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DEATH AND DEEPROOT: ELDER FINANCIAL ABUSE IN THE TWENTY-FIRST CENTURY

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INTRODUCTION

Nolan was a rocket scientist—literally.[1] Nolan joined the Air National Guard in 1953 and the Air Force in 1956. He was trained to work on F-89 fighter aircraft but transferred to the Missile Command where, for 10 years, he worked as a controller in the underground missile program during the Cold War. He earned an Aerospace Engineering degree awaiting orders to fire on Cuba—again, literally.

In August 1965, Nolan and his wife, Lois, along with their two boys, moved to Greenville, Texas, after Nolan was hired by Ling-Temco-Vought, Inc. (LTV),[2] to design and build a long-range radar system that was to be placed in Turkey to monitor Russian military activity. When Nolan was informed a year later that the company intended to send him to Turkey to install and operate the system, he decided to leave LTV for something a little closer to home. He and Lois moved their family to Houston, Texas, where they welcomed their third son.

In Houston, Nolan went to work for Lockheed at the Johnson Space Center, designing navigation systems for NASA's manned spaceflight program. Though he was excluded from the astronaut program himself at least in part because of his stature (Nolan was around 6 foot 4 inches and 225 pounds in those days), he rubbed shoulders with the men whose names have become synonymous with those first days of space flight and pioneering forays to the moon.

Suffice it to say Nolan was an extremely smart man.

However, toward the end of his life, Nolan also was a particularly unhealthy man. He was diabetic and, after a quadruple bypass in 2014 led to kidney failure, he received dialysis three times a week. He had circulation problems and couldn't walk well, and he partially lost his ability to speak after a bout with cancer along his tongue and jaw.

[1] In the interest of full disclosure (and in acknowledgment of bias), Nolan was the author's grandfather. The history of his life is based on his own accounts, along with those of the author's father and uncle. His military service has been confirmed through his discharge paperwork. And, of course, there are pieces the author herself witnessed that led her to pursue this topic.

[2] For a more in-depth look at LTV's work during the 1960s, see "The How-To Men of LTV Electrosystems, Inc," https://texasarchive.org/2013_00639. Based on Nolan's description of his work, the family suspects, though cannot confirm, he worked on a project similar to the one mentioned around 8:40. The project almost certainly would have been classified at the time LTV released the video, and Nolan, of course, had no records detailing the nature of his work.

When the cancer returned in the fall of 2020, his health had declined to such a degree that he was no longer a candidate for treatment and was faced with the unfathomable choice of having to decide whether to let the cancer kill him or to simply cease dialysis and slowly slip away. So he decided.

This story truly begins in the months after Nolan died. In settling his estate, his sons discovered that in 2017, shortly after Nolan reached the age at which he was required to make a relatively large withdrawal from his retirement account, he opened a series of investment accounts—a blend of life insurance policies and individual retirement accounts—through an independent investment advisor.[3] One of those accounts was with an investment fund known as deeproot Funds; this account was labeled by both the advisor and deeproot as being a traditional IRA.

Nolan invested roughly $114,000 in deeproot; his investment advisor took his 10% commission off the top and deposited the rest in three separate deeproot accounts—in a 575 account, in deeproot Funds, and in deeproot Capital Management.

What Nolan's sons soon discovered was there was very little information on these transactions to work with. A document Nolan typed up and emailed to his sons detailing his final wishes referred his sons to the investment advisor who handled his accounts, and he received a certificate of ownership from deeproot Funds (deeproot) stating he had invested. The circumstances of the agreement and what Nolan knew about deeproot was (and remains) unclear.[4] But what was clear is that there was no death benefit on Nolan's deeproot investments, which meant the accounts had to remain open when he died. So without any viable way for Nolan's family to close the accounts, this necessarily meant the 575 account, for example, was several years from maturing—indeed, according to the financial advisor, it was not eligible to be closed until September 2022, nearly two years after Nolan's death.

[3] Nolan's investment advisor will remain unnamed. Nolan's family has not pursued any claims against him and has no intention of doing so. Though this article condemns his behavior, he is legally innocent and deserves relative anonymity until and unless charges are filed against him.

[4] Nolan left behind a password-protected computer but no instructions on how to access it, nor were there instructions (or written permission) for accessing his e-mail accounts, for example, which could have shed light on the events leading up to his investment in deeproot.

On its own, this inability to fully settle Nolan's estate was frustrating for his family. Nolan was in obviously poor health when he invested in deeproot, and it seemed irresponsible, at best, to sell him an investment that would require him to remain alive for years he most likely did not have in him. However, his sons were not particularly concerned, at least at first, about the money remaining in limbo; they were gainfully employed and were not reliant on the funds to pay any of Nolan's bills or any bills of their own. Nolan had seen to it that his cremation and internment were paid in full—he was to be cremated and his ashes placed in a mausoleum with his wife's casket (Lois died in 2000). The money that was available covered his end-of-life expenses. Really, the worst-case scenario was that they would have to transfer ownership of the accounts to themselves and wait out the account terms—which was not at all a bad option if the money earned the dividends promised. But still, it stung a great deal when they learned in 2021 that Nolan's deeproot accounts were empty.

This Comment aims to explore, through a financial lens, one of the many ways elder abuse negatively affects a growing portion of the population through Nolan's experience with deeproot. The first step in this journey is parsing deeproot's operations and the SEC's case against its founder, Robert J. Mueller.[5] Mueller's behavior is crucial to the argument that what the brokers who sold investors on Mueller's companies did rises, in a fair number of cases, to financial abuse of an elder. After defining elder abuse, and financial abuse specifically, the next section will review the status of both state and Federal statutes on the issue and will include discussion of the financial realities faced by a growing and rapidly aging portion of the population. The next section will then propose a change in societal approaches to financial exploitation that is aimed at reducing the stigma associated with financial abuse and encouraging older adults to report exploitation to the authorities. As a corollary, this portion also will discuss increasing the prosecution of financial crimes under state elder abuse laws. The final topic for discussion will be the proposal of a regulation aimed at filling what appears to be a gap in the protection afforded to older Americans' retirement accounts. That is, closer federal regulation of private placements to prevent them from creating time limits that restrict the

[5] *See* Complaint at 1, SEC v. Mueller, No. 21-CV-00785-XR, 2022 WL 818678 (W.D. Tex. Mar. 17, 2022).

disbursement of funds on investment products they sell as traditional individual retirement accounts.

I. THE *OTHER* ROBERT MUELLER

Beginning in 2012, Robert Mueller, a San Antonio-based attorney and investment advisor, formed a series of limited liability corporations.[6] The first was Policy Services, which Mueller formed in Nevada in 2012 but moved to Texas in 2016.[7] Next was deeproot Funds LLC, which was based in San Antonio.[8] Mueller was the sole shareholder in both businesses.[9] Between 2015 and 2020, Mueller formed an additional five businesses and with two co-trustees, his father and stepmother, also formed the MB Hale Ohana Revocable Trust.[10]

In 2014, Mueller and deeproot formed the Growth Runs Deep Fund, LLC (the GRD Fund) and the 575 Fund, LLC (the 575 Fund) as Texas limited liability companies, with Mueller in exclusive control over the drafting and dissemination of private placement memoranda (the legal document provided to prospective investors when selling stock or other securities in a business) and other marketing materials.[11] Together, Mueller and deeproot acted as investment advisors for the funds.[12]

According to Mueller's marketing materials, the 575 Fund gave investors the choice of electing to receive a simple annual interest of 7% to be paid at the end of a five-year term, or 5% simple annual interest to be paid out in monthly installments over the course of the same five-year term.[13] These funds were to be used to purchase life insurance policies and as investments in deeproot-affiliated businesses.[14] The GRD Fund offered investors a more nebulous opportunity: they

[6] *Id.* at 6.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 7, 18.

[11] Complaint, *supra* note 5, at 8.

[12] *Id.*

[13] *Id.* at 10.

