

Book Review: Elder Mistreatment: Abuse, Neglect, and Exploitation in An Aging America

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REVIEW OF: NATIONAL RESEARCH COUNCIL, ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA. Washington, DC: National Academies Press (2003), 552 pages, \$ 57.95 (hard cover).

Reviewed by **Marshall B. Kapp***

INTRODUCTION

Within the last several decades, health care, human services, and legal professionals in the United States involved in serving older persons have discovered what is generally described as the widespread¹ social phenomenon of elder mistreatment.² Other terms that have been applied to this phenomenon include granny battering or bashing, battered elder syndrome, elder maltreatment, old age abuse, and miscare. Elder mistreatment may be inflicted through a wide variety of acts (abuse or exploitation) or omissions (neglect) on the part of others,³ and it may occur in institutional⁴ or community-based locations (including home). It may arise from varied etiologies representing a panoply of risk factors.⁵ As used in the recent report of the National Research Council

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1. NATIONAL CENTER ON ELDER ABUSE, NATIONAL ELDER ABUSE INCIDENCE STUDY: FINAL REPORT (1998), summaries available at http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse.asp (last visited Sept. 16, 2003).

2. Rosalie S. Wolf, *The Nature and Scope of Elder Abuse*, XXIV GENERATIONS 6 (Summer 2000).

3. Terry Fulmer, Gregory Paveza, & Lisa Guadagno, *Elder Abuse and Neglect: Policy Issues for Two Very Different Problems*, 12 PUBLIC POLICY & AGING REPORT 15 (Winter 2002).

4. George S. Ingalls, Linda T. Layton, & Nomiki B. Weitzel, *Elder Abuse Originating in the Institutional Setting*, 74 N.D. L. REV. 313 (1998). See also Kevin B. Dreher, *Enforcement of Standards of Care in the Long-Term Care Industry: How Far Have We Come and Where Do We Go From Here?* 10 ELDER L.J. 119 (2002).

5. Sana Loue, *Elder Abuse and Neglect in Medicine and Law: The Need for Reform*, 22 J. LEGAL MED. 159 (2001). See also Holly Ramsey-Klawnsnik, *Elder Abuse Offenders: A Typology*, XXIV GENERATIONS 17 (Summer 2002). See also Laurence G. Branch, *The Epi-*

(NRC), which is reviewed in this essay, "elder mistreatment":

[R]efers to (a) intentional actions that cause harm or create a serious risk of harm (whether or not harm is intended) to a vulnerable elder by a caregiver or other person who stands in a trusted relationship to the elder or (b) failure by a caregiver to satisfy the elder's basic needs or to protect the elder from harm. The term "mistreatment" is meant to exclude cases of so-called self-neglect—failure of an older person to satisfy his or her own basic needs and to protect him or herself from harm—and also cases involving victimization of elders by strangers.⁶

Concerned gerontological professionals in academic, social service, legal, and public policy settings have spawned an enormous literature on this subject.⁷ They also have sought to share with government officials their concern about this problem and have organized⁸ to lobby legislators into vigorous lawmaking action, for instance, through the Older Americans Act (OAA).⁹

Congressmen and Senators have garnered favorable media fanfare for years by publicly, repeatedly investigating the problem.¹⁰ A bipartisan Elder Justice Act was introduced in Congress in late 2002¹¹ and reintroduced in February, 2003.¹² Proceeding on the theory that, where there exists any social problem, massive government involvement must be the best (and usually the only desirable) solution, this 138-page bill would establish new, dual Offices of Elder Justice at the federal Departments of Justice (DOJ) and Health and Human Services (DHHS) to coordinate federal, state, and local elder mistreatment prevention efforts, while also housing policy experts and coordinating programs to

demology of Elder Abuse and Neglect, 12 PUBLIC POLICY & AGING REPORT 19 (Winter 2002).

6. NATIONAL RESEARCH COUNCIL, ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 1 (2003) [hereinafter ELDER MISTREATMENT].

7. The largest computerized annotated database of elder mistreatment resources and materials can be found at the Clearinghouse on Abuse and Neglect of the Elderly (CANE), available at <http://db.rdms.udel.edu:8080/CANE> (last visited July 20, 2003).

8. E.g., National Committee on the Prevention of Elder Abuse, available at www.preventelderabuse.org (last visited July 20, 2003).

9. 42 U.S.C. § 3002 (2003).

