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OUTLIVING CIVIL RIGHTS

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ABSTRACT

All fifty states have adopted statutes designed to protect older adults from abuse and neglect. While those statutes have been critiqued on functional and moral grounds, their legal implications have largely been ignored. In this Article, I fill that conspicuous gap and, in the process, show how elder protection systems significantly burden the constitutional rights of older adults—including the right to informational privacy, the right to engage in consensual sexual relations, and the right to enjoy equal protection of the law. I demonstrate that a subset of these burdens may be so unreasonable that the statutes are not only unwise, but also unconstitutional. I then explore how recognizing the burdens that current elder protection systems impose on older adults' civil rights could lead to a fundamental shift in the design of elder protection legislation.

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I. INTRODUCTION

The past two decades have witnessed a surge of interest in protecting senior citizens from victimization. As social service providers and policymakers have become increasingly aware of and sensitized to the problems of elder abuse and neglect—problems estimated to affect three to five percent of seniors annually in the United States[1]—they have

1. *See* James E. Lett, *Abuse of the Elderly*, 82 J. FLA. MED. ASS'N. 678 (1995) (explaining the origin of the commonly used 3–5% figure); ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 18–25 (Richard J. Bonnie & Robert B. Wallace eds., 2003) [hereinafter "ELDER MISTREATMENT"] (discussing the existing state of research on elder abuse prevalence, and discussing a series of studies suggesting a 3–5% prevalence rate); *see also* NATIONAL

responded by advocating for new laws to protect senior citizens from mistreatment. States have, in turn, enacted a variety of new statutes aimed at protecting older adults. Although well-intentioned, many of these statutes take a paternalistic approach that has serious—and potentially unjustifiable—civil rights implications for the seniors they are designed to protect. For example, some limit older adults' substantive due process rights by criminalizing certain forms of consensual sexual behavior; others undermine older adults' informational privacy rights by requiring the doctors, attorneys, priests, or other confidants to report suspected abuse or neglect to the state. The effect is that, in some states, a person's constitutional rights will be curtailed simply because he or she attains the age of sixty or sixty-five.

Although paternalistic elder protection statutes have repeatedly been critiqued, the burdens that they impose on legal rights have largely been ignored and consequently their legal permissibility has gone unchallenged. In this Article, I fill that conspicuous gap by providing a constitutionally based critique of several important categories of elder protection statutes. In so doing, I demonstrate the real, tangible, and largely overlooked rights implications of current legislative approaches addressing elder mistreatment, and show that a subset of the statutes designed to address elder mistreatment may be unconstitutional.

My primary aim, however, is not to show why courts might reasonably find certain elder protection statutes to be unconstitutional, although this is one of the Article's key contributions. Rather, it is to show that identifying the burdens such statutes impose on older adults' constitutional rights,[2] and labeling them as such, has the potential to fundamentally change legislative approaches to elder mistreatment. The United States is a country founded on liberal ideals where the political discourse is dominated by competing notions of liberalism. Consistent with this tradition, in the legislative realm and in the court of popular opinion, "rights" can function as trump cards in a way that mere "values" cannot.[3]

CENTER ON ELDER ABUSE, ELDER ABUSE PREVALENCE AND INCIDENCE (2005), *available at* http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf (providing information about conflicting prevalence estimates). The actual prevalence of elder mistreatment remains unknown, although a number of studies have attempted to provide rough estimates. The federal government is currently funding a series of research initiatives aimed at determining the best way to measure the prevalence of elder mistreatment. The delay in generating a meaningful national study of prevalence, however, remains a source of great frustration for researchers and advocates.

2. In this Article, "constitutional rights" refers to those rights for which the United States Constitution provides, or arguably provides, protection.

3. *See* discussion *infra* notes 224–35 and accompanying text.

Thus, even where arguments about the constitutional implications of an elder protection statute might not lead courts to declare it unconstitutional, a recognition of such implications may have sufficient rhetorical and persuasive power to cause policymakers to reject it as undesirable or politically impractical.

With these goals in mind, the Article proceeds with five major Parts. Part II provides an overview of the current legal framework addressing the problem of elder mistreatment. Parts III and IV analyze two distinct types of laws designed to protect elders, revealing the serious—and potentially unconstitutional—implications they can have for older adults' constitutional rights. Part V calls for recognizing and labeling these implications of current elder protection laws as burdens on constitutional rights and explores how doing so could fundamentally shift the focus of elder protection legislation.

II. OVERVIEW OF THE ELDER PROTECTION SYSTEM

Elder mistreatment is a phenomenon that includes physical, psychological, and sexual abuse, as well as financial exploitation of older adults. The term is also frequently used to describe self-neglect, a phenomenon in which individuals fail to meet their own health, safety, or personal hygiene needs. Elder mistreatment is not only a source of injury and of great emotional and physical pain, but is also associated with significantly enhanced mortality rates.[4]

Although the problem of elder mistreatment is not new, governmental authorities failed to recognize it until the middle of the twentieth century. The issue first received meaningful attention in the context of concerns about mistreatment of vulnerable adults in general. In 1953, the American Public Welfare Association (APWA) formally identified a need for protective services for physically or mentally challenged adults.[5] In the two decades that followed, through the efforts of the APWA and advocates in the social work field, federal legislation was passed to fund demonstration projects to provide services to physically and mentally challenged adults.[6] These efforts paved the way for Congress' passage in 1974 of Title XX of the Social Security Act,[7] which effectively required

4. Rosalie S. Wolf, *Introduction: The Nature and Scope of Elder Abuse*, 24 GENERATIONS 6 (2000).

5. Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 STANFORD L. & POL'Y REV. 175, 182–83 (2003).

6. *Id.*

7. Rosalie Wolf, *Appendix C: Elder Abuse & Neglect: History and Concepts*, *in* ELDER

all states to create adult protective service (APS) units.[8] These units originally focused on self-care and dementia issues, but have evolved so that today they place elder abuse, neglect, and exploitation front and center in their work.[9]

Interest in elder abuse temporarily waned following the passage of Title XX, but reemerged after a series of hearings on the topic in the late 1970s sparked congressional interest in the issue.[10] This resurgence of interest in elder abuse was marked by a change in how elder abuse was perceived. Instead of previous conceptions of elder abuse as an issue of vulnerability, elder abuse was now treated as an issue of age.[11] Terms such as "granny bashing"[12] and "elder abuse" entered the political lexicon.

Characterizing the abuse of elders as an "age" issue encouraged policymakers to look to another, already existing, age-based protection regime in designing a response. Policies aimed at protecting children from abuse and neglect became the frame of reference and so the adult protective system came to be in large part modeled on child protective systems.[13] This frame of reference has had a profound effect on the design of elder protection laws. In some cases, laws designed to protect children were adopted in the elder mistreatment context with little more tailoring than substituting the word "elder" for "child." For example, the concept of mandatory reporting, discussed at length in Part III, was borrowed from mandatory child abuse reporting schemes largely without consideration of whether it was appropriate for the senior population.[14] As discussed in

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MISTREATMENT, *supra* note 1, at 239 [hereinafter "Wolf, *Appendix C*"].

8. *See* 42 U.S.C. § 1397 (2000). This is somewhat ironic, however, given that evidence from the demonstration projects suggested that the resulting services were "very costly and of questionable effect." *See* Wolf, *Appendix C*, *supra* note 7, at 239.

9. Kohn, *supra* note 5, at 183.

10. *See* Wolf, *Appendix C*, *supra* note 7, at 239.

11. *See id*. at 240; *cf.* ELDER MISTREATMENT, *supra* note 1, at 15 ("It appears that elder mistreatment became identified as a national concern when it was conceptualized as an 'aging' issue, rather than as an unidentified component of adult protection.").

12. Bridget Penhale & Paul Kinston, *Elder Abuse: An Overview of Recent and Current Developments*, 3 HEALTH & SOCIAL CARE IN THE COMMUNITY 311 (2007) (explaining that the term "granny bashing" first originated in a 1975 article published in Britain but soon filtered into American politics).

13. Components of the elder protection system that have been modeled on the child protection system are numerous and diverse. They range from the creation of APS, which was modeled on child protective services (*see* ROSALIE S. WOLF & KARL A. PILLEMER, HELPING ELDERLY VICTIMS: THE REALITY OF ELDER ABUSE 149–50 (1989)) and mandatory reporting schemes, to more recent developments such as state elder abuse registries modeled on child abuse registries (*see Elder Mistreatment*, *supra* note 1, at 125) and elder abuse fatality review teams modeled on child abuse fatality review teams (*see* BONNIE BRANDL ET AL., ELDER ABUSE DETECTION AND INTERVENTION: A COLLABORATIVE APPROACH 15 (2007)).

14. *See* Wolf, *Appendix C*, *supra* note 7, at 123.

more detail later in this Article, the result has been a heavily paternalistic elder protection system.[15]

Although the first wave of interest in elder mistreatment was characterized by federal legislative leadership, legislative action following the reemergence of the issue in the late 1970s occurred, and continues to occur, primarily at the state level. All fifty states have enacted at least some form of legislation to address elder mistreatment.[16] This legislative activity has been facilitated by a vocal, passionate network of aging-focused service providers and advocates, armed with reports of abused elders—fathers starved to death, mothers raped by drug-abusing sons, nursing home residents rotting with bedsores, older men seduced by professional "girlfriends"[17]—that shock the conscience and have evoked bipartisan outrage, sympathy, and desire to take action.[18]

Today, despite continued agitation for comprehensive federal legislation to address elder mistreatment, the legal framework for elder protection exists predominantly at the state level. Although there is considerable variation among the states, the vast majority of laws aimed at protecting older adults fall into one of three categories. First, there are laws that create and govern state APS units, which are charged with providing services to vulnerable adults. APS agencies are generally viewed as the front-line responders to the problem of elder mistreatment because they both investigate reports of elder mistreatment and offer victim services.[19] In general, APS may only provide services with the consent of the alleged victim. Under certain circumstances, however, APS may be authorized to provide victim services without the alleged victim's consent and notwithstanding the alleged victim's explicit objection.[20] Second, there are elder abuse reporting laws that permit or require certain persons to report certain types of mistreatment to a government agency,

15. *See infra* notes 240–42 and accompanying text.

16. *See* Lori A. Stiegel, *What Can Courts Do About Elder Abuse?*, 35 JUDGES J. 38, 38 (1996).

17. The National Center for Elder Abuse provides a listserv with a daily feed of such stories. This resource provides ample anecdotal evidence for those aging service providers and advocates seeking illustrations of the tragic impact of elder mistreatment.

18. *Cf.* Marshall B. Kapp, Book Review, 5 MARQ. ELDER'S ADVISOR 121 (2003) (arguing that elder abuse has been an area where Congress has reacted first and the legal community has questioned later).

19. *See* PAMELA B. TEASTER, A RESPONSE TO ABUSE OF VULNERABLE ADULTS: THE 2000 SURVEY OF STATE ADULT PROTECTIVE SERVICES 5, 11 (2003), *available at* http://www.ncea.aoa.gov/NCEAroot/Main_Site/ pdf/research/apsreport030703.pdf.

20. *See* Lisa Nerenberg, *Communities Respond to Elder Abuse*, *in* ELDER ABUSE & MISTREATMENT: POLICY, PRACTICE & RESEARCH 11–12 (M. Joanna Mellor & Patricia Brownell eds., 2006) (discussing exceptions to the general rule that APS services are voluntary in nature).

typically APS.[21] A third category of elder protection laws consists of statutes that specifically prohibit or specially penalize (or both) certain treatment of older adults. Some create new crimes for which perpetrators of elder mistreatment can be held liable; others provide for enhanced penalties for those convicted of crimes involving elderly or otherwise vulnerable victims. Together, these three types of laws create the core of what this Article will refer to as the "elder protection system."

The development of these broad, state-level elder protection systems is cause for some celebration. These systems represent recognition by states that elder mistreatment is a problem deserving public attention and a commitment by states to take measures to try to meet the needs of older adults. At the same time, however, such elder protection systems are not without flaws. A number of these flaws have been the subject of prior criticism.[22] One flaw that has been largely overlooked, however, is that this system significantly burdens the legal rights of older adults. The next two Parts of this Article explore how two key components of elder protection systems—mandatory reporting laws and laws designed to protect older adults from sexual abuse—limit the civil rights of the persons they aim to protect.[23]

III. CONSTITUTIONAL RIGHTS & MANDATORY REPORTING

The design of, and discussion about, mandatory elder abuse reporting statutes provides perhaps the best example of how the elder protection system has overlooked the civil rights implications of its interventions. This next Part discusses the design of mandatory reporting statutes, reviews existing critiques of those statutes, and reveals the burden that they can impose on older adults' constitutionally protected rights.

A. Overview of Mandatory Reporting Laws

In every state, elder abuse that occurs at certain residential facilities, including nursing homes, must be reported to the state.[24] The vast majority

21. Efforts to require reporting at the federal level, by comparison, have been unsuccessful.

22. For example, mandatory reporting laws have received extensive criticism. *See* discussion *infra* notes 48–53 and accompanying text.

23. Thus, the Article examines statutes in two of the three categories of elder protection laws. This does not mean that statutes in the third category—those governing APS—do not also have civil rights implications. Rather, the decision to focus on statutes in only the later two categories reflects a recognition that there is currently significant legislative interest in adopting and amending statutes in these categories, and therefore there is particular value in identifying their civil rights implications.

24. Federal law requires abuse that occurs in nursing homes be reported to the appropriate state

of states currently also require at least some categories of persons to report elder mistreatment regardless of residential setting.[25] Statutes mandating reporting of abuse or neglect of non-institutionalized elders, hereafter referred to as "mandatory elder abuse reporting statutes" (as they are commonly called), vary in four primary ways.

First, they vary in the categories of persons upon whom they impose a duty to report. While some states require all persons with reason to suspect mistreatment to report,[26] others limit the duty to report to certain categories of persons.[27] Health care professionals are the most frequently targeted reporters, but some states also single out bank employees, social workers, coroners, law enforcement personnel, and assorted other public officials for special reporting duties.[28] To ensure that there is no confusion,

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agency. *See* 42 C.F.R. § 483.13(c)(2) (2009).

25. Only five states lack mandatory reporting requirements. *See* LORI STIEGEL & ELLEN KLEM, REPORTS AND REFERRALS TO LAW ENFORCEMENT: PROVISIONS AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE (2007), *available at* http://www.abanet.org/aging/about/pdfs/APS_Reports_and_Referrals_to_Law_Enforcement_Provisions_Chart.pdf. Among those states that do not mandate reporting, voluntary reporting is nevertheless encouraged. In some states, this encouragement is written into the statutory code. *See, e.g.*, COLO. REV. STAT. § 26-3.1-102(1)-(3) (West Supp. 2008) (specifically encouraging certain categories of persons to report abuse); N.J. STAT. ANN. § 52:27D–409(a) (West 2001) (specifically stating that any person may report abuse, neglect, or exploitation of a vulnerable adult); N.D. CENT. CODE § 50-25.2-03 (2007) (specifically inviting reports of abuse and neglect).

26. *See* DEL. CODE ANN. tit. 31, § 3910(a) (Supp. 2008); FLA. STAT. ANN. § 415.1034 (West Supp. 2008); IND. CODE ANN. § 12-10-3-9(a) (West 2007); KY. REV. STAT. ANN. § 209.030(2)-(6)(a) (LexisNexis 2007); LA. REV. STAT. ANN. § 14:403.2(C), (D)(1)-(4), (E)(6) (Supp. 2009); MO. REV. STAT. § 660.255(1) (2000); N.H. REV. STAT. ANN. § 161-F:46 (Supp. 2008); N.M. STAT. § 27-7-30(A)–(B) (2007); N.C. GEN. STAT. § 108A-102(a) to (b) (2007); OKLA. STAT. ANN. tit. 43A, § 10-104(A) (West Supp. 2008); R.I. GEN. LAWS § 42-66-8 (Supp. 2008); TENN. CODE ANN. § 71-6-103(b)(1) (2004); TEX. HUM. RES. CODE ANN. § 48.051 (Vernon Supp. 2008); UTAH CODE ANN. § 62A-3-305(1) (West Supp. 2008); WYO. STAT. ANN. § 35-20-103(a) (2007).

27. *See* ALA. CODE § 38-9-8 (LexisNexis Supp. 2008); ALASKA STAT. § 47.24.010 (2006); ARIZ. REV. STAT. ANN. § 46-454(A)–(C) (Supp. 2008); ARK. CODE ANN. § 12-12-1708(a)–(c) (2007); CAL. WELF. & INST. CODE § 15630(a)–(f) (West Supp. 2008); CONN. GEN. STAT. ANN. § 17b-451(a) (West 2006); GA. CODE ANN. § 30-5-4(a)(1) & (b) (2007); HAW. REV. STAT. ANN. § 346-224(a)–(b) (LexisNexis Supp. 2008); IDAHO CODE ANN. § 39-5303(1) (2002); 320 ILL. COMP. STAT. ANN. 20/2(f-5) (West 2008); IOWA CODE ANN. § 235B.3 (West 2008); KAN. STAT. ANN. § 39-1431(a)–(b) (2007); ME. REV. STAT. ANN. tit. 22, § 3477(1)–(4) (2008); MD. CODE ANN., FAM. LAW § 14-302(a) & (d) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 19A, § 15(a)–(b), 15(e) (West 2008); MICH. COMP. LAWS ANN. § 400.11a (West 2008); MINN. STAT. ANN. § 626.5572 (West Supp. 2008); MISS. CODE ANN. § 43-47-7(1) (Supp. 2008); MO. REV. STAT. § 660.255(1) (2000); MONT. CODE ANN. § 52-3-811(3) (2008); NEB. REV. STAT. § 28-372(1) (1995); NEV. REV. STAT. ANN. § 200.5093(4) (West Supp. 2008); OHIO REV. CODE ANN. § 5101.61(A) (West 2001); OR. REV. STAT. ANN. §§ 430.735(9), 430.743 (West Supp. 2008); PA. STAT. ANN., § 10225.701 (West 2003); S.C. CODE ANN. § 43-35-25 (2008); VT. STAT. ANN. tit. 33, § 6903(a) (2001); VA. CODE ANN. § 63.2-1606(A) (Supp. 2008); WASH. REV. CODE ANN. § 74.34.020(10) (West Supp. 2009); W. VA. CODE ANN. § 9-6-9(a) (LexisNexis 2007); WIS. STAT. ANN. § 46.90(4) (West Supp. 2008).

28. *Cf.*, Stiegel & Klem, *supra* note 25; *see also* Teaster, *supra* note 19, at 20.

a number of states explicitly state that these reporting duties abrogate the privilege of confidentiality that might otherwise exist.[29]

Second, states vary in the consequences they impose on those who fail to fulfill their duty to report. In most states, such failure is a misdemeanor.[30] In some of these, the penalty for the misdemeanor of failure to report is exclusively a monetary fine.[31] In other states, jail time may be imposed.[32] A few states also allow it to be the basis for imposition

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29. *See, e.g.*, N.H. REV. STAT. § 161-F:48 (West 2002) ("The privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client, shall not apply to any proceedings instituted pursuant to this subdivision and shall not constitute grounds for failure to report as required by this subdivision.").

