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Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework

SEYMOUR MOSKOWITZ*

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I. INTRODUCTION

The elderly are the fastest growing segment in the U.S. population. In 1990, persons over sixty-five comprised 12.5% of the United States population; by 2020, it is projected this group will be 17.7% and by 2050, 25% of the total population.[1] Unfortunately, interest in solving the problems facing the elderly has not grown as fast as the elderly population. Despite congressional and scholarly estimates that between 1 and 2 million cases of elder mistreatment occur every year,[2] few cases are reported to state authorities[3] and only a minute number result in criminal prosecution or civil litigation. In our civil courts and criminal justice system, mistreated aged persons are truly voiceless and their suffering invisible.

Elder mistreatment occurs in all segments of our population, irrespective of race, sex, ethnic or socioeconomic background.[4] Victims often feel powerless. Much mistreatment occurs within the family and the elderly person is often simultaneously embarrassed by the abuse, fearful of future mistreatment, and paradoxically, protective of the abus-

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1. *See* U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 16, 37 (110th ed. 1990) [hereinafter 1990 STATISTICAL ABSTRACT] (table no. 18, *Projections of the Total Population by Age, Sex, and Race: 1989 to 2010*).

2. *See House Subcomm. on Health Long-Term Care, Elder Abuse: A Decade of Shame and Inaction: A Report by the Chairman of the Subcomm. on Health and Long-Term Care of the Select Comm. on Aging, House of Representatives*, 101st Cong., 2d Sess. XI (1990) [hereinafter 1990 ELDER ABUSE HOUSE REPORT] (estimating more than 1.5 million persons may be victims of such abuse each year, and the number is rising); *see also* Karl A. Pillemer & David Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey*, 28 GERONTOLOGIST 51 (1988) (estimating 700,000-1,100,000 cases of elder mistreatment, excluding financial exploitation, more than a decade ago).

3. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at XIII (summarizing data reported by States and Adult Protective Services workers and estimating only one in eight cases of elderly abuse is ever reported).

4. *See* Steuer & Austin, *Family Abuse of the Elderly*, 28 J. AM. GERIATRIC SOC'Y 372 (1980).

er.[5] Because it most often occurs in private residences against persons who have limited contact with outsiders, it is among the most hidden of contemporary America's problems.[6] Mistreatment of the elderly is often equated with physical abuse, but more often it takes the form of less dramatic but equally damaging behaviors—psychological or emotional abuse, financial exploitation, and neglect of care-taking obligations.[7]

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5. *See, e.g.*, Jordan I. Kosberg & Daphne Nahmiash, *Characteristics of Victims and Perpetrators and Milieus of Abuse and Neglect*, *in* ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT AND INTERVENTION 31, 33, 42 (Lorin A. Baumhover & S. Colleen Beall eds., 1996) [hereinafter Kosberg & Nahmiash].

6. *See id.* at 32.

7. Examples of shocking mistreatment could be recounted without end. A few of the situations described by the 1990 Elder Abuse House Report are reproduced here verbatim to illustrate the danger faced by some elderly persons.

> An 82-year-old woman suffered a brutal beating at the hands of her 40-year-old daughter and had to be hospitalized for 8 weeks. She had been kicked and had her hair pulled out and puncture wounds had been inflicted by sharp objects all over her body. The daughter, who was reportedly unable to work because of back problems, was totally dependent upon her mother for financial support. The mother was found to be passive, withdrawn, pale and weak and so intimidated by the daughter that she was unable to consider taking any action to move or seek retribution.
>
> An elderly woman was brought to the hospital by paramedics, confused and minimally responsive. She was severely dehydrated and her hair was completely matted. She had maggots all over her left leg, which had been wrapped in cloth, and bloody drainage coming out of her knees. She weighed about 60 pounds. All uncovered parts of the woman's body revealed deep purple bruises. She also had a left blacked eye and a deep gash over her right eyebrow. The woman, upon questioning by police, said she lived with her daughter and children. She wouldn't confirm that her daughter had beaten her or denied her care because, "I don't want to get anyone in trouble."
>
> From Texas came the report of a client, age 69, who was found by a neighbor one night, lying on the ground naked with ants crawling on her. The woman was paralyzed on one side from a stroke and had heart problems.
>
> An 88-year-old Washington State woman had her prescribed medications withheld by her guardian. Cared for by a home health aide, the woman has reportedly had teeth extracted without any anesthetic and is continually having her tracheotomy and g-tube replaced by unqualified help. She was recently dropped during a move from room to room and now has a broken nose. No X-rays or pain medication were administered. She has been routinely left in her chair for 12 hours at a time and has very fragile skin which is vulnerable to decubiti.
>
> A home health aide in New Hampshire was startled to find her client, an elderly woman, in urine and feces-soiled clothing. The woman had suffered severe weight loss, too. The woman's husband, her caregiver, had failed to contact his wife's

This Article explores the critical legal issues underlying this prevalent, disturbing, yet unremediated phenomenon. At present our legal system tries to protect the elderly in two major ways: through criminal laws which outlaw mistreatment and prescribe punishments for it, and through legal mandates that require professionals to report reasonably suspected instances of abuse, thus triggering state protective services.[8] My thesis is that these forms of protection are ineffective. Our present system of reliance on the criminal law to deter and punish abusers is inadequate, and penal statutes which mandate professionals to report cases of mistreatment have failed. New approaches are needed. Civil remedies, especially malpractice actions against professionals who fail to report cases despite statutory obligations, may prove more effective in identifying and ultimately preventing instances of mistreatment.

The first five parts of the Article present an overview of the history of elder abuse and neglect, its contemporary "discovery," and its prevalence. In Part VI, the main state statutory responses are reviewed, in conjunction with a series of appendices which list, and provide easy access to, the statutes. Legal actions against perpetrators are discussed in Part VII. Part VIII outlines the obligations of various professionals—e.g., physicians, nurses, social service agencies, home health workers—who come in contact with the elderly and their families to identify mistreatment and to report it to state authorities. Available evidence indicates that reports are rarely made,[9] and since abuse is often cyclical and repeated,[10] failure to report often means further injury and loss for victims. While 43 jurisdictions make the failure to report reasonably suspected elder mistreatment a criminal offense,[11] these statutes are seldom enforced by prosecutors.[12] I thus propose the use of malpractice theories, and other civil remedies as catalytic agents to improve

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> physician as he had promised the aide he would, although his wife was weak and malnourished and had to be hospitalized. Upon questioning, the husband became angry. He denied that his wife was neglected—he said he sometimes might seem to be ignoring her but that was only to encourage her to do things by herself. When officials asked him about his wife's difficulty breathing, which was another symptom, he said he treated that by applying Vicks ointment to her chest. In fact, she had serious respiratory problems.

1990 ELDER ABUSE HOUSE REPORT *supra* note 2, at 1-7. The Report sets out more than 35 such stories, noting these are "meant to be illustrative, not exhaustive." *Id.* at 1.

8. *See infra* Part VIII.
9. *See infra* notes 205-16 and accompanying text.
10. *See infra* notes 358, 366-67 and accompanying text.
11. *See infra* Appendices B and E (listing statutes & penalties for non-reporters).
12. *See infra* note 228 and accompanying text.

diagnosis and increase identification of cases. Compliance with mandatory reporting laws is critical in stemming elder abuse. Child abuse may be detected because children are often observed by teachers and others, but many aged persons are isolated or immobile. Although professionals may insure against monetary liability, licensure sanctions, which are discussed in Part VIII.E, may be an even stronger lever. Combined with financial exposure, professional discipline may be strong enough to force significant changes in the behavior of professionals.

II. HISTORICAL CONTINUITY OF THE PROBLEM

In many aspects of human endeavor there is an understandable tendency to view the past as a "golden age" and to mourn the "world we have lost."[13] We are particularly prone to myth-making with regard to the aged; we imagine a past where extended families coexisted peacefully and the aged received loving care. However, much evidence now contradicts that view.[14] In preindustrial times, the aged were often treated quite harshly.[15] Anthropologists have documented that killing the aged or abandoning them to die was not unusual.[16] Western literature, from Greek myths to modern fiction, is replete with child-parent conflict.[17] In the sixteenth century, the brilliant gerontologist, William Shakespeare, was able to encapsulate intergenerational tension with uncommon clarity, in the speech of Goneril, King Lear's abusive daughter:

> Idle old man
> That still would manage those authorities
> That he hath given away.
> Now by my life
> Old fools are babes again, and must be used with checks as

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13. PETER LASLETT, THE WORLD WE HAVE LOST 5-7, 250-53 (1965).

14. *See* Corinne N. Nydegger, *Family Ties of the Aged In Cross-Cultural Perspective*, *in* GROWING OLD IN AMERICA 71-85 (Beth B. Hess & Elizabeth W. Markson eds., 1985).

15. *See* Peter J. Stearns, *Old Age Family Conflict: The Perspective of the Past*, *in* ELDER ABUSE: CONFLICT IN THE FAMILY 3-24 (Karl A. Pillemer & Rosalie A. Wolfe eds., 1986).

16. *See* Nancy Foner, *Caring for the Elderly: A Cross-Cultural View*, *in* GROWING OLD IN AMERICA 387-400 (Beth B. Hess & Elizabeth W. Markson eds., 1985); *see also* Anthony Glascock & Susan Feinman, *Social Asset or Social Burden: An Analysis of the Treatment of the Aged in Non-Industrial Societies*, *in* DIMENSIONS: AGING, CULTURE AND HEALTH (Christine L. Fry ed., 1981).

17. *See* Shulamit Reinharz, *Loving and Hating One's Elders: Twin Themes in Legend and Literature*, *in* Stearns, *supra* note 15, at 25-48.

flatteries, when they are seen
abused.[18]

Goneril's disdain for her father reflects her perception that his power has been relinquished and redistributed. His powerlessness creates the vacuum which her cruelty fills. As we shall see, many contemporary legal issues of the aged reflect their vulnerability and precarious social and economic position.[19]

III. CONTEMPORARY DISCOVERY OF ELDER ABUSE

Elder mistreatment is the most recent variety of domestic violence to command public concern. In a pioneering 1962 article, Doctor Kempe and colleagues directed the medical community's attention to the problem of physical child abuse, and coined the term "battered child syndrome."[20] Within a few years, volumes of research on child abuse were published, and all fifty states enacted legislation mandating the reporting of suspected child abuse to public agencies and providing protective services for children.[21] Mandated reporters were typically professionals such as doctors, nurses, and social workers.[22] By 1974, Congress had passed the federal Child Abuse Prevention and Treatment Act,[23] which provided federal financial incentives to create comprehensive state programs and procedures addressing child abuse and neglect. The act also established the National Center on Child Abuse and Neglect to serve as a central agency on incidence and research related to that topic.[24]

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18. WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 3.

19. *See generally* BETTY FRIEDAN, THE FOUNTAIN OF AGE 35-38, 39-41 (1993) (noting the absence of positive images of older persons in contemporary American mass culture, the increased attention to age as a "problem," and the burdens imposed by Social Security and Medicare on younger persons).

20. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17-24 (1962).

21. *See* Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 711 (1966).

22. *See* Brian G. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 109-10 (1974).

23. 42 U.S.C.A. §§ 5101-5107, 5119 (West 1995).

24. *See id.* The most recent National Incidence Study, by the National Center, based on a sample of 842 child protective agencies, estimates that 1,553,800 children were abused or neglected in 1993, quadruple the total in 1986. *See* ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L CTR. ON CHILD ABUSE & NEGLECT, EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 3 (Sept. 1996).

In the 1970s, spousal abuse and other forms of violence against women began to receive organized public and professional attention.[25] A broad-based movement arose, including reform of the law and the development of social programs.[26] Despite the fact that aged victims and battered spouses/partners have much in common—indeed some abused elderly fit both categories—little note was taken of the special problems of older persons.

While anecdotal reports were published in the 1970s in Great Britain, calling attention to "granny bashing,"[27] studies indicating that elder abuse was a serious national problem in the United States did not begin to appear until the late 1970s.[28] In 1981, the Select Committee on Aging of the United States House of Representatives issued a landmark report, Elder Abuse: An Examination of a Hidden Problem,[29] which attempted to define the nature of elder mistreatment and determine its extent. The report estimated 4% of the elderly—roughly one million persons—might be victims of mistreatment annually. It concluded that while elder mistreatment was a "hidden problem," it was widespread and largely unreported.[30]

Federal legislation and funding had improved systems for child abuse prevention and treatment. In 1974, protective services for adults became a state-mandated program under Title XX of the Social Security Act.[31] Adult Protective Services (APS) is "a system of preventive, supportive, and surrogate services for the elderly living in the commu-

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25. The literature on spouse abuse is vast. Among the earliest and best known works are: LENORE E. WALKER, THE BATTERED WOMAN (1979); Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7 (1978); Terry L. Fromson, Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135 (1977).

26. *See, e.g.*, DEBORAH RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 237-44 (1989); Naomi Hilton Archer, Note, *Battered Women and the Legal System: Past, Present and Future*, 13 LAW & PSYCHOL. REV. 145 (1989). *See generally* Daniel J. Jacobs, *Battered Women and Related Domestic Violence Issues: A Selective Bibliography*, 49 REC. ASS'N B. CITY N.Y. 786-94 (1994) (listing over 100 articles on domestic violence).

27. *See* Letter from Burston to the Editor, *in* 1975 BRIT. MED. J. 592; A.A. Baker, *Granny Battering*, MODERN GERIATRICS 20-24 (Aug. 5, 1975).

28. *See, e.g.*, THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY (Marilyn Block & Jan Sinnott eds., 1979); E. Lau & I. Kosberg, *Abuse of the Elderly by Informal Care Providers*, AGING, Sept.-Oct. 1979, at 10.

29. HOUSE SELECT COMM. ON AGING, 97TH CONG., 1ST SESS., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (Comm. Print 1981) [hereinafter 1981 ELDER ABUSE HOUSE REPORT].

30. *Id.* at xiii-xiv.

31. Social Services Amendment of 1974, Pub. L. No. 93-647, §§ 2001-2006, 88 Stat. 2337-48 (codified as amended at 42 U.S.C.A. §§ 1397a-e (West Supp. 1998)).

nity to enable them to maintain independent living and avoid abuse and exploitation."[32] Federal Title XX block grant funding decreased dramatically during the 1980s and states were forced to fund and develop their own responses to elder mistreatment, which soon proved inadequate.[33] Nonetheless, state-funded Adult Protective Services agencies remain the primary referral source for elderly mistreatment reports.

Although the 1981 Elder Abuse Report recommended that Congress act to assist states in identifying and treating victims of elder abuse and neglect, little federal action or funding followed. H.R. 7551, the Elder Abuse Treatment & Prevention Act of 1980, was introduced in the 96th Congress, and in subsequent Congresses. The Act was modeled on the federal child abuse statute, but never enacted. As a result, no consistent federal leadership policy or financing has emerged to protect non-institutionalized elders living in the community.[34] The federal Older Americans Act Amendments of 1987[35] required local Area Agencies on Aging to assess the need for elder abuse prevention services and the extent to which the need was being met. While $5 million was authorized to be spent in 1988, 1989, and 1990, no money was actually appropriated in those years.[36]

In 1978, Congress amended the Older Americans Act of 1965[37] to mandate the establishment of a Long Term Care Ombudsman program in every state.[38] The 1987 Amendments increased the responsibilities of state ombudsman programs, which attempt to protect residents of nursing homes and similar institutions from abuse and neglect.[39] The ombudsman is authorized to receive and investigate complaints of maltreatment and inadequacies in nursing homes. The situation of aged or disabled residents in institutional care is often dire. Captive markets, the lure of profits, and inadequate regulatory resources combine to

32. John Regan, *Intervention Through Adult Protective Services Programs*, 18 THE GERONTOLOGIST 250, 251 (1978).

33. *See* HOUSE COMM. ON WAYS & MEANS, GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, 103d Cong., 1st Sess. 876 (1993).

34. A very scaled-down and poorly funded National Center on Elder Abuse was included in the Older Americans Act of 1992. Today its future is in doubt because no appropriation was included in the 1997 budget. *See* Rosalie Wolf, *Elder Abuse & Neglect*, 2 A.B.A. SEC. PROB. & REAL PROP. (8th Ann. Spring CLE Meeting) May 1997, at D-62.

35. 42 U.S.C.A. § 3058i (West 1994).

36. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at 71.

37. *See* 42 U.S.C. § 3001 *et seq.* (1994).

38. *See id.* § 3027(a)(12).

39. *See id.*

place many at substantial risk. Problems include: low pay and poor working conditions for staff,[40] inadequate facilities and unsanitary conditions,[41] and the inappropriate use of physical and chemical restraints[42] to name but a few. A considerable caselaw has emerged reflecting the rights of residents in such facilities,[43] and the literature is well-developed.[44] As a result, this article will focus on issues of maltreatment of the elderly in the community, where litigation has been rare.[45]

Until 1977, no state had a statute specifically aimed at protecting the aged;[46] by 1985, undoubtedly expecting federal funding, 44 states had passed such statutes.[47] Presently, all fifty states have them. The statutes drew on the experience with child and adult protective services legislation and typically include two components: 1) coordinated provision of services for the elderly determined to be at risk of abuse and 2) actual or potential power of state or local agencies to intervene to protect endangered individuals. Prior to 1980, only 16 states required professionals or others to report suspected elder abuse. In the decade between 1980 and 1990, 26 additional states and the District of Columbia enacted such provisions.[48]

IV. "GREYING" OF THE UNITED STATES POPULATION

One of the dominant demographic trends in the United States this century is the aging of our population. Persons over sixty-five are the

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40. *See* GEORGE P. SMITH, LEGAL AND HEALTHCARE ETHICS FOR THE ELDERLY 99 (1996).

41. *See* USA TODAY, May 30, 1990, at 10-A (account of a 93-volume report of the federal Health Care Financing Administration describing outrageous violations of even minimal standards of sanitation in food preparation and handling, basic requirements for lavoratory needs, etc.).

42. *See* SMITH, *supra* note 40, at 96 ("On any given day, nearly 500,000 older Americans are physically restrained to their beds and chairs.").

43. *See, e.g.*, Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio 1993) (holding private right of action created by 1987 Amendments, and enforceable under 42 U.S.C. § 1983 against public facilities); Harris v. Manor Healthcare Corp. 489 N.E.2d 1374 (Ill. 1986) (implying damage action for nursing home residents under Illinois statute).

44. *See, e.g.*, Timothy S. Jost, *Enforcement of Quality Nursing Home Care in the Legal System*, 13 LAW, MEDICINE & HEALTH CARE 160 (1985); Mary Kathleen Robbins, Comment, *Nursing Home Reform: Objective Regulation or Subjective Decisions?*, 11 THOMAS COOLEY L. REV. 185 (1994); Bruce C. Vladeck, *The Past, Present, and Future of Nursing Home Quality*, 275 JAMA 425 (1996).

45. *See infra* note 228 and accompanying text.

46. *See* Miller & Dodder, *The Abused: Abuser Dyad, Elder Abuse in the State of Florida*, *in* ELDER ABUSE: PRACTICE & POLICY 167 (R. Filinson & S. Ingman eds., 1989).

47. *See id.*

48. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at 66.

fastest growing segment of our population.[49] Both the number of aged in this country and their percentage relative to the overall population have steadily increased. In 1900 there were approximately three million people aged sixty-five and over, constituting 4% of the population.[50] By 1950, the number of elderly had increased to 12 million, or 8% of the population.[51] In 1980, the elderly were 25 million strong and had increased to 11% of the population.[52] Of this 25 million, 2.9 million were older than eighty.[53] By 1994, the sixty-fives and older had grown to 33.2 million, or 12.5% of the total population, and the number is expected to increase to more than 40.1 million by 2010, almost 13.3% of the nation's total population.[54] The percentage of elderly in the United States population is further projected to reach 21.8% by 2030.[55]

Embedded within this general trend are two notable subfactors. First, the proportion of those over eighty-five years old is growing faster than the number of elderly in general. Although representing only 1% of the population in 1980 (2.2 million), this over-age eighty-five segment will double to 2% by 2000 (4.6 million)[56] and increase to more than 5% by 2050.[57] Second, the elderly population is predominantly female. At every year past sixty-five, women outnumber men, and the ratio of women to men increases as the cohort ages.[58]

As the number of elderly grows and as a greater proportion of them live longer, the number of individuals in the general population that will require medical and health services will increase as well. In addition, given the large and increasing number of cases of elder abuse

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49. *See* 1990 STATISTICAL ABSTRACT, *supra* note 1.

50. *See* Christine A. Metcalf, Comment, *A Response to the Problem of Elder Abuse: Florida's Revised Adult Protective Services Act*, 14 FLA. ST. U. L. REV. 745, 746-47 (1986).

51. *See id.*

52. *See id.*

53. *See* SENATE SUBCOMMITTEE ON AGING, CONSERVATORSHIP OF THE ELDERLY: RECOMMENDATIONS FOR ITS INTERFACE WITH PROGRAMS AND SERVICES FOR OLDER CALIFORNIANS 1 (Senate Office of Research, prepared by Marquart Policy Analysis Assoc. 1988) [hereinafter CONSERVATORSHIP RECOMMENDATIONS].

54. *See* Susan Levine, *Aging Baby Boomers Pose Challenge: Preparations Needed for Coming Strain on Services, Census Report Says*, WASH. POST, May 21, 1996, at A09.

55. *See* SENATE SPECIAL COMM. ON AGING, AGING AMERICA: TRENDS AND PROJECTIONS (Annotated) 101st Cong. 84-85 (Comm. Print 1990) (revised by Elizabeth Vierck).

56. *See* 1990 STATISTICAL ABSTRACT, *supra* note 1, at 37 tbl. 41 (*Population 65 Years Old and Over, By Age Group and Sex, 1960 to 1988, and Projections, 1990 and 2000*).

57. *See* 1990 STATISTICAL ABSTRACT, *supra* note 1, at 37 tbl. 41 (*Population 65 Years Old and Over, By Age Group and Sex, 1960 to 1988, and Projections, 1990 and 2000*).

58. *See* LAWRENCE FROLIK & ALISON P. BARNES, ELDER LAW 15-16 (1992).

and neglect,[59] we can predict an increasing demand for services to deal with this problem.

V. PREVALENCE OF ELDER ABUSE AND NEGLECT

You shall rise before the aged and show deference to the old.
—*Leviticus* 19:32

While the exact prevalence of elder mistreatment cannot be determined with precision, there is consensus that a very large number of older persons are affected. After congressional hearings were conducted, a 1981 report issued by the House Select Committee on Aging estimated 4% of the American elderly population, approximately 1 million persons, may be victims of moderate to severe abuse.[60] The study also concluded that elder abuse, although at least as prevalent as child abuse, is far less likely to be reported.[61] The committee found that physical abuse, including neglect, is the most common type of mistreatment, followed by financial and psychological abuse.[62] Ten years later, a follow up congressional report, "Elder Abuse: A Decade of Shame and Inaction," determined that the situation had worsened; elder maltreatment was reported to be increasing and 5% of the elderly, or more than 1.5 million elderly persons, were estimated abused yearly.[63] Ninety percent of states reported to the Committee that the incidence of elder mistreatment was increasing.[64]

Academic researchers have made similar prevalence estimates. In 1988, using a methodology that was validated previously in two national family violence surveys, a research team surveyed over 2,000 non-institutionalized elders living in the metropolitan Boston area and found that 3.2% had experienced physical abuse, verbal aggression, and/or neglect.[65] Extrapolated, this finding would mean 700,000 to 1,100,000 cases of mistreatment across the nation. Spousal abuse (58%) was more prevalent than abuse by adult children (24%), and the proportion of victims was roughly equally divided between males and females.

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59. *See infra* Part V.
60. *See* 1981 ELDER ABUSE HOUSE REPORT, *supra* note 29, at xiv-xv.
61. *See id.* at xiv.
62. *See id.* at xv.
63. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at XI.
64. *See id.* at XIV.
65. *See* Pillemer & Finkelhor, *supra* note 2, at 51-52.

Financial exploitation was not even queried in this survey. Other American studies have produced similar estimates.[66]

International surveys have confirmed these general prevalence statistics. A Canadian study, using a nationally representative sample of elders able to respond on the telephone, found 4% had recently experienced one or more forms of mistreatment. The rates for men and women were about equal, but financial abuse was more common than physical or other maltreatment.[67] A British study found 6% of individuals aged 65 to 74 reported recent verbal abuse by a close family member or relative; 2% reported physical mistreatment, and 1% financial exploitation.[68] A survey, using written questionnaires and clinical evaluations to determine the rate of abuse and neglect in a small, semi-industrialized town in Finland, produced a 3% elder mistreatment prevalence rate for men and 9% for women, or 5.4% for both sexes.[69] Since all these surveys are based on self-reporting, the percentages most likely are an underestimation of the problem rather than an exaggeration.[70]

While I focus on this segment of the elderly in this Article, it is important to note that most older persons are not abused or neglected. Many live independently, or are cared for in a loving and professional manner by their families or others. Often that care is provided at great personal and societal expense. We should not categorize the aged in a negative, monolithic vision. At the same time, the law should provide remedies where wrongs are perpetrated.

As noted earlier, only a small fraction of the estimated 1-1/2 to 2 million cases of mistreatment in U.S. communities comes to the attention of authorities. The 1990 House of Representatives Elder Abuse Report concluded that elder abuse is far less likely to be reported than child abuse, estimating only one of eight cases of elder abuse, as compared with one of three cases of child abuse, is reported to the authori-

66. *See, e.g.*, Susan Steinmetz, *Elder Abuse*, AGING, Jan.-Feb. 1981, at 610.

67. *See* Podnieks, *National Survey of Abuse of the Elderly in Canada*, 4 J. ELDER ABUSE & NEGLECT (1/2), 5 (1992).

68. *See* Ogg & Bennett, *Elder Abuse in Britain*, 305 BRIT. MED. J. 998-99 (1992).

69. *See* Kivela et al., *Abuse in Old Age: Epidemiological Data from Finland*, 4 J. ELD. AB. AND NEGL. NO.3, 1 (1992).

70. There is room for debate about these estimates; definitions used in studies and statutes vary, and the research methodologies utilized also vary widely. It is generally acknowledged, however, that very large numbers of the elderly are seriously mistreated, that even larger numbers of elders are at-risk in the United States today, and that our response to this problem has been ineffective.

ties.[71] It noted that while almost all states had enacted statutes or adult protective services laws that mandated reporting of elder abuse, state implementation and enforcement had been lacking, chiefly because of lack of financial support.[72] There is a dramatic disparity between funds allocated to adult protective services and child abuse services; nationwide, in 1989, $43.03 per child was spent for protective services, as compared to $3.80 per elderly resident for protective services.[73] The lack of federal funding, combined with limited state expenditures, has meant fewer services available to deal with the problem.[74] On average, only 3.95% of the total state protective services budgets were earmarked for the elderly in 1989, a drop of 40% over a decade.[75]

The National Center on Elder Abuse has collected data on abuse reports to state authorities over a number of years. The total of cases reported has increased steadily, most probably because of increasing awareness of the problem. In 1986, an estimated 117,000 cases were reported, while by 1994, 241,000 cases had been reported.[76] While this is an impressive increase, the numbers are small in comparison with the projected number of community cases. Of the estimated 241,000 reports in 1994, about 61% were substantiated; half of these were self-neglect. Figures for 1993 were similar. In domestic settings, neglect was the most common form of maltreatment reported. Physical abuse accounted for about 16% of cases in both years, while financial exploitation made up 12% of substantiated reports. In both 1993 and 1994, more than 65% of victims were white, 20% African-American and 10% Hispanic.[77]

VI. STATUTORY RESPONSE BY THE STATES

State laws concerning elder mistreatment are extremely diverse.

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71. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at XIV. Other estimates on underreporting are even more shocking. *See also Society's Secret Shame: Elder Abuse and Family Violence, Hearing Before Senate Special Committee on Aging*, 104th Cong. at 2 (1995) (estimating only one in fourteen cases of elder abuse is ever reported).

72. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at XIII, 40-43.

73. *See id* . at XII.

74. One state, Louisiana, even discontinued adult protective services for a period of five years because of budget exigencies. *See id.* at 38.

75. *See id.* at 40.

76. *See* NATIONAL CENTER ON ELDER ABUSE, SUMMARIES OF THE STATISTICAL DATA ON ELDER ABUSE IN DOMESTIC SETTINGS: AN EXPLORATORY STUDY OF STATE STATISTICS FOR FY 93 & FY 94, at V (1996).

77. *See id.* at v-vi.

They contain myriad specific sections regarding protected classes, mandatory reporting of suspected abuse and neglect, definitions of reportable behavior, guidelines for investigations of reports and a host of other subjects. No single definition encompasses all varieties of elder mistreatment. Prohibited conduct may be acts of commission or omission; it may be intentional, i.e., a conscious and voluntary attempt to inflict suffering, or inadvertent, i.e., reflecting inadequate knowledge, effort, or even infirmity, on the part of the perpetrator. Even the placement of the statutes is inconsistent. Many states use generic Adult Protective Services laws to address elder mistreatment, while others have specific elder abuse statutes.[78] Other relevant provisions can be found in penal provisions or domestic violence laws.[79]

Despite such diversity, some common threads stand out. Mistreatment is typically characterized as abuse or neglect.[80] Common elements are non-accidental physical injury, sexual molestation, emotional or mental abuse, financial exploitation, and neglect. Whether behavior is labeled as abusive or as neglectful may depend on the frequency of the mistreatment, its duration, intensity, and severity.[81] Abuse may encompass several types of behavior: a) physical abuse, the infliction of

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78. *See infra* Appendices A-D.

79. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/12-21 (West 1996) (penal statute); ME. REV. STAT. ANN. tit. 19-A §§ 4001-4014 (West 1998) (domestic violence).

80. The current federal definition as set forth by Section 144 of the Older Americans Act, 42 U.S.C. § 3022-3030(g) (1997), includes three major types of elder maltreatment—physical abuse, neglect, and exploitation, and clearly recognizes self-neglect as a form of neglect. Under the federal statute, "abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or deprivation by . . . a caregiver, of goods or services . . . necessary to avoid physical harm, mental anguish, or mental illness." 42 U.S.C.A. § 3002(13)(A-B) (West 1997). "Neglect" is the "failure to provide for oneself goods or services necessary to avoid physical harm, mental anguish, or mental illness" or the "failure of a caretaker to provide such goods or services." 42 U.S.C.A. § 3002(37)(A-B) (West 1997). The term "exploitation" means "the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain." 42 U.S.C.A. § 3002(26) (West 1998). A "caregiver" is an individual "who has the responsibility for the care of an older individual, either voluntarily, by contract, by receipt of payment for care, or as a result of the operation of the law." 42 U.S.C.A. § 3002(20) (West 1997).

Section 144 notes that "elder abuse" refers to "abuse of an older individual" but does not specify any particular age. However, because other provisions under Title III of the Older Americans Act are applicable to people who are sixty years of age and older, it may be assumed that the congressional intent is to cover the elderly in the same age group with the new elder abuse prevention program. The language clearly implies that the federal elder abuse definitions cover both domestic and institutional abuse.

81. *See* Audrey Garfield, *Elder Abuse & the States' Adult Protective Services: Time for Change in California*, 42 HASTINGS L.J. 861, 872-74 (1991).

non-accidental physical pain or injury, (e.g., slapping, bruising, restraining, molesting, and similar behavior);[82] b) psychological abuse, the willful infliction of severe mental anguish, (e.g., humiliation, threats, etc.);[83] and c) financial abuse, the unauthorized or exploitative use of funds, property or resources of an elder person.[84] Neglect is generally defined as the willful or passive failure of a caregiver to fulfill his or her caretaking obligations or duties, (e.g., the deprivation of basic services such as food, housing, care for physical or mental health, such as medication).[85] "Self Neglect" is self-directed conduct by an older person that threatens his or her safety or health.[86] Adult protective services are the "preventive and remedial activities performed on behalf of elders and dependent adults who are unable to protect their own interests."[87]

The penalty to be imposed upon persons responsible for the mistreatment varies. In many states the perpetrator is guilty of a misdemeanor.[88] Some, however, classify many forms of maltreatment as a

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82. *See, e.g.*, N.Y. SOC. SERV. LAW § 473(6)(a) (McKinney Supp. 1997) ("'Physical abuse' means the non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained."); IDAHO CODE § 39-5302(i) (1997) ("'Abuse' means the nonaccidental infliction of physical pain, injury or mental injury.").

