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"There Oughtta Be a Law": A Survey of Legislative Responses to Elder Abuse

By Gail Chirnoff Conway

While a loving 77-year-old grandmother is preparing Thanksgiving dinner for her family, her 8-year-old adored grandson visits her. He asks her to drive him home, and she leaves the melting turkey and unbaked piecrust to comply with his request. But, somewhere along the road, he attempts to kill her by choking her and finally succeeds in his gruesome task by holding her head under water in a stream. His motive is to get enough of her money to buy clothes and drugs.

This incident is a particularly shocking example of the victimization of older persons. Evidently abuse and neglect of the elderly take place hundreds of thousands of times every year in our country. Physical, emotional, verbal, or sexual abuse is a component of this picture, as well as many instances of neglect that may place an older person in jeopardy.

In addition to being subject to physical and emotional abuse, older persons are commonly victims of financial exploitation. Family members or others may augment their incomes by improperly “sharing” assets of an older person; they may resort to joint bank accounts and powers of attorney in these ventures. Seniors are the primary targets of various schemes ranging from local home repair scams to multibillion-dollar telemarketing swindles.

The examples noted above suggest the tangled skein of greed, family pathology, ageism, and the vulnerabilities associated with growing older in society’s consciousness under the label “elder abuse, neglect, and exploitation.” In an attempt to combat this challenging problem, all states have developed laws. They range from those that provide basic protections for vulnerable adults to others that offer complex legal remedies for the various manifestations of elder abuse and exploitation.

In this article I describe some of these statutory efforts in order to illuminate our current location in this unhappy landscape and to give examples for further development in new directions. Although every state has developed some law to protect the most vulnerable of adults, the

major focus here will be on some of the newer and more innovative statutory provisions.

The extent and manner each jurisdiction has chosen to address these issues have wide variations. Almost every state has recently adopted specific criminal laws related to elder abuse and exploitation. Many jurisdictions have enacted measures to make the legal system more accessible to older persons. Other recent statutes provide support for victims of abuse and exploitation by expressly creating a civil cause of action to award damages to the victim. In sum, a broad array of law—with little uniformity among the states—endeavors to remedy the demanding problem of elder abuse and exploitation.

I. Laws Common to All, or Almost All, States

All states and the District of Columbia have established some form of adult protective services, typically administered through the social services structure.5 The adult protective service agency investigates reports of abuse, neglect, and exploitation and fashion remedies as appropriate. A second area in which all jurisdictions have developed laws is that of long-term care ombudsman programs that allow access to federal funding and that an amendment to the Older Americans Act mandates.6 These programs assign advocates to represent long-term care facility residents who may have suffered some form of abuse, neglect, exploitation, or violation of their rights.

All states have—in addition to the aforementioned statutory provisions—laws that provide for some version of guardianship. These statutes grant authority for the appointment of a guardian or conservator to oversee the personal and financial affairs of incompetent persons.” Almost every state has enacted statutes that require designated professionals (typically physicians, nurses, and other health care workers) to report suspected instances of elder abuse and exploitation to appropriate authorities.8 The obligation to report such suspected activities may be extended to a wide range of individuals; for example, Georgia places this requirement on employees of financial institutions.9

II. Statutes That Criminalize Abuse and Financial Exploitation of Older Persons

A substantial majority of states have developed laws (in addition to a general penal code) that specifically criminalize elder abuse.10 But these laws are by no means standardized and differ from state to state in a surprising number of particulars. For example, while many states have established as a crime the abuse, neglect, or exploitation of older persons, the laws may characterize the victims of these acts quite differently. They define victims most often as “endangered or impaired” or “vulnerable adults.”* There are other states’ laws that simply describe victims as “older” or “elderly” persons; the Texas Penal Code, for instance, designates as crimes the commission of certain offenses against an “elderly individual.”*#

Laws in the various states may classify enumerated crimes against older victims as either felonies or misdemeanors, varying with the nature of the offense. They

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7 See, e.g., N.Y. MENTAL HYG. LAW § 81.02 et seq. (McKinney 1996).
10 See infra app. A.
may or may not specifically label perpetrators as "caregivers."13

Designated crimes other than the generic "abuse, neglect and exploitation" also appear in various state codes. For example, a law of the state of Washington recognizes "homicide by abuse" of a dependent adult victim as a crime.14 California law lists isolation as one form of abuse, which includes preventing an older adult from receiving mail or telephone calls.15

A few states include emotional abuse or mental suffering as triggering factors for criminal charges; one example is a California statute that prescribes penalties where a perpetrator has subjected an older or dependent adult to "mental suffering."16 Another example is Michigan's statute that provides for felony convictions where the defendant has intentionally caused physical harm or serious "mental harm" to a vulnerable adult.

