

**THE 51ST STATE—THE “STATE OF DENIAL”: A COMPARATIVE EXPLORATION OF PENAL STATUTORY RESPONSES TO “CRIMINAL” ELDER ABUSE IN CANADA AND THE UNITED STATES<sup>1</sup>**

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*Elder abuse is a term common to both the Canadian and American lexicons. Its meaning is similarly debated, discourses around the identifiable types of elder abuse*

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1. The title “The 51st State” as a state of denial was inspired by an interview on the Canadian Broadcasting Corporation with Kurt Vonnegut. *The Current* (Canadian Broadcasting Corporation radio broadcast Feb. 1, 2006), [http://www.cbc.ca/thecurrent/media/200602/2006020/the\\_current\\_sec3.ram](http://www.cbc.ca/thecurrent/media/200602/2006020/the_current_sec3.ram) (last visited Mar. 13, 2006).

are consistent, and the aging demographics are nearly identical in both countries. Yet the similarities in the civil aspects of elder abuse and neglect debates do not extend into the criminal justice discourse. Rather, Canada and the United States have had very different experiences around issues of penal elder abuse legislation. In this article, based on a presentation given at the University of Illinois College of Law, the authors explore the differences in the criminal elder justice debate between the United States and Canada. They examine both legal discourses, substantive laws and structural underpinnings of Canadian and American experiences in criminal elder justice. They challenge Canadian legal silence and conclude that Canada must enter into a vigorous analysis of criminal justice issues regarding older adults. They suggest that current Canadian criminal laws may require reform in order to better respond to issues of elder abuse and neglect in the modern context.

## I. Introduction

“Elder abuse” is a term that is widely used in both Canada and the United States. Scholars have similar debates over its meaning in both countries, and the aging demographics are nearly identical. Yet Canada and the United States have had very different experiences around issues of penal elder abuse legislation.

Notably, the United States has experienced a vibrant and substantive discussion of the issues related to the criminality of elder abuse over the course of approximately forty years. Many states have enacted specific penal statutes with “elder abuse” or “vulnerable adult” criminal charges; others have chosen to address the criminality of elder abuse by way of mandatory charging, “no drop” policies, judicial case management or elder-specific sentencing principles, or a combination of the foregoing.<sup>2</sup>

By contrast, the few whispers in Canada about elder abuse and criminality are primarily experiential and lacking in evidence-based research.<sup>3</sup> Sometimes, silence must be examined even more thoroughly than debate.

This paper will examine Canadian and American differences in legal discourse and substantive law surrounding criminal elder abuse issues, in an attempt to explain the notable Canadian legal silence.

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2. For an excellent discussion of the various American state responses, see Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77 (1998).

3. When discussed at all, these issues tend to be raised as anecdotal experience by older adults, specific lawyers, or law enforcement professionals. See *infra* Part II.B.

The key questions it will address are:

- What is the state of the law in Canada regarding criminal elder abuse or neglect, and what analogous, but elder specific criminal provisions, exist in the United States?
- What factors may have contributed to the differences in the Canadian and American experience related to criminal elder abuse and neglect?

This article by no means purports to provide an exhaustive analysis of the law in each American jurisdiction or of the storied American legal history leading to the strong institutions now in place for older Americans.<sup>4</sup> Rather, it seeks to shed light on a dark void in Canadian legal discourse and to spark a debate around the relative merits of creating specific criminal elder abuse offenses in Canada.<sup>5</sup> This exploration concludes that Canadians need to start the same public conversation that the Americans have been engaged in for nearly four decades.

This public debate in Canada will naturally be informed by different legal traditions, social values, and governmental infrastructures than those of the United States. As a result, Canadians may arrive at different conclusions on issues around criminal elder abuse than Americans. However, the need for a national discourse on this particular subject in Canada is both critical and long overdue.

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4. See, e.g., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA (Richard J. Bonnie & Robert B. Wallace eds., 2003); Candace J. Heisler & Lori A. Stiegel, *Enhancing the Justice System's Response to Elder Abuse: Discussions and Recommendations of the "Improving Prosecutions" Working Group of the National Policy Summit on Elder Abuse*, 14(4) J. ELDER ABUSE & NEGLECT 31 (2002); Thomas J. Hierl, *The Prevention, Identification, and Treatment of the Elder Abuse Act of 1987: Is It a Proper Federal Response to Elder Abuse?*, N.Y.L. SCH. J. HUM. RTS. (1989); The American Bar Association Commission on Law and Aging, <http://www.abanet.org/aging> (last visited Mar. 13, 2006); Administration on Aging, [http://www.aoa.dhhs.gov/eldfam/Elder\\_Rights/Elder\\_Abuse/Elder\\_Abuse.asp](http://www.aoa.dhhs.gov/eldfam/Elder_Rights/Elder_Abuse/Elder_Abuse.asp) (last visited Mar. 13, 2006).

5. The Toronto-based Advocacy Centre for the Elderly is Canada's only legal aid office dedicated to advocating for older adults, and is jurisdictionally bound to Ontario. They have been a rare voice in calling for discussion on this subject. See, e.g., JUDITH WAHL & SHEILA PURDY, ADVOCACY CENTRE FOR THE ELDERLY AND COMMUNITY LEGAL EDUCATION ONTARIO (2005), available at <http://www.advocacycentreelderly.org/elder/pubs.htm>.