83. *See, e.g.*, N.D. CENT. CODE § 50-25.2-01(1) (1995) ("'Abuse' means any willful act or omission of a caregiver . . . which results in . . . mental anguish, ..."); NEV. REV. STAT. ANN. § 41.1395(4)(a)(1) (Michie Supp. 1997) ("'Abuse' means willful and unjustified infliction of pain, injury, or mental anguish . . . .").

84. *See, e.g.*, MISS. CODE ANN. § 43-47-5(i) (West 1993) ("Exploitation shall mean the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage.").

85. *See, e.g.*, ARK. CODE ANN. § 5-28-101(3)(A) (Michie 1997) ("'Neglect' means [n]egligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult."); *see also* CAL. WELF. & INST. CODE § 15610.07 (West Supp. 1998) ("'Abuse of an elder or a dependent adult' means physical abuse, neglect . . . or the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.").

86. *See, e.g.*, ALA. CODE § 38-9-2(10) (Michie Supp. 1997) (Neglect is ". . . the failure of the person to provide . . . basic needs for himself or herself when the failure is the result of the person's mental or physical inability.").

87. Regan, *supra* note 32, at 251; *see also* CAL. WELF. & INST. CODE § 15610.10 (West Supp. 1998).

88. *See, e.g.*, UTAH CODE ANN. § 76-5-111(3) (Michie Supp. 1998):

> Under circumstances other than those likely to produce death or serious physical injury any person, including a caretaker, who causes a disabled or elder adult to suffer physical injury, abuse, or neglect, or having the care or custody of a disabled or elder adult, causes or permits that adult's person or health to be injured, abused, or neglected, or causes or permits a disabled or elder adult to be placed in a situation where his person or health is endangered, is guilty of the offense of abuse of a disabled or elder adult as follows: (a) if done intentionally or knowingly, the offense is a class A misdemeanor; (b) if done recklessly, the offense is a class B misde-

felony.[89] Many states, however, make no mention of penalty.[90] Normally the statutes create liability for the caretaker of an elderly person or any other person who willfully commits an abusive act or omission. Caretaker is typically defined as an individual or entity responsible for the care of a vulnerable adult as a result of family relationship, voluntary assumption, or contract.[91]

To facilitate comparative analysis, the appendices at the end of this article catalogue key provisions of state law. Several focus on statutes mandating reporting of suspected elder abuse, and the process for receiving and investigating such reports, statutes which are of particular relevance to subsequent sections of this article. Laws protecting elders and mandating reporting are listed alphabetically by state in Appendices A and B.

Appendix C identifies the protected individuals and categories of harm. Column 1 shows that some states protect all "vulnerable," "disabled" or "incapacitated" adults (using different verbal formulations) whatever their age,[92] while others cover only those over a designated

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> meanor; and (c) if done with criminal negligence, the offense is a class C misdemeanor.

See also W. VA. CODE § 61-2-29(4)(b) (Michie 1997) ("Any care giver who neglects an incapacitated adult, or who knowingly permits another person to neglect said adult, is guilty of a misdemeanor . . . .").

89. *See, e.g.*, NEV. REV. STAT. ANN. § 200.5099(1) (Michie Supp. 1997):

> [A]ny person who abuses an older person, causing the older person to suffer unjustifiable physical pain or mental suffering is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than two years and a maximum term of not more than six years, unless a more severe penalty is prescribed by law . . . .

See also ARK. CODE. ANN. § 5-28-103((a-b(1)) (Michie 1997):

> It shall be unlawful for any person . . . to abuse, neglect, or exploit any person subject to protection . . . of this chapter. Any person or caregiver who purposely abuses an endangered or impaired adult in violation of the provisions of this chapter, if the abuse causes serious physical injury or substantial risk of death, shall be guilty of a Class B felony and shall be punished as provided by law.

90. *See, e.g.*, ALASKA STAT. §§ 47.24.010-47.24.900 (Michie 1996); D.C. CODE ANN. §§ 6-2501 to -2513 (Michie 1996).

91. *See, e.g.*, ALASKA STAT. § 47.24.900(3)(A) (Michie 1996) ("'[C]aregiver' means a person who is providing care to a vulnerable adult as a result of a family relationship, or who has assumed responsibility for the care of a vulnerable adult voluntarily, by contract, or by court order."); MISS. CODE ANN. § 43-47-5(c) (West Supp. 1998) ("'Caretaker' shall mean an individual . . . which has assumed the responsibility for the care of a vulnerable adult.").

92. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-451(A)(10) (West 1997) ("Vulnerable adult means an individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment."); DEL. CODE ANN. tit. 31 § 3902(1) (Michie 1997) ("Infirm adult shall mean any person 18 years of age or over who, because of physical or mental disability, is substantially impaired in

age, usually sixty,[93] or sixty-five[94] who experience mistreatment. Each state operates under its own set of definitions. Components of maltreatment vary widely. As Column 2 demonstrates, all states include physical harm as abuse, although some jurisdictions require a willful infliction of injury or deprivation of needed services.[95] Neglect is likewise included by all statutes (Column 3).[96] Self-neglect is included by more than one-half of the states (Column 9). Financial exploitation and fiduciary abuse (Column 5), the illegal or improper use of a vulnerable or incapacitated elder's resources or property for the exploiter's or another's profit or personal advantage, is almost always covered.[97]

Variations in state definitions occur in other areas. Some statutes include "emotional abuse," or "mental anguish" (Column 4) as prohibited conduct,[98] although these terms present obvious difficulties in classification and severity. Sexual abuse (Column 6) is a separate category in some states,[99] while in others it is considered a part of the general

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the ability to provide adequately for the person's own care and custody."); NEB. REV. STAT. § 28-371 (West 1995) ("Vulnerable adult shall mean any person eighteen years of age or older who has a substantial mental or functional impairment or for whom a guardian has been appointed under the Nebraska Probate Code.").

93. *See, e.g.*, CONN. GEN. STAT. ANN. § 17b-450(1) (West Supp. 1998) ("The term 'elderly person' means any resident of Connecticut who is sixty years of age or older.").

94. *See, e.g.*, CAL. WELF. & INST. CODE § 15610.27 (West Supp. 1998) ("'Elder' means any person residing in this state, 65 years of age or older.").

95. *See, e.g.*, FLA. STAT. ANN. 825.102(1)(a) (West Supp. 1998) (Abuse of an elderly person consists of the "intentional infliction of physical or psychological injury."); GA. CODE ANN. § 30-5-3(1) (Harrison Supp. 1997) ("Abuse means the . . . willful deprivation of essential services to a disabled adult or elder person."); MISS. CODE ANN. § 43-47-5(a) (1993) ("willful infliction" of physical pain or injury).

96. *See, e.g.*, CAL. WELF. & INST. CODE § 15610.57 (West Supp. 1998) ("'Neglect' means that negligent failure of any person having the care or custody of an elder . . . to exercise that degree of care which a reasonable person in a like position would exercise."); IDAHO CODE § 39-5302(8) (Michie 1998) ("'Neglect' means failure of a caretaker to provide food, clothing, shelter or medical care reasonably necessary to sustain the life and health of a vulnerable adult . . . .").

97. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 720, para. 5/16-1.3 (1998) ("(a) A person commits the offense of financial exploitation of an elderly person when he stands in a position of trust and confidence with the elderly or disabled person and he knowingly and by deception or intimidation obtains control over the elderly or disabled person's property with the intent to permanently deprive the elderly or disabled person of the use, benefit, or possession of his property."); MASS. GEN. LAWS ANN. 19a § 14 (West 1994) ("An act or omission by another person, which causes a substantial monetary or property loss to an elderly person . . . .").

98. *See, e.g.*, N.H. REV. STAT. ANN. § 161-F:43(III)(a) (Butterworth 1994) ("'Emotional abuse' means the misuse of power, authority, or both, verbal harassment, or unreasonable confinement which results or could result in the mental anguish or emotional distress of an incapacitated adult.") GA. CODE. ANN. § 30-5-3(1) (Harrison 1997) ("'Abuse' means the willful infliction of . . . mental anguish . . . .").

99. *See, e.g.*, FLA. STAT. ANN. § 415.102(1) (West 1998) ("'Abuse' means the nonaccidental

definition of abuse. The lack of consistent definitions among states is a major problem; it hinders efforts to obtain prevalence and incidence data, and it makes useful comparisons between research findings difficult.

Appendix D presents the criminal penalties prescribed for perpetrators. Again, these vary widely, with different states defining the same conduct as either felony or a misdemeanor (Columns 1 & 2). Many states require referral of cases to criminal authorities (Column 3).

Appendix E is a compilation of laws relating to the reporting provisions. Forty-two states and the District of Columbia mandate a wide variety of professionals to report known or suspected cases of elder abuse. The remaining states (Colorado, Illinois, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, and Wisconsin) make reporting voluntary.[100] The categories of professionals required to report instances of mistreatment include health care and social service professionals, and law enforcement personnel. My own inexact count encompassed at least twenty different types of professionals as "mandatory reporters" in the various states. As this appendix makes clear, some groups are almost always required to report, e.g., physician, nurse, mental health professional, social worker, etc.[101] Other states

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infliction of physical or psychological injury or sexual abuse upon a disabled adult or an elderly person by a relative, caregiver, or household member . . . or sexual abuse of a disabled adult or an elderly person by any person. 'Abuse' also means the active encouragement of any person by a relative, caregiver, or household member to commit an act that inflicts or could reasonably be expected to result in physical or psychological injury to a disable adult or an elderly person.").

100. *See* COLO REV. STAT. ANN. § 26-3.1-102(b) (Bradford 1998) ("The following persons *are urged* to make or initiate an initial oral report within twenty-four hours followed by a written report within forty-eight hours.") (emphasis added); ILL. COMP. STAT. ANN. ch. 320, para. 20/4 (West 1993) ("(a) Any person wishing to report a case of alleged or suspected abuse or neglect *may* make such a report . . . .") (emphasis added); N.J. STAT. ANN. § 52:27D-409 (West Supp. 1998) ("(a) A person who has reasonable cause to believe that a vulnerable adult is the subject of abuse, neglect, or exploitation *may* report . . . .") (emphasis added); *see also* N.Y. SOC. SERV. LAW § 473-b (McKinney 1992); N.D. CENT. CODE § 50-25.2-03 (Michie 1997); 35 PA. CONS. STAT. ANN. § 10215 (West 1996); S.D. CODIFIED LAWS § 22-46-6 (Michie 1998); WIS. STAT. ANN. § 46.90 (West 1997).

101. *See, e.g.*, ALA. CODE § 38-9-8(a) (Michie 1992 & Supp. 1996) ("All physicians and other practitioners of the healing arts having reasonable cause to believe that any adult protected under the provisions of this chapter has been subjected to physical abuse, neglect or exploitation shall report or cause a report to be made . . . ."); ARIZ. REV. STAT. ANN. § 46-454 (West 1998) ("A physician, hospital intern or resident, surgeon, . . . psychologist, or social worker, who has a reasonable basis to believe that abuse or neglect of the adult has occurred . . . shall immediately report or cause reports to be made . . . ."); ARK. CODE ANN. § 5-28-203(a)(1) (Michie 1997) ("Whenever any physician . . . registered nurse, hospital personnel, . . . social worker, . . . mental health professional, . . . has reasonable cause to suspect that an

also include clergy,[102] attorneys,[103] dentists,[104] chiropractors,[105] ambulance drivers,[106] and a host of others. Many states also mandate that "any person" with knowledge or reasonable cause to believe that the defined abuse has occurred report the incident.[107] Column 12 notes the mental state required for criminal conviction under the mandatory reporting statutes,[108] if one is specified, and the penalties for failure to report a violation, typically classified as a misdemeanor.[109]

Appendix F surveys the type and timing of the required reports. The content of the report usually includes names and addresses of the allegedly abused citizen, the reporter, and the alleged abuser, as well as information relating to the nature of the extent of the harm, the basis of the reporter's knowledge, etc.[110] The time frame for making such a report is delineated either explicitly (Columns 3 & 4) or through gener-

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endangered adult has been subjected to . . . abuse . . . he shall immediately report or cause a report to be made in accordance with the provisions of this section.").

102. Reports of suspected abuse must be made by "[e]very clergyman, practitioner of Christian Science or religious healer, unless he has acquired the knowledge of abuse, neglect or exploitation from the offender during a confession." NEV. REV. STAT. ANN. § 432B.220(2)(d) (Michie 1997); *see also* ALASKA STAT. § 47.24.010(a)(10) (Michie 1996); CONN. GEN. STAT. ANN. § 17b-451 (West 1997); NEV. REV. STAT. § 200.5093(2)(d)-(f) (Michie 1997); OHIO REV. CODE ANN. § 5010.61 (Anderson 1992); OR. REV. STAT. § 124.060 (Michie Supp. 1996); S.C. CODE ANN. § 43-35-25 (Law. Co-op 1997).

103. *See, e.g.*, NEV. REV. STAT. ANN. § 200.5093(f) (Michie 1997) (Reporting required by "[e]very attorney, unless he has acquired the knowledge of abuse, neglect, exploitation or isolation . . . from a client who has been or may be accused of such abuse, neglect, exploitation or isolation.").

104. *See, e.g.*, GA. CODE ANN. § 30-5-4(a)(1) (Harrison1997).

105. *See, e.g.*, MONT. CODE ANN. § 52-3-811(3)(a-c) (1997).

106. *See id.*

107. *See, e.g.*, MISS. CODE ANN. § 43-47-7(1) (West Supp. 1998) ("[A]ny person having reasonable cause to believe that a vulnerable adult has been or is being abused, neglected, or exploited shall report such information . . . .").

108. *See, e.g.*, D.C. CODE ANN. § 6-2512(a)(1) (Michie 1996) ("Any person required to report under § 6-2503(a)(1) who willfully fails to do so shall be guilty of a misdemeanor and, upon conviction, subject to a fine not exceeding $300.").

109. *See* IDAHO CODE § 39-5303(2) (Michie 1998) ("Failure to report as provided under this section is a misdemeanor subject to punishment as provided in section 18-113, Idaho Code.").

110. *See, e.g.*, LA. REV. STAT. ANN. § 14:403.2(D)(2) (West 1986 & Supp. 1996) ("All reports shall contain the name and address of the adult, the name and address of the person responsible for the care of the adult, if available, and any other pertinent information."). *See also* MASS. GEN. LAWS. ANN. 19A § 15(c) (West 1994 & Supp. 1998) ("Reports . . . shall contain the name, address and approximate age of the elderly person who is the subject of the report, information regarding the nature and extent of the abuse, the name of the person's caretaker, if known, any medical treatment being received or immediately required, if known, any other information the reporter believes to be relevant to the investigation, and the name and address of the reporter and where said reporter may be contacted, if the reporter wishes to provide said information.").

al description.[111]

Appendix G summarizes the agency or agencies designated to receive reports of elder abuse or neglect and the response. Many states assign this task to more than one agency, especially where there are several applicable abuse laws. These include state social services, APS, and law enforcement agencies.[112] Column 3 sets out the legally required response, including the time allowed by statute for investigation. Column 6 also details the use of central registries, a centralized listing for abuse reports and information to which only certain individuals may gain access.[113] These registries facilitate computerization of data, allowing rapid access to, and retrieval of, relevant information. This is particularly useful in states where more than one agency is involved in the investigation and response to mistreatment.

Appendix H surveys statutory protections for the reporter. Almost all states guarantee anonymity or confidentiality to reporters of abuse[114]—an important consideration given the chilling effect that fears of retaliation or violation of privacy may have on the willingness to report. A few states provide for disclosure of the reporter's identity during the subsequent investigation and/or court proceedings if consent or a court order is obtained.[115] Immunity, either absolute[116] or for re-

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111. *See, e.g.*, ARK. CODE ANN. § 5-28-206(a) (Michie 1997) ("A report of abuse, sexual abuse, or negligence of an abused or neglected adult may, pursuant to this chapter, be made by telephone and shall be followed by a written report within forty-eight (48) hours, if so requested by the receiving agency."). *See also* GA. CODE. ANN. § 31-8-82(a) (Harrison 1997) ("Such person shall also make a written report to the Department of Human Resources within 24 hours after making the initial report.").

112. *See, e.g.*, GA. CODE ANN. 30-5-4(a)(2) (Michie 1997) (requiring that reports of elder abuse be directed toward an "adult protection agency, . . . [or] an appropriate law enforcement authority or district attorney").

113. *See, e.g.*, FLA. STAT. ANN. 415.103(1) (West 1997) (requiring that a "central abuse registry" be established to receive all reports of elder abuse).

114. *See, e.g.*, ALASKA STAT. §47.24.050(a) (Michie 1996) ("Investigation reports and reports of the abandonment, exploitation, abuse, neglect or self-neglect of a vulnerable adult filed under this chapter are confidential and are not subject to public inspection and copying . . . ."); CAL. WELF. & INST. CODE § 15634(a)-(b) (West 1991 & Supp. 1996) ("The reports . . . shall be confidential and may be disclosed only as provided in subdivision (b). Any breach of the confidentiality required by this chapter is a misdemeanor . . . .") (Subdivision (b) permits disclosure to authorized persons and agencies responsible for investigation of the alleged abuse.).

115. *See* ILL. COMP. STAT. ANN. 320 20/4 (West 1997) ("(c) The identity of a person making a report of . . . abuse or neglect under this Act may be disclosed . . . only with such person's written consent or by court order."); MICH. COMP. ANN. § 14.800 (723) (West 1996); WASH. REV. CODE ANN. § 74.34.050 (West Supp. 1998) ("Unless there is a judicial proceeding or the person consents, the identity of the person making the report is confidential.").

116. *See* ALA. CODE § 38-9-9 (1992) ("Any person, firm or corporation making . . . a report pursuant to this chapter . . . shall in so doing be immune from any liability, civil or criminal,

ports made in good faith,[117] is typically provided to protect reporters from legal liability for adherence to statutory commands. Many states presume reports are made in good faith unless proved otherwise by clear and convincing evidence.[118]

VII. LEGAL ACTIONS AGAINST PERPETRATORS

A. *Criminal Law*

Conceptually, almost every form of elder mistreatment corresponds to a common law or statutory crime. Physical abuse, for example, could be assault, battery, or perhaps even attempted murder; financial exploitation may be theft, larceny, or extortion. By criminalizing elder mistreatment, society proclaims that such violence is not acceptable, despite its prevalence. "[T]he criminal code reflects . . . some notion of the moral sense of the community . . . ."[119] Once the illegality of such behavior is recognized, the criminal law can be enforced aggressively to protect the victim and to hold the offender accountable in a public way. Criminal (and other) courts can also protect victims by "no contact" orders, requiring the abuser to vacate the residence, ordering restitution for theft or medical expenses, and by a wide variety of other measures.[120] Emergency orders are often available.[121]

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that might otherwise be incurred or imposed."); *see also* Jones v. Living Ctrs. Holding Co., 695 So. 2d 1194 (Ala. Civ. App. 1997) (section confers absolute immunity for mandatory reporters).

117. *See* IDAHO CODE § 39-5303(5)(4) (1998) ("Any person who makes any report pursuant to this chapter, or who testifies in any administrative or judicial proceding arising from such report, . . . shall be immune from any civil or criminal liability on account of such report, testimony . . . except that such immunity shall not extend to perjury, reports made in bad faith or with malicious purpose . . . .").

118. *See* FLA. STAT. ANN. § 415.1036 (West 1998) ("Any person who participates in making a report under § 415.1034 or participates in a judicial proceeding resulting therefrom is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any liability, civil or criminal, that otherwise might be incurred or imposed . . . .").

119. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 125 (1993).

120. *See, e.g.*, OR. REV. STAT. §§ 107.700-107.720 (1998) (includes authority for courts to issue temporary restraining orders, injunctions of different types; includes requirement for warrantless arrest upon probable cause of a person believed to have violated such an order); UTAH CODE ANN § 30-6-4.8 (1996) (Electronic Monitoring of Domestic Violence Offenders); 750 ILL. COMP. STAT. 60/103 (West 1993). For a comprehensive overview of cases and statutes on abuse of women, see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law*, 21 HOFSTRA L. REV. 801 (1993).

121. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 19A § 20(b) (West 1994) ("If an emergency

Abuse, neglect, and financial exploitation of older persons have been made specific crimes in many states.[122] Statutes often make serious physical abuse or neglect a separate offense.[123] States which do not specifically criminalize abuse and neglect often have provisions requiring reports to be reported to the police for criminal investigation.[124] Most states allow the advanced age of a victim to be considered as an aggravating factor in sentencing because of the vulnerability to crime of older persons as well as the enhanced effect that crime has on them.[125] Others designate various crimes, including assault, battery,

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exists and the department, its designated agency, a member of the immediate family or a caretaker has reasonable cause to believe that an elderly person is suffering from abuse and lacks the capacity to consent to the provision of protective services, said department, designated agency, member of the immediate family or caretaker may petition the court for an emergency order of protective services."); TEX. CODE ANN. § 48.061(b) (West 1998) ("If the department determines that an elderly or disabled person is suffering from abuse, exploitation, or neglect presenting a threat to life or physical safety, that the person lacks capacity to consent to receive protective services, and that no consent can be obtained, the department may petition the probate or statutory or constitutional county court that has probate jurisdiction in the county in which the elderly or disabled person resides for an emergency order authorizing protective services.").

122. *See, e.g.*, TENN. CODE ANN. § 71-6-117 (1995) ("It is unlawful for any person to willfully abuse, neglect or exploit any adult within the meaning of the provisions of this part. Any person who willfully abuses, neglects or exploits a person in violation of the provisions of this part commits a Class A misdemeanor"); WYO. STAT. ANN § 35-20-109 (Michie 1997) ("A person who abuses, neglects, exploits or abandons a disabled adult is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars [$1000.00]."). *See also infra* Appendix A.

123. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 265 § 13K(e) (West 1997) ("Whoever, being a caretaker . . . permits serious bodily injury to such elder or person with a disability, or wantonly or recklessly permits another to commit an assault and battery upon such elder . . . shall be punished by imprisonment in the state prison for not more than ten years or . . . in the house of correction for not more than two and one-half years . . . ."). *See also* DEL. CODE ANN. tit. 31, § 3913 (1997) (intentional abuse causing bodily harm, permanent disfigurement is a Class D felony); KY. REV. STAT. ANN. § 209.990 (Banks-Baldwin 1997) (knowing and willful abuse causing serious physical or mental injury is Class C felony).

124. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 19A § 18(a) (West 1994) ("If an assessment results in a determination that the elderly person has suffered serious abuse, the department or designated agency shall report such determination to the district attorney of the county where the abuse occurred within forty-eight hours. The district attorney may investigate and decide whether to initiate criminal proceedings.") *See also* CONN. GEN. STAT. ANN. § 17b-460 (West 1997); IDAHO CODE § 39-5310 (1997).

125. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-702(13) (West 1997) (enhancing culpability "[i]f the victim of the offense is sixty-five or more years of age or is a handicapped person"); DEL. CODE. ANN. tit. 11 § 841(c)(2) (1996) (enhancing liability if the "victim is 60 years of age or older"); 730 ILL. COMP. STAT. ANN. 5/5-5-3.2(b)(4)(ii) (West 1997) (augmenting punishment if the victim is "a person 60 years of age or older at the time of the offense"); NEV. REV. STAT. ANN. § 193.167 (1-2) (Michie 1997) ("Certain crimes committed against persons 65 years of age or older . . . shall be punished by imprisonment . . . for a term equal to and in

robbery, etc. as more serious offenses when committed against an elderly person.[126] Moreover, if the victim of a crime is particularly vulnerable, a judge may take that into account in imposing a sentence even without specific statutory authorization. As long as the sentence is kept within normal sentencing guidelines, there is little to prohibit a judge from imposing a greater sentence.[127]

These criminal provisions reflect the special vulnerability of the elderly to crime. The physical, financial, and behavioral impacts of crime on the elderly, by caretakers or strangers, are much greater than upon younger victims.[128] According to the National Conference on Crime Against the Aging, the elderly are eight times more vulnerable to crime than are younger people, primarily because of their physical limitations and poverty.[129] It has long been recognized that the elderly are among the groups especially vulnerable to crime.[130] Perceived wealth and physical weakness combine to make the elderly likely targets and their living arrangements often leave them dependent and isolated.[131] Thieves know that elderly persons will receive checks or

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addition to the term of imprisonment prescribed by statute for the crime.").

126. *See, e.g.*, FLA. STAT. ANN. § 784.08(2) (West 1998):

> Whenever a person is charged with committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, regardless of whether he or she knows or has reason to know the age of the victim, the offense for which the person is charged shall be reclassified as follows:
>
> (a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.
>
> (b) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
>
> (c) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

127. *See, e.g.*, People v. Jorgensen, 538 N.E.2d 758, 761 (Ill. App. Ct. 1989) (holding that it was proper for the trial court to enhance the sentence of a defendant who was convicted of home invasion and armed robbery because the victim was over the age of sixty even when there was no specific statutory mandate to consider age because "a sentencing court has wide latitude to conduct a broad inquiry into facts which may tend to mitigate or aggravate the offense . . . ."); State v. Flowers, 394 S.E.2d 296 (N.C. Ct. App. 1990) (finding the advanced age of the victim a proper basis for enhancing the defendant's conviction for murder, burglary, kidnapping, larceny, armed robbery, and breaking and entering because of the greater vulnerability of the elderly victim).

128. *See* ROBERT J. SMITH, CRIME AGAINST THE ELDERLY: IMPLICATIONS FOR POLICYMAKERS AND PRACTITIONERS 18-21 (1979).

129. *See* Joan N. Scott, *Senior Citizens Present a Special Case*, JUDGES J., Summer 1982, at 19.

130. *See* HANG VON HENTIG, THE CRIMINAL AND HIS VICTIM: STUDIES IN THE SOCIOBIOLOGY OF CRIME 408-11 (1948).

131. *See* Jordon I. Kosberg, *Victimization of the Elderly: Causation and Prevention*, 10 VICTIMOLOGY 376, 377 (1985).

carry large sums of cash on certain days.[132]

Despite the shocking prevalence statistics of elder abuse and neglect discussed earlier, elder abuse victims rarely report.[133] Some may feel abusive treatment is ordinary[134] or that recourse through the law is unavailable or unavailing.[135] Others may be so thoroughly isolated or under the control of the caregiver that they have no opportunity to seek help.[136] Victims are often particularly reluctant to proceed against family members because of embarrassment, shame, lack of third party emotional support, and failure of the criminal justice system to accommodate victims' needs.[137] The failure of mandated professionals to report suspected cases[138] likewise means prosecutors are rarely involved. Elder abuse follows patterns similar to other forms of family violence, especially spousal abuse.[139] To be successful, the criminal justice system must take the victim's situation and vulnerability into account. Ultimate responsibility for arrest, charging, and disposition of a criminal

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132. *See id.*

133. *See, e.g.*, 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at 42 (estimating only one in every eight cases of elder abuse is ever reported; Pillemer & Finkelhor, *supra* note 2 (estimating only one in fourteen cases of elder mistreatment is reported to authorities).

134. *See, e.g.*, Linner W. Griffin, *Elder Maltreatment Among Rural African-Americans*, 6 J. OF ELDER AB. & NEGL. 1-29 (1994).

135. *See* A. Paul Blunt, *Financial Exploitation of the Incapacitated: Investigation and Remedies*, 5 J. ELDER AB. & NEGL. 19, 28-31 (1993).

136. *See* K.A. Pillemer, *Social Isolation & Elder Abuse*, 8 RESPONSE No. 4, 2-4 (1984).

137. *See* Suzanne K. Steinmetz, *Dependency, Stress and Violence Between Middle Aged Caregivers and Their Elderly Parents*, *in* ABUSE AND MALTREATMENT OF THE ELDERLY 134-49 (Jordon I. Kosberg ed.). Prof. Martha Minow has astutely commented on the complexity of these situations.

> Two important features are neglected in this familiar debate over assigning blame for family violence. The first is the real possibility that violence within a family involves a system of human interactions that should all be changed, rather than a single, sick, and malevolent wrong-doer. The second is the family's embeddedness in larger social patterns—of neighbors who look the other way, police and social workers who do not respond to reports of violence, and public attitudes that tolerate or deny family violence. By neglecting these two features, debates over assigning blame for violence within the family contribute to the sense that the problem is abnormal, private, and contained within that family. At the same time, these features may help explain why some people who engage in family violence believe it to be normal, publicly accepted, and not confined to their own family.

Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665, 1682-83 (1990).

138. *See infra* notes 205-16 and accompanying text.

139. *See, e.g.*, LENORE E. WALKER, THE BATTERED WOMAN 52 (1979) (describing reasons battered women are unable to respond effectively); Mark Hansen, *New Strategy in Battering Cases*, A.B.A. J., Aug. 1995, at 14 (analyzing increasingly violent cycle in domestic abuse cases).

case should rest with police and prosecution. Elder mistreatment is a matter of public concern, not a private or family matter.

Given the "hidden" nature of the events, there is no precise data on the number of unreported instances of geriatric mistreatment. There is, however, anecdotal and general information available. Although Massachusetts, for example, has one of the most active programs for identifying elder abuse, a study conducted in that state concluded that only one case in fourteen comes to the attention of state authorities.[140] Congressional reports have noted that while elder abuse is at least as prevalent as child abuse, it is far less likely to be reported.[141] In 1990, the House Subcommittee on Health and Long-Term Care sent questionnaires to all states in an effort to assess the extent of underreporting of elder mistreatment. All states concurred that significant numbers of elder abuse cases were never reported.[142] Some of the responses by state agencies are truly shocking; California estimated one in ten cases are reported; Wisconsin one in sixteen and Indiana responded that as few as one in fifty cases were reported.[143]

B. *Civil Remedies*

Elder maltreatment often has a devastating impact on its victims. Because of their age, health, or limited resources, the elderly typically have fewer options for resolving or avoiding the abusive situation. Their physical frailty makes them more vulnerable to physical or other abuse, and poor health often accentuates the problem.[144] Older persons may have less ability to recover from financial exploitation because of fixed incomes or short remaining life spans. The loss of a home lived in for many years may be particularly traumatic because of its familiarity, memories, and the trauma of being moved.

Since elder mistreatment is often a "family affair" involving grown children or spouses, doctrines of intrafamilial and interspousal tort im-

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140. *See* Pillemer & Finkelhor, *supra* note 2.

141. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at XI ("On the average . . . roughly 1 of 8 elder abuse cases is ever reported . . . ."); 1981 ELDER ABUSE HOUSE REPORT, *supra* note 29, at xiv-xv (estimating one of six cases is reported to authorities).

142. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, Table 8, at 53.

143. *See id.*, Table 9, at 54.

144. While it would be inaccurate to describe the vast population over sixty-five with one generalization, physical decline eventually becomes an aspect of the aging process. *See generally* DAVID A. TOMB, GROWING OLD 15-40 (1984). Chronic health problems increase dramatically in this age group. *See* ROBERT C. ATCHLEY, SOCIAL FORCES AND AGING 91 (1988).

munity at one time blocked civil remedies.[145] Modern family and tort law concepts have swept away most of these barriers[146] and civil damages are available in suits by parents against emancipated children and between spouses.[147] Provided that legal counsel is available and the legal process is accessible, traditional civil law remedies can sometimes be effectively utilized against many of the forms of elder mistreatment. Physical or sexual abuse is civil battery. Misuse of the elder's funds may be remedied by litigation claiming conversion or fraud. There are particularly useful civil tools where the abuser occupied a fiduciary status such as trustee, guardian, conservator, or power of attorney. A "fiduciary" relationship exists where "special confidence is reposed in one who is bound in equity and good conscience to act in good faith with due regard to the interest of the person reposing the confidence."[148] In addition, an attorney for the fiduciary has a duty to the beneficiaries or wards.