Criminal penalty for financial exploitation of older persons is often an element of states' legislative efforts in this area, but in many instances only in very general terms and without specific recognition of the various means by which older persons become victims of these activities. Several states simply incorporate the term "exploitation" among other potential offenses; for example, Delaware's law assigns criminal penalties where there has been "exploitation of an infirm adult."18 However, Minnesota law criminalizes as a gross misdemeanor deceptive or unfair trade practices that perpetrators direct at a senior citizen and that cause or will likely cause a substantial loss of assets.19

Lucrative scams that telemarketers primarily direct against older persons have encouraged some state legislatures to create laws prohibiting such activities. However, such laws will likely have limited effectiveness since these activities typically operate on a national scale, involving victims in many states, and thus federal law can deal with them more successfully.20

Another area of crimes against older persons is that of sexual abuse and exploitation. Criminal codes of several states have expressly included these offenses as punishable acts. Florida law designates as felonies "lewd or lascivious offenses committed upon or in the presence of an elderly person."21 A Maryland statute lists sexual abuse by a caregiver or a household or family member among criminal offenses.** A Nebraska law names sexual abuse of vulnerable adults among proscribed acts.23

New York has taken an additional approach to the victimization of older persons by including persons who are 60 years old or more as a protected class in its hate crimes law. New York may charge a perpetrator with a hate crime where that person has committed a specified offense because of a belief or perception regarding some characteristic of the victim, including the victim's age.24

In a developing area of the law, advances in modern science are the basis

13 See, e.g., 18 PA. CONS. STAT. ANN. § 2713 (West 2000) ("(a) . . . A caretaker is guilty of neglect of a care-dependent person . . . ").
14 WASH. RN. CODE ANN. § 9A.32.055 (West 2000).
17 MICH. COMP. LAWS § 750.145(n)(1), (2) (Supp. 2000).
19 MINN. STAT. ANN. § 609.2336 Subd. 2 (West Supp. 2001). For a discussion of civil remedies for consumer fraud, see section VII.
21 FIA. STAT. ANN. § 825.1025 (West 2000).
24 N.Y. PENAL LAW § 485.05 (McKinney 2000). Louisiana has a similar law, LA. REV. STAT. ANN. § 14:107.2 (West 1997).
for a Nevada statute mandating that a defendant convicted of abuse or neglect of an older person provide a blood sample for the purpose of creating a genetic “fingerprint” for future identification.25

III. Enhanced Penalties for Elder Abuse

Many states have established laws that give special consideration to punishment of crimes affecting older persons.26 Enhanced penalties, such as longer prison sentences or increased fines, are features of most of these laws. For example, Rhode Island law includes enhanced penalties for designated crimes that caregivers and others perpetrate; one specified crime is breaking and entering the dwelling of a person 60 or older while that person is on the premises. The penalty for the first offense is a prison sentence of four to twenty years and a possible fine of up to $15,000. Restitution or up to 500 hours of community service is mandatory.27

Similarly a Louisiana statute provides enhanced penalties for certain specified crimes against the elderly and orders a minimum sentence of five years with no parole in such cases. Lack of knowledge of the victim’s age is no defense.28 Enhanced penalty for the crime of assault of an older person is a feature of Connecticut law, which also forbids suspension or reduction of sentences for the offense.29

In Hawaii a convicted defendant may be subject to an extended term of imprisonment when the victim of the offense is an older person. If the defendant is not sentenced to an extended term, and the offense led to the death or serious injury of a victim 60 or older, the law prescribes a mandatory minimum term of imprisonment without possibility of parole.30

A Nevada statute prohibits any probation or suspension of sentence in cases where a person is convicted of wrongfully taking property from a victim who has any age-related infirmity.31 Florida law reclassifies offenses in cases of assault and battery when the victim is 65 or older. For example, the law elevates aggravated battery of an elderly person from a felony of the second degree to a felony of the first degree.32

