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## Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending

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**LASHED TO THE MAST AND CRYING FOR  
HELP: HOW SELF-LIMITATION OF  
AUTONOMY CAN PROTECT ELDERS FROM  
PREDATORY LENDING**

*Kurt Eggert\**

*They tied me up, then, plumb  
amidships, back to the mast, lashed to the mast,  
and took themselves again to rowing. Soon,  
as we came smartly within hailing distance,  
the two Seirênês, noting our fast ship  
off their point, made ready, and they sang . . .*

*The lovely voices in ardor appealing over the water  
made me crave to listen, and I tried to say  
'Untie me!' to the crew, jerking my brows;  
but they bent steady to the oars. Then Perimêdês  
got to his feet, he and Eurylokhos,  
and passed more line about, to hold me still.  
So all rowed on, until the Seirênês  
dropped under the sea rim, and their singing  
dwindled away.<sup>1</sup>*

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1. HOMER, THE ODYSSEY bk. 12, at 214–15 (Robert Fitzgerald trans., 1963). See Gerald Dworkin's discussion of this passage at note 220 and accompanying text.

## I. INTRODUCTION

The elderly face the twin dangers of financial abuse and overprotection. Seniors are too often targeted for fraud and other forms of theft or deception since they frequently have significant assets to plunder and some of them lack the competence or financial skills needed to defend themselves from this abuse. At the same time, providing a blanket protection of elders from financial abuse has its own dangers. Limiting the kinds, scope, or substance of transactions in which the elderly can engage also harms the elderly by limiting their ability to chart their own financial futures and dispose of their own property. The vast majority of senior citizens are fully competent, and restraining their freedom to contract simply because of their age could, on the whole, hinder more than help them. Many seniors are threatened by ageism, and if their independence is too constricted in an effort to protect them, seniors may be deprived of the very freedom they need to live a full and active life.

This dilemma, how to protect elders from financial elder abuse and sharp business practices while at the same time preserving as much of their autonomy as possible, is the subject of this Article. In Section II, I discuss the various types of financial elder abuse, distinguishing abuse by family members, friends, and custodial care givers, which I call *personal financial abuse*, from that conducted by businesses or entrepreneurs, which I term *commercial financial abuse*.

A primary form of commercial financial elder abuse, and one that has wreaked havoc among elderly and lower income homeowners across the country, is predatory lending, the subject of Section III. Lenders engaging in this practice use various manipulative methods to induce borrowers to agree to loans that are overpriced given the borrowers' risk profiles, or which affirmatively harm the borrowers. Here, the conflict between protecting elders' finances and their freedom to contract can be difficult to resolve.

While the elderly are among the favored targets of predatory lenders, the legislation and rule-making designed to halt predatory lending do not generally contain any special protections for older

borrowers or provisions that specifically address their special needs or characteristics, a matter I discuss in Sections IV and V. Instead, the rules designed to halt predatory lending typically treat the elderly victims just as any other victims, and the lenders that target the elderly just as any other lenders. Rather than crafting predatory lending statutes and rules that specifically address the concerns of the elderly, some states rely on catch-all protections designed to prevent fraud against the elderly by increasing the punishment of that fraud.

While it is a useful tactic, simply increasing damages awards does not go to the heart of the problem facing elderly borrowers. Most predatory lending takes advantage of the freedom to structure loans in myriad ways so that lenders can baffle borrowers with varied and confusing loan terms. For example, lenders often overcharge their borrowers by hiding the true cost of loans with complicated terms such as credit insurance, prepayment penalties, and balloon payments. While a sophisticated borrower might agree to such terms in return for a lower interest rate, many less sophisticated borrowers become bound by these terms without either understanding them or receiving any benefit in return. The unsophisticated borrowers' freedom to bargain with their lenders regarding all of these terms gives lenders the ability to extract excessive fees or interest from the unwitting borrowers.

By confusing its borrowers, a lender can take advantage of them without committing fraud, or at least not fraud that is easy to prove. Elder borrowers who, while not incompetent, have lost some of their mental acuity are especially susceptible to such sharp practices. Yet the provisions specifically designed to protect the elderly may provide little help to these borrowers because they focus on preventing fraud, not lender-induced confusion.

Legislating additional protection against predatory lending specifically for the elderly has its own potential pitfalls. Such protection, if not carefully crafted, could limit their freedom to borrow even when they are fully competent. Efforts to protect senior homeowners must always be accompanied by a concern for their autonomy; fully competent elders should not be unduly restricted in order to protect their less able peers. I discuss the conflict between

protecting elders from predatory lending, on the one hand, and defending their autonomy, on the other, in Section VI. In Section VII, I discuss the definition and role of autonomy and its special importance for seniors. I outline various ways in which one can increase one's overall autonomy by limiting a specific aspect of it. I then attempt to construct a general test, or rather series of interlocking questions, to determine which self-limitations of autonomy should be enforced.

Based on this understanding of the potential benefits to self-limitation of autonomy, I propose a method to protect seniors' autonomy and their finances at the same time: Allow elders to choose greater protections against predatory lending than may be available to the non-elderly by allowing them to record an instrument that would limit the terms of any loan that could be secured by their principal residence. The instrument, which I call the Elder Home Equity Loan Instrument (or Elder HELP Instrument), would allow the senior homeowners to reform any loan documents that contain interest rates or fees above a certain benchmark, or that contain other potentially confusing or harsh terms. In this way, elders would be given the power to renounce intentionally some portion of their unbridled ability to enter into any available loan. In return, seniors would retain the greater freedom of managing their own affairs with less fear that they may fall victim to the guile of unscrupulous lenders. They could lash themselves to the mast so that they would not succumb to the dangerous blandishments of predatory lenders, just as brave Ulysses saved himself despite the sweet songs of the deadly Sirens.

To buttress my proposal, I look at one attempt to provide consumer protection in another consumer financial arena, commercial gambling. Some states, in response to the growing number of compulsive or addicted gamblers, have passed self-exclusion laws, which I discuss in Section VIII. Though they vary dramatically by state, self-exclusion laws in general allow gamblers to place their names on lists passed out to all of the casinos in the state. When a compulsive gambler signs up for self-exclusion, the gambler agrees that if she enters a casino, she can be ejected or even

arrested, and that if she succeeds in winning any money before she is caught, she forfeits all those winnings. The gambler renounces her freedom to gamble, no doubt hoping to rid herself of the pernicious effects of a horrible addiction.

In Sections IX and X, I propose that an analogous method be designed to protect elderly homeowners concerned that they might be coerced or manipulated into accepting a predatory loan. Under this proposal, older homeowners would be able to limit their freedom to enter into high-cost loans by signing and recording a simple document, the Elder HELP Instrument, that would limit the terms of any loan secured by their residence. All lenders would be on notice of these limitations and so could freely choose whether to lend to the self-restricted borrower. If any lender somehow managed to convince the borrower to accept a loan with an excessive fee or interest rate or other prohibited terms, the terms of the borrowers' recorded self-limitation would govern, and the borrower could have the loan reformed. By restricting in advance their own freedom to contract with lenders, elder homeowners could be free from the greatest abuses of predatory lending.

## II. FINANCIAL ELDER ABUSE AS A COMMERCIAL ENTERPRISE

While the physical abuse or neglect of the elderly received growing attention in this country during the last few decades, financial abuse of the elderly was much less discussed.<sup>2</sup> Despite its relatively low profile, financial elder abuse is a nationwide problem, and may encompass almost one-third of all cases of elder mistreatment.<sup>3</sup> There are two primary types of financial elder abuse.<sup>4</sup> One type, which I call *personal financial abuse*, is abuse committed

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2. See Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 204 (2000).

3. See Heather Elayne Davis, *The California Elder Abuse and Dependent Adult Civil Protection Act and Its Relationship to Rule 10b-5 of the Securities and Exchange Act of 1934*, 42 ORANGE COUNTY LAW. 40, 40-41 (2000) (citing *The National Elder Abuse Incidence Study: Final Report September 1998*, Table 4-2).

4. For the warning signs of financial elder abuse, see Ken Ransford, *Financial Abuse of Elderly Adults*, 23 COLO. LAW. 1077, 1077-78 (1994).

by someone with a personal relation to the victim, such as a family member, friend, caretaker, or a “befriender” who has gained the victim’s trust in order to take advantage of that trust.<sup>5</sup> This abuse typically takes the form of theft or coerced transfer of the victim’s assets, including funds in the victim’s bank accounts or title or equity in the victim’s house.<sup>6</sup> It is often accompanied by other forms of elder abuse, such as physical attacks, threats, or psychological assault.<sup>7</sup>

A second type of financial elder abuse, which I label *commercial financial elder abuse*, is that practiced by more organized businesses. The commercial abuser acts under color of a business enterprise to obtain access to the elder’s assets. Rather than resorting to outright theft, the commercial abuser typically seeks to gain the elder victim’s money by providing or promising to provide goods or services, and either fails to provide the goods or services, provides defective goods or services, or charges significantly more than the market price for them.<sup>8</sup> Commercial abusers target the elderly both because there is a perception that the elderly are easier to take advantage of and because the elderly have significant assets.<sup>9</sup>

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5. Carolyn Dessin calls this the “intentional misuse of an elder’s assets by a fiduciary or caregiver.” Dessin, *supra* note 2, at 207. It has also been termed “exploitation” or “material abuse.” Sana Loue, *Elder Abuse and Neglect in Medicine and Law*, 22 J. LEGAL MED. 159, 166 (2001).

6. “Financial abuse or exploitation is theft or conversion of property by the elder’s relatives, caregivers, or others; it can range from expropriating small amounts of cash to inducing the elder to sign away bank accounts or other property.” Seymour Moskowitz, *Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, 47 LOY. L. REV. 191, 197 (2001).

7. *See id.* at 197–98.

8. Commercial financial elder abuse is rife in the areas of telemarketing and home repair by unlicensed contractors. *See* Richard A. Starnes, Note, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 ELDER L.J. 201, 206–10 (1996). For a discussion of telemarketing fraud and its effects on the elderly, see Jeffrey L. Bratkiewicz, Essay, “Here’s a Quarter, Call Someone Who Cares”; *Who is Answering the Elderly’s Call for Protection from Telemarketing Fraud?*, 45 S.D. L. REV. 586 (2000).

9. Terrie Lewis notes that “the elderly are worth exploiting. They average a net worth of over \$250,000. Over seventy percent own their own vehicles and their own homes. The elderly own retirement accounts, mutual funds, and

### III. PREDATORY LENDING: ITS DEFINITION AND PRACTICES

One of the most virulent forms of financial elder abuse is predatory lending.<sup>10</sup> Predatory lending is notoriously difficult to define, but I offer the following attempt:<sup>11</sup> predatory lending is the use by lenders of deceptive, manipulative, or coercive practices in order to induce borrowers to accept loans that (1) have interest rates or fees significantly above the current market rate given the risk

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stocks.” Terrie Lewis, Note, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 WM. MITCHELL L. REV. 911, 914 (2001) (citations omitted).

10. Cassandra Jones Havard notes the distinction between legitimate subprime lending and predatory lending, stating:

Generally, fair sub-prime lenders engage in risk-based lending, making loans that are appropriately priced to compensate for the risk of lending to a credit-blemished borrower. Predatory lenders engage in asset-based lending. They charge fees and interest rates far beyond the risk incurred, and price the loan based on the assets of the borrower, which are usually tied to the borrower’s equity in a home.

Cassandra Jones Havard, *Invisible Markets Netting Visible Results: When Sub-Prime Lending Becomes Predatory*, 26 OKLA. CITY U. L. REV. 1057, 1065 (2001).

11. Engel and McCoy note, “In 2000, Senator Phil Gramm, then the chairman of the Senate Banking Committee, famously asserted that predatory lending could not be addressed until it could be defined. With that remark, Senator Gramm shrewdly seized on the difficulties in defining predatory lending . . . .” Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1259–60 (2002). In a previous article on predatory lending, I discussed the difficulty in defining this problem and proposed that investors in the secondary markets bear increased liability for predatory lending so that they will be encouraged to purchase loans only from non-predatory lenders. See Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 511–12, 608 (2002). For other proposed solutions, see Daniel S. Ehrenberg, *If the Loan Doesn’t Fit, Don’t Take It: Applying the Suitability Doctrine to the Mortgage Industry to Eliminate Predatory Lending*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 117, 119–20 (2001). See also Engel & McCoy, *supra*, at 3 (proposing that the suitability doctrine currently governing securities brokers be applied to lenders in the residential loan market); Margot Saunders & National Consumer Law Center, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. BANKING INST. 111, 128–39, 142–46 (2002) (proposing changes to federal law on several fronts to reduce predatory lending).

profile of the borrowers or other terms significantly worse than the market norm offered by legitimate lenders, or (2) which leave the borrowers worse off than they would have been without any new loans, or (3) both.<sup>12</sup> These factors should be balanced against each other so that a loan with grossly excessive interest rates or fees, given the risk characteristics of the borrower, would need less in the way of lender deception, manipulation, or coercion to be considered predatory.

A loan may affirmatively harm a borrower whether or not the loan is overpriced where, for example, the borrower is unable to repay the new loan and will lose her house as a result, or where it refinances existing loans with interest rates below the current market rate.<sup>13</sup>

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12. A recent federal task force that investigated predatory lending defined it as follows:

Predatory lending—whether undertaken by creditors, brokers, or even home improvement contractors—involves engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of understanding about loan terms. These practices are often combined with loan terms that, alone or in combination, are abusive or make the borrower more vulnerable to abusive practices.

Joint U.S. Department of Housing and Urban Development—U.S. Department of the Treasury Task Force on Predatory Lending, *Curbing Predatory Home Mortgage Lending* 1 (June 2000), available at <http://www.hud.gov/library/bookshelf18/pressrel/treasrpt.pdf> (last visited Mar. 9, 2002) [hereinafter *Curbing Predatory Home Mortgage Lending*]. By comparison, Engel and McCoy define predatory lending as a

syndrome of abusive loan terms or practices that involve one or more of the following five problems:

- (1) loans structured to result in seriously disproportionate net harm to borrowers,
- (2) harmful rent seeking,
- (3) loans involving fraud or deceptive practices,
- (4) other forms of lack of transparency in loans that are not actionable as fraud, and
- (5) loans that require borrowers to waive meaningful legal redress.

Engel & McCoy, *supra* note 11, at 1260.

13. See Alvin C. Harrell, *Subprime Lending Developments with Implications for Creditors and Consumers*, 52 CONSUMER FIN. L.Q. REP. 238,

The primary goal of predatory lending is to convince or coerce borrowers to obtain loans that cost more than the market rate given the borrowers' risk characteristics.<sup>14</sup>

Common methods of inducing borrowers to pay higher than market interest rates or fees or accept affirmatively harmful loans include:<sup>15</sup>

- 1) *Loan Flipping*: The rapid refinancing of borrowers' loans, adding new fees and costs to each refinancing so that the lender bleeds dry the equity in the house.<sup>16</sup> Flipping appears to be widespread in the subprime market among elder borrowers.<sup>17</sup>
- 2) *High Prepayment Penalties*: This predatory method is rare in the prime market, but runs rampant in the subprime market.<sup>18</sup> Many subprime lenders charge

242 n.45 (1998); *see also infra* note 20 and accompanying text (discussing "equity stripping").

14. *See Testimony before the House Comm. on Banking and Fin. Servs.*, 106th Cong., (2000) (testimony of Ellen Seidman, Director of the Office of Thrift Supervision), available at 2000 WL 19304110 [hereinafter *Testimony of Ellen Seidman*]; *see also* Eggert, *supra* note 11 (defining the purpose of predatory lenders).

15. There are numerous similar lists of the various aspects of predatory loans, and this author does not claim originality in the following list.

16. *See Curbing Predatory Home Mortgage Lending, supra* note 12, at 21.

17. One study found that thirty-five percent of elder subprime refinance borrowers reported refinancing two or more times within the previous three years. *See Older Subprime Refinance Mortgage Borrowers*, 74 AARP DATA DIGEST 4 (2002), available at [http://research.aarp.org/consume/dd74\\_finance.html#pdf](http://research.aarp.org/consume/dd74_finance.html#pdf) (last visited Sept. 29, 2002). Rapid refinancing is much more harmful in the subprime market than it is in the prime market due to the extensive use of prepayment penalties and other high fees. *See supra* note 18 and accompanying text (discussing prepayment penalties).

18. While eighty percent of subprime loans carry prepayment penalties, as few as two percent of the prime market loans carry these penalties. *See* James H. Carr & Lopa Kolluri, Fannie Mae Foundation, *Predatory Lending: An Overview* 3 (2001), at <http://www.fanniemaefoundation.org/news/pr/2001sum/010802.shtml>; John Hechinger, *Home Bound: Nasty Surprise Haunts Some Folks' Mortgage: A Prepayment Penalty*, WALL ST. J., Aug. 1, 2001, at A1, available at 2001 WL-WSJ 2871388; Brad Scriber, *Prepayment Penalties a Boon To Lenders, Burden to Consumers*, AM. BANKER, Nov. 2, 2001, at 16, available at 2001 WL 26574837. Engel and McCoy explain this phenomenon, stating "In competitive loan markets, market forces and

prepayment penalties, often as high as five percent of the loan, if borrowers pay off their loans before a set period of time passes.<sup>19</sup>

- 3) *Equity Stripping*: The process of convincing homeowners to enter into loans that cause them to lose their homes when they cannot pay the loans.<sup>20</sup>
- 4) *Packing*: The process of increasing the amount of loans by adding unnecessary charges for products, such as credit insurance, that the borrower does not need, want, or often even realize that she is purchasing.<sup>21</sup>
- 5) *Steering*: The process by which loan brokers direct borrowers to lenders who will provide high-cost loans, even though the borrowers would qualify for much lower interest rates.<sup>22</sup> Steering by brokers is so effective that perhaps thirty-five to fifty percent of borrowers induced into accepting subprime loans could have qualified for much less expensive prime rate loans.<sup>23</sup>
- 6) *Balloon payments*: The requirement that the borrower pay the entire loan amount before the monthly payments

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disclosures are generally sufficient to curb such abuses. In the market for predatory loans, however, disclosures are usually incomprehensible and market forces do not provide sufficient constraints against that conduct . . .” Engel & McCoy, *supra* note 11, at 1270.

19. See Hechinger, *supra* note 18.

20. See Harrell, *supra* note 13, at 242 n.45.

21. See *Curbing Predatory Home Mortgage Lending*, *supra* note 12, at 88. Unscrupulous lenders charge borrowers a single premium large enough to pay for insurance for the term of the loan, making it difficult for the borrower to cancel the insurance and increasing the amount of the loan. For a complete discussion of consumer credit insurance, as well as charges that it is used in a predatory manner, see Anthony Rollo, *A Primer on Consumer Credit Insurance*, 54 CONSUMER FIN. L.Q. REP. 52, 58 (2000).

22. See Kathleen C. Engel & Patricia A. McCoy, *The CRA Implications of Predatory Lending*, 29 FORDHAM URB. L.J. 1571, 1578–80 (2002). Engel and McCoy suggest that banks be required to determine whether applications for subprime loans from a bank be reviewed by the bank to determine whether the applicants would be eligible for prime rate, and hence much less expensive, loans. See *id.* at 1598.

23. See Carr & Kolluri, *supra* note 18, at 7.

would have gradually paid off the loan. Some abusive lenders include this requirement to ensure that their borrowers, who rarely can make such a large lump-sum payment, must refinance their loans, offering a new opportunity for the lender to charge points and fees, thus increasing the amount of the loans.<sup>24</sup>

- 7) *Fraud or Deception*: Outright deception is the most blatant form of predatory lending and may occur either through express statements or by concealing information from borrowers that would reveal the true cost or effects of the loan.<sup>25</sup>

Predatory lending is a growing problem that harms not only its victims but also their communities.<sup>26</sup> Its victims are burdened with overpriced mortgages and, even if they are able to pay these loans, they feel the financial loss caused thereby for years afterward. This direct cost was recently estimated at \$9.1 billion annually.<sup>27</sup> A much greater and separate harm, that of foreclosure, is suffered by those

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24. See Eggert, *supra* note 11, at 519.

25. Engel and McCoy state:

The most notorious deceptions include fraudulent disclosures, failures to disclose information as required by law, bait-and-switch tactics, and loans made in collusion with home-repair scams. There are reports of lenders financing fees without borrowers' knowledge, secretly conveying title to borrowers' property, and deliberately concealing liens on borrowers' homes.

Engel & McCoy, *supra* note 11, at 1267.

26. See *Testimony of Ellen Seidman*, *supra* note 14; Todd Silberman, *Slowing Economy Blamed For Rise In Mortgage Fraud*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 1, 2001, at B8 (quoting James Croft, head of the Mortgage Asset Research Institute, which researches mortgage fraud); Peggy Twohig, *Prepared Statement of the Federal Trade Commission before the Board of Governors of the Federal Reserve System on Predatory Lending Practices in the Home-Equity Lending Market* (Sept. 7, 2000), at <http://www.ftc.gov/os/2000/09/predatorylending.htm> (last visited Sept. 29, 2002).

