

GOOD INTENTIONS ARE NOT ENOUGH: A CRITIQUE OF ELDER ABUSE LAW

David Ray Papke

Physical and emotional elder abuse in the United States is a major public health and human rights problem, but attempts to address the problem have been largely ineffective. Since the 1980s, state lawmakers have frequently revised the statutes regarding the reporting of elder abuse, but the resulting statutes have unfortunately been modeled on child abuse rather than domestic abuse reporting statutes. In the courts, civil actions against abusers are time-consuming and costly to pursue, and assistant district attorneys have found it difficult to prosecute elder abuse cases swiftly and to preserve the testimony of aging victims. When prosecutors do obtain convictions, courts have not meted out sufficiently harsh sentences or had at their disposal hate crime enhancement statutes that reference older victims. Attempts to improve physical and emotional elder abuse reporting, prosecuting, and sentencing are usually well intentioned, but success in these areas requires—as do many reforms regarding older Americans—a much deeper respect for the people supposedly being helped and a concomitant appreciation of how they live their lives.

Introduction

Elder abuse is a serious public health and human rights problem in the United States. Common and widespread, elder abuse often devastates older Americans physically, psychologically, and financially. Our inability to recognize the magnitude of the problem and the stumbling attempts by lawmakers and legal officials to address the problem

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are themselves further testimony to how unimportant many Americans take older people to be.

This article has three parts. The first part discusses the disturbing phenomenon of elder abuse, focusing primarily on physical and emotional elder abuse. Among its other goals, this part seeks to capture the motivations of abusers. The second and longest part scrutinizes the legal response to elder abuse that began in the 1980s and continued into the twenty-first century. This part underscores the flaws in the laws and legal procedures related to elder abuse reporting, prosecution, and punishment. The third and concluding part offers what might be thought of as a model legal approach to elder abuse and then analyzes why, despite abundant good intentions, the current law and legal procedures regarding elder abuse are often ineffective and sometimes misguided.

Part of the reason for the failure to address elder abuse satisfactorily relates to the general rigidity of the law and cautiousness regarding legal reform, but a more specific explanation involves attitudes and assumptions regarding older people in the United States. Stated simply, many Americans fail to respect and understand older people. As ironic as it might be, harmful attitudes and assumptions about older people make their way into even the attempts by lawmakers, courts, and prosecutors to address elder abuse.

Part One: Elder Abuse

Elder abuse is something of a hydra. Its unsightly tentacles include, but are not limited to, debilitating neglect, sexual assault, financial exploitation, physical attacks, and emotional degradation. What's more, these tentacles often intertwine.

This article focuses on physical and emotional abuse. The driving force of physical and emotional abuse is not the disreputable, self-interested conniving of financial elder abuse.¹ Instead, physical and emotional elder abuse originates in the deeper and often confused

1. In the typical instance of financial exploitation, a friend or relative bilks an older person, but on some occasions, gangs of elder abusers have worked their way through whole institutions or neighborhoods, taking financial advantage of large numbers of older residents. See Candace J. Heisler, *Elder Abuse and the Criminal Justice System: New Awareness, New Responses*, 24 GENERATIONS: J. AM. SOC'Y. ON AGING, 52, 53–54 (2000).

psychological make-up of abusers.² These origins, according to one observer, make physical and emotional elder abuse unusually difficult to understand.³

This is not to say that physical and emotional elder abuse is rare, and, indeed, it is quite common in the United States.⁴ While rock-solid data is difficult to locate, various sources estimate that 5-10 percent of Americans over age sixty have experienced it.⁵ Furthermore, instances of physical and emotional elder abuse are often not single incidents but rather parts of a pattern of abuse that extends over months and even years.⁶

By most accounts, physical and emotional elder abuse is on the rise.⁷ The number of victims has been steadily increasing since 2002,⁸ and the COVID-19 pandemic made the problem even worse.⁹ According to one study, abuse jumped nearly 84 percent from pre-pandemic levels.¹⁰ During the pandemic, abusers were able to capitalize on older people's worries and exert undue power and control over them.¹¹ Some

2. L. René Bergeron, *An Elder Abuse Case Study: Caregiver Stress or Domestic Violence? You Decide*, 34:4 J. GERONTOLOGICAL SOC. WORK 47, 53–54 (2001).

3. *See id.* at 52.

4. According to one source, only India has a greater “aggregated elder abuse prevalence” than the United States. *See* Karl Pillemer, David Burnes, Catherine Riffin & Mark S. Lachs, *Elder Abuse: Global Situation, Risk Factors, and Prevention Strategies*, 56:2 GERONTOLOGIST S194, S196 (2016) [hereinafter Pillemer et al.].

5. *See generally* NAT'L CTR. VICTIMS OF CRIME & OFF. VICTIMS OF CRIME: U.S. DEP'T OF JUST, CRIMES AGAINST OLDER ADULTS FACT SHEET, NCVRW RESOURCE GUIDE 1 (2018), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_OlderAdults_508_QC.pdf [hereinafter *Crimes Against Older Adults*]; Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, NEW ENG. J. MED. 1947, 1949 (Nov. 12, 2015); Karl Pillemer & David Burnes, *Elder Mistreatment Is Pervasive in New York State*, 151 POPULATION HEALTH RSCH. BRIEF SERIES, SYRACUSE UNIV. 1 (2021).

6. David Ray Papke, *Emotional and Physical Elder Abuse*, 44 BIFOCAL, J. ABA COMM'N ON L. & AGING 98, 98 (May-June 2023) [hereinafter Papke, *Emotional and Physical Elder Abuse*].

7. *See generally* Steven Reinberg, *Elder Abuse on the Rise in America*, HEALTHDAY (April 4, 2019), <https://consumer.healthday.com/senior-citizen-information-31/caregiving-news-728/elder-abuse-on-the-rise-in-america-744704.html>.

8. *Id.*

9. *Confronting Ageism, Racism, and Abuse in Later Life During COVID-19*, NCALL (May 27, 2020, 7:00 AM), https://www.ncall.us/2020/05/27/weaad_covid-19/ [hereinafter *Confronting Ageism*].

10. Terri D'Arrigo, *Abuse of Older People Increases During Pandemic*, PSYCHIATRICNEWS, AM. PSYCHIATRIC ASS'N (May 25, 2021), <https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2021.5.12>.

11. *See id.*

abusers also convinced older people that they could not navigate the pandemic without the abuser's assistance.¹²

Older people from all walks of life are potentially vulnerable to abuse, but certain living arrangements and social determinants make physical and emotional elder abuse more likely.¹³ For example, older people who are isolated and have a pronounced dependence on another person for care and support are more vulnerable than others.¹⁴ A majority of caregivers are genuinely committed to the older people for whom they provide care,¹⁵ but imbalanced relationships in which one person depends overwhelmingly on the other can go awry. Then, too, an isolated older person who lives alone has only a limited number of social contacts and interactions is more susceptible to undetected and undetectable mistreatment.¹⁶

Conventional social determinants, that is, the forces and systems that shape the conditions in which we live, are also factors in older people's susceptibility to abuse.¹⁷ Sexism's lingering hold on daily life, for example, helps explain why older women are more likely to be abuse victims than are older men.¹⁸ According to one source, violent victimizations of women are twice as likely as violent victimizations of men,¹⁹ and this is only partially explained by the fact that women are on average smaller and have less strength than men. A sexist society might be inclined to cast women as appropriate and even deserving victims, and that tendency contributes to the different victimization rates for men and women.²⁰

Elder abuse is also more likely in impoverished sectors of the population.²¹ Ethnic and racial minority groups are over-represented among the poor, and ethnicity and race can also be seen as

12. See *Confronting Ageism*, *supra* note 9.

13. See K. Maya Jayawardena & Solmon Liao, *Elder Abuse at the End of Life*, 9 J. PALLIATIVE MED. 127, 129–30 (2006).

14. See *id.*

15. See *Caregiver Statistics: Demographics*, FAMILY CAREGIVER ALLIANCE, <https://www.caregiver.org/resource/caregiver-statistics-demographics/> (last visited Oct. 3, 2023).

