

Comment,
WILL YOU STILL . . . WHEN I'M SIXTY-
FOUR: ADULT CHILDREN'S LEGAL
OBLIGATIONS TO AGING PARENTS

I. Introduction

Under the care of his son Richard, sixty-seven-year-old Robert Heitzman died lying on a rotted mattress with exposed metal springs, one-sixth of his body covered with bedsores. Robert suffered from incontinence as a result of a series of strokes. His bedroom and bathroom reeked of urine and feces. Three days before Robert's death, Richard began to deprive Robert of food and liquid to keep him from defecating or urinating, since Richard was having guests over for dinner and he did not want the smell in his house to worsen.¹

Robert's daughters, Lisa and Susan, visited him just prior to his death, but failed to report his living conditions to authorities. No charges were brought against Lisa; Susan was charged with elder abuse, but the California Supreme Court dismissed the charges because she had not assumed the duty to care for her father.² In the case of Robert Heitzman, the horrific neglect, and ultimately his death, could have been avoided if his daughters had contacted authorities. Unfortunately, the moral obligation they owed to their father did not translate into a legal obligation and those who should have cared for Robert the most, failed him.

Robert Heitzman is not alone. According to an ABC News report, allegations of elder abuse have been brought against the son of multi-millionaire New York philanthropist Brooke Astor.³ The report asserts "if it could happen to Brooke Astor, it could happen to anyone."⁴

¹ People v. Heitzman, 886 P.2d 1229 (Cal. 1994).

² *Id.*

³ *ABC News: Elder Abuse – Could It Happen to You?* (ABC television broadcast July 27, 2006). The allegations were brought by Astor's grandson against his father, Astor's son. Astor's grandson alleged that Astor is living in filth and simple requests for non-skid socks by nurses were refused by Astor's son, who denied the allegations.

⁴ *Id.*

Elder abuse and mandatory reporting laws in nearly every state have been unsuccessful in curbing the epidemic of gross mistreatment of America's elders.

Up to two million Americans age sixty-five and older are victims of abuse or neglect and experts say in sixty percent of those cases, the abuser is a family member. . . . What concerns authorities most is that, over the next thirty years, the number of seniors will more than double to seventy-two million. . . . [E]xperts warn this is just the tip of the iceberg . . . and could soon be an epidemic of neglect.⁵

While many states have enacted laws establishing a legal obligation for adult children to provide financial support for their indigent parents, no state requires adult children to either care for or monitor the care of their elderly parents.

This Note argues that adult children should have a legal duty to take affirmative action to aid and protect their elderly parents. This duty should apply to adult children who have actual or constructive knowledge or a reasonable suspicion of abuse. Part II shows the aging of America and discusses current trends in eldercare as well as statistics about and reasons behind elder abuse. Part III discusses the current state of elder abuse laws in the United States. This Part also provides a comparison of elder abuse laws to child abuse laws, while identifying gaps in the legal protection of the elderly, specifically who has a duty of care and the obligation of mandatory reporting laws. Part IV examines comparative law, exploring cross-cultural social and legal obligations for eldercare, and provides proposed duty to aid legislation.

The duty proposed in this Note is first and foremost a moral duty. No one would dispute the immorality of leaving an incapacitated parent to their own defenses in the hands of a neglectful "caregiver." But a duty to aid or protect that incapacitated parent, a duty recognized by ancient cultures, prominent world religions, and foreign laws currently has no precedential support in American law. So, this Note sets forth the rationale and content for an adult child's duty to aid or protect an incapacitated parent.

⁵ *Id.*

II. The Graying of America

A. Aging Statistics

For the last century America has been growing older and the rate of aging will soon increase as the Baby Boomer generation reaches age sixty-five, the age at which one becomes part of the “older population” or elderly.⁶ Far surpassing the rate at which the rest of the American population is growing, the number of those sixty-five and older grew from 3.1 million (4.1 percent of the total population) in 1900 to 35 million (12.4 percent of the total population) in 2000 and is projected to grow to twenty percent of the total population in 2030.⁷

Of bigger concern is the rate at which those eighty-five years old and older (the oldest-old) is increasing. This segment is growing faster than any other segment of the population.⁸ In 2000, the oldest-old group was thirty-four times larger than it was in 1900.⁹ By 2030 there will be 8.6 million members of the oldest-old group compared to 100,000 in 1900 and 4.2 million in 2000.¹⁰

In addition, this group is more vulnerable to physical and psychological problems such as poor health, depression, and poverty.¹¹ Dependency on others increases exponentially in these later years, and dependency leads to greater risk of abuse or neglect. “Abuse is two to three times more prevalent in people over age 80 than in those from ages 60 to 80.”¹² The life expectancy for a woman who reaches age sixty-five is nineteen years, and of those years for the last five she will be dependent on someone else.¹³ A man’s life expectancy at age sixty-five is fifteen years,

⁶ See WAN HE, ET AL., 65+ IN THE UNITED STATES: 2005, CURRENT POPULATION REPORTS 9 (U.S. Census Bureau 2005); see also *The Demographics of Aging in America*, Population Resource Center, http://www.prcdc.org/300million/The_Aging_of_America/.

⁷ HE, ET AL., *supra* note 6.

⁸ *Demographics of Aging*, *supra* note 6.