> In all matters connected with [the] trust a trustee is bound to act in the highest good faith toward all beneficiaries, and may not obtain any advantage over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. An attorney who acts as counsel for a trustee provides advice and guidance to all beneficiaries. It follows that when an attorney undertakes a relationship as an adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary.[149]

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145. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 445 (Cooley 3d ed. 1884) ("[H]usband and wife are one," so a married woman could not sue her husband in tort for physical or other mistreatment.).

146. *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 370-81 (1987).

147. *See, e.g.*, Fitzgerald v. Valdez, 427 P.2d 655, 659 (N.M. 1967) (recognizing suit by parent against child); Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 342 (W. Va. 1978) (allowing compensatory and punitive damages in assault suit brought by one spouse against the other).

148. People v. Riggens, 132 N.E.2d 519, 522 (Ill. 1956). *See generally* JONATHAN FEDERMAN & MEG REED, ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM (Government Law Ctr. of Albany Law Sch. ed., 1994).

149. Morales v. Field, DeGoff, Huppert & MacGowan, 99 Cal. App. 3d 307, 316 (1979); *see also* Weingarten v. Warren, 753 F. Supp. 491, 496 (S.D.N.Y. 1990) ("By alleging Warren acted as attorney for the trustee and that he violated his fiduciary duty to the beneficiaries, plaintiffs have stated a cause of action against Warren individually for breach of fiduciary duty."); Estate of Halas, 512 N.E.2d 1276, 1280 (Ill. App. 1987) (attorney for the trustee owed both a fiduciary duty directly to the beneficiaries, but also a "derivative fiduciary duty . . . ."); Fickett v. Superior Court of Pima County, 558 P.2d 988, 990 (Ariz. App. 1976) ("[P]ublic policy requires that the attorney exercise his position of trust and superior knowledge responsi-

Attorneys who participate in misconduct may have licensure sanctions imposed on them.[150] The fiduciary may be forced to provide an accounting of the money and property that have been expended in order to determine whether improprieties have occurred. Numerous states have also provided statutory remedies for abuse by fiduciaries.[151]

Sometimes intervention may eliminate future abuse in straightforward ways. Power of attorney may be annulled in most states by written revocation of the power.[152] Names on bank accounts can be changed or a representative payee removed upon notice to the Social Security Administration.[153]

Even without formal legal appointment, a fiduciary relationship may be found when a person has voluntarily undertaken the care of an elderly person, particularly if the elder is disabled. Courts may then find a "guardian-like" relationship and impose upon the caregiver a fiduciary duty to safeguard assets. A "constructive" trust may be imposed if fraud or abuse has occurred within a confidential relationship.[154] Where

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bly" to the trustee.).

150. *See, e.g., In re* Matter of Smith, 572 N.E.2d 1280 (Ind. 1991) (upholding suspension from practice of two attorneys who drafted instruments used in fraudulent transactions). *See also* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.8(c).

151. *See, e.g,* ARIZ. REV. STAT. ANN. § 46-454(G) (West 1997) ("If any person is found to be responsible for the abuse, neglect, or exploitation of an incapacitated or vulnerable adult in a criminal or civil action, the court may order the person to make restitution as the court deems appropriate."); FLA. STAT. ANN. § 415.102 (12)(a)(2) (West Supp. 1998) (action available against person who "[k]nows or should know [action will] . . . deprive the disabled adult or elderly person of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the disabled adult or elderly person"); OR. REV. STAT. § 124.110 (1)(a) (1995) ("An action may be brought . . . for fiduciary abuse in the following circumstances: (a) When a person, including but not limited to a person who has the care or custody of an elderly or incapacitated person or who stands in a position of trust to an elderly or incapacitated person, takes or appropriates money or property of the elderly or incapacitated person for any wrongful use").

152. *See, e.g.,* IND. CODE ANN. § 30-5-10-1 (West 1998).

153. *See* Representative payee status, 42 U.S.C. § 405(j)(2)(A) (1997) ("If the Commissioner of Social Security or a court of competent jurisdiction determines that a representative payee has misused any individual's benefit paid to such representative payee pursuant to this subsection or section 1383(a)(2) of this title, the Commissioner of Social Security shall promptly revoke certification for payment of benefits to such representative payee pursuant to this subsection and certify payment to an alternative representative payee or, if the interest of the individual under this subchapter would be served thereby, to the individual."); 20 C.F.R. § 404.2055 ("If a beneficiary receiving representative payment shows us that he or she is mentally and physically able to manage or direct the management of benefit payments, we will make direct payment.").

154. *See, e.g.,* Estate of Campbell, 704 A.2d 329, 330 (Me. 1997) (holding that a constructive trust may be imposed to do equity, prevent unjust enrichment when title to property is

the aged person is dependent, and has allowed a third party to handle assets, a "constructive trust" requires the fiduciary to use resources only for the benefit of the older person.[155] If funds or property were expended for something other than the elder's best interest, traditional common law remedies may be employed to recover the assets.[156]

In appropriate circumstances, punitive damages may be assessed. Particularly where the abuser has resources, or the funds have been egregiously wasted, the requirements for "criminal type" damages may be met.[157] Extra-compensatory liability is justified because of outrageous misconduct that is accompanied by malicious intent.[158]

C. *New Statutory Remedies*

Mistreated elderly often find legal remedies inadequate. Many victims are unable to obtain an attorney, even when the abuse is obvious and shocking; there is little financial incentive for lawyers to become involved. Because of the slow pace of litigation, many of the frail elderly do not survive long enough for a law suit to come to judgment. In some states the death of the abused elder person cuts off

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acquired by fraud, or when property is acquired in violation of a fiduciary duty); Stauffer v. Stauffer, 351 A.2d 236, 241 (Pa. 1976) (constructive trust, shaped by the conscience of equity, unlike an express trust, is a remedy created to prevent unjust enrichment).

155. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (1996) (stating that "despite the differences in the legal circumstances and responsibilities of various fiduciaries, one characteristic is common to all: a person in a fiduciary relationship to another is under a duty to act for the benefit of the other as to matters within the scope of the relationship"); *see also* Kurtz v. Solomon, 656 N.E.2d 184, 190-91 (Ill. App. Ct. 1995) (stating that factors in "determining whether a fiduciary relationship exists between parties, the breach of which would warrant a constructive trust, include health, mental condition, education, and business experience . . . . The fiduciary is prohibited from seeking a selfish benefit during the relationship.").

156. *See, e.g.*, Wennerholm v. Wennerholm, 46 N.E.2d 939, 944 (Ill. 1943) (setting aside a transfer of property between family members after requiring that such a gratuitous transfer be not only free from fraud but also equitable to the grantor); Wiemer v. Havana Nat. Bank 385 N.E.2d 340, 344 (Ill. App. Ct. 1978) (holding that actions of trustee bank violated the fiduciary responsibilities owed to its customer to preserve the trust property).

157. *See generally* 1 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE tbl. 4.1 (1984 & Supps.) (noting most states recognize the supercompensatory nature of punitive damages).

158. *See* 1 DAN B. DOBBS, THE LAW OF REMEDIES, § 3.11(2), at 468 (1989); RESTATEMENT (SECOND) OF TORTS § 908(2) cmt. b (1979) (stating that "[p]unitive damages . . . can be awarded . . . for conduct [that is] . . . outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others"); Martsch v. Nelson, 705 P.2d 1050, 1054 (Idaho 1985) (stating that courts would award punitive damages when conduct is "wanton, malicious or gross and outrageous or the facts imply malice and oppression").

recovery for pain, suffering, or disfigurement.[159] Problems of proof are another disincentive to lawyers' taking abused elderly clients; often victims suffer from diminished mental capacity, memory loss, or speech difficulties.[160] In many instances of financial abuse, the misappropriated property may be the elder's life savings, but still amounts to a relatively small sum in comparison to attorney fees and other costs of litigation. We thus need new statutory remedies, and several states have become "laboratories"[161] in which experiments in new remedies are being conducted.

In 1992, California enacted a new statute covering abused elders or dependent adults. The Elder Abuse and Dependent Adult Civil Protection Act[162] begins with legislative findings: the infirm elderly and dependent adults are a "disadvantaged class," and few civil cases are brought in connection with their abuse because of problems of proof, court delays, and the lack of incentives to prosecute these suits.[163] The legislative intent, clearly stated, is to enable abused, vulnerable persons to engage attorneys to take their cases. When it is proven by "clear and convincing" evidence that the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of abuse of the elderly, new remedies are created. These include postmortem recovery for pain and suffering, and mandatory attorney fees and costs.[164] The Act allows fees for the services of a conservator litigating an elder's claim and continuation of a pending action by the elder's personal

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159. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 126, at 942-43 (5th ed. 1984) ("The pain and suffering recovery on behalf of the estate . . . is clearly a windfall to the heirs and a respectable number of states explicitly exclude such damages in the survival action."). *See also, e.g.*, ARIZ. REV. STAT. ANN. § 14-3110 (1997) ("Every cause of action, . . . shall survive the death of the person entitled thereto . . . [but] damages for pain and suffering of such injured person shall not be allowed"); CAL. CIV. PROC. CODE § 377.34 (1998) ("In an action or proceeding by a decedent's personal representative . . . , the damages recoverable . . . do not include damages for pain, suffering, or disfigurement.").

160. *See, e.g.*, *Society's Secret Shame: Elder Abuse and Family Violence, Hearing Before the Senate Special Committee on Aging*, 104th Cong. 27-30 (1995) (statement of Leo J. Delicata, Esq.) (describing fear and impairment of victims and delay in litigation process as factors deterring lawsuits).

161. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

162. CAL. WELF. & INST. CODE § 15600-15657.3 (West Supp. 1997).

163. *See id.* § 15600(j)(h)(i).

164. *See id.* § 15657.

representative or successor.[165] In addition, if a conservator has been previously appointed, the Act extends jurisdiction over the new civil action to the court that deals with probate conservatorships.[166] As a result, courts skilled in dealing with issues which often emerge with the elderly—capacity, memory, undue influence, etc.—will be the forum for such suits.

Another group of innovative statutes deal specifically with financial abuse. Illinois' recent Financial Exploitation of the Elderly and Disabled Act[167] creates, in addition to criminal penalties, treble damages and attorney fees for a civil judgment deciding property has been converted or stolen from a senior citizen by threat or deception. These enhanced remedies are available regardless of the outcome of the criminal case. In Maine, a statute allows an elderly, dependent individual who has transferred property as a result of undue influence to secure a court order forcing return of the property. If real estate, or 10% or more of such an individual's money or personal property, was taken for less than fair market value, and a confidential or fiduciary relationship existed, a presumption is created that the elderly person has been unduly influenced in making the transfer.[168] Statutes like this make civil suits against the financial exploiter more feasible, and even attractive, for attorneys. In some states, civil remedies provide for punitive damages.[169]

Other jurisdictions have created additional means of relief. In the District of Columbia, a statute permits the city's Corporation Counsel to secure a judicial order against the abuser, shifting the costs of conducting the investigation and providing protective services to the victims.[170] Several states provide a civil cause of action against the perpetrator and shift plaintiff's attorney's fees to a losing defendant.[171]

All states now have domestic violence laws designed to protect

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165. *See id.* § 15657.3(d).
166. *See id.* § 1567.3(a).
167. 720 ILL. COMP. STAT. ANN. 5/16-1.3 (West 1995).
168. *See* ME. REV. STATS. ANN., tit. 33, §§ 1021-1024 (West Supp. 1997). Examples of "confidential or fiduciary" relationships under this statute include family, accountants, brokers, individuals providing care and services to the elderly person, etc. *See id.* § 1022.
169. *See, e.g.*, CAL. WELF. & INST. CODE § 15657 (West Supp. 1998); FLA. STAT. ANN. § 415.1111 (West 1998).
170. *See* D.C. CODE ANN. § 6-2510 (1997); *see also* WASH. REV. CODE ANN. § 74.34.130(6) (West Supp. 1998) (respondent required to pay filing fees and attorney costs).
171. *See, e.g.*, CAL. WELF. & INST. CODE § 15657 (West Supp. 1998); OREG. REV. STAT. § 124.100 (1998); WASH. REV. CODE ANN. § 74.34.130 (West Supp. 1998); WISC. STAT. ANN. § 46.90 (West 1997).

victims of abuse.[172] Although restricted in some jurisdictions to spouse or partner abuse cases, in other states these statutes provide for a judicial "protection order" for all family or household members threatened with physical harm.[173] Under these laws, the court may order the abuser to: (i) refrain from abusing the elder; (ii) move away from, and stay out of, the residence shared with the victim; (iii) refrain from contacting the victim; and (iv) provide alternative housing for the victim.[174] In addition, some domestic violence statutes protect "high risk adults" (e.g., "vulnerable adults") from neglect and financial exploitation as well.[175] Prompt orders of an equitable nature can be used to enjoin other forms of mistreatment in the same manner as physical abuse.[176] Often restraining orders can prevent future maltreatment. While the details of these statutes vary from state to state, the use of a "protection order" can often spark police involvement and bring the case to the attention of adult protection and social service agencies.

VIII. LEGAL ACTIONS AGAINST PROFESSIONALS FOR FAILURE TO ASSESS, TREAT, AND REPORT

A. *Background*

Mandatory reporting laws seek to create social and legal interventions into elder mistreatment cases by (1) requiring certain professionals, or "any person" with "reasonable belief" or "suspicion," to report

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172. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/111-8 (West 1989). A comprehensive discussion on domestic violence cases and statutes is found in Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law*, 21 HOFSTRA L. REV. 801 (1993).

173. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 209A, §6 (West Supp. 1998) ("Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, the officer shall use all reasonable means to prevent further abuse . . . ."); MO. REV. STAT. § 455:035, :045, :085 (West 1997) (providing judicial remedies for adults abused by present or former adult household members); N.J. STAT. §§ 2C-25-28, 2C-25-32 (same). For discussion of the lawyer's role in abuse and neglect, see Linda G. Mills, *On the Other Side of Silence: Effective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996).

174. *See* statutes cited *supra* note 173; *see also* ME. REV. STAT. ANN. tit. 19 § 4001 (West 1998) (temporary emergency protection orders available against family or household members; after one year, orders may be made final; defendant may be ordered to pay plaintiff's attorney fees).

175. *See, e.g.*, WASH. REV. CODE § 74.34.110(2) (West Supp. 1998).

176. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 60/103 (West 1998).

that information to designated public authorities;[177] (2) providing immunity from liability for those reporting in good faith;[178] and (3) initiating investigative and treatment services by Adult Protective Services or other agencies.[179] Licensed health care and social service providers are likely to examine and treat injured elders and their caretakers, and are presumed qualified to identify the symptoms and to diagnose mistreatment of the aged. The statutory inclusion of these groups as mandatory reporters is legislative recognition of their access to, and relationship with, the elderly. Their strategic position in emergency rooms, physicians' offices, clinics, social service agencies and other locales where the aged and their caregivers appear makes it logical to place a duty to report upon them. The professional nature of these relationships increases the probability that an elder will confide in them if appropriate interviewing and screening techniques are used.[180] In addition, these professionals should be knowledgeable about community agencies that deal specifically with elder related problems.

Mandatory reporting has always been controversial, and a long debate has raged regarding its propriety and efficacy.[181] The arguments of those opposed to mandatory reporting may be grouped under four headings. First, compulsory reporting is said to violate the elder's right to self-determination and to constitute an ageist response to this social problem.[182] The aged are presumed competent to manage their affairs, and victims of elder mistreatment have the capacity to control their own decision-making and seek assistance when, and if, they choose.[183]

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177. *See infra* Appendix E, columns 1-11.

178. *See infra* Appendix H.

179. *See infra* Appendix G.

180. *See infra* notes 238-52 and accompanying text.

181. *See generally* U.S. General Accounting Office, *Elder Abuse: Effectiveness of Reporting Laws and Other Factors* (Apr. 1991) and *infra* notes 182-203 and accompanying text.

182. *See generally* Lawrence P. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69 (1982) (exploring ramifications of mandatory reporting laws and cautioning that moving too quickly to adopt such laws may actually worsen the situation for an already dependent elder); Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well Being?*, 273 JAMA 1781 (1995) (describing state reporting laws, their effect and how physicians can minimize potential harm to patients); John Palincsar & Deborah Crouse Cobb, *The Physician's Role in Detecting and Reporting Elder Abuse*, 3 J. LEGAL MED. 413 (1982) (describing physician's role in addressing elder abuse and neglect in informal settings).

183. *See* Faulkner, *supra* note 182, at 84-86; Katheryn D. Katz, *Elder Abuse*, 18 J. FAM. L. 695, 710-11 (1980); Palincsar & Cobb, *supra* note 180, at 436; Vicki Gottlich, *Beyond Granny Bashing: Elder Abuse in the 1990's*, 28 CLEARINGHOUSE REV. 371 (1994).

Critics contend the aged are already disempowered and devalued in our society, and mandatory reporting perpetuates society's perception that they are helpless and childlike.[184] These writers often highlight the fact that for the elderly the loss of a caregiver (albeit an abusive and/or otherwise flawed caregiver) will be perceived as leading to institutionalization and other negative consequences.

A second attack leveled against mandatory reporting is that it violates the confidentiality which is inherent in a professional-patient/client relationship and disrupts the trust that professionals need to operate effectively.[185] Moreover, the required reporting may publicize a situation which the elder has consciously chosen not to reveal.[186] The attendant humiliation and embarrassment may be particularly traumatic for the parent or spouse in such a family situation. A third common argument, building on the previous two points, posits that required reporting is counter-productive because it discourages elders from reporting abuse themselves and deters victims from seeking professional, especially medical, assistance.[187] Fourth, opponents maintain that mandatory reporting will flood the existing social service system, prevent informed decision-making distinguishing valid reports from those based on supposition and fear of legal consequences for not reporting, and ultimately engulf the overtaxed APS system.[188]

Proponents of mandatory reporting respond with equally strong arguments. The most important consideration, they maintain, is the physical safety and financial integrity of the aged person involved.[189]

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184. *See* Faulkner, *supra* note 182, at 84-86; *see also* Hyman et al., *supra* note 182, at 1785 (similar argument used regarding battered spouses).

185. *See, e.g.*, Wanda G. Bryant & Sondra Panico, *Physicians' Legal Responsibilities to Victims of Domestic Violence*, 55 N.C. MED. J. 418, 420 (1994) (stating, in context of domestic violence, mandatory reporting will prevent relationship of trust between doctor and patient); Robert M. Gordon & Susan Tomita, *The Reporting of Elder Abuse and Neglect: Mandatory or Voluntary?*, 38 CANADA'S MENTAL HEALTH 1, 3 (1990). *See also* Jane R. Matlaw & Jane B. Mayer, *Elder Abuse; Ethical and Practical Dilemmas for Social Work*, 11 HEALTH & SOCIAL WORK 85-94 (1986) (discussing dilemmas that result from multidisciplinary intervention in abuse cases, including the decision to report, its ramifications, and the effect on the victim's right to self-determination).

186. *See* Palincsar & Cobb, *supra* note 182, at 429.

187. *See* Gottlich, *supra* note 183, at 371, 375; Metcalf, *supra* note 50, at 753.

188. *See, e.g.*, David P. Matthews, Comment, *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 PEPP. L. REV. 653, 664 (1988).

189. Examples of serious mistreatment fill congressional reports and academic studies. A few examples, as recounted by the 1990 Elder Abuse House Report, are included here as illustrative of abuse encountered by older Americans in domestic situations.

Elder abuse is often a "family affair" in which wrongful behavior is

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In New Jersey, a 70-year-old woman was beaten by her 32-year-old son, who did not contribute to the household expenses and whom she suspected of abusing alcohol and drugs. She said she was terrified of his unprovoked attacks and that he had broken her glasses and once attacked her in bed while she was sleeping. A social worker saw her badly bruised left breast, the result of the son punching her.

In Massachusetts, an elderly couple's alcohol-addicted son went on a rampage, breaking windows, ripping lights from the ceiling, striking his father, spitting in his mother's face and threatening to kill both because they would not give him money.

In Texas, a 61-year-old woman with Alzheimer's disease and diabetes was being neglected by her daughter. They lived in a house which was dirty and cluttered. The older woman had a large, 4" deep decubitus ulcer on her buttocks and numerous other decubiti. She had pulled out her feeding tube, had an elevated temperature and her blood pressure was very low. Her alcoholic sister was supposed to be assisting in her care but did not bathe the client or dress her wounds. A second daughter who lived nearby used part of the client's Social Security check to pay her own household expenses. The family would not permit the elderly woman to enter a nursing home because they then wouldn't have access to her Social Security.

An elderly woman in Vermont was found frozen to death in her home. Court papers indicate that her younger brother, her legal guardian, was empowered to oversee her finances, her care and her medical attention. This 82-year-old woman had been living in a house without running water or toilet facilities, and had been forced to heat the house herself by stoking a coal stove, which required great physical stamina. When the police arrived, they found piles of frozen human excrement, no food and no heat. Authorities became aware of the situation when the brother petitioned to complain about the tax assessment for the home, which he referred to as "nothing but a shell."

An 80-year-old Texas man lived alone in a small house, his only family a stepson who lived nearby. The client suffered a massive stroke which left him totally incapacitated. His stepson left the older man alone in the house with no food or water for three days and would not allow him to be hospitalized for fear of being held responsible for the medical bills. Without the intervention of State caseworkers, the man would have died. He was finally admitted to the hospital.

An 81-year-old woman from Texas suffered a broken hip when her husband "fell" on her. He refused to allow her to go to a doctor for 4 days after this accident. This 5'8" woman had gone from "obese," according to social workers' reports, to weighing a mere 78 pounds in 4 months. The husband refused to allow a provider to bathe or otherwise help his wife. When a caseworker visited the woman at home, she found her naked, lying on a green rubber sheet. She was covered with urine and feces, and was unable to speak or to move without assistance. Her husband insisted she remain naked so she wouldn't dirty her clothing. When the woman was finally seen by a doctor, she was seriously malnourished. She lived for only three weeks after being removed from this situation.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 2, at 2-9.

not revealed to outsiders.[190] The aged person may desire to "save face" and thus be unwilling to create or exacerbate intrafamilial conflicts. Moreover, victims do not self report because of dependency, fear of institutionalization, feelings of powerlessness, or other deterrents.[191] Non-reporting on the part of the victim may thus be a coerced decision, either objectively or subjectively. Moreover, although the aged are typically competent and may decide most issues for themselves, autonomous decision-making always takes place when the person is in a social context. Abused and neglected elderly people tend to be socially isolated, with fewer contacts and weaker support systems than non-mistreated elders.[192] This means victims of elder abuse are unlikely to have the support they need to make a free choice about self-reporting.

In most instances, the mistreatment is a crime,[193] sometimes violent against those who are not able to protect themselves. Many non-elderly victims wish that public authorities are not alerted, and that the crime would not be prosecuted. Similar arguments have been made with respect to whether battered women have the right to prevent prosecution of their batterers.[194] The prosecutor, however, represents the state, not just the victim; the victim's choice is not the only criterion used in deciding whether a public response is activated.[195] Moreover,

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190. *See, e.g.*, Kosberg & Nahmiash, *supra* note 5, at 42.

191. *See* Matthews, *supra* note 188, at 662 (positing that many abused elders do not come forward on their own and that only mandatory reporting will help them); Blunt, *supra* note 135, at 25 (reporting that in cases of financial exploitation, elderly victims may not be reliable sources of information due to illness, unwillingness to discuss their finances and reluctance to testify against family members).

192. *See* Pillemer, *supra* note 136; Pillemer & Finkelhor, *supra* note 2, at 54 (discussing lack of support systems); *see also* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 35-38 (1992) (stating that the inherent private nature of family relations leads to presumption that a family should be free from external interference); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) (specifically addressing battered women and recognizing the "dark and violent side of privacy"). "Police traditionally managed violence in the home very differently from violence on the street. They tried to mediate domestic "disputes" . . . [t]he message was that assaults in the home were permissible; victims were not afforded adequate protection and assailants were not subject to consequences." Howard Holtz & Kathleen Furniss, *The Health Care Provider's Role in Domestic Violence*, 8 TRENDS IN HEALTH CARE, L. & ETHICS No.2, 47, 50 (1993).

193. *See* statutes collected in *infra* Appendices A & D.

194. *See generally* Donna R. Mooney & Michael Rodriguez, MD, *California Healthcare Workers and Mandatory Reporting of Intimate Violence*, 7 HASTINGS WOMEN'S L.J. 85 (1996) (arguing mandatory reporting and public decision-making about criminal enforcement removes autonomy from women and may worsen abuse in many situations).

195. Many victims of elder abuse are spouses or partners, so the categories often overlap. *See, e.g.*, Metcalf, *supra* note 50, at 775 (1986) (estimating 20% of elder abuse occurs in married couples); Faulkner, *supra* note 182, at 86.

often services may be offered to victims without unnecessary intrusion into their lives. In many states, aged persons may refuse consent to an investigation by APS.[196] Public control of such investigation may be reasserted if an emergency exists or there is reasonable cause to believe the aged person refusing consent is incapacitated.[197] Here, as in many legal issues concerning the elderly, societal values of personal autonomy and protection of the individual exist in uneasy tension.

Further, while there has been a long tradition of safeguarding the confidentiality of information gathered in the professional-client relationship, exceptions have always been made when the public interest outweighs the private interest.[198] There is no realistic possibility of liability where information is disclosed by a professional pursuant to court order[199] or legislative command. Every state has a statute that provides some type of immunity for reporters of elder mistreatment. The form of these statutes varies. The majority provide immunity from liability if the report is made in "good faith,"[200] while others protect the professional unless he acted "maliciously," in "bad faith," or knew the report was false.[201] Such immunity is recognized even where the report

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196. *See, e.g.*, ALASKA STAT. § 47.24.017(d) (Michie 1996) (requiring consent of alleged victim or court order to investigate); UTAH CODE ANN. § 62A-3-304(1) (1997) (same); WISC. STAT. ANN. § 46.90(g) (1997); KY. REV. STAT. ANN. § 209.030(6) (Michie 1998).

197. *See, e.g.*, ALASKA STAT. § 47.24.016 (Michie 1996).

198. *See, e.g.*, Storch v. Silverman, 186 Cal. App. 3d 671 (1986) (absolute immunity granted mandatory reporter under California child abuse statute); Hope v. Landau, 486 N.E. 2d 89, 91-92 (Mass. 1985) (holding in the context of child abuse that a writer of a report required by statute is immune from liability regardless of correctness of belief). *See generally* Robert F. Danelen, *Statutory Immunity Under the Child Abuse and Neglect Reporting Act: From First Impression to Present Day*, 12 J. JUV. L. 16 (1991) (discussing absolute immunity for mandatory reporters under the California Child Abuse and Neglect Reporting Act); Dorothy Ann Gilbert, *The Ethics of Mandatory Elder Abuse Reporting Statutes*, 8 ADV. NURS. SCI. 51 (1986) (discussing mandatory reporting of elder abuse by nurses and immunity from liability if reports are made in good faith).

199. *See, e.g.*, Arnett v. Baskous, 856 P.2d 790, 791 (Alaska 1993) (holding physician not liable for breach of patient confidence for releasing a patient's medical records pursuant to a court order); Bryson v. Tillinghast, 749 P.2d 110, 113 (Okla. 1988) (holding a doctor's disclosure of patient information leading to conviction did not violate the physician-patient privilege and benefited the public at large).

200. *See, e.g.*, ALASKA STAT. § 47.24.120(a) (Michie 1996) ("A person who in good faith makes a report under AS 47.24.010, regardless of whether the person is required to do so, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report.").

201. *See, e.g.*, GA. CODE ANN. § 30-5-4 (1997) ("[A]nyone who makes a report . . . shall be immune from any civil or criminal liability . . . unless such person acted in bad faith or with malicious purpose."); IDAHO CODE § 39-5303 (Michie Supp. 1997) (same); MONT. CODE ANN. § 52-3-814 (1997) (same); N.C. GEN. STAT. § 108A-102 (1997) (same).

turns out to be incorrect.[202] Moreover, since patients will be informed that the report to authorities is statutorily required, disclosure is unlikely to reduce trust in the relationship, and in fact may give the client more confidence in the professional who cares enough to attempt to protect him or her. Nor is it likely that elders will not seek medical or other help when they need it, given the exigent nature of such needs.

Despite considerable debate in the professional literature, no consensus has emerged regarding the wisdom or the efficacy of mandatory reporting.[203] Existing studies provide no clear answer. The lack of rigorous control of variables in studies that have been conducted, together with inconsistent definitions in the various states, makes it unlikely any conclusion to this debate will emerge in the foreseeable future. More significantly, however, legislatures in forty-two states and the District of Columbia[204] have manifestly decided this question by enacting mandatory reporting laws. These laws represent the state's assessment of the gravity of the problem and the pivotal role professionals play in case finding. Non-reporting and non-enforcement flouts legislative choice, creating discretionary situations such statutes are meant to obviate. The near unanimity in favor of mandatory reporting requirements also reflects the relative isolation of at-risk elders. Many aged adults have few social engagements and emerge from their homes infrequently or not at all.

There is much evidence of failure to comply with the mandatory reporting statutes. In 1991 the House of Representatives Subcommittee on Health and Long-Term Care evaluated questionnaires returned by all state agencies to Congress to determine the extent of underreporting. The subcommittee found that the states were unanimous in responding that a significant number of elder-abuse cases are never reported.[205]

Doctors are the most frequently named professional group with a

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202. *See, e.g.*, Zamstein v. Marvasti, 692 A.2d 781 (Conn. 1997) (no duty on part of mandatory reporters to accused abuser, because potential liability would discourage reporting); Simonson v. Swenson, 177 N.W. 831, 832 (Neb. 1920) (physician not liable to patient for disclosing a contagious disease when the physician acts in good faith, even if mistaken diagnosis made).

203. *See, e.g.*, Karen I. Fredriksen, *Adult Protective Services: Changes with the Introduction of Mandatory Reporting*, 1 J. ELDER ABUSE & NEGLECT 59-70 (1989) (calling for more research on effectiveness of mandatory reporting in elder abuse).

204. *See generally infra* Appendix E (cataloging mandatory reporters and penalty for noncompliance).

205. *See Elder Abuse: What Can be Done? Hearings Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102d Cong. 46 (1991); *see also supra* notes 142-43 and accompanying text.

duty to report,[206] but evidence indicates substantial non-compliance. An Alabama study, conducted eleven years after the passage of that state's mandatory reporting law, reported 60% of doctors believed an experienced physician could accurately diagnose cases of elder abuse. However, the study also showed that 77% expressed doubt about the definition of abuse; over one-half reported they were not sure that Alabama had procedures for dealing with abuse, and 60% were uncertain of the procedure for reporting abuse cases. Many doctors reported they were deterred from reporting by the necessity of court appearances, by fear of arousing the anger of the abuser, and by concern about loss of confidentiality.[207] Another study found the overwhelming majority (84%) of physicians in North Carolina and Michigan were uninformed about the existence of their states' mandatory reporting laws.[208] In a more recent study in Michigan, of 17,238 cases of possible elder abuse reported to authorities during 1989-93, physicians reports were only 2% of the total. Nor are doctors more accurate in their diagnoses. Comparison of substantiation rates showed no significant differences between physician reports and other professional reporting sources.[209] Many victims are treated at hospital emergency departments, but physicians are often unsure even about the mechanisms for reporting.[210]

Numerous other observers confirm that elder abuse laws have had little impact on physicians' failures to report.[211] Studies regarding the mistreatment of the aging rank physicians as the professionals most in need of training on elder abuse.[212] Under federal law, local area Agencies on Aging must identify public and private entities in their geo-

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206. *See infra* Appendix E, col. 2.