16. Jayawardena & Liao, *supra* note 13, at 129–30.

17. *Id.*

18. See *Crimes Against Older Adults*, *supra* note 5, at 1.

19. *Crimes Against Older Adults*, *supra* note 5, at 1.

20. See *Crimes Against Older Adults*, *supra* note 5, at 1.

21. See Christopher S. Evans, Katherine M. Hunold, Tony Rosen, & Timothy F. Platts-Mills, *Diagnosis of Elder Abuse in U.S. Emergency Departments*, 65 J. AM. GERIATRIC SOC. 91, 94 tbl.2 (2017).

demographic risk factors.²² Here, as in so many areas of social life, members of weaker, less empowered social groups are more likely to be exploited and wronged than are middle and upper-class whites.²³

Many of the living conditions and social determinants that contribute to elder abuse susceptibility are especially prevalent in nursing homes, where, not surprisingly, striking amounts of abuse occur.²⁴ Despite the superficial collegiality of common rooms and bingo parties, residents are often despairingly lonely and both physically and psychologically isolated in their rooms.²⁵ Many develop an untoward dependence on their caregivers.²⁶ In addition, most residents of nursing homes are frail or in poor health, and large percentages are impoverished women belonging to minority groups.²⁷

Many of the residents cannot defend themselves and may have few resources to which they can turn, thus propelling more abuse.²⁸ In one study, 81 percent of nursing-home staff reported that they had observed at least one incident of abuse in the preceding 12-month period.²⁹ Another study of over 2000 nursing-home residents found that 44 percent of those surveyed had been abused and that 95 percent had either experienced or witnessed neglect.³⁰

Why does so much elder abuse occur? Although each instance of abuse is distinct, the most common explanations relate to the difficulties encountered by caregivers, both in the home and in the institutional setting.³¹ Caregivers are often too few in number and poorly trained.³²

22. See generally Catherine Hawes, *Elder Abuse in Residential Long-Term Care Settings: What Is Known and What Information Is Needed?* in ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 446, 451 (Richard J. Bonnie & Robert B. Wallace eds., 2003).

23. *Id.* at 451.

24. See *id.* at 447; see also Jayawardena & Liao, *supra* note 13, at 129; David Ray Papke, *The Stage Was Set for Disaster: For-Profit Nursing Homes, Federal Law, and COVID-19*, 1 J. ELDER POL'Y 199, 206-07 (2021) [hereinafter Papke, *Stage Was Set*].

25. See Hawes, *supra* note 22, at 454.

26. See *id.* at 447.

27. See *id.* at 451.

28. See *id.* at 465-67.

29. *Nursing Home Abuse: Understanding Nursing Home Abuse*, NURSING HOME ABUSE CTR., <https://www.nursinghomeabusecenter.com/nursing-home-abuse/statistics/#:~:text=According%20to%20a%20survey%20of,during%20a%2012%2Dmonth%20period> (last visited Nov. 16, 2023).

30. Richard Weinmeyer, *Statutes to Combat Elder Abuse in Nursing Homes*, 16 VIRTUAL MENTOR: AM. MED. ASSOC. J. ETHICS 359, 360 (2014).

31. See Bergeron, *supra* note 2, at 53-54.

32. See *id.* at 53.

This can understandably result in stress and burn-out, which in turn can lead to rough, abusive treatment of older people.³³ Then, too, older people suffering from dementia and other cognitive maladies are prone to wild outbursts and behavior that is dangerous to their caregivers.³⁴ The latter sometimes feel the need to use force and restraints in order to control chaotic situations.³⁵

Concern for the plight of caregivers is of course appropriate. Their tasks are difficult, and they are either underpaid or not paid at all for their demanding work.³⁶ But explanations for elder abuse that emphasize caregivers' stress and the difficulty of caregivers' work can deflect attention from the phenomenon of physical and emotional elder abuse. As sociologist and social worker Holly Ramsey-Klawnsnik has suggested, criminal prosecution of poorly trained and/or overwhelmed caregivers would only rarely be appropriate.³⁷ In situations of this sort, social service providers and nursing home managers should instead take steps to eliminate mistreatment and to improve the quality of care.³⁸

Actual abusers, meanwhile, are individuals who mean to hurt and injure older people or who intentionally insult and berate them.³⁹ Some abusers are bullies, who feel the need to attack and ridicule others and then go on to rationalize their bullying.⁴⁰ "These offenders are given to outbursts of rage, and misuse relationships of trust to justify exercising coercive control over others."⁴¹ Older people can be easy pickings for bullies. Other abusers more consciously target older people because they do not like them.⁴² These ageist abusers derive feelings of power and importance by humiliating, terrifying, and harming older people.⁴³ These abusers "typically exhibit sociopathic personalities, lacking guilt, shame, or remorse for their behavior."⁴⁴ Older people, the abusers might say to themselves, get what they deserve.

33. *See id.* at 53.

34. *See Hawes, supra* note 22, at 452.

35. *See id.* at 452-53.

36. *See id.* at 483.

37. *See Holly Ramsey-Klawnsnik, Elder-Abuse Offenders: A Typology, 24 GENERATIONS: J. ON AM. SOC'Y ON AGING 17, 18 (2000).*

38. *Id.* at 21.

39. *Id.* at 19.

40. *Id.* at 20.

41. *Id.*

42. Pillemer et al., *supra* note 4, at S200.

43. Ramsey-Klawnsnik, *supra* note 37, at 20.

44. *Id.*

One genuinely troubling example of this type of abuse involved a 91-year-old dementia patient in a Chicago-area nursing home.⁴⁵ Two of her caregivers taunted her with a hospital gown, which the caregivers knew she feared.⁴⁶ She panicked and flailed her arms madly, a scene the caregivers blithely recorded in a Snapchat video with the caption “Margaret hates gowns” and two laughing-face emojis.⁴⁷ The caregivers’ abuse of Margaret and the joy they took in it were truly inhumane.

Some of these elder abusers might qualify as gerontophobes. The sociologist Joseph Bunzel coined term “gerontophobia” in the 1970s, defining it as an irrational hatred or fear of older people.⁴⁸ Gerontophobes, it seems, are afraid of growing old and dying. Seeing, hearing, or touching older people bring these fears to the surface.⁴⁹ Convuluted as it might seem, some gerontophobes drive away the fears that are haunting them by ridiculing and beating up on older people.⁵⁰

Overall, assorted bullies, psychopaths, and gerontophobes have left American society with a grave and widespread problem. The obvious victims of physical and emotional elder abuse are the older people whom the abusers have injured, psychologically damaged, and sometimes killed. In addition, elder abuse has harmed society as a whole by making it less humane and humanistic. A full-bodied humanism includes empathy and respect for fellow human beings who happen to be older than most other people.

Part Two: Legal Response

Upon learning how harmful and widespread elder abuse is, many people insist that the problem be called to the public’s attention. And, indeed, efforts have been made along these lines.⁵¹ The Area Agencies

45. See Elisha Fieldstadt, *Nursing Home Staffers Accused of Taunting 91-Year-Old Dementia Patient in Snapchat Video*, NBC NEWS (Aug. 12, 2019, 12:07 PM), <https://www.nbcnews.com/news/us-news/nursing-home-staffers-accused-of-taunting-91-year-old-dementia-patient-n1041366>.

46. *Id.*

47. *Id.*

48. Lawrence R. Samuel, *Do We All Suffer from Gerontophobia?*, PSYCH. TODAY (June 21, 2021), <https://www.psychologytoday.com/us/blog/psychology-yesterday/202106/do-we-all-suffer-from-gerontophobia>.

