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REFLECTING REALITY: ADDING ELDER ABUSE AND NEGLECT TO LEGAL EDUCATION

Seymour H. Moskowitz

*Cast me not off in the time of old age:
Forsake me not when my strength faileth.¹*

October is Domestic Violence Awareness Month, and April is Child Abuse Prevention Month. In our law schools' curricula, these issues are reflected in a variety of courses. Domestic violence is covered in family law, criminal law, evidence, constitutional law, and others. An analysis of eight widely used family law casebooks, for example, interpreted domestic violence as violence against women by non-elderly men.² Child abuse and child neglect were likewise featured prominently in all these casebooks.³ Criminal law and evidence materials often include the

1. *Psalms* 79:9.

2. JUDITH AREEN, *FAMILY LAW: CASES AND MATERIALS* 291-325 (4th ed. 1999); IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEXTS, PROBLEMS* 161-79 (3d ed. 1998); LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* 116-47, 781-82 (2d ed. 2000); HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 459-93 (4th ed. 1998); CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* 175-206 (1996); PETER N. SWISHER, ET AL., *FAMILY LAW: CASES, MATERIALS AND PROBLEMS* 419-57 (2d ed. 1998); WALTER WADLINGTON & RAYMOND C. O'BRIEN, *DOMESTIC RELATIONS: CASES AND MATERIALS* 276-90 (4th ed. 1998); D. KELLY WEISBERG & SUSAN F. APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 357-88 (1998).

3. The Areen casebook, for example, devotes an entire chapter (92 pages) to the topic, including mandatory reporting of suspected child abuse/neglect, evidentiary issues concerning children's testimony, etc. *See also, e.g.*, ELLMAN, *supra* note 2, at 1273-1384 (devoting 111 pages); HARRIS, *supra* note 2, at 116-47, 774-79, 781-82 (devoting 37 pages); KRAUSE, *supra* note 2, at 459-93 (devoting 34 pages); SCHNEIDER, *supra* note 2, at 802-969 (devoting 167 pages); SWISHER, *supra* note 2, at 539-82 (devoting 43 pages); WADLINGTON, *supra* note 2, at 828-76 (devoting 48 pages); WEISBERG, *supra* note 2, at 975-1103 (devoting 128 pages).

battered woman's defense, materials on videotaping of child witnesses, and other related subjects.

Omitted in the laudable efforts to include these issues in our law school courses are the pervasive problems of elder abuse and neglect.⁴ Despite the fact that those over sixty-five are the fastest growing segment of the United States population, legal issues of older citizens have traditionally garnered minimal attention in the law school curriculum. Elder law courses have only recently been added to the curriculum at some schools, while many law schools do not offer a specialized course. Even where specific courses on elder law do exist, this may not be the most effective way of introducing these issues in the law school curriculum. Confining the aged to a single course marginalizes their importance and may be another illustration of ageism.⁵

The absence of elder abuse and neglect in family law casebooks and courses may stem from the supposed equivalence of this phenomena with the domestic violence issues that are covered. But such an equivalence is facile, if not false. While the domestic violence model explains some percentage of elder abuse and neglect cases, significant differences are also present. Elder abuse and neglect is often perpetrated not by partners, but by children or third parties. Domestic violence theory often focuses on sexism in society and male dominance over women.⁶ Many cases of elder abuse and neglect do not fit within this analysis. Maltreated elder citizens often find the shelters and services offered younger

4. Remarkably none of the eight family law casebooks surveyed in note 2 present any material on elder mistreatment.

5. "Ageism [may be defined] as a systematic stereotyping of, and discrimination against, people because they are old. . . . [J]ust as racism and sexism accomplish this with skin color and gender . . . 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*, 503 ANNALS AM. ACAD. POL. & SOC. SCI., 138, 139 n.2 (1989) (quoting paper previously presented). See generally ROBERT N. BUTLER, *WHY SURVIVE?: BEING OLD IN AMERICA* (1975).

6. See, e.g., Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433, 435-43 (1998) (extensively discussing the historic responses of civil and common law to domestic violence as reflecting sexism). See also Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118-20 (1996) (discussing the historical, substantive, and methodological concerns of domestic violence).

victims of battering inappropriate or closed to them.⁷ Elder abuse and neglect cases present issues of competency, incapacity, client self-determination, and a wholly different public response system—Adult Protective Services⁸—from the classic domestic violence scenarios. The prototypical public response to domestic violence is based on a criminal justice response. Moreover, the dynamics of elder mistreatment in institutions is significantly different from that which characterizes domestic violence among younger partners in the community.

Donna Ferrato and others at this conference have captured the pain and lethal consequences of what we have traditionally called domestic violence. But elder abuse and neglect produces equally horrendous results. Cases of serious mistreatment of the elderly fill Congressional reports and academic studies; examples of shocking mistreatment can be extensively recounted.⁹ Few

7. See, e.g., Bonnie Brandl & J. Raymond, *Unrecognized Elder Abuse Victims: Older Abused Women*, 6 J. CASE MGT. No. 2 (1997); Bonnie Brandl & J. Raymond, *Older Abused and Battered Women: An Invisible Population*, WISC. MED. J. (May, 1996).

8. Adult Protective Services is a series of "preventive, supportive and surrogate services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation." John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 THE GERONTOLOGIST 250, 251 (1978).

9. A few of the situations described by the 1990 Elder Abuse Report by a House of Representatives Committee are reproduced here verbatim to illustrate the danger faced by some elderly persons. See HOUSE SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE, SELECT COMM. ON AGING, 101ST. CONG., 2D SESS., ELDER ABUSE: A DECADE OF SHAME AND INACTION xi (Comm. Print 1990) [hereinafter 1990 ELDER ABUSE HOUSE REPORT].

An eighty-two-year-old woman suffered a brutal beating at the hands of her forty-year-old daughter and had to be hospitalized for eight weeks. *Id.* She had been kicked and had her hair pulled out and puncture wounds had been inflicted all over her body by sharp objects. *Id.* The daughter, who was reportedly unable to work because of back problems, was totally dependent upon her mother for financial support. *Id.* 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. *Id.*

An elderly woman was brought to the hospital by paramedics, confused and minimally responsive. *Id.* She was severely dehydrated and her hair was completely matted. *Id.* She had maggots all over her left leg, which had been wrapped in cloth, and bloody drainage coming out of her knees. *Id.* She weighed about sixty pounds. *Id.* All uncovered parts of the woman's body revealed deep purple bruises. *Id.* She also had a left blacked eye and a deep gash over her right eyebrow. *Id.* The woman, upon questioning by police, said she lived with her daughter and children. *Id.* She would not confirm that her daughter had beaten her or denied her care because, she declared "I don't want to get anyone in trouble." *Id.*

From Texas came the report of a client, age sixty-nine, who was found by a neighbor one night lying on the ground naked with ants crawling on her. *Id.* The woman suffered from paralysis on one side from a stroke and had heart problems. *Id.*

cases are reported to state authorities, however, and only a minute number result in criminal prosecution or civil litigation. In our civil courts and criminal justice system, mistreated elderly 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.¹⁰ Victims often feel powerless. Much of the mistreatment occurs within the family and therefore the elderly person is often simultaneously embarrassed by the abuse, fearful of future mistreatment, and paradoxically, protective of the abuser.¹¹ Because it occurs primarily in private residences against persons who have limited contact with outsiders, it is among the most hidden of contemporary America's problems.¹² Mistreatment of the elderly is often associated 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.

In this essay, I plead the case for including elder mistreatment in the law school's preparation of the student for future practice and service. Lawyers who practice criminal, tort, finan-

An eighty-eight-year-old Washington State woman had her prescribed medications withheld by her guardian. 1990 ELDER ABUSE HOUSE REPORT, *supra*. 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. *Id.* She was recently dropped during a move from room to room and now has a broken nose. *Id.* No X-rays or pain medication were administered. *Id.* She has been routinely left in her chair for twelve hours at a time and has very fragile skin which is vulnerable to decubiti. *Id.*

A home health aide in New Hampshire was startled to find her client, an elderly woman, in urine and feces-soiled clothing. *Id.* The woman had suffered severe weight loss, as well. *Id.* The woman's husband, her caregiver, had failed to contact his wife's physician as he had promised the aide he would, even though his wife was weak and malnourished and had to be hospitalized. *Id.* Upon questioning, the husband became angry. *Id.* 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. *Id.* 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. *Id.* In fact, she had serious respiratory problems. *Id.*

10. Joanne Steuer & Elizabeth Austin, *Family Abuse of the Elderly*, 28 J. AM. GERIATRIC SOC'Y 372-76 (1980).

11. See, e.g., Jordan 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 & INTERVENTION 31 (Lorin A. Baumhover & S. Colleen Beall eds., 1996) [hereinafter BAUMHOVER & BEALL].

12. *Id.*

cial (including wills, trusts and estates), administrative, health, consumer, family or elder law are likely to have cases complicated by abuse and neglect of the aged. Part II describes the demographic trends which make the legal problems of the elderly appropriate for study during law school. Parts III, IV, and V define elder abuse and neglect, examine its startling prevalence in contemporary society, and compare mistreatment of the aged with other forms of domestic violence. Part VI presents an overview of how elder mistreatment can be included in a variety of required and elective courses in the curriculum. Law schools can help bring this problem to the attention of students and practitioners and be catalytic agents in local legal cultures and the broader community.

I. "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 fastest growing segment of our population.¹³ Both the number of aged in this country and their percentage relative to the overall population have steadily increased.¹⁴ In 1900 there were 3.1 million people age sixty-five and over, constituting four percent of the population.¹⁵ By 1998, the elderly had grown to 34.4 million, or 12.5 percent of the total population, and the number is expected to increase to more than 40.1 million by 2010, almost 13.3 percent of the nation's total population.¹⁶ The percentage of elderly in the United States population is further projected to reach 17.7 percent by 2020, and almost twenty-two percent by 2050.¹⁷

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

13. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON AGING, *Profile of Older Americans*, available at <http://www.aoa.dhhs.gov/aoa/stats/profile/default.htm#older> (last visited Nov. 8, 2000).