207. *See* R. Stephen Daniels et al., *Physicians' Mandatory Reporting of Elder Abuse*, 29 GERONTOLOGIST 321 (1989).

208. *See* James G. O'Brien, *Elder Abuse and the Primary Care Physician*, MED. TIMES, Dec. 1986, at 60-64; *Elder Abuse: Barriers to Identification and Intervention* (paper presented at the 1985 Annual Meeting of Gerontological Society of America).

209. *See* Dorrie E. Rosenblatt et al., *Reporting Mistreatment of Older Adults: The Role of Physicians*, J. AMER. GERIATRICS SOCIETY Jan. 1996, at 65-70.

210. *See* C.L. Clark-Daniels et al., *Abuse and Neglect of the Elderly: Are Emergency Department Personnel Aware of Mandatory Reporting Laws?*, 19 ANN. EMERG. MED. 970-77 (1990).

211. *See generally* Mark Lachs, *Preaching to the Unconverted: Educating Physicians About Elder Abuse*, 7 J. ELDER ABUSE & NEGLECT 1 (1995) (listing possible reasons why physicians fail to report); C. Cochran & S. Petrone, *Elder Abuse: The Physician's Role in Identification and Treatment*, 171 ILL. MED. J. 241-46 (1987) (suggesting elder victims of domestic violence tend to be overlooked by physicians).

212. *See* B.E. Blakely et al., *Improving the Responses of Physicians to Elder Abuse and Neglect: Contributions of a Model Program*, 19 J. GERONTOLOGICAL SOC. WORK 35, 37 (1993).

graphic areas which are engaged in the prevention, identification and treatment of elder abuse and neglect.[213] Workers in these agencies initiate and maintain face-to-face contacts with seniors to assess cases and advocate on their behalf. A national survey of these direct practice workers examined their perceptions of the usefulness of fourteen occupational groups in the discovery and treatment of elder mistreatment. Generally, doctors were rated between "not very helpful" and "no help at all" in the discovery of cases, and between "somewhat helpful" and "not very helpful in treatment."[214] Physicians, in fact, were ranked near the bottom of the list of occupations in discovery and treatment.

It is unlikely that other professionals with a statutory duty to report are complying at a dramatically higher rate than physicians. In the same survey of fourteen occupations by direct service workers, not one group achieved even a rating of "somewhat helpful" in the discovery or treatment of cases. The groups rated included visiting nurses, hospital social workers, mental health workers, nursing home personnel, and many others.[215] Recent testimony before the Senate's Special Committee on Aging highlights the problem.

> I took an informal poll this morning of about 10 emergency department staff at Maine Medical Center, which sees about 45,000 patients a year, 10,000 of whom are pediatric. So in a 35,000 adult population, you can imagine a good many of those are dependent adults. I asked the staff, in the last year, how many adult protective DHS referrals they made, and the answers were from zero to one each. And I think that some of the ones who said "one" were probably trying to please me and may have been stretching back more than a year.[216]

A common fear is that reporting would be a breach of the professional's duty of confidentiality for information gathered in the course of a professional relationship. This legally enforceable duty is of ancient origin[217] and may indeed provide a cause of action for its

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213. *See* Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 218 (codified as amended in scattered sections of 42 U.S.C.).

214. B.E. Blakely & Ronald Dolon, *The Relative Contributions of Occupation Groups in the Discovery and Treatment of Elder Abuse and Neglect*, 17 J. GERONTOLOGICAL SOC. WORK, 183, 189-94 (1991).

215. *See id.*

216. HEARING BEFORE THE SENATE SPECIAL COMM. ON AGING, 104th Cong., 1st Sess., 39 (Portland, Maine, April 11, 1995) (statement of Emmy Hunt, Head Nurse, Emergency Department, Maine Medical Center).

217. The Hippocratic Oath provides, in part: "Whatsoever things I see or hear concerning the

breach in some circumstances.[218] There is no possibility of liability, however, when reporting is in compliance with statutory command. The reporting laws represent a decision that public knowledge and intervention is of higher social value than confidentiality in these circumstances.[219] In discussing this duty in an analogous child abuse reporting case, a Missouri appellate court noted:

> [W]hen the cost of imposing this duty and the economic burden upon the actor are balanced against the magnitude of preventable injury suffered, the outcome overwhelmingly weighs in favor of imposing a duty . . . . The burden imposed on an individual in fulfilling this duty is greatly outweighed by the potential or actual harm suffered as a result of failure to fulfill this duty.[220]

The statutory immunity clauses for mandatory reporters of elder abuse make it abundantly clear that disclosure outweighs confidentiality in such circumstances,[221] and case law is uniform in upholding this legislative choice.[222] Some states explicitly abrogate any claim of professional

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life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets." 15 ENCYCLOPEDIA BRITANNICA, A HISTORY OF MEDICINE 199 (14th ed. 1959). Today, the American Medical Association's Privileges of Medical Ethics provides:

> Confidentiality. The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.

218. *See, e.g.*, Horne v. Patton, 287 So. 2d 824 (Ala. 1973) (finding disclosure of medical information to be breach of implied contract); Humphers v. First Interstate Bank of Or., 696 P.2d 527 (Ore. 1985) (canvassing various theories explaining origin of duty to keep medical information confidential). *See generally* Almeta E. Cooper, *The Physicians Dilemma: Protection of the Patient's Right to Privacy*, 22 ST. LOUIS U. L.J. 397, 412-19 (1978).

219. *See generally* Ralph Slovenko, *Child Abuse and the Role of the Physician in the Proof of a Case*, 17 J. PSYCHIATRY & LAW 477, 480-81 (1989) (discussing social value of reporting in instances of child abuse); Hope v. Landau, 486 N.E.2d 89 (Mass. 1985) (giving weight to policy).

220. Bradley v. Ray, 904 S.W.2d 302, 310 (Mo. Ct. App. 1995).

221. *See, e.g.*, FLA. STAT. ANN. § 415.1036 (West 1998) ("Any person who participates in making a report under § 415.1034 or participates in a judicial proceeding resulting therefrom is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any liability, civil or criminal, that otherwise might be incurred or imposed . . . .").

222. *See, e.g.*, Arnett v. Baskous, 856 P.2d 790, 790 (Alaska 1993) (holding that a physician

privilege.[223]

B. *Criminal Liability*

Failure to report elder mistreatment to public authorities is typically a criminal offense.[224] Although education and voluntary compliance might be the preferred methods for encouraging professionals and others to report, a majority of states make such an omission a misdemeanor.[225] The use of criminal penalties is obviously designed to provide a deterrent to, and punishment for, noncompliance. Often, though, to produce criminal liability the failure to report must be "willful,"[226] "knowing,"[227] or a similarly elevated standard.

Although reporting of suspicious cases is thus statutorily required, criminal enforcement of these reporting laws is typically nonexistent. Few actual cases of prosecution against professionals can be found. A computer search of published court decisions in all fifty states between

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cannot be held civilly liable for releasing the medical records of a patient, pursuant to a valid court order, for use in his criminal trial for sexual abuse of a child); Bryson v. Tillinghast, 749 P.2d 110, 113 (Okla. 1988) (finding that there was no common law or ethical basis to hold a doctor civilly liable for furnishing information to police that ultimately led to his patient's arrest and conviction for rape, and that the doctor-patient privilege does not extend beyond trial testimony).

223. *See, e.g.*, FLA. STAT. ANN. § 415.109 (West 1998):

> The privileged quality of communication between . . . any professional person and his patient or client, and any other privileged communication . . . , as such communication relates to both the competency of the witness and to the exclusion of confidential communications, does not apply to any situation involving known or suspected adult abuse, neglect, or exploitation and does not constitute a ground for failure to report as required by § 415.103, for failure to cooperate with the department in its activities . . . , or for failure to give evidence in any judicial proceeding relating to abuse, neglect, or exploitation of an aged person or disabled adult.

224. *See infra* note 225.

225. *See infra* Appendix C, col. 12; *see also* ARIZ. REV. STAT. ANN. § 46-454(J) (West 1997) ("A person who violates any provision of this section is guilty of a class 1 misdemeanor."); CAL. WELF. & INST. CODE § 15634(d) (West 1991) ("Any person who fails to report an instance of elder or dependent adult abuse, as required by this article, is guilty of a misdemeanor . . . .").

226. *See, e.g.*, UTAH CODE ANN. § 76-5-111.1(4) (Supp. 1998) ("A person who is required to report suspected . . . abuse, neglect, or exploitation of a disabled or elder adult . . . and who willfully fails to do so, is guilty of a class B misdemeanor."). *See also* VT. STAT ANN. tit. 33 § 6913(e) (Supp. 1998).

227. *See, e.g.*, ALA. CODE § 38-9-10 (Michie 1992) ("Any physician or other practitioner of the healing arts who shall knowingly fail to make the report required by this chapter shall be guilty of a misdemeanor . . . ."); LA. REV. STAT. ANN. § 14:403.2(J)(1) (West 1986) ("Any person who knowingly and willfully fails to report as provided by Subsection C, shall be fined . . . or imprisoned . . . or both."); *see also infra* Appendix E, col. 12.

1994-1997 found only one prosecution based on a failure to report elder mistreatment statute, and even that case did not directly involve a failure to report.[228] The ratio of reported cases to all instances of mistreatment is impossible to calculate; however, when estimates of the number of reported cases are compared to prevalence studies, it is clear that the threat of criminal penalties has done little to ensure reporting.

Prosecutors are rarely aware of the failure to report; therefore, lack of criminal enforcement is not surprising. Even when they do become aware, prosecutors are loathe to proceed against white collar professionals. Moreover, difficulties in securing evidence for these cases, i.e., the victim's reluctance to testify or a disability that renders testifying difficult, likewise makes criminal prosecution unlikely.

C. *Civil Liability*

1. *Introduction*

Since there have been few criminal prosecutions of mandated reporters, it is logical to turn to the civil law system as a more effective vehicle for encouraging professionals to diagnose and report elder mistreatment. The relationship between law and professional conduct involves several intersecting subjects, including malpractice litigation, federal and state regulatory initiatives, and peer and institutional self-governance. The civil law has often been the catalyst creating change in professional behavior.[229] Physicians surveyed in the famous Harvard study on iatrogenic medical injuries in New York felt that the threat of civil litigation was efficacious in maintaining standards of care.[230] Both malpractice suits and licensure sanctions may be more effective than criminal prosecutions in enforcing reporting laws. Although both are often inconsistently applied,[231] their primary purpose is to hold provid-

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228. *See* People v. Heitzman, 886 P.2d 1229 (Cal. 1994). A Westlaw computer search, under the "All-States" database library, revealed only the *Heitzman* case.

229. *See, e.g.*, Harold L. Hirsch, *New Developments in Health Care*, 20 LOY. U. CHI. L.J. 713, 713 (1989) (noting that medical negligence actions cause the modification of processes and procedures, and enhance that category of quality assurance referred to as "risk management—successfully reducing patient injury by controlling exposures to risk").

The power of law to change behavior regarding the elderly is illustrated in the dramatic reduction of various practices in nursing homes. Since the Nursing Home Reform Act of 1987, the use of physical restraints has declined by 50%; inappropriate use of anti-psychotic drugs has declined by 25%. *See* Bruce C. Vladeck, *The Past, Present and Future of Nursing Home Quality*, 275 JAMA 425 (1996) (presenting overview of statistics and articles).

230. *See* HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK, 9-1 (1990).

231. *See, e.g.*, Stephen D. Sugarman, *Dr. No, Review of Medical Malpractice on Trial by*

ers accountable for deviations from the standard of care and thus deter injury-producing behavior.[232] In principle, malpractice cases produce an incentive structure designed to induce professionals to invest training and time in injury prevention. One economist has estimated that the "current . . . non-trivial incidence of injury due to negligence would be at least 10 percent higher, were it not for the incentives for injury prevention created by the one in ten incidents of malpractice that result in a claim."[233] The possibility of civil litigation, with its inherent costs and potential jury damage awards, is a threat all contemporary professionals can readily appreciate.

The shocking prevalence of elder mistreatment, discussed earlier, and the potentially lethal consequences of such behavior should alert professionals to the need for competent assessment of clients for possible abuse or neglect. The ability to make an accurate assessment requires sensitivity to the sometimes subtle indications of abuse as well as general knowledge of, and orientation to, the problem. Professionals in family service agencies, hospital emergency departments, primary care clinics or offices, and other institutions serving the aged must be able to recognize the signs and symptoms of various forms of elder mistreatment and act appropriately.

Elder abuse and elder neglect are recognized diagnoses. National organizations have acknowledged the need for adequate assessment. For example, the Joint Commission on the Accreditation of Health Organizations (JCAHO) is the leading accrediting organization for American health care facilities, especially hospitals.[234] JCAHO stan-

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Paul C. Weiler, 58 U. CHI. L. REV. 1499, 1500-02 (1991) (reviewing PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL (1990), estimating that only 50,000 patients claim compensation out of 400,000 injured each year in American hospitals).

232. *See generally* SYLVIA A. LAW & STEVEN POLAN, PAIN & PROFIT: THE POLITICS OF MALPRACTICE (1978) (analyzing relationship between professional licensure and malpractice).

233. Patricia M. Danzon, Ph.D., *An Economic Analysis of the Medical Malpractice System*, 1 BEHAV. SCI. & L. 39, 53 (1983); *see also* Randall R. Bovbjerg, *Medical Malpractice on Trial: Quality of Care Is the Important Standard*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 321.

234. Accreditation by JCAHO is critical because most states incorporate this private accreditation into their hospital licensure standards. *See, e.g.*, ALASKA STAT. § 18.20.080(a) (Michie 1996); OHIO REV. CODE § 3727.02(a) (West 1997). In addition, JCAHO accredited hospitals are "deemed" to meet almost all Medicare certification requirements, a critical contemporary source of income for most hospitals. 42 U.S.C.A. §§ 1395x(e), 1395bb (West 1992); 42 C.F.R. § 488.5 (1996).

> (a) Deemed to meet. Institutions accredited as hospitals by the JCAHO or AMA are deemed to meet all of the Medicare conditions of participation for hospitals, except—
>
> (1) The requirement for utilization review as specified in section 1861(e)(6) of the Act in §482.30 of this chapter;

dards require hospital emergency departments and ambulatory care services to have written policies and procedures for identifying possible victims of abuse and neglect, including the elderly.[235] In addition, hospitals must have specific plans for educating professional staff about criteria for identifying, and procedures for treating, possible victims of mistreatment.[236] The American Medical Association (AMA) has also established guidelines for physicians which suggest elder abuse as a possible diagnosis in many cases.[237]

The AMA recommends that every clinical setting have a protocol for the detection and assessment of elder mistreatment.[238] "All person-

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> (2) The additional special staffing and medical records requirements that are considered necessary for the provision of active treatment in psychiatric hospitals (section 1861(f) of the Act) and implementing regulations; and
> (3) Any requirements under section 1861(e) of the Act and implementing regulations that HFCA, after consulting with JCAHO or AOA, identifies as being higher or more precise than the requirements for accreditation (section 1865(a)(4) of the Act).

42 C.F.R. § 488.5 (1996).

235. *See* JOINT COMMISSION ON ACCREDITATION OF HEALTH ORGANIZATIONS, COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS: THE OFFICIAL HANDBOOK (1998) [hereinafter JCAHO Standards]. These policies and procedures address the following issues:

> PE 1.8 Possible victims of abuse are identified using criteria developed by the hospitals.
>
> Intent of PE.1.8 . . . The hospital has objective criteria for identifying and assessing possible victims of abuse and neglect, and they are used throughout the organization. Staff are to be trained in the use of these criteria.
>
> The criteria focus on observable evidence and not on allegation alone. They address at least the following situations:
>
> a. Physical assault;
> b. Rape or other sexual molestation;
> c. Domestic abuse; and
> d. Abuse or neglect of elders and children.
>
> When used appropriately by qualified staff mambers, the criteria prevent any action or question that could create false memories of abuse in the individual being assessed.
>
> Staff members are able to make appropriate referrals for victims of abuse and neglect. To help them do so, the hospital maintains a list of private and public community agencies that provide help for abuse victims.

236. *See id.* at HR.3. HR.3 requires that "[t]he leaders ensure that the competence of all staff members is assessed, maintained, demonstrated, and improved continually." *Id.*

237. *See* SARA C. ARAVANIS, AMERICAN MED. ASS'N, DIAGNOSTIC AND TREATMENT GUIDELINES ON ELDER ABUSE AND NEGLECT (1992) [hereinafter AMA ELDER ABUSE GUIDELINES]. *See also* Teri Randall, *AMA, Joint Commission Urge Physicians Become Part of Solution to Family Violence Epidemic*, 266 JAMA 2524 (1991).

238. *See* AMA ELDER ABUSE GUIDELINES, *supra* note 237, at 8. *See also* Mark S. Lachs & Terry Fulmer, *Recognizing Elder Abuse & Neglect*, 9 CLINICS IN GERIATRIC MEDICINE 665, 665-81 (1993) (discussing need for written protocols and better training of staff).

nel who come in contact with older patients, including nurses, nursing assistants, social workers, and physical therapists should be familiar with the protocol and should be alert to the various types of mistreatment and possible risk factors."[239] The form of the protocol may vary; a narrative, a checklist, or many other means will enable doctors, nurses, and other care providers to rapidly assess the patient for elder abuse and neglect and to document it.[240] Abusers often bring the patient to the health care site and could be reluctant to leave the victim alone with the professional. Because of this, the interview and examination of the patient should normally be conducted away from the caregiver or suspected abuser.[241] The protocol should screen for specific types of mistreatment about which the professional has been previously educated. It should include direct questions to the patient dealing with physical, psychological, and financial abuse, and neglect.[242] Affirmative answers should be followed up to determine how and when the mistreatment occurs, who perpetrates it, and the patient's attending feelings and coping mechanisms.

Immediate efforts are required to ensure patient safety and to prevent the behavior from recurring. The clinician must have information on state reporting requirements, protective services, and other community resources. Physicians are specifically advised to educate patients about different forms of abuse and neglect, the older person's right to be free from mistreatment, and how to access local resources.[243] Written materials on elder abuse should be routinely provided to patients.[244] When mistreatment is detected or reasonably suspected, the professional must ensure the safety of the victim, and report to the appropriate state

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239. AMA ELDER ABUSE GUIDELINES, *supra* note 237, at 9.

240. *See* AMA ELDER ABUSE GUIDELINES, *supra* note 237, at 8.

241. *See* Judy S. Bloom et al., *Detecting Elder Abuse: A Guide for Physicians*, GERIATRICS June 1989, at 40, 43.

242. The AMA Elder Abuse Guidelines suggest questions such as:

Has anyone at home ever hurt you?
Has anyone ever touched you without your consent?
Has anyone ever made you do things you didn't want to do?
Has anyone taken anything that was yours without asking?
Has anyone ever scolded you or threatened you?
Have you ever signed any documents that you didn't understand?
Are you afraid of anyone at home?
Are you alone a lot?
Has anyone ever failed to help you take care of yourself when you needed help?

AMA ELDER ABUSE GUIDELINES, *supra* note 233, at 9.

243. *See id.*

244. *See id.*

agency in accordance with laws that govern elder abuse and neglect.[245]

If personnel are not trained, proper questions not asked and investigations not undertaken, cases will be undiagnosed and undetected. Lack of detection may result in additional injury because elder abuse, like spouse and child abuse, often follows cyclical patterns, with the victim being mistreated again—often more severely.[246] "Mistreatment is likely to escalate in frequency and severity over time . . . . The long-term trajectory of abuse is such that if intervention is not initiated after abuse is first observed in a clinic or examining room, the chances are good that it will continue."[247] Physicians are cautioned by the AMA that if they treat abused elders and do not report suspected mistreatment, they may be civilly or even criminally liable.[248] Numerous protocols and other tools for assessing mistreatment reflecting professional standards are also available to nurses,[249] social workers and caregivers,[250] health care workers,[251] and law enforcement professionals.[252]

Where questioning, examination, or other information provides the basis for reasonable suspicion or belief that mistreatment has occurred, follow-up is required by the professional.[253] Thorough, well-documented records are essential.[254] The verbal statements of the patient, his

245. *See id.* at 9, 23.

246. *See* COUNCIL ON SCIENTIFIC AFFAIRS, AMERICAN MED. ASS'N., *Elder Abuse and Neglect*, 257 JAMA 966-71 (1987); H. O'MALLEY ET AL., ELDER ABUSE IN MASSACHUSETTS: A SURVEY OF PROFESSIONALS AND PARAPROFESSIONALS (1979) (Legal Research and Services for the Elderly, Boston, Mass.) (estimating 70% of reported cases involved repeated instances of abuse).

247. Lorin A. Baumhover & S. Colleen Beall, *Prognosis: Elder Mistreatment in Health Care Settings*, *in* ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT AND INTERVENTION 241, 248 (Lorin A. Baumhover & S. Colleen Beall eds., 1996) [hereinafter Baumhover & Beall].

248. *See* AMA ELDER ABUSE GUIDELINES, *supra* note 237, at 20.

249. *See, e.g.*, Sue Haviland & James O'Brien, *Physical Abuse and Neglect of the Elderly: Assessment and Intervention*, ORTHOPAEDIC NURS. July-Aug. 1989, at 11; Jeanne Floyd, *Collecting Data on Abuse of the Elderly*, J. OF GERONTOL. NURS., Dec. 1984, at 11.

250. *See, e.g.*, MARY JOY QUINN & SUSAN K. TOMITA, ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS AND INTERVENTION STRATEGIES (1986).

251. *See, e.g.*, TERRY T. FULMER & TERRANCE A. O'MALLEY, INADEQUATE CARE OF THE ELDERLY: A HEALTH CARE PERSPECTIVE ON ABUSE AND NEGLECT (1987); H. Ramsey-Klawsnik, *Recognizing and Responding to Elder Mistreatment*, 12 PRIDE INST. J. OF LONG TERM HOME CARE, No. 3, 12-20 (1995).

252. *See, e.g.*, ROGER NASH, ILL. DEP'T OF AGING, ELDER ABUSE: INFORMATION FOR LAW ENFORCEMENT OFFICERS (1986).

253. *See* AMA ELDER ABUSE GUIDELINES, *supra* note 237, at 13-14 (detailing recommendations for intervention and case management).

254. The AMA Guidelines, for example, recommend the following be documented:

Chief complaint and description of the abusive event or neglectful situation, using the

affect, etc. must be recorded. In addition to complete written records, photographs and other imaging studies are particularly valuable.[255] Time gaps and subsequent changes should be avoided and normal procedures followed. This documentation provides protection for both professional and client, and may be used in subsequent legal proceedings. For records to be admissible in court, they must have been contemporaneously made during the "regular course of business" in accordance with routinely followed procedures, properly stored and secured.[256] Contemporaneous medical records may be used at trial to prove the physical condition of the elderly patient at the time of treatment.[257]

The required response may vary depending on whether the patient resides at home or in an institution. In cases of abuse or neglect in the community, the professional should be aware of the variety of services available, including, for example, respite care, visiting nurses, and social work evaluations. In institutional settings, state laws typically

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> patient's own words whenever possible rather than the physician's assessment.
> Complete medical history.
> Relevant social history.
> A detailed description of injuries, including type, number, size, location, stages of healing, color, resolution, possible causes, and explanations given. Where applicable, the location and nature of the injuries should be recorded on a body chart or drawing.
> An opinion on whether the injuries were adequately explained.
> Results of all pertinent laboratory and other diagnostic procedures.
> Color photographs and imaging studies, if applicable.
> If the police are called, the name of the investigating officer and any actions taken.

AMA ELDER ABUSE GUIDELINES, *supra* note 237, at 18.

255. The AMA Guidelines suggest:

> When possible, take photographs before medical treatment is given.
> Use color film, along with a color standard.
> Photograph from different angles, full body and close-up.
> Hold a coin, ruler, or other object to illustrate the size of an injury.
> Include the patient's face in at least one picture.
> Take at least two pictures of every major trauma area.
> Mark photographs precisely and promptly with the patient's name, location of injury, date, time of day, and names of the photographer and others present.

Id. at 19.

256. FED. R. EVID. 803(6), *Hearsay Exceptions . . . Records of Regularly Conducted Activities. See also In re* Estate of Poulos, 229 N.W.2d 721, 727 (Iowa 1975) ("We have long held that medical and hospital records are admissible, upon proper foundation, as an exception to the hearsay rule."); Hytha v. Schwendeman, 320 N.E.2d 312, 316 (Ohio Ct. App. 1974) ("[M]edical diagnosis, made by a qualified physician and contained in an otherwise duly authenticated record, is admissible . . . .").

257. *See, e.g.*, United States v. Bohle, 445 F.2d 54, 60-66 (7th Cir. 1971) (hospital records used to prove "appearance, conduct and reactions" of patient on arrival at hospital).

mandate that admissions to residential facilities be made by a physician and, after the admission, patients must be under the supervision of specified medical or nursing personnel.[258] As a result, instances of mistreatment in these institutions should be identified, treated, and reported. State laws often specifically provide for reporting of elder mistreatment in long-term care facilities.[259]

2. *Malpractice Liability*

Malpractice is legal fault, a breach of the standard of care in the profession.[260] It involves unreasonable risk of harm to others, measured by the utility of the behavior compared to the probability and gravity of the harm it presents.[261] Professionals who fail to diagnose, treat, and report reasonably identifiable cases of elder maltreatment should be civilly liable if the failure subsequently leads to further damage.[262] Plaintiffs in such cases might be the elderly victim who has escaped from an abusive situation, a relative acting as "next friend," a guardian, or a public agency.

Civil actions have a number of important advantages over criminal enforcement of mandatory reporting laws, which is why malpractice is a valuable avenue for curing this epidemic. First, previously noted, criminal prosecutions are virtually nonexistent.[263] Private civil actions are under the control of the individual and not subject to prosecutorial discretion. Second, a liability determination provides the opportunity to compensate a victim for injury suffered as the result of the unreported abuse, while providing a financial deterrent to noncompliance with applicable reporting statutes in other cases. Third, the lower standard

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258. *See, e.g.*, WIS. STAT. § 50.04(2m) (West 1994 & Supp. 1996) ("No nursing home may admit any patient until a physician has completed a plan of care for the patient and the patient is assessed or the patient is exempt . . . ."); TENN. CODE ANN. § 68-11-804(29) (West 1996) ("The nursing home must have an agreement with a physician and a hospital that will care for a patient who does not have a private physician or hospital of choice.").

259. *See, e.g.*, ARK. CODE ANN. § 5-28-203(b)(2) (Michie 1997) ("A report for endangered adults residing in long-term care facilities shall be made immediately to the local law enforcement agency in which the facility is located, and to the Office of Long-Term Care of the Division of Economic and Medical Services of the Department of Human Services pursuant to regulations of that office."); NEV. REV. STAT. § 200.5093(2)(i) (Michie 1997) (Reports of abuse are mandated from "[a]ny person who maintains or is employed by a facility or establishment that provides care for older persons.").

260. *See, e.g.*, Bardessono v. Michels, 478 P.2d 480, 484 (Cal. 1970).

261. *See* RESTATEMENT (SECOND) OF TORTS § 282 (1965).

262. *See, e.g.*, Landeros v. Flood, 551 P.2d 389 (Cal. 1976) (see discussion *infra* notes 354-65 and accompanying text).

263. *See supra* note 228 and accompanying text.

of proof and wider discovery possibilities in civil litigation likewise make it a more attractive path than criminal prosecution. To succeed in such a suit, the plaintiff must establish the elements of malpractice and counter possible defenses. Each of these will be discussed individually.

a. Duty

The plaintiff in a negligence action must prove that the defendant owed him a duty to exercise due care to protect his interests.[264] The existence of a duty of care is a legal question to be decided by judges, weighing a variety of considerations.[265] These considerations include, in addition to foreseeability,

> the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[266]

Once the plaintiff demonstrates a duty was owed to him, the question becomes what the appropriate standard of care is, and whether the defendant's conduct fell below that standard. In contrast to the often more stringent requirements for prosecution of non-reporters under some criminal statutes,[267] individuals and institutions are required to report even if they simply have a "reasonable basis" or a "reason to

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264. *See* KEETON ET AL., *supra* note 159, § 30, at 164; *see also* RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965) (stating that "in order for the actor to be negligent with respect to the other, his or her conduct must create a recognizable risk of harm to the other individually, or to a class of persons of which the other is a member").

265. *See* KEETON ET AL., *supra* note 159, § 37, at 236; *see also* RESTATEMENT (SECOND) OF TORTS § 328B cmt. e (1965) (stating that "it is the further function of the court to determine whether the law imposes upon the defendant any legal duty to act . . . . This decision is always for the court").

266. Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

267. Criminal liability in such an instance is often dependent on a "willful" or "knowing" failure to report, *see supra* notes 226-27 and App. E, col. 12. *See also* ALASKA STAT. § 47.24.010(c) ("A person who . . . because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor.").

believe" that an individual has been abused or neglected.[268] Protocols, guidelines, and other assessment tools provide specific examples of what constitutes reasonable cause for the professional in clinical settings to believe or suspect maltreatment has occurred.[269] JCAHO standards have been used to establish liability against hospitals using a corporate negligence theory.[270] A hospital's breach of such standards is generally accepted as evidence of negligence.[271]

1) Standard

Mandated reporting is not conditioned on actual knowledge of maltreatment; rather the statutory test is an objective one—whether a prudent professional would have reasonable cause to believe mistreatment may be occurring if confronted with the same totality of factual circumstances as that presented to the defendant professional.[272] Statutes calling for reporting based on "suspicion" or "reasonable suspicion"[273]

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268. *See, e.g.*, ALA. CODE § 38-9-8(a) (Michie 1992 & Supp. 1996) ("All physicians and other practitioners of the healing arts having reasonable cause to believe that any adult protected under the provisions of this chapter has been subjected to physical abuse, neglect or exploitation shall report or cause a report to be made . . . ."); ALASKA STAT. § 47.24.010(a)(10) (Michie 1995) ("[T]he following persons who, in the performance of their professional duties, have reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect, or self-neglect shall . . . report the belief to the department's central information and referral service for vulnerable adults . . . ."); Ariz. Rev. Stat. Ann. § 46-454 (West 1998) ("A physician, hospital intern or resident, surgeon, dentist, psychologist, social worker, peace officer or other person who has responsibility for the care of an incapacitated or vulnerable adult and who has a reasonable basis to believe that abuse or neglect of the adult has occurred . . . shall immediately report or cause reports to be made . . . .").

269. *See* J. Jones et al., *Emergency Department Protocol for the Diagnosis and Evaluation of Geriatric Abuse*, 17 ANNALS OF EMERGENCY MED. 191 (1988); *The Role of the Emergency Physician in the Prevention of Domestic Violence*, ANNALS OF EMERGENCY MED., Oct. 1987; *see also supra* notes 249-52 and accompanying text.

270. *See, e.g.*, Darling v. Charleston Community Mem'l Hosp., 211 N.E.2d 253 (Ill. 1965) (using JCAHO standards and state licensing regulations to establish hospital's standard of care).

271. *See id. See also* Blanton v. Moses H. Cone Mem'l Hosp., 354 S.E.2d 455, 458 (N.C. 1987) (holding that although the doctor was not an agent of the hospital, the hospital was negligent for allowing an unqualified physician to perform operations).

272. *See, e.g.*, statutes cited at *supra* note 268 and accompanying text. *See also* Op. Mass. Att'y Gen. 139, 140 (1974-75) (construing identically worded duty to report suspected child abuse as not requiring documentation of abuse or neglect allegations; "reasonable cause" standard was intended to increase, not restrict, reporting).