27. See Eric Stein, *Quantifying the Economic Cost of Predatory Lending, a Report from the Coalition for Responsible Lending* (July 25, 2001), at <http://www.responsiblelending.org> (revised Oct. 30, 2001). The estimates in the report are admittedly "rough, though conservative . . ." *Id.* at 13.

unable to pay their loans. Recently, the rate of serious delinquencies among subprime loans escalated to record highs.<sup>28</sup>

#### IV. PREDATORY LENDING IS OFTEN TARGETED AT THE ELDERLY

Predatory lending is often aimed at the elderly, some of whom are more vulnerable to such abusive tactics than are younger borrowers. Unscrupulous lenders can target elderly homeowners by obtaining databases that sort homeowners by age, race, or gender.<sup>29</sup> Many seniors purchased their home years ago, have paid off their loans, and own their homes free and clear of any debt.<sup>30</sup> Moreover, even where elder homeowners have loans, the loan amount as a percentage of the home's value is on average much smaller for homeowners sixty-five and older than for the general population, with a median loan amount of only 33.8% of the total value of the

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28. See *SPECIAL REPORT: REO & Foreclosure Management, the Challenge Ahead*, NAT'L MORTGAGE NEWS, Aug. 26, 2002, at 15, available at 2002 WL 8160239. The number of homes in foreclosure has skyrocketed, despite what had been a booming economy and a corresponding sizeable increase in home values that should have provided a buffer to financially strapped homeowners. For example, the number of foreclosures in or near the Chicago area nearly doubled between 1993 and 1998. See U.S. Department of Housing & Urban Development, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* 8 (April 2000), at <http://www.hud.gov/library/bookshelf18/pressrel/subprime.html> (last visited Aug. 16, 2001); see also Thomas Grillo, *Foreclosure on the Rise: Losing a Job Can Spell Disaster if You're Heavily Mortgaged in a High-Priced Place Like Mass.*, BOSTON GLOBE, July 14, 2002, at H.1, available at 2002 WL 4138291 (discussing the effects of the rise in foreclosures on homeowners).

29. See Paul D. Davies, *Subprime Lenders Prey on Hard-Luck Consumers*, PHIL. DAILY NEWS, Feb. 7, 2001, at 1, available at 2001 WL 12167836.

30. See *Mortgage Lending Abuses: Testimony Before the House Comm. on Banking & Fin. Servs.*, 106th Cong. (2000) (testimony of Margot Saunders, Managing Attorney, National Consumer Law Center), available at 2000 WL 19304095 [hereinafter *Testimony of Margot Saunders*]. The latest American Housing Survey reveals that seventy-six percent of homeowners sixty-five or older own their houses free and clear of any mortgages, compared to thirty-seven percent of the general population, including the elderly. See U.S. Census Bureau, *American Housing Survey for the United States: 1999*, available at <http://www.census.gov/hhes/www/housing/ahs/ahs99/tab315.html> (last visited Sept. 29, 2002).

house, compared to 59.4% for all homeowners/borrowers.<sup>31</sup> This sizeable equity makes the elders' homes tempting targets compared to newly purchased homes saddled with purchase money loans.<sup>32</sup>

Many senior homeowners need to hire contractors because they own older homes that require some renovation, especially if the owner is, due to age, unable to make the improvements herself.<sup>33</sup> Often, retirees find themselves living on a fixed income, without sizeable cash reserves, and so they must borrow to finance the necessary improvements.<sup>34</sup>

Predatory lenders seek out homes needing repairs and directly approach the homeowners.<sup>35</sup> As a result, many elders find themselves personally targeted by subprime lenders. In one study, sixty-one percent of refinance subprime borrowers sixty-five years and older reported that they were approached by a broker or lender, rather than the borrower initiating contact.<sup>36</sup> This number is nearly *double* the rate reported by prime rate refinance borrowers of the same age.<sup>37</sup> Subprime lenders and brokers seek, as their perfect client, "an uneducated widow who is on a fixed income . . . who has

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31. *See id.*

32. *See Saunders & National Consumer Law Center, supra* note 11, at 119.

33. *See Mortgage Lending Abuses, Testimony Before the House Comm. on Banking & Fin. Servs.*, 106th Cong. (2000) (testimony of William J. Brennan, Jr., Director, Home Defense Program of the Atlanta Legal Aid Society, Inc.), available at 2000 WL 19304097 [hereinafter *Testimony of William J. Brennan*]; *see also* AARP Research, *Home Improvement Contractors* (Jan. 1999), at [http://research.aarp.org/consume/fs75\\_contract\\_1.html](http://research.aarp.org/consume/fs75_contract_1.html) (last visited Sept. 29, 2002) (finding that elder homeowners are more likely to own homes and that their homes are, on average, older and more often require repairs). The study also found that elder homeowners are less able or willing to do their own repairs, stating "According to 1995 AHS data, of homeowners 75 and older reporting home repair work over a two-year period, eight in ten (79%) did none of the repairs themselves." *Id.*

34. Low income elders are much more likely than their younger equivalents to own houses and thus be ready targets for home equity fraud. While only thirty-nine percent of households with incomes under the federal poverty level are homeowners, fifty-eight percent of older Americans below the poverty level own homes. *See Testimony of Margot Saunders, supra* note 30.

35. *See Engel & McCoy, supra* note 22, at 1584.

36. *See Older Subprime Refinance Mortgage Borrowers, supra* note 17, at 3.

37. *See id.*

her house paid off, is living off of credit cards, but having a difficult time keeping up her payments, and who must make a car payment in addition to her credit card payments.”<sup>38</sup>

Subprime lenders are successful in their sales efforts aimed at the elderly. While only twenty-one percent of prime borrowers were at least fifty-five years old, thirty-five percent of subprime borrowers were fifty-five or older.<sup>39</sup> Because they are more likely to enter into subprime loans, older homeowners are also more likely to be victims of predatory lending. Not all subprime lenders are predatory, but virtually all predatory lenders deal in the subprime market, because there they can charge high interest rates and fees.<sup>40</sup> One study in California concluded that predatory terms or conditions were included in more than one-third of the subprime loans reviewed made to borrowers refinancing existing loans.<sup>41</sup>

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38. *Predatory Lending Practices: Hearing Before S. Special Comm. on Aging*, 105th Cong. (1998) (statement of Jim Dough), available at 1998 WL 8993304.

39. *Curbing Predatory Home Mortgage Lending*, *supra* note 12, at 36.

40. See Association of Community Organizations for Reform Now (ACORN), *Separate and Unequal: Predatory Lending in America 2* (Nov. 2001), at <http://www.acorn.org/acorn10/predatorylending/plreports/report.htm> (last visited Sept. 29, 2002) (stating that “[w]hile not all subprime lenders are predatory,” the overwhelming majority of predatory lenders are subprime, “and the subprime industry is a fertile breeding ground for predatory practices . . .”); see also Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved With Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 536–37 (2000) (reviewing SEC filings and finding that subprime loans in the reviewed securitized pools had a median interest rate somewhere between eleven percent and 11.99%, while the rate for conventional thirty-year mortgages averaged 7.54%). In addition to higher interest rates, subprime loans also feature points and fees that are three to five times as much as those typically charged in the prime market. See Davies, *supra* note 29, at 1; ACORN, *supra*, at 28.

41. See California Reinvestment Committee, *Stolen Wealth: Inequities in California's Subprime Mortgage Market* (Nov. 2001), available at <http://www.calreinvest.org/PredatoryLending/StudyOnWeb7.24.01.html> (studying in depth 117 homeowners in four California communities and discussing the prevalence of predatory lending in the subprime lending industry). The study concluded that thirty-three percent of the homeowners “felt that they were victims of predatory lending or lending discrimination” and that over thirty-three percent of the homeowners studied appeared to be “predatory lending victims,” such as those trapped in a “worst case scenario,”

Predatory lenders take advantage of the frailties they sometimes find in elderly borrowers. One such lender explained, "If someone appeared uneducated, inarticulate, was a minority, or was particularly old or young, I would try to include all the insurance coverages [my company offered] . . . . The more gullible the customer appeared, the more coverages I would try to include in the loan."<sup>42</sup> Elders who suffer from Alzheimer's and other deficits of memory and cognition are favored customers for predatory lenders, as they are least able to defend themselves from fraud, deception, or other sharp business practices.<sup>43</sup> Donna Harkness explains that "poor, elderly persons are often illiterate and/or unsophisticated and/or too ill, either physically or mentally, to carefully read and comprehend a complicated sheaf of mortgage loan documents."<sup>44</sup> A recent study of elder borrowers reveals that subprime borrowers are more likely than prime borrowers to be unfamiliar with the mortgage process and confused by key terms, such as prepayment penalties, interest rate, and points and fees.<sup>45</sup>

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with two or more of a set of factors indicative of predatory loans, such as "high points and fees," deception by the lender, subprime loans for prime lenders, and bait and switch tactics. *Id.*

42. Jordan Rau, *Stalking the Predators: State Legislature Eyes More Restrictions on Lending*, NEWSDAY, June 27, 2001, at A06, available at 2001 WL 9238572 (quoting an assistant manager at a Citigroup subsidiary regarding aggressive tactics she used to trick customers into taking out loans).

43. According to William J. Brennan, Jr., Director, Home Defense Program of the Atlanta Legal Aid Society, Inc., "The common characteristics of these victims are a need for money (either real or suggested by the lender) combined with a lack of financial sophistication, often exacerbated by diminished mental capacity as a result of Alzheimer's and other dementia-related diseases." *Testimony of William J. Brennan, supra* note 33.

44. Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1, 43 (2000).

45. See *Older Subprime Refinance Mortgage Borrowers, supra* note 17, at 3. This study of 1008 subprime and prime borrowers, conducted for AARP and the Federal Home Loan Mortgage Corporation, concluded that subprime borrowers were "less likely . . . to report completely understanding three key loan terms: prepayment penalties, points and fees, and interest rate[s]" and that "[s]ubprime borrowers were less likely to be familiar with their credit records, loan qualification requirements, mortgage rates and costs, types of mortgages available, and basic mortgage terms." *Id.*

Not only is predatory lending often targeted at the elderly, its effects are often more devastating to older homeowners. Because they often live on fixed incomes, the elderly typically are less likely to rebound from financial loss than are younger victims.<sup>46</sup> While foreclosure, the common result of predatory lending, often causes great damage even to young homeowners,<sup>47</sup> it is even more frequently catastrophic to the elderly, who are often unlikely ever to be able to purchase a replacement house.<sup>48</sup> Seniors who have lived in their homes for years and raised their children there may place an enormous emotional value on their houses, quite apart from their homes' financial worth.<sup>49</sup> Elder homeowners often have held onto their homes, hoping to "age in place" and take care of themselves.<sup>50</sup>

When the elderly lose their homes, typically while losing a sizeable amount of equity at the same time, they often do not have alternative places to live.<sup>51</sup> Furthermore, the trauma of being forced out and the difficulty of suddenly packing all of their belongings and finding a new residence, are generally worse for elders than they are for their younger counterparts.<sup>52</sup> The independence of elders is often dependent upon their having a place to live that they can afford, so that when they find themselves homeless, they may have no alternative but to move to a much more restrictive housing alternative, such as a board and care facility or a rest home.<sup>53</sup> Elders

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46. See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 101 (1998).

47. See Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 386 (1994).

48. See Eggert, *supra* note 11, at 581.

49. See Moskowitz, *supra* note 46, at 101.

50. For the challenges to providing housing to the elderly and allowing them to "age in place," see Cori Menken, Note, *Senior Citizen Overlay Districts and Assisted Living Facilities: Different but the Same*, 21 PACE L. REV. 481, 507 (2001).

51. "A tight housing market and a shortage of appropriate housing is a serious problem for older Americans." *Id.* at 482 (quoting Patricia Baron Pollack & Alice Nudelman Gorman, *Community-Based Housing for the Elderly*, 420 AM. PLANNING ASS'N, PLANNING ADVISORY SERV. 1 (1989)).

52. See Moskowitz, *supra* note 46, at 101.

53. See Eggert, *supra* note 11, at 581–82.

fear the loss of autonomy that financial abuse can cause them, and frequently fail even to report financial elder abuse out of fear that reporting such abuse may “lead to the initiation of protective proceedings or nursing home confinement.”<sup>54</sup>

#### V. ANTI-PREDATORY LENDING LAWS ARE NOT SPECIFICALLY TAILORED TO PROTECT THE ELDERLY

While a distressing amount of predatory lending is targeted at the elderly, who generally suffer more from its effects, the laws designed to curb this lending are not tailored to give special protection to the elderly or to address the greater consequences suffered by the elderly. Instead, most predatory lending laws are designed to give additional protections to any homeowner paying high interest rates or fees for home loans and to bar the use of certain terms in high-cost loans.

The first major attempt to stop predatory lending was the Home Ownership and Equity Protection Act of 1994 (HOEPA).<sup>55</sup> While HOEPA’s flaws are well documented, it still has served as a template for subsequent legislation intended to cure HOEPA’s defects.<sup>56</sup> HOEPA is designed to identify high-cost mortgage loans by determining whether the loans exceed specific interest rate and fee triggers set much higher than the fees or rates of most legitimate loans.<sup>57</sup> Once high-cost mortgages are identified, the affected

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54. Ransford, *supra* note 4, at 1078.

55. Riegle Community Development and Regulatory Improvement Act, Pub. L. No. 103-325, §§ 151-58, 108 Stat. 2190-2198 (1994) (enacted as a part of the Federal Truth in Lending Act (TILA), 15 U.S.C. § 1601; Reg. Z, 12 C.F.R. § 226). For a broad overview of HOEPA, see Jean Constantine-Davis, *HOEPING for Better Days: The Home Ownership and Equity Protection Act of 1994 (HOEPA)*, in 2 CONSUMER FINANCIAL SERVICES LITIGATION 243 (1999), and Gary Klein, *The Home Ownership And Equity Protection Act of 1994: Enhanced TILA Protections*, in 2 CONSUMER FINANCIAL SERVICES LITIGATION 343 (1999).

56. For a discussion of the flaws in HOEPA, see Eggert, *supra* note 11, at 584-92.

57. See 15 U.S.C. § 1602(2)(A); 66 Fed. Reg. 65,604, 65,606 (Dec. 20, 2001); *infra* note 64 and accompanying text.

borrowers are given additional protections<sup>58</sup>—including additional disclosures provided three days before the loan is to close—that are designed to be understood by less sophisticated borrowers. These disclosures give borrowers six days from the time they are given accurate price information in which to rescind, rather than the three days given by the more generic Federal Truth in Lending Law.<sup>59</sup> For high-cost loans, HOEPA also restricts the use of some terms associated with predatory lending, such as prepayment penalties, balloon payments with a short duration, and higher interest rates that spring into existence upon the borrower's default.<sup>60</sup> HOEPA provides enhanced damages through refund of the finance charges and fees that were paid by the borrower, and also provides expanded rescission rights.<sup>61</sup>

When HOEPA was originally passed, the interest and fee triggers were set so high that HOEPA was fairly ineffective, as many predatory lenders merely set their fees and interest rates slightly below the triggers and still reaped a tidy profit.<sup>62</sup> The volume of subprime lending surged after HOEPA was passed, as did the amount of predatory lending.<sup>63</sup> In 2001, the Federal Reserve Board amended Regulation Z, which implements HOEPA, to lower the APR trigger for first-lien mortgage loans from ten percentage points to eight percentage points above the rate for Treasury securities with

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58. See CAROL V. CLARK, PADRICK'S RESPA, TILA, HOEPA AND ECOA IN REAL ESTATE TRANSACTIONS WITH FORMS § 2-30, at 244 (4th ed. 2001) (stating that "[t]he Act identifies a class of high-cost mortgage loans through rate and fee triggers, and provides consumers entering into these transactions with special protections."); see also Harkness, *supra* note 44, at 11–12 (stating that "[b]oth Truth in Lending and HOEPA predominantly mandate disclosures without proscribing or prescribing any further conduct.").

59. See 15 U.S.C. § 1635(a) (2000).

60. See 15 U.S.C. § 1639(c)–(f).

61. See 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(a)(3) (2000).

62. See *Curbing Predatory Home Mortgage Lending*, *supra* note 12, at 85.

63. See Allen Fishbein & Harold Bunce, *Subprime Market Growth and Predatory Lending* 273, at <http://www.huduser.org/publications/pdf/brd/13Fishbein.pdf> (last visited Oct. 8, 2002). Fishbein and Bunce state, "In 1994, the \$35 billion in subprime mortgages represented less than 5 percent of all mortgage originations. By 1999, subprime lending had increased to \$160 billion, almost 13 percent of the mortgage origination market." *Id.* at 274.

a comparable maturity, and amended the fee trigger to include optional insurance and other debt-protection products to be financed by the loan.<sup>64</sup>

Because of HOEPA's initial ineffectiveness, other governmental bodies stepped into the breach. North Carolina was the first state to pass anti-predatory lending legislation, with its ground-breaking measure, S.B. 1149.<sup>65</sup> In addition to fee and interest rate triggers, North Carolina added as a trigger any prepayment fees lasting more than thirty months which exceed two percent of the amount prepaid.<sup>66</sup>

For loans that trip the triggers, North Carolina bars balloon payment provisions, increases in interest rates upon default, and negative amortization in high-cost loans.<sup>67</sup> Lenders are also required to receive, for each high-cost loan, a certification "from a counselor

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64. 66 Fed. Reg. 65,606, 65,608–65,610, 65,612, 65,613 (Dec. 20, 2001). For a discussion of these changes, see Donald C. Lampe & Stephen F.J. Ornstein, *Federal Reserve Board Amendments to Regulation Z/HOEPA Regulations*, 55 CONSUMER FIN. L.Q. REP. 223 (2001). Compliance with these changes did not become mandatory until October 1, 2002. See 66 Fed. Reg. 65,604 (Dec. 20, 2001).

65. See 1999 N.C. Sess. Laws 332, available at <http://www.ncga.state.nc.us/html1999/bills/AllVersions/Senate/S1149vc.html> (last visited Aug. 30, 2002); see also Harkness, *supra* note 44, at 29–32 (providing a brief history of how American mortgage laws led to the proliferation of predatory lending practices and ways in which these practices can be curtailed); Donald C. Lampe, *The North Carolina "Predatory Lending" Usury Statute—S.B. 1149*, 55 CONSUMER FIN. L.Q. REP. 81 (2001) (giving a brief overview of North Carolina predatory lending laws, and explaining how these laws protect consumers' residential homes); Stephen F.J. Ornstein, *Summary of North Carolina Senate Bill 1149 Prohibiting Predatory Lending*, 54 CONSUMER FIN. L.Q. REP. 302 (2000) (summarizing and highlighting the important provisions of North Carolina's predatory lending laws); Richard R. Daugherty, Note, *Will North Carolina's Predatory Home Lending Act Protect Borrowers From the Vulnerability Caused by the Inadequacy of Federal Law?*, 4 N.C. BANKING INST. 569, 604 (2000) (explaining the practice of predatory lending and noting how numerous federal laws often hinder the application of North Carolina's predatory lending laws).

66. See 1999 N.C. Sess. Laws 332 § 24-1.1E(a)(6)(b)(3), available at <http://www.ncga.state.nc.us/html1999/bills/AllVersions/Senate/S1149vc.html> (last visited Aug. 30, 2002).

67. See *id.* at § 24-1.1E(a)(7)(b).

approved by the North Carolina Housing Finance Agency that the borrower has received counseling on the advisability of the loan transaction and the appropriate loan for the borrower” and lenders cannot make loans without “due regard to repayment ability.”<sup>68</sup> In addition to special protections for high-cost loans, North Carolina’s legislation also bans some practices in all residential lending, including flipping loans, packing loans with single-premium credit insurance, and encouraging a borrower to default on an existing loan.<sup>69</sup>

While lenders have widely predicted that lenders would withdraw from states that enact strong anti-predatory legislation, a recent study concluded that subprime lenders have not fled from North Carolina nor stranded its borrowers.<sup>70</sup> More importantly, lenders have not even raised their prices in reaction to the increased protections.<sup>71</sup> Instead, by curbing abusive lending, North Carolina has likely saved its borrowers an estimated \$100 million.<sup>72</sup>

Even though the North Carolina law is designed to correct HOEPA’s flaws and protect elderly homeowners who are prime targets for predatory lending, North Carolina’s anti-predatory legislation does not include any provisions directed specifically toward elderly borrowers. Similarly, a myriad of other enactments in other states designed to prevent predatory lending also lack any special provisions specifically aimed at protecting the elderly, including those enacted in California,<sup>73</sup> Colorado,<sup>74</sup> Connecticut,<sup>75</sup>

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68. *Id.* at § 24-1.1E(a)(7)(c)(1).

69. *See id.* at § 24-10.2(a)–(d).