14. *Id.*

15. *Id.*

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

17. U.S. SENATE SPECIAL COMM. ON AGING, 101ST CONG., *AGING AMERICA—TRENDS AND PROJECTIONS* (Annotated) 84–85 (Comm. Print 1990).

only one percent of the population in 1980 (2.2 million), this over eighty-five segment doubled to two percent by 2000 (4.6 million)¹⁸ and will increase to more than five percent by 2050.¹⁹ Second, the elderly population is predominantly female. At every year after age sixty-five, women outnumber men, and the ratio of women to men increases as the cohort ages.²⁰

II. DEFINING ELDER ABUSE AND NEGLECT

The four main types of elder mistreatment are physical abuse, psychological abuse, financial exploitation, and neglect.²¹ Physical abuse is violent conduct resulting in pain and/or bodily injury. Common examples include hitting, sexual molestation, and the use of physical or chemical restraints.²² Psychological

18. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS 1990 STATISTICAL ABSTRACT, *Population 65 Years Old and Over, By Age Group and Sex, 1960 to 1988, and Projections, 1990 and 2000*, at 37 tbl. 41.

19. *Id.*

20. LAWRENCE A. FROLIK & ALISON P. BARNES, *ELDERLAW: CASES AND MATERIALS* 13-14 (1992).

21. The current federal definition includes three major types of elder maltreatment—physical abuse, neglect, and exploitation—and clearly recognizes self-neglect as a form of neglect. 42 U.S.C. § 3002(24), (25) (1994). 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." *Id.* § 3002(13). "Neglect" is the "failure to provide for oneself goods or services that are necessary to avoid physical harm, mental anguish, or mental illness" or the "failure of a caregiver to provide the goods or services." *Id.* § 3002(37). 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." *Id.* § 3002(26). 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 law." *Id.* § 3002(20). Section 3002(24) notes that "elder abuse" refers to "abuse of an older individual" but does not specify any particular age. *Id.* § 3002(24). 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. See *id.* § 3003.

22. 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." N.Y. SOC. SERV. LAW § 473(6)(a). "'Abuse' means the intentional or negligent infliction of physical pain, injury or mental injury." IDAHO CODE § 39-5302(a) (Michie 1997).

abuse is behavior that induces significant mental anguish and may consist of threats to harm, institutionalize, or isolate the elder adult.²³ While the effects of physical abuse are usually visible, the effects of psychological abuse are less obvious; however, psychological abuse can cause a wide range of responses including depression, nervous system disorders, fearfulness, physical illness, and, in extreme cases, suicide.²⁴ Financial abuse or exploitation is theft or conversion of property by the elder's relatives, caregivers, or others; it can range from expropriating small amounts of cash to inducing the elder to sign away bank accounts or other property.²⁵ Financial exploitation is often accompanied by

Examples of documented physical abuse cases can be found in many sources. *See, e.g.*, 1990 HOUSE ELDER ABUSE REPORT, *supra* note 9, at 3.

"Nevada authorities report that an 80-year-old woman there was hospitalized with a serious knee injury." *Id.* "Her grandson had knocked her to the ground and stolen her car despite her protests." *Id.* Reportedly, the grandson had been physically abusive to her on several occasions and had stolen other cars. *Id.*

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. *Id.* 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. *Id.* A social worker saw her badly bruised left breast, the result of the son punching her. *Id.*

23. *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" *Id.* "'Abuse' means willful and unjustified infliction of pain, injury, or mental anguish" NEV. REV. STAT. ANN. § 41.1395(4)(a)(1) (Michie Supp. 1997).

Illustrative examples of psychological abuse in the 1990 HOUSE ELDER ABUSE REPORT, *supra* note 9, at 17 follow:

An elderly woman in Oregon lived with her son, who was diagnosed as a paranoid schizophrenic and who suffered additional mental impairment from alcohol and drug abuse which began at about age 14. *Id.* He tormented her in several ways, one day becoming angry, grabbing his mother's arm, twisting it and spinning her around in her wheelchair. *Id.* He often threatened her verbally and was physically abusive. *Id.* Once he crept up behind his mother and yelled, "I could make you have a heart attack!" *Id.*

In Montana, the nephew of an elderly woman threatened repeatedly to kill her and set fire to her ranch. *Id.* On one occasion, he gave her a black eye and bruises when she refused to give him money. *Id.*

24. SENATE SPECIAL COMM. ON AGING, 102D CONG., 1ST Sess., AN ADVOCATE'S GUIDE TO LAWS AND PROGRAMS ADDRESSING ELDER ABUSE (Comm. Print 1991).

25. *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." *Id.*

Illustrative examples of documented financial abuse cited in the 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at 12-13, include:

Muriel, an elderly woman in Oklahoma, was being terrorized by her adopted son, who would often display his violent temper to obtain and then squander her money. *Id.* at 12. The son and his wife gained control of Muriel's money by obtaining power of attorney, which allowed them to cash her Social Security and retirement checks each month and to gain ac-

physical or psychological abuse. Neglect is the failure to fulfill a caretaking obligation necessary to maintain the elder's physical and mental well-being; examples include abandonment and failure to provide food or health-related services.²⁶ Neglect may be intentional or negligent, resulting from the caretaker's own infirmity or ignorance. It can arise from an overwhelmed and/or dysfunctional care-giving system, the isolation of the elder, refusal of the elder to accept assistance, or other complex and multifactorial causes.²⁷

cess to her savings account. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at 12. The pair bought a new boat, new car, and other luxury items with his mother's money. *Id.* Soon Muriel, now 78, was penniless. *Id.*

In Delaware, an elderly couple, both suffering from Alzheimer's disease, were the victims of actual and threatened abuse by their granddaughter. *Id.* at 12-13. She cashed certificates of deposit worth \$35,000, although they were in her grandparents' names. *Id.* at 13. The granddaughter had a history of violent behavior and had previously been admitted to Delaware State Hospital for psychiatric care. *Id.*

26. See, e.g., ARK. CODE ANN. § 5-28-101(8)(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." *Id.* "'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." CAL. WELF. & INST. CODE § 15610.07 (West Supp. 1998).

Illustrative examples of neglect cited in the 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at 8, include:

When apartment cleaners and painters entered a Texas apartment vacated by the tenants three weeks previously, they discovered an elderly woman in a back room. *Id.* This stroke victim, in her mid-80's, was bedbound and incontinent, unable to call for help. *Id.* Her relatives moved out one night, leaving her alone with a glass of water and one plate of food. *Id.* The woman was found starving, dehydrated and lying in her urine and feces. *Id.* She had seen no one in the three weeks since her family moved. *Id.* She died in the hospital several days later. *Id.* Relatives stated that they could not afford to take her along. *Id.*

In Tennessee, an eighty-four-year-old man was found in a urine-soaked, feces-covered bed. *Id.* He had a staph infection. *Id.* His care was supposed to be handled by his 50-year-old, low-functioning daughter, who was totally financially dependent on him. *Id.* She fought the notion of placing him in a nursing home because she would be left without financial support if that happened. *Id.*

27. Self-neglect refers to an individual's failure to provide himself or herself with the necessities of life such as food and shelter. Classifying self-neglect as abuse is controversial because it may result from society's failure to provide for the needs of the elderly, or from an autonomous life style choice of a competent but eccentric individual.

Examples of self-neglect cited in the 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at 7, include:

In Massachusetts, a sixty-two-year-old mildly retarded man was trying to care for his wheelchair-bound mother in her home, which had been ravaged by fire. *Id.* Both slept on bare mattresses on dirt floors. *Id.* About sixty-five cats, chickens, dogs and rabbits ran in

III. PREVALENCE OF ELDER MISTREATMENT

Elder abuse and neglect is a profoundly disturbing subject.²⁸ Despite biblical injunction²⁹ and modern statutory protections,³⁰ elder mistreatment is a pervasive phenomenon, occurring in all segments of our population.³¹ Approximately one and a half to two million cases of moderate to severe mistreatment occur each year

and out of the house. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at 7. The son got their water from a nearby mountain stream and buried their waste in the yard. *Id.*

In Texas, paramedics responded to a call and found a ninety-five-year-old woman lying in a pool of urine, wrapped in a blanket. *Id.* When they tried to move her, her skin came off in layers. *Id.*

28. Although physical and sexual abuse are its most dramatic manifestations, far more common are psychological abuse of the elderly, financial exploitation, and neglect of caretaking obligations. The National Aging Resource Center on Elder Abuse estimated that "55 percent of the reported cases in 22 states during 1988 were determined to be self-neglect or self-abuse cases." NATIONAL AGING RESOURCE CENTER ON ELDER ABUSE, ELDER ABUSE: QUESTIONS AND ANSWERS, AN INFORMATION GUIDE FOR PROFESSIONALS AND CONCERNED CITIZENS 5-6 (1991). Estimates of the percentage of incidence in twenty-four states in 1988, excluding self-abuse and neglect, include: neglect 37.2%, physical abuse 26.3%, financial exploitation 20%, emotional abuse 11%, all other types 2.8%, sexual abuse 1.6%, and unknown 1.1%. *Id.* The most recent statistics reporting substantiated new cases in 1996 by state Adult Protective Services agencies generally confirm these figures. NATIONAL CENTER ON ELDER ABUSE, THE NATIONAL ELDER ABUSE INCIDENCE STUDY, FINDINGS, at 2, available at <http://www.aoa.gov/abuse/report/Cexecsum.htm> (last visited Sept. 15, 2000) [hereinafter NATIONAL ELDER ABUSE INCIDENCE STUDY].

29. See, e.g., *Exodus* 20:12 (stating "[h]onor thy father and mother"); *Lev.* 19:32 (stating "[y]ou shall rise before the aged and show deference to the old"); *Ephesians* 6:1 (stating "[c]hildren, obey your parents in the Lord, for this is right").

30. Abuse is illegal in every state. 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 . . .

Id. 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." *Id.* § 5-28-103(a). "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." *Id.* § 5-28-103(b)(1); WYO. STAT. ANN. § 35-20-109 (Michie 1997). "A person who abuses, neglects, exploits or abandons a disabled adult is guilty of a misdemeanor . . ." *Id.*

31. See NATIONAL ELDER ABUSE INCIDENCE STUDY, EXECUTIVE SUMMARY, *supra* note 28, at 1. See also Steuer & Austin, *supra* note 10, at 372-76 (discussing the pervasiveness of elder abuse).

among non-institutionalized aged,³² and its prevalence appears to be increasing.³³ The National Elder Abuse Incidence Study estimated 450,000 new cases of elder abuse and neglect in 1996 in domestic settings alone.³⁴ In almost ninety percent of incidents where the perpetrator is known, it is a family member; two-thirds of perpetrators are adult children or spouses.³⁵ Although women represent only fifty-eight percent of persons over sixty years of age, they comprise more than two-thirds of those subjected to abuse and neglect.³⁶ Moreover, the most vulnerable and fastest growing segment of the aged, those eighty years and over, are abused and neglected at two to three times their proportion in the elderly population. The oldest-old are also victims of more than one-half of neglect cases.³⁷ Clearly, we are failing in our mission to protect senior citizens.

