

## THE KIDS AREN'T ALL RIGHT: THE FAILURE OF CHILD ABUSE STATUTES AS A MODEL FOR ELDER ABUSE STATUTES

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*Elder abuse is a serious and pervasive problem in America. The federal government's failure to adequately address this problem leaves states' elder abuse statutes as the main legal tools designed to protect the elderly. Despite states' intentions to effectively prevent and reduce elder abuse, these statutes are largely ineffective. Their shortcomings stem from the flawed assumption that elder abuse statutes should be modeled after child abuse laws. While child abuse statutes have been successful, the same methods are ineffective in the elder abuse context because the forms of abuse are distinct. Furthermore, states' elder abuse statutes lack proper enforcement mechanisms.*

*Mr. Barber proposes that states' responses to domestic violence are more appropriate models for crafting a legal remedy for elder abuse. The optimal way to reduce elder abuse is to empower the elderly and eliminate societal prejudices toward them. To achieve this goal, Mr. Barber recommends focusing on the abusers, empowering the victims, enforcing existing laws, and improving educational efforts to address this problem. Finally, Congress should adopt a model federal statute to serve as a guide for state legislatures and make elder abuse prevention a national priority.*

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## I. Introduction

Samantha is a ninety-three year-old woman with diabetes who has lived in her home for sixty years.<sup>1</sup> Samantha's granddaughter Denise recently moved in and lives rent-free, ostensibly as her caregiver.<sup>2</sup> Denise's unemployed boyfriend has moved in as well.<sup>3</sup> One day, Denise becomes abusive and pushes Samantha down a flight of stairs while drunk.<sup>4</sup> Samantha was reluctant to report Denise to the authorities because she felt both embarrassed and a duty of familial responsibility.<sup>5</sup> Unfortunately, Samantha's story is far more common than one would like to think. Her story highlights the problem of elder abuse and the need to halt it.

In response to experiences like Samantha's and a lack of a uniform federal remedy, the states enacted statutes to prevent elder abuse.<sup>6</sup> States turned to existing child abuse statutes as a starting point for elder abuse laws, which state legislatures deemed analogous.<sup>7</sup> These statutes required certain individuals considered to be in the best position to detect abuse early on to report any suspected cases of abuse.<sup>8</sup>

This Note examines the dominant statutory framework for combating and preventing elder abuse. Part II provides background information on elder abuse as states currently define it and the main method states have used to address the problem so far—mandatory reporting statutes. Part III explores the critiques of mandatory report-

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1. NAT'L COMM. FOR THE PREVENTION OF ELDER ABUSE & NAT'L ADULT PROTECTIVE SERVS. ASS'N, NAT'L CTR. ON ELDER ABUSE, THE 2004 SURVEY OF STATE ADULT PROTECTIVE SERVICES: ABUSE OF ADULTS 60 YEARS OF AGE AND OLDER 7 (2006), available at <http://www.nasua.org/pdf/2-14-06%20FINAL%2060+REPORT.pdf> [hereinafter 2004 SURVEY]. The names of the individuals mentioned in the report have been changed to protect their privacy.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207, 213-16 (2003) (discussing 1980 and 1985 congressional committee hearings on the problems of elder abuse and mistreatment in America and the call for congressional action to simplify and centralize state action); Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 809 (2000).

7. Breaux & Hatch, *supra* note 6, at 213; Charles Pratt, *Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvement in California*, 40 CAL. W. L. REV. 195, 200-01 (2003).

8. See, e.g., FLA. STAT. § 415.1034 (2006); MD. CODE ANN., FAM. LAW § 14-302 (West 2006); MONT. CODE ANN. § 52-3-811 (2006).

ing in the elder abuse context and looks at the enforcement of elder abuse statutes through the criminalization of failing to report by a mandatory reporter. Finally, Part IV recommends that additional approaches be implemented to create a more comprehensive elder abuse prevention strategy.

## II. Background

### A. The Growing Elder Abuse Problem

The mistreatment of older Americans is a large and disconcerting problem. This problem will only get larger in coming years as the baby boomer generation ages.<sup>9</sup> From 1990 to 1995 the elderly population increased by a factor of eleven and will double by 2050 according to current growth rates.<sup>10</sup> The elderly population is currently 35 million people, and 4.2 million members of the elderly population are over eighty-five years-of-age.<sup>11</sup> Thus, the elderly will make up 20% of the population in 2050 as compared to 12.4% currently.<sup>12</sup> Furthermore, the fastest growing segment of the elderly population are those individuals aged eighty-five years and older.<sup>13</sup>

As Americans live longer, the need for institutions and practices designed to ensure adequate care for the aging population increases.<sup>14</sup> Diabetes, heart disease, and other chronic medical ailments require extensive and continuing care,<sup>15</sup> and place greater pressure on American society to provide adequate health care for the elderly population.

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9. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION PROFILE OF THE UNITED STATES: 1997, at 7 (1998), *available at* <http://www.census.gov/prod/3/98pubs/p23-194.pdf> [hereinafter 1997 CENSUS REPORT].

10. *Id.* at 48. For purposes of this note, elderly Americans are those aged sixty-five and older.

11. YVONNE J. GIST & LISA I. HETZEL, U.S. DEP'T OF COMMERCE, WE THE PEOPLE: AGING IN THE UNITED STATES 1 (2004), *available at* <http://www.census.gov/prod/2004pubs/censr-19.pdf> [hereinafter AGING REPORT].

12. *Id.*

13. LISA HETZEL & ANNETTA SMITH, U.S. DEP'T OF COMMERCE, THE 65 YEARS AND OVER POPULATION: 2000, at 2 (2001), *available at* <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf> [hereinafter 65 & OVER POPULATION].

14. 1997 CENSUS REPORT, *supra* note 9, at 51 (stating that as age increases, so does need for some form of personal assistance: “[t]he proportion requiring personal assistance jumped from 8 percent for those 65 to 69 years old to 45 percent for those 85 years old and older.”).

15. Dorothy C. Raskini-Gregory & Miriam Piven Cotler, *The Elderly and Health Care Reform: Needs, Concerns, Responsibilities and Obligations*, 21 W. ST. U. L. REV. 65, 74 (1993).

Dovetailed with the general veneration of youth and health in American society that marginalizes many elderly family members, these health problems result in an increasingly vulnerable, significantly at-risk American population nearing crisis.<sup>16</sup>

The most recent data compiled by the state of Illinois in its Fiscal Year 2005 Elder Abuse and Neglect Annual Report shows a steady increase in reports of elder abuse since 1996.<sup>17</sup> The largest increase in reports of abuse occurred between Fiscal Years 1998 and 1999.<sup>18</sup> This increase is likely due to a mandatory reporting law introduced the year before.<sup>19</sup> For Fiscal Year 2004, there were 8359 reported cases of elder abuse reflecting an increase of 8.9% over Fiscal Year 2003—the largest increase since 1999.<sup>20</sup> The rise in reported abuse demonstrates that current prevention strategies are not working.

According to a 2004 survey conducted by the National Center of Elder Abuse (NCEA), reports of elder and vulnerable adult abuse increased 20% from 2000, and substantiated reports were up 15%.<sup>21</sup> The most common type of reported abuse was self-neglect, followed closely by caregiver neglect.<sup>22</sup> While the statistics could lead one to believe that self-neglect is the most common form of elder abuse, they are somewhat deceptive: combining the percentage of reports resulting from some form of caregiver neglect and emotional, physical, or sexual abuse, the non-self-directed abuse jumps to almost 50% of reported abuse.<sup>23</sup> Thus, abuse by a third party is at least as likely as self-abuse.