[14] *Id.* at 8-9.

committed their principal investment for an unspecified amount of time with the potential to earn a larger payout based on a complex redemption process sometime in the future.[15] These funds also were to be used to purchase life insurance policies and as investments in deeproot-affiliated businesses.[16]

Deeproot's life insurance model was based on consumers' ability to accept a cash settlement of their policies while they are still alive—in other words, consumers can sell their policies to third parties for cash, or a life settlement.[17] Deeproot then purchased consumers' death benefit interests in the policies, which would have allowed deeproot and its affiliated funds to receive a cash payout when the consumers eventually died.[18] The risk was largely in deeproot's subsequent responsibility for the insurance premiums on the policies it purchased.[19] There was no guarantee the consumer would die and deeproot would be able to collect on the policy before the funds ran out of money; but in theory, if deeproot did what it said it would and continued attracting investors, there should have been an eventual return on consumers' investments. As such, to the average investor who was capable of doing basic research, the funds probably seemed like relatively safe investments—a certain amount of risk is inherent to investing, but everyone dies, after all—and Mueller himself assured investors that he and deeproot would be unable "to raid the piggy bank" because the funds would be purchasing the life insurance policies from Policy Services.[20]

According to the SEC, however, that is exactly what Mueller was doing.[21]

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[15] *Id.* at 10.

[16] *Id.* at 8-9.

[17] *See* Complaint, *supra* note 5, at 8-9; *Selling Your Life Insurance Policy*, NAT'L ASS'N OF INS. COMM'RS, https://content.naic.org/sites/default/files/publications-consumer-life-settlement.pdf (last accessed Nov. 12, 2022).

[18] Complaint, *supra* note 5, at 8.

[19] Chorus Nylander, *N4T Investigators: Investors blame Tucson financial advisor for losing money to alleged Ponzi scheme*, NEWS 4 TUCSON (Mar. 17, 2022), https://www.kvoa.com/news/n4t-investigators-investors-blame-tucson-financial-advisor-for-losing-money-to-alleged-ponzi scheme/article_c17b8a6a-a648-11ec-972a-679fae77ffda.html.

[20] Complaint, *supra* note 5, at 11.

[21] *Id.* at 3.

In its first two years, deeproot received more than $15 million from investors in the 575 and GRD funds and spent approximately $10 million on life insurance policies.[22] In September 2017, however, the funds stopped purchasing life insurance policies even as they continued recruiting new investors—they raised another $43 million from October 2017 to February 2021.[23]

The remaining question is an obvious one: Where did the money go?

A. The Tea

Mueller, during deeproot's lifespan, spent more than a million dollars of investor money on, among other things, vacations, art, his children's private school tuition, season tickets for an area professional sports team, and personal medical and dental bills.[24] In 2016, he spent $135,000 from a Policy Services bank account on a condominium in Kauai, Hawaii, which was titled in the name of MB Hale Ohana Revocable Trust.[25] He also spent quite a lot of money on wives.[26] He paid for his second wedding, his second divorce, and a wedding to his third wife, along with jewelry for each woman, including engagement rings and wedding bands, using investor money.[27]

Mueller and one of his wives also used credit cards in the name of one of the deeproot businesses to incur "vast personal expenses," which Mueller then paid using Policy Services's bank accounts that were under his sole control and were funded, again, almost exclusively with investor money.[28]

The rest of the money was tied up in what the SEC alleges was a Ponzi-like scheme.[29] The name "Ponzi scheme" has its origins with a con artist named Charles Ponzi, who promised investors a 50% return on their investments in ninety days—he was arrested and sentenced to

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[22] *Id.*

[23] *Id.*

[24] *Id.* at 17-18.

[25] *Id.* at 4.

[26] *See* Complaint, *supra* note 5, at 4.

[27] *Id.*

[28] *Id.* at 17.

[29] *Id.* at 12.

fourteen years in prison in 1920[30] after he swindled investors out of millions of dollars.[31] Ponzi schemes usually are run by a central figure—Mueller, in deeproot's case—who uses the money from new investors to pay the promised returns to older investors.[32] No profits are actually being made, but as long as there has not been a default on payments, the business still seems sound enough to continue drawing new investors.[33] The person running the operation typically takes the remaining money or uses it to expand the business.[34] Over time, operations like these usually are not sustainable and end when new investors become difficult to find:[35] The money runs out, payments to investors cease, and the scheme collapses.[36]

Perhaps the most infamous Ponzi scheme in American history is the case of Bernie Madoff.[37] Madoff, who died in prison in 2021 at the age of eighty-two, carried out one of the biggest frauds in American history, taking investors for more than $50 billion between 1960 and 2008.[38] His victims, many of whom have never received any compensation for their losses, numbered in the thousands and included pension funds, foundations, a philanthropy established by Holocaust survivor Elie Wiesel, and a number of household-name celebrities such as Kevin Bacon and Kyra Sedgwick.[39] Ultimately, the scheme collapsed

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[30] Stephanie Yang & Grace Kay, *Bernie Madoff died in prison after carrying out the largest Ponzi scheme in history - here's how it worked*, BUS. INSIDER (Apr. 15, 2021, 12:23 AM), https://www.businessinsider.in/finance/news/bernie-madoff-died-in-prison-after-carrying-out-the-largest-ponzi-scheme-in-history-heres-how-it-worked/articleshow/82072614.cms.

[31] Angela Wang, *In the Decade Since Madoff, Ponzi Schemers Try New Tactics*, N.Y. TIMES (Sept. 22, 2019), https://www.nytimes.com/2019/09/22/business/ponzi-scheme-bernie-madoff.html.

[32] Yang & Kay, *supra* note 30.

[33] *See id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Breeanna Hare & Marika Gerken, *8 of the most notorious Ponzi schemes in US history*, CNN (Apr. 24, 2021, 8:10 AM), https://www.cnn.com/2021/04/24/business/famous-ponzi-schemes-generation-hustle/index.html.

[38] Wang, *supra* note 31.

[39] Katie Benner, *Victims of Bernard Madoff's Ponzi Scheme to Receive Millions More*, N.Y. TIMES (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/business/madoff-ponzi-scheme-

when Madoff confessed to his sons that the business was a fraud—he owed roughly $7 billion in returns but had only $200 million to $300 million left to give.[40] Madoff's family notified the authorities, and Madoff was arrested.[41]

According to the SEC, Mueller executed a similarly formulated scheme through which he paid older investors using new investors' money.[42] The 575 Fund, which was supposed to invest most of its assets in life insurance policies, never owned any policies outright, but purchased securities in them through the GRD Fund, which had purchased the policies from another of Mueller's companies, Policy Services.[43] 575 investors who elected to receive monthly payouts were paid using money Mueller and deeproot raised through new investors; everyone else simply received periodic statements reporting their earnings.[44] In total, deeproot businesses purchased roughly $10 million in life insurance policies, but the remaining funds were used, as noted above, to pay Mueller's personal expenses or were channeled into the affiliate businesses,[45] including deeproot Pinball, which in 2020 recruited an internationally-ranked pinball player to help launch its first game, Retro Atomic Zombie Adventureland.[46]

Between August and November 2020, in the absence of new investors, Mueller and deeproot missed payments to most of the 575 investors who had elected to receive their dividends on a monthly basis.[47] In a letter to those investors dated August 22, 2020, Mueller blamed the COVID-19 pandemic for the "disruptions to cash flow" but assured investors the company typically maintained reserves "for things like

compensation.html.

[40] *Id.*; Yang & Kay, *supra* note 30.

[41] Benner, *supra* note 39.

[42] Complaint, *supra* note 5, at 15.

[43] *Id.* at 8-9.

[44] *Id.* at 2-3, 13.

[45] *Id.* at 3.

[46] Rene Guzman, *Puro Pinball Wizard*, SAN ANTONIO EXPRESS-NEWS (Mar. 5, 2020, 11:29 AM), https://www.expressnews.com/entertainment/article/World-ranked-pinball-wizard-is-reviving-the-game-15102514.php. The SEC's case against Mueller was filed August 20, 2021, and the game never went to market. Complaint, *supra* note 5, at 1.

[47] Complaint, *supra* note 5, at 14.

this."[48] There was no explanation for why payments were not made using those reserves.[49] In a second letter to these same investors, dated September 30, 2020, Mueller again cited the pandemic for the missed payments, but this time he also blamed it for the depletion of deeproot's reserves.[50]

Payments resumed November 30, 2020, after Mueller obtained third-party loans, secured by deeproot assets, to pay them—there were no new investors in the funds and Mueller could not sustain the Ponzi structure.[51] According to the SEC, Mueller never informed GRD investors or those 575 investors who elected to receive their dividends when their accounts matured that the funds were depleted.[52] Neither he nor the funds ever maintained cash reserves.[53]

It was at around this same time that Nolan died.

B. It's Not Rocket Science

At the heart of what happened to Nolan is what should be considered a breach of fiduciary duty by both his financial advisor and Mueller. While the SEC has Mueller in its crosshairs, less attention has been paid to the investment advisors who peddled deeproot as a viable investment option.[54] The funds were speculative, unregistered private investments, which made them high-risk[55]—private placements generally are not subject to a number of the laws and regulations that

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[48] *Id.*

[49] *See id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Complaint, *supra* note 5, at 14.