49. *Id.*

50. See *id.*; see also Benjamin F. Shepherd & Paula M. Brochu, *How Do Stereotypes Harm Older Adults? A Theoretical Explanation for the Perpetration of Elder Abuse and Its Rise*, 57 AGGRESSION & VIOLENT BEHAVIOR, 2021, at 3.

51. See *About Us*, NAT. CTR. ON ELDER ABUSE, <https://ncea.acl.gov/about#gsc.tab=0> (last visited Oct. 2, 2023).

on Aging (AAAs) has been particularly active in calling elder abuse to the public's attention and devising strategies to combat the problem.⁵² Other government agencies and nonprofit organizations have also worked to alert the public to the problem of elder abuse.⁵³ On the international level, the United Nations General Assembly has accommodated a request of the International Network for the Prevention of Elder Abuse and formally recognized June 15 as World Elder Abuse Awareness Day.⁵⁴

But while these efforts and others have led to some positive developments,⁵⁵ ample room remains for law and legal institutions to play a role in addressing elder abuse. Earnest and well-intentioned reformers made some changes in the law regarding elder abuse during the 1980s and '90s,⁵⁶ but many of these earlier changes were halting, limited, and, in some cases, misguided. Ironically, some of the changes manifested the bias and uncertainty about older people that is present in many laws, legal proceedings, and legal institutions.⁵⁷ This section of the article reviews the past reforms and also discusses the work that remains to be done in the areas of (1) reporting instances of elder abuse, (2) suing and prosecuting abusers, and (3) punishing those abusers.

(1) Reporting Abuse

While the amount of reported and substantiated elder abuse in the United States is disturbing, reported and substantiated instances are only, to use a tired metaphor, "the tip of the iceberg."⁵⁸ Stated simply, most elder abuse is unreported and therefore unsub-

52. See Area Agencies on Aging (AAAs), <https://www.usaging.org>; see also *id.*

53. See *World Elder Abuse Day—June 15, 2024*, NAT'L TODAY, <https://nationaltoday.com/world-elder-abuse-awareness-day> (last visited Oct. 3, 2023).

54. *Background*, UNITED NATIONS: WORLD ELDER ABUSE AWARENESS DAY, June 15, <https://www.un.org/en/observances/elder-abuse-awareness-day/background> (last visited Oct. 15, 2023).

55. See Gerald J. Jogerst, Jeannette M. Daly, Margaret F. Brinig, Jeffrey D. Dawson, Gretchen A. Schmuck & Jerry G. Ingram, *Domestic Elder Abuse and the Law*, 93 AM. J. PUB. HEALTH 2131, 2131 (2003).

56. See Heisler, *supra* note 1, at 52; Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse*, 16 FAM. L. Q. 69, 70 (1982).

57. See generally Howard C. Eglit, *ELDERS ON TRIAL: AGEISM AND THE AMERICAN LEGAL SYSTEM* (2004).

58. See Sue Rovi, Ping-Hisn Chen, Marielos Vega, Mark S. Johnson & Charles P. Mouton, *Mapping the Elder Mistreatment Iceberg: U.S. Hospitalizations with Elder Abuse and Neglect Diagnoses*, 21 J. ELDER ABUSE & NEGLECT 346, 347 (2009).

stantiated.⁵⁹ One 2003 report estimated that only 21 percent of elder abuse was reported to adult protective services.⁶⁰ A more recent study estimated that only one in twenty-four cases of elder abuse is reported.⁶¹

Why would that be? One explanation is that elder abuse is difficult to recognize.⁶² Older people's aches and bruises could be warning signs of abuse, but these aches and bruises might also be dismissed as merely the problems of old age. According to one professor of health policy and management, "[s]igns that may indicate abuse or neglect tend to be attributed to either the normal processes of aging or to the chronic diseases and disabilities experienced by many frail elders."⁶³

This explanation is perhaps plausible for assorted friends and relatives who visit older people in their homes and overlook the signs of abuse, but it is less so for professional caregivers. These professionals should be able to recognize elder abuse, but in nursing homes and assisted living facilities, for example, caregivers often fail to recognize abuse among both the new residents and the long-term residents as well.⁶⁴ Sometimes the caregivers dismiss the abuse as the product of chronic medical conditions.⁶⁵ This obliviousness and inattentiveness also occurs in emergency rooms, where doctors and nurses sometimes fail to distinguish the signs of abuse from aspects of the aging process.⁶⁶

Even worse is the tendency of some caregivers to look the other way when they *know* abuse has occurred.⁶⁷ Some lay observers do so as well.⁶⁸ They take abuse to be something that is best addressed by a human services agency or by members of the victim's family.⁶⁹ Even in an era in which families are increasingly dispersed and fractured, the belief that families exist unto themselves as sanctuaries of a sort with in-

59. See Hawes, *supra* note 22, at 471–77.

60. See Jogerst et al., *supra* note 55, at 2131.

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

62. See Jogerst et al., *supra* note 55, at 2131.

63. Hawes, *supra* note 22, at 471.

64. See *id.* at 471.

65. *Id.* at 471.

66. See Jayawardena & Liao, *supra* note 13, at 130. X-ray machines that might be used to distinguish abuse from normal injuries *in children* are said to be less useful for older people. See generally Joseph W. Barber, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 *ELDER L. J.* 107, 123 (2008).

67. See Hawes, *supra* note 22, at 472.

68. See *id.* at 473.

69. See Heisler, *supra* note 1, at 57.

house rules still has remarkable currency. Then, too, some look the other way because, in their minds, older people have put their best and most productive years behind them and are often incessant whiners to boot.

Beyond the various explanations and rationalizations for not recognizing and attending to elder abuse, reporting statutes also play a role in the low number of elder abuse reports and investigations.⁷⁰ Since federal lawmakers for the most part have not concerned themselves with elder abuse, the reporting statutes come chiefly from state legislatures.⁷¹ Inspired by the child abuse statutes enacted as early as the 1960s, the states began enacting elder abuse reporting statutes in the 1980s.⁷² By the end of the twentieth century, lawmakers in all 50 states had enacted laws addressing elder abuse in domestic and institutional settings.⁷³

The state reporting statutes are similar, but they vary in their specific provisions.⁷⁴ A typical statute begins with a definition of elder abuse, or at least a sketch of the developments that should prompt someone to report elder abuse.⁷⁵ The statute then lists those who are required to report elder abuse.⁷⁶ This list almost always includes physicians, nurses, emergency room personnel, social workers, police, and firemen, but some statutes also list members of less anticipated occupational groups.⁷⁷ Some of the statutes go on to list people who *might* report abuse, and a minority of states say explicitly that anyone may report abuse.⁷⁸ In order to encourage reporting, the statutes usually grant civil and criminal immunity to reporters if they make a good-faith mistake in their reporting, and, to further shield reporters, the statutes promise anonymity if reporters want it.⁷⁹

70. See Faulkner, *supra* note 56, at 69 n.1.

71. See *id.* at 69 n.1.

72. See *id.* at 70 n.3.

73. See Jogerst et al., *supra* note 55, at 2131.

74. For useful summaries of the states' reporting statutes, see generally ABA COMM'N ON L. AND AGING, ADULT PROTECTIVE SERVICES REPORTING LAWS (2022).

75. See, e.g., COLO. REV. STAT. § 18-6.5-108 (2023).

76. See *id.*

77. Arkansas, for example, lists 26 occupational categories. They include dentists, dental hygienists, humane society officials, osteopaths, postmen, priests, and rabbis. See ARK. CODE ANN. § 12-12-1708 (2023)—Person required to report adult long-term care facility maltreatment.

78. Indiana, for example, says the employees of financial institutions may report abuse. See IND. CODE § 12-10-3-9 (2023)—Duty to report endangered adult.