70. Keith Ernst et al., North Carolina’s Subprime Home Loan Market After Predatory Lending Reform: A Report from the Center for Responsible Lending 3 (Aug. 13, 2002), at <http://www.responsiblelending.org/other/media.cfm> (last visited Aug. 30, 2002).

71. *See id.* at 5.

72. *See id.* at 8.

73. *See* A.B. 489, Gen. Assem., Reg. Sess. (Cal. 2001) (enacted as CAL. FIN. CODE § 4970 (West 2002)).

74. *See* H.B. 02-1259, Ch. 323, Gen. Assem., Reg. Sess. (Colo. 2002), available at [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/sl2002a/sl.323.htm](http://www.state.co.us/gov_dir/leg_dir/olls/sl2002a/sl.323.htm) (last visited Sept. 15, 2002).

75. *See* Sub. H.B. 6131, Pub. Act 01-34, Gen. Assem., Reg. Sess. (Conn. 2001), available at <http://www.cga.state.ct.us/2001/act/Pa/2001PA-00034->

the District of Columbia,<sup>76</sup> Florida,<sup>77</sup> Georgia,<sup>78</sup> Maryland,<sup>79</sup> Michigan,<sup>80</sup> Minnesota,<sup>81</sup> New York,<sup>82</sup> Oregon,<sup>83</sup> Pennsylvania,<sup>84</sup> Texas,<sup>85</sup> Virginia,<sup>86</sup> Washington,<sup>87</sup> West Virginia,<sup>88</sup> the City of

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R00HB-06131-PA.htm (last visited Sept. 15, 2002) (enacting a general predatory lending law); Sub. H.B. 5073, Pub. Act 02-12, Gen. Assem., Reg. Sess. (Conn. 2002), *available at* <http://www.cga.state.ct.us/2002/act/Pa/2002PA-00012-R00HB-05073-PA.htm> (last visited Sept. 15, 2002) (affecting the use of prepaid finance charges).

76. *See* Home Loan Protection Act of 2002, C.B. 14-515, Act 14-296, Council of D.C., Reg. Sess. (D.C. 2002), *available at* [http://www.ncsl.org/programs/banking/PredLend\\_2002.htm](http://www.ncsl.org/programs/banking/PredLend_2002.htm) (last visited Sept. 15, 2002). This act repealed the District of Columbia's stricter bill, *Protections from Predatory Lending and Mortgage Foreclosure Improvements Act of 2000*.

77. *See* S.B. 2262, Ch. 57, 2002 Leg. (Fla. 2002), *available at* [http://www.leg.state.fl.us/cgi-bin/view\\_page.pl?Tab=session&Submenu=1&FT=D&File=sb2262er.html&Directory=session/2002/Senate/bills/billtext/html](http://www.leg.state.fl.us/cgi-bin/view_page.pl?Tab=session&Submenu=1&FT=D&File=sb2262er.html&Directory=session/2002/Senate/bills/billtext/html) (last visited Sept. 15, 2002).

78. *See* H.B. 1361, Gen. Assem., Reg. Sess. (Ga. 2002), *available at* [http://www.legis.state.ga.us/Legis/2001\\_02/sum/hb1361.htm](http://www.legis.state.ga.us/Legis/2001_02/sum/hb1361.htm) (last visited Aug. 30, 2002).

79. *See* H.B. 649, Ch. 532, Gen. Assem., Reg. Sess. (Md. 2002), *available at* <http://mlis.state.md.us/2002rs/billfile/HB0649.htm> (last visited Sept. 15, 2002).

80. *See* H.B. 6121 91st Leg., Reg. Sess. (Mich. 2002), *available at* <http://www.michiganlegislature.org/documents/mcl/pdf/mcl-act-660-of-2002.pdf> (last visited Feb. 27, 2003).

81. *See* S.B. 2988, Ch. 342, 2002 Leg., 82d Sess. (Minn. 2002), *available at* [http://www.revisor.leg.state.mn.us/cgi-bin/getbill.pl?number=SF2988&session=ls82&version=latest&session\\_number=0&session\\_year=2002](http://www.revisor.leg.state.mn.us/cgi-bin/getbill.pl?number=SF2988&session=ls82&version=latest&session_number=0&session_year=2002) (last visited Sept. 15, 2002).

82. *See* H.B. 11856, Gen. Assem., Reg. Sess. (N.Y. 2002), *available at* [http://www.mbaa.org/state\\_update/2002/ny/a11856\\_fin.pdf](http://www.mbaa.org/state_update/2002/ny/a11856_fin.pdf) (last visited Nov. 12, 2002).

83. *See* H.B. 2764, 71st Leg., Reg. Sess. (Or. 2001), *available at* <http://www.leg.state.or.us/01orlaws/0952.pdf> (last visited Feb. 27, 2003).

84. *See* S.B. 377, Gen. Assem., Reg. Sess. (Pa. 2001), *available at* <http://www.legis.state.pa.us/WU01/LI/BI/BT/2001/0/SB0377P1240.HTM> (last visited Feb. 27, 2003).

85. *See* S.B. 1581, Ch. 622, 77th Leg., Reg. Sess. *available at* [http://www.capitol.state.tx.us/tlo/legislation/bill\\_status.htm](http://www.capitol.state.tx.us/tlo/legislation/bill_status.htm) (last visited Feb. 27, 2003).

86. *See* H.B. 2708, Ch. 510, Gen. Assem., Reg. Sess. (Va. 2001), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?011+ful+CHAP0510> (last visited Sept. 15, 2002).

Cleveland,<sup>89</sup> and the City of Oakland.<sup>90</sup> A rare example of anti-predatory lending legislation that has a provision specifically regarding the elderly is Ohio's.<sup>91</sup> Ohio's enactment specifies that lenders who fail to comply with its legislation can be fined and that "If the person injured by the failure to comply is sixty-five years of age or older, the superintendent may double the amount of the fine."<sup>92</sup>

When the American Association of Retired Persons (AARP) drafted a Model Home Loan Protection Act to prevent predatory lending, one might have supposed that the AARP would design special protections for older homeowners.<sup>93</sup> Indeed, the model bill's Introduction notes that predatory lenders often target the elderly, and that older homeowners are more likely to have substantial equity in their homes, which likely need repair.<sup>94</sup> Enacting the provisions of the AARP's model bill will "help to ensure that millions of older Americans will be able to remain financially secure in their homes

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87. See H.B. 1205, Ch. 81, 57th Leg., Reg. Sess. (Wash. 2001), available at [http://www.leg.wa.gov/pub/billinfo/2001-02/House/1200-1224/1205\\_pl\\_04092001.txt](http://www.leg.wa.gov/pub/billinfo/2001-02/House/1200-1224/1205_pl_04092001.txt)

88. See H.B. 4379, Ch. 39, Gen. Assem., Reg. Sess. (W. Va. 2002), available at <http://www.legis.state.wv.us/legishp.html> (last visited Sept. 15, 2002).

89. See CLEVELAND, OHIO, ORDINANCE 737-02 (Apr. 23, 2002), available at [http://www.mbaa.org/state\\_update/2002/oh/cleveland\\_final.pdf](http://www.mbaa.org/state_update/2002/oh/cleveland_final.pdf) (last visited Sept. 2, 2002). For claims that Cleveland's ordinance is driving out lenders see *Panel Urged to Toughen Lending Law*, CIN. POST, Aug. 28, 2002, at 12A, 2002 WL 25164410.

90. See OAKLAND, CAL., ORDINANCE 12361 (Oct. 2, 2001).

91. Given the pace of new predatory lending enactments on the federal, state, and local level, it is difficult to attempt to track all such enactments, other than through a constantly updated Web page.

92. See H.B. 386, Sec. 1349.34(F), 124th Gen. Assem., Reg. Sess. (Ohio 2001-2002), available at [ohioacts.avv.com/124/hb\\_386.html](http://ohioacts.avv.com/124/hb_386.html) (last visited Feb. 27, 2003).

93. See AARP, *Home Loan Protection Act: A Model State Statute* (2001), available at [http://research.aarp.org/consume/d17346\\_loan.html](http://research.aarp.org/consume/d17346_loan.html) (last visited Sept. 25, 2002). This model statute was drafted by Mike Calhoun of the Self-Help Credit Union and Margot Saunders, Elizabeth Renuart, and Mark Benson of the National Consumer Law Center.

94. See *id.* at Introduction.

and communities.”<sup>95</sup> However, despite the interest of its sponsor and the purpose stated in its Introduction, the AARP model bill does not provide any special protections for elderly homeowners.<sup>96</sup> If the AARP model bill, like most enacted legislation, does not contain special protections for the elderly, presumably good reasons must explain this stark and nearly universal omission.

Instead of offering elders specific protections in their anti-predatory lending legislation, some states have enacted separate laws targeting fraud against the elderly, commonly by providing enhanced remedies for elderly victims. For example, California enacted the landmark Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), which “provides civil plaintiffs a private right of action to recover enhanced remedies in cases where they can show clear and convincing evidence of physical abuse, reckless neglect, or fiduciary abuse.”<sup>97</sup> In addition, the California Consumer Legal Remedies Act (CLRA), which is designed to prevent acts of unfair competition or unfair business practice, provides treble damages when such behavior is directed toward the elderly.<sup>98</sup> A senior

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95. *Id.*

96. This comment is intended as an observation, not a criticism. There are potential pitfalls to creating special protections for the elderly in general anti-predatory lending legislation unless those protections are carefully constructed. See *infra* note 109 and accompanying text.

97. Martin Ramey, Comment, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California's Elder Abuse Act*, 39 SAN DIEGO L. REV. 599, 603 (2002) (citations omitted).

98. See Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750-85 (West 1998 & Supp. 2002). California Civil Code section 3345 provides that a trier of fact may impose a fine up to three times that provided by statute or, where no statute provides a set sum, up to three times what would otherwise be set based on one or more of the following factors:

- (1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.
- (2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence . . . or assets essential to the health or welfare of the senior citizen or disabled person.
- (3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public

consumer may also be awarded an additional sum of up to \$5,000 if he has suffered substantial physical, emotional, or economic damages in certain instances.<sup>99</sup> Illinois' Financial Exploitation of the Elderly and Disabled Act also provides for treble damages in addition to attorneys' fees where a senior citizen, through threat or deception, loses property.<sup>100</sup> Oregon provides similar protection, though without treble damages.<sup>101</sup> While these statutes are crucial weapons in the fight to protect elders from financial abuse, they are not crafted to respond to the intricacy of lending law and do not strike at all forms of predatory lending.<sup>102</sup>

In many instances, predatory lenders do not affirmatively misrepresent their loans to their customers, but instead employ hard-sell tactics and rely on a welter of impenetrable loan terms designed to confuse unsophisticated borrowers and trick them into unwittingly accepting over-priced loans.<sup>103</sup> Even when a predatory lender has engaged in affirmative fraud, the borrower is often left with only a

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to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

CAL. CIV. CODE § 3345 (West 1997).

99. See CAL. CIV. CODE § 1780(b) (West 1998 & Supp. 2002) (providing that a senior citizen may be awarded:

up to five thousand dollars (\$5,000) where the trier of fact (1) finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct, (2) makes an affirmative finding in regard to one or more of the factors set forth in subdivision (b) of Section 3345, and (3) finds that an additional award is appropriate.).

100. See 720 ILL. COMP. STAT. ANN. 5/16-1.3 (1993). For a discussion of the Illinois statute, see Moskowitz, *supra* note 46, at 106, and Seymour Moskowitz, *New Remedies for Elder Abuse and Neglect*, 12 PROB. & PROP. 52, 56 (Jan. 1998).

101. See OR. REV. STAT. § 124.100 (2001).

102. For a description of elder abuse statutes throughout the United States, see Dessin, *supra* note 2, Carolyn L. Dessin, *Financial Exploitation Statutes' Impact on Domestic Relations Practice*, 16 J. AM. ACAD. MATRIM. LAW. 379 (2000), and Moskowitz, *supra* note 46.

103. See Engel & McCoy, *supra* note 11, at 1283.

worthless claim, as most subprime lenders have declared bankruptcy in recent years.<sup>104</sup>

Unscrupulous originators of loans typically sell them quickly on the secondary market, leaving borrowers subject to purchasers who claim holder in due course status, thus entitling purchasers to freedom from claims of personal fraud asserted by borrowers.<sup>105</sup> Therefore, the states' elder protection laws may not protect borrowers from the overreaching that lies at the heart of predatory lending, as treble damages count for little if they cannot be collected.

Using enhanced remedies to punish elder abusers relies on a system of enforcement that is not suited for many of the elderly. Enforcing borrowers' rights requires litigating their claims, perhaps years after the fact, and depends on testimony by the victims. Elder victims of fraud are already often in declining health and may be poorly equipped to testify or to prosecute a lawsuit to protect or regain their home.<sup>106</sup> Seymour Moskowitz has noted that "[b]ecause of the slow pace of litigation, many of the frail elderly do not survive long enough for a lawsuit to come to judgment."<sup>107</sup> Not only is litigation difficult for vulnerable elders, but they are also less likely to seek protection by contacting community organizations that offer such support.<sup>108</sup>

#### VI. THE CONFLICT BETWEEN AUTONOMY AND PROTECTIONISM IN SHIELDING ELDERS FROM PREDATORY LENDING

If elders are a favorite target of predatory lenders and stand the most to lose when they fall victim to unscrupulous lenders, one might well ask why the various statutes, regulations, and ordinances designed to prevent predatory lending largely ignore the special need

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104. See the description of the boom, bust, and bankruptcy cycle of subprime lenders in Eggert, *supra* note 11, at 522.

105. See Engel & McCoy, *supra* note 11, at 1301.

106. See discussion of this point in Harkness, *supra* note 44, at 43–44.

107. Moskowitz, *supra* note 46, at 104.

108. Donna Harkness states that "by definition, the elderly most likely to be victimized by predatory lenders are those individuals least able to organize and take advantage of the technical support offered by organizations like ACORN." Harkness, *supra* note 44, at 38.

for protection of the elderly. Both the lending industry and some advocates for the elderly might argue that providing special protections for senior homeowners could either drive up the cost of loans to that group or, by making it more difficult for them to obtain a loan, deprive them to some extent of the freedom of borrowing money.<sup>109</sup>

One risk in attempting to protect the vulnerable elderly is falling into “new ageism”<sup>110</sup> or “compassionate ageism,”<sup>111</sup> which is an excessive concern for the frailties and vulnerabilities of the elderly that, in its zeal to protect their finances or physical health, neglects to protect the freedom and autonomy of seniors.<sup>112</sup> The classic criticism of this over-protectionism is the widely quoted statement of Richard Kalish:

The message of the New Ageism seems to be that “we” understand how badly you are being treated . . . and that if you adhere to our program, “we” will make your life considerably better. You are poor, lonely, weak, incompetent, ineffectual, and no longer terribly bright. You

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109. For the lending industry’s argument that protections designed to reduce predatory lending will drive up the cost of credit or constrict the amount of credit available to subprime borrowers, see Neil J. Morse, *The Predatory Lending Obstacle Course*, MORTGAGE BANKING 52, Apr. 1, 2002, available at 2002 WL 11226626. *But see* Ernst et al., *supra* note 70, at 5 and accompanying text (documenting that additional protections in North Carolina have not driven up the cost of credit). According to one drafter of the AARP model bill, one reason that the model bill omitted any special protections for the elderly was the view that such protections could, by denying non-elderly borrowers the additional protections, disadvantage other vulnerable homeowners who somehow seem less sympathetic than the elderly. Telephone conversation with Elizabeth Renuart, National Consumer Law Center (Oct. 11, 2002).

110. Richard A. Kalish, *The New Ageism and the Failure Models: A Polemic*, 19 GERONTOLOGIST 398, 398 (1979).

111. Robert H. Binstock, *The Aged as Scapegoat*, 23 GERONTOLOGIST 136, 136 (1983). Binstock argues that, by presenting the aged as homogenous, compassionate ageism actually nourishes what would seem to be its opposite, the scapegoating of the elderly. *See id.* at 142.

112. For an excellent general discussion of “new ageism” and “compassionate ageism” and the works of Kalish and Binstock, see Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 468–69 (1997).

are sick, in need of better housing and transportation and nutrition, and “we”—the nonelderly and those elderly who align themselves with us and work with us—are finally going to turn our attention to you, the deserving elderly, and relieve your suffering from ageism.<sup>113</sup>

In protecting elders from financial abuse, it is difficult to balance protecting their financial assets and income with protecting their autonomy and freedom to make their own decisions unencumbered by well-intentioned, but excessive, restrictions on their ability to borrow, buy, sell, or give away their assets. For example, one method to prevent predatory lending against elders would be to require anyone over sixty-five years of age to have an independent loan counselor review and approve any loan that the elder might take out. Such a plan would likely meet furious opposition, not only from the lending industry but also from senior citizens groups who would protest that almost all of their members are fully competent to make borrowing decisions and do not need to be treated as children.

The great challenge in designing protections for the elderly lies in heterogeneity of the senior population, with some showing a great decline in their faculties and the majority showing little.<sup>114</sup> Dessin notes, “[M]ost older adults function at the same level as earlier in their lives. Although a significant number of older adults suffer from some level of dementia, the percentages within the older population suffering from dementia are fairly small.”<sup>115</sup> Many senior citizens are, despite or even because of their age and experience, able to protect themselves from most fraud, and could resent the restriction that protections might impose on them.<sup>116</sup>

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113. Kalish, *supra* note 110, at 398. Kalish argues that we should instead “communicate to older persons that we have faith in their abilities, that we recognize that they are capable of making decisions . . . that we respect their ownership of their own bodies and times and lives.” *Id.* at 402.

114. See Linda S. Whitton, *Re-examining Elder Law Practices: Reflections on Ageism*, 12 PROB. & PROP. 8, 10 (Jan. 1998).

115. Dessin, *supra* note 2, at 218.

116. Linda S. Whitton notes, “For the majority of persons, it is now believed that age-related change in cognitive abilities is a very slow process, with only

Two separate issues of autonomy intersect in the area of predatory lending against the elderly. On the one hand, the predatory nature of unscrupulous lending stems from the violation of the consumers' autonomy that this lending represents. Generally, capitalism operates relatively smoothly and efficiently when each party in the exchange is sufficiently informed and competent to determine for herself whether to participate in the exchange, and each will normally only do so when the exchange benefits her or others she wants to help.<sup>117</sup> It is assumed that each person understands her own preferences better than anyone else could, and so generally is in the best position to determine whether she will be satisfied with the outcome of the exchange.<sup>118</sup> So long as each party is sufficiently informed and capable, and voluntarily engages in an exchange, that exchange should create a net benefit, even if an uninvolved third party might question the wisdom of the exchange.<sup>119</sup> At the heart of capitalism's efficiency then, is the autonomous decision-making of each informed individual taking part in the economy.<sup>120</sup>

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minimal declines of insignificant functional consequence." Whitton, *supra* note 112, at 467.

117. Of course, this ideal is often not realized in consumer transactions, as merchants and lenders often have greater information and other advantages over consumers that sometimes lead consumers to accept transactions that do not benefit them. See Bailey Kuklin, *Self Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 651 (1992) (arguing that merchants have inherent advantages, such as economies of scale, that render their exchanges with consumers less than completely fair and efficient).

118. Feinberg describes Mill's articulation of this point as follows:

Mill insists that a given normal adult is much more likely to know his own interest, talents, and natural dispositions (in the fulfillment of which consists his good) than is any other party, and is much more capable therefore of directing his own affairs to the end of his own good than is a government official or a legislator.

JOEL FEINBERG, 3 *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 58 (1986).

119. To Milton Friedman, the test to determine whether a transaction benefits both parties is whether the transaction is bilaterally voluntary and informed. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 13 (1962).

120. See Lawrence Haworth, *Autonomy and Utility*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 155, 167 (John Christman ed., 1989)

Predatory business behavior, however, subverts consumer autonomy so that consumers accept exchanges that do not benefit them or are worse than other available exchanges. This predation relies on various means to undercut autonomy, such as: using coercion or manipulation;<sup>121</sup> concealing or misrepresenting information needed to determine the value of the exchange; or seeking victims who, because of physical or mental infirmities, frailties that sometimes accompany age,<sup>122</sup> or addictive or compulsive behavior,<sup>123</sup> are unable to assert or defend their own autonomous, informed decision-making powers.

The design of anti-predatory lending laws appropriately recognizes this subversion of autonomy, and these laws intervene to protect borrowers who are about to agree to loans so expensive that the borrowers would likely reject the loans were the borrowers truly

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(stating “If our goal is to maximize satisfaction of autonomous preferences or pleasures . . . then prima facie we should also strive to enhance the autonomy of people generally . . .”).

121. “Coercion and manipulation subject the will of one person to that of another. That violates his independence and is inconsistent with his autonomy.” JOSEPH RAZ, *THE MORALITY OF FREEDOM* 378 (1986). Yochai Benkler notes “Joseph Raz identified two primary forms of constraint that one person can impose on another: coercion and manipulation. A person coerces another when she reduces the other’s range of options by force. A person manipulates another when she interferes with the way that the other ‘reaches decisions, forms preferences, or adopts goals.’” Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 38 (2001).