[54] The author has so far located only a single case against an investment advisor in the Houston area. *See* Donaldson v. Vallier, No. 202213962 (125th Dist. Ct., Harris County, Tex. filed Mar. 8, 2022) (Westlaw, Dockets); *see also* Marian Johns, *Investor claims he was fraudulently sold high risk investment by unregistered firm, advisor*, SE. TEX. REC., (Mar. 14, 2022), https://setexasrecord.com/stories/621740443-investor-claims-he-was-fraudulently-sold-high-risk-investment-by-unregistered-firm-advisor.

[55] *See Options Exist for DeepRoot Funds Investor Victims to Recover Their Losses*, STOLTMANN L. (Oct. 5, 2021), https://stoltmannlaw.com/options-exist-for-deeproot-funds-investor-victims-to-recover-their-losses/.

are designed to protect investors in registered, publicly offered companies, including comprehensive financial disclosures.[56]

Under 17 C.F.R. § 230.506, a portion of the law commonly known as Regulation D of the Securities Act of 1933, deeproot was required to ensure its nonaccredited investors—typically individuals who make less than $200,000 annually and have a total net worth of less than $1 million, excluding their primary residence[57]—were sophisticated enough to evaluate the wisdom of the investment.[58] This requirement could be met by having a purchaser representative, such as an investment advisor, conduct the transaction.[59]

In his healthier days, Nolan most likely would have met the Rule 506 sophistication requirement on his own. In addition to his work with the space program, he owned and managed a network of rental homes that undoubtedly required more than just simple bookkeeping, especially during tax season. He was well off financially and gradually sold off the rental properties as he neared retirement. He was computer literate and more than capable of doing in-depth research on his investments, and he often did. It wasn't rocket science, after all.

Much of that changed, though, as Nolan's health began to fail. There was never any doubt that Nolan remained as intelligent as ever, but he no longer had the stamina to follow every rabbit down its respective rabbit hole. His health troubles began to add up, and holiday gatherings became more consistent as the family, including Nolan himself, began to worry that each one might be the last one they got to spend together. Such was the state of Nolan's health when his investment advisor acted as his purchaser investor and got him involved with deeproot.

According to the *San Antonio Business Journal*, Nolan's financial advisor was among the first financial brokers to push deeproot

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56 *The Trouble with Private Placements Under Regulation D*, THE WHITE L. GRP., https://whitesecuritieslaw.com/the-trouble-with-private-placements-under-regulation-d/ (last visited Nov. 11, 2022).

57 James Chen, *What Is a Non-Accredited Investor?*, INVESTOPEDIA (Aug. 27, 2020), https://www.investopedia.com/terms/n/nonaccreditedinvestor.asp#:~:text=A%20non%2Daccredited%20investor%20is,and%20Exchange%20Commission%20(SEC).

58 *The Trouble with Private Placements Under Regulation D*, *supra* note 56.

59 *See id.*

annuities.[60] Collectively, these brokers accumulated finders' fees, or commissions, of more than $1 million for the GRD and 575 funds over the course of about a year.[61] The advisor Nolan hired made about $10,000 on Nolan's investment alone.

What makes this more than a simple investment—what carries this over the line into exploitation—is that Nolan's advisor should have known better. As a financial advisor, he had an obligation to his clients to investigate deeproot in some depth before he became its shill and sold untold numbers of investors on a product that by all accounts was laden with red flags.[62] Under Texas law, given Nolan's age, this would qualify as financial abuse of an elder.[63]

C. On the Books

Elder abuse is the physical, sexual, psychological, or financial abuse or neglect of a person who is 60 years old or older.[64] The National Council on Aging estimates that approximately 1 in 10 Americans in this age group has experienced some form of elder abuse, with only 1 in 24 cases of abuse of any type reported to authorities.[65] An American study suggested these rates increased significantly during the COVID-19 pandemic, particularly in the community setting (i.e., settings that are not hospitals, nursing homes, or other long-term care facilities).[66]

This is not an area of law for which there are federal criminal statutes; instead, the federal government prosecutes these cases under

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[60] Kristen Mosbrucker, *San Antonio financial advisor raises $15 million from investors*, SAN ANTONIO BUS. J. (Aug. 16, 2017), https://www.bizjournals.com/sanantonio/news/2017/08/16/san-antonio-financial-adviser-raises-15m-from.html.

[61] *Id.*

[62] *See generally* Kat Tretina, *How Fiduciary Duty Impacts Financial Advisors*, FORBES ADVISOR, https://www.forbes.com/advisor/investing/financial-advisor/what-is-fiduciary-duty/ (May 17, 2023, 4:59 PM).

[63] TEX. PENAL CODE ANN. § 22.04(c)(2) (West 2021); TEX. HUM. RES. CODE § 48.002(a)(1) (West 2015); TEX. PENAL CODE ANN. § 32.55 (West 2023).

[64] *Fun Facts: Preventing Elder Abuse*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 21, 2021), https://www.cdc.gov/violenceprevention/elderabuse/fastfact.html#:~:text=Elder%20abuse%20is%20an%20intentional,a%20person%20the%20elder%20trusts.

[65] *Get the Facts on Elder Abuse*, NAT'L COUNCIL ON AGING (Feb. 23, 2021), https://www.ncoa.org/article/get-the-facts-on-elder-abuse.

[66] *Abuse of older people*, WORLD HEALTH ORG. (June 13, 2022), https://www.who.int/news-room/fact-sheets/detail/elder-abuse.

other categories of federal crime (e.g., wire fraud, violations of consumer financial law, mail fraud, etc.).[67] Criminal prosecution and the pursuit of civil actions as a result of incidents of abuse against older people are largely left to the states. This is potentially a result of the relative newness of the concept of elder abuse. Federal interest in the protection of vulnerable adults first appeared in the 1960s, with the 1962 passage of the Public Welfare Amendments to the Social Security Act authorizing payments to the states to establish protective services for people who could not "manage their own affairs . . . or who were neglected or exploited."[68] For some time, however, there remained limited data and knowledge tied to elder abuse.[69] Between 1990 and 2003, for example, the National Institute on Aging funded fewer than fifteen studies on elder mistreatment, and support from other governmental agencies was even less substantial.[70]

But that is not to say there has been *no* progress in the understanding of elder abuse, or of financial abuse specifically. The government has created an extensive network of supports since the subject first came to the public's attention in the 1960s and 1970s.[71]

In 1965, Congress passed the Older Americans Act in an effort to expand community social services offered to older people.[72] The original legislation authorized grants to states "for community planning and social services, research and development projects, and personnel training in the field of aging" and established the Administration on Aging to manage the grants and serve as the federal hub on matters

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67 *Elder Abuse,* U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/elder-abuse (last visited Aug. 31, 2022).

68 NAT'L RSCH. COUNCIL, ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 13 (Richard J. Bonnie & Robert B. Wallace eds., 2003), https://www.ncbi.nlm.nih.gov/books/NBK98802/pdf/Bookshelf_NBK98802.pdf [hereinafter ELDER MISTREATMENT].

69 Shelly L. Jackson & Thomas L. Hafemeister, *Using the Criminal Law to Respond to the Financial Exploitation of Older Adults: The Statutory Evolution in the United States from 2000 to 2020*, 29 ELDER L. J. 316, 322 (2021), https://theelderlawjournal.com/wp-content/uploads/2022/01/Jackson.pdf.

70 ELDER MISTREATMENT, *supra* note 68, at 2.

71 *See* Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203 (2000), https://works.bepress.com/carolyn_dessin/4/.

72 *Older Americans Act*, ADMIN. FOR CMTY. LIVING, https://acl.gov/about-acl/authorizing-statutes/older-americans-act (Oct. 31, 2023).

concerning older individuals.[73] The law has been reauthorized repeatedly, most recently in 2020, and now authorizes a wide variety of service programs through a national network of service providers and state agencies.[74]

In 2010, Congress passed the Elder Justice Act, authorizing programs and initiatives "to better coordinate federal responses to elder abuse, promote elder justice research and innovation, support Adult Protective Services systems, and provide additional protections for residents of long-term care facilities."[75] In turn, the Elder Justice Act established the Elder Justice Coordinating Committee to coordinate activities related to elder abuse across the federal government.[76] The committee "is charged with identifying and proposing solutions to the problems surrounding elder abuse, neglect, and financial exploitation."[77] Member agencies "support early intervention services to identify, remove, or reduce risk factors for abuse, neglect, or exploitation," and they support Adult Protective Services systems in intervening when abuse occurs.[78]

In 2016, the Centers for Disease Control added its gloss to the issue when it released definitions for the surveillance of elder abuse, including financial exploitation:[79]

> The illegal, unauthorized, or improper use of an older individual's resources by a caregiver or other person in a trusting relationship, for the benefit of someone other than the older individual. This includes, but is not limited to, depriving an older individual of rightful access to, information about, or use of personal benefits, resources, belongings, or assets.[80]

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[73] *Id.*

[74] *Id.*

[75] *The Elder Justice Act*, ADMIN. FOR CMTY. LIVING, https://acl.gov/about-acl/elder-justice-act (Oct. 11, 2023).