79. See, e.g., N.C. GEN. STAT. § 108A-102 (2023).

How does one actually report elder abuse? Toward the end or maybe at its beginning, the typical statute identifies a state agency that is supposed to record reported elder abuse and go on to investigate it.⁸⁰ Some states are quite detailed in their descriptions of how the reporting should be done.⁸¹ If the agency's investigation substantiates elder abuse, the agency is supposed to then turn matters over to local law enforcement officials.⁸²

Some states have tinkered with their reporting statutes in hopes of increasing effectiveness.⁸³ If reporting is mandatory for a wide range of occupational groups, subsequent investigations will, not surprisingly, tend to increase.⁸⁴ Another small but important variation among the statutes involves how elder abuse is defined. If statutes define elder abuse in multiple ways and in some detail, substantiation of the abuse will be easier.⁸⁵ That is, the more thoroughly elder abuse is defined, the more likely it is that investigations will be able to find the abuse.

The Wisconsin elder abuse reporting statute is well done in this regard.⁸⁶ It begins by listing varieties of abuse, and the list is longer than the usual one.⁸⁷ Beyond physical, emotional, sexual and financial abuse, for example, the Wisconsin statute thoughtfully adds "treatment without consent" and "unreasonable confinement or restraint."⁸⁸ The statute then goes on to define various types of abuse.⁸⁹ Some of the definitions are short, but the definition of emotional abuse is quite lengthy.⁹⁰ Emotional abuse is said to include "language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten or otherwise harass the individual to whom the language or conduct is directed."⁹¹ This language gives an investigator various types of conduct to

80. See, e.g., ALA. CODE § 38-9-8 (2023).

81. Minnesota, for example, authorizes oral or electronic reports through a designated "common entry point," but says written reports may not be required. See MINN. STAT. § 626.557 (2023)—Reporting of maltreatment of vulnerable adults.

82. See *id.*

83. See *id.*

84. See Jogerst et al., *supra* note 55, at 2134-35.

85. *Id.* at 2135.

86. WIS. STAT. ANN. § 46.90 (2023)—Elder abuse reporting system.

87. *Id.*

88. *Id.*

91. *Id.*

90. *Id.*

91. *Id.*

consider while potentially substantiating the abuse. A less developed statute, by contrast, could lead to confusion and/or caution among investigators.

It should be incumbent on states to explore these changes and others, but a bigger issue presents itself. While tinkering with parts of an engine can be valuable, sometimes it is preferable to tear down the whole engine. With regard to elder abuse reporting statutes, the biggest problem is often that they are derived from, or put together with reference to, child abuse statutes.⁹² Here are the words of reformer Nina A. Kohn seeking to justify that approach: "In seeking to design a better system for addressing and preventing elder mistreatment, reformers should look to approaches, policies, and laws designed to protect children from mistreatment."⁹³

But is it prudent to model elder abuse statutes on child abuse statutes? While child abuse and elder abuse both result in harm to innocent people, the social context for each is different. Most notably, while children are typically in daycare or school and make regular visits to their doctors, older people tend to move in smaller circles and to be fairly isolated.⁹⁴ They frequently do not come into contact with many other people, especially if handicapped by illness or chronic conditions.⁹⁵ Hence, teachers, social workers, and doctors are less likely to be in position to observe the abuse and its consequences.⁹⁶ State statutes can require members of certain occupational and professional groups to report the abuse, but mandating reporting does little good if these members of occupational and professional groups are not in a position to observe the abuse and its consequences.

According to some, elder abuse is actually more analogous to domestic violence than it is to child abuse.⁹⁷ As a result, we might look more to law enforcement to ferret it out rather than to teachers, social

92. See generally Patricia Schene & Sue F. Ward, *The Relevance of the Child Protection Experience*, PUB. WELFARE, Spring 1988, at 14.

93. See *id.*; see also Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 STAN. L. & POL'Y REV. 175, 176 (2003) [hereinafter Kohn, *Second Childhood*]. She continues by saying, "[g]iven the important parallels between the two types of mistreatment, there is a valuable opportunity to learn about how to address elder treatment by examining child mistreatment systems." *Id.*

94. See generally Barber, *supra* note 66, at 124; Faulkner, *supra* note 56, at 74–75.

95. See Barber, *supra* note 66, at 124; Faulkner, *supra* note 56, at 74–75.

96. See Barber, *supra* note 66, at 121.

97. See *id.* at 124.

workers, and doctors to report it. Then, too, we might listen more to older people who are themselves prepared to alert law enforcement to their predicaments. Older people, despite a degree of isolation, are not as dependent on others as children are. The law should facilitate the amplification of older people's voices, and whatever they report should be respected and immediately investigated by law enforcement.

Some have gone so far as to argue that analogizing abused older people to abused children in reporting statutes constitutes a variety of infantilization.⁹⁸ The latter is common and especially irksome for older people, who so frequently have to deal with younger people speaking down to them. When an older person buys a movie ticket at a discounted senior price, the clerk might ask with a smile, "Are you sure a young fellow like you is eligible?" Ho, ho, ho." Older people also routinely interact with younger people who lower the pitch of their voices as if they were speaking to children, or who insist on using what they think are endearing terms such as "sweetie" or "sweetheart."⁹⁹ How demeaning. Embedded in the process of infantilization, even when it is sympathetic, is the assumption that older people are weaker, need special guidance, and are unable to think for themselves.

Perhaps allegations that elder abuse reporting statutes infantilize older people are unduly harsh reactions to elder abuse reporting statutes, but the statutes are nevertheless flawed in their understanding of older people's lives and capabilities. Many older people have small and ever-shrinking social circles and do not routinely come into contact with many professionals who can observe and report the abuse they might be encountering.¹⁰⁰ But most older people *can* contact law enforcement if they are being abused or observe other older people being abused. They know how to dial 911. Modern elder abuse reporting statutes should incorporate a sharper understanding of the nature and content of elder abuse and of older people in general.

(2) In the Courts

Even when incidents of elder abuse are reported, investigated, and substantiated, courtroom proceedings do not routinely follow.¹⁰¹

98. See Faulkner, *supra* note 56, at 87.

99. See *id.* at 87 n.88.

100. See Barber, *supra* note 66, at 121.

101. See generally Lori Stiegel, *The Changing Role of the Courts in Elder-Abuse Cases*, 24 GENERATIONS: J. AM. SOC'Y ON AGING 59, 60 (2000).

Initiating and pursuing courtroom proceedings are more difficult tasks than even seasoned lawyers might realize. In addition, the various standards and procedures for holding elder abusers responsible for their acts have the effect of limiting what victims can do.¹⁰²

With good reason, older people are cautious about bringing allegations of their abuse to court.¹⁰³ They are often embarrassed by the physical and emotional abuse they have experienced, and they do not want to share what has happened to them with the public.¹⁰⁴ Then, too, some are hesitant to publicly identify the particular caregivers who look after them. If the caregivers are friends or relatives who look after them in the home, abuse victims are likely to be highly dependent on those caregivers and, despite the abuse, be deeply concerned about losing the caregivers' support.¹⁰⁵ Abuse victims might also be worried that losing their caregivers "will ultimately lead to being placed in a nursing home or other institutional setting."¹⁰⁶ If the victims are already in long-term institutional care facilities, the victims might worry that their caregivers will lose their jobs or that other members of the institutional staff will retaliate on behalf of the exposed abuser.¹⁰⁷ The complexity of the relationships between abuse victims and their abusers should never be underestimated. As noted in the first part of this article, it seems sometimes that the victims and their abusers are virtually cemented together.

Older people also have practical problems if they go to court. It takes time and money to pursue a legal action, and it may be difficult or near-impossible for older people to visit private attorneys' or assistant district attorneys' offices.¹⁰⁸ Abuse victims also might realize that their abusers have only limited resources from which they might be compensated or that proceedings might take years that they do not have to spare.¹⁰⁹ They might ask themselves, "Why bother?"