30. *See, e.g.*, ALA. CODE § 38-9-10 (LexisNexis 1992); ALASKA STAT. § 47.24.010(c) (2006); ARIZ. REV. STAT. ANN. § 46-454(K) (Supp. 2008); ARK. CODE ANN. § 12-12-1720(a) (2007); CAL. WELF. & INST. CODE § 15630(h) (West Supp. 2008); CONN. GEN. STAT. ANN. § 17b-451(a) (West 2006); GA. CODE ANN. § 30-5-8(b)(2) (2007); HAW. REV. STAT. ANN. § 346-224(e) (LexisNexis Supp. 2008); IDAHO CODE ANN. § 39-5303(2) (2002); 320 ILL. COMP. STAT. ANN. 20/4(e) (West 2008); IOWA CODE ANN. § 235B.3(12) (West 2008); KAN. STAT. ANN. § 39-1431(e) (Supp. 2007); LA. REV. STAT. ANN. § 14:403.2(A) (Supp. 2009); MISS. CODE ANN. § 43-47-7(1)(c) (Supp. 2008); NEB. REV. STAT. § 28-384 (1995); NEV. REV. STAT. ANN. § 200.5093(9) (West Supp. 2008); N.H. REV. STAT. ANN. § 161-F:50 (2002); N.M. STAT. § 27-7-30(C) (2007); OKLA. STAT. ANN. tit. 43A, § 10-104(D) (West Supp. 2008); PA. STAT. ANN., § 10225.706(c) (West 2003); S.C. CODE ANN. § 43-35-85(A) (2008); TENN. CODE ANN. § 71-6-110 (2004); TEX. HUM. RES. CODE ANN. § 48.052(a) (Vernon 2001); UTAH CODE ANN. § 62A-3-305(4) (Supp. 2008); WASH. REV. CODE ANN. 74.34.053(1) (West 2001); W. VA. CODE ANN. § 9-6-14 (LexisNexis 2007); WYO. STAT. ANN. § 35-20-111(b) (2007).

31. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 19A, § 15(a) (West Supp. 2008) (fining any required person who fails to make a report not more than one thousand dollars); MISS. CODE ANN. § 43-47-7(1)(c) (Supp. 2008); R.I. GEN. LAWS § 42-66-8 (Supp. 2006) (fining any person who fails to make a report not more than one thousand dollars); VT. STAT. ANN. tit. 33, § 6913(b) (2008); (fining a mandatory reporter who willfully fails to make such a report no more than $500 for each 24-hour period that a report was not made with a maximum penalty of $5,000 per reportable incident); VA. CODE ANN. § 63.2-1606(H) (Supp. 2008) (fining any person who fails to make a required report "$500 for the first failure and not less than $100 nor more than $1,000 for any subsequent failures").

32. Some limit imprisonment to as little as ten or thirty days. *See* HAW. REV. STAT. ANN. § 346-224(e) (LexisNexis Supp. 2008), HAW. REV. STAT. ANN. § 701-107 (LexisNexis Supp. 2007) (punishment consisting of imprisonment not exceeding thirty days); IOWA CODE ANN. § 235B.3(12) (West Supp. 2008), IOWA CODE ANN. § 903.1(1)(a) (West 2008) (punishment consisting of a "fine of at least sixty-five dollars but not to exceed six hundred twenty-five dollars" and "[t]he court may order imprisonment not to exceed thirty days in lieu of a fine or in addition to a fine"); W. VA. CODE ANN. § 9-6-14 (LexisNexis 2007) (punishment consisting of a fine "not more than one hundred dollars or imprison[ment] for not more than ten days, or both"). A number limit imprisonment to 90 days or three months. *See* ALASKA STAT. § 47.24.010(c) (2007), ALASKA STAT. § 12.55.135(b) (2006), ALASKA STAT. § 12.55.035(b)(6) (Supp. 2009) (punishment consisting of "definite term of imprisonment of not more than 90 days" and/or a fine of no more than $2,000); ARK. CODE ANN. § 12-12-1720(a) (West 2008), ARK. CODE ANN. § 5-4-401(b)(2) (2007), ARK. CODE ANN. § 5-4-201(b)(2) (West 2008) (punishment consisting of a sentence not exceeding ninety days and/or a fine not exceeding five hundred dollars); NEB. REV. STAT. §§ 28-384, 28-106 (1995) (punishment consisting of imprisonment not exceeding three months and/or a fine not exceeding five hundred dollars); WASH. REV. CODE ANN. 74.34.053(1) (West 2001), WASH. REV. CODE ANN. 9A.20.010(2) (West 2000) (punishment consisting of a fine not more than one thousand dollars or imprisonment for not more than ninety days, or both).

A limit of six months imprisonment is also common. *See* ALA. CODE § 38-9-10 (LexisNexis 1992) (punishment for physicians or others engaged in healing arts consisting of "imprisonment for not more

of civil liability.[33] Finally, failure to report may have licensure implications for certain professionals.[34]

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than six months or a fine of not more than $500.00"); ARIZ. REV. STAT. ANN. § 46-454(K) (Supp. 2008), ARIZ. REV. STAT. ANN. § 13-707(A)(1) (Supp. 2008), ARIZ. REV. STAT. ANN. § 13-802(A) (2001) (punishment consisting of imprisonment of no more than six months and/or a fine not more than two thousand five hundred dollars); CAL. WELF. & INST. CODE § 15630(h) (West Supp. 2008) (punishment consisting of imprisonment for not more than six months, or a fine of not more than one thousand dollars, or both); IDAHO CODE ANN. § 18-113(1) (Supp. 2008) (punishment consisting of imprisonment not exceeding six months, or a fine not exceeding one thousand dollars, or both); 320 ILL. COMP. STAT. ANN. 20/4(e) (West 2008), 730 ILL. COMP. STAT. ANN. 5/5-8-3(a)(1) (West 2007), KAN. STAT. ANN. § 39-1431(e) (Supp. 2007), KAN. STAT. ANN. § 21-4502(1)(b) (2007), KAN. STAT. ANN. § 21-4503(c)(2) (2007) (punishment consisting of a definite term of confinement not to exceed six months and a fine in addition to or instead of the confinement not exceeding $1,000); LA. REV. STAT. ANN. § 14:403.2(A) (Supp. 2009) (punishment consisting of a fine not more than five hundred dollars, or imprisonment for not more than six months, or both); MISS. CODE ANN. § 43-47-7(1)(c) (Supp. 2008) (punishment consisting of a fine not exceeding five thousand dollars, or imprisonment for not more than six months, or both); NEV. REV. STAT. ANN. § 200.5093(9) (West Supp. 2008), NEV. REV. STAT. ANN. § 193.150(1) (West Supp. 2008) (punishment consisting of imprisonment for not more than 6 months, or a fine of not more than $1,000, or both); UTAH CODE ANN. § 62A-3-305(4) (Supp. 2008), UTAH CODE ANN. § 76-3-204(2) (2003), UTAH CODE ANN. § 76-3-301(d) (2003) (punishment consisting of imprisonment not exceeding six months and/or a fine not exceeding $1,000).

Most frequently, however, states allow for terms of imprisonment of a year or nearly a year. *See* CONN. GEN. STAT. ANN. § 17b-451(a) (West 2006), CONN. GEN. STAT. ANN. § 53a-36 (West 2007), CONN. GEN. STAT. ANN. § 53a-42 (West 2007) (punishment consisting of a fine of not more than five hundred dollars for failing to report but if such failure is intentional, punishment shall be imprisonment not to exceed three months and/or a fine not to exceed five hundred dollars for the first offense and punishment shall be imprisonment not to exceed one year and/or a fine not to exceed two thousand dollars for any subsequent offense); GA. CODE ANN. § 30-5-8(b)(2) (2007), GA. CODE ANN. § 17-10-3(a)(1) (Supp. 2007) (punishment consisting of imprisonment not exceeding 12 months, or a fine not to exceed $1,000.00, or both); IDAHO CODE ANN. § 39-5303(2) (2002), 730 ILL. COMP. STAT. ANN. 5/5-9-1(a)(2) (West 2007) (punishment consisting of imprisonment less than one year, or a fine not exceeding $2,500, or both); N.H. REV. STAT. ANN. § 161-F:50 (2002), N.H. REV. STAT. ANN. §§ 651:2(II), (IV) (2007) (punishment consisting of imprisonment not to exceed one year and a fine not exceeding $2,000); N.M. STAT. § 27-7-30(C) (2007), N.M. STAT. § 31-19-1(A) (2007) (punishment consisting of imprisonment for less than one year, or a fine not more than one thousand dollars, or both); OKLA. STAT. ANN. tit. 43A, § 10-104(D) (West Supp. 2008) (punishment consisting of imprisonment not exceeding one year or a fine of not more than one thousand dollars, or both); PA. STAT. ANN. § 10225.706(c) (West 2003), PA. STAT. ANN. § 1104(3) (West 1998), PA. STAT. ANN. § 1101(6) (West 1998) (punishment consisting of imprisonment of not more than one year, or a fine not exceeding $2,500, or both); S.C. CODE ANN. § 43-35-85(A) (2008) (punishment consisting of a fine not more than twenty-five hundred dollars or imprisonment of not more than one year); TENN. CODE ANN. § 71-6-110 (2004), TENN. CODE ANN. § 40-35-111 (2006) (punishment consisting of imprisonment "not greater than eleven (11) months, twenty-nine (29) days or a fine not to exceed two thousand five hundred dollars ($2,500), or both"); TEX. HUM. RES. CODE ANN. § 48.052(a) (Vernon 2001), TEX. PEN. CODE ANN. § 12.21 (Vernon 2003) (punishment consisting of a fine not to exceed $4,000, or confinement in jail for a term not to exceed one year, or both); WYO. STAT. ANN. § 35-20-111(b) (2008) (punishment consisting of imprisonment for not more than one year, or a fine not more than one thousand dollars, or both).

33. *See, e.g.*, ARK. CODE ANN. § 12-12-1720(b) (West 2008) (making any mandated reporter or caregiver who purposely fails to make a report civilly liable for damages proximately caused by such failure); IOWA CODE ANN. § 235B.3(12) (West 2008) (making a mandated reporter who fails to make a report civilly liable for the damages proximately caused by such failure); MICH. COMP. LAWS ANN.

Third, states vary as to the factors triggering the duty to report. In some jurisdictions, reporting requirements apply to all apparent victims who have attained the statutorily specified triggering age, regardless of their mental or physical limitations or other vulnerabilities. For example, Rhode Island requires "all persons with reasonable cause to believe that a person age 60 or older has been subject to abuse, neglect, exploitation, or is self-neglecting" to report it to the State.[35] Similarly, under Texas law any person having reason to believe that a person age sixty-five or older is being abused, neglected, or exploited must notify the designated state agency.[36] The Texas statute explicitly states that this duty extends to persons whose "professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional."[37] In other states, age is one of two or more variables triggering a duty to report.[38] In yet other states, although age is not itself a factor, "infirmities" or "impairments" associated with age can trigger reporting duties.[39] Finally, some states avoid making age

§ 400.11e(1) (West 2008) (making a required person who fails to make a report liable civilly for the damages proximately caused by the failure to report).

34. *See, e.g.*, ALASKA STAT. § 47.24.010(c) (2006) ("If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction."); IDAHO CODE ANN. § 39-5303(2)(a) (2002) (allowing a facility's license to be revoked if an employee at a state licensed or certified residential facility fails to report abuse or sexual assault that has resulted in death or serious physical injury jeopardizing the life, health, or safety of a vulnerable adult); 320 ILL. COMP. STAT. ANN. 20/4(e) (West 2008), 225 ILL. COMP. STAT. ANN. 60/22(A) (West Supp. 2008), 225 ILL. COMP. STAT. ANN. 25/23 (West 2007) (allowing the license of a physician, dentist, or dental hygienist to be revoked for willful failure to make a report); MISS. CODE ANN. § 43-47-7(1)(c) (Supp. 2008) (requiring a court to notify the appropriate licensing, certifying, or regulating entity of a conviction if the person convicted is "a member of a profession or occupation that is licensed, certified or regulated by the state"); S.C. CODE ANN. § 43-35-85(A) (2008) (subjecting any person required to report who knowingly and willfully fails to report to "disciplinary action as may be determined necessary by the appropriate licensing board").

35. *See* R.I. GEN. LAWS § 42-66-8 (Supp. 2008). Prior to 2007, Rhode Island did not include self-neglecting elders in its mandatory reporting statute. Instead, the state required mandatory reporting of "abandoned elders." The 2007 amendments replaced the word "abandoned" with "self-neglecting," and added a provision stating that "[n]othing in this section shall require an elder who is a victim . . . or who is self-neglecting to make a report . . . ." *See* 2007 R.I. Pub. Laws, ch. 209, § 1 (eff. July 2, 2007).

36. *See* TEX. HUM. RES. CODE ANN. §§ 48.051, 48.002(a)(1) (Vernon Supp. 2008).

37. *Id.* § 48.051(c).

38. *See, e.g.*, MO. REV. STAT. §§ 660.255, 660.250 (2000) (defining the category of persons about whom reports must be made to include any "person sixty years of age or older . . . who is unable to protect his own interests or adequately perform or obtain services which are necessary to meet his essential human needs").

39. *See, e.g.*, FLA. STAT. ANN. § 415.102(26) (West Supp. 2008) (defining a "vulnerable adult," the category of persons about whom reports are mandated, as including any adult "whose ability to

either directly or indirectly a factor that triggers a duty to report; rather, such states tend to have reporting requirements triggered by the alleged victim's "vulnerability" in general.[40]

Fourth, states differ in their definitions of reportable elder abuse and neglect. A major distinction is whether states include "self-neglect" (i.e., neglect that occurs when an individual fails to meet his or her own basic needs). In states that include self-neglect, cases involving self-neglect account for a significant portion of reported instances of mistreatment.[41] Although the inclusion of self-neglect in mandatory reporting schemes has been criticized as a form of "social control" unduly limiting individuals' self determination,[42] a current legislative trend is to enlarge the scope of existing mandatory reporting laws to require reporting of self-neglect.[43]

Finally, some states provide exceptions to general reporting requirements. For example, unless the apparent victim's life or health is "immediately threatened," Maine does not require professionals to report mistreatment if their factual basis for knowing or suspecting the mistreatment was obtained while treating the suspected perpetrator for a related problem.[44] Similarly, Maine does not require professionals to report if their factual basis for suspecting mistreatment was obtained in the course of treating the apparent victim for a problem relating to mistreatment unless the victim is "incapacitated" or her health is "immediately threatened."[45] In Wisconsin, unless a person other than the alleged victim is currently at risk, reporting is only required where there is "imminent risk of serious bodily harm, death, sexual assault, or significant property loss" to the alleged victim and she "is unable to make an informed judgment about whether to report the risk."[46] Moreover, Wisconsin provides exceptions from mandatory reporting requirements where the otherwise mandated reporter has a documented belief that reporting would not be in the "best interest" of the victim or where the

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perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to . . . the infirmities of aging").

40. *See, e.g.*, ALASKA STAT. § 47.24.900(16) (2006) (defining "vulnerable adults," the category of persons about whom reports are mandated, in strictly age-neutral terms).

41. *See, e.g.*, Elizabeth Capezuti, Barabara L. Brush & William T. Lawson, *Reporting Elder Mistreatment*, J. GERONTOLOGICAL NURSING 24, 27 (1997); Dorothy Ann Gilbert, *The Ethics of Mandatory Elder Abuse Reporting Statutes*, 8 ADVANCES IN NURSING SCI. 51, 57 (1986).

42. *See* Gilbert, *supra* note 41, at 57.

43. *See, e.g.*, R.I. GEN. LAWS § 42-66-8 (Supp. 2008) (amended in 2007 to include self-neglect as a reportable form of abuse); MASS. GEN. LAWS. ANN. ch. 19A, § 14 (West Supp. 2008) (amended in 2004 to include self-neglect as a reportable form of abuse).

44. *See* ME. REV. STAT. ANN. tit. 22, § 3479-A(3) (Supp. 2008).

45. *See id.* § 3479-A(4).

46. *See* WIS. STAT. ANN. § 46.90(4) (West Supp. 2008).

would-be reporter provides health care using "spiritual means" and her religion requires confidential communications.[47]

B. Existing Critiques of Mandatory Reporting

Mandatory elder abuse reporting laws have been critiqued on functional grounds. Functional critiques have focused on concerns that such laws may be ineffective, or even counterproductive.[48] There is concern, for example, that mandatory reporting laws fail to meaningfully increase the number of cases of elder abuse reported, but nonetheless discourage vulnerable elders or their caregivers from seeking needed medical attention or assistance.[49] Mandatory reporting statutes also have been blamed for hindering the ability of service providers to meet the needs of elder abuse victims by increasing providers' investigatory obligations.[50]

In addition, mandatory reporting laws have been repeatedly critiqued on moral grounds. The primary thrust of the moral critique is that mandatory reporting laws undermine the autonomy of older adults. This is seen as morally problematic because it undermines adults' human dignity in ways that can be significant and unjustified, especially where

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47. *See id.*

48. *See, e.g.*, Capezuti, Brush & Lawson, *supra* note 41, at 26 ("Since there is no guarantee that reporting with result in successful APS intervention, nurses may actually place reporting elders in a more vulnerable position" if they comply with reporting duties); Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 107–09 (1998) (setting forth four arguments that have been advanced against mandatory elder abuse reporting: (1) that it undermines self-determination in an ageist manner, (2) that it violates confidential relationships, (3) that it is counter-productive because it will discourage victims from seeking help, and (4) that existing systems are ill-equipped to handle the resulting reports); Ruthann M. Macolini, *Elder Abuse Policy: Considerations in Research and Legislation*, 13 BEHAV. SCI. & L. 349, 359 (1995) (discussing multiple critiques of mandatory reporting statutes and finding the functional line of critique persuasive); Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L.J. 165 (1995) (arguing mandatory reporting laws can be more effective if (1) APS funding is increased, (2) mandatory reporting requirements are publicized, (3) interagency cooperation is increased, and (4) state statutes are amended to protect reporters); William A. Formby, *Should Elder Abuse Be Decriminalized? A Justice System Perspective*, 4 J. ELDER ABUSE & NEGLECT 121, 126 (1992) (arguing that mandatory reporting statutes are inappropriate given that mandated reporters have an "incomplete understanding" of elder abuse); Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69 (1982) (critiquing mandatory elder abuse reporting on a variety of functional grounds).

49. *See, e.g.*, Moskowitz, *supra* note 48, at 109 (discussing the critique that mandatory reporting is counter-productive because it will discourage victims from seeking help).

50. *See, e.g.*, ROSALIE S. WOLF & KARL A. PILLEMER, HELPING ELDERLY VICTIMS: THE REALITY OF ELDER ABUSE 149–50 (1989) [hereinafter "WOLF & PILLEMER, HELPING"].

mandatory reporting laws apply to cognitively intact seniors.[51] Many autonomy-focused critiques also express concern that mandatory elder abuse reporting statutes are ageist insofar as they selectively undermine the autonomy of older adults based on stereotypes about aging, or that they encourage ageism by promoting inappropriate stereotyping of older adults.[52] In offering this moral critique, commentators frequently point to the potential conflict between mandatory reporting duties and pre-existing ethical norms. For example, numerous commentators have expressed concern that such laws require professionals to take actions that conflict with their ethical codes of conduct, even in contexts where client or patient autonomy is generally treated with great deference.[53]

These existing critiques are largely well-founded but have done little to curb legislative enthusiasm for mandatory reporting laws. Rather, states continue to enact mandatory reporting statutes and continue to enlarge the scope of those laws already in existence.[54] One reason such critiques may not have effectuated meaningful policy change is that they fail to fully recognize and describe the costs that mandatory reporting laws impose on seniors. Specifically, to the extent that critiques of mandatory reporting

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51. *See, e.g.*, Jennifer Beth Glick, Note, *Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy*, 12 VA. J. SOC. POL'Y & L. 714 (2005) (arguing that mandatory reporting laws are appropriate but, in the interest of "preserving autonomy," should be revised to only require reporting where the would-be reporter has assessed the mental capacity of the subject of the report and found it lacking); Sandra Guerra Thompson, *The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 19–24 (2002) (highlighting problems with mandatory reporting laws by discussing two elder abuse cases and arguing that such laws raise "concerns regarding the dignity and autonomy of competent elders").

52. *See, e.g.*, Mary Twomey, Mary Joy Quinn & Emily Dakin, *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 73 (2005) (arguing that mandatory reporting inappropriately treats adults like children and arguing instead in favor of following a domestic abuse model); Stephen Crystal, *Social Policy & Elder Abuse*, *in* ELDER ABUSE: CONFLICT IN THE FAMILY 338–39 (Karl A. Pillemer & Rosalie S. Wolf eds., 1986) (arguing that mandatory reporting policies rest on inappropriate assumptions and stereotypes about older adults).