[76] *Elder Justice Coordinating Council*, ADMIN. FOR CMTY. LIVING, https://acl.gov/programs/elder-justice/elder-justice-coordinating-council-ejcc (Nov. 1, 2022).

[77] *Id.*

[78] *What is the Elder Justice Coordinating Council?* FED. ELDER JUST. COORDINATING COUNCIL, https://ejcc.acl.gov/ (last accessed Nov. 11, 2022).

[79] Jackson & Hafemeister, *supra* note 69, at 324.

[80] *Id.*

There also have been studies on the prevalence of financial exploitation, along with the construction of models using neuroscience and other health data to better explain the occurrence of financial exploitation and highlight what puts older adults at greater risk.[81] It is known that, predictably, financial exploitation can be linked to an older adult's dementia or cognitive impairment,[82] but research also indicates the soundness of older adults' financial decisions tends to be tied to their existing knowledge of how financial products work—individuals who were financially literate earlier in their lives generally continued making sound financial decisions as they aged.[83]

Much work also has been done to measure the scope of the financial abuse inflicted upon older individuals. According to the National Council on Aging, the annual cost of financial abuse and fraud to older Americans is estimated to be anywhere from $2.6 billion to $36.5 billion in the United States alone.[84] The massive variation in those estimates likely is due, at least in part, to underreporting—and financial abuse is self-reported at higher rates than emotional, physical, and sexual abuse or neglect.[85] The Elder Justice Coordinating Council estimates that as few as 1 in 44 cases of financial abuse is reported to the authorities.[86]

The problem is staggering in its size.

D. The Lonestar State

For its part, Texas has enacted a number of statutes, both penal and civil, that specifically seek to punish the knowing financial exploitation of older people. Here, elders are defined as those who are sixty-five years old or older[87]—Nolan was eighty-one when he invested in deeproot and fell well within the category. The Texas Penal Code, like

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[81] *See id*. at 324-25.

[82] *Id*.

[83] Ye Li et al., *Sound credit scores and financial decisions despite cognitive aging*. 112 PROC. OF THE NAT'L ACAD. OF SCIENCES OF THE U.S. 65, 67 (Dec. 22, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4291658/pdf/pnas.201413570.pdf.

[84] *Get the Facts on Elder Abuse*, *supra* note 65.

[85] *Id*.

[86] *What is the Elder Justice Coordinating Council?*, *supra* note 78.

[87] TEX. PENAL CODE ANN. § 22.04(c)(2) (West 2021); TEX. HUM. RES. CODE § 48.002(a)(1) (West 2015).

the U.S. Government Accountability Office, defines financial abuse as "the wrongful taking, appropriation, obtaining, retention, or use of, or assisting in the wrongful taking, appropriation, obtaining, retention, or use of, money or other property of another person by any means."[88]

This includes financial exploitation, which the code further defines as "the wrongful taking, appropriation, obtaining, retention, or use of money or other property of another person by a person who has a relationship of confidence or trust with the other person."[89] Financial exploitation may involve coercion, manipulation, threats, intimidation, misrepresentation, or the exerting of undue influence.[90] The offense includes "the breach of a fiduciary relationship, including the misuse of a durable power of attorney or the abuse of guardianship powers, that results in the unauthorized appropriation, sale, or transfer of another person's property."[91]

The penal code further specifies that a person has a relationship of confidence or trust with another if they are "a financial planner or investment professional who provides services to the other person."[92]

Fiduciaries—and thus many financial advisors—owe two key duties to their clients: a duty of care and a duty of loyalty.[93] The duty of care requires analysis of an investor's finances before making recommendations or plans.[94] The duty of loyalty requires fiduciaries to disclose all economic and personal conflicts of interest; they cannot use their position to further their own interests.[95] However, only advisors who are *fiduciary* financial advisors are required to place clients' interests over their own.[96] This group includes registered investment advisors and certified financial planners.[97] Non-fiduciary financial advisors are held to a different legal standard, known as the suitability

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[88] TEX. PENAL CODE ANN. § 32.55(a)(2) (West 2023).

[89] TEX. PENAL CODE ANN. § 32.55(a)(3)(A) (West 2023).

[90] TEX. PENAL CODE ANN. § 32.55(a)(3) (West 2023).

[91] TEX. PENAL CODE ANN. § 32.55(a)(3)(A) (West 2023).

[92] TEX. PENAL CODE ANN. § 32.55(b)(4) (West 2023).

[93] Tretina, *supra* note 62.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

standard.[98] Essentially, this means they are required to offer investors advice and products that are *suitable* for the investor, but they can charge higher fees or command bigger commissions.[99]

Nolan's financial advisor very clearly assumed fiduciary responsibility by presenting himself as a qualified financial professional and by taking on Nolan and others as clients.[100] Not surprisingly, Nolan relied upon the advisor's alleged expertise to invest his money in what he likely was told was a responsible manner. Even if Nolan's advisor was a non-fiduciary advisor and was held only to a suitability standard, he still breached his fiduciary duty by recommending Nolan invest in deeproot for the simple fact that deeproot was not suitable for *anyone*.[101] It should have been clear from the start that deeproot was not a safe investment.[102] The fund was not registered with the SEC, the life insurance policy model was risky, and there was no way to tell what deeproot actually did with investors' money. Indeed, a suit brought in Harris County accuses a financial advisor of similar qualifications of a breach of fiduciary duty in recommending deeproot to a client[103]—and like the advisor in that case, Nolan's advisor repeatedly sold deeproot products to Nolan and others and pocketed tens of thousands of dollars in commissions as a result.[104]

In Nolan's case, the financial advisor's behavior arguably fits into the penal code's definition of financial exploitation of an elder.[105] The advisor, in breaching his fiduciary duty and selling Nolan, an eighty-one-year-old, on deeproot as an investment opportunity, enriched himself and facilitated Mueller's continued misappropriation of investor funds—given the Ponzi-like structure deeproot used to pay its older investors, it would have collapsed much sooner but for the

98 *Id.*

99 Tretina, *supra* note 62.

100 *See* Donaldson v. Vallier, No. 202213962 (125th Dist. Ct., Harris County, Tex. filed Mar. 8, 2022) (Westlaw, Dockets) (describing a similarly qualified investment advisor in pursuing accusations of breach of fiduciary duty).

101 Tretina, *supra* note 62.

102 *See supra* Section II.

103 Donaldson v. Vallier, No. 2022-13962 (125th Dist. Ct., Harris County, Tex. filed Mar. 8, 2022) (Westlaw, Dockets).

104 *See* Mosbrucker, *supra* note 60.

105 *See* TEX. PENAL CODE ANN. § 32.55(a)(3)(A) (West 2023).

efforts of investment advisors like Nolan's who continued to funnel money its way.

If it is possible to find a silver lining in Nolan's story, it is that, paradoxically, his being dead makes him one of deeproot's luckier investors. The dead have little use for retirement accounts, after all. For the living, however, the collapse of a Ponzi scheme can be nothing short of devastating.

II. GET RICH OR DIE TRYING

Although there generally has been little reporting on the victims of the deeproot scheme, the stories of Mueller's victims that have been shared tend to mirror Nolan's in all but their endings. These people are alive. In Tucson, Arizona, one woman lost $95,000, a large portion of her retirement savings; as of this writing, she has named but not sued her financial advisor—the advisor claims she also lost a significant amount of money in Mueller's scheme (and likely has no money for the victim to recover).[106] However, a handful of lawsuits against financial advisors are proceeding in the Phoenix, Arizona, area, with plaintiffs claiming they were urged to invest around $100,000 each in deeproot funds.[107] At least one suit has been filed against an advisor in the Houston area, though it has yet to make the news.[108] In that case, the investor lost $400,000 after his financial advisor assured him deeproot was a low-risk investment.[109]

It is unlikely that any of these investors will get their money back.[110]

The same can be said of investors in most Ponzi schemes, though in the case of Bernie Madoff, his enterprise was so large that as of 2018, the government had managed to recover about $1.2 billion and made payouts to about 21,000 victims.[111] (The staggering size of Madoff's

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[106] Nylander, *supra* note 19.