A tort action is the most likely vehicle for an abuse victim in civil court, and such an action could conceivably be pursued by not only the victim but also the victim's legal guardian or a representative of the

102. *See id.*

103. *See id.*

104. *See Barber, supra note 66, at 108.*

105. *See Stiegel, supra note 101, at 60.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* at 61.

victim's estate.¹¹⁰ However, the victim might actually have difficulty determining whom to sue, especially in the institutional setting. Many individual nursing homes are only tiny parts of multi-facility corporate chains with complex and intentionally obfuscating organizational structures.¹¹¹

Even if the defendant can be identified, many nursing homes and assisted living facilities require arbitration agreements as a prerequisite to admission—in hopes of keeping embarrassing developments “out of the public gaze.”¹¹² Although such agreements are supposedly entered into voluntarily, it is not implausible that older people or their representatives will agree to enter into the agreements in order to secure admission in particular nursing homes or assisted living facilities.

The Centers for Medicare and Medicaid Advocacy, an unofficial watchdog of sorts for nursing homes and assisted living facilities, toyed with a ban on mandatory arbitration agreements, but the nursing home industry successfully fought to save these cost-cutting and publicity-squashing agreements.¹¹³ At least the Centers for Medicare and Medicaid Advocacy's current rule insists that arbitration agreements not be used as a condition for admission and that residents have at least 30 days to rescind them.¹¹⁴ Responsible nursing homes and assisted living facilities use the agreements openly and fairly, but according to a former adjunct professor at the Georgetown University Law Center, “it is not out of the question that we will see a denial of admission for some reason as a pretext for rejecting the applicant who refuses to sign an arbitration agreement.”¹¹⁵

Among the various civil claims an abuse victim might make, battery is probably the most likely. Battery is an intentional tort, and it occurs when a person intentionally acts in a way that leads to another person's injury.¹¹⁶ Many abuse victims have of course experienced such

110. See *Estate of Lowrie*, 12 Cal. Rptr. 3d 828, 832 (Cal. App. 4th 2004).

111. See Papke, *Stage Was Set*, *supra* note 24, at 203.

112. Taylor M. Harrington, *Nightmare on High Street: The Haunting Effects of Voluntary Arbitration in Nursing Home Administration*, 87 MO. L. REV. 863, 881 (2022).

113. See generally Charlie Sabatino, *Our New Nursing Home Arbitration Mandate: Educate, Educate, Educate*, 40 BIFOCAL: J. ABA COMM'N ON L. AND AGING 103, 103 (2019), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/volume-40-issue-6/cms-final-rule-on-nursing-home-arbitration-clause/.

114. *Id.*

115. *Id.*

116. See *Assault and Battery*, LEGAL INFO. INST. (NOV. 2021), https://www.law.cornell.edu/wex/assault_and_battery.

injury. However, battery claims conventionally involve only contact with the victim's body, and this would preclude the types of emotional harm—denigration, harassment, and ridicule—that a victim has experienced.¹¹⁷ Assault, meanwhile, is also an intentional tort, and it involves causing apprehension of bodily harm.¹¹⁸ Here too, emotional abuse might be difficult for a claimant to establish. In order to successfully claim they have been assaulted, victims must be able to assert they feared bodily harm, but denigration, harassment, and ridicule do not necessarily create this fear.¹¹⁹

A tort action for the intentional infliction of emotional distress might also be a possibility. In this type of action the plaintiff argues that the defendant's outrageous actions caused the plaintiff to suffer distress.¹²⁰ But unfortunately for an elder abuse victim hoping to claim the intentional infliction of emotional distress, "courts have not been terribly friendly to this type of civil wrong."¹²¹ The fear seems to be that actions of this sort of claim could be based on fictitious allegations or result in litigation regarding "trivialities and mere bad manners."¹²² Even the Supreme Court of the United States has expressed its reservations about such actions, albeit primarily because of First Amendment concerns.¹²³

For a long time lawyers did not rush to bring tort actions against abusers, but this has begun to change in recent decades because of the growth in the institutional care industry.¹²⁴ Nursing homes, for example, have had extraordinary growth in size since World War II.¹²⁵ The biggest spur for the growth was the creation of the Medicare and

117. *See id.*

118. *Id.*

119. *See, e.g.,* Joy M. Bingham, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 N.D.L. REV. 837, 850–854 (2005); *see* Assault, LEGAL INFO. INST. (June 2022), <https://www.law.cornell.edu/wex/assault>; *see also* Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L. J. 109, 111 (2003).

120. *See* Cavico, *supra* note 119, at 113.

121. Heath Hooper, *Sticks and Stones: IIED and Speech after Snyder v. Phelps*, 76 Mo. L. Rev. 1217, 1217 (2011).

122. *See* Cavico, *supra* note 119, at 112.

123. *See* Andrew Meerkins, *Distressing Speech After Snyder—What's Left of IIED*, 107 NW. UNIV. L. REV. 999, 1008 (2013).

124. *See* Papke, *Stage Was Set*, *supra* note 24, at 203.

125. Between 1950 and 1980 the number of nursing homes doubled, and during the same period the number of beds in nursing homes tripled. *See* Papke, *Stage Was Set*, *supra* note 24, at 202–03.

Medicaid programs during the 1960s and the concomitant option for eligible parties to have some of their nursing home costs paid by these programs.¹²⁶ Nursing homes currently number almost 16,000 and house at least 1.5 million people.¹²⁷ Over 70 percent of nursing homes are operated for profit, and many are parts of large complexes that offer independent living, assisted living, and memory care, not to mention an occasional hospice as well.¹²⁸ Suffice it to say that when employees of institutional care facilities abuse residents, the deep pockets of the employers are potentially available to compensate the abuse victims.

While it would have been inconceivable as recently as twenty-five years ago, hundreds if not thousands of lawyers have made suing long-term care institutions and their employees for elder abuse into a practice specialty.¹²⁹ Some practice in small elder abuse firms, while others are members of larger firms.¹³⁰ These lawyers are as likely to advertise as “Nursing Home Lawyers” or “Nursing Home Abuse Lawyers” as they are to dub themselves “Elder Law Lawyers” or “Elder Abuse Lawyers.”¹³¹ Their advertising is common on the Internet and often is pitched primarily to family members of abuse victims.¹³² The advertisements feature reports of million-dollar settlements with nursing homes as well as glowing testimonials.¹³³ And the advertisements routinely promise that work will be done on a contingency fee basis, without necessarily saying that explicitly.¹³⁴ Rest assured, an advertisement might promise, that “We Do Not Get Paid Until You Do” or “No Fees Unless You Win.”¹³⁵

To some extent, a criminal prosecution for elder abuse might be more useful than a tort claim against either an individual abuser or a

126. *See id.* at 203.

127. *See id.* at 202.

128. *See id.* at 202; *see also* Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L. J. 719 (2008).

129. *See generally* William E. Hanrahan, *Seeking Justice in Death's Waiting Room: Barriers to Effectively Prosecuting of Crime in Long-Term Care Facilities*, 77 WIS. LAW. (Aug. 2004), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=77&Issue=8&ArticleID=626>.

130. *See, e.g., id.*

131. *See, e.g., Seeking Justice for Nursing Home Abuse?*, LEVIN & PERCONTI, <https://contact.levinperconti.com/contact-nursing/> (last visited Oct. 3, 2023).

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

long-term care institution.¹³⁶ Of course, no bright line exists between these possibilities. The acts which could prompt a tort claim for battery or assault, for example, could also be prosecuted as criminal acts. Then too, punitive damages in a tort case look very similar to fines in a criminal prosecution. These overlaps notwithstanding, tort actions are primarily civil actions seeking compensation for negligently injured plaintiffs, while criminal prosecutions are brought by the state against a wrongdoer.¹³⁷

Successful prosecution of an abuser of an older person would not only have serious ramifications for the abuser, but other consequences as well. The abuser, of course, would face the possibility of imprisonment and creation of a formal criminal record. Beyond retribution, meanwhile, a prosecution would indicate how seriously the state takes the problem of elder abuse. Reiterating that elder abuse is serious wrongdoing always seems valuable.