53. *See, e.g.*, Gilbert, *supra* note 41, at 59 (arguing that mandatory reporting laws are "largely contrary to a contemporary ethical trend in nursing to weight autonomy heavily); Formby, *supra* note 48, at 129 ("The criminalization of mandatory reporting places the physician, or other professional person, in the position of taking away the individual's right to decide out of fear of prosecution."); Capezuti, Brush & Lawson, *supra* note 41, at 29 (discussing the ethical conflict mandatory reporting statutes may pose for nurses).

54. *See, e.g.*, MASS. GEN. LAWS. ANN. ch. 19A, § 14 (West 2008) (amended in 2004 to include self-neglect as a reportable form of abuse); S.C. CODE ANN. § 43-35-10 (2008) (amended in 2004 to expand the definition of exploitation to include causing a vulnerable adult to buy goods or services for the benefit of another using undue influence, harassment, duress, coercion, or swindling); VA. CODE ANN. § 63.2-1603 to 63.2-1606 (West 2008) (revised in 2004 to, among other things, expand the list of mandated reporters); CAL. CODE § 15610.07 (West 2008) (amended in 2001 to expand the definition of elder abuse).

laws express concern about limiting the ability of older adults to self-determine, they tend to frame this concern in ideological or ethical terms.[55] This posture ignores the fact that undermining older adults' abilities to determine their own fates can burden, and potentially violate, constitutionally protected rights. Although words such as "privacy" and "rights" are often used in these existing critiques, they are articulated in a generic manner, detached from any constitutionally informed meaning of such terms.[56] As a result, as discussed in Part V, existing critiques neither fully appreciate nor fully describe the costs of mandatory reporting schemes and thus fail to capture an important and persuasive argument against mandatory reporting.

C. A Rights-Based Critique of Mandatory Reporting

Whereas viewing the autonomy-reducing impacts of mandatory reporting statutes simply as ethically, ideologically, or morally problematic provides an incomplete description of the cost of such statutes, simultaneously looking at such laws through a constitutional rights lens provides a more complete—and more troubling—picture. In the next Part, I look at mandatory reporting statutes through the lens of constitutional jurisprudence and thereby show how such laws can undermine constitutional liberty interests including those in informational privacy and equal protection of the law.

1. Informational Privacy Rights

Mandatory abuse reporting laws directly implicate the constitutional right to informational privacy. An individual has "informational privacy"

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55. *See, e.g.*, Christopher Dubble, *A Policy Perspective on Elder Justice Through APS and Law Enforcement Collaboration*, *in* ELDER ABUSE & MISTREATMENT: POLICY, PRACTICE & RESEARCH, *supra* note 20, at 44–46 (M. Joanna Mellor & Patricia Brownell eds., 2006) (discussing the "ideological debate" over victim self-determination).

56. This is true in the legal literature as well as the social science literature. *See, e.g.*, Velick, *supra* note 48, at 172–73, 175 (arguing that concerns that mandatory reporting laws would amount to unnecessary invasions of privacy are (1) based on the mistaken assumption "that an elderly person who is mentally competent can report abuse or give permission for it to be reported"; and (2) blunted by procedures governing how such reports are to be handled by the state once they are made); Kristine S. Knaplund, *The Right to Privacy & America's Aging Population*, 86 DENVER L. REV. 441 (2009) (in discussing elders' ability to secure personal privacy in various care settings, focusing exclusively on statutory and regulatory protections and ignoring both constitutional protections and proposed policies' implications for constitutionally recognized privacy interests); MARSHALL B. KAPP, LEGAL ASPECTS OF ELDER CARE 233–48 (2009) (in a chapter exclusively focused on "older individuals and the right to privacy," only considering statutory and regulatory privacy rights).

when he or she can control the acquisition or dissemination of information about himself or herself. [57] Concurring in the 1977 case of *Whalen v. Roe*,[58] Justice Brennan recognized the possibility that future cases might find a constitutionally based interest in "avoiding disclosure of personal matters."[59] Later that same year, in *Nixon v. Administrator of General Services*,[60] the Supreme Court assumed that President Nixon had a legitimate privacy interest in information about him that would be impacted by the screening of his papers for archival purposes.[61]

The Supreme Court has failed to significantly develop and explain the right of informational privacy, and the right's contours remain vague.[62] However, the majority of federal appellate courts have recognized such a right.[63] Most commonly, federal courts have recognized individuals' legal interest in informational privacy in the context of medical records and medical status. In the landmark case of *Doe v. Barrington*,[64] for example, the New Jersey Federal District Court held that the plaintiff's constitutional right of privacy was violated when a government agent revealed that the plaintiff was HIV-positive.[65] Since that decision in 1990, a number of federal courts have come to broadly recognize a right to informational privacy vis-à-vis medical records.[66]

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57. *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202–04 (1998) (grouping privacy rights into three categories: spatial privacy, decisional privacy, and informational privacy).

58. 429 U.S. 589 (1977).

59. *Id.* at 606. In his concurrence in *Whalen*, Justice Brennan stated that the majority opinion "recognizes that an individual's 'interest in avoiding disclosure of personal matters' is an aspect of the right of privacy." *Id.* at 607. The portions of the majority opinion cited by Brennan for this proposition, however, could simply be read as the Court recognizing that others have conceived of such a privacy right. *See id.* 599–600 & nn.24–25.

60. 433 U.S. 425 (1977).

61. *Id.* at 456–57.

62. *See* DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATIONAL PRIVACY LAW 401 (2d ed. 2003).

63. *Id.* (noting that the Second, Third, Fourth, Fifth, Seventh, and Ninth circuits have recognized a right to informational privacy; that the Sixth Circuit has recognized a limited right to informational privacy; but that the D.C. Circuit has questioned the existence of such a right). The Tenth Circuit has since joined in recognizing the right. *See* Aid for Women v. Foulston, 441 F.3d 1101 (10th Cir. 2006). For the Sixth Circuit's reasoning in refusing to recognize the right of information privacy, *see* J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981).

64. 729 F. Supp. 376 (D.N.J. 1990).

65. *See id.*

66. *See, e.g.*, Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999) (holding that a transsexual prisoner had a constitutional privacy right protecting the confidentiality of the prisoner's medical records); Doe v. City of New York, 15 F.3d 264 (2d Cir. 1994) (holding that a job applicant had a constitutional right to privacy regarding his HIV-positive status); Doe v. Delie, 257 F.3d 309 (3d Cir. 2001) (treating the existence of a constitutional right to privacy over one's own medical information as well settled and holding that the right extends to prisoners); Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135

More importantly for the purposes of this Article, in recent years several courts have explicitly recognized that mandatory child abuse reporting laws infringe on the informational privacy rights of suspected victims. For example, in *Aid for Women v. Foulston*, professionals working with sexually active minors challenged the constitutionality of a Kansas child abuse reporting statute insofar as it mandated reporting of the consensual sexual activity of minors.[67] The Court of Appeals for the Tenth Circuit found that minors possessed a right to informational privacy that was impacted by the state statute.[68] Although the court ultimately declined to grant the plaintiffs' motion for a preliminary injunction, this reflected the fact that the case involved children. The court explained that the privacy rights asserted were "diminished" because they were those of minors.[69]

Later that year, in *Planned Parenthood of Indiana v. Carter*,[70] the Court of Appeals of Indiana considered the refusal of Planned Parenthood of Indiana (PPI) to turn over the medical records of minor patients as requested by the state, which was investigating PPI for neglecting its patients by failing to report child abuse.[71] The court held that the minor patients had an informational privacy right in their records that could not be extinguished by the state choosing to criminalize certain conduct, in this case sexual contact with persons under the age of fourteen.[72] The court further held that PPI had a reasonable likelihood of success in showing that requiring PPI to release the records to the state would constitute an unconstitutional violation of that right.[73]

Similarly, in *Planned Parenthood Affiliates of California v. Van de Kamp*,[74] health care providers challenged the California Attorney General's interpretation of a mandatory child abuse reporting statute that

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F.3d 1260 (9th Cir. 1998) (holding that employees of a research facility operated by state and federal agencies had a privacy interest in avoiding disclosure of medical information); Herring v. Keenan, 218 F.3d 1171 (10th Cir. 2000) (holding that a probationer alleged violation of a constitutional right when he alleged a probation officer violated his right to privacy by disclosing to probationer's sister and employer that probationer was HIV-positive).

67. *Foulston*, 441 F.3d 1101.

68. *Id.* at 1116.

69. *Id.* at 1120 (declining to grant the motion because the plaintiffs had failed to show (1) a significant likelihood that they could show the minors had a cognizable privacy interest in conduct that was concededly criminal, and (2) that the minors' privacy rights would outweigh the government's interest in reporting).

70. 854 N.E.2d 853 (Ind. Ct. App. 2006).

71. *Id.*

72. *Id.* at 877.

73. *Id.* at 881.

74. 226 Cal. Rptr. 361 (Ct. App. 1986).

required reporting of any minor under the age of fourteen who presented any "indicia of past or present sexual activity."[75] The California Court of Appeals held that the Attorney General's interpretation was impermissible.[76] It then went on to assert in dictum that even if the legislature had written the statute as the Attorney General interpreted it, the statute would have violated minors' rights to informational privacy under the California Constitution.[77]

If children have a legal interest in informational privacy that can be undermined by child abuse reporting statutes, certainly adults have no lesser legal interest in informational privacy which can be infringed on by elder abuse reporting statutes. The question is when such infringements are constitutionally permissible.

Since *Nixon*,[78] the federal courts have used several different balancing tests for determining the permissibility of infringements on informational privacy rights. The most commonly accepted formulation was set forth by the Third Circuit Court of Appeals in *United States v. Westinghouse Electric Corporation*.[79] The *Westinghouse* test calls upon courts to consider seven factors in determining whether a given intrusion on informational privacy is constitutionally permissible:

> [1] the type of record requested, [2] the information it does or might contain, [3] the potential for harm in any subsequent nonconsensual disclosure, [4] the injury from disclosure to the relationship in which the record was generated, [5] the adequacy of safeguards to prevent unauthorized disclosure, [6] the degree of need for access,

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75. *Id.* at 366–67. The reporting statute required certain professionals to file a report with a designated state agency regarding any minor "whom he or she knows or reasonably suspects has been the victim of child abuse." *Id*. at 365. The Attorney General issued an interpretative opinion concluding that any "indicia of past or present sexual activity" would "render the minor a child abuse victim." *See id.* at 366–67.

76. *Id*. at 378.

77. Although the Court was not explicit, it appears that it was discussing the right to informational privacy as protected by the California State Constitution and that the Court was not referring to any federal constitutional right to information privacy. *See id*. at 381.

78. In *Nixon*, the Supreme Court weighed President Nixon's privacy interest against the public interest in subjecting the President's materials to archival screening and found the infringement constitutionally permissible. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 458 (1977). In doing so, the Court explained that only a small fraction of the materials at issue were personal in nature and that the screening procedure was specifically designed to minimize any privacy intrusions. *See id.* at 458–65.

79. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980); *see also* SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 62, at 402 (noting the prominence of the *Westinghouse* approach); Planned Parenthood of Indiana v. Carter, 854 N.E.2d 853, 879 (Ind. Ct. App. 2006) (using the *Westinghouse* approach to analyze the minors' informational privacy claim).

> and [7] whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. [80]

Evaluating mandatory elder abuse reporting statutes using the *Westinghouse* test calls into serious question the constitutionality of some such statutes. To see why this is the case, it is necessary to consider the first six *Westinghouse* factors. The final factor, by contrast, clearly weighs in favor of finding mandatory reporting statutes constitutional—after all, by definition, states with mandatory elder abuse reporting statutes have an express statutory mandate for such reporting.[81]

a. Type of Record

The first factor that the *Westinghouse* test directs the courts to consider is the type of record requested.[82] Elder mistreatment reporting statutes require the disclosure of a wide range of information, all of it by necessity individually identifiable. Pursuant to the terms of the broadest state statutes, information from interactions with medical professionals, clergy, attorneys, social workers, family, friends, and others is all subject to mandatory disclosure. In many cases, the disclosure would involve, or be equivalent to, the disclosure of medical records.[83] Not only are medical professionals among those most frequently singled out as mandated reporters, but in many cases reporting elder abuse requires disclosure of the alleged victim's physical or mental condition.[84]

Courts tend to see medical records as a type of record in which individuals have uncommonly strong privacy interests. Alleged victims of elder mistreatment have a strong privacy interest in their medical records. Like those of other patients, the medical records of such individuals may contain highly sensitive information about their physical, mental, and social state—information they might not willingly have shared with

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80. *Westinghouse*, 638 F.2d at 578.

81. The fact that the seventh factor unequivocally weighs in favor of finding such statutes constitutional is, of course, insufficient to render such statutes constitutional. Allowing this factor to trump the other six is inconsistent with the underlying balancing approach embraced by the *Westinghouse* court. *Cf. Planned Parenthood of Indiana*, 854 N.E.2d at 877 ("[W]e find persuasive Judge Herrera's observations that a state cannot extinguish a federal privacy right by criminalizing certain conduct.").

82. *Westinghouse*, 638 F.2d at 578.

83. *Cf.* MINN. STAT. § 626.557, Subd. 4 (stating that a medical record may be disclosed where necessary to comply with mandatory reporting duties).

84. See text *infra* Part III.C.1.b and accompanying footnotes for a discussion of the information to be disclosed.

anyone other than the health care provider who created those records. The potential victim status of the subject of the report does not diminish this interest.[85]

Individuals may have even more compelling privacy interests in other types of information subject to mandatory reporting.[86] For example, an abuse victim may have a stronger privacy interest in information shared with her attorney, despite the fact that attorneys are frequently mandatory reporters. Attorney-client confidentiality has long enjoyed protection under the common law.[87] Violations of attorney-client confidentiality also impact constitutionally protected rights. For individuals against whom criminal proceedings have been instigated, state interference with the confidentiality of attorney-client communications undermines the client's Sixth Amendment right to effective assistance of counsel[88] as well as their Fifth Amendment right against self incrimination. In addition, clients may have a constitutionally protected First Amendment interest in confidential communications with their attorneys.[89] As the Seventh Circuit Court of

85. *See Planned Parenthood of Indiana*, 854 N.E.2d at 878 ("[V]ictims of criminal activity have a heightened expectation of privacy."); *see also* Michigan v. Lucas, 500 U.S. 145, 149–50 (1991) (explaining that a sexual assault victim's interest in, among other things, privacy regarding his or her previous sexual relationship with the defendant may outweigh the defendant's right to confrontation of a victim's witness).

86. States have implicitly recognized this in the child abuse reporting context. *See* Robin A. Rosencrantz, *Rejecting "Hear No Evil Speak No Evil": Expanding the Attorney's Role in Child Abuse Reporting*, 8 GEO. J. LEGAL ETHICS 327, 345 ("[M]ost states have abrogated the physician-patient privilege and the husband-wife privilege in cases of child abuse. . . . By contrast, the attorney-client privilege is rarely abrogated and is often excepted from abrogation in the express language of the child abuse reporting statutes.").

87. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981). The Court noted:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. at 389 (citations omitted); *see also* Shabnam Akhoundzadeh, *Attorney-Client Privilege*, 4 J. LEGAL ADVOC. & PRAC. 235, 236 (2002) ("The attorney-client privilege has been recognized as 'the oldest of the privileges for confidential communications known to the common law.'"); Jill A. Hornstein, Comment, *Paying the "Traditional Price" of Disclosure: The Third Circuit Rejects Limited Waiver of the Attorney-Client Privilege*, 71 WASH. U. L.Q. 467, 469–70 n.18 (1993) (discussing the history of the attorney-client privilege and its transition from emphasizing attorneys' honor to emphasizing clients' protection).

88. *See generally* Weatherford v. Bursey, 429 U.S. 545, 556–57 (1977) (discussing when state intrusion into the attorney-client relationship constitutes a Sixth Amendment violation, and indicating that a violation would occur where the intrusion amounted to a disclosure of an otherwise confidential communication).

89. *See* Denius v. Dunlap, 209 F.3d 944, 954 (7th Cir. 2000) ("Because the maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively

Appeals explained: "Because the maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively counsel her client, interference with this confidentiality impedes the client's First Amendment right to obtain legal advice."[90]

Similarly, individuals may have a heightened privacy interest in confidences shared with members of the clergy, who are frequently mandated reporters of elder abuse and neglect. The clergy-communicant privilege is recognized in all fifty states.[91] Although it is an open question whether the privilege itself is constitutionally protected,[92] requiring clergy members to reveal parishioner confidences implicates both informational privacy rights[93] and the right to free exercise of religion.[94]

Records generated in the medical, legal, and religious contexts are illustrative of the kinds of private communications whose disclosure is required by mandatory reporting statutes, but they are not the only types of records whose disclosure may be required despite a victim's strong

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counsel her client, interference with this confidentiality impedes the client's First Amendment right to obtain legal advice."); Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982) (holding that a public agency's requirement that employees disclose certain communications made to their attorneys violated the employees' First Amendment rights).

90. *Denius*, 209 F.3d at 954. Notably, this line of jurisprudence is the logical extension of the Supreme Court's more general finding that freedom of speech, among other First Amendment rights, protects the right to obtain and consult with an attorney. *See* United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 221–22 (1967) ("We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."). *Accord* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult with an attorney . . . implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech.").

91. *See In re* Grand Jury Investigation, 918 F.2d 374, 382–83 (3d Cir. 1990).

92. *See* R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1703–04 (2003) (discussing whether the privilege is constitutionally required and noting the Supreme Court has not directly considered the question). One commentator argued that clergy-communicant communications should be afforded greater protection than attorney-client communications because whereas the attorney advises the communicant about his or her legal relation to the state or other individuals, the clergy advises the communicant about his or her relationship with God, and the state has no interest in regulating the latter relationship. *See* Shawn P. Bailey, Note, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 BYU L. REV. 489.

93. *But see* Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 775 (1987) (arguing otherwise).

94. As early as 1813, a New York court held that requiring a Roman Catholic priest to testify as to the identity of a confessed thief would violate the priest's right under that state's constitution to freely exercise his religion. *Id.* at 737–38. More recently, numerous law review articles and notes have debated whether requiring clergy to report child abuse is constitutional under the free exercise clause. *See e.g. id.* (arguing that some child abuse reporting laws may infringe on clergy members' free exercise of religion).

interest in maintaining informational privacy. For example, a victim can also have a profound privacy interest in confidences shared with a spouse or other family member, yet in some states such persons are nevertheless mandated reporters.[95] In short, mandatory elder abuse reporting statutes require the disclosure of a myriad of types of confidences at least as "private" as medical records and arguably even more deserving of protection.

b. Information to be Disclosed

The second *Westinghouse* factor focuses on the information that would or might be contained in the disclosure,[96] and, specifically, the degree to which that information is "sensitive."[97] Any report of elder abuse or neglect will, by definition, require the disclosure of the fact that an individual is being abused or neglected. Information about abuse or neglect is likely to be considered by the victim to be highly private in nature. It may be information that the victim has never chosen to share or has only chosen to share with a family member or confidential advisor. In many instances, it may be information to which the government is in no other way entitled. Without mandatory reporting statutes requiring reporting of self-neglect, for example, it is hard to conceive of the government being entitled to information that particular, mentally competent adults fail to properly feed, clothe, or clean themselves.

Not all information about abuse and neglect, however, is equally sensitive. In general, the more intimate and personal the information, and the more likely disclosure of the information will have adverse consequences for the subject, the more "sensitive" it is considered.[98] The

95. ALASKA STAT. § 47.24.010 (2006); ARIZ. REV. STAT. § 46-454(A)–(C) (Supp. 2008); CAL. WELF. & INST. CODE § 15630(a) (West 2008); DEL. CODE ANN. tit. 31, § 3910(a) (2006); IND. CODE ANN. § 12-10-3-9(a) (West 2007); Ky. REV. STAT. ANN. § 209.030(2)–(6)(a) (LexisNexis 2007); LA. REV. STAT. ANN. § 14:403.2 (Supp. 2009); ME. REV. STAT. ANN. tit. 22, § 3477 (Supp. 2008); MO. REV. STAT. § 660.255(1) (2000); N.M. STAT. ANN. § 27-7-30(A)–(B) (West 2007); OKLA. STAT. ANN. tit. 43A, § 10-104(A) (West Supp. 2008); R.I. GEN. LAWS § 42-66-8 (Supp. 2008); TENN. CODE ANN. § 71-6-103(b)(1) (2004); TEX. HUM. RES. CODE ANN. § 48.051 (Vernon Supp. 2008); WYO. STAT. ANN. § 35-20-103(a) (2007); *see also* FLA. STAT. ANN. § 415.1034 (West Supp. 2008); N.H. REV. STAT. ANN. § 161-F:46 (Supp. 2008).

96. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980).

97. *See id.* at 579 (when evaluating the second factor, asking whether the information to be disclosed was "of such a high degree of sensitivity that the intrusion could be considered severe").

98. The *Westinghouse* Court implied that information should be considered highly sensitive when disclosure was likely to cause adverse effects or when the intrusion would subjectively be perceived as "severe" by the subject of that information. *See id*. Subsequently, courts have used the *Westinghouse* discussion of the importance of medical record privacy to conclude that information about an individual's body and health will generally be considered highly sensitive. *See* Woods v.

sensitivity of information about elder mistreatment, and the degree to which it warrants protection, can thus be expected to depend on the nature of the mistreatment, the relationship of the abuser and victim, and the mental status of the victim. Information about mental or sexual abuse, for example, will tend to be more sensitive in nature than information about financial exploitation because it is more likely to be of an intimate and personal nature. For the same reason, information that an elder is abused by a spouse or other close family member will tend to be more sensitive in nature than information that an elder is being abused by a paid caregiver. Similarly, information about self-neglect will tend to be more sensitive than information about abuse or neglect perpetrated by third parties because it reveals the "victim's" personal habits and intimate behavior as opposed to the actions of a third party. Finally, information about an elder who has the mental capacity to understand the nature and effect of the mistreatment will tend to be more sensitive than information about the abuse of an elder lacking such capacity because the victim with capacity is more likely to be voluntarily withholding information about that mistreatment. Voluntary withholding of information, in turn, may reflect the elder's subjective desire to keep the information private or the elder's concerns about adverse consequences of disclosure—both of which would suggest that the information is "sensitive."

Mandatory elder abuse reporting laws generally do not, however, simply require the disclosure of the fact that an individual is abused or neglected. Rather, many require the disclosure of a good deal of information beyond the mere suspicion of abuse. States commonly require the disclosure of the victim's name and contact information, the victim's mental or physical health, and any information the reporter considers pertinent or that will facilitate the investigation.[99] Some states also require

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White, 689 F. Supp. 874, 876 (W.D. Wis. 1988) ("[I]nformation about one's body and state of health is particularly sensitive, and . . . such information has traditionally been treated differently from other types of personal information."); Doe v. Borough of Barrington, 729 F. Supp. 376, 383 (D.N.J. 1990) (same).

99. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-454(C) (2008). Arizona requires disclosure of:

> 1. The names and addresses of the adult and any persons having control or custody of the adult, if known. 2. The adult's age and the nature and extent of his incapacity or vulnerability. 3. The nature and extent of the adult's injuries or physical neglect or of the exploitation of the adult's property. 4. Any other information that the person reporting believes might be helpful in establishing the cause of the adult's injuries or physical neglect or of the exploitation of the adult's property.

Id. Colorado requires disclosure of:

> The name and address of the at-risk adult; the name and address of the at-risk adult's caretaker, if any; the age, if known, of such at-risk adult; the nature and extent of such at-risk

adult's injury, if any; the nature and extent of the condition that will reasonably result in mistreatment or self-neglect; and any other pertinent information.

COLO. REV. STAT. ANN. § 26-3.1-102(2) (West Supp. 2008). Florida requires:

To the extent possible, a report . . . must contain, but need not be limited to, the following information: 1. Name, age, race, sex, physical description, and location of each victim alleged to have been abused, neglected, or exploited. 2. Names, addresses, and telephone numbers of the victim's family members. 3. Name, address, and telephone number of each alleged perpetrator. 4. Name, address, and telephone number of the caregiver of the victim, if different from the alleged perpetrator. 5. Name, address, and telephone number of the person reporting the alleged abuse, neglect, or exploitation. 6. Description of the physical or psychological injuries sustained. 7. Actions taken by the reporter, if any, such as notification of the criminal justice agency. 8. Any other information available to the reporting person which may establish the cause of abuse, neglect, or exploitation that occurred or is occurring.

FLA. STAT. ANN. § 415.1034(1)(b) (West Supp. 2008). Georgia requires:

The report shall include the name and address of the disabled adult or elder person and should include the name and address of the disabled adult's or elder person's caretaker, the age of the disabled adult or elder person, the nature and extent of the disabled adult's or elder person's injury or condition resulting from abuse, exploitation, or neglect, and other pertinent information.

GA. CODE ANN. § 30-5-4(b)(2) (2007). Kansas requires:

The report . . . shall contain the name and address of the person making the report and of the caretaker caring for the involved adult, the name and address of the involved adult, information regarding the nature and extent of the abuse, neglect or exploitation, the name of the next of kin of the involved adult, if known, and any other information which the person making the report believes might be helpful in the investigation of the case and the protection of the involved adult.

KAN. STAT. ANN. § 39-1431(b) (2000). Kentucky requires:

Any person making such a report shall provide the following information, if known: (a) The name and address of the adult, or of any other person responsible for his care; (b) The age of the adult; (c) The nature and extent of the abuse, neglect, or exploitation, including any evidence of previous abuse, neglect, or exploitation; (d) The identity of the perpetrator, if known; (e) The identity of the complainant, if possible; and (f) Any other information that the person believes might be helpful in establishing the cause of abuse, neglect, or exploitation.

KY. REV. STAT. ANN. § 209.030(4) (LexisNexis 2007). Maryland requires:

Insofar as is reasonably possible . . . a report . . . shall include . . . : (1) the name, age, and home address of the alleged vulnerable adult; (2) the name and home address of the person responsible for the care of the alleged vulnerable adult; (3) the whereabouts of the alleged vulnerable adult; (4) the nature of the alleged vulnerable adult's incapacity; (5) the nature and extent of the abuse, neglect, self-neglect, or exploitation of the alleged vulnerable adult, including evidence or information available to the reporter concerning previous injury possibly resulting from abuse, neglect, self-neglect, or exploitation; and (6) any other information that would help to determine: (i) the cause of the suspected abuse, neglect, self-neglect, or exploitation; and (ii) the identity of any individual responsible for the abuse, neglect, self-neglect, or exploitation.

MD. CODE ANN., FAM. LAW § 14-302(d) (LexisNexis 2006). *See also* CONN. GEN. STAT. ANN. § 17b-451(b) (West 2006) (requiring disclosure of the "name and address of the involved elderly person, information regarding the nature and extent of the abuse, neglect, exploitation or abandonment, and any other information which the reporter believes might be helpful in an investigation of the case and the protection of such elderly person."); IDAHO CODE ANN. § 39-5304(1) (2002) ("If known, the report shall contain the name and address of the vulnerable adult; the caretaker; the alleged perpetrator; the nature and extent of suspected abuse, neglect or exploitation; and any other information that will be of assistance in the investigation."); LA. REV. STAT. ANN. § 14:403.2D(2) (Supp. 2009) ("All reports

disclosure of the basis for the reporters' suspicions,[100] which effectively requires the reporter to disclose information about her relationship with the victim (for example, an attorney-client or psychologist-patient relationship).

c. Potential Harm from Subsequent Disclosure

The third *Westinghouse* factor is the potential harm in any "subsequent nonconsensual disclosure" (i.e., disclosures that might follow a report of abuse).[101] Harms stemming from such disclosure of reports of elder mistreatment, as the functional critique of mandatory elder abuse reporting has recognized,[102] could take a number of forms. Disclosure could have a "chilling effect" on the willingness of mistreated elders to seek basic care or services, or on the willingness of their caregivers to permit them or help

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shall contain the name and address of the adult, the name and address of the person responsible for the care of the adult, if available, and any other pertinent information [excepting the name of the suspected perpetrators].").

100. *See*, *e.g.*, IND. CODE ANN. § 12-10-3-10(c) (West 2007) (requiring reports to include, if known, "The name, address, and telephone number of the reporter and the basis of the reporter's knowledge."); NEV. REV. STAT. § 200.5094 (Supp. 2008) (a report must include, among other specified information, "The basis of the reporter's belief that the older person or vulnerable person has been abused, neglected, exploited or isolated."); OHIO REV. CODE ANN. § 5101.61(C) (West 2001) (requiring disclosure of, among other information, "The basis of the reporter's belief that the adult has been abused, neglected, or exploited."). In Texas:

> The report may be made orally or in writing. It shall include: (1) the name, age, and address of the elderly or disabled person; (2) the name and address of any person responsible for the elderly or disabled person's care; (3) the nature and extent of the elderly or disabled person's condition; (4) the basis of the reporter's knowledge; and (5) any other relevant information.

TEXAS HUM. RES. CODE ANN. § 48.051(d) (Vernon Supp. 2008). Wyoming requires:

> The report shall provide . . . the following, to the extent available: (i) The name, age and address of the vulnerable adult; (ii) The name and address of any person responsible for the vulnerable adult's care; (iii) The nature and extent of the vulnerable adult's condition; (iv) The basis of the reporter's knowledge; (v) The names and conditions of the other residents, if the vulnerable adult resides in a facility with other vulnerable adults; (vi) An evaluation of the persons responsible for the care of the residents, if the vulnerable adult resides in a facility with other vulnerable adults; (vii) The adequacy of the facility environment; (viii) Any evidence of previous injuries; (ix) Any collaborative information; and (x) Any other relevant information.

WYO. STAT. ANN. § 35-20-103(b) (2008). The District of Columbia also takes this approach, requiring disclosure of, if known:

> The name, age, physical description, and location of the adult alleged to be in need of protective services; the name and location of the person(s) allegedly responsible for the abuse, neglect, or exploitation; the nature and extent of the abuse, neglect, self-neglect, or exploitation; the basis of the reporter's knowledge; and any other information the reporter believes might be helpful to an investigation.

D.C. CODE § 7-1903(c) (LexisNexis 2008).

101. *Westinghouse*, 638 F.2d at 578.

102. *See* discussion *supra* notes 48–50 and accompanying text.

them to do so. A parallel effect was recognized as legally significant by the Indiana Appellate Court in *Planned Parenthood of Indiana*. The court explained that requiring disclosure of minors' medical records created "significant potential for harm in a subsequent nonconsensual disclosure" because it might have a "chilling effect" on patients who would be reluctant to continue to receive services from Planned Parenthood of Indiana.[103]

Release of such information could also result in reputational injury or stigma. The labeling of an individual as an abuse victim may be treated as evidence of that person's diminished capacity or worth, and this may, in turn, affect his or her social standing and the respect and treatment received from others. This is particularly true when the mistreatment alleged is neglect or self-neglect. Allegations that an individual lives in squalor, fails to maintain personal hygiene, or is too demented to meet his or her own needs may be the ultimate affront to the individual's sense of personal dignity. Perhaps most importantly, the release of such information has the potential to trigger processes that lead to the diminution of the alleged victim's legal rights. An elder reported to be the victim of third party mistreatment or of self-neglect may face the prospect of being cajoled or forced to leave his or her home and move instead to a long-term care facility. Indeed, institutionalization is among the most common interventions used in cases of elder mistreatment,[104] and involuntary institutionalization can occur even if the victim has not been adjudicated mentally incompetent.[105] Individuals who are subjects of elder mistreatment reports also face the prospect of being stripped of their right to make financial and personal decisions for themselves, as guardianship is

103. Planned Parenthood of Indiana v. Carter, 854 N.E.2d 853, 879–80 (Ind. Ct. App. 2006).

104. Ailee Moon et al., *Elder Abuse & Neglect Among Veterans in Greater Los Angeles: Prevalence, Types, & Intervention Outcomes*, *in* ELDER ABUSE & MISTREATMENT: POLICY, PRACTICE & RESEARCH, *supra* note 20 (M. Joanna Mellor & Patricia Brownell eds., 2006) (finding that the most common intervention for abused or neglected veterans in an outpatient clinic at a Los Angeles-based Veteran's Medical Center was to move the victims into a long-term care facility); Margaret F. Hudson, *Elder Mistreatment: Current Research*, *in* ELDER ABUSE: CONFLICT IN THE FAMILY, *supra* note 52, at 125, 130 (in reviewing research on the treatment offered to victims of elder abuse, discussing a study that found that institutionalization was the treatment mechanism used for 46% of identified elder abuse victims). *Cf.* Crystal, *supra* note 52, at 338 (noting that the "cure" offered to victims of elder abuse may be perceived by the victim to be "worse than the disease").

105. Mental incapacity is not necessarily required. Rather, in some states "need" for services may be sufficient. *See, e.g.*, ALA. CODE. §§ 38-9-2(2), 38-9-6 (Supp. 2008). Alabama allows a court to order protective services be provided to an adult whom the court determines "because of physical or mental impairment, is unable to protect himself or herself from abuse, neglect, exploitation, sexual abuse, or emotional abuse by others, and who has no guardian, relative, or other appropriate person able, willing, and available to assume the kind and degree of protection and supervision required under the circumstances." *Id.*

another common intervention.[106] Moreover, the disclosure of abuse allegations can trigger such processes even if the state agency responsible for investigating elder abuse determines that state intervention is not appropriate.[107]

d. Injury to the Relationship

Under the *Westinghouse* approach, the courts must consider whether and how disclosure may damage the relationship between the alleged victim and the person required to report.[108] In some cases, the consequences to such relationships could be devastating. Consider the relationship between an elderly abuse victim and her doctor. Suppose the victim reveals to her doctor that her caretaker son pushes her around, but tells her doctor not to tell anyone. By reporting the abuse, the doctor not only violates her trust but may make it impossible for the victim to continue to see him if the son learns of the report and pressures or forces her to transfer to another physician. Similarly, suppose a trusts and estates lawyer is visited by an elderly man who is a dialysis patient. The man explains that he and his wife had agreed that he would stay at home and she would care for him, but he now realizes that he should move to a long-term care facility. He asks the attorney to advise him on long-term care planning and Medicaid eligibility. The attorney, seeking to understand the man's urgency and time frame, asks him why he has suddenly changed his mind. He replies that lately the around-the-clock care has taken too much of a toll on his wife and she slapped him in frustration. Under the current law of many states, that attorney must now report elder abuse to the local authorities. The consequences for the relationship between attorney and client are likely to be severe—one could expect the client to feel he can no longer trust the attorney and to end the representation.

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106. Moon et al., *supra* note 104 (finding that the second most common intervention for abused or neglected veterans in an outpatient client at a Los Angeles based Veteran's Medical Center was to be placed under conservatorship); *see also* Faulkner, *supra* note 48, at 85 (explaining why elders reported to be abused or neglected have good reason to fear unwanted institutionalization or guardianship).

107. For example, after learning of suspected financial exploitation, the alleged victim's heirs may attempt to limit her ability to manage her own affairs by seeking to obtain a guardianship over her. Similarly, the family of an individual reportedly engaging in self-neglect may seek to have the individual involuntarily institutionalized, or may pressure the individual to consent to institutionalization, even if APS believes the alleged victim has the capacity to refuse such a move.

108. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980).

e. Adequacy of Safeguards

Under the *Westinghouse* approach, courts must consider "the adequacy of safeguards to prevent unauthorized disclosure."[109] In *Planned Parenthood of Indiana*, the court found that the fact that the state agency requesting the minors' medical records was under a statutory duty to safeguard the requested information was insufficient to protect against unauthorized disclosure. The court examined the agency's procedures in some detail, noting that "there is no indication that [the agency] restricts access to the records to those involved in the investigation or that its employees have received any training in confidentiality regulations or procedures."[110] The court also observed that the state agency receiving reports was not subject to civil or criminal penalties for breaching its safeguarding duties.[111]

The same concerns exist with regard to some states' elder mistreatment reporting schemes. For example, Rhode Island's mandatory reporting statute simply states that reports received by the state will be confidential unless it is necessary to share them with other state agencies in order to further protect the elderly person.[112] By comparison, Rhode Island provides a more structured approach for protecting the confidentiality of mandated reports of child abuse. Specifically, for reports of child abuse, Rhode Island law states that "[t]here shall be established a central registry within the department . . . [which] shall take all necessary precautions to assure confidentiality of records protected by this chapter."[113] Similarly, although Rhode Island's child abuse reporting statutes indicate that any person or agency that violates the confidentiality rule "shall be subject to civil sanctions," [114] the state's mandatory reporting statute for elder abuse is silent as to whether someone who disseminates confidential information to a non-authorized party may be held liable.

A number of other states, by contrast, have made significant efforts to protect the confidentiality of reports of elder mistreatment. For example,

109. *Id.*

110. Planned Parenthood of Indiana v. Carter, 854 N.E.2d 853, 880 (Ind. Ct. App. 2006).

111. *Id.*

112. R.I. GEN. LAWS § 42-66-10 (Supp. 2008) ("The director may . . . disclose to the attorney general, any local state, or federal police officials, appropriate courts, state departments, public or private agencies, or medical personnel, pertinent information that is necessary to investigate reports of abuse, neglect, exploitation, or self-neglect, the coordination of needed services, the protection of the elderly victim or criminal prosecution.").

113. *Id.* § 42-72-7(a).

114. *Id.* § 42-72-8(f) (The "civil sanctions" to which this statute refers are laid out in § 5-37.3-9(a), and consist only of liability for "actual and exemplary damages.").

Texas statutes provide that reports of elder abuse and neglect, the identity of the person making the report, and all communications regarding the investigation of the report are to remain confidential.[115] As required by Texas statute,[116] the state has adopted regulations specifically identifying those agencies with which such reports may be shared as well as those agencies which may view redacted versions of abuse reports.[117] The state agency receiving reports reserves the right to withhold such information if an investigation would be compromised or a life would be threatened by the release of such information.[118] In addition, Texas regulations firmly state that records remain confidential even when shared and make improper release of records a criminal offense.[119]

f. Need for Access

The sixth *Westinghouse* factor is "the degree of need for access."[120] A government desiring to fully meet the needs of its vulnerable elders has an important and legitimate interest in information identifying elders who are suspected to be victims of mistreatment. This interest, however, is not equally compelling across all cases of mistreatment. Rather, its strength depends in part on the type of abuse alleged and the mental capacity of the alleged victim.

The governmental interest is strongest where a third party is mistreating an elder who lacks capacity to understand and appreciate the nature of the abuse, or to seek assistance. Here, the government may have a significant need for access in order to prevent further abuse, punish the transgressor, and provide protection to an individual unable to protect himself or herself. By comparison, where another person is victimizing an elder who understands the nature and consequences of the mistreatment and who has capacity to seek assistance but who does not wish the report to be made, the government's interest is weaker. Although the government retains an interest in enforcing its laws and punishing the transgressor, its interest in protecting the elder is significantly diminished both because the

115. *See* TEX. HUM. RES. CODE ANN. § 48.101(a)(1)–(3) (Vernon Supp. 2008).
116. *Id.* § 48.101(g), (g-1).
117. *See* 40 TEX. ADMIN. CODE §§ 705.7101, 705.7109 (1999).
118. *See id.* §§ 705.7107, 705.7109, 705.7113.
119. *Id.* § 705.7123. According to TEX. HUM. RES. CODE ANN. § 40.005(e) (Vernon 2001), release of confidential information to unauthorized persons is a Class A misdemeanor.
120. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980).

elder is less vulnerable and because the elder has a countervailing interest in self-determination.[121]

The government's interest is even weaker in situations involving self-neglect, that is, where the individual at risk is failing to meet his or her own needs. Unlike other forms of abuse or neglect, which might rise to the level of a crime, no crime is involved in self-neglect and thus the government's interest is limited to protecting the elder.[122] The interest is also diminished because self-neglect situations involve self-regarding behavior. Consistent with a liberal political tradition, to the extent that the government has any legitimate interest in possessing information about self-regarding behavior, that interest is significantly diminished relative to information about other-regarding behavior.[123] Unless the individual has diminished capacity, the government is unlikely to have an interest sufficient to justify infringing on the individual's liberty simply in order to stop a destructive self-regarding behavior.[124]

In addition to varying by type of mistreatment, a state's interest in its mandatory reporting scheme depends on the expected effectiveness of that scheme. Unfortunately, as discussed earlier in the context of the functional critique of mandatory reporting statutes, such laws could have counterproductive and even harmful effects on older adults by reducing their access to care, increasing their isolation, and disempowering them.[125] Moreover, mandatory reporting laws appear relatively ineffective at

121. *Cf.* JOHN STUART MILL, *On Liberty*, *in* MILL: THE SPIRIT OF THE AGE, ON LIBERTY, THE SUBJUGATION OF WOMEN 48 (Alan Ryan ed., 1997) (distinguishing the state's right in interfering with the self-regarding behavior of persons with full mental faculties and those whom Mills believed lacked such faculties).