In a number of community surveys, four to six percent of older adults reported experiencing incidents of elder abuse, neglect, and financial exploitation.³⁸ International surveys have con-

32. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at xi (estimating that 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, 51-57 (1988) (estimating 700,000-1,100,000 cases of elder mistreatment, excluding financial exploitation, more than a decade ago).

33. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at xi. Ninety percent of states reported to the Committee that the incidence of elder mistreatment was increasing. *Id.* at xiv. A recent California elder mistreatment bill noted in its proposed legislative findings that 225,000 incidents of adult abuse occur in California annually, an increase of 1,000 percent since 1986-87. 1998 Cal. Legis. Serv. Ch. 946 (S.B. 2199) (West). These findings were adopted into law and are codified at CAL. WELF. & INST. CODE § 15610.07 (West Supp. 1999).

34. NATIONAL ELDER ABUSE INCIDENCE STUDY, EXECUTIVE SUMMARY, *supra* note 28, at 1.

35. See *id.* CONCLUSIONS, at 4.

36. *Id.*

37. *Id.*

38. Using a methodology previously validated in two United States family violence surveys, a research team surveyed more than 2,000 non-institutionalized elders living in the metropolitan Boston area. Pillemer & Finkelhor, *supra* note 32, at 51. They found two percent had experienced physical abuse, 1.1 percent verbal aggression, 0.4 percent neglect. *Id.* at 53-54. The overall prevalence rate was 3.2 percent, and no inquiries were made about financial exploitation. *Id.* at 56. Extrapolated, this finding would mean 700,000 to 1.1 million cases of mistreatment across the nation. See *id.* The proportion of victims was almost equally divided between males and females, and economic status and age were not related to risk of abuse. Other American studies have produced similar estimates. See, e.g., Susan Steinmetz, *Elder Abuse*, AGING 610 (Jan.-Feb. 1981).

firmed these general prevalence statistics.³⁹ There is room for debate about these estimates; definitions used in studies and statutes vary, and the research methodologies utilized are often inconsistent.⁴⁰ It is generally acknowledged, however, that very large numbers of the non-institutionalized 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.

After extensive Congressional hearings, a 1981 report issued by the House Select Committee on Aging estimated four percent of the American non-institutionalized elderly population, approximately 1 million persons, may be victims of moderate to severe mistreatment.⁴¹ The study also concluded that elder abuse, although as prevalent as child abuse, is far less likely to be reported.⁴² Ten years later, a follow up Congressional report, "Elder Abuse: A Decade of Shame and Inaction," determined the situation had worsened; elder maltreatment was reported to be increasing and it was estimated that five percent of the elderly, or

39. A Canadian study, using a nationally representative sample of elders able to respond on the telephone, found that four percent had recently experienced one or more forms of mistreatment. Elizabeth Podniecks, *National Survey of Abuse of the Elderly in Canada*, 4 J. ELDER ABUSE & NEGLECT (1/2), 5, 5 (1992). The rates for men and women were about equal, but financial abuse was more common than physical or other maltreatment. *Id.* A British study found that six percent of individuals aged sixty-five to seventy-four reported recent verbal abuse by a close family member or relative; two percent reported physical mistreatment, and one percent reported financial exploitation. Ogg & Bennett, *Elder Abuse in Britain*, 305 BRIT. MED. J. 998-99 (1992). 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 three percent elder mistreatment prevalence rate for men and nine percent for women, or 5.4 percent for both sexes. Kivela et al., *Abuse in Old Age: Epidemiological Data from Finland*, 4 J. ELDER ABUSE & NEGLECT NO.3, 1 (1992). Since all these surveys are based on self-reporting, the percentages most likely are an underestimation of the problem rather than an exaggeration.

40. A recent study making use of the "sentinel" methodology previously employed in child abuse surveys estimated that 450,000 persons sixty and over living in domestic settings were newly abused, neglected, or exploited in the United States in 1996 alone. NATIONAL ELDER ABUSE INCIDENCE STUDY, EXECUTIVE SUMMARY, *supra* note 28. Of this total, 71,000 cases were reported and substantiated by Adult Protective Services Agencies; the remaining 379,000 were not reported but were identified by "sentinels" (drawn from agencies that ordinarily serve older people, such as hospitals and clinics, law enforcement agencies, senior citizen programs, and banking institutions). *Id.*

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

42. *Id.* at xiv.

more than 1.5 million elderly persons, were abused yearly.⁴³ Ninety percent of states reported to the Committee that the incidence of elder mistreatment was increasing.⁴⁴

In 1995, almost 1.8 million Americans lived in 16,700 nursing homes.⁴⁵ In addition, the elderly are increasingly housed in assisted care facilities.⁴⁶ Abuse in institutional settings has never been measured precisely but has been well documented in academic studies, government inquiries, personal histories, and ombudsman projects.⁴⁷ A survey of nursing home personnel in one United States state⁴⁸ disclosed that thirty-six percent of nursing staff reported that they had seen at least one incident of physical abuse by other staff members in the preceding year; ten percent admitted committing at least one act of physical abuse themselves. At least one incident of psychological abuse against a resident had been observed by eighty-one percent of the sample in the preceding year, and forty percent admitted to having committed such an act. These findings from community and institutional settings suggest that the mistreatment of older residents may be even more extensive than is generally believed.

Despite the prevalence of shocking statistics of elder abuse and neglect, victims of elder abuse rarely report it.⁴⁹ Some may

43. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at xi (estimating that more than 1.5 million persons may be victims of such abuse each year, and the number is rising).

44. *Id.* at xiv.

45. Paul Emrath, *Seniors' Housing: Supply & Demand*, HOUSING ECON. 8 (1998).

46. *Growth of Assisted Living Facilities is Booming: Analysis*, NAT'L MORTGAGE NEWS, June 28, 1999, at 16, available at 1999 WL16554061.

47. Over the past year, for example, administrative agencies in at least five states found that the United States's largest chain of assisted living facilities, Alterra Healthcare Corp., which also operates 150 residences for people with Alzheimer's disease, has inadequate and untrained staffs which fail to give elderly residents drugs and nutritional supplements and fail to protect their safety. Barry Meier, *States See Problems With Care at Chain of Centers for Aged*, N.Y. TIMES, Nov. 26, 2000, at A1. See also Karl Pillemer & David W. Moore, *Highlights From a Study of Abuse of Patients in Nursing Homes*, 2 J ELDER ABUSE & NEGLECT 5 (1990); U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL: RESIDENT ABUSE IN NURSING HOMES; UNDERSTANDING AND PREVENTING ABUSE, PUBL. NO. OEI-06-88-00360 (1990); ADMIN. ON AGING, LONG TERM CARE OMBUDSMAN ANNUAL REPORT FISCAL YEAR 1996 (1999), available at <http://www.aoa.gov/itcombudsn/960mbreprt.html> (last visited Mar. 3, 2001).

48. Pillemer & Moore, *supra* note 47.

49. See, e.g., 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at 42 (estimating that only one in every eight cases of elder abuse is ever reported).

feel that abusive treatment is ordinary⁵⁰ or that legal recourse is unavailable or unavailing.⁵¹ Others may be so thoroughly isolated or under the control of the caregiver that they have no opportunity to seek help.⁵² 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.⁵³ The failure of mandated professionals to report suspected cases⁵⁴ likewise means prosecutors are rarely involved.

IV. COMPARISON WITH OTHER FORMS OF FAMILY VIOLENCE

As noted earlier, only a small fraction of the estimated one and a half to two million cases of mistreatment in United States 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 that only one of eight cases of elder abuse, as compared with one of three cases of child abuse, is reported to the authorities.⁵⁵ It noted that while almost all states had enacted statutes or adult protective services laws that mandated reporting of elder

50. See, e.g., L.W. Griffin, *Elder Mistreatment Among Rural African-Americans*, 6 J. ELDER ABUSE & NEGLECT 1, 1-29 (1994).

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

52. See Karl A. Pillemer, *Social Isolation and Elder Abuse*, 8 RESPONSE No. 4, 2, 2-4 (1985).

53. Suzanne K. Steinmetz, *Dependency, Stress and Violence Between Middle Aged Caregivers and Their Elderly Parents*, in ABUSE & MALTREATMENT OF THE ELDERLY 134-49 (Jordan I. Kosberg, ed.). Professor Martha Minow has astutely commented on the complexity of these situations. Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665, 1682-83 (1990).

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. See *id.* 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.

Id.

54. See *infra* notes 100-02 and accompanying text.

55. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at xiv. Other estimates on underreporting are even more shocking. See *Society's Secret Shame: Elder Abuse and Family Violence*, Hearing Before Senate Special Committee on Aging, 104th Cong., 1st Sess., at 2 (Apr. 11, 1995) (estimating that only one in fourteen cases of elder abuse is ever reported).

abuse, state implementation and enforcement had been lacking, largely because of lack of financial support.⁵⁶ There is a dramatic disparity between funds allocated to adult protective services and those provided for child abuse services; nationwide, in 1989, \$43.03 per child was spent for child protective services, as compared to \$3.80 for protective services for adults, including the elderly.⁵⁷ The lack of federal funding, combined with limited state expenditures, results in few services available to deal with the problem.⁵⁸ On average, only 3.95% of the total state protective services budgets was earmarked for the elderly in 1989, a drop of 40% over a decade.⁵⁹

The etiology of abuse and neglect of seniors is multifactoral. No one theoretical explanation can account for the mistreatment of elderly individuals. The diversity of cases reflects multiple and sometimes interconnected causations.⁶⁰ Isolation is a precipitating factor in many instances of elder abuse.⁶¹ Although some cases of aged mistreatment correspond to the traditional view of non-elderly domestic violence, many do not. While many younger abused women are dependent on their batterers for financial support, in many instances of elder abuse, the relationship is reversed; the abuser depends on the victim because of his own economic impoverishment, mental illness, or substance abuse.⁶²

V. TEACHING OPPORTUNITIES IN LAW SCHOOL COURSES

Our current law students will become prosecutors, criminal defense attorneys, family and business law practitioners, trust and estate experts, and will practice numerous other specialties. Current practitioners engage in all of these roles. Moreover, lawyers in the United States become legislators, lobbyists, adminis-

56. 1990 ELDER ABUSE HOUSE REPORT, *supra* note 9, at xiii.

57. *See id.* at xii.

58. One state, Louisiana, even discontinued adult protective services for a period of five years due to budget exigencies. *Id.* at 38.

59. *Id.* at 40.

