*, A.B.A. J., Jan. 1997, at 26; Robert Pear, *Repeal Urged for Law on Giving Away Assets*, N.Y. TIMES, Feb. 18, 1997, at A1; *Rectifying a Legislative Blunder*, N.Y. TIMES, Feb. 24, 1997, at A14.

212. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 706 (codified as amended at 42 U.S.C.A. § 1320a-7b(a)(b) (West 1998)).

213. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 262 (1968).

ulated.[214] When a legislature wants to apply a criminal sanction to a new category of conduct, it is most effective if it is preceded by other forms of conditioning.[215] It has been said that "[i]t is very doubtful . . . whether . . . enforcement of the criminal sanction against tax evaders would have been nearly as successful if it had not been preceded by the development of a tradition of self-assessment."[216] In addition, the perception that the conduct is immoral must be accompanied by a build-up of public opinion that the law should regulate the conduct.[217]

When Congress passed the sanction against transferring assets in order to become eligible for Medicaid benefits, the prevailing view was that such conduct was immoral.[218] Supporters of the law attempted to sway public opinion in support of the sanction; however, the public did not acquiesce, and the provision faced stiff resistance that eventually led to its repeal. The poor reception of the law demonstrated that the legislature's decision to criminalize the conduct was out of sync with public opinion and that a sense of immorality about the conduct was not enough to make it criminal.

B. Blame Shifting

Congress replaced section 217 with section 4734 of the Balanced Budget Act of 1997.[219] The new rule provides that whoever

> for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX of this Chapter, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1396p(c) of this title shall . . . in the case of such a . . . provision of counsel or assistance by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both.[220]

Section 4734 is based in part on the perception that attorneys who engage in Medicaid planning are doing something objectionable

214. *See id.* at 262-63.

215. *See id.* at 263.

216. *Id.* A more well-known example of the failure to impose criminal sanction on behavior thought to be immoral is Prohibition. *See id.*

217. *See id.* at 264.

218. *See* Rein, *supra* note 166, at 205.

219. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 706 (codified as amended at 42 U.S.C.A. § 1320a-7b(a)(6) (West 1998)).

220. *Id.*

and punishable as a crime.[221] Not only are their actions criticized for being exploitative of Medicaid loopholes and for making people artificially poor,[222] but they are also accused of "ripping off the system" by sheltering large estates and, in effect, shifting the burden of the long-term care costs of the wealthy to society.[223] Despite such criticisms, most critics concede that the practice is "legal."[224]

C. The Constitutionality of Section 4734

Section 4734 is not the first attempt at punishing attorneys for engaging in this practice.[225] The Ohio Bar proposed to disbar attorneys who advised clients to transfer assets in order to obtain Medicaid eligibility.[226] However, the proponents became stalled in their efforts when confronted with the task of drafting a statute that would punish someone for encouraging another to do something "legal."[227] Congress apparently was undaunted by this issue.[228]

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221. *See* Rein, *supra* note 166, at 230-31 ("Medicaid planning has become a pejorative term.").

222. *See id.*

223. *See id.*

224. *See id.* at 232 n.200 (quoting critics who find the practice to be legal, but that it takes advantage of the complex eligibility rules and places a greater burden on the Medicaid program which was not intended).

225. *See id.*

226. *See id.*

227. *See id.* Although Medicaid planning is perceived as objectionable for a number of reasons, the planning strategies have been perceived as "legal." *See id.*

228. A wide range of communications are punished in our society. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 5 (1989). Professor Greenawalt has compiled a list of twenty-one separate crimes that involve communications. A person may be guilty of a crime if he/she:

1. agrees with another to commit a crime;
2. offers to agree with another to commit a crime;
3. orders another to commit a crime;
4. requests another to commit a crime;
5. induces another to commit a crime (as by a bribe);
6. threatens harm unless another commits a crime;
7. carries out an ordinary criminal purpose by communicating; for example, by telling a blind companion on a mountain path that he can safely step to the right, while wanting to cause his death and knowing that a 2000-foot drop lies to the right;
8. puts another in fear of imminent serious injury by physical menace;
9. participates in a criminal endeavor by communicating; for example, by telling thieving friends the combination of the employer's safe;
10. warns a criminal how to escape from the police;
11. threatens harm if someone does not turn over his wallet, submit to sexual intercourse, or perform some other act he is free not to perform;

This section will discuss how section 4734 violates the Free Speech Clause of the First Amendment. Although a U.S. district court found the provision unconstitutional, the court provided no reasoning, largely due to the fact that U.S. Attorney General Janet Reno decided not to defend the provision.[229] In an effort to give some guidance to policymakers and lawmakers, this section provides an explanation for why holding the statute unconstitutional is consistent with the First Amendment and critiques the reasoning offered by the litigants.