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

17. ILL. DEP'T ON AGING, ELDER ABUSE AND NEGLECT PROGRAM ANNUAL REPORT FY 2005, at 2 (2005), available at [http://www.state.il.us/aging/1news\\_pubs/publications/ea-an\\_report2005.pdf](http://www.state.il.us/aging/1news_pubs/publications/ea-an_report2005.pdf) [hereinafter ILLINOIS 2005 DATA].

18. *Id.* The number of elder abuse reports jumped from 6,213 in 1998 to 7,157 in 1999, an increase of 15.2%.

19. John F. Erbes et al., *Survey of Illinois Law: Elder Law*, 23 S. ILL. U. L.J. 1009, 1031 (1999). Public pressure and a push from the Illinois Attorney General eventually cajoled the legislature into adopting a mandatory reporter requirement, and in 1989 a mandatory reporting requirement was added, making Illinois one of the later states to do so. *Id.*

20. ILLINOIS 2005 DATA, *supra* note 17, at 2.

21. 2004 SURVEY, *supra* note 1, at 5. Substantiated reports are those that are shown to be actual cases of abuse upon investigation.

22. Self-neglect constituted 29.4% of reports, and caregiver neglect accounted for 26.1%. *Id.* at 18. See discussion *infra* Part II.B for definition of the various types of elder abuse.

23. Of substantiated reports, caregiver neglect accounts for 20.1%, emotional abuse accounts for 14.6%, sexual abuse counts for 1.0%, and physical abuse accounts for 10.5%. 2004 SURVEY, *supra* note 1, at 17. This means 46.2% of substanti-

## B. Defining Elder Abuse

Consistent definitions of elder abuse do not exist because each state has a different statutory definition. Despite the differences, common themes and similarities do exist among the various state definitions, and by and large, these similarities outweigh any differences.

Elder abuse statutes generally define neglect as a situation in which a dependant adult is unable to perform, or a caregiver does not provide, tasks and services necessary for adequate health and welfare.<sup>24</sup> Self-neglect refers to behavior in which the elder adult threatens her own health or safety.<sup>25</sup> Self-neglect is generally caused by the onset of depression, dementia, or other mental impairments, such as Alzheimer's disease.<sup>26</sup> Common examples of self-neglect include an adult being unable or unwilling to bathe herself adequately, failing to take required medication, or failing to obtain adequate amounts of food or clothing.<sup>27</sup> Caregiver neglect describes situations in which the caregivers fail to perform the necessary tasks they are paid to perform.<sup>28</sup> This form of neglect runs the gamut of behaviors from refusing to give medication to failing to turn an invalid confined to bed.<sup>29</sup>

Statutory abuse, on the other hand, usually requires some sort of physical action by the abuser. In Illinois, as in many other states,

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ated elder abuse reports are the result of physical abuse from someone other than the elder adult victim. *Id.*

24. See CAL. WELF. & INST. CODE § 15610.57 (West 2008); 320 ILL. COMP. STAT. 20/2(g) (2007); KY. REV. STAT. ANN. § 209.020(15) (West 1999); see also 2004 SURVEY, *supra* note 1, at 9 (defining neglect as deprivation of "life necessities such as food, water, clothing, shelter, personal hygiene, medicine, comfort, personal safety, and other essentials"); Arlene D. Luu & Bryan A. Liang, *Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 CORNELL J.L. & PUB. POL'Y 165, 172 (2005).

25. 2002 National Victim Assistance Academy, *Victimization of the Elderly*, <http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter14.html> (last visited Feb. 18, 2008) [hereinafter *Elder Abuse Chapter*]; see also 320 ILL. COMP. STAT. 20/2(i-5). "'Self-neglect' means a condition that is the result of an eligible adult's inability, due to physical or mental impairments, or both, or a diminished capacity, to perform self-care tasks that substantially threaten his or her own health." *Id.*

26. See Mary Twomey et al., *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 73, 74 (2005); *Elder Abuse Chapter*, *supra* note 25.

27. *Elder Abuse Chapter*, *supra* note 25.

28. See Audrey S. Garfield, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 873 (1991). Caregivers can be both family members and paid assistants. *Id.*

29. *Id.*; 2004 SURVEY, *supra* note 1, at 10; *Elder Abuse Chapter*, *supra* note 25.

abuse can be physical, sexual, mental, or financial.<sup>30</sup> Physical abuse is the actual striking of the dependant adult.<sup>31</sup> Sexual abuse includes any nonconsensual sexual act with a dependant adult, including those victims that are incapacitated and lack the ability to consent.<sup>32</sup> Mental abuse includes acts such as verbal assaults, threats, intentional infliction of distress and harassment, as well as nonverbal action that produces these results.<sup>33</sup> Isolating the dependant adult from family and friends and giving the dependant adult the “silent treatment” are also forms of mental abuse.<sup>34</sup> Financial abuse refers to the mismanagement of an elderly person’s assets or property.<sup>35</sup> Common examples of financial abuse include simple stealing, forcing someone to sign a power of attorney, and unauthorized check cashing.<sup>36</sup>

For the purposes of this Note, all types of abuse and neglect are collectively referred to as “elder abuse.” All of these forms of abuse trigger mandatory reporting statutes. Self-neglect and caregiver abuse, alone, account for roughly 80% of all reports<sup>37</sup> and are the focus of most states’ elder abuse laws.<sup>38</sup>

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30. 320 ILL. COMP. STAT. 20/2(a) (“‘Abuse’ means causing any physical, mental or sexual injury to an eligible adult, including exploitation of such adult’s financial resources.”); *see also* CAL. WELF. & INST. § 15610.07 (West 2008); IOWA CODE § 235B.2(5)(a) (2007); KY. REV. STAT. ANN. § 209.020(8) (West 2007).

31. Elder Abuse Chapter, *supra* note 25; *see also* Jennifer Beth Glick, *Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy*, 12 VA. J. SOC. POL’Y & L. 714, 718 (2005).

32. Elder Abuse Chapter, *supra* note 25. Included in sexual abuse are all types of sexual assault or battery such as rape, sodomy, or coerced nudity, and even sexually explicit photography. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 2004 SURVEY, *supra* note 1, at 19.

38. *See, e.g.*, CAL. WELF. & INST. CODE § 15600 (West 2008); 320 ILL. COMP. STAT. 20 (2007); KY. REV. STAT. ANN. § 209 (West 2007). The other 20% of reports are financial exploitation crimes. 2004 SURVEY, *supra* note 1, at 9. This is however rapidly changing with the rise in statutes designed to prevent the financial abuse of the elderly. *Id.* at 9.

### C. Causes of Elder Abuse by Caregivers

Caregiver abuse occurs in both institutional<sup>39</sup> and residential<sup>40</sup> settings, and the explanations for abuse in both settings are similar. Living situations in residential housing range from the dependant adult living in an adult child's home to the dependant adult living in his own home, possibly with a caregiver, either familial or not.<sup>41</sup> Institutional living refers to nursing homes and similar situations. Immediate family members commit almost 70% of the instances of elder abuse in the residential setting, a number that rises to almost 90% when extended family is included.<sup>42</sup>

Elder abuse is caused by a complex mix of factors and circumstances. Five main factors, however, help explain elder abuse: caregiver stress, social isolation, inadequate staffing and training, impairment of the elderly adult, and prejudice. These five factors are not exhaustive and do not necessarily exist in every instance of elder abuse, but they provide a sufficient framework for understanding the causes of elder abuse.

