

CRIMINALIZING PHYSICAL AND EMOTIONAL ELDER ABUSE

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Elderly persons, particularly those who require care givers, are vulnerable to both physical and emotional abuse. In this note, Mr. Polisky discusses the rising problem of elder abuse and offers a solution to reduce its incidence. After a history highlighting the prevalence of elder abuse in care-giving situations, Mr. Polisky analyzes how tort law and criminal law inadequately redress elder abuse victims. Mr. Polisky concludes that state statutes which criminalize both physical and emotional elder abusive acts are the key to protecting the elderly from abuse because they punish the abuse itself rather than relying on proof of the act's impact on the victim. Though some abusers have attacked these statutes on constitutional grounds of overbreadth and vagueness, Mr. Polisky argues that courts have already determined such claims constitutional. In closing, Mr. Polisky proposes model legislation which would best protect the elderly and other vulnerable adults from abuse.

I. Introduction

On Christmas Eve, 1988, when Emily P. Bissell Hospital nursing aide Linda Foley was changing a thirty-nine-year-old quadriplegic man's catheter, an elderly woman afflicted with Alzheimer's disease wandered into the room.¹ Seizing the opportunity to emotionally harm both nursing home residents, Foley reached for the eighty-nine-year-old woman's hand and demanded that she fondle the man.² Fortunately, another nurse's aide witnessed this ordeal and successfully pulled the Alzheimer's patient away before she was forced to touch the man.³

1. Mack Reed, *First Conviction in Delaware for Emotional Abuse*, PHILA. IN-QUIRER, Jan. 13, 1990, at B1.

2. *Id.*

3. *Id.*

This incident is but one illustration of the scarcely recognized problem plaguing the elderly—elder abuse. In addition to financial exploitation of the elderly, there are two different types of elder abuse: physical and emotional abuse.⁴ Most statutory definitions of physical elder abuse are similar in that they involve a physical attack on an elder's body, such as hitting or kicking an elder. In contrast, statutory definitions of emotional elder abuse differ widely among the states. Basically, however, emotional elder abuse ranges from simple name calling and verbal assaults to a continued and systematic attempt to dehumanize an elder, occasionally pushing an elder to insanity or suicide.⁵

Under most state laws, Foley would face no criminal liability and would be permitted to continue practicing as a nurse's aide. Foley, however, happened to be practicing in Delaware, one of a handful of maverick states imposing criminal liability for physical *and* emotional elder abusive *acts*. In these states, neither proof of physical injury nor mental suffering is needed to sustain a criminal elder abuse conviction. Consequently, the abusive incident was reported, and Foley was subsequently fired.⁶ On January 3, 1990, she pleaded guilty to two misdemeanor counts of emotional patient abuse.⁷

As the above example suggests, the states are not uniform in criminalizing elder abuse. The state statutes criminalizing elder abuse can be viewed on a continuum from least to most restrictive. At the first level, a state requires certain types of persons, such as doctors and nurses, to report elder abuse and imposes criminal liability on those failing to report. Thus, only the nonreporter of elder abuse and not the actual elder abuser is punished. Beginning at the second level, a state punishes an elder abuser. At this level, a state criminalizes physical elder abuse and sanctions nonreporters of elder abuse. At the third level, a state criminalizes physical and emotional elder abuse and sanctions nonreporters of elder abuse. At this level, a prosecutor

4. "Emotional elder abuse" and "psychological elder abuse" are synonymous terms. For simplicity, only the term "emotional elder abuse" is used in this note.

5. CHAIRMAN OF HOUSE SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE SELECT COMM. ON AGING, 101ST CONG., 2D SESS., REPORT ON ELDER ABUSE: A DECADE OF SHAME AND INACTION 1-28 (Comm. Print 1990) [hereinafter REPORT ELDER ABUSE: A DECADE OF SHAME AND INACTION].

6. Reed, *supra* note 1, at B1. Actually, Foley, who is almost six feet tall, threatened to throw the other aide out the window if she told anyone. *Id.* For this act, she was convicted of a felony charge of aggravated intimidation. *Id.* In all, she received a suspended two-month jail sentence and one year of probation. *Id.*

7. *Id.*

must prove that the victim suffered emotional injury. This "mental anguish" requirement precludes many prosecutions because often the victim is either unable or unwilling to testify. Finally, at the fourth level, a state criminalizes physical and emotional abusive acts and sanctions nonreporters of elder abuse. This level most effectively ensures that elder abusers are prosecuted.

Before analyzing the four types of state statutes, this note will explore the reasoning behind imposing criminal liability for elder abuse. First, this note will discuss the vulnerability of elders to support the contention that elders need added protection. Second, this note will examine the prevalence of both elder abuse in general and, more specifically, emotional abuse occurring in care-giving situations in order to portray physical and emotional elder abuse as a serious national problem requiring attention. Third, this note will contrast tort law with criminal law to bolster the argument that elder abuse needs to be criminalized. Fourth, this note will examine the four types of state statutes and their impact on elder abuse prosecutions. Fifth, this note will scrutinize the constitutionality of imposing criminal liability for physical and emotional abusive acts. Finally, this note will propose model legislation.

II. Background

A. The Vulnerability of Elders

The elderly, as a group, share characteristics that make them especially vulnerable to abuse.⁸ Many elders, particularly those over seventy-five, experience increased frailty, primarily in their declining ability to carry out routine activities.⁹ Impaired hearing or vision, slowed motor and mental response, decreased coordination, and

8. ROSALIE S. WOLF & KARL A. PILLEMER, *HELPING ELDERLY VICTIMS: THE REALITY OF ELDER ABUSE* 14 (1989).

9. *Id.* A nationwide survey found that nursing home residents are very dependent:

- 9 of 10 require assistance bathing;
- 7 of 10 require assistance dressing;
- 1 of 2 require assistance going to the bathroom;
- 1 of 3 require assistance eating;
- 4 of 10 have trouble or cannot control their bowels or bladders.

CHAIRMAN OF THE HOUSE SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE SELECT COMM. ON AGING, 102D CONG., 1ST SESS., *REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY: THE NEED FOR CONGRESSIONAL ACTION 2* (Comm. Print 1991) [hereinafter *REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY*].

many other physical and mental impairments—and the anxiety they cause—make elders vulnerable to abuse¹⁰ and can affect the nature and effects of abuse when it occurs.¹¹ These frail elderly are dependent on care givers and, consequently, are at their mercy.¹² Elder abuse can have particularly tragic consequences when it comes from the only source of human contact that an elder has or when it occurs in an elder's last days of consciousness.¹³ In these instances, the effects of the abuse fester in the victim because no one is readily available to denounce the abuse or provide solace.

B. The Prevalence of Elder Abuse

National data on the occurrence of elder abuse are scarce.¹⁴ Sadly, elder abuse often has been overlooked because of lack of awareness.¹⁵ Following the "discovery" of child abuse in the 1960s and spousal abuse in the 1970s, elder abuse first received public attention in the late 1970s and early 1980s.¹⁶ By the late 1970s, many studies began to surface indicating that elder abuse is a serious problem in the United States.¹⁷ According to Toshio Tatara, Director of the National Aging Resource Center on Elder Abuse in Washington, D.C., and one of the leading researchers on the elderly, elder abuse is "just beginning to gain public recognition . . . [and is] going to be the problem of the next decade and the next century."¹⁸

10. Robert N. Butler, *Foreword* to ABUSE AND MALTREATMENT OF THE ELDERLY: CAUSES AND INTERVENTIONS at xi (Jordan I. Kosberg ed., 1983).

11. WOLF & PILLEMER, *supra* note 8, at 14.

12. MARY J. QUINN & SUSAN K. TOMITA, *ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTION STRATEGIES* 58 (1986).

13. JEFFREY L. AMESTOY, ATT'Y GEN., STATE OF VT., OFFICE OF ATT'Y GEN., PEOPLE IN NEED OF CARE: A POPULATION AT RISK 8 (1992).

14. DONNA HUNZEKER, NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATIVE RESPONSE TO CRIMES AGAINST THE ELDERLY 3 (1990) (statement of Toshio Tatara, Director of the National Aging Resource Center on Elder Abuse).

15. *Id.*

16. Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 861, 863-64 (1991).

17. *Id.* at 864 & n.16 (citing HOUSE SELECT COMM. ON AGING, 97TH CONG., 1ST SESS., REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (Comm. Print 1981) [hereinafter REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM]; THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY (M. Block & J. Sinnott eds. 1979); LEGAL RESEARCH & SERVS. FOR THE ELDERLY, ELDER ABUSE IN MASSACHUSETTS: A SURVEY OF PROFESSIONALS AND PARAPROFESSIONALS (1979) (prepared by H. O'Malley et al.)).

18. Steve Bates, *Elderly Abuse Rises Sharply*, THE WASH. POST, Mar. 7, 1993, at A1, A18 (quoting Toshio Tatara, Director of the National Aging Resource Center on Elder Abuse in Washington, D.C.).