122. The broader the definition of self-neglect, the more limited the government's interest. Some would have the state view self-neglect so broadly as to make the term virtually meaningless. *See* L. René Bergeron, *Self-Determination and Elder Abuse: Do We Know Enough?*, *in* ELDER ABUSE & MISTREATMENT: POLICY, PRACTICE & RESEARCH, *supra* note 20, at 81, 86 ("Self-neglect also includes the collection of either valuable or worthless items, or the collection of animals without the provision to provide them with proper care.").

123. As John Stuart Mill eloquently argued, "[t]he only part of the conduct of anyone for which he is amenable to society is that which concerns others. . . . Over himself, over his own body and mind, the individual is sovereign." MILL, *supra* note 121, at 48.

124. Of course, which category a particular case of elder mistreatment falls into may be debatable. Many aging service providers and victim advocates would point to the influence that abusers have over their victims and query whether victims have capacity to self-determine while experiencing victimization. *See, e.g.*, Bergeron, *supra* note 122, at 94–95 (arguing that it is not reasonable to expect people who are "isolated, depressed, sick, and in crisis" to self-determine and suggesting that a wide range of elder abuse victims not be treated as if they are capable of self-determination). Similarly, situations labeled "self-neglect" by some, might be labeled third-party neglect by others who view third party duties and omissions more broadly.

125. *See supra* notes 48–50 and accompanying text.

achieving their primary goal: increasing reports of elder mistreatment.[126] A 1991 Government Accounting Office report comparing mandatory and voluntary reporting schemes cast serious doubt on the value of mandating the reporting of elder abuse. It concluded that there was insufficient evidence to determine whether mandatory reporting schemes were more effective than voluntary ones.[127] Other studies have produced similar results.[128] Compared to mandatory reporting requirements, other mechanisms may be significantly more effective at increasing the detection of elder abuse. For example, public education about elder abuse is associated with higher reporting rates.[129] If would-be reporters cannot identify signs of abuse or are unaware of those to whom to report suspected abuse, they cannot be expected to report even if legally required to do so. Since many would-be reporters lack the basic information needed to identify elder abuse,[130] training those who work with older adults to identify such abuse may be a far more effective detection strategy than mandating reporting. Similarly, developing effective responses to reports of mistreatment also has the potential to significantly increase reporting. As research on child maltreatment reporting suggests, individuals are significantly more likely to report abuse or neglect if they expect a satisfactory response to that report.[131] Therefore, improving the

126. *See* Jeanette M. Daly et al., *Mandatory Reporting: Relationship of APS Statute Language on State Reported Elder Abuse*, 15 J. ELDER ABUSE & NEGLECT 1, 2 (2003) ("The impetus for mandatory reporting legislation is to improve case detection."). Notably, were the purpose to prevent or treat elder abuse, such statutes would likely appear even less effective. *See* U.S. GENERAL ACCOUNTING OFFICE, ELDER ABUSE: EFFECTIVENESS OF REPORTING LAWS & OTHER FACTORS 2 (1991) (finding general agreement among experts that mandatory elder abuse reporting statutes are not a particularly effective method for identifying, preventing, or treating elder abuse).

127. *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 126, at 2.

128. *See, e.g.*, SANDRA L. HUGHES, CAN BANK TELLERS TELL?—LEGAL ISSUES RELATING TO BANKS REPORTING FINANCIAL ABUSE OF THE ELDERLY 44 (2003), *available at* http://www.ncea.aoa.gov/NCEAroot/ Main_Site/pdf/publication/bank_reporting_long_final_52703.pdf (finding, in a study of laws requiring banks to report suspected financial exploitation of older adults, that "[e]nactment of a mandatory reporting law alone does not seem to result in a significant increase in reporting by banks" and "the absence of mandatory reporting [in states without mandatory reporting laws] has not been a major obstacle to developing a successful bank reporting project," and concluding that "efforts are better directed at securing the cooperation of the banking industry than toward attempting to enact a mandatory reporting law.").

129. *See* ELDER ABUSE PROJECT, AMERICAN PUBLIC WELFARE ASSOC., & NAT'L ASSOC. OF STATE UNITS ON AGING, A COMPREHENSIVE ANALYSIS OF STATE POLICIES AND PRACTICES RELATED TO ELDER ABUSE, REPORT NO. 3, at 87 (1986); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 126, at 9 (citing public and professional awareness regarding elder mistreatment as key in preventing such mistreatment).

130. *Cf.* Kohn, *supra* note 5, at 188–89 (discussing studies showing the relative lack of training about elder mistreatment relative to training about child maltreatment).

131. *See id*. at 190; *see also* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 126, at 7 (indicating that the reputation of elder abuse agencies affects reporting rates).

effectiveness and appropriateness of APS agency responses to elder abuse reports is critical to increasing reporting rates.[132] In addition, increased responsiveness by the judicial system might increase the rate at which reports are made.[133] As one of the nation's leading elder abuse experts has noted, "when the word gets out that a prosecutor is willing to prosecute elder abuse cases, or that the police are willing to investigate such cases, the number of reports rises, presumably because reporting is then believed to be a meaningful recourse, thus making it a worthwhile endeavor."[134] In short, there appear to be other methods for increasing detection of mistreatment that are more effective than mandating reporting.[135]

g. The Sum of the Factors

A review of mandatory reporting statutes in light of the *Westinghouse* factors strongly suggests that at least a subset of state mandatory elder mistreatment reporting statutes contain unconstitutional provisions. Rhode Island's mandatory reporting scheme is among those that are the most constitutionally suspect. Rhode Island requires reporting of all types of mistreatment (including self-neglect), requires all categories of persons to report regardless of the anticipated impact of the report, and makes age the only criterion for determining about whom reports must be made.[136] Moreover, the statutory scheme provides virtually no protection to ensure that reports are kept confidential.[137] The effect is that, in Rhode Island, an individual's ability to engage in private communications is fundamentally altered upon reaching age sixty regardless of whether the behavior from which the state seeks to protect the individual is inflicted by herself or another person and regardless of her mental or physical capacities.

Unlike Rhode Island's scheme, Wisconsin's mandatory elder abuse reporting scheme raises only minimal constitutional concerns. Wisconsin created a very narrow category of persons subject to reports. Reporting is only required where the subject of the report is "at imminent risk of

132. *See* Kohn, *supra* note 5, at 190.

133. *Id.*

134. *See* Marie-Therese Connelly, Where Elder Abuse and the Justice System Collide: Police Power, Parens Patrie and Twelve Recommendations (Feb. 2008 draft) (on file with author).

135. Advocates of mandatory reporting sometimes describe it as creating an "opportunity for public education" and thus as a key element of a public awareness campaign. Although it may be helpful to tell those whom one wishes to educate that the education will help them comply with legal duties, mandatory reporting should not be treated as a pre-requisite for elder abuse education. Indeed, professional training about elder mistreatment could be required without requiring reporting.

136. *See* R.I. GEN. LAWS § 42-66-8 (Supp. 2008).

137. *See id.* § 42-66-10 and discussion *supra* notes 112–14 and accompanying text.

serious bodily harm, death, sexual assault, or significant property loss and is unable to make an informed judgment about whether to report the risk" or where another person is at risk of such harms from the suspected perpetrator.[138] Moreover, as discussed previously, Wisconsin makes exceptions to its reporting requirement for situations in which reporting would not be in the best interest of the victim.[139] In addition, unlike many other states, Wisconsin does not specify what information must be included in a mandated report and thus allows for the disclosure of significantly less information than many states. Wisconsin also significantly limits the types of records that must be disclosed as its mandatory reporting provisions apply only to a relatively small set of professionals.[140] Although Wisconsin allows records of abuse to be shared with a variety of persons and organizations, it delineates limited purposes for which such shared information may be used.[141] Furthermore, access to records of elder abuse may be denied where not in the best interest of the victim or alleged victim.[142] Thus, Wisconsin limits mandatory reporting to situations in which the government's interest in receiving reports of mistreatment is especially great, and also minimizes the extent to which reporting burdens individuals' privacy interests.

Florida's statute, by contrast, raises fewer concerns than Rhode Island's, but is more troubling than Wisconsin's. In Florida, all persons with knowledge or reasonable suspicion of abuse, neglect, or exploitation are mandatory reporters[143] and are required to divulge extensive information, including any "which may establish the cause of abuse, neglect, or exploitation that occurred or is occurring."[144] The category of persons subject to mandatory reporting is narrower than that in Rhode Island because Florida's requirements apply only to "vulnerable adults" and not to all persons over the age of sixty.[145] However, Florida fails to limit the subjects of mandatory reporting to persons who lack the mental capacity to understand their own abuse and neglect, but rather defines vulnerability to include persons whose ability to perform activities of daily

138. WIS. STAT. ANN. § 46.90(4) (West Supp. 2008).
139. *Id.*
140. *Id.* (listing as mandated reporters employees of any entity that is licensed, certified, or approved by or registered with a particular governmental agency; health care providers; and social workers, professional counselors, and marriage and family therapists).
141. *Id.* § 46.90(6).
142. *Id.*
143. *See* FLA. STAT. ANN. § 415.1034(1)(a) (West Supp. 2008).
144. *See id.* § 415.1034(1)(b).
145. *See id.* § 415.102(26).

living are limited by physical disabilities or "infirmities of aging."[146] Moreover, Florida, like Rhode Island, requires reporting of self-neglect.[147] Florida requires that records remain confidential, but creates numerous exceptions to this rule which allow for the release of complete records to, among other people, legislative staff, a broad range of state employees, the victim's caregiver, and the suspected perpetrator.[148]

To the extent that the *Westinghouse* factors are treated as non-exclusive, as the Court of Appeals for the Ninth Circuit has indicated they should,[149] the number of constitutionally questionable statutes might increase. In *In re Crawford*, the Ninth Circuit explained:

> This [*Westinghouse*] list is not exhaustive, and the relevant considerations will necessarily vary from case to case. In each case, however, the government has the burden of showing that "its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest."[150]

In the case of mandatory reporting, an additional consideration might be that alleged victims may be subject to other infringements on their liberties as a result of mandated reports.[151]

The conclusion that a subset of mandatory reporting statutes unconstitutionally violate elders' rights, however, does not depend on the application of the *Westinghouse* approach. The same conclusion can be reached using the "legitimate expectation of privacy" approach[152] that the Tenth Circuit Court of Appeals used in *Aid for Women*.[153] As the Tenth

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146. *See id.* § 415.102(26).

147. *See id.* § 415.102(15).

148. *Id.* § 415.107.

149. *In re* Crawford, 194 F.3d 954, 959 (9th Cir. 1999).

150. *Id.* (quoting Doe v. Attorney Gen., 991 F.2d 780, 796 (9th Cir. 1991).

151. *Cf.* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 102 (1996) (arguing that "the infringement of other liberties by sex offender community notification and registration requirements combined with the privacy infringement may collectively violate the protections of the Fourteenth Amendment.").

152. The "legitimate expectation of privacy" approach is sometimes referred to as the "reasonable expectation of privacy" approach. *See* California v. Ciraolo, 476 U.S. 207, 219 n.4 (1986) (Powell, J., dissenting) ("Since *Katz* [*v. United States*, 389 U.S. 347 (1967)] our decisions also have described constitutionally protected privacy interests as those that society regards as 'legitimate,' using the words 'reasonable' and 'legitimate' interchangeably."); *see also* Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 517 n.54 (2005) (noting that the Supreme Court "seems to indiscriminately waffle between phrasing the requirement a 'reasonable' expectation of privacy and a 'legitimate' expectation of privacy, leaving uncertain whether the test is meant to be empirical, as suggested by the former term, or normative, as suggested by the latter.").

153. Aid for Women v. Foulston, 441 F.3d 1101 (10th Cir. 2006). The *Aid for Women* court

Circuit explained, under this approach "[a]n individual is . . . protected from disclosure of information where the individual 'has a legitimate expectation . . . that it will remain confidential.'"[154] An individual has such an expectation where she or he has "an actual, subjective expectation of privacy" and society recognizes that expectation as reasonable.[155] Thus, the "legitimate expectation of privacy test" embodies the same considerations as the *Westinghouse* test. *Westinghouse* also requires courts to consider an individual's privacy expectation (reflected in the first five *Westinghouse* factors) and society's judgment as to whether that expectation is reasonable under the circumstances (reflected in the last two *Westinghouse* factors). Not surprisingly, then, the two approaches can be expected to lead to the same conclusion: that mandatory reporting statutes can unconstitutionally violate alleged victims' informational privacy rights. Analyzed using the legitimate expectation of privacy approach, the potential unconstitutionality of such statutes can be identified simply by recognizing that many of the reports required under mandatory reporting statutes would necessitate the disclosure of information (for example, medical records, conversations with a priest, consultations with an attorney) that reasonable people would expect to be kept confidential. It is, for example, reasonable for a patient to expect that her doctor will not disclose her medical information without her consent unless needed to prevent imminent harm.[156]

2. Additional Constitutional Rights

The constitutional interest most directly affected by mandatory reporting statutes is that in informational privacy, but other constitutional interests are also undermined by such statutes. For example, elder abuse reporting statutes that allow the state to access alleged victims' homes or

suggested that a more rigorous test would have been appropriate had the rights of adults been implicated. *Id.* at 1120.

154. *Id.* at 1116 (quoting Sheets v. Salt Lake County, 45 F.3d 1383, 1387 (10th Cir. 1995)).

155. *See* Planned Parenthood of Indiana v. Carter, 854 N.E.2d 853, 869 (Ind. Ct. App. 2006) (quoting Hanney v. State, 789 N.E.2d 977, 990 (Ind. Ct. App. 2003)); *see also* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule [for determining when a Fourth Amendment violation has occurred] that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

156. The existence of the federal Health Insurance Portability & Accountability Act (HIPAA), which limits disclosures of medical records, points to the reasonableness of such expectations.

property over their objections implicate elders' interests in physical privacy.[157]

Arguably, mandatory elder abuse reporting laws also implicate seniors' constitutional right to equal protection of the law. Starting with its 1976 decision in *Massachusetts Board of Retirement v. Murgia*,[158] the Supreme Court has consistently refused to subject age-based classifications to heightened scrutiny.[159] All of the Court's relevant cases, however, considered age discrimination in the employment context. It is debatable whether they closed the door to finding age a suspect classification in certain non-employment contexts.[160] Although the *Murgia* holding is so broadly stated that it is generally seen as foreclosing such a possibility,[161] the already faulty reasoning of the *Murgia* opinion is further undercut by modern elder protection statutes and, in particular, by mandatory elder abuse reporting statutes. The *Murgia* court based its decision that age was

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157. *See, e.g.*, HAW. REV. STAT. § 346-229 (2008) (giving those investigating reports of abuse the right to "visit" with the alleged victim and the right to enter into the alleged victim's home without a warrant under certain situations). Similarly, in Iowa:

> Upon a showing of probable cause that a dependent adult has been abused, a court may authorize a person, also authorized by the department, to make an evaluation, to enter the residence of, and to examine the dependent adult. Upon a showing of probable cause that a dependent adult has been financially exploited, a court may authorize a person, also authorized by the department, to make an evaluation, and to gain access to the financial records of the dependent adult.

IOWA CODE § 235B.3(7) (West 2008).

158. 427 U.S. 307 (1976).

159. In *Murgia*, the Court rejected the claim that Massachusetts' mandatory retirement age for police officers violated the officers right to equal protection. The Court explained that "uniformed state police officers over 50" did not constitute a suspect class for purposes of equal protection analysis. *Id.* at 313–14. Subsequently, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court held that a Missouri constitutional provision setting a mandatory retirement age for judges did not violate equal protection. Similarly, in *Vance v. Bradley*, 440 U.S. 93 (1979), the Court upheld a federal statute setting a mandatory retirement age for federal employees covered by the Foreign Service retirement and disability system against an equal protection challenge because the plaintiffs failed to show the statute to be irrational.

160. Scholars have not yet fully explored the extent to which *Murgia* might not control in non-employment contexts, although Howard Eglit has considered the constitutionality of age discrimination in the health care context, arguing that:

> *Murgia* and *Vance* . . . demonstrate that in the employment setting, at least, the Supreme Court has had no problem with the notion that those who have accumulated too many years legitimately can be required to sacrifice a desirable government-created and -funded commodity—albeit one not fundamentally important for constitutional purposes—in order to make that commodity available for younger successors.

Howard Eglit, *Health Care Allocation for the Elderly: Health Care Discrimination by Another Name?*, 26 HOUS. L. REV. 813, 842 (1989).

161. *See, e.g.*, HOWARD EGLIT, ELDERS ON TRIAL: AGE & AGEISM IN THE AMERICAN LEGAL SYSTEM 127 (2004) ("[I]t is too late in the day to mount a successful challenge to the application of a minimum rationality test to age classification . . . . That battle was first was lost in . . . *Murgia*.").

not a suspect class on, among other things, the Court's determination that the elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[162] Yet, at least some mandatory reporting schemes create unique disabilities on the basis of stereotyped characteristics by selectively limiting the rights of older adults to engage in certain forms of confidential communications, and by responding to reports of elder abuse in ways that target older adults for interventions such as institutionalization or guardianship that can diminish their legal rights.

If the courts are unwilling to depart from the *Murgia* line of cases and commit to applying traditional, highly deferential rational basis scrutiny, however, a successful challenge based on equal protection grounds would be unlikely. The Supreme Court has explained, in the absence of a suspect or quasi-suspect classification, "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement . . . the Equal Protection Clause requires only a rational means to serve a legitimate end."[163] Under this formulation, the question is, therefore, whether older age is relevant to the ends the state is attempting to achieve. To the extent that the state can legitimately prefer to protect some of its citizens over others of its citizens—perhaps in this case because older adults are perceived as more deserving of special protection[164]—such distinctions would likely be found permissible. That said, the emergence of what Julie Nice has termed the "third strand" of equal protection jurisprudence might present an opportunity to successfully challenge such laws even if courts are unwilling to apply heightened scrutiny to all age-based classifications.[165] Nice explains that in certain situations in which the Supreme Court has been confronted with equal protection challenges in which "fairly important rights" were denied to "relatively vulnerable groups," the Court has used a "third strand" of analysis and implicitly applied heightened scrutiny even though no fundamental rights, quasi-suspect classifications, or suspect classifications were implicated.[166] Mandatory reporting statutes are arguably a prime example of such a situation: they involve a relatively vulnerable group

162. *Murgia*, 427 U.S. at 313.

163. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 441–42 (1985).

164. By comparison, a distinction based on "vulnerability" may not be rational, at least as long as the targeted group includes persons as young as sixty or sixty-five.

165. *See* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 99 U. ILL. L. REV. 1209 (1999).

166. *See id.* at 1212.

being denied important rights that arguably fall just shy of being fundamental.[167]

D. Conclusion

Examining mandatory elder abuse reporting statutes through a constitutional lens suggests that certain such statutes impermissibly infringe on constitutionally protected privacy rights. Other such statutes may not rise to the level of impermissibly burdening constitutional rights but may nevertheless impose significant burdens on constitutionally protected interests. Thus, the manner in which such statutes burden elders' liberty is not only an ethical, ideological, or moral concern, but also a legal one.