10. E.g., U.S. House Select Committee on Aging, Subcommittee on Health and Long-Term Care, *Elder Abuse: A Decade of Shame and Inaction*, Committee Publication No. 101-752, 101st Cong., 2d Sess. (April 1990).

11. Elder Justice Act, § 2933, 107th Cong. (2002).

12. Elder Justice Act, § 333, 108th Cong. (2003).

study, detect, treat, prosecute, and prevent abuse, neglect, and exploitation of older citizens living independently and in residential care facilities. The bill additionally would establish new programs to assist victims and provide grants for education and training of law enforcement personnel and prosecutors, while developing more forensic expertise. It would enhance incentives for the reporting of crimes in institutional settings and require Federal Bureau of Investigation (FBI) criminal background checks for staff members employed by long-term care providers.

However, most of the legal activity in the elder mistreatment sphere thus far has taken place at the state level. Every state has spun a wide web of laws dealing with this subject.¹³ Some states rely on generic Adult Protective Services (APS) laws to address elder mistreatment, while others have enacted specific statutes on this matter. Additional relevant provisions are found in state criminal or penal codes, domestic violence laws, and probate statutes. The majority of states include self-neglect in their respective statutes as a discrete category of elder mistreatment,¹⁴ and indeed it is allegations of self-neglect that now comprise the overwhelming majority of cases of elder mistreatment reported to authorities.¹⁵ This makes the express exclusion of self-neglect from consideration in the *Elder Mistreatment* report especially interesting, but probably necessary in order to keep the panel's task reasonably manageable.

Although policy makers continue to be routinely chastised for not going far enough in this regard,¹⁶ almost every state explicitly imposes criminal liability for willful acts or omissions amounting to elder mistreatment. Some states make elder mistreatment a misdemeanor,¹⁷ others classify this conduct more seriously as a felony,¹⁸ while a few statutes do not specifically deal with the question of punishment for

13. A comprehensive list of state statutes on this subject is available at <http://www.elderabusecenter.org/default.cfm?p=statelaws.cfm> (last visited July 20, 2003).

14. Carmel Dyer & Angela M. Goins, *The Role of the Interdisciplinary Geriatric Assessment in Addressing Self-Neglect of the Elderly*, XXIV GENERATIONS 23 (Summer 2000). See also MARY JOY QUINN & SUSAN K. TOMITA, *ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS AND INTERVENTION STRATEGIES* (2nd ed. 1997). See also SELF-NEGLECTING ELDERS: A CLINICAL DILEMMA (Eloise Rathbone-Mc Cuan & Dorothy R. Fabian eds., 1992).

15. Valory N. Pavlik, David J. Hyman, Nicolo A. Festa, & Carmel B. Dyer, *Quantifying the Problem of Abuse and Neglect in Adults—Analysis of a Statewide Database*, 49 J. AM. GERIATRICS SOC'Y 4548 (2001).

16. Robert A. Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 ELDER L.J. 377 (1995).

17. UTAH CODE ANN. § 76-5-111 (2003).

18. NEVADA REV. STAT. § 200.5099 (2003).

violations.¹⁹ The criminal statutes ordinarily apply to the older person's "care giver" and others. A number of states explicitly lump together institutional and non-institutional care giver mistreatment in the same statutes, while other jurisdictions handle these two categories distinctly, at least for legislative (if not programmatic) purposes. Mistreatment of older persons also may violate generic assault and battery criminal statutes in every jurisdiction. When the care giver who is responsible for mistreatment is a licensed health or human service professional, proof of the mistreatment may be grounds for discipline of that professional by the applicable state licensing board.

State mistreatment statutes differ in their respective specifications of the class of individuals who may qualify for legal protection. In some states, all "vulnerable," "disabled," or "incapacitated" adults (persons over eighteen years old) are protected. Elsewhere, only persons over a designated higher age – usually sixty or sixty-five – are covered.

Over forty states have enacted statutes mandating a wide variety of helping professionals to report known or reasonably suspected cases of elder mistreatment to designated public bodies, usually local APS agencies²⁰ or law enforcement offices, for further investigation. Several of these statutes extend the duty to report to "any person." These mandatory reporting statutes make non-compliance punishable as a criminal offense. Some commentators argue that physicians and other health care professionals also should be exposed to professional disciplinary action by the relevant state licensing board and civil malpractice lawsuits initiated by or on behalf of individual mistreatment victims for failure to timely report mistreatment that was or should have been reasonably suspected.²¹ Some states already explicitly create a civil cause of action for negligent or intentional failure to report mistreatment of a protected adult,²² but use of this remedy by older mistreatment victims has been rare. A few states²³ encourage but do not require the reporting of suspected elder mistreatment, by keeping reporters' identities confidential and immunizing reporters against any form of legal liability if they voluntarily make good faith reports.