Notwithstanding the paucity of research devoted to measuring elder abuse, some researchers have attempted to study elder abuse. It has been estimated that five percent of the elder population, or more than 1.5 million elders nationwide, may be abused annually.¹⁹ This number represents a one percent or 500,000-case increase annually over the number reported in a 1981 House Report.²⁰ According to the National Aging Resource Center on Elder Abuse, reports of elder abuse rose sixty-two percent from 1988 to 1991. This increase far outpaced the increase in the national elder population during the 1980s, which according to census figures, increased by only twenty-two percent.²¹ Research has shown that rather than occurring as isolated incidents, elder abuse occurs frequently, and reoccurs in up to eighty percent of cases.²²

Even more disturbing is the possibility that the aforementioned elder abuse statistics may be seriously lower than the actual existence of elder abuse. The House Subcommittee on Health and Long-Term Care found that elder abuse is significantly less likely to be reported than child abuse. The Subcommittee determined that only one out of every eight cases of elder abuse is reported, which is much lower than the estimate that one out of every three cases of child abuse is reported.²³ In fact, the Subcommittee's 1990 report reflects a decrease in reporting from the 1981 House Report, which estimated that one out of every five cases of elder abuse is reported.²⁴

There are many possible explanations why elder abuse is underreported. Often, the elder abuse victim is overwhelmed by the abuse and is either embarrassed to acknowledge the existence of the abuse or does not know where to find help.²⁵ Moreover, elder abuse victims often do not inform authorities because they fear retaliation from their

19. REPORT ON ELDER ABUSE: A DECADE OF SHAME AND INACTION, *supra* note 5, at 3.

20. *Id.* (referring to REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17).

21. Bates, *supra* note 18, at A18. The elder population was defined to constitute persons aged 65 and older. *Id.*

22. Council on Scientific Affairs, *Council Report: Elder Abuse and Neglect*, 257 JAMA 966, 968 (1987) [hereinafter *Council Report: Elder Abuse and Neglect*] (citing T.A. O'Malley et al., *Identifying and Preventing Family-Mediated Abuse and Neglect of Elderly Persons*, 98 ANNALS INTERNAL MED. 998-1005 (1983)).

23. REPORT ON ELDER ABUSE: A DECADE OF SHAME AND INACTION, *supra* note 5, at xi.

24. *Id.*

25. *Council Report: Elder Abuse and Neglect*, *supra* note 22, at 967.

abuser.²⁶ Sadly, some elder abuse victims do not come forward out of the belief that they are the major cause of the abuse occurring and therefore deserving of the abuse.²⁷ Finally, many elder abuse victims are physically unable to report abuse because they are afflicted by a memory-inhibiting condition, such as Alzheimer's disease.²⁸

C. The Prevalence of Emotional Elder Abuse by Professional Care Givers

To date, most of the formal research on elder abuse focuses on the domestic abuse between children and their elder parents.²⁹ Inadequate or inappropriate practices that professional care givers use in the course of patient care is an area that has received much media and public attention but has been virtually ignored by researchers.³⁰ This scarcity of research is surprising considering the large elderly population that is dependant on professional care givers. In 1990, an estimated 1.5 million elders were living in the nation's 20,000 nursing homes³¹ at any given time.³² In addition, over a million elderly and disabled Americans in 1990 were living in approximately 68,000 licensed and unlicensed board and care homes.³³ In all, one out of nine elderly Americans can be found daily in institutions.³⁴ These 3.4 million Americans over the age of sixty-five are among the most vulnerable and dependent people in our society.³⁵

In a leading study on nursing home abuse, self-reported patient abuse data were collected from the nursing staffs of thirty-two skilled

26. REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17, at 3 (statement of James A. Bergman, Regional Director, Legal Research and Services for the Elderly).

27. *Id.*

28. Bates, *supra* note 18, at A1.

29. Dorothy I. Meddaugh, *Covert Elder Abuse in the Nursing Home*, 5 J. ELDER ABUSE & NEGLECT 21, 22 (1993).

30. Karl A. Pillemer & David W. Moore, *Highlights from a Study of Abuse of Patients in Nursing Homes*, 2 J. ELDER ABUSE & NEGLECT 5, 7 (1990).

31. Nursing homes are privately operated establishments where maintenance and personal or nursing care are provided for aged or chronically ill persons who are unable to care for themselves properly. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 1.

32. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 1; Meddaugh, *supra* note 29, at 22.

33. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 1. Board and care homes are facilities that provide shelter, food, and protection for frail and disabled individuals. *Id.* Because of an increasing elderly population and a fairly constant number of nursing home beds, many elderly who previously would have been placed in nursing homes are now living in board and care facilities. *Id.*

34. *Id.*

35. *Id.*

nursing and intermediate care facilities in New Hampshire.³⁶ The study defined emotional abuse "as an act carried out with the intention, or perceived intention, of causing emotional pain to another person."³⁷ The acts used to measure emotional abuse included isolating a patient beyond what was needed to gain control, insulting or swearing at a patient, yelling at a patient in anger, denying a patient food or privileges as part of a punishment, and threatening to hit or throw something at a patient.³⁸

Of the 577 staff surveyed, eighty-one percent had observed at least one emotionally abusive incident in the facility during the preceding year.³⁹ Seventy percent of the respondents had witnessed another staff member yell at a patient in anger.⁴⁰ Fifty percent of the

36. Karl A. Pillemer & David W. Moore, *Abuse of Patients in Nursing Homes: Findings from a Survey of Staff*, 29 THE GERONTOLOGIST 314, 315 (1989). Intermediate care nursing homes serve persons who do not need intensive nursing care, but who require institutionalization because of functional impairments. *Id.* Skilled nursing facilities provide care under the supervision of a physician, including 24-hour skilled nursing and a variety of therapeutic services. *Id.* Of the 32 facilities, 23 were operated for profit, and nine were nonprofit institutions. *Id.* All of the facilities were certified as intermediate care facilities, and several also had skilled nursing facility units. *Id.*

The data were collected between February and April of 1987. *Id.* Approximately 30% of staff members in each nursing home were randomly selected for telephone interviews. *Id.* Of the 691 staff members contacted, 577 agreed to be interviewed, for a completion rate of 85%. *Id.* All interviews were conducted by telephone and lasted approximately 30 minutes. *Id.* To obtain information on the extent of abuse, respondents were asked to report first on actions they had observed other staff commit, and then on actions they had personally taken. *Id.*

37. *Id.*

38. *Id.* at 316.

39. *Id.* at 317.

TABLE 1
Psychological Abuse Observed by Staff in Past Year (N = 577)

| TYPE OF ABUSE | NEVER | ONCE | 2-10 TIMES | MORE THAN 10 TIMES |
|----------------------------------|-------|------|------------|--------------------|
| Yelled at patient in anger | 30% | 11% | 44% | 15% |
| Insulted or swore at | 50% | 9% | 30% | 11% |
| Isolated patient inappropriately | 77% | 7% | 12% | 4% |
| Threatened to hit or throw at | 85% | 5% | 9% | 1% |
| Denied food or privileges | 87% | 2% | 8% | 3% |

Id.

40. *Id.*

respondents had seen a staff member insult or swear at a patient.⁴¹ Twenty-three percent of the respondents had witnessed other staff isolating a patient beyond what was needed to control him or her.⁴² Threats to hit or throw something at a patient were reported less often (fifteen percent), as were denials of food or privileges (thirteen percent).⁴³

In the same survey, forty percent of the respondents admitted they committed at least one emotionally abusive act against an elderly resident within the preceding year.⁴⁴ Thirty-three percent of the staff had yelled at a patient.⁴⁵ Ten percent of the respondents also reported that they had insulted or sworn at a patient during the past year.⁴⁶ Isolating a patient inappropriately was reported by four percent of the staff, as was denying patients food or privileges as a punishment.⁴⁷ Only two percent of the respondents had made threats to hit or throw something at a patient.⁴⁸

Interestingly, these stark statistical differences between those who observe emotional elder abuse and those who commit emotional elder abuse lead to one of two conclusions: either some abusers are reluctant to admit they abuse the elderly, or some staff incorrectly perceive conduct to be emotional abuse. The former conclusion seems

41. *Id.* In both cases of yelling at a patient in anger and swearing or insulting a patient, the majority of those who reported seeing abuse indicated that it had occurred more than once during the preceding year. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

TABLE 2
Psychological Abuse Committed by Staff in Past Year (N = 577)

| TYPE OF ABUSE | NEVER | ONCE | 2-10 TIMES | MORE THAN 10 TIMES |
|--|-------|------|------------|-----------------------|
| Yelled at patient in anger | 67% | 15% | 17% | 1% |
| Insulted or swore at Isolated patient | 90% | 4% | 5% | 1% |
| inappropriately | 96% | 1% | 2% | 1% |
| Threatened to hit or throw at | 96% | 2% | 2% | — |
| Denied food or privileges | 98% | 1% | 1% | — |

Id.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

more plausible than the latter because the observer of abuse is more impartial than the actual abuser, who may be in self-denial, may not consider his or her behavior abusive, or may suffer from embarrassment over his or her abusive conduct. The prevalence of emotional elder abuse probably lies somewhere in the middle between the two sets of figures. Yet, even if the lower set of figures (self-reported abuse) are accurate measures of emotional elder abuse, emotional elder abuse by professional care givers is a pervasive problem.

D. Possible Causes of Elder Abuse

Many intertwined factors cause elder abuse. The House Subcommittee on Health and Long-Term Care found that "those caring for nursing home residents are often ill-trained, grossly overworked, and very poorly paid."⁴⁹ Although unlicensed nurses' aides provide as much as ninety percent of all direct care given to elderly nursing home residents, these aides are usually inadequately trained and have little or no nursing experience.⁵⁰ Generally nurses' aides are paid less than janitors; janitors receive an average of \$280 per week, whereas aides only receive an average of \$251 per week.⁵¹ High turnover among aides also contributes to incidents of elder abuse because aides are less likely to feel attached to the nursing home or its residents.⁵² In addition, although nurses' aides are trained to perform only specific duties, including feeding, dressing, and bathing patients, the Subcommittee on Health and Long-Term Care found that responsibilities that should be performed by doctors and nurses are often delegated to aides, such as preparing and administering oral medications, suctioning patients' noses and throats, applying in-dwelling catheters, and applying apical pulses.⁵³

Board and care homes have similar staffing problems.⁵⁴ Board and care home workers perform critical services to elders: they supervise residents, assist in daily living activities, prepare and serve food, and keep the home clean and safe.⁵⁵ The Subcommittee staff visited many board and care homes where the personnel were either not

49. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 6.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 6-7.