122. For a discussion of the “profound consequences for autonomy” that mental deterioration causes, see Caroline Dunn, *The Effect of Ageing on Autonomy*, in *AGEING, AUTONOMY AND RESOURCES* 7, 15–16 (A. Harry Lesser ed., 1999). Dunn notes the conditions more commonly afflicting the elderly that can result in incompetence, such as Alzheimer’s disease, stating, “None of these issues relate solely to the elderly . . . but it is also true to say that the elderly are more susceptible by virtue of the incidence of chronic illness being higher amongst the elderly . . .” *Id.* at 16.

123. See FEINBERG, *supra* note 118, at 166. Fallon also notes, “Helplessness can take other forms as well. For example, a drug addict may be unable to resist her compulsion.” Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 888 (1994).

free and informed.<sup>124</sup> A Florida assistant attorney general described the fees of one notorious predatory lender as “just so excessively high that it’s hard for me to conceive of any way a consumer would agree to that kind of loan if all the facts have been put before them.”<sup>125</sup>

While predatory business behavior subverts autonomy, so too may clumsily drawn or overly broad protections designed to protect the elderly from those predations. Any regulation designed to prevent elders from dealing with predatory businesses may have the effect of restricting the freedom of those very elders, thereby threatening their autonomy.<sup>126</sup> This presents the difficult choice of which is a greater threat to the autonomy of seniors, predatory businesses or overprotective governments.

#### VII. AUTONOMY: ITS DEFINITION AND ROLE

Any effort to protect autonomy and resolve difficult choices regarding it must be based on an understanding of what autonomy is. The word “autonomy” comes from the Greek roots for “self” and “rule” or “law,” and so concerns the individual’s ability to govern one’s self.<sup>127</sup> Alan Rosenbaum defines autonomy as “the range of control the participants in a particular social situation have with respect to each other over their own private actions and over the exercise of their respective processes of decision-making, valuing,

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124. Government intervention is appropriate to protect autonomy, some argue, even if it results in the restriction of the autonomy of some. *See infra* note 216 and accompanying text.

125. Diana B. Henriques & Lowell Bergman, *Profiting From Fine Print With Wall Street’s Help*, N.Y. TIMES, Mar. 15, 2000, at A1, C13, available at 2000 WL 19064943.

126. Dessin notes:

The elderly victims are adults who previously had complete autonomy in their financial dealings. Any proposed solution to the problem that does not take this into account is seriously lacking. One of the most fundamental rights in our legal system is the right to make our own choices as long as we are competent.

Dessin, *supra* note 2, at 217.

127. FEINBERG, *supra* note 118, at 27.

and willing.”<sup>128</sup> Feinberg calls it “the realm of inviolable sanctuary most of us sense in our own beings.”<sup>129</sup>

Autonomy has recently been widely recognized as one of the central values and organizing concepts in Western Civilization.<sup>130</sup> It is called a “core value in American public and private law”<sup>131</sup> and is said to be “nearly synonymous with human dignity, and an imminent value in any system which purports to place proper emphasis on the respect for persons as such.”<sup>132</sup> While autonomy is an important value, however, it is not the only one and often must be weighed against other important values.<sup>133</sup>

### A. *Autonomy and the Elderly*

Autonomy is a particularly sensitive issue to seniors. Compared to their juniors, elders are in much greater danger of losing their freedom to chart their own way, either because of the illnesses and weaknesses that sometimes accompany old age, or because of the perhaps well-intentioned efforts of others to limit the activities of the

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128. ALAN S. ROSENBAUM, COERCION AND AUTONOMY 107 (1986).

129. FEINBERG, *supra* note 118, at 27.

130. Raz notes that autonomy, the freedom of individuals to be “(part) author of [one’s] life,” is “an ideal particularly suited to the conditions of the industrial age and its aftermath with their fast changing technologies and free movement of labour.” RAZ, *supra* note 121, at 369. *But see* PAUL BARRY CLARK, AUTONOMY UNBOUND 71–73 (1999) (discussing an Ancient Egyptian text, approximately 4000 years old, which constitutes an inner dialogue by a young man contemplating suicide as an escape from a life he finds meaningless). Clark concludes that, even in the “theocratic society” of Ancient Egypt and at least 3500 years before significant discussion of autonomy began, the author of the ancient text “is indeed an individual in significant respects and an [sic] also an autonomous individual in significant respects.” *Id.* at 73.

131. David A.J. Richards, *Autonomy in Law*, in THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 246 (John Christman ed., 1989).

132. THOMAS MAY, AUTONOMY, AUTHORITY AND MORAL RESPONSIBILITY 13 (Francisco J. Laporta et al. eds., 1998).

133. Dworkin notes, “Autonomy is important, but so is the capacity for sympathetic identification with others . . . or the virtue of integrity. Similarly, although it is important to respect the autonomy of others, it is also important to respect their welfare, or their liberty, or their rationality.” GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 19 (Sydney Shoemaker et al. eds., 1988).

elderly.<sup>134</sup> Elders may have to struggle to preserve their ability to make their own decisions even when faced with a life seemingly devoid of the opportunity to do so, if, for example, they live in a nursing home, with few friends or relations still alive, and with deteriorating health.<sup>135</sup> Autonomy is particularly important to seniors, not only because they are in greater danger of losing it, but also because their level of autonomy is an important predictor of their subjective well-being and successful aging.<sup>136</sup> The modern conception of autonomy has forced a reevaluation of many areas of law particularly affecting the elderly, such as the doctrine of

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134. See Daniel Thursz, *Introduction*, in EMPOWERING OLDER PEOPLE: AN INTERNATIONAL APPROACH, at xi (Daniel Thursz et al. eds., 1995). In discussing the fight of the elderly to preserve their own autonomy, Thursz writes: "In order to live out their lives as they wish, they have to struggle against both popular and professional biases. Often, these barriers to self-determination are created by well-meaning individuals, be they children, relatives, or social workers." *Id.*

135. See CHARLES W. LIDZ ET AL., THE EROSION OF AUTONOMY IN LONG-TERM CARE 15 (1992) (noting that such a patient "may only plan for the next few weeks as opposed to a younger person who has at least some plans for years ahead. However, that does not limit the importance of the consistency of her action with such longer-term goals.").

136. See P.S. Fry, *The Unique Contribution of Key Existential Factors to the Prediction of Psychological Well-Being of Older Adults Following Spousal Loss*, GERONTOLOGIST 6981 (2001), available at 2001 WL 16568538 (citing C.K. HOLOHAN & R. R. SEARS, THE GIFTED GROUP IN LATER MATURITY (1995); J.S. Levin & L.M. Chatters, *Religion, Health and Psychological Well-Being in Older Adults*, 10 J. AGING & HEALTH 504, 531 (1998)).

informed consent in medicine,<sup>137</sup> advanced care directives,<sup>138</sup> and end of life issues such as physician-assisted suicides.<sup>139</sup>

Discussing autonomy, however, is complicated by the challenge of pinning down its exact meaning. Joel Feinberg has noted that at least four different concepts are tied up in the common understanding of autonomy.<sup>140</sup>

The specific situation I address, that of an elder who needs, wants, or can be coerced to take out a loan, is a complicated one in terms of issues of autonomy.<sup>141</sup> One might argue that allowing an elder to be free to deal with lenders, even at the risk of being defrauded, increases her autonomy because it allows her to make her own financial decisions. At the same time, dealing with an unscrupulous lender could cause a quick and drastic diminution of

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137. See *id.*; see also LIDZ ET AL., *supra* note 135, at 3–4 (1992) (noting that until the 1960s, “the dominant (and perhaps only) values in discussions of health care ethics were beneficence and nonmaleficence” but since then the new value of patient autonomy has become a central element of these discussions).

138. See Leslie Pickering Francis, *Decisionmaking at the End of Life: Patients With Alzheimer’s or Other Dementias*, 35 GA. L. REV. 539, 551–53 (2001) (discussing whether the autonomy of patients is fostered by advanced care directives or other instruments designed to provide “[w]hat Ronald Dworkin calls ‘precedent autonomy’”—allowing a person when competent to record her directives to be followed when she is no longer competent).

139. For a discussion of autonomy and end of life issues see Gavin Fairbairn, *Ending Lives: Age, Autonomy and the Quality of Life*, in AGEING, AUTONOMY AND RESOURCES 93–103 (A. Harry Lesser ed., 1999).

140. Feinberg states:

It can refer either to the capacity to govern oneself, which of course is a matter of degree; or to the actual condition of self-government and its associated virtues; or to an ideal of character derived from that conception; or (on the analogy to a political state) to the sovereign authority to govern oneself, which is absolute within one’s own moral boundaries (one’s “territory,” “realm,” “sphere,” or “domain”).

FEINBERG, *supra* note 118, at 28.

141. John Kultgen notes, “Any reasonable ban on parentalism based on respect for autonomy must be replete with exceptions because the forms of autonomy vary in degree and importance and some deserve much more respect than others.” JOHN KULTGEN, *AUTONOMY AND INTERVENTION: PARENTALISM IN THE CARING LIFE* 89 (1995).

the senior's autonomy if, as a result, she loses her home through foreclosure.<sup>142</sup>

### *B. Autonomy and Orders of Desires*

When a person is buffeted by influences, threats, pleas, and promises from all sides, from parents, churches, friends, governments, and businesses, it is difficult to determine whether that person's decisions were made autonomously or were merely the product of one or more outside influences.<sup>143</sup> One school of thought on describing and defining autonomy, led by Harry G. Frankfurt and Gerald Dworkin, argues that the key to autonomy is understanding how people are able to choose among their various desires, preferences, and hopes and, by choosing which ones they seek to embrace, "define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are."<sup>144</sup> Authenticity is the key to autonomy—autonomous decisions are those that a person has made in a more considered way than decisions made based on mere desire or command. Because they are more authentic and considered, autonomous decisions reflect the individual's central conception of self.<sup>145</sup>

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142. See *supra* notes 46–54 and accompanying text (discussing disastrous effects foreclosure has on the autonomy of an elderly homeowner).

143. Fallon notes, "To the extent that someone is coerced or manipulated, she is not autonomous" but admits "'coercion' and 'manipulation' are vague and relative concepts." Fallon, *supra* note 123, at 889.

144. DWORKIN, *supra* note 133, at 19.

145. May argues "that Dworkin has the relationship between autonomy and identification reversed," and that "[i]t is not that autonomous behavior is that behavior we identify with, it is that those behaviors we identify with are autonomous behaviors." MAY, *supra* note 132, at 14. However, this criticism ignores Dworkin's abandonment of identification as the key to autonomy and Dworkin's new view that reflection and the ability to choose among first-order desires by considering second-order volitions is the crux of autonomy. See *infra* notes 152–157 and accompanying text.

Furthermore, because Dworkin's argument signifies that autonomy and identification are inextricably linked—that autonomy requires identification—arguing that the reverse of Dworkin's statement is also true does not seem to substantially weaken Dworkin's argument.

Frankfurt distinguishes between first-order desires and second-order desires.<sup>146</sup> First-order desires are the direct wants, needs, and urges a person may have, such as the desire to eat or go swimming, however primal, sophisticated, desirable, or venal those urges might be.<sup>147</sup> Second-order desires on the other hand are, in effect, wanting to want something.<sup>148</sup> For example, if a person wished that he cared more about schoolwork, that yearning to care more is a second-order desire. Frankfurt distinguishes between merely wanting to have a certain desire and wanting a certain desire to be the one acted on, to be the person's will, to be the first-order desire a person wants to be effective.<sup>149</sup> In this way, Frankfurt differentiates between a mere whim that one might desire something, and an authentic yearning to want something.<sup>150</sup>

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146. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 8–9 (1971); see also ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 355 (1981) (stating that “[p]eople have higher order wants about what wants and desires to have, what they are to be like.”); Gordon C. Winston, *The Reasons for Being of Two Minds: A Comment on Schelling's "Enforcing Rules on Oneself"*, 1 J.L. ECON. & ORGANIZATION 375, 377 (1985) (“People have ‘metarankings’ of their preferences, in Amartya Sen’s phrase; we have preferences about our preferences.”) (emphasis omitted) (citing Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977)).

147. See Frankfurt, *supra* note 146, at 8.

148. Irving Thalberg attacks the theoretical structure of first- and second-order desires by raising the possibility of infinite regress, questioning that if there are second-order volitions, why are there not third- and fourth-order volitions, such as wanting to feel that you wanted to feel that you wanted to be something different, so to speak. See Irving Thalberg, *Hierarchical Analyses of Unfree Action*, in THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 123, 130 (John Christman ed., 1989). Gerald Dworkin responds, “As a matter of contingent fact human beings either do not, or perhaps cannot, carry on such iteration at such great length.” DWORKIN, *supra* note 133, at 19. Nozick also discounts the necessity of an infinite regress, stating that, “Instead of imagining an infinite number of levels, we can imagine that we reach a desire that desires some desire at the next lowest level and also self-subsumptively desires itself.” NOZICK, *supra* note 146, at 357.

149. See Frankfurt, *supra* note 146, at 10.

150. Dworkin and Frankfurt’s description of first- and second-order desires is akin to Feinberg’s conception of an inner core and an outer core of self, with the inner core being essential for self-control, which Feinberg identifies as an important aspect of autonomy. Feinberg states:

These latter types of second-order volitions are what Frankfurt insists makes a person human, namely the ability to pick and choose among his desires and decide which desires that he wants to be acted on and embraced as elemental to himself.<sup>151</sup> By comparison, a complete wanton would be one who acts heedlessly, based on whichever first-order desire is currently strongest without any attempt to decide which desire is most desirable.<sup>152</sup>

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The inner core self is the “ruling part” with which we most intimately identify. The self outside the inner core . . . includes the body, the passions, and particular desires, appetites, and emotions. The inner core is usually identified with “Reason,” but if reason is to have any opportunity to do its job . . . we must also attribute to it the materials it works with—one’s most deeply entrenched first principles, ideals, goals, and values.

FEINBERG, *supra* note 118, at 41.

151. Elster argues that, rather than being essential to being a person, second-order desires may “simply reflect weakness of will,” since they might be the result of being unable to follow one’s better judgment. JON ELSTER, ULYSSES UNBOUND 21 (2000). However, without second-order processes to choose among first-order desires, one would have great difficulty regulating those first-order desires, which seems to be itself a case of weakness of will. Thalberg has argued, however, that autonomy cannot be merely a product of second-order volitions, or identification with second-order volitions, because a person could have second-order volitions, yet fail to identify with them, and instead identify with his first-order desires. See Thalberg, *supra* note 148, at 130. Thalberg states, “[W]hy grant that a second-order attitude must always be more genuinely his, more representative of what he genuinely wants, than those you run into at ground level?” *Id.*; see also Gary Watson, *Free Agency*, in THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 109, 119 (John Christman ed., 1989) (speculating that “‘identification and commitment’” occur more “generally to courses of action, that is, [they] are first-order [desires].”).

If the failure to identify with certain second-order volitions or the decision to identify with first-order volitions is a conscious, reflective choice, however, then that choice is itself arguably to some extent a second-order process, as it indicates a preference for a first-order volition and demonstrates the autonomy of the chooser, but neither the possible failure to identify with second-order volitions nor the possibility of identifying with first-order desires disprove the existence of those second-order volitions or removes them from the process of determining autonomy.

152. See Frankfurt, *supra* note 146, at 11. Mele argues, however, that a person may exhibit what appears to be autonomous self-control not because of a victorious second-order desire, but rather because the dominant first-order

Dworkin moves away from Frankfurt and his initial view by deciding that, while identification with certain desires is important to autonomy, it is not the absolute crux of autonomy.<sup>153</sup> Earlier, Dworkin almost solely focused on the process of identification with certain desires as the determining factor of autonomy.<sup>154</sup>

While he still considers this identification an important aspect of autonomy, Dworkin has come to view reflection and the capacity to attempt to change first-order desires, rather than identification, as the critical steps in determining whether an individual's behavior is autonomous. He concludes that "autonomy is conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values."<sup>155</sup>

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desire produces such restraint. See ALFRED R. MELE, *AUTONOMOUS AGENTS: FROM SELF-CONTROL TO AUTONOMY* 68 (1995) (stating "[I]t seems plain, [that] an agent may exhibit a modicum of self-control and behave continently in the absence of any relevant second-order desire."). However, the mere possibility that someone might from time to time exhibit restraint based on first-, rather than second-order desires does not seem to eliminate the possibility of second-order desires or greatly reduce their role in an individual's self-governance.

153. Dworkin states that "[i]t is not the identification or lack of identification that is crucial to being autonomous, but the capacity to raise the question of whether I will identify with or reject the reasons for which I now act." DWORKIN, *supra* note 133, at 15.

154. See Gerald Dworkin, *Autonomy and Behavior Control*, HASTINGS CENTER REP. (Feb. 1976) ("It is the attitude a person takes toward the influences motivating him which determines whether or not they are to be considered 'his'. Does he identify with them, assimilate them to himself, view himself as the kind of person who wishes to be motivated in these particular ways?").

155. DWORKIN, *supra* note 133, at 20. Dworkin finishes the thought by stating, "By exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are." *Id.* Dworkin acknowledges that his conception might be criticized as requiring such a high level of critical thinking that it would be mainly "professors of philosophy who exercise autonomy . . ." *Id.* at 17. Dworkin responds by noting that "a farmer living in an isolated rural community, with a minimal education, may without being aware of it be conducting his life in ways which indicate that he has shaped and molded his

Someone who, after critical reflection, decides to become a heroin addict and revels in the illicit sub-bohemian life that accompanies the addiction would be choosing the addiction autonomously, even if he would have great difficulty overcoming the addiction were he to try.<sup>156</sup> On the other hand, someone who is equally addicted, but wishes, hopes, and prays to be free from the addiction, does not choose to take heroin autonomously if he does so because of the addiction and not because of a second-order volition.<sup>157</sup>

Michael Bratman has recently emphasized the importance of time and planning in autonomy. Bratman locates an individual's ability to endorse a desire reflectively, and hence autonomously, in her creation of self-governing policies, which are higher-order plans about how to treat desires, rejecting them or endorsing them, over time.<sup>158</sup>

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life according to reflective procedures." *Id.* Conversely, philosophy professors have been known to be prisoners of their desires on occasion.

156. For a critique of the moral neutralism of the Frankfurt/Dworkin conception of autonomy, see Henry S. Richardson, *Autonomy's Many Moral Normative Presuppositions*, 38(3) AM. PHIL. Q. 287 (2001). Richardson concludes that "there is systematic reason to believe that analyses of rational autonomy that attempt to remain neutral as to moral or evaluative content will necessarily fail. . . [E]ven the paradigm cases to which these analyses appeal are subject to being converted to counterexamples by varying their moral and evaluative content." *Id.* at 299.

157. Frankfurt compares the unwilling addict, who may continue to take drugs while identifying with the desire to be free of drugs, with the wanton addict, who does not care whether his craving for drugs or his aversion to the harm caused by drugs proves to be the dominant desire. See Frankfurt, *supra* note 146, at 13.

158. See Michael E. Bratman, *Reflection, Planning and Temporally Extended Agency*, 109(1) PHIL. REV. 35, 48–51 (2000). Bratman states:

[S]uch [self-governing] policies—unlike intentions and plans that concern only particular occasions—are explicitly concerned with the functioning of relevant desires generally in one's temporally extended life. . . . This suggests that the agent's reflective endorsement or rejection of a desire can be to a significant extent constituted by ways in which her self-governing desires are committed to treating that desire over time. She endorses or rejects a desire, roughly, when relevant self-governing policies endorse or reject relevant functioning of the desire.

Applying this framework of first-order and second-order desires to the field of consumer transactions in general and predatory lending in particular, we see that an elderly borrower may have first-order desires to obtain a loan, or to put a new roof on her house, or to pay off her credit card bills, or any other of the numerous reasons homeowners find themselves talking to lenders.<sup>159</sup> However, she will likely have many other first-order desires implicated in her decision whether or not to borrow money or what terms she should accept. She will likely want to make certain that she will be able to make her house payments and will not lose her home to foreclosure. Also, she will likely want not to be overcharged for the loan and not to pay higher interest rates or fees than she needs to, given her credit rating. She will probably want to deal with a lender who is trustworthy, who gives her complete and accurate information about the loan, and who does not try to pressure her into taking a loan that would not be appropriate for her.<sup>160</sup>

From this analysis, we can see that the autonomy of the homeowner is not determined solely or even primarily by whether or not she is free to enter into any loan she may desire. Instead, under the Frankfurt/Dworkin view, her autonomy is determined by how well she is able to pick among her first-order desires, to reflect on her choice, and by how authentic her decision among those first-order desires may be.<sup>161</sup> Naturally, her desires are easiest to reconcile if her higher order volitions endorse her first-order desires.<sup>162</sup> If she

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*Id.* at 48.

159. For examples of why homeowners decide to take out loans or refinance, see Saunders & National Consumer Law Center, *supra* note 11, at 116–20.