## II. State of the Law

What is the state of the law in Canada regarding criminal elder abuse or neglect, and what analogous, but elder specific criminal provisions, exist in the United States?

### A. Legal Frameworks

Unlike in the United States, where much of the criminal law is governed at the state level, Canada has a single governing penal statute. The Criminal Code<sup>6</sup> (CC) is a comprehensive and universally applicable codification of all criminal offenses<sup>7</sup> in Canada. Changes to the CC can only be made at the federal level, and once the statute is revised, application of the change is countrywide.<sup>8</sup>

As such, changes to the CC may be understood as normatively different from changes to American state criminal legislation. Indeed, something of the Canadian national identity is infused into CC changes. The statement “this is what we as a country have decided is criminal” has arguably greater, or at least different, heft than single-state penal changes. A government publication puts it this way: “Our laws mirror those values that all Canadians regard as important and demonstrate how they will be protected.”<sup>9</sup>

### B. The Deafening Silence: Criminal Elder Abuse Discourse in Canada

The literature surrounding the criminality of elder abuse typically contains no more than vague or general statements. In one lengthy Health Canada report, the only substantive reference to the criminal sanction of elder abuse is the following: “A number of legal remedies are available to Canadians in dealing with the problem of elder abuse and neglect. General legal safeguards found in the Crimi-

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6. Canada Criminal Code, *available at* <http://www.canlii.org/ca/sta/c-46/> (last visited Mar. 13, 2006).

7. There are some exceptions within other statutes which may provide criminal or quasi-criminal purview in limited matters.

8. It is also notable that in Canada any case may be appealed to the Supreme Court of Canada, including any type of criminal matter.

9. Statistics Canada, Canada E-book, [http://142.206.72.67/04/04b/04b\\_000\\_e.htm](http://142.206.72.67/04/04b/04b_000_e.htm) (last visited Mar. 13, 2006).

nal Code deal with physical abuse, assault and neglect.”<sup>10</sup> Notably, the Ministry of Health generated this foundational report, indicating that Canadians generally perceive elder abuse as a health, or possible civil law issue, rather than a criminal justice issue.

A similarly spartan review of the CC’s applicability to elder abuse cases can be found in the Canadian Department of Justice’s Fact Sheet.<sup>11</sup> Although it provides a list of the “many Criminal Code provisions that may be applicable in cases of abuse of older adults,” it also notes that, “to date, much of the response to abuse of older adults has focused on the welfare and protection of older adults.”<sup>12</sup>

Joan Harbison, who is somewhat more vocal on this issue, is one of the few Canadian academics engaged in a preliminary exploration of criminality and elder abuse in Canada.<sup>13</sup> In a coauthored paper, Harbison and her colleagues write:

With some hesitation, we support the idea that the primary legal response to physical and sexual abuse should be through the criminal justice system. Taking such an approach breaks down the notion that “elder abuse” is a single phenomenon to which a single Act can adequately respond. It also helps eliminate age as a “master status[.]” defining all experiences relating to the elderly as essentially similar: violence should sometimes be treated simply as violence, and in particular spousal assault should be treated as spousal assault, whatever the age of the victim.<sup>14</sup>

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10. L. McDONALD & A. COLLINS, HEALTH CANADA, FAMILY VIOLENCE PREVENTION UNIT, ABUSE AND NEGLECT OF OLDER ADULTS: A DISCUSSION PAPER 43 (2000).

11. DEP’T OF JUST. CAN., ABUSE OF OLDER ADULTS: A FACT SHEET (2006), [http://www.justice.gc.ca/en/ps/fm/adultsfs.html#\\_edn39](http://www.justice.gc.ca/en/ps/fm/adultsfs.html#_edn39) (last visited Mar. 13, 2006).

12. *Id.* Criminal Code provisions that may apply in cases of financial abuse include: theft (§§ 323, 328–332, 334), criminal breach of trust (R.S.C. § 336), extortion (R.S.C. § 346), forgery (R.S.C. § 366), fraud (R.S.C. § 380(1)). Criminal Code sections that might apply in cases of physical and sexual abuse include: failure to provide the necessities of life (R.S.C. § 215), criminal negligence causing bodily harm or death (R.S.C. §§ 220–221), unlawfully causing bodily harm (R.S.C. § 269), manslaughter (R.S.C. §§ 234, 236), murder (R.S.C. §§ 229–231, 235), counseling suicide (R.S.C. § 241), assault (R.S.C. §§ 265–268), sexual assault (R.S.C. §§ 271–273), forcible confinement (R.S.C. § 279(2)), breaking and entering (R.S.C. § 348), unlawfully in a dwelling (R.S.C. § 349). Some of the Criminal Code provisions that may apply in cases of psychological abuse include: criminal harassment (R.S.C. § 264), uttering threats (R.S.C. § 264.1), harassing telephone calls (R.S.C. § 372(2)–(3)), intimidation (R.S.C. § 423).

13. Charmaine Spencer, Adjunct Professor and Research Associate at Simon Fraser University’s Gerontology Research Centre has also written extensively on the subject.

14. JOAN HARBISON ET AL., HEALTH LAW INST., MISTREATING ELDERLY PEOPLE: QUESTIONING THE LEGAL RESPONSE TO ELDER ABUSE AND NEGLECT: SUMMARY DOCUMENT 43 (1995).