⁹ *Id.*

¹⁰ JAMIA JASPER JACOBSEN, HELP! I’M PARENTING MY PARENTS 8 (1988); HE, ET AL., *supra* note 6, at 11.

¹¹ JACOBSEN, *supra* note 10.

¹² Peg Gray-Vickrey, *Combating Elder Abuse*, 34 NURSING 47, 48 (Oct. 2004).

¹³ OLIVIA J. SMITH, AGING IN AMERICA 122 (2000).

the first twelve of which he will be independent.¹⁴ However, a new school of thought in gerontology predicts a lower incidence of the common disorders among the elderly in the future, due to medical advancements.¹⁵ While this school of thought offers a less bleak picture of the elderly, it does not suggest that the elderly will avoid disorders such as arthritis, dementia and diabetes altogether, but instead suggests that these disorders will merely be delayed.¹⁶ Some level of disability is inevitable for the majority of seniors. In fact, eighty percent of seniors will develop at least one chronic health condition and fifty percent will develop two.¹⁷ The seniors who develop chronic health conditions are those the country should be most concerned about since they will be most in need of assistance and care.

B. *Trends in Eldercare*

In the United States eldercare takes three primary forms: assisted living centers, nursing homes, and family care.¹⁸ “As of the late 1990s . . . one in four American families were caring for an elderly relative, and an estimated 43 percent of seniors could expect to spend some time in a nursing home during their lifetimes.”¹⁹

Assisted living centers are a recent trend in eldercare for those who need minimal assistance but wish to retain a high level of independence. According to the Assisted Living Federation of America the United States has more than 20,000 assisted living centers with over a million residents.²⁰ Residents in assisted living can customize their level of assistance and are charged accordingly; however round-the-clock skilled care is not available.²¹ Common services provided by assisted living centers typically include meals, housekeeping, assistance with activities of daily living, social activities, among others.²²

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ HE, ET AL., *supra* note 6, at 54.

¹⁸ SMITH, *supra* note 13, at 85.

¹⁹ *Id.*

²⁰ Assisted Living Federation of America, <http://www.alfa.org/i4a/pages/index.cfm?pageid=3285>, (last visited Aug. 30, 2006).

²¹ *Id.*

²² DAN R. HARRIS, AGING SOURCEBOOK 624 (1998).

While the popularity of assisted living is growing, for most elderly, living independently in their own home is the ideal situation and services exist that are designed to allow for that. In addition to the three most common types of eldercare listed above, other options such as adult day-care services, meals-on-wheels, and medical alert services make remaining in independent home living possible for many elders.²³ Staying at home is often not possible though, and for those who need additional care, moving into a nursing home or living with a family member are the only options.

Currently, 1.8 million beds in 17,000 nursing homes in the United States hold 1.6 million residents.²⁴ In addition, 2.4 million residents are discharged each year to “home, hospital, or hospice care.”²⁵ Half of those living in nursing homes are eighty-five or older and most are widowed women.²⁶ Nursing homes are comprised of older people who have some type of disability or struggle with “activities of daily living.”²⁷ However, dementia is the most common ailment among residents.²⁸ Due to the increase in the elderly population, without a breakthrough in the study of dementia, the American Geriatric Society projects that the nursing home populations will double by the year 2020.²⁹

While the number of nursing home residents seems large, family care remains the most common method of eldercare, even for those with the most burdensome condition, Alzheimer’s disease. In fact, many elderly suffer from not only Alzheimer’s, but many other severe disabilities or conditions that untrained, unskilled family members cannot provide care to adequately meet their loved-one’s needs. Nevertheless, at least seventy percent of Alzheimer’s sufferers live at home, with three-quarters of those receiving care from a family member, friend, or neighbor.³⁰

²³ JACOBSEN, *supra* note 10, at 264-65.

²⁴ American Geriatrics Society, *Aging in the Know*, http://www.healthinaging.org/agingintheknow/chapters_ch_trial.asp?ch=15, (last visited Aug. 30, 2006).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Dementia affects more than half of nursing home residents.

²⁹ *Id.*

³⁰ HE, ET AL., *supra* note 6, at 57.

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Often the feeling of guilt is what keeps the elderly family member in the care of the family.³¹ The guilt manifests itself when an elderly parent has made the comment, “Promise me you won’t put me in one of those places.’ . . . ‘There’ of course, is a nursing home. . . . The pressure placed on the adult child in being asked to make such a promise is heart-rending, to say the least.”³² But most people, even having made such a promise, realize that it is not always possible to keep the promise. Instead, they tolerate the guilt in order to provide the best situation for all involved, which is usually moving the older person to a nursing home.³³ For those who do honor the promise to keep their loved ones out of nursing homes, many cannot handle the enormous stress that comes with caring for an incapacitated parent, which can lead to tragic incidents of abuse or neglect.³⁴

C. Elder Abuse

“[M]ost statistics show the majority of perpetrators of crime against the elderly are family members.”³⁵ The most common victim of elder abuse is a physically or mentally impaired, frail woman who is over seventy-five-years-old, living with relatives, who has little income, but abuse of the elderly takes many forms and crosses all demographic lines.³⁶ Abuse may be domestic or institutional and it may include physical abuse as well as emotional, financial, sexual abuse or neglect either by another person, or self-neglect.³⁷ The number of elderly being abused or neglected each year can only be estimated, and according to the National Center on Elder Abuse (NCEA) that number is between one and two million.³⁸ Experts believe this to be merely a

³¹ CHARLES R. ROOTS, *THE SANDWICH GENERATION, ADULT CHILDREN CARING FOR AGING PARENTS* 51 (1998).