160. For a description of the homeowner's difficulty in determining whether a lender is dishonest, see Eggert, *supra* note 11, at 534–52.

161. Thomas C. Schelling counsels against putting too much stock in "authenticity" in deciding which of our preferences or selves should hold sway, stating, "Should we look for the authentic self? . . . The question, which is the authentic one, may define the problem wrong. Both selves can be authentic." Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, AM. ECON. REV. 1, 9 (May 1984) (separately paginated Papers and Proceedings issue).

162. See NOZICK, *supra* note 146, at 357 ("The most harmony would be exhibited if all desires above the first level endorsed the first level desires . . .").

can make a decision that is true to her higher-order desires, one that is an authentic declaration of herself, then she has made the decision autonomously. If she signs a loan as the result of a high-pressure sales pitch by an unscrupulous lender without understanding the terms or effects of the loan or having time to think about them, however, then even though she was free not to sign the loan, her decision was not a truly autonomous one.<sup>163</sup> Her autonomy was diminished by her ignorance and lack of time to deliberate, and also by the manipulative influence of the lender.<sup>164</sup>

If we hold that autonomy has intrinsic value, then to improve the lives of the elderly, we should try to increase their autonomy.<sup>165</sup> However, as Raz points out, one cannot force another person to be more autonomous.<sup>166</sup> Instead, the most that can be done is “by and large confined to securing the background conditions which enable a person to be autonomous.”<sup>167</sup> Still, the law has a clear role to play in individual autonomy, as it can (a) affect the number of options a person has by restricting or mandating their availability, (b) alter, to some extent, a person’s ability to form preferences by, for example, banning or requiring some forms of literature or communication, and

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163. “The more fully one understands one’s action, the alternatives, and their consequences, and makes a decision based on this information, the more autonomous the action is.” LIDZ ET AL., *supra* note 135, at 10.

164. Lidz, Fischer, and Arnold distinguish between coercive threats, which “present[] a threat of unwanted and unavoidable harm that a person will be unable to resist,” with manipulative influences, which do not employ coercive threats, but still attempt to change the nature or number of choices available to the chooser or to alter the chooser’s perception of the nature or quality of the choices. *Id.* at 8–9.

165. See RAZ, *supra* note 121, at 407 (“Since autonomy is morally valuable, there is reason for everyone to make himself and everyone else autonomous.”). Lidz, Fischer, and Arnold state, “There is an intrinsic good to be gained from allowing an individual to direct her own life.” LIDZ ET AL., *supra* note 135, at 5. It is important to separate the value of autonomy from the value of merely having more choices. See discussion of the gains to autonomy that may come from limiting choices at notes 174–177 and accompanying text.

166. See RAZ, *supra* note 121, at 407. Raz also notes, “[I]t is the special character of autonomy that one cannot make another person autonomous. One can bring the horse to water but one cannot make it drink.” *Id.*

167. *Id.*

(c) give or deny one set of persons power to control the actions of another set of persons.<sup>168</sup>

*C. Maximizing Overall Autonomy by Specific Limitations on Autonomy*

Deciding what changes to make to maximize elders' autonomy is difficult in that, just as autonomy resists easy definition, it also resists easy quantification.<sup>169</sup> Increasing autonomy is not merely a matter of removing restraints, for even unrestrained, a person may have so few options that she has no real choice in what to do.<sup>170</sup> Nor does merely providing more options provide more autonomy, since the individual given the options may effectively have no way to analyze them or determine which is preferable. To provide the greatest possibility of autonomy, we would need to provide a rich array of options as well as work to ensure that the chooser has the capacity to rate and compare those options.<sup>171</sup> As Kultgen notes:

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168. See Benkler, *supra* note 121, at 39–40.

169. Kultgen states:

No one would be so foolish as to claim that quanta of autonomy can be measured and aggregates summed, but gross differences can be discriminated. . . . Despite these limitations, one who intervenes in the life of another can often judge well enough whether his action will enhance her autonomy in a significant way by providing her more resources, reinforcing her self-control, helping her sort out her values, providing her information, etc.

KULTGEN, *supra* note 141, at 90.

170. See RAZ, *supra* note 121, at 407–08. Raz lists as the ways to increase the autonomy of another “refrain[ing] from coercing or manipulating him,” helping to “creat[e] the inner capacities required for the conduct of an autonomous life,” and creating “an adequate range of options for him to choose from.” *Id.*

171. Bruce Waller notes:

Determining whether the choice is naturally *autonomous* requires study of the setting in which the choice is made, with focus on two key questions: are there genuine alternatives available and does the individual possess what is needed to effectively examine those alternatives (human needs include knowledge, intelligence, and freedom from obsession or irrational fear . . .).

BRUCE N. WALLER, THE NATURAL SELECTION OF AUTONOMY 14 (1998).

The first thing to observe is that autonomy is variable along several dimensions: it involves resources, opportunities to act, and the cost of each act, along with rationality in the form of an ordered set of preferences, sound beliefs, logical powers of inference, and self-control. Each of these may be present in any number of quantities or degrees.<sup>172</sup>

In the area of lending, however, the ability of borrowers to choose among lenders is often hindered rather than aided by a multiplicity of options. Take, as an example, an elder homeowner who has decided to borrow \$20,000 for home improvements. She would like to compare the different lenders' proposals to determine which of them are best suited to her. Most likely, she will focus on those terms that she believes concern her most: the amount of her payment and the term of her loan. Lenders have many other possible options that they can present to her, such as whether she has a prepayment penalty, whether she purchases single premium credit insurance, whether her interest rate and payment amount will be adjusted upward after a low introductory period, or whether she pays significant up-front fees in return for a putatively lower interest rate. By using a barrage of such options and by failing to explain them or their effects, unscrupulous lenders can confuse a borrower, preventing a borrower from being able to determine whether the loan is appropriate for the borrower and how well it compares to other loans she might obtain.<sup>173</sup>

In other words, the borrower would be freer effectively to choose among several loans if each lender were forced to provide fewer options—if the subprime market functioned much more like

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172. KULTGEN, *supra* note 141, at 90.

173. Engel and McCoy state:

In short, the borrowers targeted by predatory lenders end up committing to complex mortgages with probabilistic terms, while prime borrowers, who are generally more sophisticated, can take advantage of straightforward, fixed-rate mortgages without any penalty provisions or contingent price terms. In the end, the victims of predatory lenders sign documents without having a clear sense of the terms of the contracts, how much they borrowed, what they purchased, the terms of repayment, or the risks they assumed.

Engel & McCoy, *supra* note 11, at 1286.

the prime market and all of the loans available to borrowers were fairly similar, with only a handful of differing terms.<sup>174</sup> This similarity makes comparing several loans easier, as the borrower need only compare the few different terms. If borrowers could choose how many choices they would have, many would likely prefer to have fewer variables among loans, making the decision-making process easier, with less risk of error and less time and effort in making the decision.<sup>175</sup> These decisions of how many and which choices to have are called “metachoice.”<sup>176</sup>

Therefore, there are at least two ways in which restricting the choices or freedom available to borrowers may, counter-intuitively, increase their autonomy. First, an elder who is not free to enter into a predatory loan will actually be, in the end, more autonomous if she can thereby avoid losing her home or a significant portion of its equity. Second, if a borrower can more effectively rate loan options because more of the loan terms are standard among all of the loans and fewer of the terms vary between the loans, then the borrower is more in control of the loan process, has greater freedom to make good decisions concerning the loans, and is more independent of the influence of mortgage brokers.<sup>177</sup>

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174. *See id.* at 1284 (“In contrast to prime-mortgage lenders, predatory lenders rarely make plain-vanilla, fixed-rate loans with easily understood payment terms.”).

175. Dworkin notes that “[i]n addition to the costs of acquiring information, there are the costs in time and effort of making the choice” as well as the “psychic costs” of agonizing over whether the decision was the correct one. DWORKIN, *supra* note 133, at 66–67.

176. *Id.* at 155 (citing Robert Nozick, *Coercion*, in 4 PHILOSOPHY, POLITICS AND SOCIETY 101–36 (Peter Laslett et al. eds., 4th ed. 1972)).

177. Michael Blake notes the possibility that having excess options may decrease one’s autonomy, stating that, “it seems plausible that past a certain point, having further options may actually reduce our ability to make sense of and organize our lives in accordance with our plans.” Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30(3) PHIL. & PUB. AFF. 257, 269 (2002).

*D. Determining When to Honor and Enforce Self-Limitations of Autonomy*

While it seems counter-intuitive that restricting one's own autonomy in specific ways can at times increase one's overall autonomy, such an idea has been widely accepted.<sup>178</sup> On this point Raz notes, "providing, preserving or protecting bad options does not enable one to enjoy valuable autonomy."<sup>179</sup> Gerald Dworkin adds:

These are cases where it is rational for individuals to reject the possibility of making certain choices on the grounds that if the choices were available they would be tempted to make them and they recognize, in advance, that making such choices would be harmful in terms of their long-range interests.<sup>180</sup>

The ability to self-limit one's own autonomy has been legally recognized as well.<sup>181</sup> For example, some states permit voluntary conservatorships, even where the proposed conservatee is competent, but still desires someone else to have control over his estate.<sup>182</sup> More controversial are proposals for "Ulysses directives" or "Ulysses contracts," which would allow someone with a recurring mental ailment to determine, when they are fully competent, what mental

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178. For a laundry list of various criticisms of self-limitation of autonomy, as well as a response to each criticism, see Kuklin, *supra* note 117, at 661-71.

179. RAZ, *supra* note 121, at 412.

180. DWORKIN, *supra* note 133, at 76.

181. I refer to this effort to restrict one's options as "self-limitation of autonomy" though I recognize that such self-limitation of autonomy often requires the actions of a third party for enforcement. Self-limitation of autonomy has also been termed "self-paternalism" and "precommitment." Kuklin, *supra* note 117, at 654 n.6. It is similar to "precedent autonomy," which Ronald Dworkin uses to describe instances where a competent person attempts to choose that which will be binding when she becomes incompetent. Francis, *supra* note 138.

182. For example, Florida law provides:

Without adjudication of incapacity, the court shall appoint a guardian of the property of a resident or nonresident person who, though mentally competent, is incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity and who has voluntarily petitioned for the appointment.

FLA. STAT. ANN. § 744.341 (West 2002).

health treatment they would receive at a later date, including commitment, when their ailment begins to flare up.<sup>183</sup> These advance directives are controversial because they could be used to overrule the later wishes of the signer even if the signer is technically competent.<sup>184</sup>

This controversy over Ulysses contracts indicates the potential danger in self-limitation of autonomy: that it may be taken too far. For example, few would argue that people should be allowed to sell themselves into slavery, though it is challenging to set forth a straightforward rationale for banning such a possibility that relies solely on the grounds of autonomy. Nozick goes so far as to argue that a person selling himself into slavery would still be “exercising that self-choosing nature, and so, in virtue of that choice, [he] would be (at the fundamental level) a self-chooser.”<sup>185</sup>

Dworkin responds to Nozick’s hypothetical by constructing a test of whether we should enforce an individual’s self-limitation of autonomy even when that same individual might later recant. Dworkin acknowledges that he cannot argue against self-imposed slavery solely on the grounds of autonomy, but rather rejects the possibility for two separate reasons: (1) safety concerns, based on the fear that the would-be self-seller would miscalculate the benefits and costs of slavery and (2) the fact that “[m]ost of us do not want to

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183. Elizabeth M. Gallegher, *Advance Directives for Psychiatric Care: A Theoretical and Practical Overview for Legal Professionals*, 4 PSYCHOL. PUB. POL’Y & L. 746, 780–81 (1998) (discussing Ulysses clauses and contracts and suggesting that, while the theoretical hurdles may be overcome, the practical problems in enforcing these documents are daunting).

184. For example, Rebecca Dresser argues that too often the voluntary commitment contract would become an instrument of coercion, poorly explained to patients who would be too eager to please their doctors. See Rebecca S. Dresser, *Ulysses and The Psychiatrists: A Legal And Policy Analysis of the Voluntary Commitment Contract*, 16 HARV. C.R.-C.L. L. REV. 777, 836–41 (1982). Winick proposes that this flaw could be ameliorated by providing revocation power through a judicial or administrative hearing. See Bruce J. Winick, *Advance Directive Instruments For Those With Mental Illness*, 51 U. MIAMI L. REV. 57, 87 (1996).

185. NOZICK, *supra* note 146, at 355. For a discussion of Nozick’s views see John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677, 681 (1988).

live in a society in which, for example, we are legally obligated to return runaway slaves to their owners.”<sup>186</sup>

Feinberg also proposes a test to determine when self-limitations of autonomy should be held binding. First, he asks, “which request, that of the early self to bind the later, or that of the later self for a release, is closer to being a genuinely voluntary one, or one that reflects the settled disposition of the chooser as an enduring self over time.”<sup>187</sup> It would be an easy decision to support the self-limitation of autonomy where “the later self’s contrary ‘choice’ is the result of coercion or fraud, and hence is not wholly voluntary.”<sup>188</sup> Feinberg gives as an example someone with a drinking problem who asks his host to limit him to two drinks at a party, concluding that “when my compulsive, excited, abandoned future self renounces my earlier request, the party host should think of the earlier request as the controlling one.”<sup>189</sup>

To determine which version of the self-limiter’s choice—the earlier decision to limit autonomy or the later decision to revoke that limitation—is closer to being more authentic and voluntary, the relative quality of the choice should be examined. Factors to consider include which decision was made with greater competency, more information, and greater freedom from manipulation, coercion,<sup>190</sup> or fraud, as well as which shows a more “resolute intention” to make the decision.<sup>191</sup>

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186. DWORKIN, *supra* note 133, at 128–29.

187. FEINBERG, *supra* note 118, at 82.

188. *Id.* at 82–83.

189. *Id.* at 82.

190. See Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON & ORG. 357, 360–61 (1985) (noting that “people may be coerced into severe ‘voluntary’ restrictions on their own behavior,” but that more dangerous than the rules people may impose on themselves are the “long-term or permanent technologies and sanctions and privations and disablements that people might choose to incur.”).

191. James W. Nickel, *Autonomy and Procedural Independence* 2, 10–12 (May 2002) (unpublished manuscript, on file with the Loyola of Los Angeles Law Review) (setting forth the characteristics of a decision to submit to subordination that does not threaten the autonomy of the decider. Nickel argues that the procedural aspects of the decision, such as the presence of a method of reviewing the decision and escaping from the submission to

Choosing which request to honor is often difficult, as it may be hard to decide which intention is more trustworthy or indicative of one's central purpose, if one reliably has such a thing.<sup>192</sup> Schelling notes, "Sometimes, but not always, it is easy to know which is Jekyll and which is Hyde."<sup>193</sup>

One could, following Parfit, attempt to separate one's identity into various strands, such as a present self and various future selves, with the central relation between them being not a specific unitary self, but rather the degree of "psychological connectedness and continuity."<sup>194</sup> If we, at least theoretically, split the self this way, then the self-limitation of autonomy becomes, to a significant extent, a method for the present self to bind the future self, or for the long-term planning self to bind the self desiring immediate gratification.<sup>195</sup>

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subordination, determine whether the submission to subordination threatens the autonomy of the decider.)

192. Not only may it be difficult to decide which choice is more authentic, there may be authenticity and resoluteness of purpose in the making of both choices. Schelling notes:

Both selves can be authentic . . . . That both selves are authentic does not eliminate the issue. We must still decide which request to grant. But if both selves deserve recognition, the issue is distributive, not one of identification . . . . In the absence of certainty about which self is authentic, we have something like the distributive issue of dealing fairly with two selves that have opposite needs.

Thomas C. Schelling, *Ethics, Law, and the Exercise of Self-Command*, in 4 THE TANNER LECTURES ON HUMAN VALUES 75 (Sterling M. McMurrin ed., 1983).

193. THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 61 (1984). As an example, Schelling notes the difficulty of judging someone who impulsively gives his own overcoat to a freezing drunkard. *See id.* Elsewhere, Schelling framed the problem by stating, "How do we tell—how do you tell—if this is the moment of truth or the moment of derangement?" Thomas C. Schelling, *The Intimate Contest for Self-Command*, 60 PUB. INT. 94, 104 (1980).

194. DEREK PARFIT, REASONS AND PERSONS 313 (1984). Elster notes that discounting of time preferences can be separated into two forms, the first being the "absolute priority of the present," so that effect of any action on all future selves, however near or distant, is less important than its current effect on the present self. The second form of discounting notes that even among future selves, there is some decay of priority of importance from the near future to the distant future. JON ELSTER, ULYSSES AND THE SIRENS 71 (1979).

195. Schelling states:

A policy privileging the present or long-term self over the future or immediate gratification self could be criticized as paternalistic, or as putting a thumb on the scale of authenticity.<sup>196</sup> However, failing to intervene, or at least to provide the present self or long-term planning self effective methods to have their will have an effect could give the future self or immediate gratification self too great leverage, at least for those who, through addiction or weaknesses of will, are unable to command themselves effectively.<sup>197</sup> Allowing the present self or long-term planning self to bind the future self or immediate gratification self seems necessary, to some extent, to prevent the latter selves from abusing their opportunity to ignore the demands of the former selves.<sup>198</sup> The law expresses societal

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I suggest that the ordinary human being is sometimes not a single rational individual. Some of us, for some decisions, are more like a small collectivity than like the textbook consumer. Conflict occurs not only when two distinct human beings choose together but also within a single one; and individuals may not make decisions in accordance with the postulates of rationality, if by individuals we mean live people.

Schelling, *supra* note 192, at 58.

196. Cass Sunstein argues against this criticism, stating that laws may “reflect the public’s ‘preferences about preferences.’ The phenomenon of conscious selection of preferences is hardly uncommon, its manifestation in law suggests that people in their capacity as citizens may seek laws that differ from their choices in their capacity as consumers.” Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1135 (1986).

197. Of course, society often has an interest, generally, in choosing one self over another, even apart from questions of authenticity. To the extent society benefits from long-term planning, it may favor the self-binding self over the immediate gratification self, for example. See SCHELLING, CHOICE AND CONSEQUENCE, *supra* note 193, at 91 (stating “[W]e are not impartial. We have our own stake in the way people behave. For my comfort and convenience I prefer that people act civilized, drive carefully, not lose their tempers when I am around or beat their wives and children. I like them to get their work done.”).

198. See Schelling, *supra* note 192, at 59 (noting certain instances where a person might deprive himself of some opportunities, such as a well-stocked liquor cabinet, because a future or alternative self might “abuse the opportunity.”).

preferences about these types of decisions by determining which type of present decision will have a future binding effect.<sup>199</sup>

Raz notes that limitations of autonomy are appropriate where the specific limitation increases overall autonomy. He states, "A moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future."<sup>200</sup>

The duration of the self-limitation of autonomy should also be taken into account, as short-term limitations of autonomy are easier to justify. Not only do they cause less restriction of overall autonomy because of their short duration, but also there is less risk that, during the term of the self-imposed limitation of autonomy, the person involved would alter her second-order volitions in such a way that the self-restriction of autonomy would no longer express her truest considered desire.<sup>201</sup> For this reason, someone who chooses to become a "slave for a day" as part of a charity auction seems less likely to have her autonomy threatened than one who sells herself into slavery for a year or for life, if such a sale were allowed.

Another aspect to be considered is whether the person choosing self-limitation of autonomy has any way to lift the self-restriction, either on a temporary or permanent basis, should his second-order volitions genuinely change.<sup>202</sup> In this way, a self-limiter can reduce

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199. Elster notes that there is often an asymmetry in which one self tries to bind the other, with the sober self acting far more often to bind the drunken self than vice versa, and persons trying to bind themselves to their long-term interests rather than to their short-term interests. See ELSTER, *supra* note 151, at 22. He argues that this asymmetry can be viewed as a justification for choosing the dictates of the self-binding self over the self seeking release. See *id.*

200. RAZ, *supra* note 121, at 419.

201. See Dworkin, *supra* note 154, at 27–28. Dworkin insists that not only the duration of the restriction, but also the rapidity by which the restriction takes place affect the magnitude of the restriction's effect, as they are connected to whether the restriction can be reversed without the aid of another party. See *id.*

202. See *id.* ("Given our knowledge of the possibility of changing tastes, desires, new knowledge and so forth, we wish to maintain some options for reversing our behavior."). Bernard Berofsky argues that there is no loss of autonomy in subordinating oneself to authority where the subordinator retains the right to review that decision as well as the power to take whatever actions

the loss of flexibility that is one of the greatest risks of pre-commitment.<sup>203</sup> Even when the underlying bases for the limitation remain valid, a person may need a temporary reprieve from the restrictions, like permission to take a sip of champagne at a wedding.<sup>204</sup>

How a person lifts these restrictions should depend on whether the restrictions are designed to prevent a person from succumbing to his own weakness of will and whether a significant portion of the benefit of the limitation of autonomy comes from the fact that the self-limiter cannot easily release himself from the limitation. To protect the person from merely caving in to first-order desires that the self-limitation of autonomy was designed to thwart, some protections may need to be put into place to ensure that the later decision is a considered, reflective one. Where the individual is attempting to protect himself from his own weakness of will, or where the efficacy of the limitation depends on its binding nature, the self-limitation program could require the person to appeal to a neutral party, for example, and demonstrate to that neutral party that the person's second-order volitions had changed or that circumstances had changed so that the self-restriction was no longer necessary or beneficial.<sup>205</sup> In Bruce Winick's words, "People should be allowed to lock the door and hide the key, but not to throw it away."<sup>206</sup> If the approval process, finding a well-hidden key, as it

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the review indicates is appropriate. See Bernard Berofsky, *LIBERATION FROM SELF: A THEORY OF PERSONAL AUTONOMY* 127 (1995) (quoted in Nickel, *supra* note 191, at 16 (referring to this process as "review and escape")).