#### 1. CAREGIVER STRESS

The factor most often blamed for elder abuse is caregiver stress.<sup>43</sup> The sources of caregiver stress, however, vary greatly. A few representative samples include the financial dependence of the caregiver,<sup>44</sup> the dependant adult acting in a difficult manner,<sup>45</sup> and substance abuse of the caregiver.<sup>46</sup> Furthermore, caregivers with either a history of committing violence or being the victim of violence are more likely to commit violent acts themselves, thereby perpetuating the traditional cycle of violence.<sup>47</sup>

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39. Elder abuse in state-licensed nursing homes or their equivalent is usually perpetrated by a nursing home staff member. Kohn, *supra* note 16, at 178. "Elder abuse is common in America's nursing homes. In 1999, the Health Care Financing Administration or 'HCFA' (now known as the Centers for Medicare and Medicaid Services or 'CMS') cited 14.1% of the nation's nursing homes for elder abuse." *Id.*

40. Residential care settings are those where the adult lives alone or with a caregiver. *See Id.*, at 178-79.

41. *Id.* at 178.

42. Twomey et al., *supra* note 26, at 75.

43. Glick, *supra* note 31, at 719; Kohn, *supra* note 16, at 179; Twomey et al., *supra* note 26, at 75.

44. Kohn, *supra* note 16, at 179.

45. Glick, *supra* note 31, at 721. This may range from the dependant adult refusing help to simple pouting and other childish behavior. *Id.*

46. Glick, *supra* note 31, at 719; Twomey et al., *supra* note 26, at 75.

47. Kohn, *supra* note 16, at 179.

## 2. SOCIAL ISOLATION

The social isolation of elderly adults is also a factor that contributes to elder abuse. Dependant elderly adults typically lack the social contacts and interactions of independent adults.<sup>48</sup> Often the caregiver is the only person a dependent adult will see on a daily basis, making abuse hard to detect.<sup>49</sup> Social isolation can also facilitate the caregiver's abusive behavior.<sup>50</sup> If the caregiver knows there is little chance of the dependant adult encountering outside help, there may be the temptation to commit abusive acts that would be noticed if the dependant adult had more frequent outside contact.<sup>51</sup>

## 3. INADEQUATE STAFFING AND TRAINING

Inadequate staffing is an alarming problem in nursing homes throughout the nation.<sup>52</sup> Even well-trained nurses or nurse's assistants cannot provide adequate care if they are responsible for more patients than they can handle.<sup>53</sup> The shortage of staff closely relates to the inadequate training of caregivers, especially in the residential setting.<sup>54</sup> Due to the high cost associated with qualified elder care, unqualified family members may attempt to care for their elderly relatives.

## 4. IMPAIRMENT OF THE ELDERLY ADULT

Impairment of the elderly adult itself actually may be one of the most critical factors that place the elderly at risk for abuse.<sup>55</sup> The most likely victim of elder abuse is an adult over the age of eighty,<sup>56</sup> which

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48. *Id.* at 180; *see also* Glick, *supra* note 31, at 720.

49. Glick, *supra* note 31, at 720.

50. Kohn, *supra* note 16, at 180.

51. *See id.*

52. *Id.* (citing study that found only 8% of the nation's nursing homes were sufficiently staffed to provide the basic level of adequate care needed to secure federal funding); *see also* Michael J. Davidson, *Governmental Responses to Elder Abuse and Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act*, 12 *ELDER L.J.* 327, 331 (2004) ("A 1981 congressional report found that many nursing home care providers are 'often ill-trained, grossly overworked, and very poorly paid.' More than [two] decades later the same problems exist.").

53. Kohn, *supra* note 16, at 180.

54. *The Nursing Home Reform Act Turns Twenty: What Has Been Accomplished, and What Challenges Remain?: Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 87, 88-89 (2007) (statement of Alice H. Hedt, Executive Director, National Citizens Coalition for Nursing Home Reform).

55. Kohn, *supra* note 16, at 181; Twomey et al., *supra* note 26, at 75.

56. 2004 SURVEY, *supra* note 1 at 18.

is the age when impairments are most common.<sup>57</sup> Further, “nearly 60% of the victims of substantiated incidents of elder abuse experience some degree of cognitive impairment.”<sup>58</sup> The oldest and most impaired adults are also the least likely to resist abuse or take some form of preventative action, and therefore they are the most vulnerable to abuse.<sup>59</sup>

## 5. PREJUDICE

Finally, American society’s prejudice toward the elderly and aging influences the prevalence of elder abuse.<sup>60</sup> Because society often views the elderly as less valuable members, caregivers may feel justified to treat their dependants with a lower level of care.<sup>61</sup> Fueled by these societal prejudices, caretakers may view their dependents as less important or subhuman.<sup>62</sup> Additionally, society is generally less willing to punish those that commit abuse of the elderly because of similar justifications.<sup>63</sup>

### D. Mandatory Reporting Statutes

States only began to address the problem of elder abuse and neglect in light of studies, including a 1981 congressional report, that first highlighted the problem.<sup>64</sup> Legislators viewed child abuse statutes as a logical place to start addressing elder abuse.<sup>65</sup> As a result,

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57. AGING REPORT, *supra* note 11, at 11.

58. Kohn, *supra* note 16, at 181.

59. Glick, *supra* note 31, at 721; *see also* Richard J. Vangelisti, *A Senior Duty: Why Not Mandatory Reporting for Elder Abuse?*, 65 OR. ST. B. BULL. 5, 17–18 (2005) (describing the same effect in child abuse cases whereby as children get older they are less likely to become the victims of child abuse).

60. Glick, *supra* note 31, at 720 (citing articles that highlight a “demonstrable connection between ageist attitudes among health care workers and the psychological abuse of the elderly”).

The general ageism present in modern American society is also apparent in contexts other than elder abuse. *See, e.g.*, R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1182 n.67 (2006) (citing a psychological study that shows bias based on age); Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 362 (2006) (discussing juror bias toward elderly witnesses).

61. *See* Glick, *supra* note 31, at 720.

62. *See* Kohn, *supra* note 16, at 181.

63. *Id.*

64. *See* Garfield, *supra* note 28, at 863–64, 869.

65. Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 74–75 (1982); Vangelisti, *supra* note 59, at 16–17.

most states appropriated mandatory reporting statutes from analogous child abuse statutes.<sup>66</sup>

#### 1. CHILD ABUSE MANDATORY REPORTING LAWS

Commentators did not recognize child abuse as a problem until the 1960s. In 1962, C. Henry Kempe described Battered Child Syndrome in an article published in the *Journal of the American Medical Association* at the same time the Department of Health, Education, and Welfare (DHEW) promulgated a model statute requiring physicians to report suspected cases of abuse.<sup>67</sup> State legislatures reacted by passing statutes criminalizing child abuse and incorporating the DHEW model statute with its mandatory reporting requirements.<sup>68</sup> State statutes were inconsistent, however, because they lacked standard definitions for child abuse and differed as to who was required to report suspected cases.<sup>69</sup>

In 1974 Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) with the goals to create a uniform definition of child abuse and to create a program to attack and treat substantiated cases of child abuse.<sup>70</sup> CAPTA was designed to provide a national standard for child abuse and prevention by tying federal grant money to the development of state programs modeled after the federal act.<sup>71</sup> CAPTA specifically called for the creation of training programs geared to educate professionals, in *inter alia*, medicine and law enforcement, to detect and prevent child abuse,<sup>72</sup> as well as assist states in managing state child services and protection systems.<sup>73</sup>

The most important aspect of the CAPTA program is the mandatory reporting of suspected cases of abuse by certain groups of indi-

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66. See, e.g., 320 ILL. COMP. STAT. 20/2(f-5) (2007).

67. Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 942 (2004); Caroline T. Trost, Note, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 191-92 (1998).

68. Trost, *supra* note 67, at 192 (stating that by 1967 every state, the District of Columbia, and the U.S. Virgin Islands had child abuse prevention statutes).

69. See Jill D. Moore, Comment, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2071 (1995).

70. See Brown, *supra* note 67, at 942; Karen L. Ross, *Revealing Confidential Secrets: Will It Save Our Children?*, 28 SETON HALL L. REV. 963, 965 (1998).

71. See Brown, *supra* note 67, at 942-43.

72. 42 U.S.C. § 5106(a)(1) (2006).