54. *Id.* at 7.

55. *Id.*

working at all, or were under the influence of alcohol or drugs.⁵⁶ Moreover, at some locations, the Subcommittee staff observed residents left alone without personnel on duty, and, at other locations, the personnel did not speak the same language as the residents.⁵⁷

Not surprisingly, elder abuse often occurs where care givers are placed in extremely difficult situations and lack the necessary skills to deal effectively with those situations.⁵⁸ A congressional study found that care givers often report symptoms of depression, anxiety, feelings of helplessness, low morale, and emotional exhaustion.⁵⁹ Accordingly, elder abuse is becoming more prevalent because of the increasing level of stress placed on care givers, both personally and professionally.⁶⁰

III. Analysis

A. The Deficiencies of Tort Law and the Virtues of Criminal Law in the Elder Abuse Context

Traditionally, the only redress available to elder abuse victims has been civil action, specifically tort law.⁶¹ Claiming injury under a battery action is the most applicable tort used for physical abuse. A tortious battery is a harmful or offensive contact with a person, resulting from an act intended to cause the victim or a third person to suffer such a contact, or apprehension that such a contact is imminent.⁶² Under the Restatement (Second) of Torts, "contact" extends to any part of the victim's body, or to anything which is attached to the victim's body and practically identified with it.⁶³ Thus, an elder usually can recover under a battery approach only when the elder experiences physical abuse or some acts of emotional abuse in which an object attached and associated with the elder's body is touched. Conse-

56. *Id.*

57. *Id.*

58. Telephone Interview with Thomas E. Carluccio, Deputy Attorney General of Delaware and Director of the Delaware Medicaid Fraud Control Unit (Sept. 13, 1994).

59. HOUSE SUBCOMM. ON HUMAN SERVICES OF THE SELECT COMM. ON AGING, 100TH CONG. 2D SESS., *A STUDY OF EXPLODING THE MYTHS: CAREGIVING IN AMERICA* 30 (Comm. Print 1988).

60. Bates, *supra* note 18, at A18.

61. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

62. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

63. *Id.* § 18 cmt. C.

quently, most forms of emotional abuse, such as ridicule, are not redressable under tortious battery.

Another avenue of tort redressability is claiming injury under an assault action. Tortious assault is an apprehension of a battery.⁶⁴ Traditionally, an abuser's act must consist of a threat to use force⁶⁵ with an apparent ability to carry out the threat immediately.⁶⁶ Most emotional elder abusive acts do not cause imminent fear of a battery, but instead merely cause humiliation, embarrassment, or depression and therefore will not constitute a legal assault.⁶⁷

A third tort remedy that may serve to redress elder abuse victims is infliction of emotional distress. Some courts have been reluctant to consider infliction of emotional distress as a tort, reasoning that "mental consequences are so evanescent, intangible, and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonable 'proximate' connection with the act of the defendant."⁶⁸ Nonetheless, other courts have recognized infliction of emotional distress as a separate cause of action where a special relationship between the tortfeasor and the victim exists.⁶⁹ Because a special relationship exists between the care giver and the victim, any elderly victim emotionally abused by a care giver, in either a facility or private setting, should have a cause of action for infliction of emotional distress in a jurisdiction allowing this kind of tort.

Although these three tort remedies are often available to victims of physical or emotional elder abuse, tort law inadequately redresses many of these victims. Tort law in the context of elder abuse does not provide remedies for victims who are unable to bring a civil action

64. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43 (5th ed. 1984).

65. *Id.* at 44 (citing *State v. Daniel*, 48 S.E. 544 (N.C. 1904); *Haupt v. Swenson*, 101 N.W. 520 (Iowa 1905); *Alexander v. Pacholek*, 192 N.W. 652 (Mich. 1923)).

66. *Id.*

67. *Id.* at 55.

68. *Id.* (citing *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896); *Braun v. Craven*, 51 N.E. 657 (Ill. 1898); *Chittick v. Philadelphia Rapid Transit Co.*, 73 A. 4 (Pa. 1909)).

69. *Id.* at 57-58 (citing *Cole v. Atlanta & West Point R.R.*, 31 S.E. 107 (Ga. 1897) (holding a common carrier liable for insulting a passenger); *Birmingham R.R. Light & Power Co. v. Glenn*, 60 So. 111 (Ala. 1912) (holding a common carrier liable for profane and indecent language directed at a passenger); *Milner Hotels v. Dougherty*, 15 So. 2d 358 (Miss. 1943) (holding an innkeeper liable for mental suffering of patron)).

against their abusers.⁷⁰ Many of the same factors which caused the underreporting of elder abuse explain why many elder abuse victims do not bring tort claims against their abusers. The elder abuse victim may be overwhelmed by the abusive situation and embarrassed to acknowledge it.⁷¹ Moreover, the victim may be unaware that the abusive conduct constitutes a tort either because the victim is unfamiliar with tort law or because the victim suffers from dementia, unable to remember the particular details of the abuse.⁷² Even if the elder abuse victim is aware of potential tort remedies, the victim may not know how to bring a cause of action.⁷³ Alternatively, the victim may fear retaliation and consequently may not want to be subjected to the trauma of confronting the abuser.⁷⁴ The victim also may be physically unable to bring a cause of action or may conclude that bringing an action is not worth the time and expense.

Therefore, tort action is fraught with the potential to leave both the harm unredressed and the abuser unsanctioned. Although this deficiency of tort law cannot be cured, criminal prosecution is a means of assuring that, at least, some justice is done. Beyond that, criminal prosecution can have a prospective effect in preventing future abuse.

Although both criminal law and tort law impose sanctions upon those who commit violations, the two areas of law differ in their underlying purposes.⁷⁵ The purpose of criminal law is to protect society against harm by punishing harmful conduct or situations likely to result in harm if allowed to continue.⁷⁶ The elder abuse victims need not bring the criminal action; the state prosecutes the abuser to protect the public.⁷⁷ In contrast, the purpose of tort law is to compensate the victim.⁷⁸ In a tort case, the victim must bring the action alone; the state is not a party to the action.⁷⁹

In addition, tort law inadequately addresses elder abuse because it does not impose a criminal record on an abuser and thus does not

70. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

71. *Council Report: Elder Abuse and Neglect*, *supra* note 22, at 967.

72. See Bates, *supra* note 18, at A1.

73. See *Council Report: Elder Abuse and Neglect*, *supra* note 22, at 967.

74. See REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17, at 3 (statement of James A. Bergman, Regional Director, Legal Research and Services for the Elderly).

75. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 1.3 (2d ed. 1986).

76. *Id.*

77. 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 7, at 20 (14th ed. 1980).

78. LAFAYE & SCOTT, *supra* note 75, § 1.3.

79. See 1 TORCIA, *supra* note 77, § 7, at 20.

prevent the abuser from practicing health care elsewhere.⁸⁰ If the prosecutor decides not to prosecute an abuser, the worst punishment that abuser would face is being fired.⁸¹ Without a criminal conviction the abuser could be hired by other nursing homes or facilities.⁸²

Imposing criminal liability for elder abuse is important because it reduces an abuser's ability to practice health care elsewhere. Under the Medicare and Medicaid Patient and Program Protection Act of 1987,⁸³ the Department of Health and Human Services' Office of Inspector General (OIG) is required to exclude individuals convicted of criminal offenses relating to patient abuse from participating in Medicare and state health care programs, such as Medicaid, for a minimum of five years.⁸⁴ The OIG has discretion to extend the period of exclusion for more than five years if any of the four following factors exist: (1) the acts resulting in the conviction, or similar acts, were committed

80. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

81. Tape of Thomas E. Carluccio, Deputy Attorney General of Delaware and Director of the Delaware Medicaid Fraud Control Unit, Emotional Abuse: Is it a Crime, Civil Matter, or Freedom of Speech—A Criminal and Civil Perspective?, Keynote Address at the Silent Suffering: Elder Abuse in America Conference (Feb. 4, 1994) [hereinafter Tape of Carluccio] (on file with *The Elder Law Journal* and the Delaware Office of the Attorney General).

82. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

83. Medicare & Medicaid Patient & Program Protection Act of 1987, Pub. L. No. 100-93, 101 Stat. 680 (codified at 42 U.S.C. § 1320a-7 (1991)).

84. 42 U.S.C. §§ 1320a-7(a), 1320a-7(c)(3)(B) (1991).

42 C.F.R. § 1001.2 (1993) defines "convicted" to mean:

(a) A judgment of conviction has been entered against an individual or entity by a Federal, State, or local court, regardless of whether:

(1) There is a post-trial motion or an appeal pending, or
(2) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(b) A Federal, State, or local court has made a finding of guilt against an individual or entity;

(c) A Federal, State, or local court has accepted a plea of guilty or *nolo contendere* by an individual or entity; or

(d) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

42 C.F.R. § 1001.2 (1993) defines "exclusion" to mean:

[I]tems and services furnished by a specified individual or entity will not be reimbursed under Medicare or the State health care programs.