Yet lacking the financial incentives that are available to private attorneys pursuing tort actions related to elder abuse, assistant district attorneys have not always been enthusiastic about prosecuting elder abusers in the criminal courts.¹³⁸ Harried and stressed, assistant district attorneys rarely pluck elder abuse cases from the giant tree of cases which they can choose to pursue.¹³⁹ Indeed, they tend to prosecute only the most egregious and shocking elder abuse cases.¹⁴⁰

In partial defense of district attorneys' offices, proving that injuries result from a specific abuser is difficult.¹⁴¹ Law enforcement is rarely called to the scene at the time of abuse and often has little to offer at trial. Expert testimony is sometimes necessary to show that the injuries resulted from abuse rather than an accident and that the injuries were not the result of an older person's missteps and mistakes.¹⁴² Nobody is available to serve as a witness to the abuse because it took place

136. See Robert A. Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 *ELDER L. J.* 377, 388 (1995).

137. For a thoughtful but tentative attempt to distinguish a torts claim from a criminal prosecution, see generally Simons, *supra* note 128, at 719.

138. See generally Hanrahan, *supra* note 129.

139. See *id.*

140. See *id.*

141. For an excellent review of the challenges faced by assistant district attorneys in elder abuse prosecutions and the ways to address these problems, see generally BRENDA K. UEKERT, SUSAN KEILITZ, & DEBORAH SAUNDERS, *PROSECUTING ELDER ABUSE CASES: BASIC TOOLS AND STRATEGIES* 29 (2012).

142. See Kohn, *Second Childhood*, *supra* note 93, at 192.

in secret. The victims themselves are often confused and might suffer from dementia, Alzheimer's disease, or other forms of memory loss and therefore be unable to testify effectively.¹⁴³ And if all of that is not enough to trouble an assistant district attorney, imagine the frustration of an assistant district attorney when, after lengthy, complicated, and often delayed proceedings, the abuse victim dies before the case concludes. The abuse and related proceedings in themselves might actually hasten such deaths.¹⁴⁴

The states have made or should make procedural and substantive changes in order for assistant district attorneys to prosecute elder abusers more forcefully and frequently.¹⁴⁵ With regard to procedure, states should develop specialized rules and procedures to accommodate the needs of elder abuse victims. For example, courts could set early hearing and trial dates in cases involving elder abuse so that victims would not have to endure long delays. In addition, courts could develop ways to preserve the testimony of victims.¹⁴⁶ This could include the videotaping of the victims' testimony, perhaps in their nursing homes or assisted living facilities. Judges would preside, and the testimony could be under oath. This approach would keep the testimony intact and available should the victim become fully incapacitated or die.¹⁴⁷

On the substantive side, the enactment of criminal statutes relating specifically to elder abuse could conceivably aid assistant district attorneys in their work. As previously noted, proceedings and prosecutions under traditional battery statutes are sometimes difficult because emotional abuse is unreachable and, more generally, because serious problems of proof present themselves. A statute specifically directed at elder abuse would be preferable.

A good number of states have in fact enacted statutes of this sort, but their provisions vary greatly.¹⁴⁸ For starters, the very site of alleged abuse can be an issue. When shocking journalistic reports of abuse in nursing homes began appearing in the 1980s, some states hurried to enact so-called "patient abuse statutes."¹⁴⁹ Wisconsin's law regarding

143. *See id.* at 193 n.123.

144. *See id.* at 193.

145. *See id.* at 193.

146. *See Heisler, supra* note 1, at 56.

147. *See id.* at 56–57.

148. *See Polisky, supra* note 136, at 392; *see also Heisler, supra* note 1, at 52.

149. *See Polisky, supra* note 136, at 397–99.

the abuse and neglect of patients and residents is an example.¹⁵⁰ It identifies a range of care-providing facilities, including nursing homes and assisted living facilities,¹⁵¹ and case law related to the statute makes clear that the statute would apply to nursing home staff.¹⁵²

Given the amount of abuse that occurs in nursing homes and assisted living facilities, patient abuse statutes are more than appropriate. However, as most lawmakers have come to realize, elder abuse is hardly limited to nursing homes and assisted living facilities.¹⁵³ Elder abuse also occurs in the home.¹⁵⁴ Its “invisibility” in that setting makes it especially horrendous. Victims suffer behind closed doors, and frequently nobody knows of their plight. Hence, statutes that envision abuse occurring *only* in nursing homes and assisted living facilities do not suffice.

Statutes specifically criminalizing elder abuse also vary with regard to their inclusion of emotional abuse and burdens of proof.¹⁵⁵ Some continue to impose criminal liability only for physical abuse.¹⁵⁶ For obvious reasons, these statutes would be less useful than those that impose criminal liability for emotional as well as physical abuse. Emotional abuse, after all, can be every bit as harmful as physical abuse. Mental suffering, meanwhile, can be extremely difficult to prove, especially if the victim has had a stroke or suffers from dementia, Alzheimer’s disease, or other forms of memory loss.¹⁵⁷

Overall, turning to the courts with civil actions or for criminal prosecutions should be a more viable option for abuse victims than it is. Existing procedures and statutes could be improved, but courts and legislatures have been hesitant to make the necessary improvements.¹⁵⁸ Changes of this sort are complicated, but might part of the problem be that courts and legislatures do not take elder abuse seriously enough and to give it the attention it requires?

150. See WIS. STAT. ANN. § 940.295 (2023).

151. See *id.*

152. See *State v. Serebin*, 350 N.W.2d 65, 68 (Wis. 1984).

153. See Kohn, *Second Childhood*, *supra* note 93, at 178.

154. See *id.* at 178.

155. See *id.* at 191–92.

156. See *id.* at 191–92.

157. See *id.* at 192.

158. See generally Polisky, *supra* note 136, at 407–08 (discussing improvements to current states’ legislation regarding elder abuse due to its overbreadth and vagueness).

(3) Punishment

Convicted abusers of older people deserve punishment. The victims are frequently weak and unable to defend themselves.¹⁵⁹ Several older studies showed that victims are often left severely injured and permanently impoverished by the abuse they experienced.¹⁶⁰ One study showed that elder abuse victims on average die earlier than older people who are not abuse victims.¹⁶¹ In light of the terrible harm they do their victims, abusers of older people should be punished—and punished harshly.

The penalty for elder abuse should of course “fit the crime,” and, as with other felonies, the “fit” customarily involves consideration of the social harm done by the criminal act and of the state of mind of the perpetrator.¹⁶² That is, the penalty should ultimately be proportional to the seriousness of the social harm that has resulted and to the nefariousness of the perpetrator’s state of mind.¹⁶³

With regard to the social harm element, comparisons to penalties for child abuse are revealing. Penalties in some of the previously discussed state elder abuse statutes are less severe than they are for child abuse.¹⁶⁴ This is problematic. While everyone is of course concerned with harm done to vulnerable children, older people are *also* vulnerable, and harm done to them is comparably disturbing. Then, too, from a humanistic perspective, all lives are equally valuable, and the implicit suggestion that the harm done by elder abuse is less serious than the harm done by child abuse is upsetting.¹⁶⁵

As for the state of mind element, one major distinction involves whether the abuse was intentional or merely reckless.¹⁶⁶ With the former, the perpetrator has some degree of deliberate, voluntary intent, while with the latter the crime results from imprudence or

159. See Polisky, *supra* note 136, at 407–08.

160. See Heisler, *supra* note 1, at 52–53.

161. See *id.* at 53.

162. See Simons, *supra* note 128, at 720–21.

163. See *id.* at 720–21.

164. See Kohn, *Second Childhood*, *supra* note 93, at 196.

165. See *id.* at 196.

166. One state has attempted to define the perpetrator of an intentional crime as someone who “intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be.” See NEB. REV. STAT. § 28-201(1)(b) (2023).

negligence.¹⁶⁷ Reckless crimes have no foresight and demonstrate no malice.¹⁶⁸ Most elder abuse should be treated as a more serious type of felony because it is intentional, that is, because it is deliberate and voluntary.