203. See ELSTER, *supra* note 151, at 81 ("By keeping one's options open one may be able to gather new information and make a better decision than by foreclosing them permanently.").

204. This argument and example is from Thomas C. Schelling, *Self-Command: A New Discipline*, in *CHOICE OVER TIME* 167, 175 (George Loewenstein & Jon Elster ed., 1992).

205. Even if the neutral party is likely to approve such request, having to seek such approval is, by itself, something of a deterrent. See Schelling, *supra* note 190, at 373.

206. Winick, *supra* note 184, at 87. Winick was discussing whether people should be able to make irrevocable mental health advance care directives specifying what treatment they are to receive in the future, even should they later reject that treatment. Winick proposed that the signer of such a directive

were, inevitably takes some time, such delay could give the self-limiter time to withdraw his request to be freed from his self-restriction. Schelling praises this effect, stating, "It is remarkable how effective delays can be . . . the delay often seems to block relapse."<sup>207</sup>

Using Feinberg's example, if a partygoer initially asked the party's host to deny her drinks after her first one, so that she might drive safely home, she might later appeal to the host to allow her another drink and show the host that she was being driven home by a sober friend. Upon such a showing, the host could give the partygoer another drink without undermining her autonomy or put her off for a few minutes to see if she renews her request for another drink.<sup>208</sup>

Other factors that should be examined to determine the appropriateness of the limitation of autonomy include the scope of the limitation and the external cost of enforcing the limitation. If a person wants to limit only one discrete aspect of one's autonomy, such as the ability to smoke cigarettes, that limitation is much less worrisome than the complete limitation that selling oneself into slavery would represent. Limiting autonomy is also less burdensome where the person would be unlikely to engage in the forbidden activity even without the restriction. Barring one from entering Paris would be more limiting to the average Frenchman than to the average Kansan.

The cost to the self-limiter and to third parties of monitoring and enforcing the limitation of autonomy should also be a factor in determining whether that limitation should be enforced. If the chosen restriction is inexpensive to enforce, then it is much more appealing than a restriction that would force many others to change their behaviors or to bear the cost of the enforcement. Someone who

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would apply to a court or administrative body for release from the directive. *See id.* Elster also distinguishes between throwing away and giving away the key, giving several examples from life and literature of people giving the authority to deny them drugs, liquor, or money to others. *See* ELSTER, *supra* note 151, at 65–68.

207. Schelling, *supra* note 204, at 174.

208. In this example, other important concerns besides autonomy are obviously implicated, such as the safety of the partygoer.

wants to be prevented from practicing law, and therefore does not pay her bar dues, will cost society little, since society already takes pains to prevent non-lawyers from practicing law. By comparison, someone who wants to be prevented from walking along sidewalks in major cities can hardly expect police officers to spend their time attempting to prevent her from engaging in such perambulation. Also, if other parties might be affected in dealing with a self-limited party, we should consider whether those other parties would or should understand the possibility and effects of such self-limitation and can easily determine whether such self-limitation is in effect. Otherwise, parties may rely on some actions or promise of the self-limiter to their detriment and so be harmed when the self-limitation is enforced.

We should also question how reliably the self-limitation of autonomy can be enforced, as those which are enforced only fitfully may have less usefulness than those easy to enforce reliably.<sup>209</sup> Reliability may cut two ways, in that limitations that are highly reliable may more consistently accomplish their purposes, but also may more completely limit the autonomy of the self-limiter. If the unreliability is in the hands of the self-limiter, then it provides a means of escape.

In short, determining whether to enforce an individual's decision to limit her own autonomy depends on the following interrelated questions:

- 1) Is her decision the type that, in general, increases rather than decreases one's overall autonomy?
- 2) How long does the self-limitation of autonomy last?
- 3) What is the scope of the limitation of autonomy?
- 4) Is the amount of autonomy she might give up so great or the risk that she may have erred in thinking she will be better off so high that the danger of an incorrect decision outweighs the benefits that she likely hopes to receive in return?

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209. See Schelling, *supra* note 190, at 364 (stating that good rules of self-limitation are those "most readily, most easily, and most reliably enforced.").

- 5) When is the self-limiter likely to be acting more freely and more true to her essential self: when she decides to limit her autonomy or when later she decides to revoke or transgress against that limitation?
- 6) Is there some method by which the self-limiter can, in a considered and reflective manner, be freed, temporarily or permanently, from the self-restriction should her second-order volitions change or she require a temporary exception?
- 7) Is there an overall harm or benefit to the self-limiter or to society by allowing this form of self-limitation apart from its effect on the autonomy of the individual self-limiter?
- 8) What are the monitoring and enforcement costs to the self-limiter and third parties for this self-limitation of autonomy?
- 9) How reliable is the enforcement of the self-limitation?

These various tests for whether someone's self-limitations of autonomy should be enforced can be separated into: subjective tests, those that focus on whether the individual's decision to self-limit is a trustworthy declaration of that particular person's most free and autonomous decision; and objective tests, which focus on whether the type of decision the individual has made will, in general, increase their autonomy or otherwise benefit or harm them or others.

These tests may also be separated into those that protect the substantive independence of the individual (tests one through four); those that protect person's the procedural independence (tests five, six, and, to some extent, nine); and those that protect third-party interests or non-autonomy interests of the self-limiter (tests seven, eight, and, to some extent, nine). A person's substantive independence is protected if the decision to self-limit increases, or at least does not diminish, the person's overall independence of action or thought.<sup>210</sup> By contrast, one's procedural independence is protected if the method by which one limits her autonomy ensures that she fully intends to limit her independence and is not doing so as

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210. See Dworkin, *supra* note 154, at 25.

the result of such outside forces as deception, coercion, and manipulation.<sup>211</sup> The outcomes of these tests should be weighed against each other, and greater substantive limitations should require more extensive procedural protections.

The distinction between substantive and procedural independence is not always a tidy one, as the two tend to bleed into each other. It could be argued that, where someone has effectively renounced all substantive independence and has completely adopted another's will for her own, providing procedural independence adds no real freedom or autonomy, since the renouncer may have effectively renounced her ability to benefit from the procedural independence as well.<sup>212</sup> However, it seems just as likely that providing procedural independence creates or preserves some level of substantive independence. Someone who has asked to be thrown into prison for the remainder of his life has more substantive independence if, at the beginning of every day, his jailor asks him if he still desires to be imprisoned for the rest of his days, offering to release him if he does not.<sup>213</sup>

Given that some limitations on autonomy can enhance autonomy, the challenge is in determining how such autonomy-enhancing restrictions can be put into place. Clearly, the borrower will often be unable to put the restrictions into place herself, through contract law, for if she could so protect herself, she would not likely need these restrictions in the first place.<sup>214</sup> However, when her

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211. *See id.*; *see also* Nickel, *supra* note 191, at 1–2 (discussing the distinction between substantive and procedural independence).

212. *See* Nickel, *supra* note 191, at 16 (arguing that a minimum substantive autonomy is necessary for procedural independence).

213. The jailed man would be more substantively free even while refusing release if only because he could, while still jailed, make plans to be released the next day.

214. *See* Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 304 (1944).

In the normal situation there is a rough equivalency of exchange in the contract obligations of the parties. It is only in the abnormal or atypical case that there is a gross inadequacy of consideration. But such inadequacy is per se legally inconsequential. However, when it is coupled with a charge of fraud, undue influence, or mental incompetency, the picture immediately changes. Inadequacy of

autonomy is threatened, either by the fraud, coercion, or manipulation of the unscrupulous lender, or by her own weaknesses of mind, body, or financial condition, then the homeowner requires protection outside of contract law and her own ability to say no to protect her and preserve her autonomy.<sup>215</sup> This need for protection would justify government intervention to protect the homeowner's autonomy by restricting it.<sup>216</sup> Still, not every elder needs or may want restrictions beyond those provided to younger homeowners.

One workable resolution to this dilemma would be to provide additional protective restrictions to those elderly homeowners who desire them, while leaving those who resist or decline such restriction free to contract, with only the general anti-predatory lending legislation to protect them. Such a system would not compromise the autonomy of elder homeowners, because they could simply opt not to be more protected than their younger peers.

To discover how such a system of voluntary abdication of autonomy could function, it is helpful to look to another consumer field, that of casino gambling, where an analogous system has been put into use. States are beginning to allow problem gamblers to restrict their own freedom to enter casinos in order to help these gamblers conquer their gambling compulsion while leaving others free to gamble.

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consideration, then, takes on significance: it becomes an important element to be considered.

*Id.*

215. Fallon defines "coercion" as "the deliberate and wrongful subjecting of one human being to the will of another or domination that disrespects the other's equal moral worth," and "manipulation" as involving "a similar judgment of moral wrongness. It implies a perversion of someone's thinking, deciding, or acting." Fallon, *supra* note 123, at 889.

216. Raz states:

So if the government has a duty to promote the autonomy of people the harm principle allows it to use coercion both in order to stop people from actions which would diminish people's autonomy and in order to force them to take actions which are required to improve people's options and opportunities.

RAZ, *supra* note 121, at 416.

## VIII. SELF-EXCLUSION AS PROTECTION FROM PROBLEM GAMBLING

One method of providing protection from excessive gambling, while respecting the autonomy of the problem gambler, is the process of self-exclusion. Self-exclusion is a system, implemented to varying degrees in several states, whereby problem gamblers can request to be personally excluded from one or more, or perhaps all, of the casinos in the state.<sup>217</sup> Once the gamblers sign up for self-exclusion, their names are put on a list that, depending on the state's laws, may be circulated to casinos statewide. If anyone on the self-exclusion list is found in a casino, the state will mandate some punishment that may include ejection, seizing winnings, and possibly even incarceration. In addition, those who sign up for self-exclusion may, depending on state law, have their names removed from casinos' mailing lists used to send advertisements and other promotional materials to gamblers and find their lines of credit and check-cashing privileges at casinos terminated.<sup>218</sup>

The self-exclusion program is a classic example of the self-limitation of autonomy as a method of consumer protection.<sup>219</sup> Like Ulysses, the compulsive gambler recognizes that he will be unable to resist the siren call of the casinos, and seeks a way to limit his own freedom. Gerald Dworkin's description of Ulysses can equally describe a compulsive gambler who signs up for self-exclusion,

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217. See Kevin Ferguson, *Casino Self-Exclusion Programs Grow, Called a 'Work in Progress'*, LAS VEGAS SUN, Oct. 31, 2001, available at <http://www.lasvegassun.com/sunbin/stories/text/2001/oct/31/512557949.html> (last visited Sept. 24, 2001) (discussing the various self-exclusion programs started by Nevada, New Jersey, Illinois, Missouri, Michigan, and Louisiana).

218. See *id.*

219. Schelling anticipated such a legal procedure enforcing self-limitation of autonomy, though he predicted a delay until its fruition, when he stated:

I do not conclude that the dangers are so overwhelming that we should continue to deny any legitimacy to the demand for legal status for these unilateral self-commitments . . . I conclude . . . that there are probably innovations along the lines I have suggested, and that with care there might be some tentative exploration, with adequate safeguards and the expectation that it may be years or generations before we converge on a reasonable legal philosophy.

Schelling, *supra* note 192, at 73.

hoping that he can stop himself from gambling even though he knows that he will want to gamble.

He wants to have his freedom limited so that he can survive. Although his behavior at the time he hears the sirens may not be voluntary—he struggles against his bonds and orders his men to free him—there is another dimension of his conduct that must be understood. He has a preference about his preferences, a desire not to have or to act upon various desires . . . . In limiting his liberty, in accordance with his wishes, we promote, not hinder his efforts to define the contours of his life.<sup>220</sup>

*A. State Self-Exclusion Programs for Problem Gamblers: The Missouri Model*

The first statewide self-exclusion list, as well as perhaps the most stringent, is operated by the state of Missouri, which began its program in 1996.<sup>221</sup> Notably, Missouri's program provides that anyone who signs up for a self-exclusion list is banned for life from entering any of Missouri's casino/riverboats.<sup>222</sup> If they try to ignore the ban and gamble on one of Missouri's riverboats anyway, those on the self-excluded lists are to be removed from the boat, and "the licensee shall cooperate with the commission agent in reporting the incident to the proper prosecuting authority and request charges be filed . . . for criminal trespassing, a class B misdemeanor."<sup>223</sup>

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220. DWORKIN, *supra* note 133, at 15.

221. For Missouri's rules governing self-exclusion, see MO. CODE REGS. ANN. tit. 11, §§ 45-17.010-17.050 (2000), available at <http://www.sos.state.mo.us/adrules/csr/current/11csr/11csr.asp> (last visited Sept. 10, 2002). Missouri's program is "the most comprehensive self-exclusion program," according to Carol O'Hare, executive director of the Nevada Council on Problem Gaming. Clayton Bellamy, *Problem Gamblers Keep Advocate Busy in Year-Old Missouri Post*, ST. LOUIS POST-DISPATCH, June 17, 2001, at C1, available at 2001 WL 4467297. For information regarding the 1996 start date of the program, see Ferguson, *supra* note 217.

222. See MO. CODE REGS. ANN. tit. 11, § 45-17.050 (stating that "[a]ny person who has been placed on the List of Disassociated Persons shall remain on the List permanently and may not petition to be removed.").

223. *Id.* § 45-17.010(2)(A); see also Virginia Young, *Blacklist Lets Gamblers Ban Themselves at Illinois Casinos; Program Replaces One Where*

Self-excluded gamblers are to be denied any winnings if they somehow manage to come aboard a riverboat, gamble, and win.<sup>224</sup> As of July 2002, more than 4,200 gamblers had self-excluded themselves in Missouri alone, with another 100 new names added per month.<sup>225</sup> An estimated five to eight self-banned gamblers are arrested monthly in Missouri while attempting to violate their self-exclusion.<sup>226</sup> On eighty-eight occasions during 1999, self-excluded gamblers were arrested in Missouri for violating their self-ban, with a dozen of the offenders arrested more than once.<sup>227</sup>

Other states are more lenient than Missouri and allow gamblers to have their name removed from the list. After five years of self-exclusion, for example, those in Illinois' and Louisiana's self-exclusion programs can be removed from the exclusion list if they obtain a determination from a mental health professional that they no longer suffer from a gambling addiction.<sup>228</sup>

Excluding gamblers from casinos is only one of several forms of self-exclusion that can be used to reduce gambling by problem or pathological gamblers. For example, gamblers can request that they

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*Individual Boats Policed Addicts*, ST. LOUIS POST-DISPATCH, July 16, 2002, at B1, available at 2002 WL 2573911 (discussing how Illinois' program for self-exclusion is less strict than Missouri's program).

224. See MO. CODE REGS. ANN. tit. 11, § 45-5.065(2); see also Virginia Young, *Missouri Wants to Know if Self-Banning Program Works; Study Will Ask Whether Problem Gamblers Benefit*, ST. LOUIS POST-DISPATCH, Jan. 1, 2002, at A1, available at 2002 WL 2538034 (discussing the success of Missouri's self-banning program).

225. See Young, *supra* note 224, at A1.; Chris Fusco, *'Blacklist' to Help Gamblers Get a Grip; Program Lets Addicts Ban Themselves from State's Casinos*, CHI. SUN-TIMES, July 15, 2002, at 8, available at 2002 WL 6465123.

226. See *Can Gambling Addicts Sue Casinos for Losses? Missouri's Voluntary Exclusion Program May Spawn Lawsuits*, MO. LAW. WKLY, Dec. 18, 2001, available at <http://www.lawyersweeklyusa.com/resources/pressrelease/pressrelease1218.htm> (last visited Aug. 8, 2002).

227. See Craig Savoye, *Casinos Stop Gamblers Who Stop Themselves*, THE CHRISTIAN SC. MONITOR, Feb. 29, 2000, available at [http://www.csmonitor.com/cgi-bin\\_article.pl?script/2000/02/29/pls5.txt](http://www.csmonitor.com/cgi-bin_article.pl?script/2000/02/29/pls5.txt) (last visited Dec. 27, 2001). Many of these arrests are believed to have led to probation. See *id.*

228. See Young, *supra* note 223, at B1. For Louisiana's similar term, see LA. ADMIN. CODE tit. 42, §§ III:304(C)(3), (G)(2)-(3), REGALERT, Apr. 20, 2002, available at 2002 WL 18777378.

be prevented from obtaining money from casino automated teller machines (ATMs), and at least some providers of ATM services will honor that request.<sup>229</sup> Slot machines can be designed so that the customer can set the machine to shut down when either a set amount of time or a set sum of player losses occurs.<sup>230</sup>

*B. The Effectiveness of Self-Exclusion Programs in the Gaming Industry*

Because self-exclusion programs are so new, little study has been conducted to determine their effectiveness.<sup>231</sup> One study of a casino's self-exclusion program found that eighty percent of the self-excluded gamblers surveyed stopped gambling at the casino during the two years the program had been in effect, but that most of those who violated the self-exclusion program "did so full throttle, gambling nine or more times."<sup>232</sup> The leader of the study noted that the prime motivation of those who violated the self-exclusion program was money, while the "determination to stay abstinent and fear of arrest" were the chief reasons the others stayed out of the casinos.<sup>233</sup> The self-exclusion program also appeared useful as a

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229. See Rachel Brand, *Hard-Core Gamblers Dealt a Helping Hand, Casino ATM Firm to Share Database of Players Who Ask to Curb Their Access to Cash*, ROCKY MTN. NEWS, Mar. 18, 2001, at 1G, available at 2001 WL 7367182.

230. See Scott MacKay, *States Bank on Gambling, But Funds for Treatment Lag*, PROVIDENCE J.-BULL. (R.I.), May 19, 2002, at F01, available at 2002 WL 5520231.

231. See Young, *supra* note 224, at A1; see also Rick Alm, *Expert Questions Gambling Programs: Missouri Loss Limit, Lifetime Ban Faulted*, KAN. CITY STAR, June 20, 2002, at C8, available at <http://n112.newsbank.com> (stating that Robert Ladouceur "acknowledged . . . that there had been almost no academic study on the effects of self-exclusion . . .").

232. Fusco, *supra* note 225, at 8; see also *Rhode Island Special House Commission to Study Gaming: Hearing Before the House Finance Committee Study Commission*, at 14 (R.I. 2002) (testimony of Dr. Marvin A. Steinberg, Executive Director of the Connecticut Council on Problem Gambling and leader of their study on problem gambling), available at [www.rilin.state.ri.us/gen\\_assembly/gaming/080602.htm](http://www.rilin.state.ri.us/gen_assembly/gaming/080602.htm) (last visited Nov. 14, 2002) [hereinafter Testimony of Marvin A. Steinberg].

233. Fusco, *supra* note 225, at 8 (quoting Marvin A. Steinberg).

“gateway” to lead problem gamblers to obtain professional counseling for about half of those who self-excluded.<sup>234</sup>

A study of the self-exclusion program at a Quebec casino concluded, “It is perhaps surprising that this intervention [self-exclusion] achieved better results than those of a well-established self-help group such as the GA [Gamblers Anonymous].”<sup>235</sup> The researchers noted, “This self-exclusion procedure appears to provide a very powerful alternative to pathological gamblers who feel they need to modify their gambling habits. The impact of the finding that 30% of participants report complete success with previous self-exclusion attempts cannot be overstated.”<sup>236</sup>

The greatest potential flaw of these self-exclusion programs appears to be their unreliability, the ease with which gamblers can circumvent them, either by going to a different casino in a state which does not have a central registry, or by tricking the casinos to allow them to gamble. One compulsive gambler described beating Missouri’s strict program by acquiring a new driver’s license under her maiden name or by borrowing a friend’s boarding pass to get into the riverboat casinos.<sup>237</sup> Even when her husband called the nearby casinos to plead with them to keep his wife from gambling and she was arrested four times for trespassing, the husband said that the resulting fines were little deterrence because she, like other compulsive gamblers, is “used to losing a whole lot more than that in one night.”<sup>238</sup>

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234. *Id.* (quoting Marvin A. Steinberg); see also Testimony of Marvin A. Steinberg, *supra* note 232, at 14.