³² *Id.*

³³ *Id.*

³⁴ Gray-Vickrey, *supra* note 12, at 49.

³⁵ Patrick Malone, *Abuse of Seniors a Growing Problem*, PUEBLO CHIEFTAIN, Apr. 11, 2006.

³⁶ Sally Balch Hurme, *Perspectives on Elder Abuse*, http://assets.aarp.org/www.aarp.org/_articles/international/revisedabusepaper1.pdf.

³⁷ Joy Solomon, *Sounding the Shofar: A Wake-up Call to the Epidemic of Elder Abuse*, J. JEWISH COMMUNAL SERVICE 211 (Spring 2006).

³⁸ National Center on Elder Abuse Fact Sheet, http://www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/family/fact_sheet.pdf.

rough estimate. Because the victims are frequently isolated, ashamed and fearful, the NCEA approximates that for every reported case of elder abuse or neglect, five go unreported.³⁹

The most prevalent form of abuse is neglect (seventy percent of reported cases), and studies have shown that forty-seven percent of abusers are the victims' adult children with the abuse occurring within the victims' homes.⁴⁰ Neglect typically involves withholding medications or refusing assistance in activities of daily living such as bathing and using the bathroom.⁴¹

The onset of abuse involves a number of factors. Generally, a caregiver will be in a stressful situation, particularly if the elder has a disability or medical condition that requires constant attention such as Alzheimer's disease, incontinence or physical impairment from a stroke.⁴² In addition, the caregiver may be retaliating for past mistreatment or a history of family violence, or the abuser may be suffering from a mental disorder or addiction.⁴³ Sadly, lack of knowledge of how to properly care for the older person is often the cause of neglect.⁴⁴ "Americans report cases of persons tied to a bed in a locked room to keep them 'safe' from wandering. . . . They may think that incontinence or forgetfulness is intentional and punish the adult for soiling their pants or losing the keys."⁴⁵

Experts predict incidences of elder abuse to increase as the Baby Boomers, who live much different family lives than their parents did, with higher divorce rates, nontraditional families, blended families, single-parent families, and cohabitating couples with no children, get older.⁴⁶ These different lifestyles, and the increase in the elderly population, will create challenges for the care giving of the Boomer generation, in turn increasing the likelihood of elder abuse.⁴⁷

³⁹ *Id.*

⁴⁰ Gray-Vickrey, *supra* note 12, at 48; K. Maya Jayawardena & Solomon Liao, *Elder Abuse at End of Life*, 9 J. PALLIATIVE MED. 127, 129 (2006).

⁴¹ Leigh Martinez Wright, *They Suffer in Silence*, MOUNT SINAI J. MED. 570 (Mar. 2006).

⁴² Gray-Vickrey, *supra* note 12, at 49.

⁴³ *Id.*

⁴⁴ Hurme, *supra* note 36.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

III. Golden Years and Formative Years: A Parallel Universe

A. Gaps in the Legal Protection of the Elderly

Enacted in 1965, the Older Americans Act (OAA) established funding for “no-cost in-home and community-based services” for seniors.⁴⁸ The Act’s purpose was to create an “aging network” that would provide funding for states to develop innovative services for the elderly.⁴⁹ OAA has undergone fourteen amendments since 1965, which have expanded services, given more control to the states, and increased protection of the elderly.⁵⁰

One component of the OAA, as part of the 2000 reauthorization, is the National Family Caregiver Support Program (NFCSP) which provides community assistance to family members caring for ill or disabled elderly.⁵¹ This program is designed to assist in relieving caregiver stress by providing support groups and respite care, temporarily relieving family caregivers from their responsibilities.⁵² NFCSP was projected to serve 250,000 caregivers, but by 2002 it had assisted nearly 600,000 caregivers.⁵³ Despite the large numbers served by the NFCSP, elder abuse is still prevalent among family caregivers, and Congress has not upheld its self-prescribed duty.

The Congress hereby finds and declares that, in keeping with the traditional American concept of the inherent dignity of the individual in our democratic society, the older people of our Nation are entitled to, and it is the joint and several duty and responsibility of the governments of the United States, of the several States and their political subdivision, and of Indian tribes to assist our older people to secure

⁴⁸ The Elder Helpline, <http://www.elderhelpline.org/Products/OAA/OAA-Explained.aspx> (last visited Aug. 30, 2006).

⁴⁹ *Id.*

⁵⁰ Advocacy, Action, Answers on Aging, http://www.n4a.org/older_americans_act_0207.pdf#search'effectiveness%20of%20Older%Americans%Act' (last visited Aug. 30, 2006).

⁵¹ Older Americans Act, 42 U.S.C. § 3030s-1 (2000).

⁵² *Id.*

⁵³ Josefina Cabonell, testimony before The Subcommittee on Retirement Security and Aging Committee on Health, Education, Labor and Pensions, U.S. Senate, May 17, 2005, <http://www.hhs.gov/asl/testify/t050517a.html>.

equal opportunity to the full and free enjoyment of . . . protection against abuse, neglect, and exploitation.⁵⁴

If approved, the reauthorization of the OAA in 2006 will attempt to provide some protection for the elderly by authorizing the Secretary of Health and Human Services to establish an Office of Elder Abuse Prevention and Services to create programs and training relating to the “prevention, detection, treatment, and intervention, and response” to elder abuse.⁵⁵

Even with programs in place, the individual states have the responsibility of drafting legislation for the legal protection of elders and all fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have done so.⁵⁶ Even so, as the incidence of elder abuse and neglect continues to rise, those laws need closer scrutiny and in most cases, substantial revision.