73. § 5106(a).

viduals.<sup>74</sup> Congress used mandatory reporting in the belief mandated reporters have regular contact with at-risk, isolated children who are unable to make reports themselves.<sup>75</sup> Additionally, mandated reporters are able to observe the signs of abuse, often committed by family members or others in a trust relationship, and thus are better situated to report suspected abuse.<sup>76</sup>

## 2. ELDER ABUSE AND MANDATORY REPORTING

Congress first addressed the issue of elder abuse in 1981 through a report presented by the House Select Committee on Aging.<sup>77</sup> The report determined that up to one million of the nation's elderly could be victims of elder abuse and recommended the passage of a statute modeled after CAPTA.<sup>78</sup> Despite the dire warning, Congress took no immediate action. In 1987, Congress passed the Older Americans Act in an attempt to address the problem but failed to provide funding.<sup>79</sup> Congress also attempted to pass an Elder Abuse and Prevention Act as recommended by the 1981 Report but failed to gain the necessary votes.<sup>80</sup>

Ten years later, the House Subcommittee on Health and Long-Term Care issued a report, *Elder Abuse: A Decade of Shame and Inaction*, damning Congress's "woefully inadequate" response to the elder abuse problem.<sup>81</sup> The Subcommittee found that many states had passed elder abuse statutes—using mandatory reporting laws—in the 1980s expecting to receive federal funding in reliance on the 1981 congressional report.<sup>82</sup> As evidence of the lack of support for these state statutes, this report found that states annually spent \$3.80 per elderly resident, on average, on elder abuse prevention while spending \$45.07 annually per resident child on child abuse.<sup>83</sup> State spending on elder

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74. See Bridget A. Blinn, Note, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 812 (2004).

75. Garfield, *supra* note 28, at 881–82; Kohn, *supra* note 16, at 187, 189.

76. Kohn, *supra* note 16, at 189–90.

77. Sarah S. Sandusky, Note, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 ELDER L.J. 459, 462 (2003).

78. *Id.*

79. Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L.J. 165, 189 (1995). Congress funded the program for a miniscule three million dollars in 1990. *Id.*

80. *Id.* at 178.

81. Sandusky, *supra* note 77, at 462.

82. Velick, *supra* note 79, at 178–79.

83. *Id.* at 179.

abuse had actually decreased 40% due to a corresponding decline in federal block grants.<sup>84</sup> The new report also revealed an increase in abuse and a decrease in reporting after states implemented mandatory reporting laws.<sup>85</sup> Since the early 1990s, congressional committees have held a series of hearings in an attempt to raise the elder abuse problem in the national conscience;<sup>86</sup> all without tangible results.

The mandatory reporting strategy for combating child abuse had successfully increased reporting of child abuse,<sup>87</sup> and legislators believed that there would be similar success in reducing elder abuse if they imposed a similar requirement.<sup>88</sup> The rationale for the use of mandatory reporting in elder abuse statutes was largely the same as for child abuse—mandated reporters are in a position to observe at-risk groups that are unable to self-report.<sup>89</sup> Thus, the primary method used to detect and prevent elder abuse was mandatory reporting, and today all states have some form of a mandatory reporter statute for elder abuse.<sup>90</sup> Mandated reporters for elder abuse, similar to the mandated reporters for child abuse, are social service workers, medical professionals, and other impartial third parties in regular contact with elderly adults.<sup>91</sup>

Adopting the rationale used to support mandatory reporting in child abuse, mandatory reporter proponents believe reporting suspected cases to the appropriate authorities is the first step in countering the prevalence of elder abuse.<sup>92</sup> They attribute the rise in reports

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84. *Id.*

85. Sandusky, *supra* note 77, at 462.

86. Breaux & Hatch, *supra* note 6, at 217.

87. Kohn, *supra* note 16, at 188.

88. Sandra Guerra Thompson, *The White-Collar Police Force: "Duty to Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 19 (2002); see also Heath R. Oberloh, *A Call to Legislative Action: Protecting Our Elders from Abuse*, 45 S.D. L. REV. 655, 665–66 (2000).

89. See discussion *supra* Part II.D.2; see also Faulkner, *supra* note 65, at 74–75; Glick, *supra* note 31, at 726.

90. 2004 SURVEY, *supra* note 1, at 14; see also CAL. WELF. & INST. CODE § 15630 (West 2008); 320 ILL. COMP. STAT. ANN. 20/2(f-5) (2007); LA. REV. STAT. ANN. § 14:403.2C (2007); MD. CODE ANN., FAM. LAW § 14-302(a) (LexisNexis 2007); VT. STAT. ANN. tit. 33, § 6903(a) (2007).

91. See Lee Beneze, *Reporting Elder Abuse: Not a Requirement but an Option for Lawyers*, 89 ILL. B.J. 93, 93 (2001). The author acknowledges attorneys are generally not included in mandatory reporting statutes, but reporting attorneys would be protected through immunity and exceptions to confidentiality requirements. *Id.* at 93–94.

92. See Velick, *supra* note 79, at 172. Even opponents to mandatory reporting statutes recognize that they are predominately tools for discovering new cases.

of elder abuse over the last decade to mandatory reporting requirements.<sup>93</sup> In fact, proponents rely on studies that purport to show the discovery of a large percentage of documented cases of elder abuse due to this reporting requirement.<sup>94</sup>

### 3. STATE ELDER ABUSE LAWS

State elder abuse statutes are predominantly similar to each other. Every state includes a definition of what constitutes elder abuse within the state as well as a list of mandated reporters.<sup>95</sup> Typically the state statutes also create an agency to respond to elder abuse complaints.<sup>96</sup> This agency is then responsible for recording instances of abuse, investigating allegations of abuse, forwarding substantiated cases to the proper authorities, training professionals and other mandated reporters on elder abuse, and promulgating rules or policy changes concerning elder abuse.<sup>97</sup> State elder abuse statutes also include provisions giving mandated reporters immunity from civil or criminal prosecution in the case of a mistaken, but good-faith, report of abuse.<sup>98</sup> Anonymity for the reporter is also guaranteed through statutory provisions.<sup>99</sup> If defamation or other liability was a “Sword of Damocles” hanging over mandated reporters’ heads, they could not perform their duties under the law.<sup>100</sup> Thus, these provisions are very important to achieving the goals of the statutes.

Despite these similarities, a few significant differences do exist among state elder abuse statutes. Some states have criminal penalties for mandated reporters that fail to report,<sup>101</sup> usually a high misde-

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Faulkner, *supra* note 65, at 76 (“[mandatory reporting] is intended to be a means of identifying the abused individual so services can be rendered”).

93. Vangelisti, *supra* note 59, at 16; *see also* Velick, *supra* note 79, at 172.

94. Vangelisti, *supra* note 59, at 16. Citing a DHS study of community reports of elder abuse, the author notes “[o]f those 6,110 reports, 48.7 percent were made by mandatory reporters. The DHS determined that abuse was substantiated in 2,486 or 40.7 percent of the 6,110 reported cases.” *Id.* The article also cites an Oregon Department of Human Services study that stated 77% of reported child abuse cases were made by mandatory reporters. *Id.*

95. *See supra* Part II.B.

96. *See, e.g.*, 320 ILL. COMP. STAT. 20/5 (2007).

97. *See id.*

98. *See, e.g.*, 320 ILL. COMP. STAT. 20/4(a-7).

99. *See, e.g.*, 320 ILL. COMP. STAT. 20/4(c).

100. *See generally* Velick, *supra* note 79, at 168 (describing mandatory reporting statutes as they apply to health professionals).