60. Edward F. Ansello, *Causes & Theories*, in BAUMHOVER & BEALL, *supra* note 11, at 9-10.

61. MARY J. QUINN & SUSAN TOMITA, ELDER ABUSE & NEGLECT: CAUSES, DIAGNOSES & INTERVENTION STRATEGIES 13-14 (1986).

62. *See, e.g.*, Karl Pillemer, *The Dangers of Dependency: New Findings on Domestic Violence Against the Elderly*, 33 SOC. PROBLEMS 144, 144-58 (1985).

trators of important public agencies, judges and occupy a host of important policy-making positions. Inclusion of elder abuse and neglect in the law school curriculum—and in continuing legal education after graduation—provides students with substantive knowledge and lawyering skills needed to competently represent clients and influence our legal system's response to this significant problem. Issues of mistreatment of the aged are present in many practice areas. In the sections below, I have outlined how elder abuse and neglect may be integrated into various required and elective law school courses.

A. Criminal Law

Elder abuse has traditionally not been viewed as criminal behavior. The criminal justice system—law enforcement, prosecution, judges, and the post-trial processes such as probation and parole—did not view mistreatment as an appropriate subject and lacked training and experience. This lack of involvement has begun to change⁶³ and law schools have a critical role in furthering this change. The criminal justice system is often the only, or the best, way to protect victims and make perpetrators accountable.

Conceptually, almost every form of elder mistreatment corresponds to common law or statutory crimes universally studied in introductory criminal law courses. 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”⁶⁴ Once the illegality of such behavior is recognized, the criminal law can be enforced aggressively to protect the victim and to hold the offender publicly accountable. Criminal (and other) courts can also protect older victims by “no contact” orders, requiring the abuser to vacate the residence, ordering restitution for theft or

63. See generally U.S. DEP'T OF JUSTICE, FOCUS GROUP ON CRIME VICTIMIZATION OF OLDER PERSONS: RECOMMENDATIONS TO THE OFFICE OF JUSTICE PROGRAMS (1998).

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

medical expenses, and by a wide variety of other measures.⁶⁵ Emergency orders are often available.⁶⁶

Moreover, abuse, neglect, and financial exploitation of older persons have been made specific crimes in many jurisdictions.⁶⁷ Some state statutes make serious physical abuse or neglect a separate offense.⁶⁸ Most states allow the advanced age of a victim to be considered as an aggravating factor in sentencing because of older persons' vulnerability to crime as well as the enhanced effect that crime has on them.⁶⁹ Other statutes designate various

65. See, e.g., OR. REV. STAT. §§ 107.700–107.720 (Supp. 1998) (including 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. See, e.g., 750 ILL. COMP. STAT. ANN. 60/101–60/103 (West 1993).

66. See, e.g., TEX. CODE ANN. § 48.208(b) (West Supp. 2001).

If the department determines that an elderly or disabled person is suffering from abuse, neglect, or exploitation 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.

Id. In Massachusetts:

If an emergency 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, protective agency, member of the immediate family or caretaker may petition the court for an emergency order of protective services.

MASS. GEN. LAWS ANN. ch. 19A, § 20(b) (West 1994).

67. See, e.g., TENN. CODE ANN. § 71–6–117 (Michie 1995) (providing: “[i]t 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) (providing that “[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 *id.* app. A (addressing the same).

68. See, e.g., MASS. GEN. LAWS ANN. ch. 265, § 13K(e) (West Supp. 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.

Id. See also DEL. CODE ANN. tit. 31, § 3913(c) (1997) (providing that intentional abuse causing bodily harm, or 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 a Class C felony).

69. See, e.g., FLA. STAT. ANN. § 784.08(2) (West Supp. 1998).

crimes, including assault, battery, robbery, etc. as more serious offenses when committed against an elderly person. 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. All these issues are appropriately raised in standard or advanced criminal law courses.

Another relevant issue for advanced criminal law courses is telemarketing fraud, which has a dramatic negative impact on the aged. Americans over the age of fifty lose an estimated \$14.8 billion every year to fraudulent telemarketers.⁷⁰ The AARP reports that fifty-six percent of the victims of telemarketing fraud are aged fifty or older.⁷¹ According to the FBI, seventy-eight percent of the companies engaging in telemarketing fraud purposefully target seniors in their scams.⁷²

Unscrupulous telemarketers prey upon the elderly because of their availability (the aged often live alone), their frailty, and their financial resources.⁷³ Fraudulent schemes offer products and services seniors typically desire, such as reduced-cost medications⁷⁴ and investment opportunities.⁷⁵ Because many aged per-

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.

FLA. STAT. ANN. § 784.08(2).

70. Proposed Seniors Safety Act of 1999, S. 751, 106th Cong. § 2(a)(7) (1999).

71. The American Association of Retired Persons, *Facts About Fraudulent Telemarketing*, at <http://www.aarp.org/fraud/1fraud.htm> (last visited Oct. 25, 2000).

72. See *Telemarketing Fraud, 1996: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary* (1996) (statement of Charles L. Owens, Chief Financial Crimes Section), available at 1996 WL 193802.

73. See United States Dep't of Justice, *Hearing Before the United State Senate Special Committee on Aging*, at <http://www.usdoj.gov/criminal/fraud/telemarketing/landreth.htm> (last modified Apr. 27, 1998) [hereinafter *Hearing on Aging*]; see also 145 CONG. REC. S3499 (daily ed. Mar. 25, 1999) (statement of Senator Tom Daschle (D-S.D.), discussing the 1999 proposed Seniors Safety Act in which he stated that "[s]eniors are often targeted by criminals because of their lack of mobility, isolation, and dependence on others").

74. Federal Bureau of Investigation, *Telemarketing Crime Problems*, at <http://www.fbi.gov/majcases/db/crimepro.htm> (last visited Nov. 29, 2000).

75. *Id.*

sons are either retired or homebound, they comprise a captive audience.⁷⁶ Not only are seniors more likely to be at home when telemarketers call, but they are also more likely to remain on the phone to hear the telemarketer's sales pitch, exploited because of their need for friendship and human contact.⁷⁷ Fraudulent telemarketers drain the elderly victim's financial resources and ultimately rob the senior of her dignity and ability to trust others.⁷⁸

A variety of federal criminal statutes provide remedies for telemarketing fraud. These provide pedagogical opportunities for statutory interpretation and creative lawyering. The Wire Fraud statute⁷⁹ is one obvious candidate for study and class discussion. There may also be violations of the money-laundering statutes,⁸⁰ lottery statutes,⁸¹ or financial institution fraud.⁸² Also relevant is the federal Senior Citizens Against Marketing Scams Act ("SCAMS"),⁸³ which enhances the penalties for telemarketers that either target or victimize persons over the age of fifty-five.⁸⁴ Under SCAMS a telemarketer that victimizes or targets seniors can be sentenced to an additional ten years in prison above and beyond the underlying penalty⁸⁵ and must also provide restitution to the elderly victim.⁸⁶

The aged are one of the groups especially vulnerable to crime.⁸⁷ According to the 1994 national crime survey, elders are particularly susceptible to crimes motivated by economic gain, including robbery, personal theft, larceny, burglary, and motor

76. Hebe R. Smythe, *Fighting Telemarketing Scams*, 17 HASTINGS COMM. & ENT. L.J. 347, 366 (1994).

77. See Richard A. Starnes, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 ELDER L.J. 201, 204 (1996).

78. See *Hearing on Aging*, *supra* note 73.

79. 18 U.S.C. § 1343 (1994); see also *id.* § 371 (addressing conspiracy to engage in wire fraud).

80. 18 U.S.C. §§ 1956-1957.

81. *Id.* §§ 1301-1302.

82. *Id.* § 1344.

83. *Id.* § 2325.

84. *Id.* § 2326.

85. 18 U.S.C. § 2326.

86. *Id.* § 2327.

87. H. VON HENTIC, *THE CRIMINAL AND HIS VICTIM: STUDIES IN THE SOCIOBIOLOGY OF CRIME* 404-38 (1948).

vehicle theft.⁸⁸ Perceived wealth and physical weakness combine to make the elderly likely targets, and their living arrangements often leave them dependent and isolated.⁸⁹ The physical, financial, and behavioral impacts of crime on the elderly, by caretakers or strangers, are much greater than upon younger victims.⁹⁰

B. Torts

Elder maltreatment often has a devastating impact on its victims. The aged 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.⁹¹ Older persons 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 damaging because of the familiarity and memories connected with it and the trauma of being forced to move.

Provided that 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 in domestic or institutional settings. Tort litigation has already become common against nursing homes. The average award in nursing home negligence cases increased from \$238,000 to \$525,000 between 1987 and 1994.⁹² Twenty percent of these cases also result in punitive damage awards, as opposed to five percent in other types of personal injury cases.⁹³ In addition, many states, including Louisiana, have special statutes which provide remedies

88. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SELECTED FINDINGS FROM BJS ELDERLY CRIME VICTIMS (1994).

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

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

91. 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 TOMB, GROWING OLD: A HANDBOOK FOR YOU AND YOUR AGING PARENT 15-40 (1984). Chronic health problems increase dramatically in this age group. RICHARD ATCHLEY, SOCIAL FORCE & AGING: AN INTRODUCTION TO SOCIAL GERONTOLOGY 91 (1988).

92. Thomas D. Begley, Jr., *Nursing Home Law & Litigation*, 156 N.J. L.J. 120 (1999).

93. *Id.*

for injuries suffered in long term care facilities or in the community. The Louisiana Cruelty to the Infirm, Disabled Adults, or Aged Persons statute,⁹⁴ for example, provides:

Cruelty to the infirm is the intentional or criminally negligent mistreatment or neglect by any person, including a caregiver, whereby unjustifiable pain, malnourishment, or suffering is caused to the infirm, a disabled adult, or an aged person, including but not limited to a person who is a resident of a nursing home . . . or other residential facility.⁹⁵

Hypotheticals or actual cases involving elder abuse and neglect⁹⁶ can be used in many tort subjects. Physical or sexual abuse is civil battery. Negligence suits are obvious candidates. Misuse of the elder's funds may be attacked by litigation claiming conversion or fraud. Particularly useful civil tools exist for situations in which the abuser occupied a fiduciary status such as trustee, guardian, conservator, or power of attorney.⁹⁷ Because elder mistreatment is often a "family affair," doctrines of intrafamilial and interspousal tort immunities (where still present) are implicated.

Elder abuse and neglect cases are also an apt way to teach about the relationship between criminal statutes and negligence. An example is mandatory reporting statutes. Forty-four jurisdictions mandate that a wide variety of professionals⁹⁸ (e.g., physician, nurse, mental health professional, social worker, etc.)⁹⁹ report "known" or "suspected" cases of elder abuse to designated public authorities. These jurisdictions impose criminal sanctions

94. LA. REV. STAT. ANN. § 14:93.3 (West 1986 & Supp. 1999).

95. "'Caregiver' . . . includes but is not limited to . . . nursing homes." LA. REV. STAT. ANN. § 14:93.3(B).