First, this analysis focuses on section 4734 within the free speech doctrine and concludes that, if it could ever be upheld, it must be upheld as a law that punishes the encouragement of illegal action. Second, this section will discuss the punishment of such encouragements. Finally, the section concludes that section 4734 is unconstitutional because it punishes encouragement of lawful action.

1. LOCATING SECTION 4734 IN FIRST AMENDMENT JURISPRUDENCE

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[230] The Supreme Court has

12. offers to bribe someone or offers to receive a bribe for the performance of an act that should be performed, if at all, free of such inducements;
13. successfully encourages someone to commit suicide;
14. entices a child from custody;
15. uses provocative or insulting language likely to cause angered listeners to commit crimes;
16. engages in speech likely to lead those who are persuaded by its message to commit crimes;
17. perjures himself or engages in other falsehoods with respect to officials;
18. makes a false public alarm;
19. acquires property or some other material advantage by deception;
20. falsely pretends to hold a position in public service with an aim to getting someone else to submit to pretended authority or act otherwise to his prejudice;
21. uses language or representations that are insulting or offensive in some way.

Id. at 6-7 (footnotes omitted).

229. *See* Letter from Janet Reno, U.S. Attorney General, to The Honorable Newt Gingrich 2 (Mar. 11, 1998).

230. U.S. CONST. amend. I. Many theories have been articulated as to what values are protected by the First Amendment. *See, e.g.*, Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1161-66 (1982). The most forceful justification is the market place of ideas theory. *See* RICHARD SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:15, at 2-13 (1997). This theory is founded upon the writings of John Milton and John Stewart Mill, *see id.* § 2:15, at 2-12, and adopted by Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919). Holmes wrote that

never accepted the absolutist position that the Free Speech Clause should protect all speech and only conduct should be punished.[231] Justice Holmes said in *Frohwerk v. United States*[232] that the First Amendment was not intended to "give immunity for every possible use of language."[233] Although the Supreme Court has not followed the absolutist approach, it has attempted to develop a test to distinguish speech from conduct in an effort to ensure that its decisions do not place burdens on the values protected by the Free Speech Clause.[234] The Court has rejected the notion that any conduct can be labeled "speech" simply because the person engaged in conduct intends to communicate or express an idea.[235] Currently, the Court determines whether conduct is sufficiently expressive to be within the protection of the First Amendment by requiring both an intent to convey a particularized message and a large probability that the message would be understood by those viewing the conduct.[236]

Although behavior can be defined as communication, the government can still proscribe the behavior based on the behavior's content if such government regulation survives strict scrutiny.[237] In

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"the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 630. Because markets can be manipulated, the theory is best understood as a defense of the marketplace. *See* SMOLLA, *supra*, § 2:19, at 2-17; *see also* Cohen v. California, 403 U.S. 15 (1971). On the other hand, the Free Speech Clause has also been interpreted as protecting libertarian values in expression. *See* SMOLLA, *supra*, § 2:24, at 2-24. That is, those who won our independence "valued liberty both as an end and as a means." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Both justifications are the predominant justifications for protecting speech.

231. *See* SMOLLA, *supra* note 230, § 2:53, at 2-52; *see also* THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 403 (1970) ("Government may punish action but not expression.").

232. 249 U.S. 204 (1919).

233. *Id.* at 206.

234. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) (referring to *United States v. O'Brien*, 391 U.S. 367 (1968), pointing out that "[t]he *O'Brien* Court thus quite wisely dropped the 'speech-conduct' distinction as quickly as it had picked it up."). The Court, beginning with *Cohen v. California*, 403 U.S. 15 (1971), started anew. *See id.* at 18.

235. *See O'Brien*, 391 U.S. at 376.

236. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

237. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

contrast, government action that proscribes speech, but is content neutral, need not meet the strict scrutiny standard.[238]

In some instances, the Supreme Court has defined categories of punishable speech. This occurs, however, only after the Supreme Court weighs the governmental interest in punishing the speech against the First Amendment values implicated by the speech at issue.[239] Thus, the government may deal more comprehensively with certain forms of individual expression simply by showing that such expression can be placed in one of these categories.[240] The Supreme Court has defined six of these categories: (1) speech that directs or encourages another to commit an unlawful action,[241] (2) speech that may incite the listener to violence,[242] (3) speech that is related to the offer or sale of a good or service,[243] (4) speech that is obscene,[244] (5) speech that depicts child pornography,[245] and (6) speech that constitutes slander or libel.[246]

For section 4734 to survive a constitutional challenge, it must either be justified as a law that punishes the encouragement of an unlawful action or meet the strict scrutiny standard. Justice Holmes stated in *Frohwerk* that it was unreasonable to suppose that "mak[ing] criminal the counseling of a murder . . . would be an unconstitutional interference with free speech."[247] Holmes's statement comports with common sense, but why are encouragements punishable?

2. PUNISHING ENCOURAGEMENTS[248]

The intention behind an encouragement is to get something done; encouragements are utterances meant to produce action by an-

238. *See, e.g., O'Brien*, 391 U.S. at 377 (defining the test for laws that limit speech by regulating the time, place, and manner of the speech but not its content). This discussion is not meant to cover the full panoply of regulations that limit speech in our society, but need not meet the strict scrutiny standard.

239. *See, e.g., Cohen*, 403 U.S. at 19-20.

240. *See id.* at 20.

241. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

242. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

243. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

244. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957).

245. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982).

246. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

247. Frohwerk v. United States, 249 U.S. 204, 206 (1919).

248. Crimes of solicitation should be distinguished from conspiracy, another form of inchoate crime that may involve the punishment of speech. Generally, a conspiracy is an agreement to violate the law, and, in unusual cases, one may be charged with a conspiracy to advocate criminal acts. *See* PAUL MARCUS,

other person.[249] An encouragement can be categorized as either: (1) pure encouragement to act, or (2) an encouragement tied to an offer or threat that is meant to impose an obligation on another person to act.[250] Section 4734 punishes pure encouragements.

Pure encouragements are so strongly linked to action that the utterances contain little in terms of the values protected by the Free Speech Clause.[251] A pure encouragement "injects the force of the speaker's personality toward a particular result."[252] In other words, the speaker is not asking others to use their judgment and consider the values he asserts.[253] Thus, when the speech is linked to an unlawful action, the state interest in proscribing the action outweighs the infringement on a person's right to freedom of speech, and the speech can be punished based on its content.[254]

Most encouragements, however, do contain evaluations of facts and values, and so some expression is intertwined with the imperative elements.[255] Furthermore, some pure encouragements assert enough fact and value so that the influence upon the listener may be indistinguishable from the influence of an expression of an opinion.[256] In order to prevent the punishment of speech that expresses an opinion about a certain action rather than encourages the action, laws punishing encouragements must meet the test articulated in *Brandenburg v. Ohio*.[257] The Supreme Court in *Brandenburg* held that "[t]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[258]

PROSECUTION & DEFENSE OF CRIMINAL CONSPIRACY CASES § 8.01, at 8-2 (1993). In conspiracy cases, the government must show that the defendants made an agreement to violate the law and then acted in furtherance of the agreement; whereas, in crimes of solicitation, a person is being punished only for communicating to another person about the illegal action. *See* GREENAWALT, *supra* note 228.

249. *See* GREENAWALT, *supra* note 228, at 69.

250. *See id.* at 111.

251. *See id.* at 68. In the end, encouragements are not meant to communicate a truth.

252. *See id.* at 70.

253. *See id.*

254. *See id.* at 113.

255. *See id.* at 70.

256. *See id.*

257. 395 U.S. 444 (1969).

258. *Id.* at 447.