101. *See, e.g.*, 320 ILL. COMP. STAT. 20/4(c).

meanor, while others do not.<sup>102</sup> Interestingly, doctors and other professionals are generally spared from the criminal sanctions and are merely referred to their respective professional organization for punishment.<sup>103</sup> Illinois has a unique provision requiring mandated reporters to testify in any court proceeding that results from a report.<sup>104</sup> This additional requirement is highly unusual because it seems to negate the provisions for anonymity and immunity.

### III. Analysis

Considering the ubiquity of mandatory reporting in state elder abuse statutes, the criticisms and effectiveness of the statutes need to be addressed, especially if federal legislation is ever adopted. Opponents argue that elder abuse is too different from child abuse to apply the same mandatory reporting requirements.<sup>105</sup> Further, mandatory reporting statutes lack internal enforcement provisions. Rather, they are enforced through criminal penalties imposed on mandated reporters for failing to report incidents of abuse.<sup>106</sup> Mandatory reporting statutes, thus, can only be as effective as the associated criminal sanctions.

#### A. Criticism of Mandatory Reporting Statutes

The efficacy of mandatory reporting requirements is questionable in the context of elder abuse, despite the prevalence of these requirements in most states' statutes. The main critiques are: elderly adults are more socially isolated than children, elderly adults should be accorded a higher degree of respect concerning their self-determination, elder abuse is difficult to diagnose, and elder abuse should be considered part of domestic violence instead of analogized to child abuse.

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102. See generally Glick, *supra* note 31, at 722 (describing the prevalence of criminal prosecution for nonreporting).

103. See, e.g., 320 ILL. COMP. STAT. 20/4(e).

104. 320 ILL. COMP. STAT. 20/4.2 ("Any mandated reporter who makes a report . . . under this Act shall testify fully in any judicial proceeding resulting from such a report, as to any evidence of abuse, neglect, or financial exploitation or the cause thereof."). This provision would also limit the number of reports actually made, raising a further contradiction with the stated desire to protect elder adults from abuse. See Erbes et al., *supra* note 19, at 1033.

105. Garfield, *supra* note 28, at 877.

106. See, e.g., 320 ILL. COMP. STAT. 20/4(e).

### 1. ELDERLY ADULTS ARE MORE SOCIALLY ISOLATED THAN CHILDREN

One problem with using mandatory reporting statutes for elder abuse is the elderly population's greater isolation compared to that of children.<sup>107</sup> Children, by their nature, are generally energetic and constantly engaged in many social situations. Children are statutorily required to attend school<sup>108</sup> where they will interact with other students and their teachers. If the child makes friends at school, then interactions between the child and the friends' parents will be likely. Children also frequently visit doctors and hospitals for the regular accidents and sicknesses attendant to childhood. Thus, there is a greater chance that child abuse will be detected and reported by someone outside the child's home.

The elderly adult's situation is different than that of a child. Adults by their nature tend to be more isolated than children—either by choice or circumstance.<sup>109</sup> Elderly adults do not have mandatory schooling to force social interaction. If an adult chooses to remain in her home, there is nothing the government can legally do. This isolation is aggravated when the elderly adult has few friends or family members living nearby. It is in this context that self-neglect is most likely to occur—when depression or dementia sets in and no one is around to recognize the problem.<sup>110</sup> The problem does not go away for elderly adults in institutional living situations if no one visits them.<sup>111</sup>

As a result of the elderly population's greater isolation, one of the main justifications for using mandatory reporting statutes is absent. Proponents push for mandatory reporting under the assumption impartial third parties are available to report the abuse.<sup>112</sup> When there is no access by these third parties the abuse cannot be observed and reported. This highlights why basing elder abuse statutes on their child abuse counterparts may be misguided. If elder abuse is not no-

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107. Velick, *supra* note 79, at 174.

108. See, e.g., KAN. STAT. ANN. § 72-1111(a) (2008) (generally requiring school attendance from age seven until eighteen); LA. REV. STAT. ANN. § 17:221A(1) (2007) (same); OR. REV. STAT. § 339.010 (2005) (same); R.I. GEN. LAWS § 16-19-1(a) (2007) (generally requiring compulsory attendance from the age of six until sixteen).

109. Kohn, *supra* note 16, at 189.

110. See *id.*

111. See *id.* at 180.

112. See *id.* at 187.

ticed by anyone other than the abuser and the dependant adult, the well-intentioned statute on the books is meaningless in practice.

## 2. SELF-DETERMINATION OF THE ELDER ADULT

Another problem with mandatory reporting laws for elder abuse is the implicit assumption that victims lack self-determination.<sup>113</sup> The theory of *parens patriae*, in part, formed the basis of child abuse laws.<sup>114</sup> Under this theory, the idea of children as legal incompetents is an accepted legal reality.<sup>115</sup> Society has determined that children do not have the experience and maturity to make many important decisions for themselves.<sup>116</sup> It is in the best interest of society to protect and shield children until they are more experienced and can make informed decisions on their own.<sup>117</sup> Thus, children are legally unable to make decisions for themselves until they reach the statutorily defined age of majority—the accepted age of self-determination.<sup>118</sup> This places a greater importance on the role of the parent or guardian as protector of the child. When the parent or guardian abuses this relationship it is in the best interest of the state to ensure someone is speaking for the interest of the child.

*Parens patriae* is fraught with problems, however, when indiscriminately applied to adults. The effect of mandatory reporting statutes is often a well-intentioned social worker substituting his reasoning for that of the elderly adult.<sup>119</sup> This usurpation of the decision-

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113. Glick, *supra* note 31, at 726; *see also* Faulkner, *supra* note 65, at 76.

114. Garfield, *supra* note 28, at 877. *Parens patriae* is an English common-law theory whereby the state has a sovereign interest to act as guardian of people and their property if they cannot properly take care of themselves. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

115. *See* Matthew S. Feigenbaum, Comment, *Minors, Medical Treatment, and Spousal Disagreement: Should Solomon Split the Child?*, 41 DEPAUL L. REV. 841, 856–57 (1992) (arguing that the state has a two-fold interest in protecting children: (1) in order to perpetuate societal ideals and (2) to minimize economic costs of institutionalizing children in abusive or unhealthy environments).

116. Matt Steinberg, *Free Exercise of Religion: The Conflict Between a Parent's Rights and a Minor Child's Right in Determining the Religion of the Child*, 34 U. LOUISVILLE J. FAM. L. 219, 221 (1996).

117. *See id.*; Feigenbaum, *supra* note 115, at 857.

118. *See* ALASKA STAT. § 25.20.010 (2007); DEL. CODE ANN. tit. 1, § 701 (2007); NEB. REV. STAT. § 28-807(a) (2007); S.D. CODIFIED LAWS § 26-1-1 (2007) (all declaring the general age of majority to be eighteen with the exception of alcohol purchase which requires twenty-one to be the minimum age).

119. Glick, *supra* note 31, at 727.

making process further stigmatizes and humiliates the adult and perpetuates the idea that elderly Americans are second-class citizens.<sup>120</sup>

Society generally assumes that once an individual reaches the age of self-determination decisions concerning health, living arrangements, and other personal decisions are made by the adult.<sup>121</sup> Existing laws that bar the state or family members from forcing medical treatment on nonconsenting adults, even in life-or-death situations, reflect this societal belief.<sup>122</sup> As one scholar observed, if we as a society allow adults to stand by their beliefs and choices in life-and-death situations, why would society force state action in situations that are not directly life threatening?<sup>123</sup>

### 3. DIFFICULTY IN DIAGNOSIS

An additional problem with basing elder abuse laws on child abuse laws is that elder abuse is more difficult to diagnose than child abuse. Using mandatory reporting to prevent child abuse arose at the same time X-ray machines became a common method of medical diagnoses.<sup>124</sup> X-ray machines, for the first time, allowed doctors to discover a long-term injury pattern for child abuse.<sup>125</sup> Unfortunately, elder abuse cannot be detected by the same diagnostic techniques; doctors cannot distinguish a pattern of abuse from the normal signs of aging by using an X-ray machine.<sup>126</sup> Thus, normal signs of aging can be difficult to distinguish from signs of abuse without the aid of more advanced diagnostic machines.<sup>127</sup>

As people age they are more likely to bruise.<sup>128</sup> Additionally, balance and stability decline with age.<sup>129</sup> The combination of these factors makes it likely that an elderly adult may merely lose his balance and hit a piece of furniture, leading to a bruise. Thus, a doctor

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120. *Id.*

121. Garfield, *supra* note 28, at 878.

122. *See* Glick, *supra* note 31, at 731.