Victims and the general public may pay little attention to the types of felonies, but if lesser penalties result, that can be troubling. These lesser penalties might very well result from assistant district attorneys' willingness to bargain for them. As noted earlier in this article, elder abuse prosecutions are especially difficult and time-consuming because of evidentiary and proof problems, and because the victims themselves are often confused or plagued by memory loss.¹⁶⁹ These complications make the cases prime possibilities for swamped assistant district attorneys who are anxious to reach a plea bargain and reduce their case-loads. More often than some would like, assistant district attorneys are receptive to elder abuse defendants "pleading down." That is, assistant district attorneys will trade a lower class of felony with a lesser penalty if the abuser is willing to plead guilty to that felony. In the process, an intentional felony might even become just a reckless one.

Plea bargaining has of course been controversial for decades.¹⁷⁰ Defenders of the practice have customarily argued that it is necessary. Without it, the argument goes, the underfunded, understaffed system would grind to a halt. Critics, meanwhile, have pointed to jurisdictions which have eliminated the practice with no obvious ill effects.¹⁷¹

Short of a complete ban on plea bargaining in elder abuse cases, limiting a ban to particularly serious and offensive cases is a possibility. Studies of victims' reactions to financial elder abuse have showed they are more tolerant of plea bargaining and the lesser sentences that might result if the amount stolen was relatively small.¹⁷² Victims of financial elder abuse are also more tolerant of plea bargaining and lesser sentences if the abuser is a friend or relative rather than a compensated caregiver.¹⁷³ Perhaps related sentiments would surface with physical

167. See generally R.A. Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615 (1987).

168. See Ty McDuffy, *Recklessness*, FINDL. (Aug. 22, 2023), <https://www.findlaw.com/injury/accident-injury-law/recklessness.html>.

169. See Uekert et al., *supra* note 141, at 5.

170. See Fine, *supra* note 167, at 615.

171. See *id.* at 616.

172. See Andrea Riederer & Jonathan M. Golding, *Perceptions of Plea Bargaining in Cases of Elder Financial Abuse*, 32 J. ELDER ABUSE & NEGLECT 217, 228 (2020).

173. *Id.* at 229.

and emotional elder abuse. Plea bargaining leading to a guilty plea with lesser penalties could be barred if the harm is severe or the abuser was a staff person in a nursing home or assisted living facility.

A conviction for elder abuse undeniably has serious ramifications. Beyond just prison time, the convicted abuser, now an “ex-con” in the eyes of many, will encounter difficulties obtaining licenses, securing housing, and finding employment.¹⁷⁴ In addition, the ultimate bargain can affect the decisions of assistant district attorneys about how to proceed if and when convicted abusers commit subsequent crimes.¹⁷⁵

These negative ramifications can, to some extent, be guaranteed if the court takes steps that will enable future identification of the offender as an elder abuser. A court could condition a sentence by prohibiting the offender from living or working near older people or near institutions that care for older people. The federal Medicaid Patient and Program Protection Act does something similar to this by excluding convicted abusers from working in any facility that receives Medicare or Medicaid monies.¹⁷⁶ According to the statute, the minimum exclusion shall be for not less than five years, but the Department of Health and Human Services Office of Inspector General has discretion to extend the five-year period.¹⁷⁷ Sentencing in individual cases could go even further and permanently ban a convicted abuser from *ever* working in a nursing home or assisted living facility.¹⁷⁸

If the actual sentences for abusers under the states’ elder abuse statutes seem too light, perhaps special sentencing enhancements would help. Assistant district attorneys commonly employ these enhancements with repeat offenders, and three-strike laws can also be used to make prison sentences even lengthier.¹⁷⁹ One sentencing enhancement that could be especially useful for abusers of older people is the hate crime approach. Some penal codes set off hate crimes as a

174. One survey in five cities found that 65 percent of those employers would not knowingly hire somebody who had served time. *See* DAVID RAY PAPKE, CONTAINMENT AND CONDEMNATION: LAW AND THE OPPRESSION OF THE URBAN POOR 48 (2019) [hereinafter PAPKE, CONTAINMENT & CONDEMNATION].

175. *See id.* at 37–39.

176. *See* Exclusion of Certain Individuals and Entities from Participation in Medicare and State Health Care Programs, 42 U.S.C. §1320a-7(a)(2).

177. *See* 42 U.S.C. §1320a-7(c)(3)(B).

178. *See* Polisky, *supra* note 136, at 390.

179. PAPKE, CONTAINMENT & CONDEMNATION, *supra* note 174, at 43.

separate crime, but a hate crime conviction more typically adds one or more years to the sentence for another crime.¹⁸⁰

In the words of two prominent scholars, a hate crime could be described as “an age-old problem approached with a new sense of urgency.”¹⁸¹ That is to say, some violent crime has long been motivated by bias, resentment, and bigotry regarding persons belonging to groups the perpetrators hate. However, crimes of this sort grew more troubling during the later decades of the twentieth century and eventually came to be seen as a different type of violent crime.¹⁸²

The evolution of the hate crime notion involved more than the undeniable ugliness of certain varieties of criminal conduct. Changing organizational goals and social forces also played major roles. In particular the concerns of the African-American civil rights movement, the women’s movement, and the gay/lesbian liberation movement dovetailed with a sense that certain groups were vulnerable to “hate crimes.”¹⁸³ These movements’ sensitivities and goals eventually resonated with legislators on the federal and state levels.

Would hate crime legislation be constitutional? The Supreme Court of the United States signed off on hate crime legislation in *Wisconsin v. Mitchell*.¹⁸⁴ Speaking through Chief Justice William Rehnquist, the unanimous Court rejected the arguments of a young man whose conviction for aggravated battery had been increased since he had targeted his victim because of the latter’s race.¹⁸⁵ The relevant Wisconsin statute authorized this type of sentence enhancement whenever a perpetrator intentionally selected a victim because of that person’s race, religion, color, disability, sexual orientation, national origin, or ancestry.¹⁸⁶ This statute, Chief Justice Rehnquist and his brethren thought, did not violate the defendant’s First Amendment protections by punishing offensive thought.¹⁸⁷ The Court also declined to revisit arguments made in the lower courts that the Wisconsin statute was susceptible to a Fourteenth Amendment challenge because of its vagueness.¹⁸⁸

180. See Ryken Grattet & Valerie Jenness, *The Birth and Maturation of Hate Crime Policy in the United States*, 45 AM. BEHAV. SCIENTIST 668, 678 (2001).

181. *Id.*

182. *See id.*

183. *See id.* at 671.

184. *See Wisconsin v. Mitchell*, 508 U.S. 476, 476 (1993).

187. *Id.*

186. *See* WIS. STAT. § 939.645 (2023).

187. *See Wisconsin*, 508 U.S. at 482.

188. *Id.* at 481.

Especially intriguing in Rehnquist's opinion was his sense that hate crimes harm more than the victims themselves.¹⁸⁹ These crimes, he pointed out, are destructive of public safety in that they might provoke retaliation and incite community unrest.¹⁹⁰ Furthermore, he thought, members of the victims' perceived group are likely to suffer "distinct emotional harm."¹⁹¹

Legislation regarding hate crimes has changed and expanded as the very notion of a "hate crime" has evolved.¹⁹² Federal hate crime law began with Title I of the Civil Rights Act of 1968.¹⁹³ The statute prohibits and punishes violent interference with certain civil rights, such as serving as a juror or using a common carrier, if the interference is motivated by bias against a person because of race, color, religion, or national origin.¹⁹⁴ In 1990 Congress enacted the Hate Crime Statistics Act, which requires the Attorney General to collect and publish data about hate crimes.¹⁹⁵ Then, in 2009, Congress enacted the Hate Crimes Prevention Act.¹⁹⁶ Prompted by the horrendous crimes perpetrated against Matthew Shepard and James Byrd, Jr., this statute expanded prior federal law by including crimes committed because of gender, sexual orientation, gender identity or disability.¹⁹⁷

Note that nothing in all of this federal lawmaking ever identified older people as potential targets for hate crimes. When the idea surfaced at one point, it was dismissed as talk about "octogenarians."¹⁹⁸ No testimony was heard about the possibility of hate crimes against older people, and nobody even suggested that such testimony ought to be heard.¹⁹⁹

State legislation is better, but not all that much so. Forty-five of the states have hate crime laws,²⁰⁰ but they are hardly uniform. All of

190. *Id.* at 484.