273. *See, e.g.*, ARK. CODE ANN. § 5-28-203(a)(1) (Michie 1993 & Supp. 1995) ("Whenever any physician, surgeon, coroner, dentist, osteopath, resident intern, registered nurse, hospital personnel, who are engaged in the administration, examination, care, or treatment of persons, has *reasonable cause to suspect* that an endangered adult has been subjected to conditions or circumstances which would reasonably result in abuse, he shall immediately report or cause a report to be made in accordance with the provisions of this section.") (emphasis added). *See*

likewise incorporate objective standards.[274] The reasonable belief or suspicion may derive from the professional's personal examination, interview or information, or credible hearsay. The statutes evidence a purpose to have the investigating state authorities filter substantiated cases of mistreatment from the unsubstantiated. No state requires a mandatory reporter to have "clear and convincing" evidence or a similarly elevated evidentiary standard to trigger the duty.[275] Mandatory reporting statutes are thus consistent with negligence principles that attempt to ensure professional competence.

2) Special Relationships

While the common law has been traditionally reluctant to recognize affirmative duties,[276] courts have often recognized a duty to act where a special relationship is present. Such relationships have included common carriers and passengers,[277] innkeepers and guests,[278] shopkeepers and business visitors,[279] jailors and prisoners,[280] and a host of others. A common carrier, for instance, may have a duty to protect its passengers

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also CONN. GEN. STAT. § 17(b)-451 (1997) (quoted *infra* note 286).

274. *See* BLACK'S LAW DICTIONARY 1297 (5th ed. 1979) ("suspicion" defined as having "a slight or even vague idea concerning;" "not necessarily involving knowledge or belief or likelihood . . ."). *See also* Op. Mass. Att'y Gen. 157 (1974-75) (equating "reasonable cause" to known and "suspected" instances of child abuse and neglect); Op. Mass. Att'y Gen. 175 (1974-75).

275. *See, e.g.*, Woodby v. INS, 385 U.S. 276 (1986) (requiring government to prove denaturalization case by "clear, unequivocal and convincing evidence").

276. *See generally* KEETON ET AL., *supra* note 159, § 56; MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY (1977) (describing "no duty to rescue" principle as based on moral vision of individualism and autonomy); Chastain v. Fuqua Indus. Inc., 275 S.E.2d 679 (Ga. Ct. App. 1980) (holding that an aunt had no duty to warn 11-year old nephew of loose seat on riding mower).

277. *See, e.g.*, Gilstrap v. Amtrak, 998 F.2d 559 (8th Cir. 1993) (reversing summary judgment for Amtrak and remanding to determine if the heightened duty that the common carrier owed passenger was breached when a sexual assault occurred on the train). *See also* Lopez v. Southern Cal. Rapid Transit Dist., 710 P.2d 907 (Cal. 1985).

278. *See, e.g.*, Coyne v. Taber Ptnrs. I, 53 F.3d 454 (1st Cir. 1995) (finding that a hotel had a duty to protect a guest from the violent attack of strikers). *See also* Kveragas v. Scottish Inns, Inc., 733 F.2d 409 (6th Cir. 1984).

279. *See, e.g.*, Figueroa v. Evangelical Covenant Church, 879 F.2d 1427 (7th Cir. 1989) (stating that there is an exception to the general rule that a party has no duty to protect a person from the criminal attacks of another unless there is a special relationship like that of a business invitor/invitee). *See also* Maguire v. Hilton Hotels Corp., 899 P.2d 393 (Haw. 1995).

280. *See, e.g.*, Iglesias v. Wells, 441 N.E.2d 1017 (Ind. Ct. App. 1982) (holding that the sheriff had a duty not to release a prisoner who was too drunk to protect himself from the severe winter weather). *See also* Thomas v. Williams, 124 S.E.2d 409 (Ga. Ct. App. 1962); Smith v. Miller, 40 N.W.2d 597 (Iowa 1950); Farmer v. State, 79 So. 2d 528 (Miss. 1955); Dunham v. Village of Canisteo, 104 N.E.2d 872 (N.Y. 1952).

from third parties who have threatened criminal actions.[281] This duty can even extend to warning a passenger who seeks to leave the bus or train in a dangerous area.[282]

The common thread linking these cases is that one party had special means with which to prevent the harm to the other, or that their interaction surpasses what is common or usual. In *J.A.W. v. Roberts*,[283] a victim of child molestation sued several defendants, including clergy, who knew about the continuing abuse, but did nothing to intervene. The court held that in order to impose an affirmative duty to act a special relationship must be present. It examined the following factors to determine if such a relationship existed: 1) the relationship between the abused individual and the person who could report it, 2) the reasonable foreseeability of harm, and 3) public policy concerns.[284] An essential element of malpractice, a branch of negligence, is the relationship between the professional and the patient/client. The duty of care arises out of that relationship, and is based upon both the level of expertise of the professional and the level of dependence of the patient/client.[285]

In the context of elder abuse, these factors are accentuated dramatically. In enacting the mandatory reporting statutes, legislatures were very clear in naming specific professionals who bear a duty of care to report suspected cases of mistreatment to public authorities.[286] Some

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281. *See* McPherson v. Tamiami Trail Tours, Inc., 383 F.2d 527 (5th Cir. 1967) (driver heard threats against an African-American passenger who sat in the front of a bus).

282. *See* Werndli v. Greyhound Corp., 365 So. 2d 177 (Fla. Dist. Ct. App. 1978) (holding that a bus driver had a duty to warn a passenger who wished to disembark that the area was known for its frequent criminal activity and its danger).

283. 627 N.E.2d 802 (Ind. Ct. App. 1994).

284. *See id.* at 808, 813. The court found that three of the defendants had no special relationship with the plaintiff, but additional evidence was necessary to determine if a fourth defendant had a relationship that created a "level of interaction or dependency" that would give rise to a special relationship.

285. *See id.* at 809.

286. *See, e.g.*, CONN. GEN. STAT. § 17b-451 (1997):

> (a) Any physician or surgeon licensed under the provisions of chapter 370 or 371, any resident physician or intern in any hospital in this state, whether or not so licensed, any registered nurse, and nursing home administrator, nurse's aide or orderly in a nursing home facility, any staff person employed by a nursing home facility, any patient's advocate and any licensed practical nurse, medical examiner, dentist, osteopath, optometrist, chiropractor, podiatrist, social worker, clergyman, police officer, pharmicist or physical therapist, who has reasonable cause to suspect or believe that any elderly person has been abused, neglected, exploited or abandoned, or is in a condition which is the result of such abuse, neglect, exploitation or abandonment, or who is in need of protective services, shall within five calendar days report such

states even place such a duty to report on "any person."[287] The abused and neglected individual is often physically and emotionally powerless to defend himself; his safety is in jeopardy. The professional knows or should know that a system for reporting, investigating, and stopping suspected elder abuse or neglect is in place. Often the victim will not be aware of this system or that the abuse or neglect is illegal and can be redressed.

The professional relationship thus gives rise to affirmative duties, minimally to diagnose and report. Professionals have, or should have, been trained in diagnosis or treatment of abuse or neglect; established protocols or guidelines should be in place. A written contract is unnecessary to create such a relationship, and indeed, is not customary in relationships with medical, mental health, social work, and other professionals. An implied contract may be created by a physical examination, an interview, or some other means of therapeutic intervention.[288]

The standard of care that is applied in professional negligence cases is derived from professional journals, protocols, and other peer discussions.[289] Over time, these coalesce to form a clinical policy, which becomes "standard practice."[290] Today, databases are available in all clinical practices.[291] Professionals may consult articles and protocols on elder mistreatment from countless sources. Computerized research allows access to case reports, books, articles, and other information. The standard of care derived from these sources provides guidance to judge or jury on how a reasonable professional would respond to the individual facts presented. Of course, such material may also be used defensively by a professional-defendant to demonstrate conformity to accept-

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information or cause a report to be made . . . .

Id. *See also infra* Appendix E (listing reporting statutes and mandatory reporters in each state).

287. *See, e.g.*, FLA. STAT. ch. 415.1034 (West 1996) ("(a) Any person, . . . who knows, or has reasonable cause to suspect, that a disabled adult or an elderly person has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion . . . .").

288. *See, e.g.*, Daly v. United States, 946 F.2d 1467, 1470 (9th Cir. 1991) (holding radiologist liable for non-disclosure of abnormalities in chest x-ray discovered in pre-employment physical); Green v. Walker, 910 F.2d 291, 296 (5th Cir. 1990) (finding doctor had duty to disclose findings emerging from workplace examination); Weaver v. University of Mich. Bd. of Regents, 506 N.W.2d 264, 267 (Mich. Ct. App. 1993) (implying contractual obligation from medical advice given by phone to patient if patient specifically seeking such advice).

289. *See generally* David Eddy, *Clinical Policies and the Quality of Clinical Practice*, 307 NEW. ENG. J. MED. 343 (1982).

290. *See id.*

291. MEDLINE, for example, which has more than six million references and articles from thousands of journals.

ed practice. Professionals are also bound by a fiduciary duty to their clients/patients, which is one of the defining characteristics of their work. The duty is recognized by the law[292] and by the professionals' codes of ethics, which safeguard the integrity of the practice and care and safety of the client/patient.[293]

3) Expert Witness

The plaintiff will typically use a qualified expert witness to establish the standard of care and to provide an opinion that the defendant's behavior—whether of omission or commission—breached the standard. Expert witnesses may testify based on their "knowledge, skill, experience, training or education"[294] and render opinions on whether the defendant-professional, confronted with the injuries or facts presented, should have diagnosed the mistreatment and reported the incident to the appropriate public authorities. If assessment and diagnosis were reasonably possible, the at-risk elder should have received the intervention that the reporting statutes are designed to trigger, thus preventing future harm. Protocols and guidelines by professional authorities[295] provide a particularized standard that an expert may use as a measuring device against which to test the defendant's conduct. Experts may also base opinions on their own practice and experience,[296] and research literature.[297]

4) States with Explicit Statutory Liability

Only four states explicitly set out civil liability for non-reporting

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292. *See, e.g.*, Norton v. Hamilton, 89 S.E.2d 809, 812 (Ga. Ct. App. 1955) (stressing that a physician's obligations emerge not only from contract but also from his fiduciary obligations and other considerations "inseparable from the nature and exercise of his calling").

293. *See, e.g.*, AMERICAN NURSES ASS'N, CODE FOR NURSES No. 3.1 (1985) ("The nurse's primary commitment is to the health, welfare, and safety of the client.").

294. *E.g.*, FED. R. EVID. 702.

295. *See, e.g.*, AMA ELDER ABUSE GUIDELINES, *supra* note 237 and protocols described *supra* notes 249-52 and accompanying text.

296. *See, e.g.*, Peiffer v. State Farm Mut. Auto. Ins. Co., 940 P.2d 967, 970 (Colo. Ct. App. 1996) (finding in an insurance bad faith case that expert testimony, based on the expert's own knowledge and practice in the insurance industry, should have been admitted); Dominguez v. St. John's Hospital, 632 N.E.2d 16, 19 (Ill. Ct. App.) (allowing expert testimony about a possible genetic defect that caused birth defects, instead of malpractice based on the experience and specialized knowledge of the expert).

297. *See, e.g.*, Young v. Horton, 855 P.2d 502, 504 (Mont. 1993) (allowing expert testimony based on medical journals on how much surgical patients remember about the risks related to them by their surgeons); Capps v. Manhart, 458 N.W.2d 742, 746 (Neb. 1990) (upholding the use of research literature as a proper basis for expert testimony in a dental malpractice action).

professionals.[298] The remaining mandatory reporting statutes do not explicitly provide a civil remedy against mandatory reporters for failure to report.[299] Typically, these statutes include criminal penalties for violation.[300] The Restatement of Torts, however, provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.[301]

The reporting statutes, as well as protocols and guidelines, thus define the standard of care of professionals who treat elderly clients/patients.

5) Civil Use of Criminal Statutes

The fact that the reporting statute is penal in nature does not negate its use in negligence litigation.[302] The criminal sanction does not make a civil duty unnecessary; to the contrary, it provides a legislative judgment that protection of the elderly is of such importance that it deserves the expenditure of public prosecutorial and judicial resources. There has long been a tradition that courts will create civil remedies to protect individuals whom the legislature sought to protect when passing a statute.[303] Indeed, such a tradition dates back to the very development of English common law.[304] Professor Foy quotes Sir Edward

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298. *See* ARK. CODE ANN. § 5-28-202(b) (Michie 1997); IOWA CODE § 235B.3(10) (1998); MICH. COMP. LAWS § 16.411e (1997); MINN. STAT. § 626.557(7) (1997).

299. *See, e.g.*, FLA. STAT. ch. 415.1034 (West 1997); MD. CODE ANN., FAM. LAW § 14-302 (1997).

300. *See, e.g.*, D.C. CODE ANN. § 6-2512(a)(1) (1997) ("Any person required to report under [the mandatory elder abuse reporting statute] who willfully fails to do so shall be guilty of a misdemeanor and, upon conviction, subject to a fine not exceeding $300."); ALASKA STAT. 47.24.010(c) (Michie 1997).

301. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

302. *See* KEETON ET AL., *supra* note 159, § 36, at 220.

303. *See id.* at 222.

304. *See, e.g.*, Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law*

Coke, the famous English barrister and jurist: "[E]very act of Parliament made against any injury, mischiefe [sic], or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved . . . ."[305]

On the other hand, courts will not create such a cause of action if the statute was enacted to protect the interests of the public, protect a class of persons other than the one whose interests are sought to be vindicated in the civil suit, or was intended to protect against other hazards than that from which the harm has resulted.[306] A court's investigation of the legislative intent is likely to be determinative. In ascertaining such intent, particularly where legislative history is ambiguous or nonexistent, courts will consider various factors: a law's relative specificity; the adequacy of existing remedies; the impact of creating a statutory tort action against a defendant; the significance of the legislative purpose at issue; how current law will be affected by recognizing new implied private torts; and the burden such causes of action will create for the judicial system.[307] The harm suffered must be of the

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Hybrid, 23 IND. L. REV. 781 (1990) (examining the sources and types of statutory duty actions and proposing analysis for judges to apply when presented with statutory duties); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 524-32 (1986) (tracing English and American implied private actions back as far as the fifteenth century); Thomas J. Andre, Jr., *The Implied Remedies Doctrine and the Statute of Westminster II*, 54 TUL. L. REV. 589 (1980) (tracing origins of implied remedies doctrine in early English Common Law).

305. Foy, *supra* note 304, at 524 (quoting EDWARD COKE, THE SECOND PART OF THE INSTITUTE OF THE LAWS OF ENGLAND 55 (1642) (emphasis added)).

306. RESTATEMENT (SECOND) OF TORTS § 288 (1965):

> The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively
> (a) to protect the interests of the state or any subdivision of it as such, or
> (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or
> (c) to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public, or
> (d) to protect a class of persons other than the one whose interests are invaded, or
> (e) to protect another interest than the one invaded, or
> (f) to protect against other harm than that which has resulted, or
> (g) to protect against any other hazards that from which the harm has resulted.

307. *See generally* KEETON ET AL., *supra* note 159, § 36, at 222-29. *See also* Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 624 (9th Cir. 1987) (explaining that courts will imply a private cause of action when statute protecting a class of persons exists, the remedy will further legislative intent, and private remedy will promote the effectiveness of statute); Lally v. Copygraphics, 413 A.2d 960, 968 (N.J. Super. Ct. App. Div.

kind the statute was intended to prevent.[308] In the absence of exclusions, the statute should be assumed to include all risks that reasonably may be foreseen as likely to follow from its violation.[309]

The issue is thus whether courts should imply a civil cause of action derived from a criminal statute which requires specified professionals to report reasonably suspected elder mistreatment cases to public authorities. In child abuse cases, courts have rendered decisions both ways. In *Landeros v. Flood*,[310] the Supreme Court of California approved both common law and statutory negligence claims against a non-reporting physician. At least two federal courts have opined that they would imply a cause of action from state reporting statutes. In *Ham v. Hospital of Morristown*,[311] the court noted that "[t]he reporting statute creates a legal obligation to report suspected brutality, neglect or physical or sexual abuse of children and failure to report 'can give rise to liability.'"[312] A Kansas federal court[313] stated that it would be inclined to follow the reasoning in *Landeros*[314] if a similar question were presented to it.[315] In addition, the Supreme Court of Arkansas, in *First Commercial Trust Company v. Rank*,[316] found that the failure to diagnose and report suspected child abuse could create a medical malpractice action.[317]

A number of courts, however, have declined to recognize a civil

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1980), *aff'd*, 428 A.2d 1317 (N.J. 1981) (holding that where an administrative remedy is provided to an aggrieved employee, but the remedy is not adequate to address all damages, a judicial remedy must co-exist so that the employee can proceed in either system); CPC Int'l. Inc. v. McKesson Corp., 514 N.E.2d 116 (N.Y. 1987) (holding that there is no private cause of action under the Martin Act for corporate fraud because the right of action is meant to benefit the state's Attorney-General, not private citizens); RESTATEMENT (SECOND) OF TORTS § 874A cmt. h (1979) ("The primary test for determining whether the courts should provide a tort remedy for violation of the legislative provision is whether this remedy is consistent with the legislative provision, appropriate for promoting its policy and needed to assure its effectiveness.").

308. *See generally* Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 473 (1933).

309. *See* KEETON ET AL., *supra* note 159, § 36, at 227.

310. 551 P.2d 389 (Cal. 1976), discussed *infra* notes 354-65 and accompanying text.

311. 917 F. Supp. 531 (E.D. Tenn. 1995).

312. *Id.* at 537.

313. *See* Doran v. Priddy, 534 F. Supp. 30 (D. Kan. 1981).

314. *See infra* notes 354-65 and accompanying text.

315. *See Doran*, 534 F. Supp. at 33 ("[*Landeros*] seems a well reasoned case, and this Court would be inclined to follow it if it were necessary.").

316. 915 S.W.2d 262 (Ark. 1996), *modified on reh'g denied*, 917 S.W.2d 167 (Ark. 1996).

317. *See id.* The Arkansas Medical Malpractice Act "encompasses a cause of action for failure to diagnose child abuse under the facts of this case." *Id.* at 267.

cause of action against professionals for failing to report suspected child abuse.[318] Some of these cases hold that such reporting laws are intended to protect the general public rather than a specific class of children.[319] Most have used reasoning similar to that of a 1989 Florida appellate case, *Fischer v. Metcalf*.[320] In that case, a psychiatrist was treating an adult because of the patient's physical and mental abuse of his children, and failed to report his alleged knowledge or suspicions of the maltreatment to state authorities. The court held that there was no civil liability on the part of the psychiatrist to the child-victims because the legislature intended the statute to protect the public, not a specific, limited class of victims.

> The subsequent history of [the reporting statute] . . . evidences a legislative intent to increase the number of classes protected by the legislation. The young, the aged, and the infirm all find shelter under the statutory provisions. It strains credulity to presume the legislature intended so broad a result as that a private right of action be available, by implication only, to classes which comprise half of our population.[321]

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318. *See, e.g.*, Isely v. Capuchin Province, 880 F. Supp. 1138, 1145 (E.D. Mich. 1995) (holding that Michigan reporting statute does not create a statutory negligence action); Letlow v. Evans, 857 F. Supp. 676, 678 (W.D. Mo. 1994) (holding that Missouri statute requiring school officials to report suspected child abuse does not create a statutory negligence action); Cechman v. Travis, 414 S.E.2d 282, 285 (Ga. Ct. App. 1991) (finding a doctor breached no legal duty by failing to discover and report a case of possible child abuse); Borne Northwest v. Allen County Sch. Corp, 532 N.E.2d 1196, 1203 (Ind. Ct. App. 1989) (holding legislature did not intend a cause of action against school district or school personnel for failure to report suspected abuse of student, and the common law also did not recognize one); Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 592 (Kan. 1991) (holding that statute did not create a statutory negligence action for psychologist's failure to report suspected child abuse); Bradley v. Ray, 904 S.W.2d 302, 312-14 (Mo. Ct. App. 1995) (indicating that statute did not create statutory negligence action for psychologist's failure to report suspected child abuse); Scott v. Butcher, 906 S.W.2d 16, 20 (Tex. Ct. App. 1994) (at common law a non-family member had no duty to prevent or report suspected child abuse and the court thus declined to create one). *But see Kansas State Bank & Trust*, 819 P.2d at 611-13 (Lockett, J., concurring in part) (disagreeing with majority opinion that Kansas legislature did not intend a statutory negligence action).

319. *See, e.g.*, Doe "A" v. Special Sch. Dist., 637 F. Supp. 1138, 1148 (E.D. Mo. 1986), *aff'd*, 901 F.2d 642, 646 (8th Cir. 1990) (refusing to recognize a statutory negligence action for violation of a child abuse reporting statute because the statute created a duty owed to the general public, rather than to individuals); Freehauf v. School Bd. of Seminole County, 623 So. 2d 761, 764 (Fla. Dist. Ct. App. 1993) (stating that the Florida child abuse reporting statute is meant to protect the general public, not any individual or particular class of people and does not create a private cause of action).

320. 543 So. 2d 785 (Fla. Dist. Ct. App. 1989).

321. *Id.* at 790.

The *Fischer* court, however, failed to ask the appropriate question. That question is: did the Florida child abuse reporting statute create a legal duty on the part of the psychiatrist to report suspected child abuse or neglect to the specified public authority? The language of the statute, ("Any person . . . who knows, or has reasonable cause to suspect, that a child is an abused or neglected child shall report such knowledge or suspicion . . . .")[322] and the total statutory scheme indicate the answer to that question should be yes, and there is no need for the legislature to explicitly create a cause of action where it creates a legal duty.

> When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate . . . . The fact that the legislation is usually penal in character, and carries a criminal penalty, will not prevent its use in imposing civil liability, and may even be a prerequisite thereto.[323]

The legislatures that have enacted these laws have expressed the intent to create a legal duty. The *Fischer* court acknowledged the evident legislative purpose: "[t]hat the thrust of the legislation is to help those who are abused, neglected or exploited; to preserve family life, where possible; to deal with the impact of such abuse on siblings, family structure, and the citizens of Florida; *and to intervene, treat and rehabilitate to forestall further harm.*"[324] These purposes are undoubtedly better served if civil liability for failing to report is imposed on professionals in appropriate factual instances. It is widely acknowledged that there is significant underreporting of elder abuse and neglect.[325] Allowing private causes of action does not thwart legislative intent as is suggested in *Fischer*; rather, it allows legislative intent to find its fullest expression. Using these statutes to imply a civil cause of action for elders against non-reporting professionals will help motivate them to take action that facilitates the protection of victims—the very protective purpose that motivated the legislature to create these statutes.

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322. FLA. STAT. ch. 415.504 (West Supp. 1998).
323. KEETON ET AL., *supra* note 159, § 36, at 220.
324. *Fischer*, 543 So. 2d at 789-90 (emphasis added).
325. *See supra* notes 205-16 and accompanying text.

Mandatory reporting laws delineate socially responsible behavior for the protection of the aged and the vulnerable. It is difficult to envision such statutes as simply protecting the general public. In creating such a cause of action the court furthers what one writer, discussing child abuse reporting, described as the "almost universal assumption throughout the English-speaking world. . . . that . . . abuse reporting laws are a necessary and integral part of a protective . . . abuse legislative program."[326] Accepted negligence principles thus allow the statute to establish the standard of care.[327]

Public health laws mandating professionals and others to report a variety of medical conditions and incidents are not unusual. Typical statutes require such reporting in the case of communicable diseases,[328] wounds inflicted by violence,[329] poisonings and industrial accidents.[330]

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326. Susan Maidmont, *Some Legal Problems Arising Out of the Reporting of Child Abuse*, 31 CURRENT LEGAL PROBS. 149, 150-51 (1979).

327. *See* source cited *supra* note 301 and accompanying text; *see also* Gabel v. Hughes Air Corp., 350 F. Supp. 612, 617 (C.D. Cal. 1972) (Finding the Federal Aviation Act created a duty for the benefit of passengers on aircraft, the district court stated: "The fundamentals here are that a duty is imposed by law; that the complaint alleges that defendants violated that duty; and that the plaintiffs were injured by that violation. Those three things are, and always have been the essential elements of tort liability.").

328. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2101 (Consol. 1997) ("Every physician shall immediately give notice of every case of communicable disease required by the department to be reported to it, to the health officer of the local health district where such disease occurs.").

329. *See, e.g.*, TENN. CODE ANN. § 38-1-101 (Michie 1997):

> (a) All hospitals, clinics, . . . doctors, . . . nurses, . . . or other persons called upon to tender aid to persons suffering from any wound or other injury inflicted by means of a knife, pistol, gun, or other deadly weapon, or by other means of violence, or suffering from the effects of poison, or suffocation, shall report the same immediately to the chief of police . . . .

See also WIS. STAT. ANN. § 146.995 (West 1989 & Supp. 1994):

> (2)(a) Any person licensed, certified or registered by the state . . . who treats a patient suffering from any of the following shall report . . .
>
> 2. Any wound other than a gunshot wound if the person has reasonable cause to believe that the wound occurred as a result of a crime.
>
> 3. Second-degree or 3rd-degree burns to at least 5% of the patient's body or, due to the inhalation of superheated air, swelling of the larnyx or a burn to the patient's upper respiratory tract, if the person has reasonable cause to believe that the burn occurred as a result of a crime.

330. *See, e.g.*, MINN. STAT. ANN. § 144.34 (West 1996).

> Any physician having under professional care any person whom the physician believes to be suffering from poisoning from lead, phosphorus, arsenic, brass, silica dust, carbon monoxide gas, wood alcohol, or mercury, or their compounds, or from anthrax or from compressed-air illness or any other disease contracted as a result of the nature of the employment of such person shall within five days mail to the department of health a report stating the name, address, and occupation of such patient . . . .

These statutory duties are analogous to legislation requiring professionals and others to report suspected elder mistreatment in order to avoid future injury to the elderly victim.

Liability may result from violation of such a statute. An illustrative example is *Derrick v. Ontario Community Hospital*,[331] a negligence action based, in part, on California statutes which required physicians to report infectious diseases to the department of health. The plaintiff, a patient in the defendant hospital, contracted such a disease from another patient, allegedly because the defendant doctors failed to report the condition to the local health officer as required by statute.[332] This failure to report prevented the health officer from taking appropriate measures to avoid contagion[333] and therefore contributed to the plaintiff contracting the disease. The court held that the plaintiff could maintain a suit based on the disease reporting statute because a duty was created.

> It thus appears that Health and Safety Code, sections 3110 and 3125 were enacted to protect the public against the spread of contagious, communicable diseases and that section 3125 does impose upon Hospital a duty to plaintiffs to report known infectious, contagious or communicable diseases to the local health officer.[334]

Since liability can be imposed for the failure to make reports of this type, it should likewise be imposed for the failure to make a report of suspected elder abuse/neglect.

b. Breach of Duty

Whether a defendant has breached his duty is a mixed question of law and fact.[335] The professional's failure to diagnose and/or treat identifiable elder abuse or neglect should constitute a breach of his duty, most especially when subsequent injury or damage results. Mal-

331. 120 Cal. Rptr. 566 (Ct. App. 1975).

332. *See id.* "All physicians, nurses, . . . in any . . . building, . . . or other place where any person is ill of any infectious, contagious, or communicable disease, shall promptly report that fact to the health officer . . . ." CAL. HEALTH & SAFETY CODE § 3125 (West 1995).

333. *See Derrick*, 120 Cal. Rptr. at 569-71. *See also* CAL. HEALTH & SAFETY CODE § 120175 (West 1996) ("Each health officer knowing, or having reason to believe, that any case of . . . contagious, infectious, or communicable disease exists, . . . shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.").

334. *Derrick*, 120 Cal. Rptr. at 570.

335. *See* KEETON ET AL., *supra* note 159, § 37, at 235.

practice is unskillful practice, resulting in injury to the client/patient caused by a failure to exercise a "reasonable degree of skill, knowledge, and care" under the unique factual circumstances of that case.[336] Professional competence is measured by the "standard of care." In the case of doctors, for example, this non-delegable duty is typically described as:

> given the circumstances of each patient, each physician has a duty to use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States . . . .[337]

Malpractice liability of other professionals follows these same basic principles.[338]

A long line of malpractice cases involves the failure of a professional, typically a physician, to reveal a foreseeable danger arising from the patient's condition or illness to the patient, his or her family, or to public authorities. Often, these cases are based on statutory duties, as in the elder abuse context, to report to public agencies specific diagnosed conditions creating danger.[339] These obligations are analogous to the duty to report suspected elder mistreatment to public authorities in order to avoid future injury to the victim or third parties, and liability is imposed for breach. The Restatement (Second) of Torts provides that a professional may be liable to a third person for harm resulting from his failure to exercise reasonable care if the "harm is suffered because of reliance of the other or third person upon the undertaking."[340] The cases tend to involve specific, identifiable third persons.[341]

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336. Bardessono v. Michels, 478 P.2d 480, 484 (Cal. 1970).

337. Hall v. Hilbun, 466 So. 2d 856, 872-73 (Miss. 1985).

338. *See generally* D. Eddy, *Clinical Policies and the Quality of Clinical Practice*, 307 NEW ENG. J. MED. 343 (1982).

339. *See, e.g.*, Gammill v. United States, 727 F.2d 950, 954 (10th Cir. 1984) (physician may be found liable for failing to warn a patient's family, treating attendants, or other persons likely to be exposed to the patient of the nature of the disease and the danger of exposure); Jones v. Stanko, 160 N.E. 456, 463 (Ohio 1928) (wrongful death action based on Ohio statutes which required physicians to report enumerated contagious diseases to public authorities); Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993) (physician liable to non-patient for failure to warn of risk of exposure to noncontagious disease). *See generally* Tracy A. Bateman, *Liability of Doctor or Other Health Practitioner to Third Party Contracting Contagious Disease from Doctor's Patient*, 3 A.L.R.5th 370 (1992); 61 AM. JUR. 2D *Physicians and Surgeons* § 88 (1987).

340. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

341. *See, e.g.*, DiMarco v. Lynch Homes-Chester County, 583 A.2d 422, 425 (Pa. 1990)

Another line of cases involves affirmative obligations imposed upon professionals by the common law to disclose even confidential information in order to protect third parties against hazards created by their patients. Known threats from a dangerous psychiatric patient is the prototypical case. The first successful instance of liability for failure to warn in this situation was *Tarasoff v. Regents of the University of California*.[342] In *Tarasoff*, a psychotherapist was counseling a patient who had threatened a woman who was readily identifiable as a former girlfriend.[343] The defendant-therapist took a number of affirmative steps—asking the police to detain the patient (which they briefly did) and initiating commitment proceedings, which were later stopped.[344] However, the defendant never warned the young woman, and she was subsequently murdered. Her parents sued, alleging that failure to warn constituted malpractice.[345] The California Supreme Court held that a therapist treating a mentally ill patient owes a duty of reasonable care to warn identifiable third persons against foreseeable danger created by the patient's condition.[346] The duty to act to protect such an endangered third person emerged from the relationship between the physician or therapist and the patient, and was breached by the failure to act.[347]

(doctor liable to sexual partner of patient exposed to hepatitis B for failure to warn patient to refrain from sexual relations with partner; court relied on RESTATEMENT (SECOND) OF TORTS § 324A). *See also* Shepard v. Redford Community Hosp., 390 N.W.2d 239, 243 (Mich. Ct. App. 1986) (treating physicians held negligent in failing to warn mother of risk of transmission of spinal meningitis to her young son, who died of the disease). *But see* Knier v. Albany Med. Ctr. Hosp., 500 N.Y.S.2d 490, 492 (Sup. Ct. 1986) (no duty to warn public that person has contagious disease).

342. 551 P.2d 334 (Cal. 1976).

343. *See id.* at 341.

344. *See id.*

345. *See id.*

346. *See id.* at 340.

347. *See id.* at 343. "[T]he common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim. . . . [T]he relationship between a therapist and his patient satisfies this requirement . . . ." *Id.* *See also* Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980) (holding that therapist-patient relationship is sufficient to impose an affirmative duty to control conduct of patient for benefit of third persons). *But see* Boynton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991) (rejecting *Tarasoff* duty to warn).