123. Garfield, *supra* note 28, at 881.

124. Faulkner, *supra* note 65, at 75.

125. *Id.*

126. *See* Glick, *supra* note 31, at 725.

127. Breaux & Hatch, *supra* note 6, at 223 (“Studies have documented how recognition of elder abuse varies even among professionals charged with preventing it”); Kohn, *supra* note 16, at 186.

128. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 148 (1999).

129. *See, e.g.*, D.G. Thelen et al., *Age Differences in Using Rapid Step to Regain Balance During a Forward Fall*, 60 J. GERONTOLOGY SERIES A: BIOLOGICAL SC. & MED. SC. 1553, 1555–57 (2005) (finding age-related declines in balance).

cannot diagnose abuse solely because a bruise is present. This leads to overreporting (doctors and other health care professionals making reports that are not really abuse) or underreporting (health care professionals assuming normal aging instead of abuse). Either way, an accurate count of abuse cases is unlikely as real abuse goes unchecked or normal aging is treated as suspected abuse.

#### 4. ELDER ABUSE SHOULD BE TREATED MORE LIKE DOMESTIC VIOLENCE INSTEAD OF CHILD ABUSE

The approach to the elder abuse problem is undergoing a change in some quarters as a result of looking at the problem from a new angle. According to these advocates, elder abuse should be treated more like domestic violence than child abuse.<sup>130</sup>

It is likely that in many cases of elder abuse the same dynamics present in domestic violence are at work in elder abuse settings.<sup>131</sup> Most cases of elder abuse involve the type of victim-abuser relationship seen in other forms of domestic violence, which is characterized by a cycle of violence and dynamic of power and control between the abuser and the victim.<sup>132</sup> Complicating the detection and prevention of elder abuse, as in the domestic violence situation, an elderly adult may not wish to undergo the real or perceived humiliation and intrusion into his private life that a report of abuse may entail.<sup>133</sup> This fear of humiliation and shame is likely higher for male elder abuse victims, as they grew up in a time of perceived male strength and stoicism.

It is often said, "better the devil you know than the devil you don't." There are many psychological reasons why an adult in an abusive situation, either in the elder abuse or domestic violence situation, would not want to report the abuse and invite state action. Commentators give four main reasons why a domestic violence victim may not report the abuse: power and control, denial, family and economic reasons, and emotional attachment.<sup>134</sup> The domestic abuser keeps his or her victim in a perpetual "state of siege" through physical and nonphysical acts of abuse, threats, and economic and social isola-

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130. See Moskowitz, *supra* note 128, at 100.

131. *Id.*

132. Kohn, *supra* note 16, at 178; Twomey et al., *supra* note 26, at 76; see also discussion *supra* Part II.C.4 (describing the factors contributing to the cause of elder abuse and the likelihood that the abuse is committed by a family member).

133. See Faulkner, *supra* note 65, at 89; Velick, *supra* note 79, at 173.

134. See Matthew Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 W. ST. U. L. REV. 173, 176-78 (2007).

tion.<sup>135</sup> Denial is a common psychological self-defense mechanism that allows the victim to maintain a sense of control and minimize the emotional pain of the abuse.<sup>136</sup> The abuser is generally in a position of financial control that effectively traps the victim in the relationship.<sup>137</sup> When the abuser is a family member, the victim may feel the judgment of the rest of the family and society in addition to internal feelings of guilt.<sup>138</sup> Emotional attachment is also common when the abuser is a relative or close friend.<sup>139</sup> The victim may feel a sense of protection in the presence of the abuser as a result of the relationship.<sup>140</sup> Ironically, this sense of security often increases during periods of abuse.<sup>141</sup>

While elder abuse and domestic violence are not identical, there are many similarities between both forms of abuse. The abuser of an elderly adult is often a family member or an institutional caregiver who exercises control over the elderly adult's daily life and care.<sup>142</sup> By definition, adults in nursing homes cannot generally care for themselves, placing their livelihoods in the fate of someone else. An elderly adult may rationally decide that it is better to live in an abusive home than to be placed in a state-run institution with a potentially worse living situation.<sup>143</sup> Family pressure is certainly present as abused elderly adults may not wish to report instances of abuse committed by family members.<sup>144</sup> Additionally, the victim may not want to report the abuse out of a desire to keep family members free of trouble.<sup>145</sup>

The problem with mandatory reporting for elder abuse is that it removes control from the elderly adult and places it with the state—similar to child abuse cases. For the state to determine that there is greater state interest in subjugating the rights of elderly Americans when it does not do so for battered women exemplifies the underlying prejudice toward the elderly in American society.

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135. *Id.* at 176–77.

136. *Id.* at 177.

137. *See id.*

138. *Id.* at 176 n.21.

139. *Id.* at 177–78.

140. *Id.*

141. *Id.* at 178.

142. *See* Glick, *supra* note 31, at 715.

143. *See id.* at 725–26.

144. *See* Oberloh, *supra* note 88, at 665; *see also* Velick, *supra* note 79, at 175.

145. Glick, *supra* note 31, at 725.

## B. Criminal Sanctions for Failing to Report

Some states have criminal sanctions for mandated reporters who fail to report suspected cases of abuse.<sup>146</sup> One rationale for criminal sanctions is that mandated reporters will not perform their statutorily required task in their absence.<sup>147</sup> This fear is potentially misplaced as mandated reporters are often unaware of their responsibilities or operate with a desire to remain out of what they consider to be others' personal matters.<sup>148</sup> Another rationale is the common belief that mandatory reporting is the most effective way to prevent instances of elder abuse.<sup>149</sup> These criminal statutes, however, are rarely enforced due to a combination of lack of resources and the difficulty in elder abuse detection.<sup>150</sup>

In an interesting recent development, in the few cases where the state prosecuted a mandated reporter for the failure to make a report, courts have shown a willingness to enforce the statutes strictly, ensuring punishment for mandated reporters that fail their statutory duties.

### 1. WASHINGTON STATE

In *State v. Kern*,<sup>151</sup> the Washington State Appellate Court upheld a conviction based on Washington's mandatory reporting statute for elder abuse, which includes criminal penalties for failing to report.<sup>152</sup> The state decided to prosecute under the mandatory reporting statute because a jury hung on the issue of criminal negligence in an especially egregious case of caregiver neglect.<sup>153</sup> In *Kern*, "an overweight, legally blind, wheelchair-bound double amputee"<sup>154</sup> diabetic mother was being cared for by her daughter and son under Washington's assisted living laws.<sup>155</sup> The daughter and son were receiving state

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146. See, e.g., CAL. WELF. & INST. CODE § 15360(n) (2006); MO. REV. STAT. § 198.188(2) (2004); W. VA. CODE § 9-6-14 (2007); see also Luu & Liang, *supra* note 24, at 185.

147. Moskowitz, *supra* note 128, at 117 (discussing misdemeanor criminal penalties' limitations of generally requiring a willful and knowing failure to report); see Luu & Liang, *supra* note 24, at 187; Ashley Jackson, Note, *The Collision of Mandatory Reporting Statutes and the Priest-Penitent Privilege*, 74 UMKC L. REV. 1057, 1066 (2006) (discussing mandatory reporting in the context of child abuse).