In defining this category of punishable speech, the *Brandenburg* court recognized that a danger lies in laws which punish inchoate crimes in that they may condemn speech which the "Constitution immunized from governmental control."[259] Thus, the Court concluded that government may punish encouragements to the extent that it can show an intent to incite imminent disobedience, but it cannot punish encouragements simply because it reflects the speaker's point of view about whether the underlying action is morally justified.[260] The statute must make this distinction in order to be upheld.[261]

3. CONSTITUTIONALITY OF SECTION 4734

Currently, attacks on section 4734 have properly focused on the nature of the conduct that is being encouraged.[262] The *Brandenburg* test specifically requires that the speech at issue be directed toward inciting "lawless action."[263] For example, in a suit brought by the New York State Bar Association, the complaint alleges that "[s]ection 4734 makes it a crime [to counsel] any individual to engage in action which is not criminal."[264] In response, the Attorney General has concurred stating that the provision would "prohibit attorneys and other professional advisors from 'counsel[ing]' their clients to engage in an estate-planning strategy that itself is lawful."[265]

Theoretically, this is a logical conclusion. It would be inconsistent to say that the government can punish encouragements as a crime when the underlying action that is encouraged is not a crime.[266] If the

259. *Id.* at 448.
260. *See id.*
261. *See id.*
262. Technically, the person who wants to engage in expressive conduct must show the First Amendment applies before the burden is placed on the government to justify infringing on First Amendment interests. *See* Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984). Clearly, First Amendment interests are implicated here. Attorneys informing clients about the law is communicative and infringing on this speech burdens the free flow of ideas.
263. *See Brandenburg,* 395 U.S. at 447.
264. New York State Bar Association's Complaint ¶ 14, New York State Bar Ass'n v. Reno, No. 97-CV-1768 (N.D.N.Y. Apr. 7, 1998).
265. Letter from Janet Reno, U.S. Attorney General, to The Honorable Newt Gingrich, *supra* note 229, at 2. Also, Ms. Reno has expressed that her office will not seek to enforce the provision nor will it defend it against the Bar's constitutional attack. Because the government has not contested the unconstitutionality of section 4734, Judge Thomas J. McAvoy has granted the Bar's motion for a preliminary injunction against the government from enforcing the section. *See New York State Bar Ass'n*, No. 97-CV-1768 (order granting preliminary injunction). However, the court did not purport to adopt a theory as to why the section is unconstitutional.
266. *See* GREENAWALT, *supra* note 228, at 474.

government does not have a strong enough interest in discouraging certain behavior by making such behavior a crime,[267] then the government's interest in proscribing its encouragement does not amount to the compelling interest needed to criminalize speech.[268] It is irrelevant to this free speech analysis that the requisite interest for punishing encouragements of these transfers would be present if Congress had been successful in its attempt to criminalize asset transfers made for the purpose of qualifying for Medicaid benefits.

Although it is consistent with the First Amendment to say that the government cannot punish encouragements that do not incite unlawful action, this conclusion is too broad. Under this rule, an applicant who decides to transfer assets to become eligible for Medicaid benefits and absorb the period of ineligibility is committing a "lawful" action.[269] The period of ineligibility seems to have no bearing on the question of whether applicants should engage in such conduct and whether it should be encouraged. The period of ineligibility is intended to be a penalty and a deterrence to such behavior. However, the rule discussed above defines actions that, despite being sanctionable with civil and administrative penalties, are lawful.

The better rule is that speech that encourages an act thought to be socially harmful should not be sanctioned with greater penalties

267. *See* PACKER, *supra* note 213, at 71. All social regulation advances the interests of society through the control of action and criminal law furthers this goal by preventing socially undesirable behavior.

268. Some support for this conclusion can be drawn from Supreme Court opinions in the commercial speech area. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) (reversing the conviction of editor of newspaper that printed advertisement about the availability of lawful abortions in other states but were not lawfully available in the editor's state); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (overruling Posadas de P.R. Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986), to the extent that *Posadas* stands for the notion that truthful speech about a lawful product can be suppressed in order to regulate the product).

269. On the other hand, if the conduct is broadly characterized as unlawful, some interesting questions are raised under the *Brandenburg* test regarding how near in time and space would the counseling have to be in order for it to be punished. For instance, Medicaid planners are known to hold seminars or produce and sell video tapes that discuss Medicaid planning strategies. The issue then becomes whether their counseling is proximate enough to have incited the transfers. *Compare* United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing convictions of attorneys who gave seminars on tax shelters which were used for fraudulent purposes by taxpayers because the tax shelters discussed were legal), *with* United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (holding that defendants' counseling in seminars and large public meetings as to tax avoidance was sufficiently close in time and space to fraud by taxpayers). *See generally* Theresa J. Pulley Radwan, *How Imminent Is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47 (1997).

than those applied to the encouraged act.[270] This rule avoids mischaracterization of civil and administrative sanctions. Also, it has already been decided in *Brandenburg* that the government does have a sufficient interest in punishing encouragements of behavior that government can proscribe such encouragements within the limits of the Constitution. Thus, punishing speech with penalties not greater than those applied to the underlying behavior is still consistent with *Brandenburg*.