42 C.F.R. § 1001.2 (1993) defines "State health care program" to mean:

(a) A State plan approved under title XIX of the Act (Medicaid),

(b) Any program receiving funds under title V of the Act or from an allotment to a State under such title (Maternal and Child Health Services Block Grant program), or

(c) Any program receiving funds under title XX of the Act or from any allotment to a State under such title (Block Grants to States for Social Services).

over a period of at least one year;⁸⁵ (2) the acts resulting in conviction had a significant adverse physical or mental impact on the patient;⁸⁶ (3) the sentence imposed by the court included imprisonment;⁸⁷ or (4) the convicted abuser has a prior criminal, civil, or administrative sanction record.⁸⁸ If any of these four factors are present, the OIG may consider the following mitigating factors to reduce the period of exclusion to no less than five years: (1) the record in the criminal proceeding, including sentencing documents, shows that the court determined the abuser had a mental, emotional, or physical condition before or during the perpetration of the abuse, reducing the abuser's culpability;⁸⁹ or (2) the abuser's cooperation with federal or state officials resulted in others being convicted or excluded from Medicare or any of the state health care programs.⁹⁰ Thus, convicted elder abusers are prevented, for at least five years, from practicing in any facility which receives Medicare or Medicaid funding. In addition to this federally imposed restriction, individual states may permanently ban a convicted patient abuser from practicing in either a public or private facility. Delaware is the leading example of such a state.⁹¹ Therefore, imposing criminal liability for elder abuse is an important way of preventing future elder abuse, because convicted abusers will be severely restricted from working with elders in care-giving situations.

By criminalizing elder abuse, society firmly denounces the notion that abuse is an effective and acceptable means of maintaining power and control.⁹² Abuse is a public concern, not a mere private action, when the criminal justice system prosecutes on behalf of the victim.⁹³ Without criminal laws, the abuser feels licensed to continue the abuse and the victim feels powerless to stop the abuse or to get help.⁹⁴ The many benefits of criminalizing elder abuse include stopping the abuse, protecting the victim, protecting the public, holding the abuser accountable for the abuse, rehabilitating the abuser, com-

85. 42 C.F.R. § 1001.102(b)(2) (1993).

86. *Id.* § 1001.102(b)(3).

87. *Id.* § 1001.102(b)(4).

88. *Id.* § 1001.102(b)(5).

89. *Id.* § 1001.102(c)(2).

90. *Id.* § 1001.102(c)(3)(i).

91. Telephone Interview with Thomas E. Carluccio, Deputy Attorney General of Delaware and Director of the Delaware Medicaid Fraud Control Unit (Feb. 14, 1995); see also DEL. CODE ANN. tit. 16, § 1137 (Michie Supp. 1994).

92. See Candace J. Heisler, *The Role of the Criminal Justice System in Elder Abuse Cases*, 3 J. ELDER ABUSE & NEGLECT 5, 7 (1991).

93. *Id.*

94. *Id.*

municating the societal intent to treat elder abuse as a crime, not a private matter, and, lastly, providing restitution to the victim.⁹⁵

B. The Deficiencies of Traditional Criminal Law in the Elder Abuse Context

Because imposing criminal sanctions on elder abusers is a more effective deterrent of elder abuse than imposing civil sanctions, it is necessary to examine whether traditional criminal law prohibits elder abuse. Criminal law defines battery "as the unlawful application of force to the person of another."⁹⁶ Traditional criminal battery requires either bodily injury or offensive touching.⁹⁷ The modern approach, however, restricts criminal battery to instances of physical injury.⁹⁸ Thus, jurisdictions adopting this modern approach sanction only the most egregious acts of physical elder abuse as a battery; offensive touching, such as pulling an elder's hair or slapping an elder, is not punishable. Moreover, those jurisdictions adopting the traditional approach only will sanction forms of physical elder abuse, not emotional elder abuse. Unlike a tort battery, criminal battery does not cover instances where an object, attached and associated with the victim's body, is harmfully or offensively touched.⁹⁹

A prosecutor also may pursue elder abusers under traditional criminal assault. Common law defines assault as "an attempt to commit a battery."¹⁰⁰ Most jurisdictions also include, as part of criminal assault, "an act which places another in reasonable apprehension of an imminent contact."¹⁰¹ Even under this extended definition of criminal assault, which is similar to tort assault, most acts of emotional elder abuse are not sanctionable.

Finally, a prosecutor may opt to bring a charge of breach of the peace; this, however, is unlikely. At common law, breach of the peace involves the use of abusive language toward another in a public place

95. *Id.* at 9.

96. LAFAYE & SCOTT, *supra* note 75, § 7.15, at 685.

97. *Id.*

98. *Id.* (citing MODEL PENAL CODE § 211.1 (1980), which covers only conduct causing "bodily injury").

99. Examples of where a court may find a tort battery but not a criminal battery are harmful or offensive contact with the victim's clothing (*Piggly-Wiggly Alabama Co. v. Rickles*, 103 So. 860 (Ala. 1925)), or any object held in the victim's hand (*Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967) (plate held in hand)). KEETON ET AL., *supra* note 64, § 9, at 39-41.

100. 2 TORCIA, *supra* note 77, § 179, at 298.

101. *Id.* § 180.

and in the presence of others.¹⁰² Accordingly, the stringent requirement of a breach of peace excludes virtually all emotional elder abusive acts; elder abuse primarily occurs within the confines of an elder's institutional room, such as in a nursing home room or residence within a private residence.¹⁰³

Criminal law inadequately addresses the specific problem of emotional elder abuse. Because of the common law's limits, a specific statute that punishes all physical and emotional elder abusive acts is needed. Only the most serious physical elder abusive acts are covered by the modern approach of criminal battery. Moreover, most emotional elder abusive acts do not constitute criminal assault. Finally, criminal law does not sanction infliction of emotional distress.¹⁰⁴

C. The States' Response to Elder Abuse

Between January 1973 and January 1981, prior to the publication of the House of Representatives' first report on elder abuse, only sixteen states had enacted legislation focusing on the problem of adult abuse. This legislation grouped together all adults eighteen years of age and older; until 1979, no statute was specific to elder abuse.¹⁰⁵ By 1980, only five states had passed statutes specifically aimed at protecting elders.¹⁰⁶ By 1985, that number grew to forty-four.¹⁰⁷ As of 1991, fifty states had enacted some type of legislation that addresses elder abuse.¹⁰⁸ Most states include elder abuse provisions in their already existing adult protective services (APS) legislation.¹⁰⁹

The states are not uniform in defining and imposing penalties for elder abuse. Moreover, many of their definitions are ambiguous. Notwithstanding this confusion, a spectrum of four types of state elder abuse statutes seems to appear: (1) states which do *not* impose

102. 4 TORCIA, *supra* note 77, § 530, at 193.

103. Telephone Interview with Toshio Tatara, Director of the National Aging Resource Center on Elder Abuse (Sept. 26, 1994).

104. See generally LAFAYE & SCOTT, *supra* note 75; 1 TORCIA, *supra* note 77.

105. Garfield, *supra* note 16, at 869.

106. *Id.*

107. *Id.*

108. *Id.* This figure includes the District of Columbia and Guam as "states." *Id.* (citing ELDER ABUSE PROJECT, AMERICAN PUBLIC WELFARE ASS'N (APWA), NAT'L ASS'N OF STATE UNITS ON AGING (NASUA), A COMPREHENSIVE ANALYSIS OF STATE POLICY AND PRACTICE RELATED TO ELDER ABUSE, at vi (1986)).

109. *Id.* An APS law is a statute that establishes an APS system. *Id.* APS laws traditionally are defined as "a system of preventive, supportive, and surrogate services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation." John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 THE GERONTOLOGIST 250, 251 (1978).

criminal liability for elder abuse apart from traditional criminal law; (2) states which only impose criminal liability for *physical* elder abuse; (3) states which impose criminal liability for physical elder abuse and for emotional elder abuse but require proof of *mental suffering* by the victim; and (4) states which impose criminal liability for physical as well as emotional elder abusive *acts*, regardless of proof of mental suffering by the victim.

1. STATES THAT DO NOT CRIMINALIZE ELDER ABUSE APART FROM TRADITIONAL CRIMINAL LAW

As of 1989, forty-two states and the District of Columbia had established mandatory reporting requirements for abuse defined by their respective statutes.¹¹⁰ These mandatory reporting laws identify fifty different professionals and groups of persons who are required to report abuse.¹¹¹ The agencies authorized to receive reports are most often state welfare or social service departments, and, less frequently, law enforcement agencies, local social service agencies, and state units on aging.¹¹² As of 1989, thirty state laws contained failure to report penalties that range from imposing no fines to fines of \$1,000, and from no imprisonment to a maximum of six months imprisonment.¹¹³

110. WOLF & PILLEMER, *supra* note 8, at 153; *see, e.g.*, CONN. GEN. STAT. ANN. § 17b-407(a) (West Supp. 1995):

Any physician or surgeon . . . , any resident physician or intern in any hospital in this state, whether or not so licensed, and any registered nurse, licensed practical nurse, medical examiner, dentist, osteopath, optometrist, chiropractor, podiatrist, social worker, clergyman, police officer, pharmacist, physical therapist, nursing home facility administrator, nurses aide or orderly in a nursing home facility, any person paid for caring for a patient in a nursing home facility, any staff person employed by a nursing home facility, any regional ombudsman or patients' advocate and any person who is a sexual assault counselor or a battered women's counselor . . . who has reasonable cause to suspect or believe that a patient in a nursing home facility has been abused . . . , or is in a condition which is the result of such abuse . . . , shall within five calendar days report such information or cause a report to be made in any reasonable manner to the Nursing Home Ombudsmen Office. Any person required to report under the provision of this section who fails to make such report within the prescribed time period shall be fined not more than five hundred dollars.