There is a vast body of caselaw and literature on *Tarasoff* and its implications. *See generally* Bradley v. Ray, 904 S.W.2d 302, 306-09 (Mo. Ct. App. 1995) (listing jurisdictions imposing a *Tarasoff*-type duty to warn or control); Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311 (Ohio 1997) (psychiatrist-outpatient relationship justifies duty to protect third parties); Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988) (upholding claim based on psychiatrist's failure to warn patient's family and failure to seek commitment); Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain*

The justification for this obvious breach in confidentiality by a professional is the state's interest in protecting public safety and potential victims.[348] The therapist need not predict such violence with absolute accuracy, but only needs to exercise reasonable skill and care, as defined by the standard of practice in that profession.[349]

The *Tarasoff* reasoning is applicable to elder abuse or neglect. If a professional should have identified elder mistreatment, or learns of the abuse or neglect through treatment of the abuser—perhaps in marital or psychological counseling—a duty to act to forestall future harm akin to the *Tarasoff* principle is created. In this instance, however, a mere warning to the victim is likely to be ineffective in preventing further harm for several reasons. First, the aged person, of course, typically already knows of the threat; what is needed is action, not a warning. Second, the presence of state systems for investigating reports of abuse or neglect[350] makes intervention relatively easy for the professional. A report mandated by statute simply is made to the appropriate agency.[351] Moreover, in these cases, the professional is far more likely to discover abuse or neglect through contact with the victim than with the abuser, and the relationship between a treating professional and the victim of abuse is far closer than that which created the affirmative duty in *Tarasoff*. The professional usually has examined and treated the victim, and often will have more concrete evidence of past and ongoing harm. The duty, though important, is not difficult to discharge. The professional need not control the actions of the abuser nor rectify the situation. It merely requires a reasonable professional to diagnose and treat the victim with the means available, which includes the established systems for reporting abuse or neglect.

Tarasoff and its progeny strengthen this argument for other reasons as well. Confidentiality is more significant in the psychotherapist-patient relationship than in other contexts because the psychotherapist gets his or her information solely from the patient. Here, there are no x-rays or other physical diagnostic tools available, other than intimate conversation. If the interest in confidentiality can be outweighed in such a situation, surely it can be outweighed in other relationships.

Their Patients or Warn Third Parties, 60 MO. L. REV. 749 (1995); Peter Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97 (1994).

348. *See Tarasoff*, 551 P.2d at 346-47.

349. *See Estates of Morgan*, 673 N.E.2d at 325-29.

350. *See infra* Appendix G.

351. *Id.*

Moreover, damage actions, or the threat of such actions, against health professionals can change behavior patterns. A survey of 2,875 psychotherapists conducted after *Tarasoff* was decided revealed that most began to warn third parties when a patient uttered a threat; they felt themselves bound by *Tarasoff* even though that case technically applied only to California therapists.[352] These professionals believed they could assess the dangerousness of the patient and were comfortable issuing a warning.[353]

The best known instance of liability imposed on a professional for failure to meet statutorily required reporting is the California Supreme Court's 1976 decision in *Landeros v. Flood*.[354] A child was brought to a hospital with a spiral fracture of the tibia and fibula, apparently caused by a twisting force for which there was no natural explanation.[355] The child also had bruises and abrasions over her entire body, and exhibited other symptoms of "battered child syndrome."[356] The physician failed to diagnose mistreatment and failed to report the case to the proper authorities.[357] The child was returned to her parents and severely beaten again, suffering permanent, physical injury.[358] Subsequently, the child's guardian ad litem brought a malpractice action against the physician and the hospital.[359] The California Supreme Court held the physician could be liable for the child's subsequent injuries.[360] The court also upheld the claim on the theory that violation of the California statutes requiring reporting of suspicious injuries demonstrated the physician's failure to exercise due care.[361] The fact that such reporting was not customarily done by doctors was brushed aside by the court.[362]

Whether the physician would have followed the procedure of reporting plaintiff's injuries to the authorities, however, is not solely a question of good medical practice. The above-cited reporting statutes (Pen. Code, §§ 11160-11161.5) were in force in 1971. They evidence

352. *See* Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WISC. L. REV. 443, 473-74.
353. *Id.* at 485.
354. 551 P.2d 389 (Cal. 1976).
355. *See id.* at 391.
356. *Id.*
357. *See id.*
358. *See id.*
359. *See id.* at 390.
360. *See id.* at 395-96.
361. *See id.* at 396.
362. *See id.* at 393-94.

a determination by the legislature that in the event a physician does diagnose battered child syndrome, due care includes a duty to report that fact to the authorities. In other words, since the enactment of these statutes, a physician who diagnoses battered child syndrome will not be heard to say that other members of his profession would not have made such a report. The same is true of each of the persons and entities covered by this legislation.[363]

The court likewise rejected the doctor's defense that such a report would breach the doctor-patient privilege.[364] The plaintiff was entitled to attempt to prove that the doctor should reasonably have foreseen the resumption of abuse and further injuries to the child if returned to the *status quo ante*.[365]

In those jurisdictions which do now, or will in the future, allow a cause of action for failure to diagnose and report child abuse, the reasoning in *Landeros* can be applied to cases of unreported elder abuse/neglect. Although the aged are presumed competent and could self-report, the dynamics of many abusive situations prevent a free choice by the victim.[366] Much elder abuse is cyclical, making it reasonably foreseeable that mistreatment will be repeated and increased injury suffered. As Professors Baumhover and Beall note, "[b]ecause many victims of elder mistreatment are out of touch with the outside world, a clinical examination and subsequent intervention may be the only opportunity to prevent future abuse."[367] The potential defendants

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363. *See id.* at 394 n.8. The statutes referred to by the court included: CAL. PENAL CODE § 11160 (West 1970) ("Every person . . . to which any person suffering from any wound . . . where injuries have been inflicted upon any person in violation of any penal law of this state shall come or be brought, shall report the same immediately . . . ."); CAL. PENAL CODE § 11161 (West 1970) ("Every physician or surgeon who has under his charge or care any person suffering from any wound or injury inflicted in the manner specified in Section 11160 shall make a report of the kind specified in this article to the appropriate officials named in Section 11160."); CAL. PENAL CODE § 11161.5 (West 1970) (In any case in which a minor is under a physician's care or is brought to him for diagnosis, examination or treatment, and "it appears to the physician" that the minor has physical injuries "which appear to have been inflicted upon him by other than accidental means by any person," the physician must report such injuries).

364. *See Landeros*, 551 P.2d at 394 n.8 ("The statute also lays to rest defendant Flood's concern that if he were required to report his findings to the authorities he might be held liable for violation of the physician-patient privilege. (Evid. Code, § 992.) Section 11161.5 specifically exempts the physician from any civil or criminal liability for making a report pursuant to its terms.").

365. *See id.* at 396.

366. *See supra* note 191 and accompanying text.

367. Baumhover & Beall, *supra* note 247, at 250.

in cases of failure to diagnose or report include licensed professionals, such as doctors, nurses, and social workers, as well as others who are statutorily required to report elder abuse. In addition, their employers, such as hospitals, clinics, nursing homes, and community agencies, may also be liable under vicarious liability theories.

Although some state courts have resisted allowing damage suits premised on violation of mandatory reporting statutes,[368] others have embraced private causes of action against negligent social service agencies that violate the same child protective statutes.[369] Typically, these cases arise when a report of suspected abuse is made to the agency and the report is never investigated. If the child is harmed after the agency negligently failed to investigate, civil liability has been found.[370] Courts usually have no difficulty finding legislative intent to allow private actions in these cases because, "when the legislature has been sufficiently specific in detailing both a duty on behalf of a particular government officer or employee and the identity of a particular class of persons in a particular situation to which the special duty is owed there must be a remedy."[371]

This reasoning should be applied to elder abuse cases and the failure to report by mandated reporters. The legislatures, by enacting mandatory reporting laws, have imposed a duty on specific individuals and delineated the class of persons to whom the duty is owed. If the duty is breached, there should be a remedy. Under state licensure, a doctor or other professional is allowed to practice only upon the condition that he or she perform their statutory duties. The reasons for imposing civil liability on social service agencies likewise apply to mandated reporters.

Imposing civil liability for failing to take action which might prevent the criminal or tortious acts of another is neither new nor novel. Similar cases are present in numerous areas. Liability for failure to protect a person from the criminal acts of third parties, for example,

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368. *See supra* notes 318-21 and accompanying text.

369. *See, e.g.*, Mammo v. State, 675 P.2d 1347 (Ariz. App. 1983); Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987).

370. *See, e.g.*, Mammo v. State, 675 P.2d 1347 (Ariz. App. 1983) (holding that a state agency was under a duty to act with reasonable care after it received information about an abused child and could be held civilly liable for damages for failure to investigate such a report); Turner v. District of Columbia, 532 A.2d 662 (D.C. 1987) (finding that the District of Columbia could be held civilly liable for failing to remove children from their abusive father after a specific report of abuse was filed with the District); Jensen v. Anderson County Dept. of Soc. Servs., 403 S.E.2d 615 (S.C. 1991) (stating that negligence in failing to investigate a report of child abuse could give rise to a private wrongful death action).

371. *Jensen*, 403 S.E.2d at 618.

has long been established in the landlord-tenant context.[372] If a criminal attack by an outsider is reasonably foreseeable and preventable, a landlord will be liable for injuries to his tenant, or others.[373] Likewise, in a long series of cases, common carriers have been found negligent for injuries to passengers inflicted by third parties.[374] These lines of cases provide a useful analogy to the reporting of elder abuse or neglect. The cyclical nature of abuse makes further harm foreseeable, and the professional who treats a victim of abuse or neglect knows, or should know, that further abuse is likely if there is no intervention. In addition, because various aids in diagnosing abuse are available, and public agencies can investigate and respond to mandated reports, further mistreatment of the aged victim is reasonably preventable. Even if future harm cannot be completely eliminated, at least the treating professional should be required to take the minimal step of making a report so that the needed services are made available to the abuse or neglect victim.

c. Negligence Per Se

It has previously been argued that mandatory reporting statutes generate a duty on the part of the professional to act when reasonable belief or suspicion should be aroused by injuries, the general condition of the patient, inconsistencies between explanations and injuries, or other circumstances. Failure to report to designated state authorities in such a situation is common law negligence. A court, however, may find these circumstances do more than create an implied civil cause of action. Where such a protective statute was intended to protect the plaintiff against the risk of harm which has in fact occurred as a result of its violation, the breach can be conclusive on the issue of negli-

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372. *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (holding that where a landlord has notice of repeated criminal assaults on his property, there is a duty to use preventive measures to protect tenants and guests from the criminal attacks of others).

373. *See, e.g.*, Medina v. 187th St. Apartments, Ltd., 405 So. 2d 485, 486 (Fla. Dist. Ct. App. 1981) (owner of apartment complex could be held liable when a person was mugged in the complex's parking lot because the owner had knowledge that similar crimes had been committed there in the past).

374. *See, e.g.*, Hernandez v. Rapid Bus Co., 641 N.E.2d 886 (Ill. App. Ct. 1994) (stating that a bus company could be held liable for the sexual assault of one of its passengers by another passenger if it was on notice of the attacker's violent tendencies); Hines v. Garrett, 108 S.E. 690 (Va. 1921) (railroad could be held liable for damages when it carried young girl past station and put her off near a "tramps' hollow" where she was raped by two unidentified persons).

gence, and the court should so direct the jury. In *Thelen v. St. Cloud Hospital*,[375] a case dealing with Minnesota's statutory civil liability for failing to report suspected abuse of a vulnerable adult, the court explained how statutory duties affect a tort action.

> Generally the tort liability resulting from violation of a statute does not differ from ordinary negligence. The only difference between a statutorily imposed duty of care and a duty of care under common law is that the duty imposed by statute is fixed, so its breach ordinarily constitutes conclusive evidence of negligence, or negligence per se, while the measure of legal duty in the absence of statute is determined under common-law principles.[376]

When the standard of care is determined by the statute, "jurors have no dispensing power by which to relax it."[377] On the other hand, some courts have held that a violation of the statute is only evidence of negligence, or prima facia evidence of negligence, which may be accepted or rejected by the jury.[378] In either case, issues of causation, contributory negligence, and damages may still remain.

d. Causation

All negligence actions require that a causal connection between the negligent act and the resulting harm be proven.[379] The requisite causal connection between the professional's negligent failure to report and the actionable injury to the aged person is arguably created when subsequent injury occurs after the time when the report should have been made.[380]

The defendant-professional in such a malpractice suit will argue that even if his behavior fell below the standard of care, it did not create damage to the elderly person. Rather, that harm emanated from the perpetrator's tortious and/or criminal acts. To succeed, the plaintiff must thus establish that the defendant was both a cause in fact and the proximate cause of the elder's subsequent injuries.[381] Proximate cause

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375. 379 N.W.2d 189 (Minn. Ct. App. 1985).
376. *See id.* at 192-93.
377. Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920) (Cardozo, J.).
378. *See* KEETON ET AL., *supra* note 159, § 36, at 230 & n.9 (citing Salinero v. Pon, 177 Cal. Rptr. 204 (1981) (listing factors necessary under California Evidence Code to create presumption of negligence)).
379. *See* KEETON ET AL., *supra* note 159, § 41, at 263.
380. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965) (explaining when an actor is liable for an invasion of an interest of another).
381. *See* KEETON ET AL., *supra* note 159, § 30, at 165.

requires a court to engage in a policy oriented examination of the factual situation and any statutes implicated. It often overlaps the discussion of whether there is a duty to the plaintiff.[382]

There are many instances when a close connection between the failure to report elder mistreatment and subsequent injuries can be perceived even if the specific harm was inflicted by a third person. The plaintiff must prove that but for the professional's failure to report, the damage subsequent to the omission would not have occurred. It is well settled that intervening negligent and/or criminal acts—in this instance by a relative, caretaker or others—which the defendant might reasonably anticipate do not supersede or cut off the defendant's liability for his own act or omission.[383] Elder abuse is typically not an isolated event, but part of a pattern of repeated mistreatment that continues and escalates until there is appropriate medical, social or legal intervention.[384] The dynamics are often similar to that found in partner abuse. There, the perpetrator may begin with psychological or financial abuse, progress to property destruction or animal abuse, and finally to physical assault.[385] Elder mistreatment may follow this "cycle of violence," or take different paths, resulting in violation of the aged person's civil rights, physical violence or other damage.

The widespread adoption of reporting statutes attests to the fact that the enacting legislatures presumed and anticipated such cyclical behavior. Therefore, once a professional suspects or has reason to believe that an older person has suffered abuse or neglect, he should also reasonably anticipate future repetition, or, indeed, escalation. The premise of reporting legislation is that elders may be protected only by identifying those at risk, and instituting protective and therapeutic measures.

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382. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (classic exposition of whether defendant should be liable for plaintiff's injury, in which the majority speaks in terms of duty rather than proximate cause). For more on the vast literature of proximate causation law, see generally 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.1, at 85-89, §§ 20.4-.6, at 130-85 (2d ed. 1986 & Supp. 1995); KEETON ET AL., *supra* note 159, §§ 42-44, at 272-319 (2d ed. 1986 & Supp. 1995); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49 (1991).

383. *See* RESTATEMENT (SECOND) OF TORTS § 449 (1965) ("If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.").

384. *See* COUNCIL ON SCIENTIFIC AFFAIRS, *supra* note 246, at 966-71. *See also supra* notes 246-47 and accompanying text.

385. *See generally* LENORE E. WALKER, TERRIFYING LOVE 42-47 (1990) (describing cycle of violence).

The ameliorative systems, however, cannot be expected to work unless they are triggered. In many instances, consequences of the failure to report are quite certain; there will be no detection by public authorities and the abuse will continue. At the very least, the failure to report may be viewed as a contributing or substantial cause of additional maltreatment, if it is not the sole cause.[386]

In the well-known *Landeros* case,[387] where a child was returned by a physician to parents who later beat the child repeatedly, the California Supreme Court held that the subsequent beatings and injuries were proximately caused by the doctor's inaction, even though physically caused by the parents.[388] The court utilized section 449 of the Restatement to respond to defendant's causation defense: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the act negligent, such an act, whether innocent, negligent, intentionally tortious *or criminal*, does not prevent the actor from being liable for harm caused thereby."[389]

The principle stated in the Restatement is demonstrated in *Stevens v. Des Moines Independent Community School District*,[390] where the plaintiff was beaten by a fellow student.[391] He then sued the school district for failing to properly supervise the attacker, a child with known violent tendencies.[392] The trial court found that the causal connection between the school's negligence in failing to supervise and the injury to the plaintiff was broken by the intervening criminal attack of the student.[393] The Supreme Court of Iowa, however, held that the causal link was not broken, because the risk of attack by the other student was the exact risk that the duty to supervise was designed to prevent.[394]

Obviously the defendant cannot be relieved from liability by the

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386. *See* KEETON ET AL., *supra* note 159, § 41, at 268 ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result . . ."); Williams v. United States, 352 F.2d 477 (5th Cir. 1965) (discussing contributory negligence and negligent acts of third parties).

387. *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976); *see* discussion *supra* notes 354-65 and accompanying text.

388. *See Landeros*, 551 P.2d at 395.

389. *See id.* (quoting RESTATEMENT (SECOND) OF TORTS § 449).

390. 528 N.W.2d 117 (Iowa 1995).

391. *See id.* at 118.

392. *See id.*

393. *See id.*

394. *See id.* at 119.

> fact that the risk, or a substantial or important part of the risk, to which the defendant has subjected the plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility.[395]

Applying this reasoning to the elder mistreatment context, if a mandated report of suspected abuse is not made, that failure would be a proximate cause of subsequent injuries. The intervening act of the abuser does not relieve the defendant professional of liability because this is the exact harm sought to be prevented by requiring that reports be made.

e. Damages

Plaintiff claims for compensation should include any damages suffered after the professional's failure to act, e.g., bodily harm, emotional distress, financial loss, medical expenses, and other injuries. All are compensable under normal tort principles.[396] On the other hand, loss of income from future employment and other elements of damages will often not be recoverable for an aged person. In addition, because plaintiff's life expectancy is apt to be shorter than in a normal suit, loss of enjoyment and consortium may have less value than in the usual case.

Suits on behalf of the elderly will present special litigation problems. The elderly bruise more easily, and suffer more falls and fractures than younger people.[397] Aged persons are apt to have chronic physical disabilities, diseases or impairments that diminish their health, strength and mobility. Defendants may attribute the results of abuse or neglect to the normal aging process, or a fact finder may confuse the two. Moreover, delays in the litigation process can have disastrous consequences for the elder's suit; in some states the action will not

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395. *Id.* (quoting KEETON ET AL., *supra* note 159, § 44, at 303-04).

396. *See* RESTATEMENT (SECOND) OF TORTS § 905 (explaining that compensatory damages that may be awarded for bodily harm or for emotional distress, without proof of pecuniary loss); *see also id.* § 924 (explaining that when an individual's personality has been tortiously invaded, that person may recover for, inter alia, past or future bodily harm and emotional distress, loss or impairment of earning capacity and/or reasonable medical and other expenses).

397. *See, e.g.*, J. O'Brien, *Elder Abuse*, *in* PRIMARY CARE GERIATRICS, 466-72 (R.J. Hamm & P. Sloan eds., 1994).

survive the death of the plaintiff before trial.[398] Often little or no social value is ascribed to older people, thus making jury verdicts problematic.[399] When ageism is combined with sexism, older female plaintiffs may be especially disadvantaged,[400] and proving damages may be difficult. Some aged persons may be poor witnesses because of speech, hearing, or other physical impairments. Poor memory, or fear and intimidation may make testimony difficult. If the action is brought by a competent elder, the issue of his or her ability to take steps to stop the abuse will again be relevant.[401]

But such cases also present intriguing litigation possibilities. Judges and jurors are instinctively able to understand that older persons are less able to defend themselves or to escape from threatening situations. As a result, the failure of professionals to report and thus to initiate protective services may be viewed quite harshly. Evidence of physical or sexual abuse is apt to elicit a visceral response. Contemporary medical documentation and photos may be used to show bodily harm. Many injuries from which a younger victim recovers quickly may have long-term disabling effects on an elderly victim.[402] Non-physical forms of mistreatment may also have important and demonstrable consequences; they can cause demoralization and depression in aged victims,[403] as

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398. *See, e.g.*, FLA. STAT. ANN. § 768.20 (West 1997) ("When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate.").

399. The term "ageism," coined in 1968 by Dr. Robert N. Butler, the first director of the National Institute on Aging, was originally defined as:

> a systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills. . . . Ageism allows the younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.

Robert N. Butler, *Dispelling Ageism: The Cross-Cutting Intervention*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1989, at 138, 139 & n.2. *See also* ROBERT N. BUTLER, WHY SURVIVE?: BEING OLD IN AMERICA (1975) (Pulitzer prize-winning book which elaborates on ageism).

400. *See generally* Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997) (discussing paternalistic interventions that encourage the dependence of elderly women); LEO DRIEDGER & NEENA L. CHAPPELL, AGING & ETHNICITY: TOWARD AN INTERFACE (1987).

401. *See infra* notes 416-32 and accompanying text.

402. *See* MORTON BARD & DAWN SANGREY, THE CRIME VICTIM'S BOOK 24 (2d ed. 1986) ("The elderly . . . feel the threat of a blow or of being knocked down more acutely than a . . . younger person does. Old bones break so easily and mend so slowly.").

403. *See* Mary C. Sengstock & Sally C. Steiner, *Assessing Non Physical Abuse*, *in* ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT AND INTERVENTION 105, 107-08 (Lorin A. Baumhover & S. Colleen Beall eds., 1996).

has been demonstrated with battered women.[404] The consequences of psychological or emotional abuse have been shown to be more severe for older people than for younger people.[405] Appetite and sleeping patterns may be disrupted, with loss of ability to function in daily life or to take prescribed medication.[406] Many elderly persons depend upon fixed public or private pensions or benefits, so financial exploitation, even of small amounts, may prevent them from obtaining needed food, medicine, or utility services.[407] Economic losses can reduce even financially comfortable elderly people to a state of dire need. Expert testimony may highlight the physical or sexual abuse and its psycho-social consequences. Symptoms associated with post-traumatic stress disorder are frequent, including a re-experience of the trauma through nightmares, intrusive thoughts, and other suffering. Psychological effects on elderly crime victims range from isolation and depression[408] to suicide.[409] These are facts and consequences that judges and jurors can easily absorb and comprehend.

Punishment for extreme behavior and deterrence of future harm resulting from a disregard for the safety of others are the bases for an award of punitive damages.[410] In determining the amount of punitive damages which are appropriate to accomplish these goals, a jury may consider the potential harm to the victim and the possible harm to other victims if the behavior is not deterred.[411] It is also free to consider the wealth of the defendant.[412]

If a mandated reporter fails to report a case of suspected elder abuse or neglect, and the failure exceeds mere negligence, punitive damages may be appropriate. In situations where the professional is

404. *See* Jacquelyn Campbell & Nancy Fishwisk, *Abuse of Female Partners*, *in* NURSING CARE OF SURVIVORS OF FAMILY VIOLENCE 68-104. (J. Campbell & J. Humphreys eds., 1993).

405. *See* Kosberg & Nahmiash, *supra* note 5, at 33.

406. *See generally id.* at 31.

407. *See* Lois Herrington, *Crime Has a Devastating, Tragic Impact on the Nation's Elderly*, JUST. ASSISTANCE NEWS, Aug. 1983, at 2 (excerpted testimony before Senate Subcommittee on Aging).

408. *See After-Effects of Crimes Against Elderly Said Intense*, CRIME CONTROL DIG., Dec. 8, 1975, at 2-3.

409. *See Crime Fears Led to Suicides*, CRIME CONTROL DIG., Oct. 11, 1976, at 9.

410. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1977) ("(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.").

411. *See* TXO Prod. Corp. v. Alliance Resources, 509 U.S. 443, 460 (1993) (discussing deterrence as a factor in awarding punitive damages).

412. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1977).

unaware of the reporting requirement or reasonably believes that there is no real danger to the aged person, the failure to report would not merit an award of super-compensatory damages. Punitive damages are appropriate, however, when the mandated reporter's conduct in not reporting suspected abuse or neglect is, in the Restatement's words, "outrageous" because of "evil motive" or a "reckless indifference" to the rights of the patient-client.[413] While evil motive will be exceedingly rare, several behaviors could demonstrate reckless indifference to the rights of the elder. For instance, if the reporter knows there is a reporting requirement, knows that there is the good possibility of continued abuse and fails to report, such actions would tend to show, at least a reckless, if not a knowing, disregard for the safety of the elder.

In addition to assessing punitive damages against the mandated reporter, when a professional who fails to report is an employee acting in the course of employment—e.g., a nurse in a hospital or clinic staff—punitive damages may be awarded against the principal in certain situations.[414] Also, if the hospital failed to institute procedures to ensure reporting or supervise staff, punitive damages may be appropriate.[415] An award of sufficient punitive damages against a hospital or other care facility would undoubtedly encourage that more comprehen-

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413. Section 908 reads in part:

> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

414. *See id.* § 909. Section 909 reads as follows:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
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> (a) the principal or managerial agent authorized the doing and the manner of the act, or
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> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
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> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

415. *See* United W. Med. Centers v. Superior Court, 49 Cal. Rptr. 2d 682 (Ct. App. 1996) (holding that, if statutory provisions regarding the pleading of punitive damages are complied with, it is possible to recover punitive damages from a hospital for the negligent or intentional failure to supervise its employees that results in the sexual assault of a patient); Farago v. Sacred Heart Gen. Hosp., 562 A.2d 300 (Pa. 1989) (stating that willful misconduct or gross negligence in failing to provide a safe and secure environment for a patient who was raped by another patient at the hospital could result in an award of punitive damages).

sive training and supervision procedures be instituted, thereby preventing future injuries.

3. *Defenses*

Even if a professional is found to be negligent in the failure to diagnose and/or report suspected elder abuse or neglect, defenses such as contributory and comparative negligence or assumption of risk may be used by the defendant to avoid liability. However, for each of these defenses, there are sound rebuttals which allow recovery by the victim.

If the fact-finder determines that the plaintiff-elder's conduct fell below the standard of care which he or she should have conformed to for his or her own protection, contributory negligence (sometimes referred to as "plaintiff's negligence") was traditionally a complete bar to recovery.[416] The defendant-professional, in a suit for failure to report, will likely raise this defense, or its more modern counterpart, comparative negligence, which is not a complete bar but apportions damages according to relative fault.[417] It may be argued that the failure of the elder to report the abuse himself, or to take some other action to end or avoid it, is negligence. However, the failure to report or perform those acts is not legal negligence unless a reasonable person under like circumstances would report, and like circumstances must include an analysis of the role that age, experience, and actual circumstances play in the decision not to report.[418]

If a reasonable elderly person in the same circumstances would not, or could not, have taken steps to report the abuse, then the plaintiff was not negligent.[419] There will often be a well-founded fear of the consequences of reporting, such as retaliatory abuse. Moreover, as one expert has noted:

> Elder abuse victims commonly experience strong feelings of shame and humiliation, particularly if the abuse has included sexual or extensive physical assault. The sense of shame can

416. *See* RESTATEMENT (SECOND) OF TORTS §§ 465, 467 (1965). *See generally* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946) (discussing early contributory negligence cases with an emphasis on jury control).

417. *See* KEETON ET AL., *supra* note 159, § 67, at 470.

418. *See* RESTATEMENT (SECOND) OF TORTS § 464 (1965) ("Unless the actor is a child or an insane person, the standard of conduct to which he must conform for his own protection is that of a reasonable man *under like circumstances*.") (emphasis added).

419. *See, e.g.*, Texas & Pac. Ry. Co. v. Stewart, 228 U.S. 357 (1913) (taking account of circumstances and the age of plaintiff in determining that her actions did not constitute contributory negligence).

> be exacerbated if the offender is a family member. Ambivalent feelings are common in victims of family abusers because they may simultaneously love and resent their offenders. Elder abuse victims may have difficulty accepting intervention, especially if they have strong affective relationships with offenders, such as spouses and adult children or grandchildren.[420]

Today most states employ comparative, rather than contributory negligence; even a finding of some measure of plaintiff negligence will not usually be a complete bar to recovery. There are three different types of comparative negligence: "pure" systems, which apportion awards strictly according to fault;[421] "modified" systems, which apportion damages if plaintiff's negligence was not as great as the defendant's;[422] and "slight-gross" systems, which apportion damages if the plaintiff's negligence was "slight" in comparison to the defendant's.[423] If the elder's failure to report abuse or neglect or take other steps to protect himself is found to be only slightly negligent, or less negligent

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420. Holly Ramsey-Klawsnik, *Assessing Physical and Sexual Abuse in Health Care Settings*, *in* ABUSE, NEGLECT AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT AND INTERVENTION 67, 73-74 (Lorin A. Baumhover & S. Colleen Beall eds., 1996).

421. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973) ("If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant.").

422. *See, e.g.*, COLO. REV. STAT. § 13-21-111 (West 1998):

> (1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence *was not as great as* the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

(Emphasis added). *See also* OR. REV. STAT. § 18.470 (1996):

> (1) Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant *was not greater than* the combined fault of all persons specified in subsection (2) of this section, but any damages allowed shall be diminished in proportion to the percentage of fault attributable to the claimant.

(Emphasis added.)

423. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 20-9-2 (Michie 1997):

> In all actions brought to recover damages for injuries to a person or his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant, but in such case, the damages shall be reduced in proportion to the amount of plaintiff's contributory negligence.

than the fault of the professional mandated to report, recovery will be allowed. Once again, as with contributory negligence, the plaintiff's focus must be on demonstrating that any failure on the part of the victim was reasonable, given age and situation. If this can be proven, comparative negligence, as well as contributory negligence, will not bar recovery against one who had a duty to report suspected abuse or neglect.

Assumption of risk is another defense a defendant is likely to raise, but it cannot realistically be maintained that an elderly person assumes the risk of abuse. To establish such a defense, defendant must prove that plaintiff voluntarily and freely assumed the risk that he would be harmed through the negligence of another.[424] Where the elder knows of the threat of further abuse and does not leave the situation or report it, there is no assumption of risk unless there is a reasonable alternative.[425] Elderly abuse victims will often perceive no other option than to remain in the abusive situation. They may be dependent on the abuser for food, medical assistance, shelter, and other caregiving necessities; may fear continued or worse abuse as retaliation for reporting; and often do not know that services are available to them. There is nothing voluntary or freely chosen about remaining in an abusive situation under these circumstances. Where there is only a choice of evils, there is no assumption of risk.[426]

Moreover, in such an implied statutory action the court is creating a new tort against which traditional common law defenses, e.g., contributory negligence, assumption of the risk, comparative fault, should play no role at all. The Restatement provides that a court, in deciding which defenses may apply in an action implied from a statute, should

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424. KEETON ET AL., *supra* note 159, § 68, at 487.

425. *See id.* at 490-91. *See, e.g.*, Neal v. Prince George's County, 700 A.2d 838 (Md. App. 1997) (overruling the granting of a summary judgment motion on the basis that an applicant who was seeking to obtain medical benefits for her son may not have assumed the risk of falling on an icy sidewalk because there may have been no reasonable alternative by which she could obtain the needed care for her son); Mack v. Kranz Farms, Inc., 548 N.W.2d 812 (S.D. 1996) (remanding for trial because there was an issue of fact as to whether a farm worker voluntarily assumed the risk of being injured while removing frozen silage from a feed trough when the only other alternatives would have caused a greater risk to his safety than the method he chose).