IV. Preventing Legal Representatives’ Financial Abuse of Elder Persons

One common vehicle for exploitation is the misuse of powers of attorney.33 Addressing this problem, a Pennsylvania statute relieves persons of potential liability for not complying with the instructions of an attorney-in-fact where there is reasonable cause not to; “reasonable cause” includes instances where a third party submits to local protective services a good-faith report concerning abuse, neglect, exploitation, or abandonment of the principal.34

Utah law protects property through a provision that forbids a “person in position of trust and confidence” from using or attempting to obtain through deception and intimidation an elder person’s funds for the benefit of someone other than the owner.35 Another approach to prevent exploitation appears in the laws of Arizona. The state enacted disclosure requirements for proposed guardians and conservators; candidates for these roles must reveal any past felony convictions, disclose whether they serve in a similar capacity for any other principals, and

26 See infra app. A.
27 R.I. GEN. LAWS § 11-8-2.3 (2000).
28 LA. REV. STAT. ANN. § 1450.1 (West 1997).
33 See Federman & Reed, supra note 3.
divulge the nature of the relationship with the intended ward and the circumstances under which the two parties met.\(^\text{36}\)

**V. Background Checks for Caregivers**

A majority of the fifty states have laws requiring criminal background checks of persons applying for employment as caregivers of older adults.\(^\text{37}\) Again these laws are not uniform and differ not only in mandated procedures but also as to classes of person they affect.

Several states have statutes that explicitly forbid nursing homes and other facilities from hiring applicants who have a record of criminal convictions. Missouri classifies as a misdemeanor the hiring of such persons.\(^\text{38}\) Texas and Pennsylvania also have established a barrier to obtaining employment as a caregiver based on past convictions for designated crimes.\(^\text{39}\) In contrast, a Georgia statute, although similarly requiring a criminal background check for applicants, allows nursing homes to hire persons with criminal records (but the statute does not oblige the facilities to do so and allows them to terminate any such employees with impunity).\(^\text{40}\) Several states mandate fingerprint checks as part of the background investigation.\(^\text{41}\)

Some state codes have expanded criminal background checks to encompass applicants for jobs other than caregivers in nursing homes or other residential facilities. For example, a Louisiana law mandates such safeguards for prospective employees of adult day care facilities as well as for licensed ambulance personnel.\(^\text{42}\) In Massachusetts those providing services for older persons in the home or other community settings must make criminal offender record information available.\(^\text{43}\) Applicants for licenses to operate facilities are also subject to similar scrutiny in some states.\(^\text{44}\)

Some jurisdictions require volunteers who provide services for older persons to undergo criminal background checks. For example, Massachusetts law specifies that entities providing care for elderly persons must obtain criminal record infor-
mation not only for employing individuals but also “prior to accepting such individual as a volunteer.” In contrast, Virginia specifically excludes volunteers from the necessity of background investigations.

VI. Expedited Legal Process for Older Persons

Several states have enacted statutes to smooth the road to the courts and the legal process for older persons. One mechanism in this effort is the provision for speedier trials where an older person might be a victim, witness, or plaintiff in a case, including cases involving abuse. For example, a Michigan law makes speedy trials available where a victim is 65 or older, and a New Hampshire statute provides for “speedy trials” for older victims and witnesses. Rhode Island extends this idea to civil actions by accelerating trials at the request of either a plaintiff or defendant who meets the minimum age requirement of 65 years.

Another vehicle some state statutes use to assist older victims with the legal process is abrogation of traditional privileges in testifying (such as the physician-patient privilege, which might permit a physician not to testify at trial regarding details of a patient’s condition or treatment). One state that allows abrogation of such privileges is Arkansas in cases involving abuse, sexual abuse, or neglect of an endangered or impaired adult. In the District of Columbia judges may waive privileges in cases involving persons who are “alleged or determined to be in need of protective services.”

VII. Civil Actions for Older Victims of Abuse, Neglect, and Exploitation

Although traditional causes of action such as negligence or fraud are available for victims to seek remedies in civil court, older persons must contend with extra obstacles in negotiating the difficult terrain of litigation. Physical or mental impairments might complicate the litigation process. Fear of retaliation by caregivers, or fear of institutionalization following loss of the caregiver’s services, also creates barriers. Further, lawyers may be reluctant to represent clients in cases where the fee potential is limited and the client may not survive a protracted action.