111. WOLF & PILLEMER, *supra* note 8, at 153.

112. *Id.*

113. *Id.* at 11.

The states that only impose criminal liability outside of traditional criminal law for violations of the mandatory reporting laws¹¹⁴ do not have separate statutes criminalizing elder abuse. If a care giver physically or emotionally abuses a patient or resident, except for a few acts prohibited by traditional criminal law, the abuse is treated as a civil matter.¹¹⁵

2. STATES WHICH ONLY CRIMINALIZE PHYSICAL ELDER ABUSE APART FROM TRADITIONAL CRIMINAL LAW

Some state statutes restrict the definition of criminal elder abuse to include only physical injury, imminent threat of physical injury, and unreasonable confinement.¹¹⁶ Maryland's elder abuse statute is typical of state statutes that only criminalize physical elder abuse. In Maryland, elder abuse includes

the sustaining of any *physical* injury by a vulnerable adult as a result of cruel or inhumane treatment or as a result of a malicious act by a caregiver, a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a vulnerable adult, or by any household or family member under circumstances that indicate that the vulnerable adult's health or welfare is harmed or threatened.¹¹⁷

States like Maryland do not consider emotional abuse a crime apart from the rare instances of conduct covered by a criminal assault statute. The emotional elder abuser is, at most, sanctioned administratively and through tort law, and is permitted to continue working in the health care industry.

3. STATES WHICH CRIMINALIZE PHYSICAL ELDER ABUSE AND EMOTIONAL ELDER ABUSE WITH PROOF OF MENTAL ANGUISH

Some state statutes define criminal elder abuse to include mental anguish, aside from physical injury, imminent threat of physical in-

114. See ALASKA STAT. § 47.24.010 (Supp. 1994); CONN. GEN. STAT. ANN. § 17b-407(a) (West Supp. 1995); HAW. REV. STAT. § 346-224 (Michie 1994); IOWA CODE § 235B.3 (West 1994); LA. REV. STAT. ANN. § 14:403.2 (West Supp. 1995); N.H. REV. STAT. ANN. § 161-F:46 (Butterworth 1994); N.J. STAT. ANN. § 52:27G-7.1 (West Supp. 1994); N.M. STAT. ANN. § 27-7-30 (Michie 1995).

115. See *supra* text accompanying notes 96-104.

116. See ARIZ. REV. STAT. ANN. § 13-3623 (West Supp. 1994); MD. ANN. CODE art. 27, § 35D(10) (Michie Supp. 1994); NEB. REV. STAT. § 28-386(1) (1989); N.C. GEN. STAT. § 14-32.2(a) (Michie 1993); S.D. CODIFIED LAWS ANN. § 22-46-2 (Michie Supp. 1993); UTAH CODE ANN. § 62A-3-302.5 (Michie 1993); VA. CODE ANN. § 18.2-369 (Michie Supp. 1994); W. VA. CODE § 9-6-1 (Michie 1990); WIS. STAT. ANN. § 46.90 (West 1987); WYO. STAT. § 35-20-102 (Michie 1994).

117. MD. ANN. CODE art. 27, § 35D(10) (Michie Supp. 1994) (emphasis added).

jury, and unreasonable confinement.¹¹⁸ For example, Texas's statute, which is typical of this group, defines elder abuse as

the willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm or pain or *mental anguish* or the willful deprivation by a caretaker or one's self of goods or services which are necessary to avoid physical harm, *mental anguish*, or mental illness.¹¹⁹

In this group of states, prosecutors need to prove that the elder abuse victim mentally suffered as a direct result of the abuse. Unfortunately, elderly victims afflicted with such health problems as Alzheimer's disease, dementia, or stroke, often do not understand or do not remember their abuse.¹²⁰ In these situations, district attorneys will not prosecute these cases due to the difficulty in obtaining evidence.¹²¹

To illustrate, Jeffrey L. Amestoy, Vermont's Attorney General, expressed frustration over the functionality of his state's elder abuse statute.¹²² Amestoy noted that the definition of abuse in Vermont's elder abuse statute "is so vague and difficult to prove that [the Vermont Office of the Attorney General] has never brought charges under this statute."¹²³ Amestoy reasoned that by requiring proof of injury or impairment, Vermont's elder abuse statute "creates an unworkable standard."¹²⁴ Seeking a solution to reinvigorate his state's dormant

118. See ALA. CODE § 38-9-7 (Michie Supp. 1994); FLA. STAT. ANN. § 415.102 (West 1993); MINN. STAT. ANN. § 609.231, § 626.557(d) (West 1987 & Supp. 1995); MISS. CODE ANN. § 43-45-5(a) (Law. Co-op. Supp. 1993); NEV. REV. STAT. § 200.5092(1) (Michie 1992); S.C. CODE ANN. § 43-35-10 (Law. Co-op. Supp. 1994); TENN. CODE ANN. § 71-6-117 (Michie Supp. 1994); TEX. HUM. RES. CODE ANN. § 48.002 (West 1990); VT. STAT. ANN. tit. 33, § 6902(1) (Butterworth Supp. 1995).

119. TEX. HUM. RES. CODE ANN. § 48.002 (West 1990) (emphasis added).

120. Tape of Carluccio, *supra* note 81.

121. *Id.*

122. See AMESTOY, *supra* note 13, at 8. VT. STAT. ANN. tit. 33, § 6902(1) (Butterworth Supp. 1994) defines abuse as:

(A) Any treatment of an elderly or disabled adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to an elderly or disabled adult;

(C) Unnecessary confinement or unnecessary restraint of an elderly or disabled adult;

(D) Any sexual activity with an elderly or disabled adult by a caregiver, either, while providing a service for which he or she receives financial compensation, or at a caregiving facility or program;

(E) Any pattern of malicious behavior which results in impaired emotional well-being of an elderly or disabled adult.

123. AMESTOY, *supra* note 13, at 8.

124. *Id.*

statute, Amestoy concluded that the definition of abuse in the elder abuse statute "should be redrafted to incorporate the concepts of cruelty and mistreatment."¹²⁵ Accordingly, Amestoy argued that the statute should criminalize physical and verbal forms of cruelty committed by care givers and all willful mistreatment of older and disabled people.¹²⁶

4. STATES WHICH CRIMINALIZE PHYSICAL AND EMOTIONAL ELDER ABUSIVE ACTS

As of February 1995, only Delaware,¹²⁷ Arkansas,¹²⁸ and Rhode Island¹²⁹ criminalize both physical and emotional abusive acts, regardless of whether mental anguish exists. Minnesota may soon join these states by enacting tough legislation against elder abuse.¹³⁰ To illus-

125. *Id.*

126. *Id.*

127. DEL. CODE ANN. tit. 31, § 3902 (Michie Supp. 1994).

128. ARK. CODE ANN. § 5-28-103 (Michie Supp. 1993).

129. R.I. GEN. LAWS § 23-17.8-10 (Michie Supp. 1994).

130. See MINN. STAT. § 609.231 (Draft No. 12C, Sept. 23, 1994) (made available to the author by Mamie S. Segall, Assistant Attorney General of Minnesota).

Currently, Minnesota, in MINN. STAT. ANN. § 626.557(d) (West 1987), defines abuse as "nontherapeutic conduct which produces or could reasonably be expected to produce pain or injury and is not accidental, or any repeated conduct which produces or could reasonably be expected to produce mental or emotional distress."

In the proposed amendments to the Vulnerable Adults Act, MINN. STAT. § 609.231 (Draft No.12C, Sept. 23, 1994), criminal elder abuse is defined as follows:

Any caregiver or facility operator, supervisor, employee, or volunteer who does any of the following is guilty of criminal abuse . . . :

(a) Engages in conduct with intent to produce physical or mental pain or injury to a vulnerable adult, and which conduct is not an accident or is not therapeutic conduct, including, but not limited to:

- (1) hitting, slapping, kicking, biting, corporal punishment;
- (2) the use of repeated or malicious oral, written or gestured language towards a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening;
- (3) any aversive or deprivation procedure, unreasonable confinement or involuntary seclusion, including the forced separation of the vulnerable adult from other persons against the will of the vulnerable adult or the legal representative of the vulnerable adult;

. . . .

- (5) the act of forcing, compelling, coercing, or enticing a vulnerable adult against his or her will to perform services for the advantage of another.

trate the broadness of this fourth category of state statutes, Delaware's elder abuse statute defines abuse as

physical abuse by intentionally and unnecessarily inflicting pain or injury on an infirm adult; or . . . [a] pattern of emotional abuse, which includes, but is not limited to, *ridiculing or demeaning an infirm adult, making derogatory remarks to an infirm adult or cursing or threatening to inflict physical or emotional harm on an infirm adult.*¹³¹

Among the three states criminalizing physical and emotional abusive acts, only Delaware has been able to measure its statute's impact. Perhaps this is explained by the provision's age: Delaware's first elder abuse statute was enacted in 1986. In contrast, Arkansas's elder abuse statute was amended in 1993, and Rhode Island's elder abuse statute was amended in 1994.

Delaware's original statute was known as the patient abuse statute¹³² because it only criminalized physical and emotional abuse that occurs in facilities.¹³³ In 1991, Delaware's General Assembly supplemented this provision by enacting a second abuse statute,¹³⁴ more broadly criminalizing physical and emotional abuse that occurs in any

131. DEL. CODE ANN. tit. 31, § 3902(16) (Michie Supp. 1994) (emphasis added).

132. *Id.* tit. 16, §§ 1131-1140.