Elder abuse laws vary from state to state with no uniform definition of what constitutes abuse or who is protected. Kansas’s statute uses the word “mistreatment” instead of “abuse” and the act or omission must be done “knowingly *and* intentionally.”⁵⁷ In Texas, however, the definition of abuse is much broader. “A person commits an offense if he intentionally, knowingly, recklessly, *or* with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a[n] . . . elderly individual . . . : (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury.”⁵⁸

The definition of abuse is a key factor in the investigation and substantiation rates of elder abuse.⁵⁹ In Kansas, where the statute is vague as to what constitutes abuse, the investigation rate is 4.5 instances of abuse per 1000 elderly people; no data is available on the substantiation rate.⁶⁰ In Texas, where elder abuse is more clearly defined, the investigation rate is 12.1 instances of abuse per 1000 elderly people, the highest in the coun-

⁵⁴ Older Americans Act, 42 U.S.C. § 3001 (1965).

⁵⁵ S. 3570 109th Cong. (2006).

⁵⁶ Information About Laws Related to Elder Abuse, <http://www.hhs.gov/asl/testify/t050517a.html> (2005).

⁵⁷ KAN. STAT. ANN. § 21-3437 (2006) (emphasis added).

⁵⁸ TEX. PENAL CODE § 22.04 (2005) (emphasis added).

⁵⁹ Gerald J. Jogerst, et al., *Domestic Elder Abuse and the Law*, 93 AM. J. PUB. HEALTH 2131, 2133 (Dec. 2003).

⁶⁰ *Id.* at 2134.

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try; the substantiation rate is 8.0 per 1000, second only to Minnesota.⁶¹

As to who is protected under elder abuse statutes, variations between states mean that protection is uneven. An “elderly person” in Florida’s elder abuse law is defined as:

a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person’s own care or protection is impaired.⁶²

But, in West Virginia, the term “elder” is simply defined as, “a person age sixty-five years or older.”⁶³ The Florida statute shows the state’s interest in protecting the elderly who truly need protection, at the same time recognizing that age alone does not create the need for protection, and thus respecting the autonomy of capable senior citizens. On the other hand, West Virginia’s over-inclusive definition of elderly encompasses not only the 95-year-old stroke victim confined to a wheelchair, unable to speak, but also the gainfully employed, physically active, fully functional 66-year-old who is completely capable of protecting him or herself.

Some states do not have separate provisions for the elderly but instead expect that the elderly will be included in the laws against abuse of dependent adults.⁶⁴ However, many states have special statutes aimed directly at the protection of the elderly. For example, California, Florida, Texas, and West Virginia all specifically mention the elderly in welfare laws or penal code sec-

⁶¹ *Id.*

⁶² FLA. STAT. § 825.101(5) (2006).

⁶³ W. VA. CODE § 61-2-29(5) (2006).

⁶⁴ See Neglect of Care – Dependent Person, 18 PA. CONS. STAT. § 2713(a) (2005) “A caretaker is guilty of neglect of a care-dependent person if he: (1) Intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care”; see also Neglect or Abandonment of a Dependent Person, IOWA CODE § 726.3 (2005) “A person who is the father, mother, or some other person having custody of a child, or of any other person who by reason of mental or physical disability is not able to care for the person’s self, who knowingly or recklessly exposes such person to a hazard or danger against which such person cannot reasonably be expected to protect such person’s self . . . commits a class ‘C’ felony.”

tions.⁶⁵ One thing all states agree on is that for an omission to be punishable, the actor must owe the victim a legal duty of care.⁶⁶

In addition, nearly all states have mandatory reporting laws with respect to elder abuse, but each varies on who is required to report.⁶⁷ Most mandatory reporting laws include healthcare professionals, nursing home and care facility employees, and law en-

⁶⁵ See Elder Abuse and Dependent Adult Civil Protection Act CAL. WEL. & INST. CODE § 15600 (2006); FLA. STAT. § 825 (2006), “Abuse Neglect, and Exploitation of Elderly Persons and Disabled Adults”; TEX. PENAL CODE § 22.04 (2005), “Injury to a Child, Elderly Individual, or Disabled Individual”; W. VA. CODE § 61-2-29 (2006), “abuse or neglect of elder person.”

⁶⁶ See, e.g., TEX. PENAL CODE § 22.04, “the actor has a legal or statutory duty to act; or (2) the actor has assumed care, custody, or control.”