Applying this more consistent approach, however, may not be worthwhile because the penalties used to deter individuals from transferring assets to become eligible for Medicaid benefits may not have enough of a deterrent effect on those counseling the individuals. In essence, the penalty on the applicant is ineligibility for Medicaid benefits. The same penalty could be placed on those who counseled the individual to make the transfer, but the loss of Medicaid eligibility would probably not affect these individuals to a great degree. On the other hand, if one views the penalty as burdening the applicant with his own healthcare costs, lawmakers could force counselors to share in those costs.

V. Was It All Sound and Fury Signifying Nothing?

Now that it is definitely not a crime to transfer assets to obtain Medicaid eligibility and probably not a crime to advise an individual to make such a transfer, two questions remain: (1) whether the practice should be discontinued because it is an immoral act, and (2) whether a need still exists for further regulation in this area. These questions were raised long before Congress enacted these criminal provisions. Does the fact that Congress repealed its criminal penalty legitimize the practice? If section 4734 is unconstitutional, does this mean attorneys should engage in this kind of speech?

A. An Inherent Moral Imperative?

From the applicants' perspective, some might be motivated to transfer assets because they believe that they are "beating the system." Most, however, are probably motivated to transfer their assets in order to preserve and pass on their assets in the face of enormous

270. *See* GREENAWALT, *supra* note 228, at 274.

healthcare costs.[271] At such large annual costs, most people's assets would be wiped out after staying only a few years in a nursing home. Thus, these individuals do not view their actions as immoral, but economically rational and efficient.[272]

An individual could decide to endure a period of ineligibility for Medicaid benefits in order to gain the same benefits in the future based purely on an economic analysis of their situation. The norms of the Medicaid asset transfer regulations were in part established by the insurance industry, which was attempting to increase the market for long-term care insurance. The insurance industry recognized the decision-making pattern of these individuals and found that they were not choosing to pay for their care with insurance because Medicaid benefits can be obtained more cheaply. Thus, the purpose of ratcheting up the sanctions was to influence the economic decision-making process of individuals looking for ways to finance their long-term care needs, not to deter individuals from committing an immoral act. If the asset transfer provision is meant to regulate the economic behavior of these individuals, then the purpose of the law is not to punish immoral conduct but to conform the conduct of individuals to the law's norms.

The amorality of certain transactions has been recognized by the U.S. Supreme Court.[273] These concerns primarily arise in the context of statutes that regulate financial transactions such as the Bank Secrecy Act.[274] For example, the Court addressed these concerns in the context of the antistructuring provisions of the Bank Secrecy Act in *Ratzlaf v. United States*.[275] The statute required a domestic bank involved in a cash transaction exceeding $10,000 to file a report with the Secretary of the Treasury.[276] The statute also made it illegal to structure a single transaction into smaller, separate transactions, in order to avoid the reporting requirement.[277]

The Court rejected the argument that structuring transactions was immoral because it found that a person might structure a transaction to avoid the reporting requirement for amoral purposes and not

271. *See* Rein, *supra* note 166, at 195-96.
272. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (2d ed. 1996) (applying principles of economics to the interactions between individuals and the law).
273. *See* Ratzlaf v. United States, 510 U.S. 135 (1994).
274. *See, e.g.*, United States v. Dichne, 612 F.2d 632 (2d Cir. 1979).
275. 510 U.S. 135 (1994).
276. *See id.* at 136.
277. *See id.*

just for the purpose of defrauding the government.[278] The Court also found a person might structure a transaction without any regard for the reporting requirement but for legitimate tax purposes.[279] Thus, the Court held that, in order to show "willfulness" in the context of the antistructuring provisions, the government must prove the defendant "knew the structuring in which he engaged was unlawful."[280] The Supreme Court's interpretation in *Ratzlaf* has been applied in subsequent cases in the lower courts.[281]

Like the individuals in *Ratzlaf* who structure transactions for reasons other than to avoid the reporting requirements of the antistructuring laws, individuals transfer assets for a variety of legitimate tax and probate reasons without regard for their Medicaid eligibility. Even without these other reasons present, an applicant may view their actions as lawful, based on the cost-benefit analysis discussed above. In the absence of a criminal penalty, the individual may have no notice that what they were doing was unlawful.