133. *Id.* § 1131(1) defines abuse as:

(a) Physical abuse by intentionally and unnecessarily inflicting pain or injury to a patient or resident. This includes, but is not limited to, hitting, kicking, pinching, slapping, pulling hair or any sexual molestation.

(b) Emotional abuse which includes, but is not limited to, ridiculing or demeaning a patient or resident, making derogatory remarks to a patient or resident or cursing directed towards a patient or resident, or threatening to inflict physical or emotional harm on a patient.

Id. § 1131(4) defines facility to "include any facility required to be licensed under this chapter. It shall also include any facility operated by or for the State which provides long-term care residential services." *Id.* § 1136(a) states that

Any person who knowingly abuses . . . a patient or resident of a facility shall be guilty of a class A misdemeanor. Where the abuse . . . results in serious physical injury then such person shall be guilty of a class D felony. Where the abuse . . . results in death then such person shall be guilty of a class A felony.

134. *Id.* tit. 31, §§ 3902-13.

setting, including a private residence.¹³⁵ In effect, this second statute has replaced the patient abuse statute.¹³⁶

Because of its broad statutes, Delaware has been successful in prosecuting emotional elder abuse. Emotional elder abuse cases were difficult or impossible to prosecute in Delaware before the patient abuse statute was passed in 1986.¹³⁷ Ten years ago, if emotional elder abuse cases had been prosecuted at all, a civil action probably would have been filed, resulting in, at most, a reprimand or a firing.¹³⁸ In 1986, the Delaware Office of the Attorney General received only four referrals of alleged abuse; of these, three abuse cases were opened, and only one abuser was convicted.¹³⁹ As a result of the patient abuse statute's enactment, the number of referrals in 1987 rose to seventy-three; out of those, forty-three cases were opened, and five abusers were convicted.¹⁴⁰ The following year, eighty-eight incidents were referred, fifty-three cases were opened, and sixteen abusers were convicted.¹⁴¹ Between 1990 and 1993, Delaware prosecuted almost eighty cases of emotional, physical, and financial abuse or neglect.¹⁴² Emotional abuse accounted for eighteen of those cases.¹⁴³ Barbara Webb,

135. See Tape of Carluccio, *supra* note 81. DEL. CODE ANN. tit. 31, § 3902(16) (Michie Supp. 1994) defines abuse to mean:

(a) Physical abuse by intentionally and unnecessarily inflicting pain or injury on an infirm adult; or

(b) A pattern of emotional abuse, which includes, but is not limited to, ridiculing or demeaning an infirm adult, making derogatory remarks to an infirm adult, or threatening to inflict physical or emotional harm on an infirm adult.

DEL. CODE ANN. tit. 31, § 3913 (Michie Supp. 1994) provides:

(a) Any person who intentionally abuses . . . an infirm adult shall be guilty of a class A misdemeanor. . . .

. . . .

(c) Any person who intentionally abuses . . . an infirm adult, and causes bodily harm, permanent disfigurement or permanent disability shall be guilty of a class D felony. Where the abuse . . . results in death, such person shall be guilty of a class A felony.

136. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

137. Reed, *supra* note 1, at B1 (statement by Barbara Zelnor, Medicaid Fraud Counsel of the National Association of Attorneys General).

138. Theresa Humphrey, *Elderly Abuse Law Seen as Model*, L.A. TIMES, Apr. 17, 1994, at A4.

139. DELAWARE OFFICE OF ATT'Y GEN., PATIENT ABUSE STATISTICS (1994) (made available by Thomas E. Carluccio, Delaware's Deputy Attorney General and Director of the Delaware Medicaid Fraud Control Unit, and on file with *The Elder Law Journal*). The patient abuse statute was enacted on May 13, 1986.

140. *Id.*

141. *Id.*

142. Humphrey, *supra* note 138, at A4.

143. *Id.*

Delaware's Administrator of Adult Protective Services, stated that "[g]etting these successful [emotional elder abuse] prosecutions in Delaware is sending a message to the community that these kinds of things will not be tolerated."¹⁴⁴

The Delaware elder abuse statute¹⁴⁵ punishes the act of abuse itself, not the act's impact on the victim. Because the Delaware statute does not require proof of mental suffering, the prosecutor does not have to prove that the victim suffered harm or distress.¹⁴⁶ The prosecutor only needs to prove that someone acted in an abusive manner—the words themselves are the harm.¹⁴⁷ If the victim, because of some mentally debilitating condition, does not understand or remember that he or she was emotionally abused, the prosecutor still has a viable case against the abuser.¹⁴⁸ As a result, the prosecutor can rely on witness testimony to support the case, rather than the victim's own testimony.¹⁴⁹ In such circumstances, the prosecutor's case will hinge on the credibility of witnesses.¹⁵⁰ The prosecutor must convince the jury beyond a reasonable doubt to believe the witness.¹⁵¹ As such, the prosecutor will want to see whether the witness has a motive to lie.¹⁵² Allowing conviction for mere proof of the abusive act rather than requiring proof of mental anguish makes convicting an elder abuser much easier.¹⁵³

Specifically, Thomas E. Carluccio, Delaware's chief elder abuse prosecutor,¹⁵⁴ does not arbitrarily decide to bring emotional elder abuse cases. When Carluccio takes a case, he examines a number of factors. Initially, he wants to ensure that the conduct technically meets the statute's requirements.¹⁵⁵ If the conduct passes this first test, Carluccio considers other factors. First, Carluccio examines jury appeal—the predicted public reaction toward the alleged abuse.¹⁵⁶

144. *Id.* (statement by Barbara Webb, Delaware's Administrator of Adult Protective Services).

145. DEL. CODE ANN. tit. 31, §§ 3902-13 (Michie Supp. 1994).

146. Tape of Carluccio, *supra* note 81.

147. *Id.*

148. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

149. Telephone Interview with Thomas E. Carluccio, *supra* note 91.

150. *Id.*

151. *Id.*

152. *Id.*

153. Tape of Carluccio, *supra* note 81.

154. Specifically, Carluccio is the Deputy Attorney General of Delaware and Director of the Delaware Medical Fraud Control Unit.

155. Tape of Carluccio, *supra* note 81.

156. *Id.*

Carluccio will decide not to prosecute the care giver if he determines that a reasonable jury would not perceive the care giver's conduct as abusive.¹⁵⁷ Second, Carluccio examines the alleged abuser as a person.¹⁵⁸ Considerations include any past abusive conduct by the alleged abuser, the severity of the conduct, and whether the conduct was maliciously intended or simply an improper response to a difficult situation.¹⁵⁹ Carluccio recognizes that it is a tough job to provide care for elders. Care givers are under constant stress, occasionally subjected to patients who spit or curse at them.¹⁶⁰ Third, Carluccio examines the evidence.¹⁶¹ To sustain a conviction, he needs to prove beyond a reasonable doubt that the emotional elder abuse occurred.¹⁶² Finally, he examines whether prosecution of the conduct is constitutional.¹⁶³ An alleged abuser will prevail if the conviction would result in a violation of First Amendment rights or if the statute was unconstitutionally vague.¹⁶⁴

Three examples help illustrate these prosecutorial considerations. In the first example, a nursing home resident liked to press her call bell because she had difficulty getting up to do simple tasks.¹⁶⁵ The resident's constant ringing annoyed the nurses and the aides.¹⁶⁶ While waiting for a response, the resident overheard nurses and aides speak profanely about her.¹⁶⁷ The resident then informed the Delaware Medicaid Fraud Control Unit. Carluccio did not prosecute this matter because the conduct did not technically meet the standard set by the statute: the insulting statements occurred in another room and were not directly addressed to the patient.¹⁶⁸ Consequently, the matter was handled administratively.¹⁶⁹

In the second example, a nursing home resident afflicted with Alzheimer's disease had a doll whom she believed to be her live,

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* A call bell is a two-way listening device that allows the resident to hear into the nurses' station and allows a nurse or aide to hear into the resident's room. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

healthy, breathing daughter.¹⁷⁰ As a janitor cleaned the resident's room, he saw the doll unattended in a small crib.¹⁷¹ The janitor took a hanging lamp cord, tied it into a noose, and hung the doll from the ceiling.¹⁷² As the resident entered her room, she saw her "baby" hanging "dead."¹⁷³ Visibly shaken, she ran down the nursing home's corridors crying.¹⁷⁴ Instead of prosecuting, Carluccio offered the janitor an Attorney General's probation.¹⁷⁵ Carluccio was able to obtain a signed admission which he could use in a subsequent prosecution if the janitor violated his probation.¹⁷⁶ Carluccio decided not to prosecute because the janitor was a first-time offender and he was not a care giver.¹⁷⁷

In the third example, a nursing home resident was fearful of cigarette smoke.¹⁷⁸ If she saw the staff smoking at the nurses' station, she became upset and screamed at them to stop smoking.¹⁷⁹ After one such outburst, a nurse sought to "get a laugh" at the resident's expense.¹⁸⁰ The nurse ordered two thirteen-year-old volunteers to tell the resident that the resident had left her cigarettes at the nurses' station, to give the resident the cigarettes, and to tell the resident that she

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* An Attorney General's probation is a diversion program entered in lieu of a formal guilty plea but predicated on an offender's admission of guilt. Telephone Interview with Thomas E. Carluccio, *supra* note 91. The probation is usually granted for abusers with no criminal record who did not cause serious injury. *Id.* Under the probation, abusers must admit to having committed the offense charged and agree not to work in health care for one year. *Id.* The probation has the practical effect of permanently barring abusers from practicing in both public and private Delaware health care facilities because they are put on the Delaware registry. *Id.* The probation usually includes conditions, such as requiring the abuser to go for counseling and/or pay for investigation costs. *Id.* Pursuant to probation, the abuser is monitored by the Attorney General's Office for one year. *Id.* If probation conditions are violated during that time, the abuser's admission will be used against him or her in a subsequent criminal prosecution. *Id.* Carluccio notes that the probation represents the difference in the underlying purpose of general criminal prosecutions and criminal health care prosecutions. In the former, the goal is to punish the individual, while in the latter, the goal is to deter future abuse. *Id.*