190. *Id.* at 488.

191. *Id.*

194. Grattet & Jenness, *supra* note 180, at 680.

193. 18 U.S.C. § 245.

194. *See id.*

195. Hate Crimes Statistics Act, 28 U.S.C. § 534.

196. *See* Matthew Sheppard and James Byrd Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249.

197. *See id.*

198. *See* Grattet & Jenness, *supra* note 180, at 675.

199. *See id.*

200. The states without hate crime laws are Arkansas, Indiana, North Dakota, South Dakota, and Wyoming. *See State Hate Crimes Statutes*, BRENNAN CTR. FOR

the states with hate crime legislation address crimes motivated by race, ethnicity, and religion.²⁰¹ Most also list gender, sexual orientation, and disability.²⁰² Almost completely missing from the state legislation's lists of protected categories is age, as only a handful of states indicate that it could prompt a hate crime.²⁰³

In general, federal and state hate crime laws do not envision elder abuse *per se* as a hate crime.²⁰⁴ The federal statutes say nothing that would be relevant, and while some state statutes include "age" as a possible motivating factor for a hate crime, these states are very much the exception rather than the rule.²⁰⁵ As one scholar put it a dozen years ago, "[t]o date, violent crime motivated by age is not part of the national discourse,"²⁰⁶ and not much has changed in the intervening years.

Assuming they had reflected on the law's failure to recognize hate crimes against older people, some would say that this failure made sense. After all, except for an occasional gerontophobe, few people who beat and berate older people consciously hate their victims because of their ages. They do not think to themselves: That person is old, I hate old people, and therefore I should abuse that person.

In reality, most hate crime legislation is not animus-based but rather opposed to discrimination more generally.²⁰⁷ That is, most federal and state statutes do not require that a defendant act with prejudice or bias toward a specific victim.²⁰⁸ Instead, the statutes require only that the perpetrator select a victim because of that victim's perceived identity class.²⁰⁹ "Hate crime" might in fact not be the best label for the type of crime federal and state legislators have in mind. A hate crime might be better thought of as a crime grounded in general bias or distaste. One

JUST. (July 2, 2020), <https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes>

201. See Irene Byhovsky, *Financial Crimes Against the Elderly as a Hate Crime in New York State*, 81 ALB. L. REV. 1139, 1141 (2018).

202. See *id.*

203. See *id.* at 1141–42.

206. See *id.* at 1142.

207. See FLA. STAT. § 775.085 (2023); IOWA CODE § 729A.2; MINN. STAT. § 609.749.

206. Helia Garrido Hull, *The Not-So-Golden Years: Why Hate Crime Legislation Is Failing a Vulnerable Aging Population*, 2009 MICH. ST. L. REV. 387, 407 (2009).

207. See Byhovsky, *supra* note 201, at 1143.

208. See Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. DAVIS L. REV. 1073, 1102 (2002).

209. See Byhovsky, *supra* note 201, at 1144.

scholar has suggested that a hate crime is perhaps better understood as “a crime of opportunity.”²¹⁰

This understanding of hate crimes could clearly be applicable to most physical and emotional elder abuse. Most perpetrators feel a general discomfort with older people, particularly those who are frail and weak.²¹¹ When an “opportunity” presents itself for beating and berating older people, abusers commit a hate crime against them. Elder abusers could then be subjected to enhanced criminal penalties.

The goal, of course, is not to be as mean to abusers of older people as the abusers are to older people but rather to penalize the abusers in stern, tailored ways. As previously noted, many older people are frail, isolated, and especially vulnerable. Many are seriously and permanently harmed by the abuse they experience and are ill-equipped to be witnesses during drawn-out lawsuits and prosecutions. Abusers take advantage of these victims. Bars on plea bargaining and concomitant sentence reductions in elder abuse prosecutions, as well as the forceful punishing of abusers through hate crime prosecutions, could send a message: The physical and emotional abuse of older people is intolerable.

Conclusion

Good intentions abounded in the various changes in elder abuse law and legal proceedings that were made starting in the 1980s, but good intentions have not been enough to reduce, much less eliminate, elder abuse in the United States. Violent crime against older people is generally increasing,²¹² and physical and emotional elder abuse is a growing public health and human rights problem in the United States.²¹³

More effective laws regarding the reporting, prosecution, and punishment of elder abuse are possible. Reporting of elder abuse need not be modeled on the approach used for child abuse. Carefully designed elder abuse reporting systems should rely to a greater extent on law enforcement and should facilitate reporting by abuse victims

210. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 872 (2014).

213. See Byhovsky, *supra* note 201, at 1149.

212. See Maria Cramer, *74-Year-Old's Killing Underscores Rise in Attacks on Older New Yorkers*, N.Y. TIMES (Feb. 19, 2023), <https://www.nytimes.com/2023/02/19/ny-region/new-york-crime-elderly-safety.html>.

213. See Reinberg, *supra* note 7.

themselves. In the courts, procedures should be developed that enable prosecutions of abusers to proceed more swiftly and preserve victims' testimony if memory problems or death are likely. When abusers are convicted, the penalties should be as harsh as they are for other serious intentional felonies. Plea bargaining that leads to reduced sentences should be limited, and, if appropriate, punishment for crimes committed because of the victim's age should be increased as they would be for hate crimes perpetrated because of race, ethnicity, religion, gender, or sexual orientation.

Why have these plausible steps not been systematically undertaken? Part of the answer involves the glacial nature of change in the law and legal institutions. This feature of the law is one of its great strengths and helps contribute to societal stability. But the slowness with which law and legal institutions change sometimes stalls much-needed improvements.

The halting manner of legal change is evident in the reporting, prosecution, and punishment of elder abuse. For example, when lawmakers finally recognized the dangers of child abuse and adjusted the law to address them, the use of alternative approaches for elder abuse became difficult to imagine. Then, too, standard types of felonies were established parts of state criminal codes, and assistant district attorneys became accustomed to bargaining within those types. A new criminal statute related to just the physical and emotional abuse of older people, would have been a sudden break with the way things were done. As for hate crime legislation, the idea itself remains controversial in some circles,²¹⁴ but to the extent hate crime statutes are comfortably established in the law, lawmakers do not imagine sentencing enhancements because the perpetrators were biased against older people. To engage briefly in a variety of personification, the law is proud of its contribution to social stability, but when all is said and done, the law is stubborn.

More pointedly, the slowness and limitations of change in elder abuse law relate to the biases and obliviousness regarding older people which are endemic in American life. Politicians and policymakers often fail to appreciate the agency of older people, including even those who are isolated. Prosecutors do not prioritize elder abuse, thinking that it

214. See generally Carter T. Coker, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64 VAND. L. REV. 271 (2011).

is something that families can address and even dismissing its importance in general. Legislators do not recognize the hatefulness of elder abuse and therefore do not enact laws that punish elder abuse harshly enough.

If we are to craft effective legal responses to the problem of elder abuse, we must first look unflinchingly in the mirror. We have to appreciate how common ageist attitudes and assumptions are. In particular, we have to recognize that these attitudes and assumptions can dwell even within our attempts to reduce elder abuse. Any hope to combat our pervasive elder abuse problem using legal reform must begin with a deeper understanding of older people and the lives they live.