[107] Nylander, *supra* note 19.

[108] Plaintiff's Original Petition, Donaldson v. Vallier, No. 2022-13963 (125th Dist. Ct., Harris County, Tex., Mar. 8, 2022) (Westlaw).

[109] *Id.* at 3, 4.

[110] Wang, *supra* note 31.

[111] Benner, *supra* note 39.

organization made it the exception to the rule.) In the decade since the collapse of Madoff's Ponzi scheme, victims of similar schemes have lost about $31 billion, with average losses of about $150,000, according to SEC data.[112] For older investors, this sometimes means returning to work. One victim lost $600,000, her entire life savings, to an investment scheme and had to take a job working at a Walmart deli counter.[113] But that, of course, would not be an option for people like Nolan whose health precludes a return to the workforce.

The prospect of falling victim to a financial scheme presents a particularly difficult situation for older adults as the life expectancy of most Americans increases: By 2060, life expectancy for the total population is projected to reach 85.6 years.[114] Researchers at the National Opinion Research Center (NORC) at the University of Chicago project that by 2033, more than 11 million middle-income seniors aged seventy-five and older may not be able to pay for assisted living while simultaneously not meeting the requirements for Medicaid in order to pay for their long-term care needs.[115] During that same time, this group is expected to grow by 7.5 million people—an 89% increase in the population cohort.[116] Even if these seniors sold their homes, the NORC predicts that 6.1 million of them (39%) still would have insufficient resources to pay the annual costs associated with long-term care.[117]

To arrive at this conclusion, the NORC examined individuals who were sixty years old or older in 2018 (since they would be seventy-five or older in 2033) and estimated their health, cognitive function, and mobility status, assuming the same rates of these conditions that existed in the 2018 population for each demographic group.[118]

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112 Wang, *supra* note 31.

113 Wang, *supra* note 31.

114 LAUREN MEDINA ET AL., U.S. CENSUS BUREAU, LIVING LONGER: HISTORICAL AND PROJECTED LIFE EXPECTANCY IN THE UNITED STATES, 1960 TO 2060 1 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1145.pdf.

115 Press Release, NORC at the Univ. of Chi., Many Middle-Income Seniors Will Not Be Able to Pay for Long-Term Care and Housing in 10 years, (Aug. 31, 2022), https://www.norc.org/NewsEventsPublications/PressReleases/Pages/many-middle-income-seniors-will-not-be-able-to-pay-for-long-term-care-and-housing-in-10-years.aspx [hereinafter NORC Press Release].

116 *Id.*

117 *Id.*

118 *Id.*

Researchers then analyzed individual finances, including income streams such as Social Security and annuitized assets such as investments, to estimate annual housing and care costs over time.[119] This analysis presumed the individuals received no financial support from their families,[120] at least until they ran out of money.

To be clear, the data the NORC used and for which it made projections is for people who *have not* fallen victim to Ponzi schemes, scams, or other forms of financial exploitation.[121] The study focused solely on middle-income seniors[122]; it seems likely the outlook is significantly worse for people who have lost everything. The average amount needed to pay for private assisted living and medical care is $65,000 annually,[123] which is significantly more than can be afforded by someone who is forced to take a minimum wage job—assuming someone who lives in a private assisted living facility is, in fact, capable of working in the first place.[124]

What this ultimately means for people who have outlived their savings, or who are left with no savings at all as a result of financial abuse, is that the costs of senior housing and caregiving support will fall to their families[125] at a time when inflation is high, resulting in higher prices for nearly everything.[126] Even before the COVID-19 pandemic and the current economic downturn, this spelled financial strain for many family caregivers.[127] An AARP Public Policy Institute study

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119 *Id.*

120 *Id.*

121 *See* NORC Press Release, *supra* note 115.

122 *Id.*

123 *Id.*

124 For perspective, in Texas, the minimum wage is $7.25. Assuming a person works 40 hours per week, every week of the year, they would earn only $15,080 before taxes. *See* Gustav Anderson, *Minimum Wage by State in 2023 and Beyond — All You Need to Know*, WORKFORCE (Aug. 18, 2023), https://workforce.com/news/minimum-wage-by-state-2022-all-you-need-to-know.

125 NORC Press Release., *supra* note 115.

126 *September Inflation Report Prices Rise Faster Than Expected*, N.Y. TIMES, https://www.nytimes.com/live/2022/10/13/business/inflation-cpi-report?name=styln-us-economy&region=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Article&variant=show&is_new=false (Oct. 14, 2022).

127 NAT'L ACADS. OF SCIS., ENG'G, & MED. COMM. ON FAM. CAREGIVING FOR OLDER ADULTS, FAMILIES CARING FOR AN AGING AMERICA 123 (Richard Schulz & Jill Eden eds., 2016),

found that 36% of caregivers of adults older than 50 reported moderate to high levels of financial strain, largely in proportion to the amount of care needed.[128] A 2011 analysis for adults sixty five years old and older showed that caregivers who provided substantial assistance with health care activities were more likely to report financial difficulty than their counterparts who provided little to no help.[129] In other words, the financial strain increased in proportion to how much care the older adult needed[130]—less financial strain would be associated with periodically giving an older parent a ride to a doctor's appointment, for example, than with hiring around-the-clock care for someone who requires constant medical attention.

On average, caregivers report an annual cost of about $5,500, with about 8% incurring more than $1,000 in out-of-pocket expenses each year.[131] For some caregivers, this means drawing down their own assets, taking on debt, or foregoing treatment of their own health problems.[132]

And a funeral? Families typically can expect to pay between $7,000 and $10,000 for a funeral.[133] For traditional burials, caskets range from about $1,000 for a wooden box to more than $25,000 for "more elaborate" models.[134] A survey of more than 1,000 Texas cemeteries showed that burial plots, on average, cost around $3,360, with the most elaborate mausoleums running into the hundreds of thousands of dollars.[135] Cremation, the most popular end-of-life preference in the United States, costs between $1,000 and $3,000 in Texas, with additional costs

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https://www.ncbi.nlm.nih.gov/books/NBK396401/pdf/Bookshelf_NBK396401.pdf.

128 *Id.* at 124.

129 *Id.*

130 *Id.* at 125.

131 *Id.* at 126-27.

132 *Id.* at 127.

133 Kevin Brasler, *Funerals can cost a fortune. Here's how to keep prices in check.*, WASH. POST. (Sept. 29, 2022, 7:00 AM), https://www.washingtonpost.com/home/2022/09/29/tips-saving-funeral-costs/.

134 *Id.*

135 *Cemetery Burial Plot Cost in Texas: Cheapest & Most Expensive Options (2023)*, PERFECT GOODBYES, https://www.perfectgoodbyes.com/texas-cemetery-burial-plot-costs/ (last visited Jan. 24, 2023).

associated with the purchase of an urn and placement in a columbarium.[136]

Death, it seems, is not the great equalizer it is made out to be if one cannot even die for free.

So, given the reality that neither being alive nor being dead is affordable, how can we encourage those who have fallen victim to financial schemes to report the abuse? And what can we do to better protect retirees and their estates, especially when it comes to the retirement accounts and investments that they spent decades working to accrue?

III. SPREAD THE WORD!

Perhaps the simplest way to encourage victims of financial abuse to report is the use of public information campaigns, at least in part through the placement of cable television advertisements. A key part of launching a successful advertising campaign is simply knowing how to reach the target audience,[137] in this case Americans who are sixty-five years old or older. According to Pew Research Center, since 2020, Americans in general have shown a strong preference for receiving their news on digital devices (53%).[138] By contrast, among adults who are 65 years old or older, the group subject to elder abuse, 56% prefer to receive their news through television programming.[139] At the same time, older Americans also spent three times more waking time watching television programming of all genres than did younger adults—TV watching accounted for 25%–30% of waking time and half of all leisure activity among those sixty-five years old or older.[140] This,

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[136] Marlaena Gonzales, *The Most Important Things to Know About the Cost of Cremation in Texas*, GREEN CREMATION TEX. (Apr. 14, 2021), https://www.greencremationtexas.com/the-most-important-things-to-know-about-the-cost-of-cremation-in-texas/. For more on the options available for cremains, *see What do I do with cremated remains?*, CREMATION SOC'Y OF AM. (Apr. 25 2019), https://www.cremationsocietyofamerica.com/what-do-i-do-with-cremated-remains/.