However, the government has a legitimate interest in limiting the funds it spends on health care and in establishing criteria to decide who is eligible for those funds.[282] The purpose of Medicaid has always been to provide "medical assistance to low-income persons."[283] The eligibility rules are designed to screen out those who can pay for their care. Thus, the issue remains whether it is unethical for an attorney to advise a person to manipulate her portfolio to make herself eligible for Medicaid benefits.

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278. *See id.* at 144-45.

279. *See id.* at 145-46.

280. *Id.* at 149.

281. *See* United States v. Hayden, 64 F.3d 126, 130-31 (3d Cir. 1995); United States v. Wynn, 61 F.3d 921, 927 (D.C. Cir. 1995); Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995). *But see* United States v. Hopkins, 53 F.3d 533, 539 (2d Cir. 1995); United States v. Daughtry, 48 F.3d 829, 831 (4th Cir. 1995); Andrea Tuwiner Vavonese, Comment, *The Medicare Anti-Kickback Provision of the Social Security Act—Is Ignorance of the Law an Excuse for Fraudulent and Abusive Use of the System?*, 45 CATH. U. L. REV. 943, 977-80 (1996) (arguing that *Ratzlaf* stands for a method of interpreting "willfulness" and that its interpretation was not meant to be applied to all cases).

282. The government must decide how to allocate its limited resources among competing interests. *See, e.g.*, James W. Fossett & James H. Wyckoff, *Has Medicaid Growth Crowded Out State Educational Spending*, 21 J. HEALTH POL. POL'Y & L. 409 (1996) (discussing the debate over whether Medicaid spending has superseded spending on other activities, education in particular).

283. 42 C.F.R. § 430.0 (1998). *But see* Rein, *supra* note 166, at 258-64 (finding a lack of clear Congressional intent to support the position that Medicaid was only meant for the poor).

B. The Role of the Elder Law Attorney

The role of the elder law attorney in Medicaid estate planning depends on whether he is advising his clients to make asset transfers for fair market value or to make the transfers for less than that value. One common method of transferring assets to become eligible for Medicaid is to convert the assets to assets that are protected by the income and asset guidelines.[284] For example, one may use excess cash to pay off a mortgage on one's home, make improvements to the home, or purchase household goods—preferably those that will appreciate in value, such as a diamond ring.[285] Because these asset transfers are at market value, they do not result in a period of ineligibility.

The issue becomes one of state enforcement of the eligibility rules. One problem in this area is the lax enforcement policies of the states regarding applicants' personal property.[286] In fact, states may employ a "don't ask, don't tell" policy.[287] Generally, an applicant can have no more than $2,000 in personal property. The state could deter the practice of asset transferring if it more aggressively enforced the personal property limitation.

As a matter of professional ethics, an attorney must not advise a client to engage in fraud. In some cases, applicants simply do not reveal the extent of their property holdings. This omission would amount to a fraud in the application process. On the other hand, if asset holdings and transfers are disclosed, the issue becomes one of the state's enforcement policies.

Furthermore, it is not necessarily unethical for an attorney to advise clients to convert nonexempt property into exempt property.[288] The assets and income guidelines protect people from becoming financially devastated by healthcare costs. Similar property protections can be found in bankruptcy law. Under bankruptcy law, converting property into exempt property can be justified for two reasons: if

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284. *See* LTC INC., THE FLORIDA FULCRUM: A COST-SAVING STRATEGY TO PAY FOR LONG-TERM CARE 125 (1989) [hereinafter FLORIDA FULCRUM].

285. *See id.*

286. *See, e.g.*, LTC, INC., THE MAGIC BULLET: HOW TO PAY FOR UNIVERSAL LONG-TERM CARE, A CASE STUDY IN ILLINOIS (1995). The authors worked from the assumption that Medicaid is a social safety net designed to help people after they spend down their assets paying for long-term care. *See* FLORIDA FULCRUM, *supra* note 284, at 2.

287. *See* FLORIDA FULCRUM, *supra* note 284, at 28.

288. *See, e.g.*, Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615 (1978).

Congress wanted to regulate such transfers they could, and such transfers should be contemplated by the debtor's creditors.[289] The same justifications apply to asset transfer regulations in the context of Medicaid eligibility: Congress has not acted in regard to the legitimacy of such transfers—only those made for less than fair market value, and it is reasonable for the government to expect such transfers will be made.