⁶⁷ See, e.g., KY. REV. STAT. ANN. § 209.030 (2006) “Any person including, but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions of this chapter. Death of the adult does not relieve one of the responsibility for REPORTING the circumstances surrounding the death.”; FLA. STAT. §415.1034 (2006) “Any person, including, but not limited to, any: 1. Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, paramedic, emergency medical technician, or hospital personnel engaged in the admission, examination, care, or treatment of vulnerable adults; 2. Health professional or mental health professional other than one listed in subparagraph 1.; 3. Practitioner who relies solely on spiritual means for healing; 4. Nursing home staff; assisted living facility staff; adult day care center staff; adult family-care home staff; social worker; or other professional adult care, residential, or institutional staff; 5. State, county, or municipal criminal justice employee or law enforcement officer; 6. An employee of the Department of Business and Professional Regulation conducting inspections of public lodging establishments under s. 509.032; 7. Florida advocacy council member or long-term care ombudsman council member; or 8. Bank, savings and loan, or credit union officer, trustee, or employee, who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the central abuse hotline.” However, some states limit mandatory reporters to specific professions. See e.g. MD. CODE ANN., FAM. LAW § 14-302 (2006) “Mandatory reporting by health practitioner, police officer, or human service worker. — Notwithstanding any law on privileged communications, each health practitioner, police officer, or human service worker who contacts, examines, attends, or treats an alleged vulnerable adult, and who has reason to believe that the alleged vulnerable adult has been subjected to abuse, neglect, self-neglect, or exploitation shall: (1) notify the local department; and (2) if acting as a staff member of a hospital or public health agency, immediately notify and give all

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forcement officers, but some controversy exists over whether certain other professions, such as members of the clergy and attorneys, should be required by law to report known or suspected elder abuse or neglect. California recently added clergy to its list of mandatory reporters and only two states include attorneys in their lists.⁶⁸

Discrepancies in state laws make protecting the elderly quite difficult. The elderly do not receive consistent protection from state to state, leaving some seniors safe and others helpless. Senators John Breaux and Orrin Hatch suggest the answer to filling in the gaps is federal legislation.⁶⁹ Research shows that without elder abuse legislation at the federal level, a national policy for prevention of elder abuse will be hindered.⁷⁰ Federal legislation would raise awareness and clarify definitions, which would in turn result in increased reporting and eventually a decrease in abuse.⁷¹

Through all the current legislation and proposals for future legislation,⁷² one commonality remains—adult children of elderly parents, regardless of their moral duty, owe no legal duty of care to those parents without assuming that duty voluntarily or contractually and even that assumed duty must be recognized by a statute to create liability for neglect.

In the Texas case, *Billingslea v. State*,⁷³ a son was acquitted after neglecting his mother to the point that “[i]n addition to [bedsores], second degree burns and blisters were found on her inner thighs, caused by lying in pools of her own urine. Maggots

the information required by this section to the head of the institution or the designee of the head.”

⁶⁸ Barbara Coleman, et al., *State Long-Term Care: Recent Developments and Policy Directions* (2003) available at <http://www.ncsl.org/programs/health/forum/lte/LTC2003.pdf>.

⁶⁹ John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 *ELDER L.J.* 207 (2003).

⁷⁰ *Id.* at 223.

⁷¹ *Id.*

⁷² *Id.*; Marc Hankin, *Annulling Predatory Marriages to Abuse Incompetent Victims and Attorneys Should Not Be Relieved of the Duty to Investigate an Obviously Mentally Impaired Client's Competence*, http://www.marchankin.com/legislative_projects/LegislativeProjects.htm, (last visited Aug. 30, 2006).

⁷³ 780 S.W.2d 271 (Tex. Crim. App. 1989).

were festering in her open bedsores.”⁷⁴ Billingslea was acquitted because the indictment did not include a statutory duty imposing liability for his act of omission.⁷⁵ Due to the absence of a common law duty for adult children to care for their elderly parents, a statutory duty of care must be present and that duty must be expressed in the criminal charge.⁷⁶

Billingslea and *Heitzman* reinforce the idea that in fact, *no one* owes the elderly any duty of care without assuming that duty either voluntarily or contractually. The debate continues over who has the responsibility to ensure the health and well-being of older Americans. As stated in the Older Americans Act, Congress believes the federal and state governments have the responsibility of protecting America’s elders.⁷⁷ But a majority of Americans would never think of abandoning their parents, let alone allowing someone else to abuse or neglect them while they sit idly by. Charles Mitchell, age 55, said, “‘Well, this is mom. I don’t have but one. She brought me up and looked after me. I feel I should do the same. I feel everybody should.’”⁷⁸

Legislatures and courts agree with Charles Mitchell to some extent. Thirty states have statutes imposing filial responsibility on adult children to provide financial assistance for their indigent parents.⁷⁹ These laws allow for either civil action or criminal penalties for nonsupport by adult children who are financially able to assist with their parents’ expenses.⁸⁰ But they are rarely enforced. For example, in California the most recent case enforcing the state’s filial responsibility law was in 1968.⁸¹ The duty prescribed by these types of statutes falls short in protecting elders from abuse since they do not extend to the physical care and well-being of elderly parents, or even to require adult children to report the abuse of their parents.

⁷⁴ *Id.* at 272-73.

⁷⁵ *Id.* at 274.

⁷⁶ *Id.*

⁷⁷ Older Americans Act, *id.* note 52.

⁷⁸ Sara Rimer, *Blacks Carry Load of Care for Their Elderly*, N.Y. TIMES, Mar. 15, 1998 (reprinted by OLIVIA J. SMITH, *AGING IN AMERICA* 87 (2000)).

⁷⁹ Matthew Pakula, *The Legal Responsibility of Adult Children to Care for Indigent Parents*, National Center for Policy Analysis Brief Analysis No. 521 (July 12, 2005) available at <http://www.ncpa.org/pub/ba/ba521/>.