176. Tape of Carluccio, *supra* note 81.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

was permitted to smoke.¹⁸¹ After the two volunteers reluctantly followed these orders, the resident fled the room screaming.¹⁸²

Although technically the nurse committed a crime—emotional elder abuse—Carluccio did not prosecute the nurse, but instead gave her an Attorney General's probation.¹⁸³ Carluccio did not prosecute because the nurse had many personal problems, was under a great deal of stress, agreed to go to counseling, paid for the costs of investigation, and admitted the abuse.¹⁸⁴

D. Constitutional Issues

Abusers have a potential defense to criminal sanctions by attacking the constitutionality of their state's elder abuse statute. A statute, either on its face or as applied, can be stricken as unconstitutionally overbroad or vague. As a result, it is important to explore the constitutionally permissible scope of elder abuse statutes. Those states which criminalize physically and emotionally abusive acts are the most effective in deterring elder abuse. Therefore, establishing case law that upholds this type of broad statute against constitutional attacks are crucial.

The Delaware Supreme Court, in *Robinson v. State*,¹⁸⁵ addressed the constitutionality of Delaware's patient abuse statute,¹⁸⁶ the flag-ship of statutes criminalizing emotional elder abusive acts. The *Robinson* court affirmed the conviction of a nurse's aide for emotionally abusing an eighty-five-year-old nursing home resident,¹⁸⁷ and rejected the defendant's arguments that Delaware's patient abuse statute was

181. *Id.* Interestingly, the two 13-year-old volunteers had the common sense to think that their actions would emotionally abuse the patient. They only committed the acts after being ordered to by the nurse, against their will. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. 600 A.2d 356 (Del. 1991).

186. DEL. CODE ANN. tit. 16, § 1136(a) (Michie Supp. 1994).

187. The charges against the defendant arose on August 13, 1989, in room 400 at the Layton Home nursing facility. *Robinson*, 600 A.2d at 358. At the time of this incident, the defendant had been employed at the Layton Home for over two years as a nurse's aide. *Id.* Room 400, which was the home for four elderly residents, was 14 feet by 14 feet in dimension. *Id.* In this room, Jane Roe, 85 years of age, had been quietly sitting in her wheelchair. *Id.* While two housekeepers were working and other residents were in the room, the defendant approached Roe and falsely told her that someone had been stealing some of her clothes. *Id.* Roe, who was very possessive of her belongings, immediately became upset. *Id.* Throughout this incident, the defendant and Roe maintained an abusive dialogue, which became loud at times. *Id.* A total of six towels (as many as three at one time) were thrown at Roe by the codefendant as Roe sat confined in her wheelchair. *Id.*

unconstitutionally overbroad and vague.¹⁸⁸ Although *Robinson* only considered the patient abuse statute,¹⁸⁹ the court implicitly upholds the latter statute's constitutionality because the language of the two statutes is virtually identical: the sole difference is that the patient abuse statute protects only patients and residents of facilities and the broader elder abuse statute protects all "infirm adults" in any setting.¹⁹⁰

The Delaware court structured *Robinson* by observing the parameters set by the United States Supreme Court in *Village of Hoffman Estates v. Flipside*.¹⁹¹ *Flipside* suggests that where a statute is challenged as facially overbroad or vague, a court should first determine whether that statute affects "a substantial amount of constitutionally protected conduct."¹⁹² If a court finds that the statute does not affect such conduct, *Flipside* holds that the overbreadth challenge must fail.¹⁹³ According to *Flipside*, a court should then explore the facial vagueness challenge, and assuming the statute affects no constitutionally protected conduct, a court may uphold the challenge only if the statute "is impermissibly vague in all of its applications."¹⁹⁴

1. OVERBREADTH

The Delaware Supreme Court began its overbreadth analysis in *Robinson* by examining the patient abuse statute's legislative purpose. Delaware's General Assembly enacted the patient abuse statute out of

Although Roe was quite upset at this point, the defendant was just beginning her havoc. The defendant took a cup of water and, out of Roe's sight, used her fingers to throw drops of water on Roe. *Id.* At the same time, the defendant imitated the sound of spitting which further upset Roe. *Id.* Roe cried out for the defendant to stop spitting on her and to leave her room. *Id.* Apparently in response to Roe telling the defendant and the codefendant to "Get away from me you bitch," the defendant told her "It takes one to know one." *Id.* The defendant also admitted that she had called Roe "mean" and had told her to "shut up" and had argued briefly with Roe. *Id.*

In the meantime, the defendant had also placed a small artificial flowerpot on Roe's head. *Id.* When the flowerpot fell to the floor, the defendant and the codefendant laughed. *Id.* With Roe yelling "bloody murder," the defendant told Roe to "kiss [my] butt," stood in front of Roe, lifted her nurse's uniform, shook her buttocks, and placed it on Roe's meal table which was attached to her wheelchair. *Id.* The entire incident lasted approximately 15 to 20 minutes. *Id.*

188. See *id.* at 362-66.

189. The abuse in *Robinson* occurred in 1989, before enactment of the statute extending criminal liability beyond care facilities.

190. See *supra* notes 133 & 135.

191. 455 U.S. 489 (1982).

192. *Id.* at 494, cited in *Robinson v. State*, 600 A.2d 356, 362 (Del. 1991).

193. *Id.*

194. *Id.* at 495.

concern that patients and residents of long-term care facilities experience abuse which is not completely sanctioned by traditional criminal statutes.¹⁹⁵ The patient abuse statute was designed to protect some of society's most vulnerable members.¹⁹⁶ Consequently, the General Assembly, in 1986, enacted the elder abuse statute which prohibits the abuse, neglect, and mistreatment of patients and residents of long-term care facilities.¹⁹⁷

Without forgetting this statutory purpose, the Delaware court considered whether the patient abuse statute affects a substantial amount of constitutionally protected speech or is overbroad because it restricts others' First Amendment rights.¹⁹⁸ The Delaware court noted that the First Amendment does not protect all speech,¹⁹⁹ and even protected speech may be punishable at certain times and places.²⁰⁰ Accordingly, the Delaware court stressed that the government constitutionally can prohibit offensive speech as intrusive when a "captive" audience is unable to avoid the speech.²⁰¹

In captive audience cases, the United States Supreme Court has balanced the speaker's First Amendment rights with the government's interest in protecting the captive audience's privacy rights.²⁰² In the course of its examination, the Delaware court placed special

195. *Robinson*, 600 A.2d at 362 (citing 65 Del. Laws ch. 442 (July 7, 1986) (synopsis) (codified at 16 DEL. CODE ANN. §§ 1131-40 (Michie Supp. 1990)).

196. *Id.* Delaware's General Assembly found that

victims of patient abuse are often at the mercy of the[ir] tormentors, are dependent upon them for daily needs, and are therefore, reluctant to report incidents committed against them. Many times, victims are unable to effectively communicate what is being done to them.

Id.

197. *Id.*

198. *Id.* at 363.

199. *Id.* The United States Supreme Court has held that the following categories of speech are not protected by the First Amendment: fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); obscenity, *Roth v. United States*, 354 U.S. 476 (1957); words tending to incite riot, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and to a limited extent libel, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Robinson*, 600 A.2d at 363.

200. *Robinson*, 600 A.2d at 363 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)).

201. *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (offensive radio broadcasts); *Lehman v. Shaker Heights*, 418 U.S. 298, 307-08 (1974) (advertisements on public buses and streetcars); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970) (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (sound trucks)).

202. *Id.* (citing *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Cohen v. California*, 403 U.S. 15, 21-22 (1971); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

emphasis on two United States Supreme Court cases: *F.C.C. v. Pacifica Foundation*²⁰³ and *Frisby v. Schultz*.²⁰⁴ In *Pacifica Foundation*, the United States Supreme Court held that the F.C.C. had the authority to sanction licensees who engage in obscene, indecent, or profane broadcasting.²⁰⁵ *Pacifica Foundation* held that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."²⁰⁶

The Delaware court also gave heightened attention to another United States Supreme Court case. In *Frisby*, the Supreme Court upheld an overbreadth and vagueness challenge against a statute which prohibited picketing in a traditionally public forum where the picketing centered on an individual residence (a captive audience).²⁰⁷ *Frisby* emphasized the significant government interest in preserving the sanctity of the home, which includes protecting the unwilling listener.²⁰⁸

Applying the above case law to the patient abuse statute, the Delaware court concluded that the elder abuse statute was not overbroad.²⁰⁹ The Delaware court reasoned that although residents and patients allow care givers to come into their homes by necessity, such invitation does not constitute a waiver of their privacy rights and their rights to be free from abusive conduct or speech.²¹⁰ Furthermore, the Delaware court found no reason to distinguish between the residential privacy rights held by patients and residents of long-term care facilities and the residential privacy rights of a homeowner which *Frisby* recognized.²¹¹ After balancing an emotional abuser's First Amendment rights against the significant government interest in protecting

203. 438 U.S. 726 (1978).

204. 487 U.S. 474 (1988).

205. *Robinson*, 600 A.2d at 363 (citing *Pacifica Found.*, 438 U.S. 726).