96. See *supra* notes 9, 22-26 and accompanying text for examples.

97. See *infra* notes 162-68 and accompanying text.

98. See generally Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 165-73, 184-92 (1998).

99. See, e.g., ALA. CODE § 38-9-8(a) (1992 & Supp. 1996) (stating that "[a]ll physicians and other practitioners of the healing arts or any caregiver having reasonable cause to believe that any protected person has been subjected to physical abuse, neglect, exploitation, or sexual abuse shall report or cause a report to be made."); ARIZ. REV. STAT. ANN. § 46-454 (West 1998) (stating that "[a] physician, hospital intern or resident, surgeon, . . . psychologist, social worker, or any other person . . . who has a reasonable basis to believe that abuse or neglect of the adult has occurred . . . shall immediately report.").

for non-compliance.¹⁰⁰ Mandatory reporting is not conditioned on actual knowledge of maltreatment; instead, the statutory test is objective—whether a prudent professional would have “reason to believe” that mistreatment may be occurring if confronted with the totality of factual circumstances presented.¹⁰¹ Many studies report that these statutes are ignored.¹⁰² In a survey of direct service workers trying to discover or treat elder maltreatment, not one group of professionals achieved even a rating of “somewhat helpful.”¹⁰³ While the common law was traditionally reluctant to recognize affirmative duties like elder abuse reporting, “special relationships” require affirmative action, e.g., where one party had special means with which to prevent harm to the other, or their interaction surpasses that which is common or usual.¹⁰⁴

100. See, e.g., ARIZ. REV. STAT. ANN. § 46-454(J) (West 1997) (providing: “[a] person who violates any provision of this section is guilty of a class 1 misdemeanor.”); CAL. WELF. & INST. CODE § 15634(d) (West 1991 & Supp. 1996) (providing: “[a]ny person who fails to report an instance of elder or dependent adult abuse, as required by this article, is guilty of a misdemeanor.” See generally Moskowitz, *supra* note 98, at 184-91.

101. See, e.g., ALA. CODE § 38-9-8(a); ARIZ. REV. STAT. ANN. § 46-454; see also ALASKA STAT. § 47.24.010(a)(10) (Michie 1995) (providing: “The 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.”).

102. An Alabama study, conducted eleven years after the passage of that state’s mandatory reporting law, reported seventy-seven percent of doctors expressed doubt about the definition of abuse; over one-half reported they were not sure that Alabama had procedures for dealing with abuse, and sixty percent were uncertain of the procedure for reporting abuse cases. R. Stephen Daniels et al., *Physician’s Mandatory Reporting of Elder Abuse*, 29 GERONTOLOGIST 321, 325 (1989). In a more recent study in Michigan, of 17,238 cases of possible elder abuse reported to authorities during 1989-1993, physicians’ reports were only two percent of the total. See Dorrie E. Rosenblatt et al., *Reporting Mistreatment of Older Adults: The Role of Physicians*, 44 J. AM. GERIATRICS SOC’Y 65, 65-70 (1996). Many victims are treated at hospital emergency departments, but these physicians are often unsure even about the mechanisms for reporting. See Carolyn L. Clark-Daniels et al., *Abuse and Neglect of the Elderly: Are Emergency Department Personnel Aware of Mandatory Reporting Laws?*, 19 ANNALS OF EMERG. MED. 970, 970-77 (1990). Studies regarding the mistreatment of the aging rank physicians as the professionals most in need of training on elder abuse. 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).

103. 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).

104. See, e.g., *Figueroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1430-31 (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

Older persons who have been injured by repeated instances of maltreatment could sue professionals—emergency room doctors, nurses, social workers, etc.—who have failed to report the suspected elder abuse and neglect to the appropriate authorities. As a result of this failure to report, subsequent damage may ensue making malpractice liability possible. Lack of detection and intervention often results in additional injury because elder abuse, like spousal and child abuse, often follows cyclical patterns, with the victim being mistreated again—often more severely.¹⁰⁵ “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.”¹⁰⁶ Numerous protocols reflecting professional standards and other tools for assessing mistreatment are also available to doctors,¹⁰⁷ nurses,¹⁰⁸ social workers and caregivers,¹⁰⁹ health care workers,¹¹⁰ and law

that of a business invitor/invitee); *Iglesias v. Wells*, 441 N.E.2d 1017, 1021 (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); *Wernkli v. Greyhound Corp.*, 365 So. 2d 177, 178 (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). See also, e.g., *Thomas v. Williams*, 124 S.E.2d 409, 413 (Ga. Ct. App. 1962); *Maguire v. Hilton Hotels Corp.*, 899 P.2d 393, 399 (Haw. 1995) (finding that a genuine issue of material fact existed as to whether the attack of a cleaning employee was reasonably foreseeable); *J.A.W. v. Roberts*, 627 N.E.2d 802, 808–09, 813 (Ind. Ct. App. 1994); *Smith v. Miller*, 40 N.W.2d 597, 600 (Iowa 1950); *Farmer v. State*, 79 So. 2d 528, 531 (Miss. 1955); *Dunham v. Village of Canisteo*, 104 N.E.2d 872, 875 (N.Y. 1952).

105. American Medical Association, Council on Scientific Affairs, *Elder Abuse & Neglect*, 257 JAMA 967–68 (1987); HELEN O'MALLEY ET AL., *ELDER ABUSE IN MASSACHUSETTS: A SURVEY OF PROFESSIONALS AND PARAPROFESSIONALS* 10 (1979) (estimating that seventy percent of reported cases involved repeated instances of abuse).

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

107. See SARA C. ARAVANIS, AMERICAN MED. ASS'N, *DIAGNOSTIC AND TREATMENT GUIDELINES ON ELDER ABUSE AND NEGLECT* 7–19 (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); Mark S. Lachs & Terry Fulmer, *Recognizing Elder Abuse and Neglect*, 9 CLINICS IN GERIATRIC MED. 665, 667–81 (1993) (discussing need for written protocols and better training of staff).

108. See, e.g., Sue Haviland & James O'Brien, *Physical Abuse and Neglect of the Elderly: Assessment and Intervention*, 8 ORTHOPEDIC NURS. 11, 15–18 (1989); Jeanne Floyd, *Collecting Data on Abuse of the Elderly*, 10 J. GERONTOL. NURS. 11–15 (1987).

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

enforcement professionals¹¹¹ in order to establish the standard of care. Liability may be premised on theories successful in *Landeros v. Flood*¹¹² and *Tarasoff v. Regents of the University of California*,¹¹³ which recognize affirmative obligations imposed on professionals by common law or statute to protect patients, clients, or third parties. Because many victims of elder mistreatment are isolated, intervention—beginning with notification of public authorities—is the best opportunity to prevent future abuse.

Teaching the law of damages in introductory and advanced torts classes would also be enhanced by the introduction of cases involving aged persons. Mistreated elderly often find traditional legal remedies to be inadequate. Because of the slow pace of litigation, many of the frail elderly do not survive long enough for a lawsuit to come to judgment. In some states the death of the abused elder person cuts off recovery for pain, suffering, or disfigurement.¹¹⁴ Senior citizens will typically not have claims for lost earnings or diminution for earning capacity; similarly, medical or other special damages will be covered by Medicare or other insurance. Pain and suffering will thus be critical elements of these suits for abuse and neglect.

110. See, e.g., TERRY T. FULMER & TERRANCE A. O'MALLEY, *INADEQUATE CARE OF THE ELDERLY: A HEALTH CARE PERSPECTIVE ON ABUSE AND NEGLECT* (1987); Holly Ramsey-Klawnsnik, *Recognizing and Responding to Elder Maltreatment*, 12 J. LONG TERM HOME HEALTH CARE 12, 14–19 (1995).

111. See, e.g., R. NASH, *ELDER ABUSE: INFORMATION FOR LAW ENFORCEMENT OFFICERS* (Illinois Dep't of Aging, Chicago, 1986).

112. 551 P.2d 389, 393–98 (Cal. 1976) (holding a physician liable for child's subsequent injuries where statute required reporting of suspicious injuries, the physician failed to do so, and subsequent damage ensued).

113. 551 P.2d 334, 340 (Cal. 1976) (holding that 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).

114. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 126, at 942–43 (5th ed. 1984) (stating that “[t]he 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.”); CAL. CIV. PROC. CODE § 377.34 (West 1998) (providing “In an action or proceeding by a decedent's personal representative . . . the damages recoverable . . . do not include damages for pain, suffering, or disfigurement.”).

Several states have become "laboratories" in which experiments fashioning novel remedies are being conducted.¹¹⁵ In 1992, California enacted a new statute, the Elder Abuse & Dependent Adult Civil Protection Act ("the Act").¹¹⁶ The legislative intent, clearly stated, is to enable abused and 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, new remedies are created. These include postmortem recovery for pain and suffering and mandatory attorneys' fees and costs.¹¹⁷ The Act also allows fees for the services of a conservator litigating an elder's claim and continuation of a pending action by the elder's personal representative or successor.¹¹⁸

In *Delaney v. Baker*,¹¹⁹ a deceased nursing home resident's daughter utilized this statute to sue for her mother's injuries which occurred in a skilled nursing facility.¹²⁰ The mother entered a nursing home after suffering a fractured ankle.¹²¹ Less than four months later, she died as a result of increasingly serious bed sores.¹²² The daughter sought relief for negligence and reckless neglect of an elder under the state Elder Abuse Act, and for wrongful death.¹²³ The plaintiff succeeded on her negligence and statutory neglect of an elder theories, and was awarded special damages for her mother's pain and suffering, medical expenses, and attorneys' fees and costs.¹²⁴ Similarly, in *In re Guardianship/Conservatorship of Denton*,¹²⁵ the Supreme Court of Arizona

115. "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 Comp. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

116. CAL. WELF. & INST. CODE §§ 15600-15657.3 (West Supp. 2001) (beginning with legislative findings and explaining that the infirm elderly and dependent adults are a "disadvantaged class," and "few civil cases are brought in connection with [their] abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits."). CAL. WELF. & INST. CODE § 15600(h).

117. *Id.* § 15657(a).

118. *Id.* § 15657.3(d).

119. 971 P.2d 986 (Cal. 1999).

120. *Id.* at 988.

121. *Id.*

122. *Id.*

123. *Id.* at 989.

124. *Delaney*, 971 P.2d at 998.