235. Robert Ladouceur et al., *Analysis of a Casino’s Self-Exclusion Program*, 16 J. GAMBLING STUD. 453, 458 (2000).

236. *Id.* at 459–60. The report notes the limits of the study, in that no comparison group was used, the participants of the study were all self-selected, and the data presented was all founded upon self-reports of the participants. See *id.* at 460. Furthermore, because the study focused on only one casino, its results “might be suspect to over-interpretation.” *Self-Help, Self-Exclusion*, THE WAGER, 6 (14), Apr. 4, 2001, available at [www.thewager.org/Backindex/vol6pdf/wager614.pdf](http://www.thewager.org/Backindex/vol6pdf/wager614.pdf) (last visited Aug. 8, 2002).

237. See Young, *supra* note 224, at A1.

238. *Id.*

Potential methods do exist for making self-exclusion programs more effective in keeping out banned players, though the costs, monetary and otherwise, to such methods may be high. For example, a casino in the Netherlands reportedly requires its customers to carry an identification card with a magnetized strip which, when swiped through a reader, tells casino employees whether the cardholder is on the self-exclusion list.<sup>239</sup> In Australia, a plan has been proposed to provide self-excluded gamblers an electronic device they could voluntarily have attached to their wrist or ankle that would trigger an alarm if they enter a gambling parlor. After the device is attached, it cannot be removed without the use of special tools not available to the general public.<sup>240</sup>

Similarly, casinos could use biometric face recognition technology to scan the faces of incoming gamblers and match them against a database of the facial characteristics of self-excluded gamblers. Such a system uses cameras linked to computers running software that “scans the face and translates spatial relationships between various parts of the face into a unique numeric template, which is compared to a database for matching purposes.”<sup>241</sup> This automatic system could immediately notify casino officials that a self-excluded gambler has entered a gambling arena, allowing them quickly to eject the excluded gambler or have him arrested.

While both the tracking device and the face recognition technology have the distinct and distressing appearance of Big Brother in action, it is important to note that casinos are already using face recognition technology, though in an effort to protect their own purses, not to help pathological gamblers fight their

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239. See John Stearns, *Self-Exclusion Programs Show Potential*, RENO GAZETTE-J., June 15, 2002, at 8, available at 2002 WL 19310468.

240. See *Aussie State Plans Wristband Alarms for Gambling Addicts*, STRAITS TIMES (Sing.), June 18, 2002, available at 2002 WL 21254719.

241. Alcohol and Gaming Commission of Ontario, Investigation Report, Investigation PC-010005-1, *The Use of Biometric Face Recognition Technology in Ontario Casinos 2* (Feb. 26, 2001), available at <http://www.ipc.on.ca/english/orders/invest-p/pc010005.htm> (last visited Sept. 3, 2002) [hereinafter *Biometric Face Recognition Report*].

addiction.<sup>242</sup> Casinos have banded together to create the Casino Information Network, which is an online system connecting casinos throughout North America, allowing them to send each other facial scans of individuals who have been expelled from a casino for allegedly cheating.<sup>243</sup> The company that provides the face-recognition technology also provides a Casino Information Database, which in early 2001 had scanned about 800 faces of “known and suspected casino cheats.”<sup>244</sup> By 2002, more than 150 casinos were using this technology, with some casinos employing more than a thousand cameras for the necessary surveillance.<sup>245</sup>

*C. An Analysis of Self-Exclusion as a Self-Limitation of Autonomy*

Self-exclusion is a stark form of the self-limitation of autonomy in that the self-excluder intentionally relinquishes a freedom, the freedom to gamble, held by almost all other adult members of society. If we apply the analysis gleaned from Dworkin and Frankfurt, however, we see that this limitation of autonomy may well increase the autonomy of the self-excluder. Those willing to subject themselves to a ban have likely concluded that, while they may want on a day-to-day basis to gamble at a casino, they recognize that such gambling is detrimental to them and wish they could conquer these harmful desires. To use the Dworkin/Frankfurt terminology, they have a second-order volition to stop their gambling compulsion, to stop being the type of person with a relentless desire to gamble. Without outside help, their second-order desire might not be strong

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242. See Steve Gold, *Big Brother Is Watching You At The Mirage*, NEWSBYTES, Apr. 11, 2000, available at 2000 WL 2275889 (stating, “Viisage Technology and Biometrica Systems have announced the installation of a full-scale biometrics facial recognition system at the Mirage Resort in Las Vegas.”).

243. See *Biometric Face Recognition Report*, supra note 241, at 3–4; see also Gold, supra note 242 (noting the timely exchange of information made possible by the Casino Information Network).

244. See *Biometric Face Recognition Report*, supra note 241, at 3.

245. See Benjamin Spillman, *Desert Sun Casinos Embrace High-tech Security*, DESERT SUN, Jan. 21, 2002, at E1, available at 2002 WL 25908332; Corrina Stellitano, *Face Value*, ACCESS CONTROL & SEC. SYS. INTEGRATION at 40, Aug. 1, 2002, available at 2002 WL 14391334.

enough to prevent their first-order desire to gamble from dragging them into a casino and causing them to lose too much money.<sup>246</sup>

The self-exclusion program is intended to allow their second-order desire to triumph over their dangerous first-order compulsion, to allow them to have the option of identifying with the desire to stop gambling, and to have that identification have an actual effect. Because the autonomy of individuals is determined by their ability to choose among their first-order desires in a considered way, the self-exclusion program increases the autonomy of those who bar themselves to the extent it is effective in preventing them from gambling. Many gamblers can, through fear of arrest if nothing else, keep themselves from entering the casinos where their compulsion to gamble will overwhelm their will and desire to avoid gambling. If it can prove effective, self-exclusion allows the compulsive gambler's better self, that part more concerned with the long-term effect of the gambler's actions, to gain control despite the personal flaws that might otherwise overwhelm the better self.

The previously discussed tests of self-limitation of autonomy indicate the appropriateness of these self-exclusion programs if, without excessive cost, they prove effective in preventing gambling by the self-excluded.<sup>247</sup> A gambler's choice to self-exclude will, in general, likely increase rather than decrease his overall autonomy, at least if it aids the gambler to defeat his addiction. The amount of autonomy the gambler gives up will likely be small so long as he honors the self-exclusion, since he is still free in every other aspect

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246. Thaddeus Pope makes the same argument regarding cigarette addiction, stating:

Addiction makes the LODs [lower order desires] insusceptible to HODs [higher order desires]; that is, the individual doesn't want to want to smoke but just can't help it. This makes the decision to smoke—or to continue to smoke—less than substantially voluntary. Just as lack of knowledge (regarding the risks of smoking) prevents individuals from autonomously deciding whether to smoke, so does the coercive or compulsive pressure imposed by addiction impinge on autonomy.

Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 469 (2000).

247. See *supra* Part VII.D (discussing the various self-limitation tests).

of his life. The risk that he may have erred in his thinking also seems small, since existing evidence indicates that almost all those who self-exclude are problem gamblers.<sup>248</sup> Perhaps most importantly, a gambler is likely to be acting more freely and more true to his essential self when he initially decides to limit his autonomy, rather than later, when his compulsion to gamble would push him to reenter a casino.<sup>249</sup> To sign up for self-exclusion in Illinois, for example, a problem gambler can go to the Illinois Gaming Board offices at casinos or in its primary offices, or at such agencies as the Northern Illinois Council on Alcoholism and Substance Abuse.<sup>250</sup> Most likely, people would put much more consideration and thought into going to a gaming board office and self-excluding than they would to dropping quarters into a slot machine.

Of course, if the gambler refuses to abide by his self-exclusion and he lives in a state such as Missouri that threatens violators with criminal sanctions, then the gambler risks a significant loss of freedom.<sup>251</sup> On the one hand, it seems troubling that a gambler who signs up to be self-excluded from casinos with all good intentions to break her addiction may find herself facing jail time if her addiction proves too strong, while another equally addicted gambler remains free because she never even tried to break her addiction. On the other hand, defenders of Missouri's law can argue that the self-exclusion offender who sneaks on board the gambling boats risks prosecution not solely because she gambled, but also because she

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248. Steinberg states, "Almost all of the self-excluders were found to be serious problem gamblers . . ." Testimony of Marvin A. Steinbert, *supra* note 232, at 14.

249. The gambler's decision to self-exclude is akin to Feinberg's example of the guest at a party who asks his host to limit him to two drinks. In both instances, the initial thoughtful decision seems a more genuine statement of the person's second-order desires than when the "compulsive, excited, abandoned future self renounces [the] earlier request." FEINBERG, *supra* note 118, at 82.

250. See Douglas Holt, *Problem gamblers sign on to blacklist: Step bars them from riverboats*, CHI. TRIB., Nov. 5, 2002, at 1, available at 2002 WL 102287779.

251. See *supra* notes 221–227 and accompanying text (discussing Missouri's law regarding violation of the self-exclusion program).

obtained access to the gambling boats under false pretences, by using a false identification, for example.<sup>252</sup>

Determining whether problem gamblers gain or lose freedom if a state potentially helps them free themselves from their addiction, by threatening them with jail time, depends on two factors: (1) how effective the threat is in aiding problem gamblers, which would generally increase their autonomy, and (2) how often the threat is carried out, which could limit their autonomy. For this reason, further study of the effectiveness of exclusion programs is crucial to determine their implications for autonomy.

Overall, society would benefit by allowing these gamblers to self-exclude, if doing so would diminish some of the social costs of problem gambling.<sup>253</sup> However, some methods of accomplishing self-exclusion, such as using face-recognition software to scan everyone entering the casino, may so diminish the freedom and privacy of other gamblers that they should not be employed for the purposes of effectuating the self-exclusion program.<sup>254</sup> Furthermore, our previous discussion of autonomy indicates that autonomy will be more fully protected if the self-excluder is given a reflective, considered method by which to be removed from the list of excluded gamblers, such as obtaining the certification of a mental health professional that removal from the self-exclusion list is appropriate.<sup>255</sup> Also, study should be conducted to see whether

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252. See *supra* note 237 and accompanying text (discussing methods for excluded gamblers to violate their self-exclusion).

253. See FEINBERG, *supra* note 118, at 28–31.

254. A more difficult question is whether a casino that already employs face recognition software to exclude known cheats should also be forced to use the same system to exclude self-excluded problem gamblers. If a casino is already scanning the faces of all incoming gamblers, it does not seem that matching those faces against previous scans of problem gamblers would, by itself, significantly undermine the autonomy of the general gambling public. However, tying self-exclusion programs to face recognition software may make these programs unpopular, by fostering the notion that the self-exclusion program is requiring the casino to spy on its patrons, rather than the casino doing so for its own monetary purposes. This unpopularity may, in time, cause the self-exclusion program to be eliminated or watered down, and so, might completely undermine the usefulness of the face-recognition software.

255. See *supra* note 202 and accompanying text.

self-exclusion is as effective when it is not permanent, for the limitation of autonomy is easier to justify when it is for a limited time.<sup>256</sup>

IX. ELDER HELP INSTRUMENTS: A PROPOSAL FOR SENIOR  
HOMEOWNER PROTECTION THROUGH SELF-LIMITATION OF  
AUTONOMY

If self-exclusion can, by limiting the autonomy of problem gamblers, maximize their overall autonomy, an analogous system could serve the same purpose in the fight against predatory lending. In the lending arena, the autonomy of the homeowners/borrowers is not typically threatened by a compulsion to borrow, but rather by unscrupulous mortgage brokers who seek to manipulate, coerce, or deceive borrowers into accepting an overpriced or otherwise dangerous loan.<sup>257</sup>

If predatory lending is made possible by the freedom of the elderly to enter into loans with harsh terms, then we can conceive of a system allowing elders to exclude themselves from loans with problem terms. Instead of keeping them out of casinos, a self-exclusion program for homeowners would prevent them from obtaining overpriced, predatory loans and would increase their overall autonomy by limiting their freedom to enter into harmful loans.

To accomplish this self-exclusion from high-priced loans, I propose a system whereby elder homeowners can voluntarily exclude themselves from entering into high cost loans or loans with any of a set of potentially confusing or harsh terms. This task could be accomplished by a legislative enactment that would provide the following. Seniors would be able to sign a formal document, to be called the "Elder Home Equity Loan Protection Instrument" ("Elder HELP Instrument") which would be notarized and recorded at the

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256. See discussion of the duration of the limitation of autonomy as a factor in whether such limitation is appropriate at note 201 and accompanying text.

257. Dworkin notes, "Both coercion and deception infringe upon the voluntary character of the agent's actions. In both cases a person will feel used, will see herself as an instrument of another's will." DWORKIN, *supra* note 133, at 14.

county recorder's office, much like any deed, mortgage, or deed of trust. That document would provide that the senior homeowner recognizes the risk he has of entering into a predatory loan and is willing to restrict his autonomy to enter freely into loans in order to avoid that risk. The document would then detail terms that would either be mandatory or forbidden in any loan secured by the borrower's residence, with restrictions much stricter than those found in existing anti-predatory loan legislation.

Existing anti-predatory lending legislation was drafted to accommodate the many types of borrowers who would be affected by it. As previously discussed, current legislation provides protections to all borrowers whose loans satisfy a "trigger" indicating a high-cost loan, whether the individual borrower prefers the additional protection or not.<sup>258</sup> Because these protections are mandatory, they have been fairly mild. For example, they do not prohibit the lender from charging an excessive rate, but merely force the lender to disclose the rate further in advance than would otherwise be required.<sup>259</sup> In this way, lenders are free to charge high interest rates and fees to borrowers with extremely poor credit ratings, to whom they might be less willing to make loans at all if interest rates were capped.<sup>260</sup>

By comparison, a voluntary protection program could explicitly bar interest rates above a certain amount calculated in reference to a particular benchmark, or fees in excess of a certain percentage. This elder protection program could be much stricter than existing legislation because it would be voluntary for elders, and elders could simply not sign the form if they found its provisions too strict.

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258. See *supra* notes 57, 62, 66 and accompanying text (discussing the use of "triggers" to determine covered loans in the HOEPA and in North Carolina's anti-predatory lending legislation).

259. See *supra* note 59 and accompanying text (discussing disclosure and rate caps).

260. Lenders argue that even laws that omit rate caps but provide extensive regulation of high-cost loans will cause lenders to refuse to make loans to borrowers with poor credit. See Andy Peters, *Fair Lending Act Has Bankers Scared*, MACON TELEGRAPH (Ga.), Oct. 13, 2002, at 1, available at 2002 WL 23049584.

For example, the Elder HELP Instrument could provide that the elder will not agree to and will not be bound by many of the terms used to coerce borrowers into accepting overpriced loans, and that instead, any loan secured by the home of the signing elder will have the following terms imposed by law:

- 1) No pre-payment penalties whatsoever.
- 2) No insurance products of any type financed by the loan proceeds.
- 3) No undisclosed yield-spread premiums paid to the broker to reward the broker for increasing the cost of the borrower's loan.<sup>261</sup>
- 4) No provisions for balloon payments.
- 5) No points or fees in excess of a set percentage of the loan, with the allowable percentage increasing somewhat for smaller loans. For example, the Elder HELP Instrument could limit all points and fees to three percent of the amount financed for loans over \$20,000 and a higher amount for loans under \$20,000. The form should strictly limit the total of points and fees to a percentage of the loan that is low, but still high enough that most borrowers would be able to find loans with fees less than this total, even if they wanted to reduce their interest rate by paying some points. Limiting points and fees together to three percent of the loan, for example, would provide sufficient flexibility to borrowers and lenders without allowing lenders to gouge borrowers with the huge fees that often are imposed in the subprime market.<sup>262</sup> This

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261. Yield spread premiums are fees that lenders pay to brokers when the borrowers delivered by the brokers agree to pay interest rates above the "par" rate, which is the rate that the lender would be willing to accept to lend to those particular borrowers on that particular day. See Saunders & National Consumer Law Center, *supra* note 11, at 120.

262. A report by the National Information and Training Center recommends that finance charges, including points and fees, be limited to three percent on any loans with interest rates above eight percent. See National Training and Information Center., *Preying on Neighborhoods: Subprime Mortgage Lenders*

would provide significantly more protection than HOEPA's current fee trigger of eight percent.<sup>263</sup>

- 6) No interest rates in excess of a certain percentage over a particular benchmark rate.

In designing the Elder HELP Instruments interest rate cap, special attention should be given to the benchmark chosen as well as the amount added to that benchmark to create the cap. An appropriate benchmark would be one that generally reflects the prevailing interest rates available in the non-predatory market. When they are securitized and sold as bonds on Wall Street, mortgages become subject to many of the factors affecting the prices and yields of Treasury notes. As a result, the interest rates of mortgages generally track the yields available for Treasury notes.<sup>264</sup> Because most home loans are paid off before they reach full maturity, their rates more closely reflect the yield of Treasury notes of shorter duration than the home loan.<sup>265</sup> Therefore, it seems appropriate that the yield of either five-year or ten-year Treasury notes be used as the benchmark for the interest rate cap. Since the typical spread between a thirty-year mortgage and a ten-year Treasury note has averaged 1.74% over the last ten years, but has sometimes widened to over two percent, perhaps an appropriate interest limit for a thirty-year

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and *Chicagoland Foreclosure* 36 (1999), available at <http://www.ntic-us.org/preying/preying.html> (last visited Oct. 24, 2002).

263. See 15 U.S.C. § 1602(a)(1)(B)(i) (2000).

264. On average, the rates offered for thirty-year, fixed-rate mortgages closely track those of ten-year Treasuries, though the exact spread, or difference between the rates can shrink or widen. For example, in October 2002, the Wall Street Journal reported:

[Th]e spread, or difference, between rates on 30-year fixed-rate mortgages and the rates on 10-year Treasuries has been widening. It now stands at an unusually wide 2.44 percentage points vs. just 1.60 percentage points in May and an average of 1.74 percentage points over the past 10 years, according to HSH [Associates].

Ruth Simon, *Banks Make It Harder to Refinance*, WALL ST. J., Oct. 16, 2002, at D1, available at 2002 WL-WSJ 3408849.

265. For example, rates on fifteen-year mortgages typically track the yields of five-year Treasury notes. See Joy C. Shaw & John Dooley, *Stocks' Gloom Becomes Bond Market's Zoom*, WALL ST. J., July 19, 2002, at C12, available at 2002 WL-WSJ 3401109.

loan for purposes of the Elder HELP Instrument would be either a three percent or 3.5% spread over the ten-year Treasury note, with fifteen-year mortgages an equivalent spread over five-year Treasury notes.<sup>266</sup>

The law creating the Elder HELP Instrument Program would mandate that, to the extent any loan signed by the elder violated the terms of the Elder HELP Instrument, the terms contradicting the Elder HELP Instrument would be void and would be replaced by the terms provided for by the Elder HELP Instrument. Any court of competent jurisdiction could order reformation of the note. To aid the borrower in finding counsel to represent her, the borrower should be able to obtain her attorneys fees in any action to reform the note. The terms and effects of the Elder HELP Instrument would expressly apply to any and all holders of the note, including holders in due course. Because the Elder HELP Instrument would be recorded, any potential purchaser of the note could determine whether there was an Elder HELP Instrument in place before purchasing the note.<sup>267</sup>

The Elder HELP Instrument would act as a reverse contract of adhesion. Rather than lenders being able to induce a financially unsophisticated consumer to agree to the terms contained in a business's form contract, instead, any lender who wanted to do business with an elder who had signed and recorded an Elder HELP

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266. *See id.* (noting the average spread between thirty-year mortgages and ten-year Treasury notes). Jumbo loans, which are larger than the conforming loans that can be purchased by the government-sponsored entities Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation), typically have interest rates about a quarter point higher, but the spread can vary from as much as 0.75 percentage points to 0.10 percentage points, depending on the lender. *See* Lew Sichelman, *New Year Will Have a Saving Ring for Borrowers*, ORLANDO SENTINEL, Dec. 8, 2002, at J1, available at 2002 WL 1040999527.

267. Because payment of an undisclosed yield spread premium in violation of the Elder HELP Instrument may not be apparent to a bona fide purchaser of a note, the homeowners' cause of action for the payment of such a premium should be against the original broker and lender who participated in the payment of such premium.

Instrument would have to agree to the terms set by the Elder HELP Instrument.<sup>268</sup>

Occasionally, there may occur instances in which an elder, having signed an Elder HELP Instrument, would discover that he wanted to obtain a loan which contains some terms barred by the Elder HELP Instrument. Just as a self-excluded gambler can, in certain jurisdictions, remove himself from the exclusion list if he has certification from a mental health professional,<sup>269</sup> so too should an elder be able to cancel the Elder HELP Instrument so long as he has certification from a consumer credit counselor unaffiliated with the lender that the loan is an appropriate one, or that the counselor has discussed the benefits and detriment of the loan.<sup>270</sup> In this way, the homeowner would maintain maximum autonomy, both freedom from overreaching lenders who would attempt to manipulate the borrower into signing an overpriced loan, but also freedom from those very protections should they prove too constraining and the borrower requires that the restrictions of Elder HELP Instrument be lifted.<sup>271</sup>

The Elder HELP Instrument would help loan counselors give effective advice to borrowers by providing a template for a fair prime-rate loan. The loan counselor then can easily focus on how the proposed loan to the elder differs from the Elder HELP Instrument and can advise the homeowner about the likely effects of those differences.