Whether attorneys should advise their clients to make transfers for less than fair market value depends in part on how one characterizes the underlying transaction. One may view the underlying transaction as lawful—even though there is an ineligibility period assigned to it—because one can absorb the ineligibility period. On the other hand, the view that an act is lawful because it is efficient has been criticized.[290]

The argument has been made that attorneys should still "know better" than the client.[291] Although section 4734 is not unconstitutional, the constitutionality of an act is not indicative of its ethical or moral quality. Thus, although the Constitution allows an attorney to advise his client about these transfers, that does not necessarily mean the attorney should give this advice. Furthermore, an attorney's character is obviously separate from the character of the client.[292] Because the attorney knows that Medicaid is intended for those who truly cannot pay for their health care costs, the attorney should not assist those who can pay for long-term care to transfer assets. However, the Ohio Bar could not find a way to formulate a rule of professional responsibility to prevent the attorney from counseling a client when the result of that relationship is a lawful transaction.[293]

The issue brings to mind the distinction between the "morality of duty" and the "morality of aspiration."[294] Rules of professional responsibility establish minimum duties of attorneys to their clients and punish them for failing in those duties.[295] Other rules are character-

289. *See id.* at 630-31.

290. *See* Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998).

291. *See* DAVID ROSENFELD, COUNSEL FOR PUBLIC POLICY, LTC, INC., UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN COLLEGE OF LAW PRESENTATION MATERIALS 10 (1996) (citing various rules of professional responsibility).

292. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1998).

293. *See supra* notes 225-27 and accompanying text.

294. *See* LON FULLER, THE MORALITY OF LAW 5-6 (1969).

295. *See* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (arguing that the Code of Professional Responsibility has aban-

ized as being aspirational, and the extent to which they are followed is left to the individual attorney. The rules of professional conduct only require that an attorney not advise a client to commit fraud.[296] As long as an attorney does not advise a client to misrepresent their asset holdings and transfers to state health agencies, no violation of the code has been committed.[297]

It is difficult to conclude that this practice is immoral because a real need exists for affordable long-term care.[298] Medicaid estate planning is symptomatic of this larger problem.[299] The better solution is to remove the motivation to engage in the practice by making long-term care more affordable and long-term health care insurance less expensive, more accessible and, ultimately, more attractive.[300] In the alternative, the government and insurance industry should devise a joint solution where government-subsidized care and insurance are integrated.[301]

C. The Need for Further Legislation

An important concern in Medicaid estate planning is the potential for its use as a vehicle for children to pressure a vulnerable parent into divesting himself of assets so that the estate is not consumed by the costs of nursing home care.[302] Sections 217 and 4734 addressed this issue in different ways. Section 217 would have provided a direct deterrence to parents and children from engaging in making such transfers,[303] while section 4734 would have prevented financial advisors and attorneys from assisting children and parents in effecting these transfers.[304]

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doned the conception that a lawyer should achieve a "fully integrated moral personality").

296. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d).

297. Of course, attorneys should advise clients of the attendant risks in transferring assets to become eligible for Medicaid, for example, their health care costs may not be as great as they estimated, they may not need long-term care, or the quality of care of patients on Medicaid may not be equal to that of private payers. *See* Rein, *supra* note 166, at 305.

298. *See* Kate A. Mewhinney, *Planning for the Senior Citizen*, in ESTATE PLANNING IN DEPTH 1994, at 1465, 1497-98 (ALI-ABA Course of Study in Depth, June 19, 1994) ("An attorney who advises an elderly or disabled client about estate planning . . . should inform the client about Medicaid planning strategies.").

299. *See* Regan, *supra* note 91, at 1261.

300. *See id.* at 1263.

301. *See id.* at 1265.

302. *See* Mewhinney, *supra* note 298, at 1496.

303. *See supra* Part IV.A.1.

304. *See supra* text accompanying Part IV.B.