[137] *A Step-by-Step Guide to a Successful Marketing Campaign*, R&A MKTG., https://www.ramarketing.com/successful-marketing-campaign/ (last visited Jan. 18, 2023).

[138] *News Platform Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/.

[139] *Id.*

[140] Colin A. Depp et al., *Age, Affective Experience, and Television Use*, 39 AM. J. OF PREVENTIVE MED. 173, 174 (Aug. 2010), https://www.ajpmonline.org/article/S0749-3797(10)00302-8/fulltext.

despite the potentially negative health effects of a more sedentary lifestyle.[141]

Further research has shown that Baby Boomers, those fifty-five years old and older, spend nearly equal time using streaming services like Netflix and getting their content from cable television services.[142] As a candidate for ad placement, however, streaming services pale in comparison to the potential power of cable television: Only 5% of Netflix users, for example, planned to downgrade to the service's ad-supported plan in December 2022, a month after the streaming service launched the less expensive subscription.[143] Similarly, only 6% of Disney+ subscribers said they planned to downgrade their subscription to the ad-supported model in the months after the service launched its new subscription tier.[144]

Clear advantage: Cable.

A. Do They Work?

In the decades since television became a fixture in American households, the country has borne witness to dozens, if not hundreds, of memorable public information campaigns aimed at preventing forest fires,[145] wearing seatbelts,[146] eating more nutritious foods,[147]

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[141] *Id.*

[142] Sara Lebow, *US adults across age groups prefer streaming services to cable TV*, INSIDER INTEL. (Oct. 26, 2021), https://www.insiderintelligence.com/content/us-adults-across-age-groups-prefer-streaming-services-cable-tv.

[143] Tyler Aquilina, *Survey: Consumers Slow to Adopt New Ad-Supported Streaming Plans*, VARIETY (Jan. 17, 2023, 6:00 AM), https://variety.com/vip/survey-consumers-slow-to-adopt-new-ad-supported-streaming-plans-1235488841/.

[144] *Id.*

[145] *About the Campaign*, THE AD COUNCIL., https://smokeybear.com/en/smokeys-history/about-the-campaign (last visited Jan. 18, 2023).

[146] *Seatbelts Save Lives*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/campaign/click-it-or-ticket (last visited Jan. 18, 2023).

[147] Julia Belluz, *How Michelle Obama quietly changed what Americans eat*, VOX (Oct. 3, 2016, 7:00 AM), https://www.vox.com/2016/10/3/12866484/michelle-obama-childhood-obesity-lets-move.

avoiding drugs,[148] and quitting smoking.[149] Who could ever forget Texas's famous "Don't mess with Texas" anti-littering campaign, which has featured famous Texans such as Willie Nelson and Matthew McConaughey[150] and has been mocked by Saturday Night Live?[151]

The campaigns are catchy and memorable, and they have one overarching goal in common: changing the public's behavior.

A significant amount of research into the effectiveness of public information campaigns in inspiring people to act dates back to the 1940s and 1950s, with studies of Nazi, Fascist, and Stalinist propaganda.[152] These studies tended to show that it was "nearly impossible to produce systematic evidence that campaigns changed people's minds."[153] Similarly, studies of campaigns during the 1970s and 1980s using more sophisticated research methods "found it difficult to produce unambiguous evidence of impact."[154] There were simply too many outside factors to evaluate whether the campaigns had actually changed people's behavior.[155]

More recent research, however, has shown that there *are* ways to create campaigns that work, one of the most important factors being that the campaign include an unambiguous call to action that is tied to a theory of change.[156] In other words, the campaign has to appeal to

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148 Michael McGrath, *Nancy Reagan and the negative impact of the 'Just Say No' anti-drug campaign*, GUARDIAN (Mar. 8, 2016, 2:23 PM), https://www.theguardian.com/society/2016/mar/08/nancy-reagan-drugs-just-say-no-dare-program-opioid-epidemic.

149 *About the Campaign*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/tobacco/campaign/tips/about/index.html (last visited Jan. 18, 2023).

150 *The Campaign*, TEX. DEP'T OF TRANSP., https://www.dontmesswithtexas.org/the-campaign/ (last visited Jan. 18, 2023).

151 *Saturday Night Live's* parodies of President George W. Bush frequently included the president's tossing out a well-placed "Don't mess with Texas." The clip at the following link provides a typical example: *Saturday Night Live: Cold Opening: George Bush Address*, NBC (Mar. 10, 2001), https://www.nbc.com/saturday-night-live/video/cold-opening-george-bush-address/n11445.

152 Janet A. Weiss & Mary Tschirhart, *Public Information Campaigns as Policy Instruments*, 13 J. POL'Y ANALYSIS AND MGMT. 82, 84 (1994), https://www.jstor.org/stable/3325092.

153 *Id.*

154 *Id.* at 85.

155 *Id.*

156 Ann Christiano & Annie Neimand, *Stop Raising Awareness Already*, 15 STANFORD SOC. INNOVATION REV. 34, 40 (2017), https://ssir.org/pdf/stop_raising_awareness_already.pdf.

the right "emotional impetus" in order to spur the audience to act.[157] When these conditions are met, public information campaigns have the potential to not just raise awareness but to bring social change on a larger scale.[158]

B. Only You Can Prevent Elder Abuse

For elder abuse in particular, education and reporting initiatives could play an important role in reducing the overall impact of financial exploitation. One of the key pieces of a public information campaign that aims to keep education and reporting at the fore is helping older Americans identify their experiences as abuse and reassuring them that what they are going through is surprisingly common—there is no reason to be ashamed of their experience. Equally important is reshaping public perception of financial exploitation to frame the issue in terms of the criminal act, not the victim's perceived diminished capacity, ignorance, or gullibility.

Consider the evolution of the stigma associated with mental illness, namely self-stigma, or the internalized shame that people with mental illness have about their own condition.[159] Where the public may have come to accept mental health disorders and the need for appropriate treatment, many people continue to view those with mental illness negatively, at least in part because of inaccurate and misleading media representations of mental illness.[160] Those struggling with mental illness frequently internalize that negativity and begin to believe in the stereotypes that have been prescribed to them, resulting in shame and a reluctance to talk about their condition.[161]

There are two leading approaches to addressing self-stigma and reducing its effects in those with mental illness: altering the beliefs and attitudes of the individual and enhancing coping skills through improvements in self-esteem, empowerment, and help-seeking

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[157] *Id.*

[158] *Id.* at 41.

[159] *Stigma, Prejudice and Discrimination Against People with Mental Illness*, AM. PSYCHIATRIC ASSOC. (Aug. 2020), https://www.psychiatry.org/patients-families/stigma-and-discrimination.

[160] *Id.*

[161] Katherine Ponte, *The Many Impacts of Self-Stigma*, NAT'L ALL. ON MENTAL ILLNESS (Feb. 8, 2021), https://www.nami.org/Blogs/NAMI-Blog/February-2021/The-Many-Impacts-of-Self-Stigma.

behaviors.[162] The same approaches likely would be effective in reducing the potential self-stigma associated with financial abuse of an elder that leads to underreporting, particularly where the person involved has fallen victim to a scheme that, in hindsight, likely was laden with red flags.

In the grandparent scam, for example, the culprit phones the would-be grandparent and asks, "Do you know who this is?"[163] When the grandparent guesses the name of the grandchild the caller's voice most resembles, the scammer affirms and then asks for money to solve an urgent financial problem—overdue rent, car repairs, or jail bond.[164] The scammer then requests that payment be made via gift cards or some other form of currency that does not require identification for collection and swears the grandparent to secrecy.[165] In a more high-pressure version of the scam, the caller claims to be an arresting officer, doctor, or lawyer who is trying to help the grandchild, who is in urgent need of cash to avoid dire consequences.[166]

In theory, all the grandparent would need to do to check the veracity of the claim is phone the grandchild in question. A more immediate red flag, though, is the request that payment be made in gift cards or in a form that requires no identification, a scam tactic so well known that it warrants its own page on the Federal Trade Commission website.[167] And the request for secrecy? A huge giveaway.[168]

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[162] *Id.*

[163] Genevieve Waterman, *The Top 5 Financial Scams Targeting Older Adults*, NAT'L COUNCIL ON AGING (Dec. 8, 2023), https://ncoa.org/article/top-5-financial-scams-targeting-older-adults.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Avoiding and Reporting Gift Card Scams*, FED. TRADE COMM'N, (July 2023), https://consumer.ftc.gov/articles/avoiding-and-reporting-gift-card-scams.