148. Luu & Liang, *supra* note 24, at 185.

149. See discussion *supra* Part II.E.2.

150. Luu & Liang, *supra* note 24, at 186; Oberloh, *supra* note 88, at 658-59.

151. No. 23781-8-III, 2006 WL 2349978 (Wash. Ct. App. Aug. 15, 2006).

152. *Id.* at \*1.

153. *Id.*

154. *Id.*

155. *Id.*

money to assist them in the care of their mother.<sup>156</sup> One day the son called state adult protective services claiming his mother was not taking her medications and suffered from a small sore on her back.<sup>157</sup> When Adult Protective Services came to the home to investigate, they found the mother in her own urine with a large bed sore and immediately took her to a hospital where she died.<sup>158</sup> At the hospital, medical personnel found six-day-old feces over the mother's body and maggots in her bedsore, which had tunneled through her thigh.<sup>159</sup> The cause of death was determined to be sepsis from the fecal infection.<sup>160</sup>

At the subsequent trial, the brother and sister were charged with manslaughter and criminal mistreatment.<sup>161</sup> However, the jury acquitted on manslaughter and could not reach a decision on criminal mistreatment.<sup>162</sup> The state then filed an amended complaint against the sister, adding a charge for failure to report for which the jury returned a verdict of guilty.<sup>163</sup> The appellate court upheld the conviction, strictly reading the Washington statute and applying it to the sister.<sup>164</sup> As a recipient of state aid for adult assistance services, she had clearly failed to meet the responsibility of a mandated reporter required to report her brother's neglect.<sup>165</sup> Thus, the Washington prosecutor was able to creatively use the mandatory reporting statute to prosecute an individual who had escaped justice under manslaughter and mistreatment laws.

## 2. CALIFORNIA

In *People v. Davis*, the California Appellate Court determined the necessary *mens rea* for a conviction under mandatory reporting statutes.<sup>166</sup> In *Davis*, the defendant was the administrator of a residential nursing facility, qualifying her as a mandatory reporter under California law.<sup>167</sup> The defendant received continuing education on her re-

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at \*2.

164. *Id.* at \*8.

165. *Id.* at \*7.

166. 25 Cal. Rptr. 3d 92, 104 (2005).

167. *Id.* at 94.

sponsibilities as a mandated reporter.<sup>168</sup> The incident in question concerned a staff member under the supervision of defendant who assaulted a resident.<sup>169</sup> The defendant fired the responsible staff member but did not report the incident to the proper authorities.<sup>170</sup>

The trial court found the defendant guilty of willful failure to report abuse because she had actual knowledge of the incident and was aware of her responsibility to report abuse.<sup>171</sup> In upholding the conviction, the appellate court found that the statute employed a reasonable person objective standard to determine whether the mandated reporter had a reasonable suspicion of abuse.<sup>172</sup> The court relied upon previous case law and the statutory similarity in child abuse cases to support its decision.<sup>173</sup> The court also relied on the Act's stated broad purpose, to protect elder and dependant adults, to justify the expansive application of the statute.<sup>174</sup>

### 3. MISSOURI

The Missouri Court of Appeals also affirmed a conviction for the violation of state mandatory reporting laws in *State v. Kaiser*.<sup>175</sup> In *Kaiser*, a nursing home resident confined to a wheelchair and suffering from Alzheimer's disease was threatened by another resident.<sup>176</sup> This threat was heard by a nurse's assistant who did not take it seriously, believing that the speaker was mad.<sup>177</sup> An hour-and-a-half later the same assistant saw the resident that had made the threat leaving the victim's room.<sup>178</sup> Upon entering the room, the assistant found the victim "in the dark behind the door with his hands up 'like he was defending himself.' {His] forehead was bleeding, and he asked, 'Why do

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168. *Id.* at 95.

169. *Id.*

170. *Id.* at 96.

171. *Id.* at 97.

172. *Id.* at 98.

173. *Id.* at 100.

174. *Id.* at 101-02 ("The legislation was enacted in response to the recognition that dependent adults 'could neither speak for, nor protect, themselves' and that elder and dependent adults are in a position analogous to that of children, 'in that the disabilities of age or a physical or mental condition may make them as helpless at the hands of a caretaking adult as is a small child. In some respects, their position may be even worse than a child's because they are likely to understand fully what is happening, yet lack sufficient control of their circumstances to do anything about it.'" (internal citations omitted)).

175. 139 S.W.3d 545 (Mo. Ct. App. 2004).

176. *Id.* at 548.

177. *Id.*

178. *Id.*

I get abused?'"<sup>179</sup> A few days later, the victim was again found hiding in his room, this time with a bloody face.<sup>180</sup> The victim was taken to the hospital, and later returned to the nursing home.<sup>181</sup> He was sent to the hospital again where he died from injuries related to the attacks.<sup>182</sup> Throughout the victim's ordeal several of the nurse's assistants reported the suspected beatings to the nursing home administrator who repeatedly told the assistants to mind their own business and that she would take care of the situation.<sup>183</sup>

Nursing home policy provided that instances of suspected abuse must be investigated by the administrator, who would then undertake an investigation, potentially lasting up to two days.<sup>184</sup> After this investigation, the administrator would issue a report to the parent company for the nursing home.<sup>185</sup> The parent company would then make the decision whether such instances should be reported to state authorities.<sup>186</sup> In fact, the administrator confirmed that at a meeting of nursing homes managed by the parent company, the attendees were instructed that they could not report an incident until they had gone through the corporate office and had spoken to either Kaiser or one of two other people.<sup>187</sup> The administrator bluntly testified that she felt she would lose her job if she reported the incidents involving the victim.<sup>188</sup>

The court found that failing to report the victim's clear signs of abuse to state authorities was a clear violation of the Missouri elder abuse statute.<sup>189</sup> The Missouri statute mandates the reporting of suspected cases of elder abuse by employees of long-term care facilities, of which the defendant nursing home was one.<sup>190</sup> The court did not

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179. *Id.* at 549.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 548.

185. *Id.*

186. *Id.* at 549.

187. *Id.*

188. *Id.*

189. *Id.* at 553.

190. *Id.*

1. [W]hen any . . . person with responsibility for the care of a person sixty years of age or older has reasonable cause to suspect that such a person has been subjected to abuse or neglect or observes such a person being subjected to conditions or circumstances which would reasonably result in abuse or neglect, he or she shall immediately report or cause a report to be made to the department in accordance with the

accept the defendants' argument that because they did not own the nursing home but merely managed it, the defendants were not covered by the statute.<sup>191</sup> The court found that the statute mandated:

[W]hen any . . . person with responsibility for the care of a person sixty years of age or older has reasonable cause to suspect that such a person has been subjected to abuse or neglect or observes such a person being subjected to conditions or circumstances which would reasonably result in abuse or neglect, he or she shall immediately report or cause a report to be made to the department.<sup>192</sup>

Further, the defendants were liable as operators of the nursing home because the statute's purpose was to protect nursing home residents.<sup>193</sup>

These recent decisions hopefully reflect an increasing awareness by the legal system of the elder abuse problem. If courts are willing to hold mandated reporters accountable for failing to report, then mandated reporters will take notice and fulfill their responsibilities. However, the question of whether punishing mandated reporters can effectively deter and punish elder abusers remains.

#### IV. Resolution

Empirical data collected by the states and organizations, such as the National Academy of Elder Law Attorneys, shows incidents of elder abuse have not declined despite the best efforts of numerous state legislatures and agencies.<sup>194</sup> Part of the reason for the lack of positive impact can be attributed to the relative newness of state statutes and the simple fact that more incidents of abuse are being reported as a result of mandatory reporting statutes.<sup>195</sup> However, these

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provisions of [MO. REV STAT. §§ 660.250 to 660.295]. Any other person who becomes aware of circumstances which may reasonably be expected to be the result of or result in abuse or neglect may report to the department. 2. Any person who knowingly fails to make a report as required in subsection 1 of this section is guilty of a class A misdemeanor.