A small group of states have enacted pioneering legislation to encourage civil actions in cases of elder abuse and exploitation. Arizona has been a leader in this effort; there a person who wrongfully takes title, control, use or management of a vulnerable adult’s property is not only guilty of the crime of theft but also subject to treble monetary damages in a civil action. Other provisions of Arizona law extend the statute of limitations to seven years for these civil actions and allow for survival of the action even after the victim’s death. Arizona law also precludes persons convicted in a criminal proceeding from denying certain allegations in a subsequent civil proceeding where the plaintiff is an incapacitated or vulnerable adult.

45 See supra note 43.
46 Va. Code Ann. § 32.1-126.01A (Michie 1997 & Supp. 2000) (“The provisions of this section shall not apply to volunteers who work with permission or under the supervision of a person who has received a clearance pursuant to this section.”).
47 See infra app. C.
50 See infra app. D.
52 D.C. Code Ann. § 6-2511 (1995). A few states have created hearsay exceptions for frail elders so that they need not testify in person at trial. See, e.g., Cal. Evid. Code § 1380 (West 2001). However, the Florida Supreme Court struck down Florida’s attempt to create such an exception as violating the defendant’s right to confrontation. Connors v. State, 748 So. 2d 950 (1999); Fla. Stat. Ann. §90.803(24) (West 1999).
53 See infra app. E.
55 Id. § 46-455.
Similarly a Florida statute grants a cause of action to elderly victims of abuse, neglect, or exploitation. Oregon law authorizes a plaintiff who is 65 or older to seek damages in cases where the plaintiff has been a victim of physical or fiduciary abuse.

Some jurisdictions specifically encourage civil actions where older persons have been victims of unfair or deceptive trade practices. An Indiana statute provides that an elderly person relying upon an “uncured or incurable deceptive act,” including (unexpectedly) “an act related to hypnotism,” may bring an action to recover treble damages. New York has an additional civil penalty for consumer frauds against elderly persons.

The trade practice laws typically provide not only recovery of damages to a prevailing plaintiff but also the award of attorney fees and costs. These provisions, along with those I noted above, create a more favorable climate for lawyers to undertake representation of older victims.

VIII. Public Information and Education to Prevent and Discover Elder Abuse

Several states have adopted education and training as an essential vehicle in the effort to prevent and bring to light the problem of elder abuse. For example, the Iowa Department of Elder Affairs has a mandate to conduct public information programs and to provide special training for persons who are likely to come into contact with situations involving abuse. Minnesota law provides for consumer education concerning telemarketing fraud.

Other state statutes provide an array of measures that aim to prevent and discover abuse and exploitation. Several states maintain a registry of perpetrators of adult abuse; an example is Tennessee’s law that establishes a registry (recently available for public inspection) of persons who have abused or intentionally neglected elderly or vulnerable individuals. Many state codes create a toll-free “hot line” connected to an appropriate state agency so that the public may report suspected instances of abuse.

IX. Conclusion

“There oughta be a law,” and indeed scores of state statutes specifically address the problem of elder abuse. But even a superficial inspection of these state statutes reveals an enormous discrepancy in their probable effectiveness and breadth.

In all probability, such laws will multiply in response to the growth of the older segment of the population. Because the bulk of this area of legislation is relatively recent, jurisdictions will need some time to weigh the efficacy of the various provisions and determine which to maintain and adopt. However, we must continue this appraisal as an urgent objective to battle abuse and exploitation of our older citizens.