Under these circumstances, Medicaid estate planning becomes a threat to the elder's autonomy and independence.[305] Elders have a strong desire to remain in their own homes.[306] The elder parent may prefer to privately pay for better nursing home care[307] or prefer to pay more for home care.[308]

A conflict of interest can arise when children and a parent come into the attorney's office at the same time, or when the children come into the attorney's office on their own, to discuss how the parent's assets are to be disposed.[309] Traditional legal ethics conceive the attorney-client relationship as a principal-agent relationship.[310] However, the ABA Model Rules fail to define under what circumstances an attorney-client relationship is formed.[311] Also, this situation requires an attorney to take into account the interest of third parties, which goes beyond the traditional approach in ethics, such as if the parent is competent, ill, or simply more vulnerable because of their age.[312] The first question that needs to be answered is whom will the attorney represent.[313] However, the rules of professional responsibility do not provide a clear answer as to what the attorney should do, and the attorney may become entangled in a generational conflict of interest.

Therefore, further legislation is still needed in the area of Medicaid estate planning. Lawmakers should consider how to protect the parent's right to be left alone and how to maintain the existing autonomy of a person who needs help.[314] Lawmakers can draw upon other areas of probate law, such as guardianship and the doctrine of undue influence.

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305. *See* Nancy C. Nawrocki, *Ethical Challenges in Serving the Elder Client*, ADVOCATE, May 1994, at 16.

306. *See* Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1860-61 (1992).

307. *See* Mewhinney, *supra* note 298, at 1499.

308. *See* Rein, *supra* note 306, at 1861 (finding that "65% of those surveyed would accept a higher priced program that offered home care") (quoting Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement & Inheritance*, 24 REAL PROP. PROB. & TR. 3 1, 7 (1989)).

309. *See* Narwocki, *supra* note 305, at 17.

310. *See* Peter Marguilies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1074 (1994).

311. *See* Nawrocki, *supra* note 305, at 16.

312. *See* Marguilies, *supra* note 310, at 1074.

313. *See* Nawrocki, *supra* note 305, at 19; *see also* Marguilies, *supra* note 310, at 1074 (taking the position that the attorney should represent the most vulnerable party).

314. *See* Marguiles, *supra* note 310, at 1095-96.

It would be preferable to positively reinforce the parents' autonomy in this situation. For instance, lawmakers could require attorneys to obtain signed disclosures of clients to ensure they are aware of attendant risks and that they are acting autonomously. Lawmakers might also require that the attorney make a determination as to whether the parent is vulnerable to pressure from the children and obligate the attorney to represent the vulnerable parent.[315] If the children have clearly asked the attorney to represent their interests without bringing the parent into the relationship, the attorney should not be allowed to assist the children in the divestiture of the parent's assets unless the parent is represented. Lawmakers might also require that the children be made guardians of the parent before forcing the parent to move out of their home.[316] However, it would be difficult to ultimately know whether the parent is making an autonomous decision or succumbing to the pressure of their children.

Lawmakers should also provide a mechanism for elder parents to challenge their placement in a nursing home after their placement has occurred. Once the elder is out from under the influence of his children, the elder may regain a sense of autonomy and realize that he has divested his assets and been placed in a home against his will. Lawmakers could adapt the doctrine of undue influence to this situation. If the parent only sought the return of her assets as a remedy, lawmakers could require a lesser showing of pressure by the children. Because the elder parent will lack resources, lawmakers should provide the parent with access to representation.[317]

Lawmakers may find it frustrating to legislate in this area because it involves intensely private familial relationships. Although such laws would define and strengthen an elder parent's rights in this situation, their effectiveness would rely upon the parent asserting them. Ultimately, the problem would be resolved more effectively by cheaper home health care and long-term care insurance.

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315. *See id.*

316. By this requirement, there would need to be a judicial determination that the parent is incapacitated.

317. Such a program could be modeled on Ombudsman Programs. *See* Elizabeth B. Herrington, *Strengthening the Older Americans Act Long-Term Care Protection Provisions: A Call for Further Improvements of Important State Ombudsman Programs*, 5 ELDER L.J. 321 (1997).

VI. Conclusion

After the dust has settled from Congress's failed attempts to increase the penalties for engaging in Medicaid estate planning, the problems of financing long-term care will still exist, especially for those belonging to the middle class who do not want to lose their life savings to health care expenses.[318] The income and resources of middle-class individuals is typically too high for Medicaid and yet they cannot afford long-term care. These individuals have a legitimate interest in not seeing their life savings entirely depleted.[319] Although elder law attorneys should continue to advise clients as to Medicaid estate planning strategies, attorneys and lawmakers should also consider the plight of the vulnerable parent.

318. *See* Eleanor Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct*, 44 SOC. SEC. REP. SERV. 897, 898 (1994).

319. *See id.*