The extensive legal landscape that has developed in reaction to

19. ALASKA STAT. § 47.24.010-47.24.900 (2003).

20. Elizabeth Capezuti, Barbara L. Brush, & William T. Lawson, *Reporting Elder Mistreatment*, 23 J. GERONTOLOGICAL NURSING 24 (July 1997).

21. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77 (1998). See also Seymour Moskowitz, *Private Enforcement of Criminal Mandatory Reporting Laws*, 9 J. ELDER ABUSE & NEGLECT 2 (1998).

22. E.g., MINN. STAT. § 626.557, subd. 7 (2003).

23. E.g., 320 ILL. COMP. STAT. 20/4(a) (2003).

professional and public concern about the problem of elder mistreatment, as well as the unceasing calls in the academic literature and popular press for yet more pervasive legal entanglement in this arena,²⁴ raise a number of significant ethical²⁵ and policy questions. Current laws have been thrust into being based mainly on lawmakers' faith and supposition, rather than a coherent body of systematic, trustworthy empirical evidence to support them.

THE NATIONAL RESEARCH COUNCIL'S REPORT

This serious void in evidence regarding many facets of elder mistreatment is the primary focus of the recent *Elder Mistreatment* volume, the careful product of an interdisciplinary panel (consisting of legal, health care, social work, and social science professionals) convened by the NRC's Division of Behavioral and Social Sciences and Education and co-chaired by an attorney (Richard J. Bonnie of the University of Virginia) and a physician (Robert B. Wallace of the University of Iowa). Legal definitions and responses should be, but for the most part presently are not, grounded in an empirical understanding of the types of conduct that are most harmful and that pose the most serious risks to older persons.²⁶ In a series of well-referenced, lucidly written chapters, this report makes a forceful and convincing argument for much more policy relevant research regarding the extent, nature, causes, and consequences of elder mistreatment, as well as the costs and effectiveness of current legal and non-legal interventions and other measures that could successfully prevent or ameliorate the impact of this awful social problem. The NRC panel stated its case directly in its discussion of:

[P]olicies and programs designed to protect older persons from mistreatment and to ensure their safety. Overall, the panel's conclusions can be easily summarized: no efforts have yet been made to develop, implement, and evaluate interventions based on scientifically grounded hypotheses about the causes of elder mistreatment, and no systematic research has been conducted to measure and evaluate the [therapeutic] effects of existing

24. E.g., Audrey S. Garfield, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859 (1991).

25. Tanya F. Johnson, *Ethics in Addressing Mistreatment of Elders: Can We Have Ethics for All?* XXIV GENERATIONS 81 (Summer 2000).

26. ELDER MISTREATMENT, *supra* note 6, at 34-59.

interventions.²⁷

Therefore, “[r]esearch on the effects of elder mistreatment interventions is urgently needed. Existing interventions to prevent or ameliorate elder mistreatment should be evaluated, and agencies funding new intervention programs should require and fund a scientifically adequate evaluation as a component of each grant.”²⁸

For example, *Elder Mistreatment* inquires, “[h]ow well, and at what cost, do interventions improve the safety, security, and independence of older persons who have come to adult protective services’ attention for mistreatment?”²⁹ In answer to this obvious, but previously almost never asked, question, the NRC panel urges, “[r]esearch is needed on the effectiveness of adult protective services interventions, ideally in study designs that compare outcomes in cases in which services were provided with those in which eligible recipients declined offered services or other cases in which mistreatment of an equivalent nature has been identified.”³⁰

A number of sections of *Elder Mistreatment* will be of particular interest to attorneys. Appendix B, for instance, provides a helpful, comprehensive compilation and reprinting of elder abuse and neglect definitions under all present state laws.