IV. PROHIBITIONS ON ELDER SEXUAL ABUSE

Mandatory reporting statutes are not the only component of elder protection schemes with the potential to violate senior citizens' constitutionally protected civil rights. The next Part of this Article provides a second case study of statutes with such potential. Specifically, it looks at a series of statutes that have been adopted to protect older adults from sexual mistreatment. Sexual mistreatment of the elderly is a real and serious problem,[168] and efforts to curb it are well-intentioned. Nevertheless, as discussed below, such laws can limit the sexual freedoms—and constitutionally protected substantive due process rights—of older adults.

A. Overview of Laws Prohibiting Elder Sexual Abuse

In recent years, states have adopted a series of statutes that specifically prohibit certain behaviors considered to constitute sexual abuse of older adults. Such statutes tend to take one of two approaches, or a combination of both.

The first approach is to prohibit certain suspect sexual activities. For example, under Florida law, a person may be held civilly liable for "sexual abuse" if he or she commits "acts of a sexual nature . . . in the presence of

167. A full discussion of the implications of the "third strand" is beyond the scope of this Article, but will be developed in the author's future work.

168. *See* Ann W. Burgess & Steven L. Phillips, *Sexual Abuse, Trauma and Dementia in the Elderly: A Retrospective Study of 284 Cases*, 1 VICTIMS & OFFENDERS 193 (2006).

a vulnerable adult without that person's informed consent."[169] The definition of a "vulnerable adult" includes any adult "whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to . . . the infirmities of aging."[170] The objection of the victim is not required to bring such a lawsuit against an alleged violator: the victim's guardian or estate may do so independently.[171] The effect of the statute is to permit civil liability to be imposed on anyone who engages in a wide range of activities—whether they be an actor performing a sexually explicit play, an erotic dancer performing in a show, or a long-standing sexual partner engaging in sexual foreplay—in front of a person of "advanced age" (because Florida allows "infirmities of aging" to be manifested simply by "advanced age" itself) [172] without obtaining the person's informed consent. Although an exception exists for "appropriate displays of affection," no definition of what constitutes such a display is provided.[173]

The second, more common statutory approach is to prohibit sexual activities, or categories of sexual activities, between certain classes of people: usually between anticipated victims and persons in a caregiving role.

For example, Vermont makes it a crime for a person in a volunteer or paid capacity at a caregiving facility or program to engage in a sex act with a "vulnerable adult."[174] Unless the defendant was "hired, supervised, and directed" by the vulnerable adult, consent is no defense.[175] Vermont

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169. *See* FLA. STAT. ANN. § 415.102(24) (West Supp. 2008) (Further stating that sexual abuse "includes, but is not limited to . . . fondling, exposure of a vulnerable adult's sexual organs, or the use of a vulnerable adult to solicit for or engage in prostitution or sexual performance . . . [but] does not include any act intended for a valid medical purpose or any act that may reasonably be construed to be normal caregiving action or appropriate display of affection.").

170. *See id.* § 415.102(26).

171. *See id.* § 415.1111 (allowing a successful plaintiff to recover both actual and punitive damages).

172. *See id.* § 825.101(5).

173. *See id*. § 415.102(34).

174.

> A person who volunteers for or is paid by a caregiving facility or program shall not engage in any sexual activity with a vulnerable adult. It shall be an affirmative defense to a prosecution under this subsection that the sexual activity was consensual between the vulnerable adult and a caregiver who was hired, supervised, and directed by the vulnerable adult. A person who violates this subsection shall be imprisoned for not more than two years or fined not more than $10,000.00, or both.

VT. STAT. ANN. tit. 13, § 1379(a) (2008).

175. *See id.* ("It shall be an affirmative defense to a prosecution under this subsection that the sexual activity was consensual between the vulnerable adult and a caregiver who was hired, supervised, and directed by the vulnerable adult."). Although one could read the statute as not making

broadly defines the term "vulnerable adult" to include any adult who exhibits "infirmities of aging" that result in "some" impairment of his or her ability to "provide for his or her own care without assistance."[176] The relevant statute provides, as examples of such persons, those whose age-related infirmities impair their abilities to provide their own food, shelter, clothing, health care, supervision, or financial management.[177] Thus, if Sam volunteers at his local adult day care center, he is potentially a criminal if he subsequently makes love to his wife Diane, an octogenarian who due to a bad hip has trouble independently shopping for groceries.[178] Similarly, if Sam is a seventy-year-old volunteer who meets Diane while she is attending a program at the adult day care center, any subsequent sexual acts between the two are criminal. It does not matter that Diane has full mental capacity, that she initiated the sexual relationship, or that all acts are fully consensual. Her age-related disability nevertheless makes her a criminal liability.

Similarly, Washington State bars consensual sex between a disabled person who is sixty years of age or older[179] and a person who provides him or her with paid transportation. Specifically, a person who provides such transportation to someone other than his or her lawfully married spouse is guilty of the class A felony of rape in the second degree if the two engage in sexual intercourse.[180] Similarly, a paid transportation provider who

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this the exclusive defense to the crime of sexual abuse of a vulnerable adult, no other portion of the Vermont code appears to offer a consent-based defense to a defendant charged in this crime.

176. Vermont defines "vulnerable adult" as:

> any person 18 years of age or older who: (A) is a resident of a facility required to be licensed under chapter 71 of Title 33; (B) is a resident of a psychiatric hospital or a psychiatric unit of a hospital; (C) has been receiving personal care and services from an agency certified by the Vermont department of aging and independent living or from a person or organization that offers, provides, or arranges for personal care; or (D) regardless of residence or whether any type of service is received, is impaired due to brain damage, infirmities of aging, or a physical, mental, or developmental disability that results in some impairment of the individual's ability to: (i) provide for his or her own care without assistance, including the provision of food, shelter, clothing, health care, supervision, or management of finances; or (ii) protect himself or herself from abuse, neglect, or exploitation.

Id.

177. *See id.* § 1375(8).

178. Read literally, there is no requirement that the vulnerable adult be part of the facility or program in which the "caregiver" is involved.

179. *See* WASH. REV. CODE ANN. § 9A.44.010(16) (West Supp. 2008) (defining "[f]rail elder or vulnerable adult" as "a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. 'Frail elder or vulnerable adult' also includes a person found incapacitated . . . , a person over eighteen years of age who has a developmental disability . . . , a person admitted to a long-term care facility . . . , and a person receiving services from a home health, hospice, or home care agency . . . ."). *Id.*

180. *See id.* § 9A.44.050(1)(f), which states:

"knowingly causes" a disabled person age sixty or older who is not his or her spouse "to have sexual contact with him or her or another" is guilty of the class B felony of "indecent liberties,"[181] regardless of whether that contact is consensual. Thus, should Desi provide Lucy, a disabled sixty-two-year-old, with a ride in his taxi he may subsequently become a felon and rapist if they become lovers and also may become a felon if—after some conversation—he sets her up on a date with his brother-in-law, his best friend, or even his pastor.

Oklahoma takes a different but related approach, barring virtually all sexual activities between a caretaker[182] and a vulnerable adult, regardless of whether there is consent.[183] Unlike the statutory schemes in Vermont or Washington, age is not explicitly linked to vulnerability, although the elderly population appears to have been the target of the prohibition.[184] Rather, the term "vulnerable adult" is defined as a person who, because of a disability, is "substantially impaired" in the ability to, among other things, provide for her own care, effectively manage her property and finances, or protect herself from abuse without assistance.[185] Thus, if Martha has primary responsibility for taking personal or financial care of

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> A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [w]hen the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who: (i) Has a significant relationship with the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

See also id. § 9A.44.050(2) (stating that rape in the second degree is a class A felony).

181. *See id.* § 9A.44.100 (setting forth the elements for the crime of "indecent liberties").

182. The statute criminalizing such abuse does not specifically define the term "caretaker." However, other parts of the statute make reference to terms defined in the state's adult protection statutes, and it seems most reasonable to conclude that the term "caretaker" would be interpreted as set forth in those statutes. There, the term caretaker is defined as a person who has: "a. the responsibility for the care of a vulnerable adult or the financial management of the resources of a vulnerable adult as a result of a family relationship, b. assumed the responsibility for the care of a vulnerable adult voluntarily, by contract, or as a result of the ties of friendship, or c. been appointed a guardian, limited guardian, or conservator." *See* OKLA. STAT. ANN. tit. 43A, § 10-103 (West 2008).

183. *See* OKLA. STAT. ANN. tit. 21, § 843.1 (West 2008).

184. *See* Press Release, Senator Ron Justice, Okla. State Senate, Bill Strengthening Penalties Against Elder Abuse Advances to House (Mar. 7, 2008), *available at* http://www.oksenate.gov/news/press_releases/press_releases_2008/pr20080307a.html (describing efforts to increase the penalties for sexual abuse of vulnerable adults as aimed at protecting the elderly).

185. *See* OKLA. STAT. ANN. tit. 43A, § 10-103(5) (Supp. 2005), which states:

> "Vulnerable adult" means an individual who is an incapacitated person or who, because of physical or mental disability, incapacity, or other disability, is substantially impaired in the ability to provide adequately for the care or custody of himself or herself, or is unable to manage his or her property and financial affairs effectively, or to meet essential requirements for mental or physical health or safety, or to protect himself or herself from abuse, verbal abuse, neglect, or exploitation without assistance from others.

her paraplegic husband George, she is a felon if they engage in sexual relations together regardless of George's mental state, who initiates the behavior, or the purpose of the behavior.

B. Existing Critiques of Elder Sexual Abuse Prohibitions

There is growing interest in the sexual activity and rights of older adults.[186] Yet, despite a climate in which sexual rights are the subject of much discussion, there has been a profound silence as to the value, effectiveness, desirability, or legal permissibility of laws designed to protect older adults from sexual mistreatment. Existing critiques of such laws are almost non-existent, and nowhere in the legal literature or the social science literature has the author found recognition that these laws may adversely impact older adults' legal rights.

This lack of critique is both troubling and telling. If we do not recognize these laws' effects on individual liberties, such laws might appear to have no cost. The result will be a burdening of individual liberty without any appreciation of that burden, and thus without any consideration of less restrictive methods for achieving the underlying policy objectives. The next section of this Article attempts to rectify this problem by identifying the burdens such laws impose on the civil rights of older adults.

C. A Rights-Based Critique of Elder Sexual Abuse Prohibitions

State statutes barring consensual sexual acts raise serious substantive due process concerns. In *Lawrence v. Texas*,[187] the United States Supreme Court recognized that consenting adults have a protected liberty interest in engaging in private sexual activity without intervention by the government.[188] Writing for the majority, Justice Kennedy determined that no legitimate state interest justified a Texas statute that burdened the liberty interest by prohibiting certain homosexual sexual activity.[189]

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186. The growing interest is likely apparent to anyone who regularly reads a major newspaper, and has been remarked on by many others. *See, e.g.*, Karyn M. Skultety, *Addressing Issues of Sexuality with Older Couples*, 31 GENERATIONS 31, 31 (2007).

187. 539 U.S. 558 (2003).

188. *See id.* (opinion of Justice Kennedy).

189. In her concurrence, Justice O'Connor chose to decide the case on equal protection grounds, and therefore did not need to determine whether or not the statute at issue violated substantive due process rights. *See id.* at 584–85 (O'Connor, J., concurring).

1. The Nature of the Undermined Right

The right undermined by the previously described statutes seeking to address sexual abuse of older adults is the same right that was violated in *Lawrence*. Like the statute at issue in *Lawrence*, the previously described statutes seeking to prevent sexual abuse of older adults burden those adults' right to engage in consensual sexual activity with other consenting adults. Older adults and disabled adults who have the capacity to consent to sexual activity have no less of a liberty interest in private, consensual relations than did the *Lawrence* defendants. To the contrary, adults of all ages and abilities can have the desire and capacity to engage in sexual activity.[190] Despite stereotypes of older or disabled persons as de-sexualized, sexual expression is an important part of the life and dignity of many such persons.[191]

The fact that the class (disabled and older persons) targeted under sexual abuse laws is not held criminally responsible under such laws, whereas the class targeted in *Lawrence* (homosexuals) was held criminally responsible, is of no consequence. Both types of laws significantly undermine the targeted groups' right to engage in consensual, adult sexual activity and can be expected to have a "chilling" effect on such activity. A person whose partner is subject to criminal enforcement if the two engage in sexual activity is no freer to engage in such activity than the person who would him or herself be held criminally liable.

Critics might argue that the liberty interest described in *Lawrence* is distinguishable from that implicated by the elder protection statutes because the validity and voluntariness of consent was not an issue in *Lawrence* and is a concern in situations involving older or frail adults.[192] A

190. *See* Stacy Tessler Lindau et al., *A Study of Sexuality and Health Among Older Adults in the United States*, 357 NEW ENG. J. MED. 762 (2007) (finding, in a national study of community-dwelling adults age 57–85, that lack of interest in sexual activity is not a primary reason for not engaging in sexual activity later in life).

191. *See id.* at 772 (finding, based on a national study of community-dwelling adults ages 57–85, that 53% of those 65 to 74 were sexually active, as were 26% of those age 75 to 85, and concluding that "the majority of older adults are engaged in spousal or other intimate relationships and regard sexuality as an important part of life. The prevalence of sexual activity declines with age, yet a substantial number of men and women engage in vaginal intercourse, oral sex, and masturbation even in the eighth and ninth decades of life.").

192. Critics might also attempt to distinguish the liberty interest described in *Lawrence* by focusing on the majority's use of the word "private" to describe the type of sexual activity at issue in *Lawrence*. It could be argued that the sexual activity targeted by elder abuse statutes should often be treated as something other than "private" because it involves persons who have an underlying duty of care and, in some cases, may be being paid for such care. This argument, however, can be quickly overcome because it has two fundamental flaws. The first is that an examination of the use of the word

moderate version of this argument would point to the fact that older and disabled individuals may, due to their infirmities and attendant dependency, be in a position in which they are less likely to be able to deny consent to sexual activity. A more aggressive version would be to argue that even where such individuals affirmatively decide to engage in a prohibited sexual behavior, their decisions cannot be presumed voluntary because their social environment unduly restricts their choices. Such radical critiques would tend to equate sexual activity and sexual abuse.[193]

It is true that the majority opinion in *Lawrence* was unequivocally limited to consensual sex acts. The majority noted firmly, albeit in dicta, that the case did not involve "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."[194] Thus, to the extent that elder protection statutes prohibit nonconsensual sex—or even impose significant burdens for proving consent for certain categories of persons—they do not undermine a liberty interest that has been recognized by the Supreme Court. By contrast, statutes that bar consensual sexual activity—such as the Vermont, Washington, and Oklahoma statutes—parallel the statute at issue in *Lawrence* and thus do implicate a constitutionally recognized interest.

Some of the persons targeted by statutes barring consensual sexual activity may be in a position due their physical, psychological, or social condition that makes it difficult to refuse consent. Thus, facial challenges to such statutes can be expected to fail as not every application of such laws would constitute a violation of a constitutionally protected interest.[195] However, other persons swept into the reach of these overly broad statutes

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"private" in *Lawrence* indicates that the majority used the term to refer to the location of the conduct—i.e., the home—and not to the nature of the defendants' relationship. Subsequent lower court distinctions have read it as such. *See, e.g.*, Singson v. Commonwealth, 621 S.E.2d 682, 685 (Va. Ct. App. 2005) (contrasting the "private" activity at issue with the defendant's solicitation of oral sex in a public restroom). Second, and perhaps more importantly, the fact that two persons have legal duties to one another does not make the sphere in which their relations occur any less "private." Traditionally, the marital relationship has been seen as the most private of relationships and the most deserving of protection from government interference. Yet the marital relationship is a legal creation which imposes significant duties of care and support on the couple involved.

193. The two have been equated in similar contexts. *See* Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1662–63 (2004) ("To infer that sex was consensual from the mere fact that it occurred, as the Court's *Lawrence* opinion does, tips the constitutional scales in favor of sex, which is to say, in favor of perpetrators of sexual violence.").

194. *Lawrence*, 539 U.S. at 578.

195. *Cf.* 16 AM. JUR. 2D *Constitutional Law* § 140 (2008) (explaining that a litigant may generally not pursue a facial constitutional challenge if the law is constitutional as applied to that litigant because a facial challenge contends that the law, "by its own terms, always operates unconstitutionally").

may not be impaired in their ability to refuse consent and thus might well prevail in an as-applied constitutional challenge.

The fact that a person has a dependency—whether physical or social—is not evidence of an impaired ability to consent to sexual activity. A person's capacity to consent in many instances may not be at all impaired by his or her disability, and to presume otherwise is to relegate disabled individuals to second-class citizenship. Similarly, the existence of a social dependency is also an illegitimate basis for determining whether a person is capable of consent. It seems reasonable to posit that most long-term relationships in which sexual intimacy occurs involve a degree of interdependency. As feminist legal theorists have explained, dependency is not an abnormal state but the common condition of human existence.[196] The extent and nature of the dependency that disabled or frail persons experience may reflect their physical status, but the existence of dependence is not unique to such persons.[197] Moreover, *Lawrence* suggests that consent is something that will, as a general matter, be presumed.[198]

Similarly, relationships involving frail or disabled adults—who may be dependent on other people, including caregivers with whom they are engaged in sexual relations—should not be considered the type of relationships in which consent might not be sufficiently easy to refuse within the meaning of *Lawrence*.[199] Although some relationships between

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196. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH (2004) (arguing that the traditional conception of individual autonomy is a myth, and that human inter-dependency is universal and inevitable).

197. *See* Ann Hubbard, *The Myth of Independence and the Major Life Activity of Caring*, 8 J. GENDER, RACE & JUST. 327, 349 (2004). Hubbard explains that:

> Dependency is part of the human condition, an aspect of our animality—not something to be stigmatized, scorned or pitied. Recognizing dependency and the attendant need for care as natural and inevitable, not exceptional or pathological, challenges the socially constructed dichotomy between the independent, self-sufficient *non-disabled* person and the dependent, needy *disabled* person. Getting beyond those stereotypes is one of the principal obstacles to social, political and legal recognition of the capabilities and contributions of people with disabilities.

Id.

198. In *Lawrence*, consent was presumed, not proven, and the majority nowhere suggests that its facile willingness to make such a presumption was unique to the case in question. *Cf.* Spindelman, *supra* note 193, at 1655 (criticizing this presumption and arguing that *Lawrence* could be seen as writing a distinction between "unwelcome" and "involuntary" sex into the Constitution).

199. There are some situations in which, consistent with *Lawrence*, courts have allowed an adult to be held criminally liable for engaging in sexual activities with another adult without the state first proving a lack of consent. For example, one court held that *Lawrence* does not prohibit the imposition of criminal liability on an officer who engaged in sexual activity with an army private of considerably lesser rank. *See* Loomis v. United States, 68 Fed. Cl. 503, 519 (2005) ("[T]he nature of the relationship [between an army private] and a lieutenant of significantly higher rank" was "such that consent might not easily be refused and thus it is outside of the liberty interest protected by *Lawrence*."). Another

frail or disabled elders and caregivers may be sufficiently coercive or involve such dependency on the part of the elder that consent cannot be easily refused, many other such relationships may not. Rather, in many of the relationships that would be criminalized by such statutes, the frail or disabled adult may have significant power over the caregiver, either because of an employment relationship or because of the balance of power that characterizes their intimate relationship (and which may pre-date the onset of disability). In other cases, the parties may be mutually dependent on one another.

Not only is the liberty interest recognized in *Lawrence* the same interest undermined by statutes that limit the sexual liberty of older adults in the name of preventing abuse, but the burdens imposed by the laws (while not identical) are in some cases analogous. In *Lawrence*, the plurality described the stigma created by criminalizing homosexual activities, categorizing the Texas statute at issue as "a way to demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."[200] Criminalizing consensual sexual conduct by the aged or frail is also demeaning and stigma-creating. Already, older persons find themselves stereotyped as sexless.[201] Indeed, sexual activity by older adults is apt to be perceived as abnormal or even pathological.[202] As Simone de Beauvoir noted, "If old people show the same desires, the same feelings, and the same requirements as the young, the world looks at them with disgust: in them love and jealousy seem revolting or absurd . . . [and] sexuality repulsive . . . ."[203] Laws that criminalize sexual activity with older adults—laws that deem their sexual partners to be felons—further entrench this stereotype of sexuality on the part of older people as perverse.