426. *See* KEETON ET AL., *supra* note 158, § 68, at 40-41. *See also* York v. Winn-Dixie Atlanta, Inc., 459 S.E.2d 470 (Ga. App. 1995) (finding that deliveryman who had the choice of using a slippery platform or losing his job may not have voluntarily assumed the risk of falling); Marshall v. Ranne, 511 S.W.2d 255 (Tex. 1974) (holding that there was no assumption of risk for a homeowner to leave his home knowing that there was a dangerous animal kept by his neighbor loose where the only other choice was to remain a prisoner in his own home).

look for guidance to the statute from which the claim arises.[427] Where the statute reflects the legislature's desire to protect those who cannot adequately guard themselves, such defenses should not be applicable. One of the reasons for the enactment of mandatory reporting statutes is that many elderly victims are unable to protect themselves adequately.[428] In cases involving defendants who violate special safety, juvenile, or other laws protecting vulnerable groups, courts have held these statutes to be essentially strict liability provisions requiring defendants to safeguard such individuals from foreseeable harm. To allow common law defenses would undermine the legislative purpose in enacting these laws.[429] One court held exactly that in its interpretation of the Minnesota Vulnerable Adult Act, which mandates the reporting of suspected abuse or neglect:

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427. RESTATEMENT (SECOND) OF TORTS § 874(A) cmt. j (1979) ("Defenses to the action may be suggested by the legislative provision itself.").

428. In the battered woman context, see LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 42-54 (1979); Naomi Hilton-Archer, Note, *Battered Women and the Legal System: Past, Present, and Future*, 13 LAW & PSYCHOL. REV. 145, 147-49 (1989).

429. *See* Thelen v. St. Cloud Hosp., 379 N.W.2d 189, 193-94 (Minn. Ct. App. 1985) (imposing absolute liability for failing to report suspected abuse of a vulnerable adult as required by statute and stating that affirmative defenses such as contributory or comparative negligence are not available when a statute is intended to protect one who cannot protect herself). *See also* Wren v. Sullivan Elec., Inc., 797 F.2d 323, 326-27 (6th Cir. 1986) (subcontractor which did not install adequate temporary lighting at construction site, in violation of state and federal safety statutes and regulations, could not assert assumption of the risk or contributory negligence defenses against injured construction worker); Boyles v. Hamilton, 45 Cal. Rptr. 399 (Cal. Dist. Ct. App. 1965) (holding that assumption of risk and contributory negligence could not be used as defenses to an action based on the violation of child labor laws); Tamiami Gun Shop v. Klein, 116 So. 2d 421, 422-24 (Fla. 1959) (store which sold rifle to minor in violation of state statute and municipal ordinance could not assert contributory negligence defense against minors); Slager v. HWA Corp., 435 N.W.2d 349, 352-58 (Iowa 1989) (tavern which served alcohol to minor in violation of state dram shop statute could assert neither contributory negligence nor comparative fault defense against minor); Lomayestewa v. Our Lady of Mercy Hosp., 589 S.W.2d 885, 887 (Ky. 1979) (hospital which violated state regulation requiring detention screen could not assert contributory negligence defense against patient who fell from window); Boyer v. Johnson, 360 So. 2d 1164, 1169-70 (La. 1978) (defendant who employed 15-year old boy to drive commercial motor vehicle in violation of state child labor laws could not assert contributory negligence defense against claim by boy's survivor); Zerby v. Warren, 210 N.W.2d 58, 62-63 (Minn. 1973) (retailer which sold glue to minor in violation of state anti-glue sniffing statute could assert neither assumption of the risk nor comparative negligence defense against claim by trustee of another minor who shared the glue with its actual purchaser); Larabee v. Triangle Steel, Inc., 451 N.Y.S.2d 258 (App. Div. 1982) (finding that contributory or comparative negligence and assumption of risk should not be allowed as defenses in an action based on the failure to follow safety regulations relating to excavation and demolition sites); *cf.* KEETON ET AL., *supra* note 159, § 36, at 227-28; § 36, at 230; § 65, at 461-62 (discussing safety laws and assumption of risk).

> The doctrine of absolute liability applies to preclude affirmative defenses when the legislature intends by enacting the statute to place the entire responsibility for the injury on the individual who violated it. . . . We agree with the trial court and hold that the Vulnerable Adult Act imposes absolute liability upon one who violates its provisions. To allow affirmative defenses would defeat the purpose of the statute. The legislature must therefore have intended that no defense would displace the responsibility imposed by the statute.[430]

The Restatement describes this situation as follows:

> There are . . . exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves. Thus a statute which prohibits the sale of firearms to minors may be clearly intended, among other purposes, to protect them against their own inexperience, lack of judgment, and tendency toward negligence, and to make the seller solely responsible for any harm to them resulting from the sale. In such a case the purpose of the statute would be defeated if the contributory negligence of the minor were permitted to bar his recovery.[431]

To allow defenses to a suit alleging violation of a mandatory reporting law on the basis of the elder's own vulnerability would negate the purposes of these laws—to protect elderly victims of mistreatment and to remove the discretion to report from the professional.

Although it is not a defense, the professional who fails to report suspected elder abuse or neglect may implead the perpetrator in an attempt to lessen his own comparative fault and financial responsibility.[432] At first glance, anything that lessens the professional's potential

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430. *Thelen*, 379 N.W.2d at 193-94; *see also* discussion *supra* note 375 and accompanying text.

431. RESTATEMENT (SECOND) OF TORTS § 483 cmt. c (1965). *See also* RESTATEMENT (SECOND) OF TORTS § 496(F) cmts. d-e (1965); KEETON ET AL., *supra* note 159, § 68, at 493.

432. *See, e.g.*, Nikolous v. Superior Court, 756 P.2d 925 (Az. 1988) (holding that the defendant, who was in an auto accident with the plaintiff, could implead the City because it was alleged that a fire truck negligently caused the accident and the City may ultimately be liable to the defendant); Smith, Kline & French Lab. v. Just, 191 S.E.2d 632 (Ga. App. 1972) (find-

liability may seem to be contrary to the goal of encouraging increased reporting of abuse or neglect. However, that goal is simply the means to the reduction of elder abuse; the larger goal may be better served by allowing the professional to bring the abuser into court and assessing damages against him as well. The professional still retains an incentive to report because defending such an action and impleading the abuser is costly, and imposing liability—criminal or civil—directly on the abuser furthers public policy. If the professional is not held responsible for his failure to report, there will be no action in which to implead the abuser.

4. *Express Statutory Liability*

A civil cause of action for failing to report suspected elder abuse or neglect as required by law has been created by statute in four states—Arkansas, Iowa, Michigan, and Minnesota.[433] These statutes have not been tested in litigation involving elder abuse and neglect. The duty and breach of duty elements needed to establish liability under these statutes vary, but in all four states the damages must have been proximately caused by the failure to report.[434]

One area in which the statutes differ is the mental state required for recovery. Minnesota imposes civil liability for a failure to report that is "negligent or intentional."[435] In Michigan any individual required to report (including any person "who is employed, licensed, registered, or certified to provide health care . . . ") who "suspects or has reasonable cause to believe that an adult has been abused" is liable for breach of

ing that a physician sued for prescribing the wrong drug could implead a drug manufacturer because the physician claimed that the drugs were unsafe and not fit for the intended use); IND. TRIAL RULE 14 (1997) ("A defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.").

433. *See* ARK. CODE ANN. § 5-28-202(b) (Michie 1997) ("Any person or caregiver required by this chapter to report a case of suspected abuse, neglect, or exploitation who purposely fails to do so shall be civilly liable for damages proximately caused by the failure."); IOWA CODE § 235B.3(10) (West 1998) ("A person required by this section to report a suspected case of dependent adult abuse who knowingly fails to do so is civilly liable for the damages proximately caused by the failure."); MICH. COMP. LAWS § 16.411c(1) (West 1997) ("A person required to make a report pursuant to section 11a who fails to do so is liable civilly for the damages proximately caused by the failure to report, and a civil fine of not more than $500.00 for each failure to report"); MINN. STAT. § 626.557(7) (West 1997) ("A mandated reporter who negligently or intentionally fails to report is liable for damages caused by the failure.").

434. *See* MINN. STAT. § 626.557(7) (West 1997).

435. *Id.*

the statutory command.[436] Michigan's statute contains no specific mental state needed for liability.[437] A case interpreting Michigan's child abuse reporting statute,[438] which is almost identical to the elder abuse statute, held that negligence sufficient to support civil liability can be inferred if the child abuse reporting statute is violated.[439] In such a state, a variety of evidence could be used to establish the standard of care.[440] The standard of care could also be established by expert testimony regarding standard training and practice in the particular field of the defendant.

The Arkansas and Iowa statutes both require an elevated level of mental culpability to support civil liability.[441] Arkansas requires that the failure to report be "purposeful," and Iowa requires that the failure to report be "knowing."[442] Presumably these statutes require actual knowledge of the reporting requirement and a conscious choice not to report. Holding a mandated reporter liable under these circumstances would be difficult.[443] Also, the existence of a statute allowing civil liability and specifying the necessary mental state might preclude using a common law malpractice theory.

Though statutes creating civil liability for failure to report exist in these four states, litigation has been rare. In Arkansas, Iowa, and Michigan, there are no reported or unreported cases interpreting or applying these laws.[444] One state supreme court decision dealt with the

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436. MICH. COMP. LAWS § 16.411a(1) (West 1997).

437. *See* MICH. COMP. LAWS § 16.411e(1) (West 1997).

438. *See* MICH. COMP. LAWS § 722.633(1) (West 1997) ("A person who is required by this act to report an instance of suspected child abuse or neglect and who fails to do so is civilly liable for the damages proximately caused by the failure.").

439. *See* Williams v. Coleman, 488 N.W.2d 464, 472 (Mich. Ct. App. 1992) (upholding a jury instruction which allowed the jury to infer negligence on the part of the defendants if they found the reporting statute had been violated). *See also* People v. Caviani, 432 N.W.2d 409, 413 (Mich. Ct. App. 1988) (holding a "reasonable suspicion" triggers obligation to report child abuse). *But see* Marcelletti v. Bathani, 500 N.W.2d 124, 130 (Mich. Ct. App. 1993) (holding that the failure of a mandated reporter to report suspected child abuse by a babysitter imposed liability only for the injuries of the child examined and not for the injuries of a child later abused by the same person).

440. *See supra* notes 289-97 and accompanying text.

441. *See* ARK. CODE ANN. § 5-28-202(b) (Michie 1997); IOWA CODE § 235 B.3(10) (West 1998).

442. *See* ARK. CODE ANN. § 5-28-202(b) (Michie 1997); IOWA CODE § 255 B.3(10) (West 1998).

443. *But see* First Commercial Trust Co. v. Rawls, 915 S.W.2d 262 (Ark. 1996) (approving of medical malpractice action against physician who failed to report suspected child abuse).

444. Computer search using both Lexis and Westlaw databases and utilizing the cites of these statutes as search terms revealed no cases on point.

Minnesota statute, peripherally mentioning, and seemingly approving, statutory civil liability.[445] In order to encourage reporting of suspected elder abuse or neglect, courts should find liability and assess damages as they are authorized to do by statute. Litigation in these four states could provide the catalyst for a more widespread acceptance of damages actions for failing to report suspected elder abuse.

D. *Respondeat Superior*

Under the doctrine of respondeat superior ("let the master answer") a principal (e.g., an employer) is held liable for the negligent acts of his agent (e.g., an employee) acting within the scope of employment[446] or within the legitimate scope of the agent's authority.[447] Recognizable examples of agents in failure to diagnose, report and treat actions would include psychologists and social workers in mental health clinics or social service agencies, and staff (e.g., interns, residents, nurses, etc.) at hospitals. The basis for vicarious liability is that the employee's actions are presumed to be on behalf of the employer.[448]

In some settings, most notably hospitals, professionals such as doctors are "independent contractors" rather than employees; thus the institution may argue it is legally relieved of vicarious liability for the negligence of a non-employee physician. Often, however, when courts have considered the range of situations in which doctors provide care in hospitals, agency principles have been extended to limit this independent contractor defense. In some departments, such as the emergency room, the hospital has increasingly been perceived as directly offering services to the patient through the doctor, even though the latter is not

445. *See* Hoppe v. Kaniyohi County, 543 N.W.2d 635, 638 (Minn. 1996) ("We note that despite the mandate to agencies and individuals to both report suspected abuse or neglect and then to investigate those reports, the legislation itself only defines the consequences of a failure to report as mandated—a criminal penalty is imposed for an intentional failure and civil liability is imposed for both negligent and intentional failure.").

446. *See, e.g.*, Mid-Continent Pipeline Co. v. Crauthers, 267 P.2d 568, 571 (Okla. 1954) (finding that agents of the defendant company that allowed oil to escape into a stream acted within the scope of employment and that the company could have been held liable for the resulting damages, but for a valid release of liability that had previously been executed).

447. *See, e.g.*, Rogers v. Town of Black Mountain, 29 S.E.2d 203, 205 (N.C. 1944) (holding that a driver who deviated from his employer's instructions and drove a company vehicle on a personal errand was not acting within the scope of the authority granted by his employer so as to give rise to vicarious liability).

448. *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 324 n.16 (Colo. 1993) (distinguishing the tort of negligent hiring from vicarious liability and finding that the defendant was not vicariously liable, but may be liable for negligent hiring).

an employee.

Where a hospital holds itself out to the public as providing a given service, in this instance, emergency services, and where the hospital enters into a contractual arrangement with one or more physicians to direct and provide the service, and where the patient engages the services of the hospital without regard to the identity of a particular physician and where as a matter of fact the patient is relying upon the hospital to deliver the desired health care and treatment, the doctrine of respondeat superior applies and the hospital is vicariously liable for damages proximately resulting from the neglect, if any, of such physicians.[449]

E. *Professional License Sanctions*

While lawsuits against mandated reporters may encourage increased reporting of elder mistreatment, sanctions regarding professional licenses have the potential to cause even greater changes in behavior. All members of licensed professions, as a condition of practice, are subject to disciplinary control by a legislatively designated Agency or Board.[450] Since health care and other professionals are usually in the best position to discover and treat abuse, the threat of licensure sanctions may provide the best means to encourage reporting.[451] Professionals may insure against damages for malpractice liability, but suspension or revo-

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449. Hardy v. Brantley, 471 So. 2d 358, 371 (Miss. 1985) (emphasis added).

450. Licensure of professionals in the United States has a lengthy history. Professional associations, such as the American Medical Association, sponsored state licensing statutes during the late nineteenth century. The Supreme Court gave impetus to this in *Dent v. West Virginia*, 129 U.S. 114 (1889), which upheld the constitutionality of the West Virginia Medical Practice Act. By 1930 all states had some form of mandatory medical licensure. *See generally* ROBERT DERBYSHIRE, MEDICAL LICENSURE AND DISCIPLINE IN THE UNITED STATES (1978). Many other health care workers, such as dentists, optometrists, pharmacists, veterinarians, practical and registered nurses, and psychologists and social workers are currently licensed in all 50 states. *See* NEIL WEISFELD, NAT'L ACADEMY OF SCIENCES, LICENSURE OF PRIMARY CARE PRACTITIONERS 8 (1977).

The Supreme Court has traditionally deferred to state regulation and licensing of professions:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (citations omitted).

451. *See, e.g., In Re* Schroeder, 415 N.W.2d 436 (Minn. Ct. App. 1988) (failure of mental health professional to file mandatory report of suspected child abuse upheld as basis for licensure sanction).

cation of their licenses directly threatens their livelihood and standing in the community and in their profession. Statutes which enumerate the grounds for license discipline of a professional can be applied to the failure to report elder abuse or neglect. The District of Columbia Code is explicit:

> Any health-care administrator or health professional licensed in the District who willfully fails to make a report required by § 6-2503(a)(1) [reports of suspected elder abuse or neglect], or willfully makes a report under § 6-2503 containing information that he or she knows to be false, shall be guilty of unprofessional conduct and subject to any sanction available to the governmental board, commission, or other authority responsible for his or her licensure.[452]

The portion of the Delaware Code which deals with long term care facilities that serve the elderly population is also very specific in this regard.

> Upon a finding of abuse, mistreatment, or neglect, *or failure to report such instances by a licensed or registered professional*, the Department or the Attorney General shall notify the appropriate licensing or registration board. If, after a hearing, a licensed or registered professional is found to have abused, mistreated or neglected a patient or resident *or has failed to report such instance*, the appropriate board shall suspend or revoke such person's license.[453]

Some states require that licensure boards be notified of professionals convicted of failure to report elder abuse.[454] The vast majority of states, however, do not have license discipline statutes which specifically reference the failure to report elder abuse/neglect.

Even without such a specific provision, other statutes may be used as the basis for discipline. Physicians may serve as an illustrative

452. D.C. CODE ANN. § 6-2512(5) (Michie 1997).

453. DEL. CODE. ANN. tit. 16, § 1137 (Michie 1996) (emphasis added).

454. *See, e.g.*, ALASKA STAT. § 47.24.010(c) (West 1998) ("If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing, certifying, or regulating entity of the conviction.").

example. Five jurisdictions (Florida, Maryland, Rhode Island, Vermont, and West Virginia) make the failure to file "any report required by law" grounds for revocation of a doctor's professional license.[455] Since a report of suspected elder abuse is mandated in the vast majority of states, a failure to make such a report could be grounds for discipline. Twelve states (Alabama, California, Georgia, Hawaii, Indiana, Louisiana, Massachusetts, Missouri, Ohio, Pennsylvania, Texas, and Utah)[456] allow sanctions against physicians who violate a law that relates to the practice of medicine. Georgia's civil code, section 43-1-19, for example, provides:

> (a) A state examining board shall have the authority to refuse to grant a license to an applicant therefor or to revoke the licence of a person licensed by that board or to discipline a person licensed by that board, upon a finding by a majority of the entire board that the licensee or applicant has:
>
> > (8) [v]iolated a statute, law, or any rule or regulation of this state, any other state, the state examining board regulating the business or profession licensed under this title, the United States, or any other lawful authority (without regard to whether the violation is criminally punishable), which statute, law, or rule or regulation relates to or in part regulates the practice of a business or profession licensed under this title . . . .[457]

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455. *See, e.g.*, R.I. GEN. LAWS § 5-37-5.1 (Michie 1995). The statute provides:

> The term "unprofessional conduct" as used in this chapter shall include but not be limited to the following items or any combination thereof and may be further defined by regulations established by the board with the prior approval of the director . . .
>
> . . .
>
> (9) Willful omission to file or record, or willfully impeding or obstructing a filing or recording, or inducing another person to omit to file or record medical or other reports as required by law . . .

Id. *See also* FLA. STAT. ch. 455.227 (West 1996); MD. CODE ANN., HEALTH OCC. § 14-404 (Michie 1996); VT. STAT. ANN. tit. 26, § 1354 (1996); W. VA. CODE § 30-14-11 (Michie 1996).

456. *See* ALA. CODE § 34-24-360 (Michie 1996); CAL. BUS. & PROF. CODE § 490 (West 1996); GA. CODE ANN. § 43-1-19 (Michie 1996); HAW. REV. STAT. § 436B-19 (1996); IND. CODE § 25-1-9-4 (West 1996); LA. REV. STAT. ANN. § 37.1285 (West 1996); MASS. GEN. LAWS ANN. ch. 112, § 5 (West 1996); MO. REV. STAT. § 334.100 (1995); OHIO REV. CODE ANN. § 4731.22 (West 1996); 63 PA. CONS. STAT. § 422.41 (West 1996); TEX. REV. CIV. STAT. art. 4495b (West 1997); UTAH CODE ANN. § 58-67-401 (Michie 1996).

457. GA. CODE ANN. § 43-1-19 (Michie 1996).

The criminal nature of most of the mandatory reporting statutes makes these licensure laws particularly useful in the effort to encourage reporting. A violation of the reporting statute would subject the professional to both criminal and licensure sanctions.

An additional twelve states (Colorado, Connecticut, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, North Carolina, Washington, Wisconsin, and Wyoming) allow discipline if the physician is found to have engaged in "negligent practice."[458] The Michigan statute, for example, provides:

> [T]he disciplinary subcommittee shall proceed under section 16226 if it finds that 1 or more of the following grounds exist:
> (a) A violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition which impairs, or may impair, the ability to safely and skillfully practice the health profession.[459]

This standard relates very closely to the previous discussion of private causes of action against those who fail to report. The principles which support a negligence suit could be used derivatively to impose license sanctions in these states. More generally, almost all statutes which govern discipline of a professional license holder include a generic prohibition against "unprofessional conduct," as a basis for discipline. The Kansas statute is representative of this group of laws:

> A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured, or an application for a license or for reinstatement of a license may be denied upon a finding of the existence of any of the following grounds:
> . . .
> (b) The licensee has committed an act of unprofessional or

458. *See* COLO. REV. STAT. § 12-36-117 (West 1996). *See also* CONN. GEN. STAT. § 20-13c (West 1994); IDAHO CODE § 54-1814 (Michie 1996); ME. REV. STAT. ANN. tit. 32, § 3282-A (West 1995); MICH. COMP. LAWS § 333.16221 (West 1996); MINN. STAT. § 147.091 (West 1996); MONT. CODE ANN. § 37-3-323 (West 1995); NEB. REV. STAT. § 71-148 (1996); N.C. GEN. STAT. § 90-14 (1997); WASH. REV. CODE § 18.130.160 (West 1996); WIS. STAT. § 448.02 (West 1995); and WYO. STAT. § 33026-402 (Michie 1996).

459. MICH. COMP. LAWS § 333.16221 (West 1996).

dishonorable conduct or professional incompetency.[460]

All these statutory criteria may be applied in appropriate cases to failure to assess, treat, and report suspected elder abuse or neglect. Public licensing boards which oversee doctors, nurses, social workers, and other professionals need to be more aggressive in ensuring that practitioners are complying with the reporting requirement and the standard of care in their jurisdictions.

IX. CONCLUSION

After the leaves have fallen, we return
To a plain sense of things. It is as if
We had come to an end of the imagination,
Inanimate in an inert savoir.

It is difficult even to choose the adjective
For this blank cold, this sadness without cause.
The great structure has become a minor house.
No turban walks across the lessened floors.[461]

—Wallace Stevens, at seventy-three

Elder abuse and neglect is a complex phenomenon, without unitary causation or simple solution. Maltreatment of older persons can, however, be substantially reduced. There are opportunities for many professionals to make a significant contribution to its treatment and prevention. When these opportunities are missed or ignored, further damage to older persons and to our communities is the result. Criminal and civil legal processes can be invaluable resources in the effort to ameliorate this great American tragedy. To ignore that potential is to acquiesce in individual and social injustice.

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460. KAN. STAT. ANN. § 65-2836 (1995).

461. Wallace Stevens, *The Plain Sense of Things*, *in* COLLECTED POEMS (1952), *reprinted in* THE ART OF GROWING OLDER: WRITERS ON LIVING AND AGING 288 (Univ. of Chicago Press 1996).

Appendix A
STATUTES PROTECTING OLDER PERSONS

ALA. CODE §§ 38-9-1 to -11 (1992 & Supp. 1997).

ALASKA STAT. §§ 47.24.010 to .900 (Michie 1996).

ALASKA STAT. § 11.81.900 (Michie 1996).

ARIZ. REV. STAT. ANN. §§ 46-451 to -454 (West 1997).

ARK. CODE ANN. §§ 5-28-101 to -306 (Michie 1997).

CAL. WELF. & INST. CODE §§ 15600 to 15660 (West 1991 & Supp. 1998).

COLO. REV. STAT. ANN. §§ 26-3.1-101 to -106 (West 1998).

CONN. GEN. STAT. ANN. §§ 17b-450 to -461 (West 1998).

DEL. CODE ANN. tit. 31, §§ 3902 to 3913 (1997).

D.C. CODE ANN. §§ 6-2501 to 6-2513 (1995 & Supp. 1998).

FLA. STAT. ANN. §§ 415.101 to .113 (West 1998).

GA. CODE ANN. §§ 30-5-1 to -8 (Harrison 1994 & Supp. 1997).

GA. CODE ANN. § 31-8-80 (Harrison 1994 & Supp. 1997).

HAW. REV. STAT. §§ 346-221 to -253 (1993 & Supp. 1996).

IDAHO CODE §§ 39-5301 to -5312 (Michie 1993 & Supp. 1998).

320 ILL. COMP. STAT. 15/0.01 to 15/10 (West 1993 & Supp. 1998).

320 ILL. COMP. STAT. 20/1 to 20/12 (West 1993 & Supp. 1998).

720 ILL. COMP. STAT. ANN. 5/12 to 5/21 (West 1993 & Supp. 1998).

IND. CODE ANN. §§ 12-10-3-1 to -31 (Michie 1997 & Supp. 1998).

IOWA CODE ANN. §§ 235B.1 to .6 (West 1994 & Supp. 1998).

KAN. STAT. ANN. §§ 39-1430 to -1442 (1993 & Supp. 1997).

KY. REV. STAT. ANN. §§ 209.010 to .160 (Banks-Baldwin 1997).

LA. REV. STAT. ANN. § 14:403.2 (West 1986 & Supp. 1998).

LA. REV. STAT. ANN. § 40:2009.13 (West 1992 & Supp. 1998).

ME. REV. STAT. ANN. tit. 22, §§ 3470 to -3487 (West 1992 & Supp. 1997).

MD. CODE ANN., CTS. & JUD. PROC. § 5-359 (1995 & Supp. 1997).

MD. CODE ANN., FAM. LAW §§ 14-101 to -404 (1991 & Supp. 1997).

MASS. GEN. LAWS ANN. ch. 19A, §§ 14 to 36 (West 1994 & Supp. 1998).

MICH. COMP. LAWS ANN. §§ 400.11a to .11f (West 1997 & Supp. 1998).

MINN. STAT. ANN. § 626.557 (West 1992 & Supp. 1998).

MISS. CODE ANN. §§ 43-47-1 to -37 (1993 & Supp. 1998).

MO. ANN. STAT. §§ 660.250 to .320 (West 1988 & Supp. 1998).

MONT. CODE ANN. §§ 52-3-801 to -825 (1997).

MONT. CODE ANN. § 46-18-212 (1997).

NEB. REV. STAT. §§ 28-348 to -387 (1995 & Supp. 1996).

NEV. REV. STAT. §§ 200.5091 to .5095 (Michie 1997 & Supp. 1997).

N.H. REV. STAT. ANN. §§ 161-F:42 to :57 (1994 & Supp. 1997).

N.J. STAT. ANN. §§ 52:27D-406 to -425 (West Supp. 1997).

N.M. STAT. ANN. §§ 27-7-14 to -31 (Michie 1997).

N.M. STAT. ANN. § 28-17-9 (Michie 1996 & Supp. 1998).

N.Y. SOC. SERV. LAW § 473 (McKinney 1992 & Supp. 1998).

N.C. GEN. STAT. §§ 108A-99 to -111 (1997).

N.D. CENT. CODE §§ 50-25.2-0 to -14 (1989 & Supp. 1997).

OHIO REV. CODE ANN. §§ 5101.60 to .72 (Anderson 1998).

OHIO REV. CODE ANN. § 5101.99 (Banks-Baldwin 1995 & Supp. 1998).

OKLA. STAT. ANN. tit. 43A, §§ 10-101 to -110 (West 1990 & Supp. 1998).

OR. REV. STAT. §§ 124.050 to .140 (Supp. 1996).

20 PA. CONS. STAT. ANN. § 5608 (West Supp. 1998).

35 PA. CONS. STAT. ANN. §§ 10225.101 to .103, 10225.301 to .310, 10225.312 (West Supp. 1998)

R.I. GEN. LAWS § 42-66-1 (1995).

R.I. GEN. LAWS § 23-4-7 (1996).

S.C. CODE ANN. §§ 43-35-5 to -90 (Law. Co-op. 1997).

S.D. CODIFIED LAWS §§ 22-46-1 to -6 (Michie 1988).

TENN. CODE ANN. §§ 71-6-101 to -119 (1995 & Supp. 1997).

TEX. HUM. RES. CODE ANN. §§ 48.001 to .103 (West 1990 & Supp. 1998).

UTAH CODE ANN. §§ 62A-3-301 to -312 (1997 & Supp. 1998).

VT. STAT. ANN. tit. 33, §§ 6901 to 6941 (1991 & Supp. 1998).

VA. CODE ANN. §§ 63.1-55.2 to -55.7 (Michie 1995 & Supp. 1998).

WASH. REV. CODE ANN. § 18.51.060 (West 1989 & Supp. 1998) (repealed).

WASH. REV. CODE ANN. §§ 74.34.010 to .901 (West Supp. 1998).

WASH. REV. CODE ANN. §§ 26.44.010 to .160 (West 1997 & Supp. 1998).

W. VA. CODE §§ 9-6-1 to -15 (1998).

WIS. STAT. ANN. § 46.90 (West 1997 & Supp. 1997).

WYO. STAT. ANN. §§ 35-20-101 to -109 (Michie 1997).

Appendix B
STATUTES MANDATING PROFESSIONALS AND/OR OTHERS TO REPORT SUSPECTED ELDER ABUSE/NEGLECT

ALA. CODE § 38-9-8 (1992 & Supp. 1997).

ALASKA STAT. § 47.24.010 (Michie 1996).

ARIZ. REV. STAT. ANN. § 46-454 (West 1997).

ARK. CODE ANN. § 5-28-203 (Michie 1997).

CAL. WELF. & INST. CODE § 15630 (West 1991 & Supp. 1998).

CONN. GEN. STAT. ANN. § 17b-451 (West Supp. 1998).

DEL. CODE ANN. tit. 31, § 3910 (1997).

D.C. CODE ANN. § 6-2503 (1989 & Supp. 1998).

FLA. STAT. ANN. § 415.1034 (West 1998).

GA. CODE ANN. § 30-5-4 (Harrison 1994 & Supp. 1998).

GA. CODE ANN. § 31-8-82 (Harrison 1994 & Supp. 1998).

HAW. REV. STAT. § 346-224 (1993 & Supp. 1997).

IDAHO CODE § 39-5304 (1998).

IND. CODE ANN. § 12-10-3-9 (Michie 1997 & Supp. 1998).

IOWA CODE ANN. § 235B.3 (West 1994 & Supp. 1998).

KAN. STAT. ANN. § 39-1431 (1993 & Supp. 1997).

KY. REV. STAT. ANN. § 209.030 (Banks-Baldwin 1997).

LA. REV. STAT. ANN. § 14:403.2 (West 1986 & Supp. 1998).

ME. REV. STAT. ANN. tit. 22, § 3477 (West 1992 & Supp. 1997).

MD. CODE ANN., FAM. LAW § 14-302 (1991).

MASS. GEN. LAWS ANN. ch. 19A, § 15 (West 1994 & Supp. 1998).

MICH. COMP. LAWS ANN. § 400.11a (West 1997 & Supp. 1998).

MINN. STAT. ANN. § 626.557 (West 1992 & Supp. 1998).

MISS. CODE ANN. § 43-47-7 (1993 & Supp. 1998).

MO. ANN. STAT. § 660.255 (West 1988 & Supp. 1997).

MONT. CODE ANN. § 52-3-811 (1997).

NEB. REV. STAT. § 28-372 (1995 & Supp. 1996).

NEV. REV. STAT. § 200.5093 (Michie 1997 & Supp. 1997).

N.H. REV. STAT. ANN. § 161-F:46 (1994 & Supp. 1997).

N.M. STAT. ANN. § 27-7-30 (Michie 1998).

N.M. STAT. ANN. § 28-17-9 (Michie 1996 & Supp. 1997).

N.C. GEN. STAT. § 108A-102 (Michie 1994).

OHIO REV. CODE ANN. § 5101.61 (Anderson 1998).

OKLA. STAT. ANN. tit. 43A, § 10-104 (West 1990 & Supp. 1998).

OR. REV. STAT. § 124.060 (Supp. 1998).

R.I. GEN. LAWS § 42-66-8 (1993).

S.C. CODE ANN. § 43-35-25 (Law. Co-op. 1997).

TENN. CODE ANN. § 71-6-105 (1995).

TEX. HUM. RES. CODE ANN. § 48.036 (West 1990 & Supp. 1998).

UTAH CODE ANN. § 62A-3-302 (1997).

VT. STAT. ANN. tit. 33, § 6903 (1991 & Supp. 1998).

VA. CODE ANN. § 63.1-55.3 (Michie 1995 & Supp. 1997).

WASH. REV. CODE ANN. § 74.34.030 (West Supp. 1998).