125. 945 P.2d 1283 (Ariz. 1997) (en banc).

held that the Arizona abuse statute provides victims and/or their representatives the right to recover damages for pain and suffering even after the victim's death.¹²⁶ The suit was against an assisted living facility.¹²⁷ This right is not limited by Arizona's survival statute, which prevents recovery of pain and suffering damages after an injured person's death.¹²⁸

Louisiana and other states have legislatively crafted civil causes of action for violation of the statutory "Bill of Rights" for residents of institutions.¹²⁹ These rights ensure that the elderly are provided with adequate and appropriate health care, protection, and support services,¹³⁰ and are free from mental and physical abuse.¹³¹ The statute is based on legislative findings that persons residing within nursing homes are isolated from the community, often lack the means to assert their rights as individual citizens, and need to live within the least restrictive environment possible in order to retain their individuality, personal freedom and self-determination.¹³² These rights complement rather than substitute for other survey and inspection programs regarding nursing homes.¹³³

According to the statute, a resident whose rights are deprived or infringed may assert a cause of action against any nursing home or health care facility responsible for the violation.¹³⁴ The suit may be brought by the resident or his conservator to enforce rights and to recover actual damages.¹³⁵ A prevailing plaintiff is entitled to recover reasonable attorney's fees, costs of the action, and damages.¹³⁶

126. *Id.* at 1286.

127. *Denton*, 945 P.2d at 1284.

128. ARIZ. REV. STAT. ANN. § 14-3110 (West 1997) (providing: "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.").

129. LA. REV. STAT. ANN. § 40:2010.8(A)-(E) (West 1992 & Supp. 1998); FLA. STAT. ANN. §§ 400.011-400.335 (West 1998 & Supp. 1999).

130. LA. REV. STAT. ANN. § 40:2010.8(A)(7).

131. *Id.* § 40:2010.8(A)(10).

132. *Id.* § 40:2010.6 (West 1992).

133. *Id.* § 40:2010.9(A), (B) (West 1992).

134. *Id.* § 40:2010.9(A).

135. LA. REV. STAT. ANN. § 40:2010.9(A).

136. *Id.*

C. Administrative/Health/Consumer Law

Materials in administrative, health, and consumer law courses may be used to focus attention on how these subject areas can be employed to study and halt elder mistreatment. Regulation of nursing homes and of telemarketing fraud are illustrative.

1. Nursing Homes and Assisted Living Facilities

At least five percent of the elder population suffers from some type of institutional abuse.¹³⁷ One study revealed that approximately forty percent of nursing homes have violated federal standards on more than one occasion.¹³⁸ Nearly half of these nursing homes engaged in practices that failed to respect the rights of their residents, while almost twenty-five percent have allowed potentially life-threatening bedsores to develop.¹³⁹ Congressional reports indicate that the percentage of serious violations within nursing homes has remained unchanged since 1995.¹⁴⁰ The General Accounting Office, Congress' investigative arm, has determined that government inspections and fines, in their current form, do little to combat institutional abuse and neglect.¹⁴¹ In addition to the 1.8 million Americans living in nursing homes, large numbers lived in licensed assisted living or board-and-care facilities.¹⁴²

Administrative enforcement of nursing home regulations has traditionally been lax, but presents pedagogic opportunities. Students can be challenged to think about more effective regulatory strategies. The purposes behind enforcement may be highlighted in readings and class discussion; is change or punishment the ap-

137. Seymour Moskowitz, *New Remedies for Elder Abuse and Neglect*, 12 PROB. & PROP. 52, 53 (1998) (citing HOUSE SELECT COMM. ON AGING, 101ST CONG., ELDER ABUSE, A DECADE OF SHAME AND INACTION (1990)).

138. Clifford E. Cardone, *Battling Nursing Home Neglect: Finding the Right Legal Pieces*, 44 LA. B.J. 508, 509 (1997) (citing *Nursing Homes: When a Loved One Needs Care*, CONSUMER REP., Aug. 1995, at 8).

139. *Id.*

140. *News, Nursing Homes*, USA TODAY, Mar. 10, 1999, at 7A. A serious violation is one which places a resident at risk of death or serious bodily injury. *Id.*

141. *Id.*

142. Robert L. Mollica, NATIONAL ACADEMY FOR STATE HEALTH POLICY, STATE ASSISTED LIVING POLICY: 1998 (June 1998).

appropriate administrative goal in these situations?¹⁴³ If a facility is cited but then corrects a deficiency, should it still be penalized for that violation? A related problem is that suspension of the nursing home's license may result in more negative consequences than allowing the facility to continue to operate.¹⁴⁴ All this presents general administrative and health law problems in a meaningful and understandable context for students.

2. Telemarketing Fraud

In addition to coverage in criminal law,¹⁴⁵ telemarketing fraud is a useful teaching device in administrative or consumer law courses. The Federal Trade Commission ("FTC") is statutorily empowered to use a broad array of enforcement mechanisms to combat unfair and deceptive trade practices that affect commerce, including telemarketing.¹⁴⁶ Additionally, the 1999 Telemarketing Act grants the FTC the primary role in establishing guidelines and regulations for the telemarketing industry.

143. One study concludes that the nursing home regulatory system relies extensively on correction and voluntary compliance rather than punishment. John Braithwaite, *The Nursing Home Industry*, 18 CRIME & JUST. 11, 29 (1993). Correction may be cheaper to the facility than contesting the citation, especially where agencies lack the capacity to effectively follow up on promised corrections. *Id.* at 31. In addition, the study reports that nursing home chains sometimes simply shift staff from one institution to another and back again to temporarily respond to cited deficiencies in individual facilities within the chain. Braithwaite, *supra* note 143, at 32.

144. When state and federal government had only license revocation or suspension as penalties, agencies frequently faced this difficulty. In 1987, OBRA provided for "intermediate sanctions," i.e., penalties that are less severe than revocation or suspension of license, for the enforcement of Medicare and Medicaid standards. The federal sanctions now include civil money penalties (not to exceed \$10,000 per day of violation), appointment of temporary management to oversee administration of the facility and to assure the health and safety of the residents, and denial of payment for residents currently residing in the facility or those admitted after the effective date of the finding of the violation. 42 U.S.C. § 1396(r)(h)(2) (1994) (establishing specific remedies for noncompliance). See generally Sandra H. Johnson, *State Regulation of Long Term Care: A Decade of Experience with Intermediate Sanctions*, 13 LAW, MED. & HEALTH CARE 173 (1985); See also, e.g., 42 U.S.C. § 1395(bbb)(f) (1994) (establishing intermediate sanctions for noncompliance); 42 U.S.C. § 263(a)(h) (1994) (establishing sanctions for laboratories found not in compliance); 42 U.S.C. § 1395w-2 (1994) (providing for intermediate sanctions for providers of laboratory testing); 42 U.S.C. § 1395(cc)(I) (1994) (establishing requirements for healthcare providers); 42 U.S.C. § 1396(a) (1994) (providing specific requirements for state sponsored health agencies).

145. See *supra* notes 68-84 and accompanying text.

146. 15 U.S.C. § 6101-6108 (1994).

The FTC has responded by promulgating its Sales Rules, a body of agency regulations worthy of study in a number of law courses. The Sales Rules control how telemarketers conduct business generally. They specifically govern telephone sales practices,¹⁴⁷ including abusive sales tactics,¹⁴⁸ the requirement that telemarketers must accurately convey the value of a prize or investment,¹⁴⁹ and a limitation on when a telemarketer may call customers.¹⁵⁰ The Sales Rules also require telemarketers to make disclosures, including the true odds of winning a prize,¹⁵¹ the total costs involved,¹⁵² and the telemarketer's cancellation policy.¹⁵³ Individuals or companies that violate the Sales Rules are subject to civil penalties of up to ten thousand dollars per violation, as well as providing full restitution to the victim.¹⁵⁴

A major issue in administrative law courses is the availability of remedies to agencies.¹⁵⁵ The FTC, for example, has the power to seek injunctive relief, to freeze a telemarketer's assets, to appoint a receiver, to seek orders of restitution, and to seek permanent bans barring telemarketing.¹⁵⁶ In instances where a telemarketer disobeys an FTC-obtained court order, the agency may seek contempt penalties against the telemarketer.¹⁵⁷

The telemarketing statutes provide the instructor with opportunities to present the complex interactions between legislative enactment and agency practice, public versus private enforcement strategies, and the need for new legislation, in this instance, to deal with the ever-changing practices of illegal market-

147. For the complete requirements, see the Telemarketing Sales Rules at 16 C.F.R. § 310 (1995).

148. 16 C.F.R. § 310.4.

149. *Id.* § 310.3(a)(2)(v).

150. *Id.* § 310.4(c).

151. *Id.* § 310.3(a)(1)(iv).

152. *Id.* § 310.3(a)(1)(i).

153. 16 C.F.R. § 310.3(a)(1)(iii).

154. 15 U.S.C. § 45(1)(1994).

155. *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW 147-75 (1994).

156. *See* 15 U.S.C. § 6103(a) (1994). *See also* 15 U.S.C. § 45 (1994). The examples are for illustrative purposes only and do not represent the full range of enforcement tools available to the FTC.

157. 15 U.S.C. § 6107(a) (1994).

ing to the elderly.¹⁵⁸ All of these are basic themes of administrative law courses. The Telemarketing Act requires the FTC to conduct a comprehensive evaluation of the Act's effectiveness five years after the adoption of the Sales Rules and then recommend possible modifications.¹⁵⁹ The proposed Senior Safety Act ("SSA") is touted by its proponents as a comprehensive legislation solution to the problems facing elderly Americans and may be used for analysis of legislative problem solving efforts.¹⁶⁰

3. Professional License Sanctions

A third connection between elder abuse and neglect and administrative agencies is licensure, typically studied in administrative and health law courses. All professionals, as a condition of practice, are subject to disciplinary control by a legislatively designated agency or board.¹⁶¹ Because health care and other professionals are usually in the best position to discover and treat elder abuse, the threat of licensure sanctions may provide the best

158. See, e.g., PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW: CASES & COMMENTS, 43-46, 67-116, 138-171, 191-225 (9th ed. 1995).