⁸⁰ *Id.*

⁸¹ *See* *Gluckman v. Gaines*, 266 Cal. App. 2d 52 (1968).

In *People v. Heitzman*⁸² the court said, “The duty of adult children to provide support for needy parents is deeply rooted in our statutory law, and it is well established that the purpose of such legislation is ‘to protect the public from the burden of supporting people who have children able to support them.’”⁸³ The *Heitzman* court refused to extend the duty of financial support to a duty of care based on the special relationship between parent and child and dismissed the court of appeal’s use of financial support statutes to show that the defendant owed a duty toward her father.⁸⁴ The reasoning of the *Heitzman* court follows the norm. Since 1956 the number of states with filial responsibility laws has decreased from thirty-nine to the current twenty-eight, eleven of which have never been invoked.⁸⁵

While ensuring the financial care of the elderly is important, legislatures and courts need to look critically at how states currently attempt to ensure the elderly are cared for physically and mentally. No common law or statutory law imposes any form of a duty of care on adult children for their elderly parents based merely on the familial relationship. “While it is well-established that parents are responsible for their children, it is often unclear—both legally and morally—whether anyone is responsible for an elder because elders are emancipated and are generally thought to be entitled to a greater degree of autonomy.”⁸⁶ The unfortunate truth about this statement is that the majority of elders at some point in their lives will not be able to maintain that autonomy. For those people, provisions must be in place and moral duty must translate into some type of legal duty. The *Heitzman* court disagreed stating, “one treatise has noted, although ‘[g]eneral principles of morals and ethics form a [large] part of the raw materials out of which law is made, . . . the boundaries are not identical.’”⁸⁷

⁸² 886 P.2d 1229 (Cal. 1994).

⁸³ *Id.* at 1242.

⁸⁴ *Id.*

⁸⁵ Katie Wise, *Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 563, 573-74 (2002).

⁸⁶ Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 STAN. L. & POL’Y REV. 175, 190 (2003).

⁸⁷ *People v. Heitzman*, 886 P.2d 1229, 1240 (Cal. 1994) (citing PERKINS & BOYCE, CRIMINAL LAW).

To be sure, the boundaries between morality and legality are not always identical, but the purpose of the common overlap between the two is often to protect society's most vulnerable. Certainly, the protection of the elderly would fall in line with that purpose. The *Restatement of Torts, Second* addresses the issue of moral versus legal duty in the context of protecting others.

[O]ne human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock . . . and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later, such extreme cases or morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule.⁸⁸

This Note does not suggest that every person should be obligated to aid all strangers in peril, but instead that the special relationship status should be extended to the adult child-parent relationship when the parent becomes infirm and when the child is in a position to assist. Arguments against similar propositions claim that mandatory reporting and similar laws violate the older people's autonomy and privacy.⁸⁹ This autonomy argument has been utilized in objecting to a general duty to care for strangers,⁹⁰ and while this argument may have some validity in terms of complete strangers aiding abused elders, it should not be extended to adult children of elderly parents. A familial relationship implies a cordial, if not loving relationship, with the expectation of protection from harm.

In general, courts have failed to recognize the existence of a special relationship that supports a duty of physical care or protection based merely on a familial relationship, except that courts consider that the parent-child relationship is "special."⁹¹ Under current law, this relationship, for purposes of a duty to care or protect, only goes one way. The adult child-parent relationship is not considered "special" and therefore, the adult child does not have a duty to protect the parent. The reason for this one-way street is the assumption that children need protection and par-

⁸⁸ RESTATEMENT (SECOND) OF TORTS § 314 (1965).

⁸⁹ Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L.J. 165, 167 (1995).

⁹⁰ Nancy Levit, *The Kindness of Strangers: Interdisciplinary Foundations of a Duty to Act*, 40 WASHBURN L.J. 463, 468 (2001).

⁹¹ Kohn, *supra* note 86, at 195 (2003).

ents do not. This is no longer the case as the population ages and life expectancies increase.

The *Heitzman* court refused to acknowledge that there may be times when adult children should have a duty to protect their elderly parents. Using tort law to interpret the California criminal statute, the *Heitzman* court determined that the legislature could not have meant to include anyone who had not assumed the duty to care for the elderly in cases of neglect, out of concern that the rule might be extrapolated to require a mere passerby to aid a stranger.⁹² The court determined that no special relationship existed between Robert Heitzman and his daughter.⁹³ But a mere passerby and the victim's own daughter have quite different relationships with the victim. As an incapacitated, malnourished, dehydrated, dying man, who else could he expect to protect him, but his own children?

B. *Child Abuse Laws May Offer Solutions*

Child abuse and neglect statutes provide for duties of care which are much broader than those that appear in elder abuse statutes.⁹⁴ This may be true for a number of reasons, the central one being that elders are not children, they are adults who are, in general, capable of making decisions and protecting themselves in ways children cannot. Today, elder abuse prevention can be compared to the stage child abuse prevention was in during the 1960s,⁹⁵ and the elders who abuse and neglect laws are intended to protect have more in common with children than with independent, autonomous adults.⁹⁶

The most frequent form of abuse of elders is neglect, depriving dependent elders of necessary food, clothing, medical needs and physical care.⁹⁷ The sociological definition of neglect of elders is identical to most state's statutory definition of the neglect of children. The child abuse statute in Florida defines "neglect of a child" to include:

⁹² *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994)

⁹³ *Id.*

⁹⁴ Kohn, *supra* note 86.