WASH. REV. CODE ANN. § 26.44.030 (West 1997 & Supp. 1998).

W. VA. CODE § 9-6-9 (1998).

WYO. STAT. ANN. § 35-20-103 (Michie 1998).

Appendix C
POPULATION TARGETED AND MISTREATMENT COVERED BY STATUTE

ST.	Population Targeted	Physical Abuse	Neglect	Emotional Abuse &/or Mental Anguish	Financial Exploitation, Fiduciary Abuse	Sexual Abuse	Unreasonable Confinement	Abandonment, Desertion	Self Neglect
AL	18+, or 1	yes	yes	yes	yes	yes			yes
AK	18+, 1	yes	yes	yes	yes	yes		yes	yes
AZ	18+, 1	yes	yes		yes	yes	yes		
AR	18+	yes	yes	yes	yes	yes			
CA	18+, 1 65+	yes	yes	yes	yes	yes	yes	yes	
CO	18+	yes	yes		yes	yes	yes		yes
CT	60+	yes	yes	yes	yes	implied		yes	yes
DE	18+, 1	yes	yes	yes	yes				
DC	18+, 1	yes	yes	yes	yes	yes	yes		
FL	18+, 1 60+, 1	yes	yes	yes	yes	yes			yes
GA	18+, 1	yes	yes	yes	yes		yes		
HI	"any adult," 1	yes	yes	yes	yes	yes			yes
ID	18+, 1	yes	yes	yes	yes				yes
IL	60+	yes	yes	yes	yes	yes			
IN	18+, 1	yes	yes		yes				

1 = if mentally, physically, or emotionally incapacitated or vulnerable

Appendix C
POPULATION TARGETED AND MISTREATMENT COVERED BY STATUTE

ST.	Population Targeted	Physical Abuse	Neglect	Emotional Abuse &/or Mental Anguish	Financial Exploitation, Fiduciary Abuse	Sexual Abuse	Unreasonable Confinement	Abandonment, Desertion	Self Neglect
IA	18+, 1	yes	yes		yes	yes	yes		yes
KS	18+, 1	yes	yes	yes	yes		yes		yes
KY	18+, 1	yes	yes	yes	yes				yes
LA	18+, 1	yes	yes	yes	yes	yes			yes
ME	18+, or 1	yes	yes	yes	yes	yes	yes		
MD	1	yes	yes		yes				yes
MA	60+	yes		yes	yes				
MI	18+	yes	yes	yes	yes	yes			
MN	18+, 1	yes	yes	yes		yes			
MS	18+, 1	yes	yes	yes	yes		yes		yes
MO	60+ 18+, 1	yes	yes	yes	yes	yes			yes
MT	60+	yes	yes	yes	yes				
NE	18+, 1	yes	yes		yes	yes	yes		
NV	60+	yes	yes	yes	yes				yes
NH	18+, 1	yes	yes	yes	yes	yes			yes

1 = if mentally, physically, or emotionally incapacitated or vulnerable

Appendix C
POPULATION TARGETED AND MISTREATMENT COVERED BY STATUTE

ST.	Population Targeted	Physical Abuse	Neglect	Emotional Abuse &/or Mental Anguish	Financial Exploitation, Fiduciary Abuse	Sexual Abuse	Unreasonable Confinement	Abandonment, Desertion	Self Neglect
NJ	18+, 1	yes	yes	yes	yes	yes	yes		
NM	18+, 1	yes	yes	yes	yes				yes
NY	18+, 1	yes	yes	yes	yes	yes	yes "isolation"	yes	yes
NC	18+, 1	yes	yes	yes	yes		yes		yes
ND	"an adult," 1	yes	yes	yes	yes	yes	yes		yes
OH	60+, 1	yes	yes	yes	yes		yes		yes
OK	18+, 1 65+	yes	yes	yes	yes				yes
OR	65+	yes	yes					yes	
PA	60+	yes	yes	yes	yes	yes	yes	yes	yes
RI	60+	yes	yes	yes	yes			yes	
SC	18+, 1	yes	yes	yes	yes				yes
SD	18+, 1	yes	yes		yes				
TN	18+, 1	yes	yes	yes	yes	yes			yes
TX	65+ 18+, 1	yes	yes	yes	yes	yes	yes		yes
UT	65+ 18+, 1	yes	yes	yes	yes		yes		yes

1 = if mentally, physically, or emotionally incapacitated or vulnerable

Appendix C
POPULATION TARGETED AND MISTREATMENT COVERED BY STATUTE

ST.	Population Targeted	Physical Abuse	Neglect	Emotional Abuse &/or Mental Anguish	Financial Exploitation, Fiduciary Abuse	Sexual Abuse	Unreasonable Confinement	Abandonment, Desertion	Self Neglect
VT	18+, 1 60+	yes	yes	yes	yes	yes	yes		yes
VA	18+, 1 60+	yes	yes	yes	yes	yes	yes		yes
WA	60+, 1	yes	yes	yes	yes	yes		yes	
WV	1	yes	yes		yes		yes		
WI	60+, or 1	yes	yes	yes			yes		yes
WY	18+, 1	yes	yes		yes		yes	yes	

1 = if mentally, physically, or emotionally incapacitated or vulnerable

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Alabama ALA. CODE § 38-9-7 (1992 & Supp. 1997)	a. intentional abuse or neglect w/ serious physical injury=Class B felony b. reckless abuse or neglect w/ serious physical injury=Class C felony c. intentional abuse or neglect w/physical injury=Class C felony d. exploitation w/ value of property, assets or resources exceeding $100=Class C felony	a. reckless abuse or neglect w/ physical injury=Class A Misdemeanor b. emotional abuse=Class A Misdemeanor c. exploitation w/ value of property, assets or resources less than $100=Class A Misdemeanor		
Alaska				X
Arizona				
Arkansas ARK. CODE ANN. § 5-28-103 (Michie 1997)	a. willfully or by culpable negligence causes or permits injury w/ great bodily harm=Class D Felony			
California CAL. WELF. & INST. CODE § 15656 (West 1991 & Supp. 1998)	any person who causes a dependent adult to be injured or causes their health to be endangered shall be imprisoned in the county jail not exceeding one year, or in the state prison for 2,3,4 yrs.	any person who willfully causes or permits a dependent adult to be injured or placed in a situation where the adult is endangered is guilty of a misdemeanor.		
Colorado				X

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Connecticut CONN. GEN. STAT. ANN. § 17b-460 (West Supp. 1998)			If as a result of an investigation done by protective services, a determination is made that a caretaker or other person has abused, neglected or exploited an elderly person, such information of abuse will be referred in writing to state's attorney to determine if criminal proceedings should be initiated.	
Delaware DEL. CODE. ANN. tit. 31 § 3913 (Michie 1997)	a. intentional exploitation using infirm adult's resources more than $500=Class G felony b. intentional abuse, causing bodily harm, permanent disfigurement or permanent disability=Class D felony c. Intentional abuse resulting in death=Class A felony	a. intentional abuse, neglect, exploitation, or mistreatment=Class A Misdemeanor b. intentional exploitation using infirm adult's resources less than $500=Class A Misdemeanor		
D.C.				X
Florida FLA. STAT. ANN. § 415.1055 (West 1998)			Upon receipt of report of abuse, the department of elderly affairs shall notify law enforcement.	
Georgia GA. CODE ANN. § 30-5-8 (1996)		abuse in violation of provisions=Misdemeanor		

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Hawaii HAW. REV. STAT. § 346-228 (Michie 1993 & Supp. 1996)			Upon investigation, the department shall take action toward preventing further abuse and shall have the authority to do any or all of the following . . . seek any protective or remedial actions authorized by law.	
Idaho IDAHO CODE § 39-5310 & § 18-1505 (Michie 1993 & Supp. 1997)		Any person who abuses, exploits, or neglects a vulnerable adult is guilty of a misdemeanor.	If . . . it appears that the abuse, neglect, or exploitation has caused injury or a serious imposition on the rights of a vulnerable adult, the commission shall immediately notify the appropriate law enforcement agency which shall investigate and determine whether criminal proceedings should be initiated.	
Illinois 720 ILL. COMP. STAT. ANN. § 5/12-21 (Smith-Hurd 1993 & Supp. 1997)	Criminal Neglect is a Class 3 felony			
Indiana IND. CODE ANN. § 12-10-3-10 (West 1994 & Supp. 1997)			Each endangered adult report shall be communicated immediately to . . . a law enforcement agency.	

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Iowa IOWA CODE ANN. § 235B.3A & § 726.8 (West 1994 & Supp. 1997)		Wanton neglect of a dependent adult is a serious misdemeanor.	Law enforcement agencies shall take any action necessary for protection of dependent adult.	
Kansas				X
Kentucky KY. REV. STAT. ANN. § 209.990 (Banks-Baldwin 1997)	knowingly and willfully abusing causing serious physical or mental injury or permanent disability=Class C felony.	knowingly and willfully abusing causing minor physical or mental injury or temporary disability=Class A misdemeanor.		
Louisiana LA. REV. STAT. ANN. § 14:403.2(E)(6) (West 1986 & Supp. 1998)			If it appears after investigation that an adult has been abused and neglected by other parties and that the problem cannot be remedied by extrajudicial means the adult protection agency shall refer the matter to the appropriate district attorney . . . who may institute any criminal proceedings he deems appropriate in accordance with existing laws.	
Maine				X
Maryland				X
Massachusetts				X
Michigan				

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Minnesota MINN. STAT. ANN. § 626.557 (West 1992 & Supp. 1998)			Report is forwarded to local police department, prosecuting attorney, or county sheriffs for possible criminal prosecution.	
Mississippi MISS. CODE ANN. § 43-47-19 (Lawyer's Co-op. 1993 & Supp. 1997)	willful infliction of physical pain or injury=felonious abuse and/or battery; upon conviction, imprisonment for not more than 20 years	willful abuse, neglect, or exploitation=misdemeanor; upon conviction, fine of not more than $1000 or by imprisonment not to exceed one year, or both fine or imprisonment.	Nothing contained in this section shall prevent proceedings against a person under any statute or ordinance defining any act as a crime or misdemeanor.	
Missouri MO. REV. STAT. §§ 660.300(11) & 660.305(3) (Vernon 1988 & Supp. 1998)	knowing abuse=Class D felony	diverting funds or property or falsifying documents=Class A misdemeanor		
Montana MONT. CODE. ANN. § 52-3-825 & § 46-18-212 (1997)		purposely or knowingly abuses, neglects or exploits an older person with a developmental disability, upon first conviction=fine not to exceed $500 or imprisonment not to exceed 6 months, or both and upon a second conviction=imprisonment not to exceed 10 yr. or fine not to exceed $10,000 or both.	When no penalty otherwise provided or if the offense is designated a misdemeanor, and no penalty is otherwise provided, may sentence the offender to a term of imprisonment not to exceed 6 months in the county jail or a fine not to exceed five hundred dollars or both.	
Nebraska NEB. REV. STAT. § 28-386 (1995 & Supp. 1996)	knowing and intentional abuse of a vulnerable adult=Class IV felony			

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Nevada NEV. REV. STAT. ANN. § 200.5099 (Michie 1997 & Supp. 1997)	a. any person who abuses an older person, causing person to suffer unjustifiable physical pain or mental suffering=category B felony punishable by imprisonment in state prison for minimum of 1 yr. Maximum of 6 yrs. b. exploitation of older person=if more than $250, but less than $5000, =category B felony by imprisonment in the state prison for not less than 1 year and a maximum term of not more than 10 years or by a fine not more than $10,000, or by both. c. exploitation of older person=if more than $5000, =category B felony by imprisonment in the state prison for not less than 1 year and a maximum term of not more than 20 years or by a fine not more than $25,000, or by both.	a. a person who knowingly and wilfully violates NRS 200.5093 is guilty of a misdemeanor. b. a person who has assumed responsibility of an older person and neglects the older person, permits the older person to suffer unjustifiable pain or mental suffering or permits the older person to be placed in a situation where the older person may suffer physical pain or mental suffering as the result of abuse or neglect=gross misdemeanor. c. exploitation of older person=if less than $250, misdemeanor; imprisonment in the county jail for not more than 1 year or fine not more than $2000, or by both. d. if exploited and amount of property cannot be determined=gross misdemeanor by imprisonment in the county jail for not more than 1 year or fine not more than $2000, or by both.		
New Hampshire				X

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
New Jersey N.J. STAT. ANN. § 52:27D-419 (West Supp. 1997)			If the county director has reasonable cause to believe that a caretaker or other person has committed a crime against a vulnerable adult, he shall immediately report the information to local law enforcement officials or the prosecutor of the county in which the alleged criminal act was committed.	
New Mexico N.M. STAT ANN. § 28-17-9 (Michie 1996 & Supp. 1997)				
New York				X
North Carolina N.C. GEN. STAT. § 108A-109 (Michie 1997)			Upon finding evidence indicating that a person has abused, neglected, or exploited a disabled adult, the director shall notify the district attorney.	
North Dakota N.D. CENT. CODE § 50-25.2-05 (Michie 1989 & Supp. 1997)			The law enforcement agency may investigate the allegations in the report, and institute legal proceedings if appropriate.	
Ohio				X
Oklahoma				X
Oregon				X

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Pennsylvania				X
Rhode Island R.I. GEN. LAWS § 11-5-10 (Michie 1994 & Supp. 1997).	Any person who shall commit an assault and battery upon a person 60 or older, causing bodily injury, shall be deemed to have committed a felony and shall be imprisoned not exceeding 5 years or fined not exceeding $1000, or both.			

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
South Carolina S.C. CODE ANN. § 43-35-85 (Law. Co-op. 1985 & Supp. 1997)		a. a person who knowingly and willfully abuses or neglects a vulnerable adult is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than 3 yrs. b. a person who knowingly and willfully exploits a vulnerable adult is guilty of a misdemeanor, and upon conviction, must be fined not more than $5,000 or imprisoned not more than 3 yrs., or both, and may be required by the court to make restitution. c. a person who threatens, intimidates, or attempts to intimidate a vulnerable adult is guilty of a misdemeanor and, upon conviction, must be fined not more than $5000 or imprisoned for not more than 3 yrs. d. a person who willfully and knowingly obstructs or in any way impedes an investigation conducted pursuant to this chapter, upon conviction, is guilty of a misdemeanor and must be fined not more than five thousand dollars or imprisoned for not more than 3 yrs.		

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
South Dakota S.D. CODIFIED LAWS §§ 22-46-2, 22-46-3 (Michie 1988 & Supp. 1997)	abuse or neglect which does not constitute aggravated assault=Class 6 Felony	theft by exploitation=misdemeanor		
Tennessee TENN. CODE ANN. §§ 71-6-103, 71-6-117 (Michie 1995 & Supp. 1997)		willful abuse, neglect, or exploitation=Class A misdemeanor		
Texas TEX. HUM. RES. CODE § 48.038 (TEX. PENAL § 22.04) and TEX. HUM. RES. CODE § 48.002 (TEX. PENAL § 21.08) (West 1990 & Supp. 1998)	a. felony of 1st degree if conduct is committed intentionally or knowingly. b. if conduct engaged in recklessly, it shall be a felony of the second degree.	sexual abuse=Class B misdemeanor		
Utah UTAH CODE ANN. § 76-5-111 (Michie 1995 & Supp. 1997)	a. any person who causes elderly adult to suffer serious physical injury likely to produce death, if done intentionally or knowingly= 2nd degree felony, if done recklessly=3rd degree felony. b. any person who exploits disabled or elder adult, if done intentionally and profit exceeds $5000, second degree felony, if done intentionally and profit less than $5000, 3rd degree felony.	a. Any person who causes elderly adult to suffer serious physical injury likely to produce death, if done w/ criminal negligence=Class A misdemeanor. b. Any person who causes elderly adult to suffer serious physical injury, if done intentionally or knowingly= Class A misdemeanor, if done recklessly=Class B misdemeanor, if done w/ criminal negligence Class C misdemeanor. c. Any person who exploits disabled or elder adult, if done recklessly, Class A misdemeanor, if done with criminal negligence class B misdemeanor.		

Appendix D
PERPETRATOR PENALTIES

STATE	FELONY	MISDEMEANOR	REFERRAL OF CASE	NO PENALTY NOTED
Vermont VT. STAT. ANN. tit. 33, § 6913 (1991 & Supp. 1997)	any person who engages in abuse, exploitation, or failure to provide subsistence or other medical care of an elderly or disabled, fined not more than $10,000 or be imprisoned not more than 18 months, or both.			
Virginia				X
Washington				
West Virginia W. VA. CODE § 61-2-29 (Michie 1997)	any care giver who intentionally abuses, or neglects an incapacitated adult is guilty of a felony, and upon conviction shall be confined to the penitentiary for not less than two nor more than ten years or be confined in the county jail for not more than twelve months and fined not more than $1,500.	any care giver who neglects an incapacitated adult is guilty of a misdemeanor, and upon conviction shall be fined not less than $500 nor more than $1500, or imprisoned in the county jail for not less than ninety days nor more than one year, or both fined and imprisoned.		
Wisconsin				
Wyoming WYO. STAT. § 35-20-109 (Michie 1997)		a. abuse, neglect, or exploitation=misdemeanor, fine not more than $1000 or imprisoned not more than 1 yr. or both-upon a second or subsequent conviction= imprisonment in state pen. for not more than 5 yrs.		

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT; PENALTY FOR FAILURE TO REPORT

ST.	Anyone	Physician	Law Enforcement Personnel	Clergy	Social Worker	Physical, Occupational Therapist	Psychologist or Mental Health Professional
AL		yes				yes	
AK		yes	yes	yes	yes		yes
AZ		yes	yes	yes		yes	yes
AR		yes	yes		yes		yes
CA		yes	yes		yes	yes	yes
CO		1	1				1
CT		yes	yes	yes			yes
DE	yes						
DC		yes	yes		yes		yes
FL	yes	yes	yes	yes			yes
GA		yes	yes		yes		yes
HI		yes	yes				yes
ID		yes	yes		yes		yes
IL	1						
IN	yes						

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT; PENALTY FOR FAILURE TO REPORT

ST.	Nurse	Adult's Caretaker	Residential Facility, Hospital	Adult Daycare Facility	Penalties for Failure to Report
AL		yes			knowingly fail to report = misdemeanor and punished by imprisonment for not more than 6 mo. & $500
AK		yes	yes	yes	failure or refusal to report under § 47.24.110=Class B misdemeanor; fine
AZ		yes			failure to report = Class 1 misdemeanor
AR	yes		yes		purposefully fail to report = Class B misdemeanor; also civil liability for damages proximately caused by failure
CA		yes	yes	yes	misdemeanor punishable by not more than 6 mo. in jail or by a fine of not more than $1000, or fine and prison
CO		1	1		
CT	yes		yes		failure to report = fine of not more than $500
DE					none noted
DC					willful failure to report = misdemeanor, upon conviction, subject to fine not exceeding $300
FL	yes		yes	yes	failure to report, or preventing another from doing so = 2nd degree misdemeanor
GA	yes				knowingly and willfully failing to make report = misdemeanor
HI	yes		yes	yes	failure to report, or willfully preventing another to make report = petty misdemeanor
ID	yes		yes		failure to report = misdemeanor
IL					knowingly transmits a false report = disorderly conduct
IN					failure to report = Class A infraction

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT; PENALTY FOR FAILURE TO REPORT

ST.	Anyone	Physician	Law Enforcement Personnel	Clergy	Social Worker	Physical Occupational Therapist	Psychologist or Mental Health Professional
IA		yes	yes		yes		yes
KS		yes	yes				yes
KY	yes	yes	yes		yes		yes
LA	yes	yes			yes		yes
ME		yes	yes	yes	yes	yes	yes
MD		yes	yes		human services worker		
MA		yes	yes		yes	yes	yes
MI		yes	yes		yes		yes
MN		yes	yes				yes
MS	yes						
MO	yes	yes	yes	yes	yes	yes	yes
MT		yes	yes				yes
NE		yes	yes				yes
NV		yes	yes	yes			yes
NH	yes	yes	yes				

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT;
PENALTY FOR FAILURE TO REPORT

ST.	Nurse	Adult's Caretaker	Residential Facility, Hospital	Adult Daycare Facility	Penalties for Failure to Report
IA	yes		yes		Simple misdemeanor and subject to civil liability for damages proximately caused by the failure
KS	yes		yes		knowingly failing to make report = Class B misdemeanor
KY	yes		yes		knowingly and willfully violating section = Class B misdemeanor
LA					failure to report = fine of not more than $500, or imprisonment of not more than 6 mo., or both
ME	yes				knowingly violates statute commits a civil violation = fine of not more than $500
MD					none noted
MA	yes				failure to report if required = fine of not more than $1000
MI	yes		yes		failure to report = civil liability for damages proximately caused by failure & fine of not more than $500
MN			yes		failure to report = misdemeanor & incurs liability for damages caused by failure
MS					failure to report = misdemeanor; fine of not more than $500, imprisonment for not more than 6 mo., or both
MO	yes				failure to report w/in required time, or violating confidentiality of reports = Class A misdemeanor
MT			yes		failure to report = misdemeanor; fine not to exceed $500, imprisonment not to exceed 6 mo., or both
NE	yes	yes	yes	yes	willful failure to report, or knowing release of confidential information = Class III misdemeanor
NV			yes	yes	failure to report = misdemeanor
NH					knowing failure to report = misdemeanor

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT; PENALTY FOR FAILURE TO REPORT

ST.	Anyone	Physician	Law Enforcement Personnel	Clergy	Social Worker	Physical, Occupational Therapist	Psychologist or Mental Health Professional
NJ	1						
NM	yes						
NY	1						
NC	yes						
ND	1						
OH		yes	yes	yes	yes		yes
OK	yes						
OR		yes		yes	yes	yes	
PA	1						
RI	yes						
SC	"with actual knowledge"	yes	yes	yes	yes	yes	yes
SD	1						
TN	yes	yes			yes		yes
TX	yes						
UT	yes	yes			yes		yes

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT;
PENALTY FOR FAILURE TO REPORT

ST.	Nurse	Adult's Caretaker	Residential Facility, Hospital	Adult Daycare Facility	Penalties for Failure to Report
NJ					not noted
NM					failure or refusal to report = misdemeanor
NY					not noted
NC					not noted
ND					willful false report = Class B misdemeanor; false rept to law enforcement officer = Class A misdemeanor
OH	yes		yes	yes	not noted
OK					willful failure to promptly report = misdemeanor
OR	yes			yes	punishable by fine
PA					not noted
RI					fine of not more than $1000, or imprisonment for not more than 1 yr., or both
SC	yes	yes		yes	guilty of misdemeanor, fine not less than $100 or prison for not less than 6 mo.
SD					not noted
TN	yes	yes	yes		knowing failure to report = Class A misdemeanor
TX					knowing failure to report = Class B misdemeanor
UT	yes		yes	yes	not noted

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT; PENALTY FOR FAILURE TO REPORT

ST.	Anyone	Physician	Law Enforcement Personnel	Clergy	Social Worker	Physical, Occupational Therapist	Psychologist or Mental Health Professional
VT		yes	yes		yes		yes
VA		yes			yes		yes
WA	yes	yes	yes		yes		yes
WV		yes	yes	yes	yes		yes
WI	1						
WY	yes						

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix E
PERSONS AND INSTITUTIONS REQUIRED TO REPORT; PENALTY FOR FAILURE TO REPORT

ST.	Nurse	Adult's Caretaker	Residential Facility, Hospital	Adult Daycare Facility	Penalties for Failure to Report
VT	yes		yes	yes	failure to report = fine of not more than $500 or 1 yr. imprisonment, or both
VA	yes	yes, if paid regularly	yes	yes	fine of not more than $500 for 1st failure; not less than $100 nor more than $1000 for subsequent failures
WA	yes		yes		not noted
WV					failure to report = misdemeanor; fine not more than $100 or imprisonment NMT 10 days, or both
WI					not noted
WY					not noted

1. Reporting of abuse/neglect is encouraged but not mandatory.

Appendix F
TYPE & TIMING OF INFORMATION BY REPORTER

STATE	Report in Any Reasonable Manner	Manner of Reporting Not Specified	Oral Report, Followed by Written	When Written Report Due	Either Oral or Written Report
AL			1	not specified	
AK		w/in 24 hrs			
AZ			1	2	
AR			1	2	
CA			1	w/in 2 wking days	
CO			1	2	
CT	w/in 5 days				
DE		no specified time			
DC					1
FL			1	2	
GA					no specified time
HI			1	ASAP	
ID		1			
IL		no specified time			
IN		1			

KEY TO TYPES OF REPORTS

1. report immediately
2. written report due within 48 hours of oral report

Appendix F
TYPE & TIMING OF INFORMATION BY REPORTER

STATE	Report in Any Reasonable Manner	Manner of Reporting Not Specified	Oral Report, Followed by Written	When Written Report Due	Either Oral or Written Report
IA		no specified time			
KS	w/in 6 hrs				
KY					1
LA			1	optional	
ME			1	2	
MD					ASAP
MA			1	2	
MI			1	optional	
MN					oral only
MS			in long-term care, oral w/in 24 hrs	in long-term care, written w/in 72 hrs	no specified time
MO					no specified time
MT					written only
NE			no time specified	if requested	
NV					1
NH			1	if requested	

KEY TO TYPES OF REPORTS

1. report immediately
2. written report due within 48 hours of oral report

Appendix F
TYPE & TIMING OF INFORMATION BY REPORTER

STATE	Report in Any Reasonable Manner	Manner of Reporting Not Specified	Oral Report, Followed by Written	When Written Report Due	Either Oral or Written Report
NJ		no specified time			
NM					no specified time
NY					
NC					no specified time
ND					ASAP
OH			1		
OK		no specified time			
OR			oral only		
PA		no specified time			
RI		1			
SC					w/in 24 hrs
SD					
TN					1
TX					no specified time
UT		1			

KEY TO TYPES OF REPORTS

1. report immediately
2. written report due within 48 hours of oral report

Appendix F
TYPE & TIMING OF INFORMATION BY REPORTER

STATE	Report in Any Reasonable Manner	Manner of Reporting Not Specified	Oral Report, Followed by Written	When Written Report Due	Either Oral or Written Report
VT				w/in 1 wk	w/in 48 hrs
VA					1
WA			1	w/in 10 days	
WV			1	2	
WI		no specified time			
WY		no specified time			

KEY TO TYPES OF REPORTS

1. report immediately
2. written report due within 48 hours of oral report

Appendix G
AGENCY DESIGNATED TO RECEIVE REPORT; AGENCY RESPONSE

ST.	Welfare, Social Services, Human Resources	Adult Protective Services	Law Enforcement/ Peace Officer	Aging Agency	Agency Response Time	Central Registry
AL	yes		yes		w/in 48 hrs	
AK	yes		if immediate need		3	
AZ		yes	yes		2, but investigate emerg. immed.	yes
AR			yes, if long-term facility		2	yes
CA		yes	yes, if long-term facility		3	
CO	yes		1		3	
CT	yes				3	yes
DE	yes				3	
DC	yes				2, but investigate emerg. immed.	yes
FL					2, but investigate emerg. immed.	yes
GA		yes	yes, if protec. svcs. unavail.		3	
HI	yes				2	yes
ID	yes			yes	2, but investigate emerg. immed.	
IL				yes	3	yes
IN	yes	yes	yes		report w/in 5 days	yes

KEY:

1. on weekends and after working hours
2. no time for investigation given
3. investigate immediately
4. or to any appropriate agency or organization

Appendix G
AGENCY DESIGNATED TO RECEIVE REPORT; AGENCY RESPONSE

ST.	Welfare, Social Services, Human Resources	Adult Protective Services	Law Enforcement/ Peace Officer	Aging Agency	Agency Response Time	Central Registry
IA	yes		1		2, but investigate emerg. immed.	yes
KS	yes		1		2, but investigate emerg. immed.	yes
KY	yes				ASAP	
LA		yes	yes		3	yes
ME	yes				3	
MD	yes				2, but investigate emerg. immed.	
MA				yes	2	
MI	yes				w/in 24 hrs.	
MN	yes		yes		3	
MS	yes				w/in 48 hrs.	yes
MO	yes				3	yes
MT	yes				2	
NE	yes		yes		2	yes
NV	yes	yes	yes		w/in 72 hrs.	
NH			1	yes	w/in 72 hrs.	yes

KEY:

1. on weekends and after working hours
2. no time for investigation given
3. investigate immediately
4. or to any appropriate agency or organization

Appendix G
AGENCY DESIGNATED TO RECEIVE REPORT; AGENCY RESPONSE

ST.	Welfare, Social Services, Human Resources	Adult Protective Services	Law Enforcement/ Peace Officer	Aging Agency	Agency Response Time	Central Registry
NJ		yes				
NM	yes				2	
NY	"may make"-4		"may make"-4	"may make"-4		
NC	yes				3	
ND	yes		yes		3	
OH	yes				w/in 24-72 hrs.	
OK	yes				3	
OR	yes		yes		3	yes
PA		yes			w/in 72 hrs	
RI				yes	3	
SC		yes			w/in 72 hrs	
SD						
TN	yes				ASAP	
TX		yes			w/in 24 hrs	
UT		yes	yes		ASAP	yes

KEY:

1. on weekends and after working hours
2. no time for investigation given
3. investigate immediately
4. or to any appropriate agency or organization

Appendix G
AGENCY DESIGNATED TO RECEIVE REPORT; AGENCY RESPONSE

ST.	Welfare, Social Services, Human Resources	Adult Protective Services	Law Enforcement/ Peace Officer	Aging Agency	Agency Response Time	Central Registry
VT				yes	w/in 72 hrs	yes
VA	yes		yes, for sex abuse		3	
WA	yes				2	yes
WV		yes			2, but investigate emerg. immed.	
WI	yes				w/in 24 hrs	yes
WY	yes		yes		2	yes

KEY:

1. on weekends and after working hours
2. no time for investigation given
3. investigate immediately
4. or to any appropriate agency or organization

Appendix H
PROTECTION FOR REPORTER

STATE	Good Faith Immunity	Reporter Confidential	Protection Against Retaliation
AL	yes		
AK	yes	yes	1, 2
AZ	yes	yes	1
AR	yes	yes	1
CA	yes	yes	1, 2
CO	yes	yes	1, 2
CT	yes	yes	
DE	yes	yes	2
DC	yes	yes	1, 2
FL	yes	yes	1
GA	yes	yes	2
HI	yes	yes	
ID	yes	yes	2
IL	yes	yes	2
IN	yes	yes	1, 2

1. Client in Community
2. Client in Institution

Appendix H
PROTECTION FOR REPORTER

STATE	Good Faith Immunity	Reporter Confidential	Protection Against Retaliation
IA	yes	yes	1
KA	yes	yes	1, 2
KY	yes	yes	2
LA	yes		2
ME	yes	yes	
MD	yes	yes	2
MA	yes	yes	1, 2
MI	yes	yes	2
MN	yes	yes	1
MS	yes	yes	2
MO	yes	yes	2
MT	yes	yes	
NE	yes	yes	
NV	yes	yes	2
NH	yes	yes	2

1. Client in Community
2. Client in Institution

Appendix H
PROTECTION FOR REPORTER

STATE	Good Faith Immunity	Reporter Confidential	Protection Against Retaliation
NJ			1, 2
NM	yes	yes	2
NY	yes		2
NC	yes		2
ND	yes	yes	1, 2
OH	yes	yes	1, 2
OK	yes	yes	2
OR	yes	yes	2
PA	yes	yes	1
RI	yes	yes	2
SC	yes		1
SD	yes		2
TN	yes	yes	1
TX	yes	yes	2
UT	yes	yes	2

1. Client in Community
2. Client in Institution

Appendix H
PROTECTION FOR REPORTER

STATE	Good Faith Immunity	Reporter Confidential	Protection Against Retaliation
VT	yes	yes	1, 2
VA	yes	yes	
WA	yes	yes	2
WV	yes	yes	2
WI	yes	yes	1
WY	yes	yes	2

1. Client in Community
2. Client in Institution