Chapter eight, “Research Ethics,” builds on the excellent background paper commissioned from law professor Rebecca Dresser on this topic, which is included as chapter eleven of this volume. Chapter eight, part of the panel’s actual report, concentrates on two large issues, namely, “(1) Under what circumstances is it ethically necessary to exclude elderly persons from participation in research on the ground that they are incapable of giving informed consent? [and] (2) How should investigators respond to evidence of mistreatment elicited during the study, and what should participants be told about this problem [that the investigator may have to report observed mistreatment to public authorities, even over the older person’s objections] in advance?”³¹ To its credit, the panel did not shy away from a critical look at the real impact on older persons of current laws requiring reporting of suspected abuse by researchers, and the report ultimately recommends that “[e]lder mistreatment reporting statutes should be amended to exempt researchers

27. *Id.* at 121.

28. *Id.* at 139.

29. *Id.* at 126.

30. *Id.*

31. *Id.* at 140.

from their mandatory requirements.”³² On the same topic, chapter eight usefully discusses the interplay between state reporting requirements and federally issued “Certificates of Confidentiality”³³ that purport to protect research data from compelled disclosure.

In her background paper, included as chapter eleven, Professor Dresser explains why research concerning elder mistreatment is an especially sensitive area legally and ethically. “First, the study population includes older persons with various mental, physical, and social vulnerabilities. Second, the research involves collecting information that could have negative legal, financial, and social consequences for the older persons and caregivers being studied.”³⁴ Against that sensitive backdrop, Dresser analyzes a range of questions pertaining to the federal and state regulation of research on elder mistreatment (for example, assuring that consent to participate in such research projects is adequately voluntary, competent, and informed) through a lens colored by the fundamental ethical principles of respect for persons, beneficence, and justice.

Chapter twelve, “The Clinical and Medical Forensics of Elder Abuse and Neglect,” is a fine interdisciplinary background paper co-authored by two physicians and an attorney. The investigation of allegations of elder mistreatment generally is a forensic matter, because the results of medical examinations of the alleged victim may carry substantial legal consequences. Attorneys working in this arena must know how to interact effectively with medical experts on such complicated, inherently interdisciplinary issues as:

Is the person physically or mentally incapacitated? At what point does the legal responsibility for the care of that person shift from self to another? What are the legal responsibilities of a caregiver under law such that failure to render such care in a home or community setting subjects the caregiver to civil or criminal liability? What types of documentation must exist to justify a failure by caregivers to intervene in the face of self-neglect (e.g., refusal to eat) in an institutional setting?³⁵

Elder law attorneys frequently are drawn into situations entailing possible financial abuse of older persons in domestic settings, and legal

32. *Id.* at 145.

33. 42 U.S.C. § 241(d).

34. ELDER MISTREATMENT, *supra* note 6, at 303.

35. *Id.* at 343.

researcher Thomas Hafemeister provides a thorough overview of this topic in his background paper published as chapter thirteen of this volume. Among the particular aspects of financial abuse of the elderly outside of institutions explicated here are definitions, types, prevalence, impact, risk factors and characteristics of victims, signals, and the motivations and characteristics of perpetrators. This analysis also honestly scrutinizes the effectiveness of reporting statutes, various proactive initiatives, and systemic post-abuse responses including intervention by APS agencies and/or the Victims Services Network, criminal investigations and prosecutions, and civil injunctive orders. The limitations of legal interventions are noted.

Child abuse and neglect laws, and to a lesser extent domestic violence statutes, always have served as the model for elder mistreatment legislation.³⁶ A consistent query, implicit and at places explicit, throughout this volume is the ethical and public policy propriety of transferring the child and domestic violence abuse models wholesale to the elder mistreatment context. An attorney readership will find chapters thirteen (on financial abuse, just discussed) and fifteen (a background paper on "Elder Abuse Intervention: Lessons from Child Abuse and Domestic Violence Initiatives") especially enlightening on this issue.

CONCLUSION

Physical, psychological, and financial elder mistreatment is a problem of paramount importance to everyone who is concerned about the autonomy and well-being of older persons in contemporary American society, including elder law attorneys. The legal response to this phenomenon in the latter part of the twentieth and the early part of the twenty-first centuries has been, in many respects, one of legislative and administrative motion first, asking basic questions later (or never). *Elder Mistreatment* is a clear and decisive call for us to now pause and begin to ask, belatedly, some basic conceptual and empirical questions about elder mistreatment and to adjust our formal and informal strategies for improving the quality of life for the elderly accordingly. Attorneys who wish to be a positive part of this social process will profit significantly by studying this volume.

36. John F. Longres, *Self-Neglect and Social Control: A Modest Test of an Issue*, 22 J. GERONTOLOGICAL SOCIAL WORK 3 (1994).