206. *Id.* (quoting *Pacifica Found.*, 438 U.S. at 748).

207. *Robinson*, 600 A.2d at 363-64 (citing *Frisby*, 487 U.S. 474).

208. *Id.* at 364 (citing *Frisby*, 487 U.S. at 484). The Supreme Court, in *Frisby*, stated that

a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

487 U.S. at 485 (citing *Pacifica Found.*, 438 U.S. at 748-49; *Rowan*, 397 U.S. at 736; *Kovacs*, 336 U.S. at 86-87).

209. *Robinson*, 600 A.2d at 364.

210. *Id.*

211. *Id.*

the residential privacy rights of a "captive" patient or resident of a long-term care facility, the Delaware court held that the patient abuse statute does not reach a sufficient amount of constitutionally protected speech to justify a ruling of facial overbreadth.²¹²

2. VAGUENESS

Addressing the defendant's second constitutional challenge, the Delaware court next examined whether the patient abuse statute's emotional abuse component is unconstitutionally vague on its face. The Delaware court observed that the vagueness doctrine nullifies a criminal statute that is not written with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."²¹³ Furthermore, the constitutionality of a statute challenged as vague is closely affected by whether that statute includes a mens rea requirement.²¹⁴

With respect to the void for vagueness challenge in *Robinson*, the Delaware court first examined the scope of criminal liability for emotional abuse under the patient abuse statute.²¹⁵ The Delaware court noted that the statute only protects patients and residents present within a "facility."²¹⁶ Furthermore, "ridiculing" or "demeaning" speech or conduct directed at a patient or resident or "derogatory remarks" made about a patient or resident are not criminally sanctioned unless the prohibited act(s) occur(s) within a facility, the prohibited act(s) were targeted at or directed towards a patient or resident of the facility, and the defendant performed the prohibited act(s) "know-

212. *Id.*

213. *Id.* at 365 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

214. *Id.* (citing *Colautti v. Franklin*, 439 U.S. 379, 395 & n.13 (1979)).

215. DEL. CODE ANN. tit. 16, § 1131(1)(b) (Michie Supp. 1990) defines emotional abuse as including, but not being limited to:

ridiculing or demeaning a patient or resident, making derogatory remarks to a patient or resident or cursing directed towards a patient or resident, or threatening to inflict physical or emotional harm on a patient.

Id. § 1136(a) states:

Any person who knowingly abuses, mistreats or neglects a patient or resident of a facility shall be guilty of a class A misdemeanor. Where the abuse, mistreatment or neglect results in serious physical injury then such person shall be guilty of a class D felony. Where the abuse, mistreatment or neglect results in death then such person shall be guilty of a class A felony.

216. *Robinson*, 600 A.2d at 365.

ingly."²¹⁷ Additionally, the Delaware court observed that the standard of liability is an objective one: a defendant's speech or conduct must be of the kind that reasonable people would recognize, in the context that they were done or spoken, as being ridiculing, demeaning, or cursing.²¹⁸ Accordingly, the Delaware court concluded that the patient abuse statute defines the criminal offense of emotional abuse with sufficient particularity such that reasonable persons can understand the forbidden conduct.²¹⁹ Moreover, the Delaware court found that the patient abuse statute's scope provides sufficient law enforcement guidelines which preclude the risk of arbitrary or discriminatory enforcement.²²⁰ Consequently, it rejected the defendant's facial vagueness challenge.²²¹

IV. Resolution and Proposal

Elder abuse is a widespread and growing problem. Because of their vulnerability, the elderly are particularly susceptible to the devastating impacts of emotional and physical abuse. Imposing civil sanctions through tort law is an ineffective remedy for elder abuse because many elders do not bring suits. Moreover, tort liability does not diminish an abuser's ability to continue to work in facilities inhabited by elders even after abuse is recognized. In addition, traditional criminal law does not fully punish all elder abuse, particularly most acts of emotional abuse. As stated by Rep. Mario Biaggi, Chairman of the Subcommittee on Human Services, "[m]ere outrage and righteous indignation does not solve a problem of the magnitude of elder abuse."²²² Therefore, states need to criminalize elder abuse, ensuring that elder abuse victims' rights are safeguarded.

As discussed previously, the states which impose some form of criminal liability on the abuser range from criminalizing only physical abuse to criminalizing physical and emotional abusive acts, regardless of evidence that the victim suffered mentally. Emotionally abusive acts should be a crime because often the victims are vulnerable and are at the mercy of their abusers. Moreover, the mental state of the

217. *Id.*

218. *Id.*

219. *Id.* at 366.

220. *Id.*

221. *Id.*

222. ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17, at vi (statement by Rep. Mario Biaggi, Chairman, Subcommittee on Human Services).

victim should not be a prerequisite to bringing a criminal charge against an abusive perpetrator. Often, elder abuse victims suffer from some sort of dementia and are unable to remember or comprehend that they were abused, or they are unwilling to testify. Therefore, unless the abusive acts themselves are criminalized, an abuser often will be able to avoid prosecution.²²³

Although the elderly comprise a majority of all adult abuse victims (approximately seventy percent),²²⁴ criminal liability for physical and emotional abuse should protect anybody at least eighteen years of age who would be considered vulnerable and dependant on others. The mentally and physically disabled, for example, are vulnerable and consequently need government protection from abuse. All vulnerable adults, not just the elderly, face the inherent problems of bringing tort actions and the insufficient deterrence of tort liability. Moreover, the problems that many elders have in remembering abusive conduct also plague other vulnerable adults. In addition, criminal liability should extend to any person upon whom vulnerable adults depend for care. This includes a relative acting as a care giver in a private setting or any employee of a facility where a vulnerable adult resides or is temporarily staying. In short, vulnerable adults are captive to physical and emotional abuse and deserve government advocacy to ensure their protection.

The following model legislation incorporates the above recommendations. To overcome overbreadth and vagueness challenges, the model legislation is precise in its definitions. Moreover, the model legislation includes a specific *mens rea* requirement for the defendant. Although the focus of this note has been on defining abuse, every criminal statute includes penalties, and this model legislation is no exception. The penalties section of the model legislation serves to show the importance of criminally grading abuse by the seriousness of the offense. The individual state legislatures should determine the particular sanctions, such as fines and/or imprisonment, roughly in accord with their state's respective sanctions for criminal battery and assault. Finally, many of the state statutes which criminalize elder abuse also include provisions criminalizing neglect and financial ex-

223. Tape of Carluccio, *supra* note 81.

224. *Elder Abuse: Curbing a National Epidemic, Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 101st Cong., 2d Sess. 4 (1990) (statement of Rep. Mary Rose Oaker).

plotation of elders. However, these are separate offenses and should be the subject of a separate discussion.

1. DEFINITIONS

(1) Criminal abuse. Any care giver or facility operator, facility supervisor, facility employee, or facility volunteer who intentionally or knowingly engages in any of the following conduct, and which conduct is neither accidental nor therapeutic, is guilty of criminal abuse:

- (a) the infliction or threat to inflict physical pain or injury, including, but not limited to, hitting, slapping, kicking, pinching, biting, pulling hair, or corporal punishment;
- (b) the use of repeated or malicious oral, written, or gestured language towards a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be ridiculing, derogatory, humiliating, harassing, or threatening;
- (c) unreasonable confinement or involuntary seclusion, including the forced separation of the vulnerable adult from other persons against the will of the vulnerable adult or the legal representative of the vulnerable adult;
- (d) sexual contact or interaction involving a vulnerable adult without the vulnerable adult's informed consent.

(2) "Vulnerable adult" means any person eighteen years of age or older suffering from physical or mental infirmity or other physical, mental, or emotional dysfunction to the extent that the person is impaired in the ability to provide adequately for his or her own care and protection and is unable or unlikely to report maltreatment without assistance.

- (3) "Care giver" means an individual or facility
- (a) who has responsibility for the care of a vulnerable adult as a result of a family relationship, or
 - (b) who has assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract, or by agreement.

(4) "Therapeutic conduct" means the provision of program services, health care or other personal care services for a bona fide purpose in the best interests of the vulnerable adult by

- (a) an individual, facility, employee or person providing services in a facility under the rights, privileges, and respon-

sibilities conferred by state license, certification or registration; or

(b) by a care giver.

2. PENALTIES

In any prosecution for criminal abuse, the following penalties, in decreasing order of severity with (1) being the most severe offense and (5) being the least severe offense, apply if the conduct:

(1) results in the death of a vulnerable adult, the person may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(2) results in great bodily harm, the person or entity may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(3) results in substantial bodily harm or the risk of death, the person or entity may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(4) results in bodily harm or the risk of great bodily harm, the person or entity may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(5) in any other circumstance, regardless of the harm or risk of harm, the person may be sentenced to imprisonment for not more than — year(s) and/or payment of a fine of not more than \$—.

V. Conclusion

Physical and emotional abuse are pervasive problems among the elderly. Elders are often treated as “second-class citizens” and often have no advocate other than the government to protect their rights. Sufficient criminal liability needs to be imposed on abusers in order to deter physical and emotional elder abuse. The penalties of imprisonment and/or fines are not really the ultimate goal in criminalizing physical and emotional elder abuse. Instead, the penalties serve as a means to create a criminal record for a convicted abuser, and in conjunction with federal and some state statutes, keep those prone to elder abuse out of care-giving situations.

Neither physical nor emotional elder abuse should be tolerated. Too many elders suffer at the hands of the people whom they depend upon for care. Consequently, legislators need to enact tough measures such as proposed in this note to both sanction the abuser and

deter future abuse. As a society, we need to protect elders' rights to ensure that they are able to live in dignity and without abuse.