Elder sexual protection statutes also create collateral consequences that are analogous to those that burdened the liberty interests of Texas homosexuals in *Lawrence*. Persons convicted under the Texas anti-homosexual conduct statute faced collateral consequences, including

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held the same with regards to a corrections officer who engaged in sexual activities with multiple inmates in the correctional facility in which she worked. *See* Commonwealth v. Mayfield, 832 A.2d 418, 425 (Pa. 2003) (finding *Lawrence* inapplicable where "[s]exual contact between correctional staff and inmates is obviously rife with the possibility of coercion, both subtle and overt, given the extensive power guards exercise over inmates").

200. *Lawrence*, 539 U.S. at 578.

201. BARBARA SHERMAN, SEX, INTIMACY & AGED CARE 3–4 (1999).

202. *Id.*

203. SIMONE DE BEAUVOIR, THE COMING OF AGE 3 (1972); *see also* EGLIT, *supra* note 161, at 173 n.14 (discussing de Beauvoir's insight).

inclusion in criminal registries and negative consequences for future employment.[204] Collateral consequences are also significant in elder abuse cases, although somewhat less direct. Persons convicted of sexual abuse of older adults are increasingly likely to be barred from working with or caring for the elderly.[205] The "abused" adult may face unwanted protective action such as involuntary isolation from the "abuser" or involuntary removal from a shared accommodation with the "abuser." In addition, as discussed earlier, persons investigated as victims of elder abuse are highly likely to be institutionalized as a result and are also at disproportionate risk of having their right to make personal choices eliminated through the imposition of a guardianship.[206]

2. The Permissibility of the Burden

Having shown how the liberty interest recognized in *Lawrence* is implicated in certain statutes aimed at protecting elders from sexual abuse, the issue is whether the burden such statutes impose on that interest is constitutionally permissible. Unlike the statute at issue in *Lawrence*, elder protection statutes advance a legitimate government interest: preventing sexual abuse. Thus, unlike the Texas statute, the elder protection statutes cannot be rejected on the grounds that they serve no legitimate state purpose. Instead, for such statutes to be found unconstitutional, their means must be found impermissible.

Unfortunately, *Lawrence* provides little guidance as to how closely courts should scrutinize state legislation that burdens consensual adult sexual activity. The level of scrutiny used by the *Lawrence* majority—and thus the level of scrutiny to be used in cases where such rights are undermined—has been the subject of extensive debate. Some scholars have categorized it is as "rational basis" scrutiny; others, as a "more searching form of rational basis" or "rational basis on steroids."[207] However, even if courts use the lowest level of scrutiny—that is, even if they simply require that means selected bear a "reasonable relation to a

204. *Lawrence*, 539 U.S. at 575–76.

205. *See* Connelly, *supra* note 134 (discussing the political push for greater use of background checks for caregivers).

206. *See supra* note 106 and accompanying text.

207. *See* Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1279 (2007) (describing the standard of review in *Lawrence* as a "more searching form of rational basis"); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1129 (2004) (describing the standard of review in *Lawrence* as "rational basis on steroids").

legitimate state interest"[208]—some statutes aimed at protecting elders from sexual mistreatment could nevertheless be found unconstitutional.

Consider Washington's statute barring consensual sex between a disabled person over the age of sixty and a person who provides him or her with transportation, but not barring such sex where the disabled person is a younger adult.[209] What possible justification is there for the use of the age sixty to limit rights? One possible justification is that older persons are at greater risk for sexual mistreatment. However, the evidence clearly does not support such a conclusion. To the contrary, older adults are far less likely to be the victims of sexual assault or rape than younger adults. According to the U.S. Department of Justice, persons age fifty and over account for less than three percent of rape and sexual assault victims, even though they comprise almost a third of the general population.[210] Persons age sixty-five and over account for less than one percent of such crimes.[211] This does not mean that sexual abuse of older adults is not a problem,[212] that an individual's old age provides protection from abuse, that sexual abuse of the elderly is not occurring at an unacceptably frequent rate, or even that the U.S. Department of Justice statistics do not underestimate its frequency. It does, however, preclude justifying restricting the sexual liberty of older adults based on a notion that they are at increased risk for sexual victimization.

Another possible justification for the Washington statute is that older persons are less likely to be able to refuse consent to sexual activity. If reaching the age of sixty were a significant risk factor for being able to refuse consent, the statute's age-based distinction, although crude, would not be arbitrary. Yet there is no basis to believe that reaching the age of sixty puts a person at any meaningfully increased risk of being unable to so consent. Granted, as persons become older, the likelihood that they will be afflicted by some degree of cognitive impairment increases, as does the likelihood that they will be limited in their ability to independently provide for their own personal care (i.e., to perform "activities of daily living" or

208. Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

209. *See* WASH. REV. CODE ANN. § 9A.44.050(1)(s) (West 2008).

210. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AGE PATTERNS OF VICTIMS OF SERIOUS VIOLENT CRIMES (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/apvsvc.pdf.

211. *See id.*

212. Age is not a barrier to sexual mistreatment and there is increasing recognition that older adults can be—and all too frequently are—the victims of serious sexual crimes. *See* ANN W. BURGESS, ELDERLY VICTIMS OF SEXUAL ABUSE & THEIR OFFENDERS (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/216550.pdf. Moreover, as is the case with younger victims, sexual abuse has serious consequences for elderly victims.

"ADLs") or to independently manage basic household tasks (i.e., to perform "instrumental activities of daily living" or "IADLs").[213] At the age of sixty, however, the vast majority of individuals are cognitively intact and not limited in either ADLs or IADLs.[214] In addition, even though the likelihood of cognitive disability increases with age, the majority of non-institutionalized persons with such disabilities are not old.[215] Moreover, to the extent that emotional difficulties impede the ability to refuse consent, older individuals are less likely to be disadvantaged, as the vast majority of non-institutionalized persons with emotional difficulties are young or middle-aged.[216]

Thus, a strong argument can be made that criminalizing certain forms of sexual activity based on an individual reaching the age of sixty or sixty-five is unreasonable and cannot withstand even the most lenient level of judicial scrutiny.[217] By contrast, statutes that limit sexual liberty based on vulnerability, such as those in Oregon and Vermont, are more likely to withstand constitutional scrutiny. "Vulnerability" does appear to be an independent risk factor for sexual abuse and might increase the likelihood that the individual feels dependent on the would-be abuser and thus unable to deny consent. If the level of scrutiny applied to statutes that undermine the liberty interest in adult, consensual activity is something more than traditional "rational basis" review,[218] however, this second category of statute might plausibly be considered constitutionally suspect as well because there may not be a sufficiently strong relationship between such "vulnerability" and an inability to refuse consent.[219]

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213. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, QUICKSTATS: ESTIMATED PERCENTAGE OF ADULTS WITH DAILY ACTIVITY LIMITATIONS, BY AGE GROUP AND TYPE OF LIMITATION—NATIONAL HEALTH INTERVIEW SURVEY, UNITED STATES, 2006, *available at* http://www.cdc.gov/MMWR/preview/mmwrhtml/mm5640a7.htm.

214. *Id.*

215. U.S. DEP'T OF HEALTH & HUMAN SERVS., DISABILITY AND HEALTH IN THE UNITED STATES, 2001–2005, at 16 (2006), *available at* http://www.cdc.gov/nchs/data/misc/disability2001-2005.pdf (approximately 57% of those with cognitive disabilities are under the age of 65).

216. *Id.* (only 12.6% of non-institutionalized persons with emotional difficulties are 65 years of age or older; 87.4% are under the age of 65).

217. The higher the age used, perhaps the more likely such statutes are to withstand constitutional scrutiny as impairments—both physical and mental—become far more prevalent among the oldest of the old.

218. There is good reason for categorizing the standard of review as something more than traditional rational basis review. As Nan Hunter has written, "One cannot simply conclude that the *Lawrence* test is one of rational basis. The rational-basis test . . . as we have known it, will almost never lead to the invalidation of a state law." *See* Hunter, *supra* note 207, at 1113. Hunter describes the plurality's approach instead as "rational basis on steroids for analyzing a substantive due process claim." *Id.* at 1129.

219. In addition to a substantive due process critique, elder mistreatment statutes might also be

In short, it appears that at least certain provisions in statutes that have been adopted to protect elders from sexual abuse are overly broad and therefore might not survive an as-applied constitutional challenge in a court of law.[220] Moreover, even if they withstood challenge, they would nevertheless undermine a constitutional interest in consensual sexual activity and, by doing so, the "equal dignity of older adults," [221] as well as such adults' sexual self-determination and sexual sovereignty.[222] To treat such laws as harmless thus requires a willingness to view the deprivation of liberty as something other than a harm. Assuming such laws are largely harmless also requires overlooking the reality that the availability of sexual partners can be very limited in later life. This is especially likely to be true among the categories of persons affected by the elder sexual mistreatment statutes, and thus such statutes may effectively deny older individuals the possibility of sexual relations.[223]

D. Conclusion

Statutes seeking to protect older adults can limit their right to engage in consensual sexual activity, despite the fact that older adults have a constitutionally based liberty interest in engaging in such activity. Such limits can amount to unconstitutional violations of elders' rights, to the extent that they arbitrarily deny individuals the ability to engage in sexual

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susceptible to an equal protection critique along the lines of that suggested for mandatory elder abuse reporting statutes. *See* discussion *supra* notes 158–67 and accompanying text.

220. This conclusion, at first blush, seems to be exactly what critics of *Lawrence* warned about: that by protecting private, sexual conduct, one might make it more difficult to prohibit coercive or otherwise exploitative sexual relations. Yet the elder abuse context may point to the flaws in their argument.

221. *See* Laurence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

222. *See* Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of* Lawrence, 14 WM. & MARY BILL RTS. J. 1429, 1461 (2006).

223. In explaining why *Lawrence* does not require the invalidation of laws prohibiting incest, Larry Tribe explains that incest laws only leave a very small circle of people off limits to an individual, whereas the Texas statue ruled "half the adult population off limits as sexual or marital partners for a distinct and despised minority." Tribe, *supra* note 221, at 1944. Thus, incest laws "cut no wide swath through the population to limit the options open to any particular oppressed minority." *Id.* Like incest laws, elder protection laws limiting consensual sex between caregivers and adults rule out only a very small number of potential partners. However, compared to bans on incest, such laws are far more likely to effectively rule out the majority of persons—or even all persons—who are potential sexual partners for a vulnerable elder. If an elder's only contacts are with people in a caretaking role (especially given how broadly such roles may be defined), prohibiting sexual relations with caretakers may leave no legal form of sexual activity open to the elder. Thus, the equal protection concerns that made the Texas statute so troubling—and arguably led the majority to implicitly use a heightened standard of review—exist in this context as well.

relations based solely on their chronological age. Moreover, such statutes might have a significant practical effect on the availability of sexual partners later in life, and might further entrench inaccurate and demeaning stereotypes about older adults' sexual lives.

V. IMPLICATIONS OF OVERLOOKING OLDER ADULTS' CONSTITUTIONAL RIGHTS

The preceding Parts of this Article have shown how scholars and policymakers have overlooked the constitutional rights implications of elder protection statutes. The next Part explores the impact this failure has had on the development and design of elder protection systems and the older adults such systems are designed to serve. It then shows how recognizing the ways elder protection systems undermine civil rights could fundamentally shift the focus of efforts aimed at addressing elder mistreatment.

A. The Value of a Rights Discourse

Failing to recognize that an elder protection policy limits the autonomy or freedom of older adults corrupts even the most basic utilitarian assessment of the policy's relative costs and benefits. For example, a cost-benefit analysis of Vermont's sexual mistreatment statute that did not consider the limitations that the statute places on older adults' sexual freedoms as a "cost" would clearly be incomplete. It is not enough, however, simply to recognize that such a policy limits autonomy. To the extent that such limitations are restraints on a person's legally protected rights, that too must be recognized.

Recognizing a burden, but failing to label it as a burden on a "right," has profound consequences. In a country founded on liberal ideals and whose political discourse is dominated by competing notions of liberalism, the impact of labeling something as a "right" is significant. "Rights" can function as trump cards in a way that mere "values" cannot. In the view of leading liberal theorist Ronald Dworkin, for example, if something is a "right" it means that "it is worth paying the incremental cost in social policy or efficiency" necessary to prevent an invasion of that right.[224] Thus, if something is a "right" it is inappropriate simply to balance it against competing interests. Such a balancing approach would be anathema to the very concept of a "right." Instead, for the government to

224. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 199 (1977).

invade a right, Dworkin would require the government to show either that a competing right is at stake or that the cost to society of not invading the right is of a "degree great enough to justify whatever assault on dignity or equality might be involved."[225]

Popular acceptance of this liberal conception of the role of government vis-à-vis its citizens means that whether something is labeled as a "right" can have significant policy consequences. [226] Where a right is at risk, the decision to adopt a policy threatening that right will generally place special weight on the harm to the right. The harm to the right cannot be treated as the equivalent of harms to interests that do not rise to the level of a "right."

Labeling a restriction as imposing a burden on a "right" not only affects policy choices, it might also affect individual and community behavior and how individual actors and communities structure relationships. As Martha Minow has explained, "claims of rights have a special resonance in our culture."[227] Consistent with this special resonance:

> [r]ights . . . can give rise to "rights consciousness" so that individuals and groups may imagine and act in light of rights that have not been formally recognized or enforced. Rights, in this sense, are neither limited to nor co-extensive with precisely those rules formally announced and enforced by public authorities. Instead, rights represent articulations—public or private, formal or informal—of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted.[228]

In Minow's words, "[r]ights in this sense are not 'trumps,' but the language we use to try to persuade others to let us win this round."[229]

Labeling something as a *constitutionally protected* right further enhances its perceived value and inviolability. As Larry Kramer has written, "the ability to tie an argument to the Constitution is critical in constitutional politics, and the stronger or more persuasive the connection,

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225. *Id.* at 200.

226. This is recognized even by those who disapprove of such effects. *See* MARY ANN GLENDON, RIGHTS TALK (1991) (describing and criticizing the significant power that the broadly accepted language of rights has on American policy choices).

227. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1877 (1987).

228. *Id.* at 1867.

229. *Id.* at 1876.

the greater one's claim to legitimacy in public debate."[230] Accordingly, Kramer notes that social movements seek to prevail by appealing to the Constitution and tying that appeal to traditional understandings about the meaning of the Constitution.[231] Moreover, there is political value in cloaking arguments in constitutional language even where a constitutional challenge would be unsuccessful.[232] Constitutional rights arguments can gain traction and help generate political support for a social cause even if those arguments would not prevail in a court of law.[233]

The political value of the rights label persists despite the fact that, in the past several decades, "rights-talk" has come under attack from both right and left wing intellectuals.[234] In part, the persistence of the value of rights discourse should be attributed to the fact that the power of this discourse extends far beyond elite institutions. The language of rights is compelling to the American public even if it is not in vogue among legal scholars, just as appeals to constitutional rights can be compelling to the public even when they would not sway the courts.

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230. Larry Kramer, *Generating Constitutional Meaning*, 94 CAL. L. REV. 1439, 1444–45 (2006). *Accord* GLENDON, *supra* note 226, at 101–02 (discussing the important role that legal language plays in shaping Americans' views, and arguing that Americans regard legal norms—especially constitutional law norms—as "expressions of minimal common values").

231. Kramer, *supra* note 230, at 1445.

232. *Cf. id.* at 1445. ("[T]o say that a social movement must appeal by arguments that are recognizably legal in form is not to say that these arguments will satisfy a court, or even a lawyer or law professor. . . . Popular understandings of what constitutes a proper or persuasive legal argument may diverge from those of the profession without ceasing to be legal in the relevant sense."); *see also* Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POL'Y FORUM 185, 191–98 (2003) (discussing how arguments that there is a constitutional right to a clean environment continue to have persuasive value in the policy world despite their rejection by the courts).

233. *See* Herman Schwartz, *The Wisdom and Enforceability of Welfare Rights as Constitutional Rights*, 8 HUM. RTS. BRIEF 2, 3 (2001). Schwartz explains that:

> [T]he presence of rights in a constitution [does not] require[] that they be *judicially* enforceable for them to be meaningful. There is also *political* enforceability. An obligation that is constitutionally mandated will have more persuasive force in debates over budget and other priorities than something that is completely discretionary with the legislature. Proponents of universal health care and those concerned about the poor and needy might have fared better in the health care debates if health care and welfare were considered matters of constitutional right.

Id.

234. Martha Minow summarized this two-sided attack nicely in 1987, when she wrote:

> Rights are under attack. Some conservatives criticize the expansion of rights for lacking a legitimate basis, for contributing to adversariness and social conflict, or for undermining respect for law. Some left-leaning scholars criticize rights because they are incoherent and indeterminate, or because they fail to promote community and responsibility. Whatever the reason, rights criticism abounds.

Minow, *supra* note 227, at 1860.

What does this mean for elder protection policy? First, it means that it matters whether we label the burdens that elder protection systems pose on older adults as burdening those adults' "rights" or simply burdening their "autonomy" or "self-determination." Second, it means that it matters whether we label the burdens that such systems pose as burdening unspecified "rights" or whether we identify them as burdening "legal rights" or "constitutional rights." Thus, recognizing the burden that elder protection systems impose on constitutionally protected rights has, at the very least, significant rhetorical and persuasive value.

By contrast, failing to recognize or acknowledge such burdens allows for the adoption of statutes that conflict with widely held beliefs about the importance of individual rights. The design of many of the mandatory elder abuse reporting laws illustrates this well. An environment in which constitutional rights implications were overlooked facilitated the adoption of mandatory reporting statutes that significantly undermine elders' privacy interests. Because the impact that such laws have on autonomy has been described only in ethical and moral terms, and not identified as a constitutional rights concern, it has been easy to dismiss this impact by treating it merely as one of many factors to be considered in determining the relative wisdom of such statutes. Consistent with this approach, for example, one scholar critiquing laws requiring attorneys to report financial abuse of the elderly concluded that such laws are appropriate and desirable as long as they result in "some" reports of "suspected" abuse being made that otherwise would not be made.[235]

Given the extent to which labeling something as burdening a right carries moral and rhetorical value in modern American society, it seems reasonable to posit that were such burdens made obvious, policymakers would be far less willing to create the type of heavily paternalistic elder protection system that is currently common.[236] This would not only mean significant changes in the mandatory reporting and sexual mistreatment statutes discussed earlier in this Article, but also changes to other laws designed to protect elders. The two case studies are merely examples of

235. Carolyn L. Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?*, 38 AKRON L. REV. 707, 722–23 (2005) (concluding that there is "no reason to do away with [mandatory reporting of suspected abuse by attorneys] if some reports of suspected abuse are made that would otherwise not be made").

236. The history and development of the disability rights movement provides a good example of how viewing laws designed to help disadvantaged populations through a civil rights lens can result in dramatically different policies than viewing them through a social welfare lens. *See generally* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004) (discussing the history and impact of the anti-discrimination strategy adopted by disability rights advocates).

types of elder protection statutes that undermine the constitutional rights of the elderly. Another example would be statutes that allow services to be involuntarily imposed on victims of elder mistreatment.[237]

A move toward less paternalistic elder protection systems would be beneficial to older adults. Burdening individuals' constitutional rights has the potential to impact significantly their quality of life. For example, the right to informational privacy that is undermined by mandatory reporting statutes serves multiple purposes: it enables individuals to avoid unwanted embarrassment, allows individuals to modulate their intimacy and relationships with others through selective self-disclosure, and helps individuals avert misuse of their personal information.[238] Moreover, denying such rights to older adults not only denies them the benefits of those rights, it also undermines their basic human dignity. It indicates that society views them as something less than full members of the community. This is both morally unacceptable and functionally counterproductive if the aim is to prevent or treat elder abuse. Undermining human dignity is inconsistent with victim empowerment, an important strategy for working with mistreated elders; it is also inconsistent with combating ageism, which is often cited as a "cause" of elder mistreatment.[239]

B. An Alternative, Rights-Conscious Framework

Identifying the burdens that elder protection systems impose on older adults' constitutional rights thus has the potential to change the nature and tone of the debate over how to address the problem of elder mistreatment. This, in turn, paves the way for new approaches to addressing elder mistreatment—approaches that seek to protect older adults while respecting their constitutional interests.

