

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

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

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

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I. Introduction

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

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

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

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

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

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

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

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

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

II. Background

A. The Growing Elder Abuse Problem

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

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

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

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

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

12. *Id.*

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

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

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

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

The most recent data compiled by the state of Illinois in its Fiscal Year 2005 Elder Abuse and Neglect Annual Report shows a steady increase in reports of elder abuse since 1996.¹⁷ The largest increase in reports of abuse occurred between Fiscal Years 1998 and 1999.¹⁸ This increase is likely due to a mandatory reporting law introduced the year before.¹⁹ For Fiscal Year 2004, there were 8359 reported cases of elder abuse reflecting an increase of 8.9% over Fiscal Year 2003—the largest increase since 1999.²⁰ The rise in reported abuse demonstrates that current prevention strategies are not working.

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

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

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

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

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

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

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

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

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

B. Defining Elder Abuse

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

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

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

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

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

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

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

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

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

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