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56 Fla. Stat. Ann. § 415.11110 (West Supp. 2001) (“A disabled adult or elderly person who has been named as a victim in a confirmed report of abuse, neglect, or exploitation. . . has a cause of action against any perpetrator named in the confirmed report. . . .”).
58 See, e.g., Del. Code Ann. tit. 6, § 2583 (1999) (“An elder person who suffers damage or injury as a result of prohibited trade practices has a cause of action to recover actual damages, court costs and reasonable attorney fees.”).
59 Ind. Code Ann. § 24-5-0.5-4(h) (Michie 1996).
Appendix A: State Statutes Establishing Criminal Penalties and Enhanced Criminal Penalties for Elder Abuse and Exploitation

CAL. PENAL CODE §§ 368, 502.9, 515, 525, 667.9, 801.6, 12022.7(C) (West 1999 & Supp. 2001).
CONN. GEN. STAT. §§ 53a-59a, -60b, -60c, -61a (1999 & Supp. 2000).
FLA. STAT. ANN. §§ 907.041(4)(a)6; 825.102; 825.1025; 825.103; 775.085(1)(a); 784.08; 782.07(2), .04(l)(a), (3)(i) (West 1992, 2000 & Supp. 2001).
GA. CODE ANN. §§ 16-8-40(c), -5-21(d), -5-23(c), -5-24(d), -8-12(b), 30-5-8;10-6B-6(c) (1996, 1997 & Supp. 1998, 1999, 2000).
IDADO CODE §§ 18-1505, -1505A (Michie 1997).
IOWA CODE ANN. §§ 726.7, 726.8 (West 1993).
KY. REV. STAT. ANN. § 209.990 (Michie 1999).
MONT. CODE ANN. § 52-3-825(2) (1999).
NEV. REV. STAT. 205.270-3 ; 207.014-1(b), -2(a); 193.167; 176.0913-4(b); 176A.120, 200.5099, 50995 (2000).
N.Y. PENAL LAW §§ 260.32, -34, 485.05 (McKinney 2000).

1 This compilation does not include those state statutes that assess criminal penalties where designated persons fail to report suspected elder abuse and exploitation as the law requires. For a review and discussion of reporting statutes, see Seymour Moskowitz, Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework, 31 CONN. L. REV. 77 (Fall 1998).
Appendix A (continued)

SD. CODIFIED LAWS §§ 22-46-1 to 3 (Michie 1998).

Appendix B: State Statutes Relating to Criminal Background Checks on Operators of Facilities and Caregivers of the Elderly

ALASKA STAT. § 18.20.302 (Michie 2000).
CONN. GEN. STAT. § 19a-491b (1999).
DEL. CODE ANN. tit. 16 § 1141 (Supp. 2000).
GA. CODE ANN. § 31-7-351 (1996).
NEV. REV. STAT. 449.176, .179, .182, .185, .188 (2000).
N.M. STAT. ANN. § 29-17-2 to 5 (Michie Supp. 2000).
TENN. CODE ANN. § 71-2-403 (Supp. 2000).
TEX. HEALTH & SAFETY CODE ANN. § 250.004(a) (West supp. 2001).
WYO. STAT. ANN. § 7-19-201(a) (Michie 1999).
Appendix C: State Statutes Allowing for Acceleration of Trials in Cases Involving Older Persons

- COLO. REV. STAT. ANN. § 18-6.5-105 (West 1999).
- MASS. GEN. LAWS ANN. ch. 231 § 59F (West 2000).
- MICH. COMP. LAWS ANN. § 780.759(c) (West 1998).

Appendix D: State Statutes Allowing for Abrogation of Witness Testimonial Privilege at Court or Administrative Proceedings Involving Adult Abuse or Exploitation

- ARK. CODE ANN. § 5-28-104 (Michie 1997).
- HAW. REV. STAT. § 346-244 (1993).
- 320 ILL. COMP. STAT. ANN. 20/4.2 (West 1999).
- KY. REV. STAT. ANN. § 209.060 (Michie 1999).
- MNN. STAT. ANN. § 626.557, subd. 8 (West Supp. 2001).
- OR. REV. STAT. § 441.675 (1999).
- WASH. REV. CODE ANN. § 74.34.050(2) (West Supp. 2001).

Appendix E: State Statutes Allowing for Civil Actions in Cases Involving Elder Abuse and Exploitation

- DEL. CODE ANN. tit. 6 § 2583 (1999).
- 720 ILL. COMP. STAT. ANN. 5/16-1.3(g) (West 1993 & supp. 2000).
- MO. ANN. STAT. § 198.093 (West 1996).
- NEV. REV. STAT. 41.1395 (2000).
- TENN. CODE ANN. § 71-6-120 (Supp. 2000).
- WASH. REV. CODE ANN. § 74.34.200 (West Supp. 2001).