159. See 15 U.S.C. § 6108 (1994).

160. Seniors Safety Act of 1999, S. 751, 106th Cong. (1999); see also 145 CONG. REC. S3457-501 (daily ed. May 19, 1999) (statement of Sen. Patrick Leahy (D-Vt.)). The SSA would create additional protections for Americans over the age of fifty-five in areas such as health-care fraud, nursing home care, and elder abuse. *Id.*

161. Licensure of professionals in the United States was first upheld in *Dent v. West Virginia*, 129 U.S. 114, 124-25 (1889), which addressed the constitutionality of the West Virginia Medical Practice Act. *Id.* By 1930 all states had some form of mandatory medical licensure. See generally ROBERT C. DERBYSHIRE, MEDICAL LICENSURE AND DISCIPLINE IN THE UNITED STATES (1969) (discussing the history of medical licensing in the United States). 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 fifty states. NEIL WEISFELD, LICENSURE OF PRIMARY CARE PRACTITIONERS, A MANPOWER POLICY FOR PRIMARY HEALTH CARE, INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES 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).

means to encourage reporting.¹⁶² Professionals may insure against damages for malpractice liability, but suspension or revocation of their licenses directly threatens their livelihood as well as their standing in the community and in their profession. Statutes which enumerate the grounds for licensure discipline of a professional can be applied to the failure to report elder abuse or neglect.¹⁶³ Some states require licensure boards to be notified of professionals convicted of failure to report elder abuse.¹⁶⁴ Even without a specific provision, other statutes may be used as the basis for discipline.¹⁶⁵ These provisions may prove effective administrative remedies for the lack of reporting.

162. See, e.g., *In re Schroeder*, 415 N.W.2d 436, 441-42 (Minn. Ct. App. 1988) (upholding the finding that the failure of a mental health professional to file a mandatory report of suspected child abuse was a sufficient basis for licensure sanction).

163. The District of Columbia Code, for example, 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] . . . 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.

D.C. CODE ANN. § 6-2512(5) (1997). 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. DEL. CODE ANN. tit. 16, § 1137 (1996).

164. See, e.g., ALASKA STAT. § 47.24.010(c) (Michie 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." *Id.*

165. Physicians may serve as an illustrative 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. See, e.g., R.I. GEN. LAWS § 5-37-6.3 (1999).

The term "unprofessional conduct" as used in this chapter includes, but not be limited to, the following items or any combination of these items and may be further defined by regulations established by the board with the prior approval of the director:

(9) Willfully omitting 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 (1996); MD. CODE ANN., HEALTH OCC. § 14-404 (2000); VT. STAT. ANN. tit. 26, § 1354 (1996); W. VA. CODE § 30-14-11 (1998 & Supp. 2000).

D. Professional Responsibility

Every accredited law school is required to offer a course on professional responsibility.¹⁶⁶ Presentation of issues created by representation of the elderly will enrich the professional responsibility course immeasurably. Particularly complex ethical issues emerge in serving aged clients, especially if there is any evidence of elder mistreatment. The following discussion highlights only a few of these concerns.¹⁶⁷

A common practice scenario for many lawyers is contact initiated by an aged person's son, daughter, or other relative. These family members are frequently involved in advising, assisting, and even directing financial and practical arrangements for care of the aged relative. At the interview, the elderly person is typically accompanied by one or more younger family members who provides the documentation or information the attorney needs about the senior citizen or his property. There may be a conflict of interest between the child and parent. If, of course, a conflict is evident initially, the attorney must quickly decide who the client is and explain completely and openly to all family members the limits this will impose.

An attorney also has the duty to maintain complete confidentiality regarding all client disclosures.¹⁶⁸ This is a standard topic in professional responsibility courses. Maintaining confidentiality is complicated in suspected mistreatment or financial exploitation situations. The client may be waiving that confidentiality if he permits his child or another family member to be present during the interview, read mail from or to the attorney, or in some other way reveals communications between the attorney and the client

166. AMERICAN BAR ASS'N, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS 302(a)(iv) (1993). The Standards mandate that accredited law schools:

require of all candidates . . . instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure, and responsibilities of the legal profession and its members, including the ABA Model Rules of Professional Conduct, are all covered.

Id.

167. Professors Frolik and Barnes devote considerable space to some of these issues in their casebook. See LAWRENCE A. FROLIK & ALISON P. BARNES, ELDERLAW: CASES & MATERIALS 60-88 (2d ed. 1999).

168. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (1998).

to a third party. Where power imbalances exist, the attorney may be required to take affirmative action to protect confidentiality.

If the family member, typically a child, is paying his parent's attorneys' fees, that must be disclosed and appropriate consent obtained.¹⁶⁹ The duty of loyalty is impaired if the attorney gives priority to another's interests, such as those of the payer of the fee, over the client's interest. Students can readily understand the professional and interpersonal strains created by this type of financial arrangement and be prompted to think about methods of coping with them.

A particularly sensitive matter for practitioners is assessment of the capacity of the elderly client to make decisions. What obligation does an attorney have to independently authenticate facts presented by family members or the client? Often a decision about whether to seek guardianship may be the event that brings family members to the lawyer's office. The degree of mental impairment required in order to predict an individual's need for assistance is a difficult determination for most lawyers;¹⁷⁰ legal capacity varies according to the decision to be made.¹⁷¹

The vulnerability of suspected victims of abuse or neglect presents a unique problem. They may have difficulty making or articulating their decisions. Victims are often reluctant to have

169. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10. "A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client." *Id.* See also *id.* R. 1.8(f)(1) (1998) (providing that the attorney must consult with the client before accepting compensation from someone other than the client).

170. The following standard was proposed by THE PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTHCARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATION OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 57-62 (1982) [hereinafter PRESIDENT'S COMMISSION]. "Decisionmaking capacity requires, to a lesser or greater degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices." An emotional state consistent with the task is also required. PRESIDENT'S COMMISSION, *supra*, at 57-58.

171. Generally, the level of understanding required varies according to the weight of the consequences of the decision. A low degree of understanding is required to make a contract in which the subject matter and value are trivial. A higher degree is needed for the testamentary disposition of a person's assets. See generally Jan E. Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1164-68 (1994).

these issues made public because of fear, embarrassment, or lack of alternatives to family care and housing. The lawyer may be tempted to make the decision for the client; autonomy may conflict with practical issues of personal safety, financial security, a place to live, etc.

There are particularly useful legal remedies available when the abuser occupies a fiduciary status¹⁷² such as trustee, guardian, conservator, or power of attorney. 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 adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary.¹⁷³

Attorneys who participate in misconduct may have licensure sanctions imposed on them.¹⁷⁴ The fiduciary may be forced to provide an accounting of the money and property that have been ex-

172. 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." *People v. Riggins*, 132 N.E.2d 519, 522 (Ill. 1956) (citing *Wharton v. Meyers*, 21 N.E.2d 772, 775-76 (Ill. 1939)). See generally JONATHAN FEDERMAN & MEG REED, GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL, ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM (1994).

173. *Morales v. Field, DeGoff, Huppert & MacGowan*, 160 Cal. Rptr. 239, 244 (Cal. Ct. App. 1979) (citations omitted). See also *Weingarten v. Warren*, 753 F. Supp. 491, 496 (S.D.N.Y. 1990) (stating that "[b]y alleging that 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"); *In re Estate of Halas*, 512 N.E.2d 1276, 1280 (Ill. App. Ct. 1987) (holding that the attorney for the trustee owed both a fiduciary duty directly to the beneficiaries, but also a "derivative fiduciary duty"); *Fickett v. Superior Court*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) (stating that "when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship notably with the guardian but also with the ward").

174. See, e.g., *In re Smith*, 572 N.E.2d 1280, 1290 (Ind. 1991) (upholding suspension from practice of two attorneys who drafted instruments used in fraudulent transactions).

pended in order to determine whether improprieties have occurred. Numerous states have also provided statutory remedies for abuse by fiduciaries.¹⁷⁵

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.¹⁷⁶ Where 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.¹⁷⁷ If funds or property were expended

175. See, e.g., ARIZ. REV. STAT. ANN. § 46-454(G) (West 1997) (stating that "if any person is found to be responsible for 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"). See also FLA. STAT. ANN. § 415.102 (7)(a)(2) (West Supp. 2001) (providing that an action is available against a person who "[k]nows or should know [action will] . . . deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult"); OR. REV. STAT. § 124.110(1)(a) (Supp. 1998).

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.

OR. REV. STAT. § 124.110(1)(a).

176. See, e.g., *Estate of Campbell*, 704 A.2d 329, 332 (Me. 1997) (holding that a constructive trust may be imposed to do equity, prevent unjust enrichment when title to property is acquired by fraud, or when property is acquired in violation of a fiduciary duty); *Stauffer v. Stauffer*, 351 A.2d 236, 241 (Pa. 1976) (reasoning that constructive trust, unlike an express trust, is shaped by the conscience of equity, and is a remedy created to prevent unjust enrichment).

177. RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (1996) (stating that "[d]espite 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 "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.") (citations omitted).

for something other than the elder's best interest, traditional common law remedies may be employed to recover the assets.¹⁷⁸

E. Family Law

1. Family Violence

All family law casebooks now deal with family/domestic abuse,¹⁷⁹ which is generally perceived as violence by intimate partners, and almost invariably perpetrated by non-elderly men. This subject is vast and includes issues of cause and effect,¹⁸⁰ the response of the criminal justice system,¹⁸¹ confidentiality,¹⁸² effect upon young children,¹⁸³ evidentiary issues,¹⁸⁴ etc. Child abuse and neglect likewise receive extensive coverage.¹⁸⁵ In all of these casebooks—and presumably the courses that use them—elder abuse and neglect is entirely ignored or given passing mention. Indeed, a recently published 891 page casebook, focusing exclusively on Domestic Violence Law, fails to address or even mention mistreatment of the aged.¹⁸⁶ The prevalence of elder abuse and neglect and its effect upon victims strongly indicates a need for the topic's inclusion in conjunction with other aspects of family violence.¹⁸⁷

The drastic effects of mistreatment on an older victim's physical condition are particularly disturbing; for example, data

178. 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).

179. See sources cited *supra* note 2.

180. See, e.g., LENORE WALKER, *THE PSYCHOSOCIAL THEORY OF LEARNED HELPLESSNESS, THE BATTERED WOMAN* (1979).

181. See, e.g., Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992); Donna Wills, *Mandatory Prosecution in Domestic Violence Cases: Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (1997).