One natural difficulty in the Elder HELP Instrument system would be ensuring that elderly homeowners who might be targeted by unscrupulous lenders will know about, sign, and record the Elder HELP Instrument, thus affording them its protections. Those entities

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268. For a discussion of contracts of adhesion, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

269. See *supra* note 228 and accompanying text (discussing the certification requirement).

270. This certification process is already used in jurisdictions such as North Carolina which requires borrowers to receive loan counseling before they enter into high priced loans. See *supra* note 68 and accompanying text.

271. This ability to extricate oneself from self-limitations of autonomy increases autonomy so long as it is designed to be done in a considered, reflective manner. See *supra* note 202 and accompanying text.

attempting to educate the public about the dangers of predatory lending could take on this task. In addition, lenders could be required to provide their elderly borrowers with notice of the Elder HELP Instrument program and directions on how to sign and record the Elder HELP Instrument during the lending process.<sup>272</sup> Furthermore, family members who are concerned that an elder in their family might fall prey to predatory lenders could learn about the existence of the Elder HELP Instruments and be instructed as to their use. In this way, these family members would finally be provided with a useful tool to protect an elderly, vulnerable relative without being forced to obtain a conservatorship over their relative, and thus avoid the massive limitation of autonomy that a conservatorship would almost inevitably entail.<sup>273</sup>

A program to allow homeowners to prevent themselves from signing over-priced loans would satisfy the tests set forth in Section VII for determining what forms of self-limitations of autonomy we should respect and enforce.<sup>274</sup>

*A Is the Decision the Type That, In General, Increases Rather Than Decreases One's Overall Autonomy?*

If the borrower frees herself from some of the risk of entering into an overpriced loan, yet retains the ability to untie herself from the restrictions by seeking the advice of a loan counselor, it appears that her decision to sign the Elder HELP Instrument would, in general, increase rather than decrease her autonomy. She would be free to consider the effects of the self-limitation of autonomy and determine for herself whether it would help or hinder her. She could judge whether it would aid her in her considered review and ordering

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272. See Engel & McCoy, *supra* note 11, at 1309–10 (addressing the difficulty of reaching potential victims of predatory lending through educational programs).

273. Limited guardianships, touted as a way to minimize the loss of autonomy that results from guardianships, have been little used. See Lawrence A. Frolik, *Guardianship Reform: When The Best Is The Enemy Of The Good*, 9 STAN. L. & POL'Y REV. 347, 354 (1998).

274. See *supra* notes 211–213 and accompanying text for the tests for appropriately enforced self-limitations of autonomy.

of her first-order desires, to see whether it will help her reach her goals, and reject it if it would not. Even after she had chosen to be bound by an Elder HELP Instrument, she would not be trapped by its restrictions and could easily be released from them if she, in a considered fashion and with the aid of a consumer credit counselor, determines that she requires such release.

The Elder HELP Instrument would also increase the elder homeowner's autonomy in that it would make it easier for her to prove that she had been taken advantage of by an unscrupulous lender. Instead of relying on senior homeowners' testimony about what representations were made to them, testimony which may be compromised by memory problems in some elders or death or illness in others, a suit based on an Elder HELP Instrument would be much more straightforward. Even a guardian for an incompetent senior or the heirs of a deceased elder could prove that an Elder HELP Instrument had been recorded and that the terms of the loan violated the Elder HELP Instrument.

#### *B. How Long Does the Self-Limitation of Autonomy Last?*

To be most effective, the Elder HELP Instrument should last for as long as the elder owns the home, or until the elder revokes the instrument. It would be problematic to have the instrument expire at a set time, because a homeowner may not track carefully the expiration date and so may be relying on a protection that no longer exists. Even though the Elder HELP Instrument should not have a set expiration date, so long as it is limited to seniors, it would at least be limited to one phase of the homeowners' lives.

#### *C. What is the Scope of the Limitation of Autonomy?*

The scope of the autonomy limited is not enormous. The signers of Elder HELP Instruments give up the power to enter into expensive loans without first receiving loan counseling, but remain free in all other aspects of their lives. This limitation is far less than other restrictions of autonomy that we freely countenance, such as joining the military or marrying, with a quicker and easier release.

*D. Is the Amount of Autonomy She Might Give Up So Great or the Risk She May Have Erred in Thinking She Will be Better Off So High That the Danger of an Incorrect Decision Outweighs the Benefits She Likely Hopes to Receive in Return?*

The freedom that the homeowner gives up is not great, since it is merely the freedom to enter into high-cost loans or loans with difficult terms quickly without seeking loan counseling first. A homeowner might possibly err in signing the document, if it turns out that she cannot obtain a loan within the restrictions of the Elder HELP Instrument, she needs a high-cost loan or one with difficult terms, and for some reason obtaining loan counseling is burdensome. However, this possibility should be minimal so long as sufficient loan counselors are available to homeowners.<sup>275</sup> This small risk should normally be far outweighed by the benefit to the homeowner of being much less likely to be bound by a high-priced loan or one with other onerous or deceptive terms.

*E. When is She Likely to be Acting More Freely and More True to Her Essential Self: When She Decides to Limit Her Autonomy or When Later She Decides to Revoke or Transgress Against That Limitation?*

A homeowner would most likely be acting more freely and true to her essential self when, away from the coercive pressure of the mortgage broker, she considers and signs an Elder HELP Instrument. By comparison, she would likely be less true to her autonomous desires if she were to succumb to high-pressure loan tactics and sign a high-price loan. Possibly, she may not understand all of the ramifications of either document, especially if she has the barriers to understanding, such as physical or mental infirmity, or lack of education or sophistication, that predatory lenders often rely on to sell their overpriced product.<sup>276</sup> However, even if she does not fully

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275. See *supra* note 68 and accompanying text (discussing loan counselor provisions).

276. See Engel & McCoy, *supra* note 11, at 1280–81 (discussing how predatory lenders take advantage of the information asymmetry between themselves and their victims by finding borrowers who have been traditionally cut off from the credit market and are financially unsophisticated).

understand either document, she may still have greater faith in a document designed by the legislature or by consumer advocates to protect her from predatory loans than she would in mortgage documents designed by a lender. Therefore, the Elder HELP Instrument could more fully express the autonomous choice even of those homeowners who lack the sophistication or education to protect their own autonomy, simply by allowing the homeowner to choose which party to trust—those preparing the Elder HELP Instruments or lenders.

*F. Is There Some Method by Which the Self-Limiter Can, in a Considered and Reflective Manner, be Freed, Temporarily or Permanently, from the Self-Restriction Should Her Second-Order Volitions Change or She Require a Temporary Exception?*

The homeowner would retain the ability to revoke the Elder HELP Instrument by going to a home loan counselor and obtaining the counselor's certification that the loan is appropriate for the homeowner, or that the counselor has informed the homeowner of the benefits and detriment of the loan. In this way, the homeowner is free to make her decision away from the coercive or manipulative efforts of the mortgage broker and in the presence of an independent loan counselor. One policy question that must be answered is whether the loan counselor must certify that the waiver is in the borrower's best interests or merely must certify that the counselor has explained the terms and potential benefits and detriments of the loan. While the former rule would most protect the homeowner from overly persuasive mortgage brokers, the latter rule would do more to guarantee the homeowner's release from the restrictions. The latter rule would provide the least interference in the homeowner deciding for himself whether to take the loan, but may do so at the cost of leaving homeowners more vulnerable. Another policy question concerns whether the waiver should be temporary, and be specific to one loan, or be more permanent, or at least until another Elder HELP Instrument is signed and recorded. The most autonomy enhancing method would be to give the homeowner the option of deciding whether to sign a mere loan-specific waiver that would be given to

the lender, or a permanent withdrawal of the Elder HELP Instrument, that would be recorded with the county recorder's office.

*G. Is There an Overall Harm or Benefit to the Self-Limiter or to Society by Allowing This Form of Self-Limitation Apart From Its Effect on the Autonomy of the Individual Self-Limiter?*

Lenders may claim that the Elder HELP Instrument will harm seniors and society by cluttering up the property records and by making it more difficult for elders to obtain loans, even elders who chose not to execute Elder HELP Instruments. These objections, which will be more fully addressed in the next Section, must be balanced against the benefits to elder homeowners and to society to be gained from this program, which I argue will more than make up for any harm caused. The self-limiters will benefit by obtaining loans without the barred terms, or at least by having some loan counseling before they accept such loans. By reducing the level of predatory lending among the elderly, society would benefit even apart from the effect on the autonomy of elder homeowners, because it would no longer need to provide housing to elderly homeowners who lost their homes to predatory lenders.<sup>277</sup> Legitimate lenders would benefit by not losing customers to their predatory competition.<sup>278</sup> The cost to third parties of this self-limitation of autonomy would include the judicial resources necessary for the litigation of the reformation actions, since the primary result would be litigation between the homeowner and the lender over the terms of the loan. Lenders could avoid most of the cost of this self-limitation by lending within the strictures of the self-limitation of autonomy. On the other hand, society will greatly benefit from this self-limitation of autonomy if it prevents elderly homeowners from losing their homes to predatory lenders.

Lenders may argue that the Elder HELP Instrument program limits lender autonomy by preventing them from freely negotiating

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277. See *supra* notes 51–54 and accompanying text (discussing the likelihood that elder victims of predatory lending will be unable to purchase a new home and will move to a nursing home or board and care facility).

278. The advantages to legitimate lenders of ridding the market of predatory lenders is discussed in Eggert, *supra* note 11, at 639–40.

with senior homeowners over the terms of loans. They might argue that the extra cost and burden on them of determining whether an Elder HELP Instrument has been recorded and determining whether a borrower has obtained loan counseling to waive the provisions of the instrument unfairly limits their own freedom to contract and conduct their business as they would like. However, lenders are not and should not be free to impose whatever price terms they desire on borrowers, but instead must reach an agreement with borrowers regarding those terms. The Elder HELP Instrument would aid borrowers in insisting on favorable terms, and lenders are free to agree to the loans or not, depending on their assessment of the profitability of lending to the senior homeowner. Therefore, lender autonomy would not be unduly restricted by this program.

*H. What Are the Monitoring Costs to the Self-Limiter and Third Parties of Enforcing This Self-Limitation of Autonomy?*

The monitoring costs to third parties are not extensive, since lenders already conduct searches of county recorder's offices before lending money in order to ensure that the putative homeowner actually owns the home and to determine what loans encumber the home at the time of the new loan. The lender needs this information to determine what loans or other encumbrances already exist affecting the property and to ensure that no loans will have priority over its loan without the lender's knowledge. Commercial lenders are likely to know of existing laws and have the ability to determine whether the law applies in each instance. Private individuals who originate a single loan, for example, by taking back a loan when they sell their home, should likely be exempt from the effects of the Elder HELP Instrument. Further monitoring and enforcement costs include the incremental costs of maintaining a functioning court system, though if the Elder HELP Instruments deter predatory lending or decrease the complexity of suits arising from predatory loans, they may actually lessen, rather than increase these costs.

### *I. How Reliable is the Enforcement of the Self-Limitation?*

The reliability of the Elder HELP Instrument would depend in a large part on seniors' access to effective mortgage counseling prior to any waiver of the instrument and to legal representation upon any breach of the instrument, as well as the ability to enforce the terms of the Elder HELP Instrument. As noted previously, elder homeowners often have great difficulty in protecting themselves through litigation, as they may not have the resources, physical, mental, or financial, to prosecute a lawsuit to a successful conclusion.<sup>279</sup> However, the Elder HELP Instrument would make this task somewhat easier, as it would decrease the extent to which the elder would be dependent on proving fraud or misrepresentation, would involve more straightforward matters of proof, and would depend less on the elder's memory. Furthermore, to the extent that violations of Elder HELP Instruments could be proven on a class-wide basis, the elder may benefit from litigation even when he does not individually finance or direct it.

## X. ARGUMENTS AGAINST THE ELDER SELF-EXCLUSION IN THE LENDING INDUSTRY

Because the Elder HELP Instrument program would break new ground, many issues will likely spring up in completing its design that should be resolved, and I do not claim that this proposal is a fully finished product, immediately ready for implementation. Instead, I view this Article as the beginning of a discussion that could lead to very useful new law, to a more rigorous method of analyzing self-restriction of autonomy, and to a new way of thinking about methods of consumer protection. In this Section, I will attempt to respond to what I anticipate might be objections raised to this program.

The lending industry might argue that the Elder HELP Instrument would prevent loans signed by elders from being securitizable, and so, would drive up the costs of loans to the

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279. See discussion of this point *supra* notes 106–108 and accompanying text.

elderly.<sup>280</sup> However, the Elder HELP Instrument program should not greatly affect the securitizability of any loan, since, so long as the loan's explicit terms conform to the restrictions of the Elder HELP Instrument program, the Elder HELP Instrument program would not change the legal rights of the borrower or provide any additional defenses against the lender. Thus, secondary market participants could require the originator of the loan to confirm either that no Elder HELP Instrument has been recorded or that the loan conforms to the Elder HELP Instrument's requirements. If the purchaser of the note determines that the originator of the note either misrepresented or was mistaken about the status of the note, the borrower, or the existence of the Elder HELP Instrument, the purchaser could require the originator to repurchase the note.<sup>281</sup>

The lending industry could also complain that the Elder HELP Instrument leaves lenders too vulnerable to the vagaries of the process of recording real estate documents and lenders could make loans between the time the senior homeowner records an Elder HELP Instrument and when the instrument shows up on the public indexes.<sup>282</sup> This problem seems more a defect among archaic public records system than a flaw in the Elder HELP Instrument program and would not be a significant problem in jurisdictions which allow title insurers to copy documents on the day they are presented for recording.<sup>283</sup>

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280. For a discussion of the securitization process and its effect on the residential mortgage process, see Eggert, *supra* note 11, at 534–52.

281. For a discussion of the repurchase requirements imposed by the secondary market, see Eggert, *supra* note 11, at 548–49, though as noted there, the repurchase requirements require the continued existence of a solvent originator.

282. “Indices are essential, but far from perfect. For one thing, there is always some interval between the time the recorder receives a document and when it appears in an index. That interval can be as short as an hour or as long as several months.” GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 218 (3d ed. 1999).

283. *See id.* at n.7. Lefcoe notes that, where title insurers are allowed to copy documents when they are filed, “[d]ocuments are immediately entered into the title insurer’s index, thus avoiding the risks of the gap between filing and indexing in the public land records.” *Id.* One possible solution for jurisdictions with antiquated recording systems, besides fixing the recording

Consumer advocates could argue that the Elder HELP Instrument, because it puts the burden on the homeowner to sign it and record it, would provide protection only to those borrowers already best able to protect themselves even without the protections of the document. Clearly, the Elder HELP Instrument program is in no way an acceptable replacement or alternative for existing or proposed measures designed to provide protections to all homeowners signing high-cost loans. State anti-predatory lending legislation, such as Georgia's, New York's, and North Carolina's, is the crucial front line defense in protecting borrowers from predatory lending.<sup>284</sup> The homeowners most likely to be victims of predatory lending need protections that do not depend on the homeowner's own understanding or knowledge of available legal restrictions. The Elder HELP Instrument program would, however, provide useful additional benefits above and beyond the general predatory lending bills to those who seek its protection.

A risk in this proposal is that lenders could argue that any homeowner who did not sign an Elder HELP Instrument could be presumed to desire a high-cost loan, that the absence of this instrument indicates somehow the desire to enter into a loan that would violate the instrument. An elder might have numerous reasons for not signing the instrument that have nothing to do with whether the elder desires to sign a high-cost loan, however, with subterfuge by the lender or simple ignorance being high on the list. Therefore, any enactment of this program should include the express statement that no inferences or presumptions may be drawn against the homeowner for the failure to sign an Elder HELP Instrument. Nor should any presumptions be drawn against a homeowner by the fact that the homeowner has withdrawn an Elder HELP Instrument,

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system itself, would be to have the Elder HELP Instrument have a short delay in taking effect until a set period goes by or it appears on the index, whichever is earlier, with the borrower instructed that the protection will take that period of time to take effect. The Elder HELP Instrument should be immediately binding upon any lender when either the lender or any of its agents have knowledge of it, however.

284. See discussion of state anti-predatory legislation *supra* notes 65–92 and accompanying text.

because that act might be the result of an especially convincing mortgage broker or less than competent counseling.

The proposal could be criticized for relying on the existence of adequately trained and affordable independent home-loan counselors to allow those seniors who do want to sign loans that violate the instrument to free themselves from its bonds. In this regard, this proposal is similar to the North Carolina bill requiring counseling for homeowners who might sign high-cost loans.<sup>285</sup> Efforts should be made to ensure that the counselors are not merely wolves in sheep's clothing, or mortgage brokers seeking to earn money on the side by counseling borrowers to enter into high-cost loans. While some agencies provide valuable counseling to potential borrowers, there is insufficient funding in many areas for effective counseling, and the opportunities for borrowers to receive personally tailored, timely and accurate information and counseling are severely lacking.<sup>286</sup> This lack of counseling is a problem that should be addressed with or without the Elder HELP Instrument program. A more effective and widespread counseling system could be funded by a fee attached to the recording process, much as California has funded programs designed to prevent predatory lending with such fees.<sup>287</sup>

Another criticism might be that if some states allow Elder HELP Instruments while others do not, that disparity would contribute to the patchwork nature of laws designed to prevent predatory lending and detract from the smooth flow of credit to all parts of the country.<sup>288</sup> To avoid not only that hazard but also the possibility of

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285. See *supra* note 68 and accompanying text (discussing the North Carolina anti-predatory lending legislation).

286. For a discussion of the great promise of effective counseling as well as the limited counseling currently available, see Harkness, *supra* note 44, at 41–43.

287. See CAL. GOV'T CODE § 27388 (West Supp. 2002) (providing that a fee of up to two dollars may be imposed on the recording of any instrument except those exempt from recording fees, upon the adoption of a resolution mandating such a fee by the county board of supervisors).

288. See Donald C. Lampe, *Predatory Lending Initiatives, Legislation and Litigation: Federal Regulation, State Law and Preemption*, 56 CONSUMER FIN. L.Q. REP. 78, 84 (2002).

federal preemption, Elder HELP Instruments could be authorized at the federal level.<sup>289</sup>

One last criticism is that, if this program would indeed protect homeowners from predatory lending, it should not be restricted to the elderly. If it were made universal, there would not be even the hint of “new ageism” or “compassionate ageism” in its enactment. The use of HELP Instruments would have a greater restricting effect on property and its recording if the use of these instruments were extended to the non-elderly, since the non-elderly may live in their homes much longer than their older equivalents. A homeowner who buys a home at age twenty-five could conceivably live there for seventy years or more. This long duration may increase the possibility of lenders failing to note the HELP Instrument in the property record if it were recorded many decades previously. Furthermore, lending conditions may change so much during the span of numerous decades that the interest and fee assumptions used to design the HELP Instrument would not match the market as closely as they did when the instrument was originally drafted. Therefore, if HELP Instruments are extended to the non-elderly, then their use could arguably be time-limited, so that the homeowner would have to refile at the end of a set period of time, such as every twenty years. Such an expiration date is problematic, as the homeowner is unlikely to remember when the protection expires so as to renew it. The homeowner may unexpectedly find himself vulnerable to overpriced loans. Even though limitations of autonomy

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289. Lenders would no doubt argue that a state Elder HELP Instrument program was preempted by federal law, including the Alternative Mortgage Transactions Parity Act of 1982 (AMTPA), Pub. L. No. 97-320, §§ 801-807, 96 Stat. 1469, 1545-48 (1982), the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, 94 Stat. 132 (1980), and the Riegle-Nagel Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified as amended in various sections of 12 U.S.C.). The issue of federal preemption of state and local anti-predatory lending enactments will likely be one of the most important battlegrounds in this area of law and a full discussion of the likelihood of preemption in this area is beyond the scope of this Article. For a useful discussion of the possibility of federal preemption of state and local enactments regarding predatory lending, see Lampe, *supra*, note 288, at 84-86.

are less worrisome if they are of short duration, this may be an instance where such a specific time limitation creates too great a danger, especially given that the homeowner can be released from the limitation through a simple affirmative act.

#### XI. CONCLUSION

The elderly are special targets of predatory lending and tend to suffer more severely when they become its victims. However, most seniors are competent and able to handle their own affairs, and may resent broadly drawn, special protections aimed solely at older homeowners as an undue restriction of their freedom. I have proposed a system that would protect seniors who desire to free themselves of the fear of predatory lending by limiting their own autonomy, without limiting the freedom of other seniors who do not desire additional protections. This system of recording notices of the self-limitation of autonomy would both respect the autonomy of the elderly while protecting those whose autonomy would be enhanced more by protection than by unrestrained freedom to contract. Like Ulysses, lashed to the mast, elderly homeowners who choose this protection could resist the siren song of predatory lenders and arrive at very old age, safe at home.