⁹⁵ Breau, *supra* note 69, at 223.

⁹⁶ *Id.*

⁹⁷ Jayawardena, *supra* note 40, at 128.

1. A caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or
- (2) A caregiver's failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person.⁹⁸

Alabama's child abuse statute reads, "negligent treatment, include[s] the failure to provide adequate food, clothing, shelter, or medical care."⁹⁹ California's statute is identical.¹⁰⁰ In short, the child abuse and neglect laws recognize precisely the obligation that elder abuse laws fail to enforce.

Unfortunately, legislatures and courts are still in uncharted waters in dealing with elder abuse prevention. Most states have acknowledged these similarities between child abuse and elder abuse by patterning elder and dependent adult abuse statutes after child abuse statutes.¹⁰¹ California's lawmakers used the exact language found in the state's child abuse statutes when they drafted the elder abuse laws. "When drafting the new legislation, the bill's author lifted the language of the child abuse statutes in its entirety, replacing the word 'child' with 'dependent adult' throughout."¹⁰² In Texas, children and elders are protected under the same statute.¹⁰³

While it would seem that elders should be guaranteed the same protection as children, especially in states in which the statutes are identical, this is not the case. The difference is in the definition of the term "caregiver." For children, "caregiver" automatically means parent, unless someone else has permanent or temporary custody.¹⁰⁴ For the elderly, the role of caregiver is not automatic based on a familial relationship, instead it must be as-

⁹⁸ FLA. STAT. § 827.03 (2006).

⁹⁹ ALA. CODE § 26-14-1 (2005).

¹⁰⁰ CAL. PEN. CODE § 11165.2 (2006).

¹⁰¹ Elder Abuse and the Law, http://www.nycagainstrape.org/survivors_factsheet_74.html, (last visited Aug. 30, 2006).

¹⁰² *Heitzman*, 886 P.2d at 1237.

¹⁰³ TEX. PENAL CODE § 22.04, *id.* note 59, "Injury to a Child, Elderly Individual, or Disabled Individual."

¹⁰⁴ *See e.g.* FLA. STAT. § 827.01 (2006), Florida's child abuse statute, "'Caregiver' means a parent, adult household member, or other person responsible for a child's welfare."

sumed.¹⁰⁵ Most definitions of elder “caregivers” are vague as to how far they reach. For example, in the *Heitzman* case, the daughter who had once provided the primary care for her father was no longer considered his caregiver under the California statute because her father had moved in with her brother and she merely visited them.¹⁰⁶ Similar problems of vagueness may arise when multiple children disagree about the care of their parents; when children live a great distance from their parents; or when a parent and child disagree about the care of the second parent. In all of these situations, the term “caregiver” can produce conflict among family members as well as eliminate culpability in borderline situations. The result is that many people who are equally as culpable as the actual abuser avoid prosecution. The *Heitzman* case is just one very sad example of this situation.

One state recently amended its elder abuse law to be more inclusive as to who may be liable for abuse of an elder. West Virginia’s elder abuse statute, amended in 2004 reads, “*Any person, caregiver, guardian or custodian who neglects an incapacitated adult or elder person, or who knowingly permits another person to neglect said adult, is guilty of a misdemeanor.*”¹⁰⁷ This amendment is not likely to provide the answer to increased protection of the elderly. The *Heitzman* court held similar language in a California statute unconstitutional.¹⁰⁸ In that case, the court said the statute “fails to provide adequate notice as to the class of persons who may be under an affirmative duty to prevent the infliction of abuse.”¹⁰⁹ This should raise concerns for other states like West Virginia, which in an effort to provide additional pro-

¹⁰⁵ See e.g. FLA. STAT. § 415.102 (2006), Florida’s Adult Protective Services Act, “‘Caregiver’ means a person who has been entrusted with or has assumed the responsibility for frequent and regular care of or services to a vulnerable adult on a temporary or permanent basis and who has a commitment, agreement, or understanding with that person or that person’s guardian that a caregiver role exists.”

¹⁰⁶ *Heitzman*, 886 P.2d at 1229.

¹⁰⁷ W. VA. CODE § 61-2-29, *id.* note 61. (emphasis added).

¹⁰⁸ “[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . .” Cal. Pen. Code § 368a (repealed).

¹⁰⁹ *Heitzman*, 886 P.2d at 1239.

tection for the elderly, may be doing the opposite. The potential unconstitutionality of West Virginia's statute and others like it leaves the door wide open for replications of the *Heitzman* case. Using *Heitzman* as a guide, legislatures have the opportunity to address the problem before another elder suffers in the same manner as Robert Heitzman, with his "innocent" children looking the other way.