182. See, e.g., Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273 (1995).

183. See, e.g., Stephen Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50 JUV. & FAM. CT. J. 1 (1999).

184. See, e.g., Heather F. Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89 (1997).

185. See sources cited *supra* notes 2-3.

186. NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* (2000).

187. See *supra* notes 9, 20-25 and Parts IV-V of this article.

from an annual health survey of 2,812 elders in one United States city were compared against reports of elder abuse and neglect made to the local adult abuse agency over a nine year period.¹⁸⁸ The mortality rates of the non-abused and abused were tracked.¹⁸⁹ By the thirteenth year following the initiation of the study, forty percent of the non-abused, non-neglected group were still alive.¹⁹⁰ Only nine percent of the physically abused or neglected elders were still living.¹⁹¹ Mistreatment may cause such extreme interpersonal stress that it confers an additional risk of death.¹⁹²

2. Familial Support Duties

Many senior citizens are abjectly poor.¹⁹³ Moreover, neglect of basic caretaking functions is an ever-present reality for millions of American's elderly. In domestic settings, neglect is the most common form of maltreatment reported and substantiated.¹⁹⁴

Support obligations are always taught in family law, but invariably focus on spousal and child support.¹⁹⁵ The importance of these economic obligations fully justifies the space and time that family law casebooks and courses provide. On the other hand, filial responsibility laws, which impose a duty of financial support upon adult children for their indigent elderly parents, are rarely mentioned.¹⁹⁶ This topic is another link between the aged and family law.

188. Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428, 428-32 (1998).

189. *Id.*

190. *Id.*

191. *Id.*

192. Lachs, *supra* note 188, at 428-32.

193. Seventeen percent of Americans over the age of sixty-five were defined as "poor or near poor" in 1998 as defined by the United States government. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON AGING, *Profile of Older Americans: 1999* (1999), at <http://www.aoa.dhhs.gov/aoa/stats/profile/default.htm#older> (last visited Nov. 8, 2000).

194. See NAT'L CENTER ON ELDER ABUSE, SUMMARIES OF THE STATISTICAL DATA ON ELDER ABUSE IN DOMESTIC SETTINGS: AN EXPLORATORY STUDY OF STATE STATISTICS FOR FY 93 AND FY 94, at V (1996).

195. See sources cited *supra* note 2.

196. Almost all family law case books ignore this topic; only two include it, both briefly. See KRAUSE, *supra* note 2, at 852-55 (i.e., 3 pages); HARRIS, *supra* note 2, at 606-15 (i.e., 9 pages).

Filial responsibility laws raise interpretation and practice issues which are similar to, but distinct from, child and special support issues.

Thirty states currently have filial responsibility laws;¹⁹⁷ twenty-two are civil statutes. In some states, the obligation to support indigent elderly relatives is even extended to adult grandchildren.¹⁹⁸ Often statutes and case law provide a right of contribution from other relatives where one child has been required to support the parent.¹⁹⁹ Twelve states make failure to provide financial support for an indigent parent a criminal offense. As in the civil liability statutes, a defense is explicitly provided by many

197. ALASKA STAT. §§ 25.20.030, 47.25.230 (Michie 1998); ARK. CODE ANN. § 20-47-106 (Michie 1991); CAL. FAM. CODE §§ 4400, 4401 (West 1994); CAL. FAM. CODE §§ 4403, 4410-4414 (West 1994); CAL. PENAL CODE § 270(c) (West 1999); CAL. WELF. & INST. CODE § 12350 (West 1991 & Supp. 2000); CONN. GEN. STAT. ANN. § 46b-215 (West 1995 & Supp. 2000); CONN. GEN. STAT. ANN. § 53-304 (West 1994 & Supp. 2000); DEL. CODE ANN. tit. 13, § 503 (1999); GA. CODE ANN. § 36-12-3 (1993); IDAHO CODE § 32-1002 (Michie 1996); IND. CODE ANN. §§ 31-16-17-1 to 31-16-17-7 (West 1999 & Supp. 2000); IND. CODE ANN. § 35-46-1-7 (West 1998) (enacted in 1921); IOWA CODE ANN. § 252.1 (West 1994); IOWA CODE ANN. §§ 252.2, 252.5, 252.6, 252.13 (West 1994); KY. REV. STAT. ANN. § 530.050 (Banks-Baldwin 1999); LA. REV. STAT. ANN. § 4731 (West 1991); MD. CODE ANN. FAM. LAW § 13-101 (1999); MD. CODE ANN. FAM. LAW §§ 13-102, 13-103, 13-109 (1999); MASS. GEN. LAWS ANN. Ch. 273, § 20 (West 1990); MISS. CODE ANN. § 43-31-25 (1993); MONT. CODE ANN. § 40-6-214 (1999); MONT. CODE ANN. § 40-6-301 (1999); NEV. REV. STAT. ANN. § 428.070 (Michie 2000); NEV. REV. STAT. ANN. § 439B.310 (Michie 1996 & Supp. 1999) (defining "indigent parent"); N.H. REV. STAT. ANN. § 167:2 (1994 & Supp. 1999); N.J. STAT. ANN. §§ 44:4-100 to 44:4-102 (West 1993); *see also* N.J. STAT. ANN. §§ 44:1-139 to 44:1-141 (West 1993); N.C. GEN. STAT. § 14-326.1 (1999); N.D. CENT. CODE § 14-09-10 (1997); OHIO REV. CODE ANN. § 2919.21 (West 1997 & Supp. 1999); OR. REV. STAT. § 109.010 (1990); PA. STAT. ANN. tit. 62, § 1973 (West 1996); R.I. GEN. LAWS §§ 15-10-1, 15-10-2, 15-10-4, 15-10-5 (1996); R.I. GEN. LAWS §§ 15-10-3, 15-10-6 (1996); R.I. GEN. LAWS § 15-10-7 (1996); R.I. GEN. LAWS §§ 40-5-13 to 40-5-18 (1997); S.D. CODIFIED LAWS § 5-7-27 (Michie 1999 & Supp. 2000); S.D. CODIFIED LAWS §§ 25-7-28, 25-7-29 (Michie 1999); S.D. CODIFIED LAWS § 28-13-1.1 (Michie 1999) (defining indigent or poor person); TENN. CODE ANN. § 71-5-115 (1995); TENN. CODE ANN. § 71-5-103 (1995 & Supp. 1999); UTAH CODE ANN. § 17-14-2 (1999); VT. STAT. ANN. tit. 15, §§ 202-203 (1989); VA. CODE ANN. § 20-88 (Michie 1995); W. VA. CODE § 9-5-9 (1998).

198. ALASKA STAT. § 47.25.230 (Michie 1998); ARK. CODE ANN. § 20-47-106 (Michie 1991); IOWA CODE ANN. § 252.5 (West 1994); LA. REV. STAT. ANN. § 4731 (West 1991); UTAH CODE ANN. § 17-14-2 (1999).

199. *Gluckman v. Gaines*, 71 Cal. Rptr. 795, 797 (Cal. Ct. App. 1968) (noting that the obligations imposed on children to support a needy parent is imposed on children collectively, and children must support the parent in proportion to their abilities); *accord Wyman v. Passmore*, 125 N.W. 213, 213-14 (Iowa 1910); S.D. CODIFIED LAWS § 27-7-28 (Michie 1999).

states for children who were not supported by their parents during their minority²⁰⁰ or who are unable to provide the support.²⁰¹

Family law teachers in states with such laws may use their own or another state's filial responsibility statute to raise questions of statutory interpretation and public policy. Who has standing to enforce these statutes? If aid is provided by one child, does he/she have a right of contribution from other relatives? Forcing or enabling financial support for indigent elderly parents from adult children saves public dollars which may be redeployed to education, libraries, recreation, or similar services. But is legal coercion necessary to require families to support their older relatives and what are the long term (including psychological and emotional) costs of legal intervention? Moreover, can a court decree create ongoing social and financial relationships within families? Litigation as a means of solving personal family problems is a particularly blunt instrument when continuing relationships or processes are involved. Discrete transactions between strangers are appropriate for winner-takes-all litigation, as Joel Handler has perceptively pointed out, but long term relations require cooperation and compromise.²⁰²

F. Elder Law

Some law schools have courses focusing on the legal problems of the elderly. These courses typically present an overview of materials and practice issues relating to aging individuals and society. Examples include social security, private pensions, issues

200. See, e.g., IND. CODE ANN. § 35-46-1-7(b) (West 1998) (providing that "[i]t is a defense that the accused person had not been supported by the parent during the time he was a dependent child under eighteen"); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 1990); OHIO REV. CODE ANN. § 2919.21(E) (West 1997 & Supp. 1999); R.I. GEN. LAWS § 15-10-1 (1996); VA. CODE ANN. § 20-88 (Michie 1995).

201. See, e.g., CAL. PENAL CODE § 270(c) (West 1999) (providing that "every adult child who, having the ability so to do fails to provide necessary food, clothing, shelter, or medical attendance for an indigent parent, is guilty of a misdemeanor"); CONN. GEN. STAT. ANN. § 53-304 (West 1994 & Supp. 2000); IND. CODE ANN. § 35-46-1-7(c) (West 1998); KY. REV. STAT. ANN. § 530.050 (Banks-Baldwin 1999); MD. CODE ANN. FAM. LAW § 13-109 (1999); MONT. CODE ANN. § 40-6-301(1) (1999); N.C. GEN. STAT. § 14-326.1 (1999); OHIO REV. CODE ANN. § 2919.21(D) (West 1997 & Supp. 1999); VT. STAT. ANN. tit. 15, § 202 (1989); VA. CODE ANN. § 20-88 (Michie 1995).

202. See generally Joel F. Handler, *Community Care for the Frail Elderly: A Theory of Empowerment*, 50 OHIO ST. L.J. 541 (1989).

of long term care, and housing. Inclusion of elder abuse and neglect in these specialized courses requires no further discussion at this point. Both elder law casebooks currently in print have cases and materials on the topic.²⁰³

G. Clinical Programs

Approximately fourteen law schools have clinical programs that specialize in elder law.²⁰⁴ Eight law schools have general practice clinics that represent aged clients when they appear in the caseload.²⁰⁵ All of these programs should routinely screen clients for mistreatment issues. Relief may include bringing some of the civil cases discussed above (including protective orders) as well as assistance and pressure to make the criminal justice process reflect the needs of the aged. These clinical programs add needed services to their communities while simultaneously enhancing students' skills and education.

VI. CONCLUSION

Persons over sixty-five years old are the fastest growing segment of our population. The legal profession has a unique role to play in meeting their needs and law schools must ensure that students attain an adequate understanding of the legal problems of the aged. Elder abuse and neglect can and should be incorporated to the law school curriculum as an integral part of legal education. Issues of mistreatment of the aged arise in numerous areas of practice. A variety of courses would be enriched by the addition of cases and materials dealing with this subject. Teaching this body of law will enhance the substantive knowledge and professional skills of our students.

203. FROLIK & BARNES, *supra* note 167, at 633-94; THOMAS P. GALLANIS ET AL., *ELDER LAW: READINGS, CASES AND MATERIALS* 280-320 (2000).

204. Kate Mewhinney, *Survey of Elder Law Clinics*, presented at the National Aging and the Law Conference (Oct. 6, 2000).

205. *Id.*