[168] *Id.*

Thus, we arrive at the feelings of shame. As one cybersecurity and fraud protection specialist put it:

> Let's be honest, being scammed is not something anyone is proud of. In fact, what is not discussed enough is the emotional toll that these scams have on their victims. The tremendous amount of shame and guilt. Thinking "How could I be so stupid, so naïve, why didn't I listen to all the red flags? I should have known better."[169]

Combatting this shame and embarrassment should start with the acknowledgment that financial abuse can happen to anyone. Where victims stereotypically are those who are less tech- savvy, such as older adults, *anyone*, including fraud experts, can fall for a convincing scam.[170] This could play a key role in encouraging older adults to report their losses as it arms them with the knowledge they need to quiet victim-blaming (or the fear of it).[171] That is, if *anyone* can fall victim to financial scams, including experts in identifying and combatting them, there is no reason an older adult who is an expert in neither identifying nor combatting those same scams should be made to feel like they should have known better.

At the same time, a public information campaign also should aim to discourage younger individuals from weaponizing victims' experiences, as this, too, likely discourages reporting, particularly if the victim fears the forcible removal of their autonomy via, for example, a conservatorship (or in Texas, guardianship). Conservatorship and guardianship proceedings usually begin with an older person's adult family members beginning to question the older person's competency.[172] At its most basic level, competency is defined as having the

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169 Ayelet Biger-Levin, *The Shame Behind Financial Scams: When Criminals Call the Shots*, BIOCATCH BLOG CHANNEL, https://www.biocatch.com/blog/shame-behind-financial-scams (last visited Sept. 30, 2022).

170 *Id.*

171 *See id.* Victim blaming is the phenomenon in which victims of crimes are held accountable for what happened to them—as opposed to the person who actually committed the crime. Kendra Cherry, *Why Do People Blame the Victim?*, VERYWELL MIND, https://www.verywellmind.com/why-do-people-blame-the-victim-2795911 (Nov. 29, 2023).

172 TEX. EST. CODE ANN. § 1001.003 (West 2014); *see also* Rebecca J. Frey, *Conservatorship*, 2 THE GALE ENCYCLOPEDIA OF SENIOR HEALTH: A GUIDE FOR SENIORS AND THEIR CAREGIVERS 699, 699 (3 ed. 2021), https://link-gale-com.ezproxy.lib.uh.edu/apps/doc/CX8080300214/HWRC?u=txshracd2588&sid=bookmark-HWRC&xid=153d3cd3.

mental ability to understand information relevant to decision making.[173] A court must find a person to be incapacitated, or incompetent, before an application for guardianship can be submitted and hearings are held before a judge.[174]

Under Texas law, courts are required take the least restrictive approach when a person's capacity is at issue—as opposed to immediately granting a guardianship—because guardianships remove "the civil rights and privileges of a person" by assigning control of that person's life to someone else.[175] Wards, the people placed under guardianship, may lose the right to vote, provide medical consent, drive, own a firearm, form contracts, and exercise other fundamental rights that Americans hold dear.[176] As such, it is understandably feared by someone who may have fallen victim to a financial scam, particularly if that person does not know how the guardianship process works. The loss of these rights should occur only after the court has considered (and rejected) less restrictive options, such as enrolling the older person in a money management program through a local area agency on aging.[177] This should be emphasized in any public information campaign aimed at encouraging reporting: The law has guardrails that are designed to prevent opportunistic family members from doubling down on an older person's victimization. And even if an older person is uncomfortable telling a family member what has occurred, they should be able to find comfort in the knowledge that reporting the scam directly to the authorities will not cost them their independence.

Further, defining financial scams as elder abuse, emphasizing Texas elder abuse law, could serve as a powerful call to action for older Texans, especially in light of size and scope of the problem that is elder abuse in general. That as many as one in forty-four Americans who are

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[173] Frey, *supra* note 172, at 700.

[174] TEX. EST. CODE ANN. § 1001.001 (West 2015); *see also Guardianship*, OFF. OF THE TEX. GOVERNOR | GREG ABBOTT, https://gov.texas.gov/organization/disabilities/guardianship (last visited Jan. 24, 2023).

[175] *Guardianship*, *supra* note 174.

[176] *What Are the Ward's Rights in a Guardianship?*, ELDERLAWANSWERS (Dec. 9, 2022), https://www.elderlawanswers.com/what-are-the-wards-rights-in-a-guardianship-18964/.

[177] TEX. HEALTH AND HUM. SERVS., A TEXAS GUIDE TO ADULT GUARDIANSHIP 9-10, 29, https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/legal-information/guardianship/pub395-guardianship.pdf.

sixty-five years old or older will experience financial abuse[178] serves as a powerful backdrop for what should be the ultimate message of an elder abuse public information campaign: What happened to you is illegal, and you can help stop it from happening to someone else. This could be particularly important when victims are faced with the harsh reality that they likely will never recover their stolen assets.[179] Empathy is a powerful tool in creating effective marketing, including public information campaigns.[180] Perhaps it is too late to prevent the victim's losses, but it is not too late for the millions of older Americans who are lucky enough to have avoided exploitation so far.

C. The Texas Hammer

Along with public awareness and an increase in victim reporting, there must be a corresponding increase in the prosecution of financial abuse of an elder. The Texas Legislature only recently adopted the state's law criminalizing the knowing financial abuse of an elder, with the law going into effect on September 1, 2021.[181] In the past, cases involving the breach of fiduciary relationships, such as the relationship Nolan had with his investment adviser, typically have been prosecuted under Tex. Pen. Code. § 32.45, which criminalizes the misapplication of fiduciary property.[182] The law applies to this misapplication generally, with a single subsection dedicated to offenses against those sixty-five years old or older:

> (d) An offense described for purposes of punishment by Subsections (c)(1)-(6) is increased to the next higher category of offense if it is shown on the trial of the offense that the offense was committed against an elderly individual as defined by Section 22.04.[183]

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178 *What is the Elder Justice Coordinating Council?*, FED. ELDER JUST. COORDINATING COUNCIL, https://ejcc.acl.gov/ (last visited Nov. 11, 2022).

179 Kathleen Tanner Beduze, Presentation at the State Bar of Texas 46th Annual Advanced Estate Planning & Probate: Recovering Assets Stolen Through Exploitation (Jun. 15–17, 2022).

180 Michael Brenner, *Why Empathy in Marketing Is More Important Than Everything Else*, MKTG. INSIDER GRP. (Oct. 25, 2023), https://marketinginsidergroup.com/marketing-strategy/empathy-in-marketing-why-its-more-important-than-data/.

181 TEX. PENAL CODE ANN. § 32.55(c) (West 2023); Beduze, *supra* note 179.

182 TEX. PENAL CODE ANN. § 32.45(b) (West 2017); Beduze, *supra* note 179.

183 TEX. PENAL CODE ANN. §32.45(d) (West 2017).

There appears to have been limited success in the prosecution of Section 32.45(d) since its implementation in 2005.[184] In fact, there is scant case law available that would tend to show it has been prosecuted with any degree of frequency in the past eight years.[185] Similarly, exploitation of children, elderly, and disabled individuals has been prosecuted since 2011 under Tex. Pen. Code § 32.53, the first criminal statute passed in Texas to combat elder fraud.[186] But as of June 2022, there was "extremely limited controlling case law" tied to the statute.[187]

It also remains to be seen whether the newest elder abuse law, Tex. Pen. Code § 32.55, will experience any degree of success—there is no case law yet that would indicate one way or the other and the law has not yet come before the Texas Supreme Court.[188]

The only real way to find out if any of these measures work? Drop the hammer.

The result must be worth the courage and effort it took for victims to come forward. When an older person reports financial exploitation, the culprits should be investigated and prosecuted under the existing elder abuse statutes. Research shows that certainty of being caught is a powerful deterrent in reducing crime, more so than the fear of being punished.[189] So, if society sends the message that it will not tolerate these crimes and will zealously pursue elder abuse claims (as a result of increased reporting), perhaps the overall rates of such crimes would decline.

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184 PUNISHMENT FOR CERTAIN PROPERTY OFFENSES COMMITTED AGAINST AN ELDERLY INDIVIDUAL, 2003 Tex. Sess. Law Serv. Ch. 432 (West).

185 Neither Westlaw nor Lexis+ turned up more than a handful of cases tied to Tex. Pen. Code. §32.45(d).

186 Beduze, *supra* note 179.

187 Beduze, *supra* note 179.

188 *See, e.g., Supreme Court*, TEX. J. BRANCH, https://www.txcourts.gov/supreme/orders-opinions/ (last visited Dec. 26, 2023) [court orders September 1, 2021, to present].