*Id.* at 554.

191. *Id.*

192. *Id.*

193. *Id.* at 551. The court further found the Missouri elder abuse statutes to be consistent with "our legislature's longstanding condemnation of the abuse of our elders." *Id.* at 553.

194. See 2004 SURVEY, *supra* note 1, at 13 (showing an increase of 92,934 reports between 2000 and 2004—an increase of 16.3%); ILLINOIS 2005 DATA, *supra* note 17 (showing a steady increase in elder abuse reports in Illinois over the last ten years).

195. See *supra* Part II.D.2–3.

reasons do not warrant complacency or patting of the collective back. The goal of state statutes is not to document the problem of elder abuse but to *eradicate* it. As discussed above, serious flaws underlie the assumptions of current elder abuse statutes.<sup>196</sup> It is time for a hard and honest look at the approach currently taken to prevent elder abuse and neglect.

The use of child abuse statutes as a basis for elder abuse statutes is seriously misguided. A more appropriate approach would recast the elder abuse problem as a facet of domestic violence. Abused elderly adults are trapped in situations that are more analogous to battered spouse situations, and the elder abuse prevention strategy should reflect this reality. Prejudice toward the elderly in America needs to be countered with aggressive education efforts toward those charged with combating the elder abuse and mistreatment problem. Furthermore, just like most domestic abuse victims, elderly victims do not need the state to make decisions for them; they are able to make decisions for themselves. Elder abuse victims should be accorded the same societal respect as domestic violence victims. Treating elder abuse in the manner it deserves requires action on three fronts: focusing on the abusers and empowering the victims, enforcing existing statutes, and federal congressional action.

#### A. Focusing on the Abusers and Empowering Victims

Rather than focusing on the victims of elder abuse and mistreatment, prevention programs should focus on the abusers themselves. First, criminal laws should increase the penalties for elder abuse. Failing this, local police departments and state attorneys general should encourage more aggressive enforcement of existing domestic violence laws. Second, education and counseling of victims needs to focus more on empowering the abused victim to change the situation for herself. This entails providing the elder abuse victim information on obtaining emergency and permanent orders of protection—a generally successful way to curtail instances of domestic violence.<sup>197</sup> By obtaining an order of protection the elder abuse victim will hopefully benefit from some time away from the situation. This

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196. See *supra* Part III.A.

197. Damon Phillips, *Civil Protection Orders: Issues in Obtainment, Enforcement and Effectiveness*, 61 J. MO. B. 29, 29–30 (2005) (arguing that protection orders can be effective in stopping domestic violence).

time for reflection may alleviate some of the reasons why an abuse victim decides to stay in the abusive environment.

Another way to empower elder abuse victims is to create shelters for victims of elder abuse that are similar to the shelters created for victims of domestic violence. Such shelters would provide a safe place as well as a support network that can help victims successfully empower themselves. Existing women's shelters can be used for victims of elder abuse until elder-abuse-specific shelters become available because the counseling and protection services offered to domestic violence victims can be used for elder abuse victims as well.

#### **B. Enforce Existing Laws**

If states are committed to the use of mandatory reporting as the primary means of combating elder abuse and mistreatment, then the statutes and the corresponding criminal punishments for failure to report must be enforced. As recent cases have shown, some states appear to be moving in this direction.<sup>198</sup> This should be applauded and encouraged. Continuing on this path will take a measure of political will on the part of the states, as this approach is likely to be confronted by fierce opposition from mandated reporters. However, if the well-being of our elderly population is something we as a society value, this is a step that needs to be taken.

As a part of mandatory reporting enforcement strategy, the failure of physicians and dentists to report suspected cases of abuse should be made equal to that of other mandated reporters. Currently, physicians and dentists are only subject to professional sanction for the failure to perform their statutory responsibility.<sup>199</sup> This leads to a multitiered system whereby some mandated reporters are subject to substantial criminal sanctions while others merely get a slap on the wrist. While professional organizations are more adept at disciplining and controlling their members than the criminal justice system in some instances, this is not one of them. Professional bodies are designed to conform behavior in the practice of that profession to decided professional norms. The reporting of elder abuse does not fall within this mandate. Professional organizations are not designed to provide significant sanctions absent egregious violations of profes-

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198. See discussion *supra* Part III.B.

199. See *supra* note 103 and accompanying text.

sional ethics.<sup>200</sup> Without a clear message by professional organizations that the detection and prevention of elder abuse and mistreatment is a priority of its membership, any sanctions will not equate to the damage done by a failure to report abusive situations.

As a measure to allay the fear of mandated reporters, states need to embark on a comprehensive campaign of education. Because most mandated reporters are licensed either through the state or a professional body, this education can become part of their licensing education. This addition would be of minimal cost to the overall education programs and would ensure that mandatory reporters are aware of their responsibilities. To aid currently licensed reporters, states already have education and continuing education funds and programs authorized.<sup>201</sup> However, adequate funding remains a problem. States need to realize that the amount of money spent on emergency and medical care dealing with the consequences of elder abuse is more than a preventative education program costs.<sup>202</sup>

### C. Federal Action

Additionally, Congress needs to take national action to address the problems of elder abuse. Congress should pass a national Elder Abuse Prevention Act similar in scope to CAPTA.<sup>203</sup> The Elder Abuse Prevention Act should create a model statute that gives state legislatures guidance. This would lead to more consistent definitions and reporting procedures from state to state. In turn, this would lead to more complete data collection which will provide a comprehensive understanding of the elder abuse problem in America. Additionally, an optimal federal statute would create a federal agency to oversee elder abuse nationally and respond to changing conditions. Furthermore, when states and agencies see the federal government take an active part in combating elder abuse, a collective shift will ideally take place, giving elder abuse the attention it deserves.

Of course, a change of focus in this arena will entail an effort to counter the predominant prejudice present in society today. While

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200. See Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 690–92 (2003).

201. See, e.g., 320 ILL. COMP. STAT. 20/3.5(a) (2007).

202. Cf. William Alvarado Rivera, *A Future for Medicaid Managed Care: The Lessons of California's San Mateo County*, 7 STAN. L. & POL'Y REV. 105, 110 (1995) (stating that preventative care reduces Medicaid costs from post-illness care).

203. 42 U.S.C. §§ 5101–5119c (2006).

this may seem a daunting task at the outset, it is necessary to eradicate the problem. Only by fully recognizing the true worth and value of our elderly population will proper enforcement occur. Changing attitudes toward the nation's elderly will be an important societal struggle in the coming years, especially as the elderly population increases.

## V. Conclusion

Elder abuse and mistreatment is a serious and troubling problem in America today. The problem is only likely to grow larger in the coming years as the baby boomer generation ages and advancements in science and medicine allow humans to live longer. In response, states have passed laws to combat elder abuse. The linchpin of these laws is the use of mandated reporters and criminal sanctions for failing to report. These statutes are flawed from both a lack of enforcement of the criminal penalties and the flawed assumptions that underlie these laws.

Mandatory reporting was based on similar statutes created to prevent child abuse. However, there are significant differences between situations that give rise to child abuse and those that result in elder abuse. Elderly adults are legally independent, often isolated, and subject to societal prejudice. Additionally, elder abuse is more difficult to detect than child abuse. To effectively confront the problem of elder abuse, states should aggressively counter that prejudice, and approach elder abuse and mistreatment in a manner similar to their approaches to domestic violence. This includes developing strategies and institutions to empower and counsel victims. Finally, the criminalization of elder abuse should focus on the abusers as opposed to the reporters. If these steps are taken, elder abuse may eventually be a thing of the past.