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237. Pennsylvania, for example, allows the provision of protective services where "the person to be protected is at imminent risk of death or serious physical harm" and the person is at least sixty years of age. *See* PA. CONS. STAT. ANN. §§ 10225.307(a), 10225.103 (West 2007). Pennsylvania does not appear to have codified any other procedures that would cover emergency provision of services for adults under the age of sixty. This may be because, unlike most other states, APS in Pennsylvania only services individuals age sixty and over.

238. *See* Kang, *supra* note 57, at 1212–17 (explaining the values that informational privacy protects in the modern era); Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968) (exploring the values that privacy protects, and explaining why the ability to control the dissemination of information about the self is an essential component of privacy).

239. *Cf.* Faulkner, *supra* note 48, at 90 ("[M]andatory reporting may, in fact, increase the potential for abuse by further infantilizing the elder adult's position in society.").

Once one adopts a rights-aware approach to elder mistreatment policymaking, the child abuse framework, upon which elder abuse legislation for so long has been modeled,[240] seems an inappropriate frame of reference. Children have significantly fewer legal rights than adults, and the government is understood by the courts to be generally freer to regulate children's rights than it is adults' rights.[241] Thus, looking at elder mistreatment policy through a constitutional rights lens suggests that heavily paternalistic approaches that might seem unobjectionable in the child abuse context can nevertheless be highly problematic when applied to persons who have attained adulthood, as have all victims of elder abuse. Unfortunately, the common use of the child abuse model, combined with a dose of ageism[242]—a key component of which is the tendency to infantilize the elderly by attributing child-like characteristics to them[243]—has created a current environment in which the potential unsuitability and overbreadth of such policies can easily be overlooked. Labeling the burdens such laws impose on the constitutional rights of older adults, by comparison, helps create an environment in which this unsuitability and overbreadth can finally be seen and the need for an alternative model can finally become apparent.

A rights-aware approach to elder mistreatment policy will thus require policymakers to seek new frames of reference. Perhaps the most relevant and useful alternative is the domestic violence framework.[244] Although it

240. While the model continues to exert powerful influence, it has been a source of dissatisfaction for more than two decades. *See id.*; Crystal, *supra* note 52, at 334–35.

241. There is a wealth of Supreme Court precedent on this point. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 482 (1989) (Kennedy, J., concurring) ("The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent."); Bellotti v. Baird, 443 U.S. 622, 634 (1978) (opinion of Justice Powell) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.").

242. The term "ageism" was first coined in 1969. *See* Robert Butler, *Ageism: Another form of Bigotry*, 9 GERONTOLOGIST 243 (1969) (originating the term). It is generally used to refer to stereotyping and discriminating against a particular age group. *Cf.* EDMAN B. PALMORE, AGEISM: NEGATIVE AND POSITIVE 4 (2d ed. 1999) (discussing competing definitions of ageism).

243. *See* Arnold Arluke & Jack Levin, *Another Stereotype: Old Age as a Second Childhood*, AGING, Aug.–Sept. 1984, at 7 (showing the pervasiveness of the "second childhood" stereotype by describing how older adults are treated as and depicted as being like children). *See also* EGLIT, *supra* note 161, at 11–12 (discussing imagery depicting older adults as children). The author was remiss in using the phrase "Second Childhood" to title an earlier article without providing an explicit critique of the stereotype.

244. The current tendency to ignore the domestic violence system as a model for elder protection systems is ironic given the women's rights movement and its examination and public discussion of

was long overlooked by elder protection advocates,[245] the domestic violence framework is increasingly being recognized as informative for two primary reasons.[246] First, many instances of elder mistreatment involve the same type of intimate partner abuse that is seen among younger adults in domestic violence situations.[247] Indeed, many instances of elder mistreatment could also be appropriately characterized as instances of domestic violence. Second, research suggests that the risk factors for elder abuse, even in situations where the perpetrator is not an intimate partner, are quite similar to those for domestic violence. Caregiver stress was for a long time cited as a primary cause of elder abuse, [248] and this was used to justify treating elder abuse as something

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oppressive intra-family relations has been credited with creating a climate in which elder mistreatment could be made visible. *See* WOLF & PILLEMER, HELPING, *supra* note 50, at 7.

245. Connections between domestic violence and elder abuse were first made in the late 1980s. *See* BRANDL ET AL., *supra* note 13. Since that time, the idea of looking to domestic violence has been suggested numerous times, although the civil rights implications of such a shift have not previously been fully fleshed out.

246. Most commonly, the domestic violence framework is described as informative for understanding and addressing intimate partner violence later in life. *See, e.g.*, Deb Spangler & Bonnie Brandl, *Abuse in Later Life: Power and Control Dynamics and a Victim-Centered Response*, 12 J. AM. PSYCH. NURSES ASSOC. 322 (2007) (explaining how strategies used to assist younger domestic violence victims could also assist elderly victims of domestic violence); David A. Wolfe, *Elder Abuse Intervention: Lessons from Child Abuse & Domestic Violence Initiatives*, *in* ELDER MISTREATMENT, *supra* note 1, at 501 (looking to domestic violence interventions to inform elder abuse policy); Bonnie Brandl, *Power and Control: Understanding Domestic Violence Later in Life*, 24 GENERATIONS 39 (2002) (arguing in favor of using the power and control model developed in the domestic violence arena to address domestic violence later in life). Recently, however, one commenter suggested that the domestic violence model should be used to address all forms of elder mistreatment. *See* Joseph W. Barber, Note, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L.J. 107 (2008) (arguing that "[t]o effectively confront the problem of elder abuse, states should . . . approach elder abuse and mistreatment in a manner similar to their approaches to domestic violence" and sanguinely suggesting that if this is done "elder abuse may eventually be a thing of the past").

247. *See, e.g.*, Macolini, *supra* note 48, at 352 ("Elder abuse shares more characteristics in common with domestic violence than with child abuse."); Sarah B. Harris, *For Better or Worse: Spouse Abuse Grown Old*, 8 J. ELDER ABUSE & NEGLECT 1 (1996) (in a study examining domestic violence later in life, concluding that domestic violence later in life looks much like domestic abuse among younger adults and thus that "elder abuse" is not necessarily an age-related phenomenon). *But see* Patricia A. Bomba, *Use of a Single Page Assessment and Management Tool: A Practical Clinician's Approach to Identifying Elder Mistreatment*, *in* ELDER ABUSE & MISTREATMENT: POLICY, PRACTICE & RESEARCH, *supra* note 20, at 105 (arguing that elder abuse should be framed as a "geriatric syndrome").

248. *See* Linda R. Phillips, *Theoretical Explanation of Elder Abuse: Competing Hypotheses & Unresolved Issues*, *in* ELDER ABUSE: CONFLICT IN THE FAMILY, *supra* note 52, at 198 (explaining that the "situational model" was the first model to be developed for explaining elder abuse and that the "basic premise of the situational model is that as the stress associated with certain situational and/or structural factors increases for the abuser, the likelihood increases of abusive acts directed at a vulnerable individual who is seen as being associated with the stress").

different than domestic violence.[249] More recent research indicates, however, that caregiver stress is a poor explanation for mistreatment and is not a factor in the majority of instances.[250]

Using the domestic violence framework as a point of reference would facilitate policy choices that are significantly more sensitive to the rights of older adults. Law reform efforts in the domestic violence arena have been shaped by the power and control model for explaining domestic violence.[251] This model, currently the dominant causal explanation for domestic violence,[252] posits that such violence results from a perpetrator's desire to maintain power and control over a victim. Adherents of the model therefore advocate victim empowerment as a strategy for breaking harmful patterns in which the perpetrator uses abuse as a tool for exerting power and control over the victim.[253] Consistent with this victim empowerment focus, victim choices are valued—not because those choices are necessarily wise but simply because they are the victim's own. As such, use of the power and control model tends to limit the adoption of policies that restrict victim self-determination to situations in which the state has a very strong interest in doing so.

The Wisconsin mandatory elder abuse reporting scheme, arguably the nation's least constitutionally problematic, shows how this type of victim empowerment focus can positively affect the design of elder protection

249. Pillemer and Wolf's important contribution to the early elder abuse literature, *Elder Abuse: Conflict in the Family*, provides a good example of how a caregiver stress explanation for elder abuse shaped policy choices. In most of Part III of the edited volume, the chapter authors embrace the "situational model" described in the previous footnote. Consistent with this approach, these authors advocate for addressing elder mistreatment by supporting caregivers. *See* ELDER ABUSE: CONFLICT IN THE FAMILY, *supra* note 52; *see also* BRANDL ET AL., *supra* note 13 (describing how the caregiver stress explanation has led to inappropriate responses to elder mistreatment).

250. *See* BRANDL ET AL., *supra* note 13, at 38–39.

251. *See, e.g.*, Sally F. Golfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487 (2008) (using the power and control explanation for domestic violence to build an argument for reforming civil protection order laws in order to give victims greater say in shaping such orders).

252. *See* Alafair S. Burke, *Domestic Violence as a Crime of Pattern & Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007) ("[S]ocial scientists almost universally describe domestic violence as an ongoing pattern of conduct motivated by the batterer's desire for power and control over the victim."). The power and control model is not, of course, the only theoretical explanation for domestic violence. *See* ALISON CUNNINGHAM ET AL., THEORY-DRIVEN EXPLANATIONS OF MALE VIOLENCE AGAINST FEMALE PARTNERS: LITERATURE UPDATE AND RELATED IMPLICATIONS FOR TREATMENT AND EVALUATION (1998) (discussing competing theories of domestic violence, including the power and control model).

253. By contrast, like child protection systems, approaches to addressing elder mistreatment tend to focus on protecting, not empowering, the victim of that mistreatment. Consistent with this fundamental divide, mandatory reporting—a policy that prioritizes protection of victims over victim self-determination—is now the backbone of states' responses to elder abuse, whereas it is virtually non-existent in the domestic violence context unless the victim meets vulnerability criteria.

policies. Wisconsin's mandatory reporting requirements, adopted in 2006, were designed by experts with extensive knowledge of domestic violence issues who recognized that a significant portion of elder abuse is also domestic violence.[254] Consistent with this background, they embraced a power and control model for explaining many instances of elder abuse and a corresponding victim empowerment model for responding to it.[255] The result was a very limited mandatory reporting scheme. Whereas most reporting schemes require reporting as long as the victim fits into a statutorily defined category of person and the reporter has a reasonable suspicion of mistreatment, Wisconsin limits reporting requirements to those situations that meet two additional conditions: (1) the alleged victim is at imminent risk of a serious harm, and (2) the alleged victim cannot "make an informed judgment about whether to report the risk."[256] An exception is only made where other victims are at risk.[257] Thus, Wisconsin requires an invasion of the alleged victim's privacy interest only in situations where the state has a very strong interest.

Although looking to the domestic violence framework for legislative guidance can thus be expected to result in an approach to elder protection

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254. Telephone interview with Jane Raymond, Advocacy & Protection Sys. Developer, Wis. Dep't of Health & Family Servs. (Aug. 11 2008); Telephone interview with Betsy Abramson (Aug. 13, 2008) (Wisconsin attorney involved in drafting the 2006 reforms).

255. Wisconsin is explicit in incorporating domestic violence concepts and victim empowerment strategies into its elder protection system. A summary of the state's approach to mandatory reporting made available by the state specifically justifies that approach using the following explanation: "While originally researchers believed that the majority of elder abuse was caused by 'caregiver stress,' more recent studies conclude that most elder abuse is a result of the same 'power and control' factors as is other domestic violence." BETSY ABRAMSON, WISCONSIN'S ELDER ABUSE & ADULT AT RISK REPORTING LAW (2006), *available at* http://www.cwag.org/uploads/Guardianship%20Support%20Center/Legis%20update%20Adult%20at%20Risk%20Laws%20BETSY%2010-06.pdf. Similarly, Wisconsin's Department of Health and Family Services offered the following guidance to facilities that work with older adults:

> The rationale for an entity to potentially not report an incident of domestic violence in later life to an external agency is based on the need for victim safety (trusting the victim to know what is best for him/her) and the principles of self-determination and empowerment. When an incident of domestic violence in later life involves a competent victim and the event does not constitute a crime . . . , then the facility may defer to the wishes of how the victim would want to proceed. . . . In these circumstances an empowerment model of offering information, options and assistance is much more likely to be successful and not put the victim at greater risk. Find out what the victim wants to have happen and support those decisions as best you can. Victims of abuse can benefit simply from being heard, believed and supported. Identify ways that the victim can increase safety when the abuser visits.

DIVISION OF DISABILITY AND ELDER SERVICES, WIS. DEP'T OF HEALTH AND FAMILY SERVS., DDES INFO MEMO 2004-03 (June 22, 2004), *available at* http://dhs.wisconsin.gov/dsl_info/InfoMemos/DDES/CY_2004/InfoMemo2004-03.htm (internal formatting omitted).

256. *See* WIS. STAT. ANN. § 46.90(4) (West Supp. 2008).

257. *See id.*

that is more sensitive to constitutional rights concerns, it is only a partial solution. There are times when interventions designed to address domestic violence among younger adults may be ill-suited to domestic violence later in life. Domestic violence interventions, for example, are generally designed for victims who have the requisite mental capacity to understand the nature and consequences of their mistreatment and to seek help. Many victims of elder mistreatment, however, have significantly diminished mental capacity.[258] Effective systems for addressing their abuse or neglect will have to take this reality into account. If they do not, they will be unable to effectively address elder mistreatment.

Designing legislative or regulatory responses to elder mistreatment that sufficiently respect the rights of older adults therefore requires more than simply borrowing an existing framework from the domestic violence arena. It requires policymakers to actively analyze the rights implications of potential elder mistreatment interventions, and to be willing to reject those interventions that impose unreasonable burdens on older adults' constitutional interests.

This goal could be operationalized through a relatively simple two-step method for evaluating whether a proposed intervention unreasonably burdens constitutional interests. The first step is to identify and characterize any rights impacted by a proposed statute or regulation. If a right is implicated, the proposal should be rejected unless it satisfies Dworkin's three-step test for determining whether a right may be burdened.[259] Specifically, it should be rejected unless either (1) the values protected by the right are not at stake or are only at stake in some "attenuated" form, (2) another individual has a competing right of equal or greater importance that would otherwise be abridged, or (3) not abridging the right would result in a cost to society of a degree far beyond the cost to the right at issue. Although defining what constitutes a "right" inevitably creates grounds for dispute,[260] for the purposes of evaluating potential elder mistreatment interventions the list should, at a minimum, include individual interests protected by the federal Constitution. Constitutionally protected rights are, especially given the important moral weight the Constitution carries in today's society, a good proxy for those rights society sees as most fundamental.

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258. *See* BRANDL ET AL., *supra* note 13, at 20 (noting that dementia is an independent risk factor for elder mistreatment).

259. *See* DWORKIN, *supra* note 224, at 200.

260. Indeed, this is a primary criticism of Dworkin's theory of rights, as he has recognized. *See id.* at 365–67.

Thus, step one requires rejection of any intervention that undermines a constitutionally protected individual right without a strong government justification for doing so. This would result in the rejection of some statutes that the courts would uphold against constitutional challenge. It is, however, preferable to err by over-protecting constitutional rights than by under-protecting them.[261] This is especially true in the context of elder mistreatment interventions because the underlying aim of such interventions is to protect rights of older adults—that is, to protect older adults from those who would deny them their rights, whether through abuse, neglect, or exploitation.

Should the proposed policy or law survive step one, step two entails identifying the population whose rights may be limited under the proposal. If it would be politically or morally acceptable to limit the rights of all persons in the way that the proposal would limit the rights of the targeted group, the proposal should be considered to lack any significant civil rights concern and may be adopted.[262] However, if it would not be acceptable to impose such burdens on all people, then the policymaker must determine whether there is something sufficiently different about the targeted group to make it legitimate for the state to selectively deny that group rights that the state would not deny to others. If there is not, the proposal should be rejected despite its potential benefits, and alternative mechanisms for achieving the underlying policy goal should be pursued instead.

Step two is necessary because arguably the most fundamental right a person has is the right to be treated as worthy of concern and respect equal to that of other similarly situated persons.[263] Thus, policies that selectively limit the rights of certain groups should be subjected to particularly close scrutiny.[264] Such close scrutiny is unlikely to be considered constitutionally mandated in the elder mistreatment context because the courts have consistently refused to treat old age as a suspect classification for equal protection purposes.[265] Nevertheless, close scrutiny akin to that

261. This is, of course, consistent with a Dworkinian approach to rights. *See id*. at 199.

262. This is not to suggest that the fact that a proposal poses no significant civil rights concerns makes it sensible or effective policy.

263. *See* DWORKIN, *supra* note 224, at 273 (arguing that this is the most fundamental of rights); *see also* RONALD DWORKIN, SOVEREIGN VIRTUE 1 (2000) (declaring "equal concern" to be "the sovereign virtue of political community—without it government is only tyranny").

264. Some might argue that step two is redundant if one considers the right to equal treatment in step one. Although some redundancies might result from the two-step process, given the importance of equal treatment, a separate line of analysis focusing attention on this issue is nevertheless worthwhile.

265. As discussed *supra* notes 120–21 and accompanying text, there may be reason to revisit this refusal.

which courts employ when scrutinizing constitutionally suspect classifications is desirable in this context because there is particular risk that policies that selectively target older adults for rights limitations will do so in an unreasonable manner. If older adults are seen as no longer engaged in the community or as no longer experiencing a valuable existence—as studies of ageist attitudes have shown to be the perception—limiting their liberties might be seen as largely harmless and inconsequential.[266] Accordingly, special vigilance is appropriate where older adults are targeted for "assistance" that has not, or would not, be offered to younger adults.

In short, taking the rights of older adults seriously requires stepping away from the child abuse model. The domestic violence framework provides a useful alternative framework for those seeking a more victim-centered, civil rights-friendly approach. However, systems designed to address domestic violence should not simply be copied by those seeking to address elder mistreatment. Although these systems can inform elder abuse interventions, a civil rights-focused approach to addressing elder mistreatment requires potential interventions to be evaluated in light of the extent to which they burden specific civil rights and in light of the extent to which they treat individuals with equal dignity and concern. Using the proposed two-step approach for doing this would greatly improve the likelihood that the civil rights implications of elder mistreatment interventions are appreciated and that the right Dworkin identifies as the most fundamental—that to equal concern and respect—is given special consideration.

VI. CONCLUSION

Although elder protection statutes have rapidly proliferated throughout the nation for nearly three decades, and countless elders have been subjected to their provisions, this is the first article to seriously challenge their legal permissibility. This Article has demonstrated that elder protection systems as currently designed can impose significant costs on the civil rights of older adults. For example, in many states, older adults face the prospect of not being able to engage in certain confidential communications or to freely choose with whom to be intimate merely as a

266. For example, if older adults are seen as no longer being sexual beings, limiting their sexual freedom is unlikely to be perceived as troubling. Rather, limiting sexual freedom may merely be seen as a way to protect such individuals from something they do not—and perhaps should not—desire in the first place.

result of their chronological age or age-associated disabilities. Imposing such limitations on older adults in the name of protecting them is not only counterproductive, morally suspect, and ethically questionable, but also raises serious legal concerns. In many cases, such limitations burden legally-protected rights, and a subset of those limitations are so unreasonable that the courts should find them to be unconstitutional.

Recognizing and describing the costs that current elder protection systems impose on older adults' constitutional rights has the potential to change the tone and nature of the debate over how to prevent and respond to elder mistreatment. For too long, elder protection legislation has infantilized older adults, unjustifiably depriving them of important civil rights in the name of protecting them and, in the process, undermining their basic human dignity. The language of "rights" and especially of "constitutional rights" has very significant rhetorical power. It is time to use this power to generate the momentum needed to reform elder protection systems.