189 US DEPT. OF JUST., FIVE THINGS ABOUT DETERRENCE 1 (2016), https://www.ojp.gov/pdffiles1/nij/247350.pdf.

IV. PUT IT IN WRITING

A second measure that should be considered in combatting elder abuse is one that would have benefited Nolan's family more directly: Closer regulation of private placement investments that would prevent companies like deeproot from incorporating in traditional IRA products mandatory time requirements similar to the five-year requirement associated with deeproot's 575 accounts.

Traditional IRAs, which is what Nolan's deeproot accounts were labeled, are funded using pre-tax money that is then taxed upon distribution at the beneficiary's ordinary tax rate.[190] When someone inherits a traditional IRA account, as Nolan's sons did, withdrawing the funds has the potential to raise the beneficiary's income tax bracket—the withdrawals are added to the beneficiary's usual income and the sum is then taxed at a percentage determined by the IRS.[191] For some people, this means the tax rate jumps significantly, from 12% to 22%, for example, or from 24% to 32%.[192] Closing Nolan's accounts outright would have amounted to at least a $50,000 increase in income for each of his sons, which likely would have raised their incomes to the next tax bracket and significantly increased the amount they were required to pay. Thus Nolan's sons never intended to withdraw Nolan's money directly but planned to shift it to separate investment accounts, where it would remain until they were ready to begin making withdrawals—most likely once they were old enough to retire and their incomes had dropped enough to keep them safely within a lower tax bracket.

At the same time, Nolan's sons also were told they could not close his deeproot accounts because of the 575 account contract terms—they were told the money had to remain in the accounts until 2022. While seemingly at odds with how traditional IRAs usually work, mainly in that inheriting a traditional IRA typically allows beneficiaries *some*

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190 *See Traditional IRAs*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/traditional-iras (Dec. 1, 2023).

191 Mark Henricks, *How Do I Avoid Paying Taxes on an Inherited IRA?*, SMARTASSET, https://smartasset.com/taxes/avoid-taxes-on-inherited-ira (July 26, 2023).

192 Sabrina Parys & Tina Orem, *2022-2023 Tax Brackets and Federal Income Tax Rates*, NERDWALLET, https://www.nerdwallet.com/article/taxes/federal-income-tax-brackets (Dec. 6, 2023). This is true except where the decedent's estate is worth more than $12.92 million; at that point, a federal estate tax is levied and the beneficiary is able to take an income-tax deduction based on the estate taxes paid. *See* James Royal, *Inherited IRA rules: 7 things all beneficiaries must know*, BANKRATE (Aug. 30, 2023), https://www.bankrate.com/retirement/inherited-ira-rules.

flexibility in how they decide to handle the accounts, the inclusion of the time limit in Nolan's contract was perfectly legal.[193] Private placements like deeproot are allowed to restrict withdrawals for a fixed amount of time.[194] It was this contractual restriction that allowed Nolan's money to vanish.

Allowing private placements to restrict traditional IRA disbursements based on contractual time limits should not be legal. Or, at the very least, it should not be legal to call a product with such time limits a traditional IRA—they do not follow the same rules, and it is misleading to the consumer to label them as such, particularly when a traditional IRA allows a beneficiary to immediately make withdrawals upon the original accountholder's death.[195]

Instead, private placements that incorporate such time restrictions should be subject to the law of contracts. Indeed, all four elements required for a contract[196] would seem to exist in Nolan's interactions with deeproot:

> 1. Offer: deeproot and Mueller offered to grow people's money over a five-year period in return for cash investments.
>
> 2. Consideration: deeproot promised a 7% return on Nolan's investment of more than $100,000.
>
> 3. Acceptance: Nolan agreed to deeproot's terms and signed off on the investment.
>
> 4. Mutuality: To the extent that Nolan believed he would eventually get his money back, there was mutual agreement.

Based on Mueller's conduct, contracts with deeproot investors likely would have been considered voidable based on his intentional misrepresentation of how investor money would be used—in other

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[193] *See* Barbara Weltman, *Inherited IRA Rules: Non-Spouse and Spouse Beneficiaries*, INVESTOPEDIA, https://www.investopedia.com/articles/personal-finance/102815/rules-rmds-ira-beneficiaries.asp (May 18, 2023).

[194] *How Investing in Private Placements Can Offer Great Rewards*, IRA INNOVATIONS, https://iraininnovations.com/investing-in-private-placements/ (last visited Jan. 27, 2023).

[195] *See* Weltman, *supra* note 193.

[196] *Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/contract (last visited Jan. 27, 2023).

words, the contracts would have been voidable for fraud.[197] This likely would have required investors to investigate deeproot on a level that, at least in some cases, probably would seem unnecessary given investors' reliance on financial advisors who had a duty to give sound advice. But what if someone *had* dug into deeproot's finances and raised a claim against Mueller sooner? What if someone had been able to save future investors $43 million?

In Nolan's case, one can only speculate about what such a change in regulation could have meant for his investments. It is possible (likely, even) that the money was long gone by the time Nolan died in November 2020—deeproot stopped paying dividends months earlier and was, by all appearances, in deep financial trouble.[198] The SEC was already investigating Robert Mueller for conducting a Ponzi scheme.[199] But it also is possible that if Nolan's sons had been able to withdraw his money from the accounts because the contracts were found voidable for fraud, Mueller's scheme would have collapsed that much sooner and fewer people would have become victims of Mueller's deceit. After all, Mueller continued recruiting investors for several months after Nolan died.[200]

But as it stands, Nolan's sons had no idea his financial advisor had led him astray. They had no reason to distrust him, no reason to believe he would have lied to his clients about deeproot. And so the scheme went on.

CONCLUSION

The SEC's case against Mueller, as of this writing, is proceeding slowly. The SEC made a criminal referral to the U.S. Attorney's office, which then opened a grand jury investigation into the matter.[201] In response, Mueller's attorney filed for a stay in the SEC's case, which was granted in part in March 2022.[202] In large part, Mueller claimed the two

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197 *See* Restatement (Second) of Contracts § 162 (Am. L. Inst. 1981).

198 Complaint, *supra* note 5, at 14.

199 *See id.*

200 *Id.* at 14.

201 SEC v. Mueller, No. 21-CV-00785-XR, 2022 WL 818678 at *1 (W. D. Tex. Mar. 17, 2022).

202 *Id.* at *4.

cases overlapped to such an extent that their proceeding in parallel would cripple Mueller's defense—Mueller claimed the civil case would require him to plead the Fifth in order to protect his interests in the criminal investigation, which in turn would hobble his defense against the SEC's charges.[203] In other words, he claimed there would be a violation of his Fifth Amendment rights.[204] The court more or less agreed. It prohibited Mueller's deposition and required that any questions asked of him be phrased in way that did not invoke his Fifth Amendment right to silence.[205]

Additionally, in November 2022, Mueller was dismissed from the case in his capacity as co-trustee to Ohana Revocable Trust—the trust was named as a defendant in the original lawsuit based on its acceptance of cash payments from Policy Services and deeproot Funds, LLC.[206] In September 2022, the trust, Mueller, his brother, and his stepmother entered into a settlement agreement in bankruptcy court whereby the parties paid roughly $300,000 to the trustee of the bankruptcy estates of the deeproot businesses to settle their debts.[207] With the money returned, there was no reason for the parties to remain named defendants in the civil suit.[208] Mueller remains, however, the primary defendant in the SEC's case.[209]

As for the prosecution of elder abuse cases, only time will tell whether elder abuse laws will spur increased investigation and prosecution of crimes against a rapidly growing segment of the population, but it is clear that America can and should do better when it comes to protecting older people from abuse. We owe it to them, but we also owe it to ourselves and to each other: Most of us likely will live to see sixty-five. It would be nice if the future was not quite so bleak.

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[203] *Id.* at *3.

[204] *Id.* at *4.

[205] *Id.*

[206] Plaintiff's Agreed Motion for Voluntary Dismissal of Relief at 1-2, SEC v. Mueller, No. 21-CV-00785-XR, 2022 WL 818678 (W. D. Tex. Mar. 17, 2022).

[207] *Id.* at 3.

[208] Hailey Konnath, *SEC Drops Fund Trustees from $58M Ponzi Scheme Suit*, LAW360 (November 28, 2022), https://www.law360.com/articles/1552997/sec-drops-fund-trustees-from-58m-ponzi-scheme-suit.

[209] *Id.*