Most states have made a somewhat successful effort to avoid situations like the *Heitzman* case through the enactment of mandatory reporting laws, similar to those enacted to prevent child abuse.¹¹⁰ However, the circumstances surrounding elder abuse are much different from those surrounding child abuse and those who are required to report signs of abuse or neglect of the elderly often do not have the chance to come in contact with the victims.¹¹¹ In contrast to child abuse victims who will be seen by teachers, doctors, or friends, abused and neglected elderly are almost always isolated and confined.¹¹²

Opponents of mandatory reporting laws argue that these laws violate physician-client, clergy-parishioner, and attorney-client privileges.¹¹³ Most states, however, see elder abuse as a significant social interest; thus an exception to the above privileges is justifiable.¹¹⁴

People may be deterred from reporting elder abuse because the elderly do not have to accept help as children do. Because elders are adults, as long as they have the capacity to make a decision about their care and health they may choose to remain in an abusive situation.¹¹⁵ Elder abuse, in this sense, is more similar to domestic abuse than child abuse. In the many cases in which the elder does not have the capacity to decide, mandatory reporting laws can offer protection. Even with mandatory reporting laws in place, elder abuse remains underreported, as most people believe that as adults, elders would report the abuse themselves if they felt the need.

¹¹⁰ Jogerst, et al., *supra* note 59.

¹¹¹ Velick, *supra* note 89, at 174

¹¹² *Id.*

¹¹³ *Id.* at 176.

¹¹⁴ *Id.*

¹¹⁵ Jayawardena, *supra* note 40, at 132.

IV. Comparative Law and Social and Legal Obligations for Eldercare

A. Cross-Cultural Eldercare Obligations

Both sacred and secular authorities agree that adult children have legal, financial, and moral obligations to their parents. The Bible says, “Honor your father and your mother.”¹¹⁶ The Quran says, “Thy Lord hath decreed that . . . ye be kind to parents. Whether one or more attain old age in thy life, say not to them a word of contempt, nor repel them.”¹¹⁷ Aristotle said, “but there is nothing by doing which a son will have done the equivalent of what he has received, so that he is always in debt.”¹¹⁸

American society recognizes these obligations, but lacks the deeply rooted cultural expectations of family often present in other cultures, most notably in Asian cultures. Filial piety is a core traditional value emphasized throughout Eastern societies.¹¹⁹

In Korea, this value is carried out through the expectation that upon gaining independence, adult children will care for their parents.¹²⁰ Korean elders have traditionally lived with their adult children and depended on them for care.¹²¹ This tradition continues today with nearly seventy-five percent of Korean elders living with a child, more than four times the number of American elders living with adult children.¹²²

The traditions of the Chinese culture are similar to those in Korea. The concept of “eminence comes with age” in Chinese culture gives elders an entitlement to care from their children.¹²³ The tradition is of a reciprocal obligation between parents and children, in which parents care for their children as they grow

¹¹⁶ Deuteronomy 5:16.

¹¹⁷ Quran 17:23

¹¹⁸ ARISTOTLE, NICOMACHEAN ETHICS, BOOK VIII (translated by W.D. Ross) available at <http://classics.mit.edu/Aristotle/nicomachaen.8.viii.html>.

¹¹⁹ Young-Hee Won & Gary R. Lee, *Living Arrangements of Older Parents in Korea*, 30 J. OF COMP. FAM. STUD. 315, 316 (1999).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 316, 323.

¹²³ Yao Yuan, *Weakening Family Support for the Elderly in China*, 34 CHINESE SOC. & ANTHROPOLOGY 26, 27 (2001).

and children return the support as their parents age.¹²⁴ This reciprocal obligation is reflected in China's Marriage Law, allowing for an elderly parent to demand payment from a child or for a court-ordered inheritance reduction if an adult child has neglected or abandoned an elderly parent.¹²⁵ Cultural changes such as geographic mobility, a growing elderly population, and effects resulting from China's one-child population control policy made the Marriage Law necessary in upholding Chinese tradition of filial piety.¹²⁶

Experiencing cultural changes similar to those in China, the Republic of Singapore enacted the Maintenance of Parents Act in the 1980s which allows anyone age sixty or older who is unable to care for him or herself to petition for an order requiring support by their children.¹²⁷ Critics of the law argue that the traditional family value of filial piety should be left to families and not legislated, but advocates argue that the elderly need protection due to a deterioration of traditional family values.¹²⁸

Japan, on the other hand, has legislated filial responsibility for centuries.¹²⁹ Contemporary Japanese laws follow that tradition. The 1948 Japanese Constitution expressly made parents and adult children reciprocally responsible for each other.¹³⁰ In addition to the constitutional provision, Japan enacted the Law for the Welfare of Elderly Persons requiring adult children to provide financially for a parent whom either currently lives with the child or lived with the child just prior to entering a nursing home.¹³¹ Like the American filial responsibility laws, Japan's are rarely enforced.¹³² With the highest proportion of three generation households in the world, Japan's government relies on soci-

¹²⁴ *Id.* at 28.

¹²⁵ Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 *MARQ. L. REV.* 401, 446 (2002).

¹²⁶ *Id.* at 448.

¹²⁷ Moskowitz, *supra* note 125, at 438.

¹²⁸ *Id.* at 438-39.

¹²⁹ *Id.* at 439.

¹³⁰ *Id.* at 440.

¹³¹ *Id.*

¹³² *Id.*

ety and morality rather than law enforcement in encouraging family eldercare.¹³³

Morality and societal pressures may preclude Japan from enforcing its eldercare laws, but the United States needs government intervention. The expectation of morality without a legal obligation has not and will not keep American elders safe, even from their own children. A key difference between Eastern and Western cultures is the view from which each looks at family eldercare. In the East words like “respect,” “responsibility” and “duty” represent children’s view of caring for their parents. In contrast, the West uses the word “burden” when discussing eldercare.¹³⁴ The burden of eldercare is representative of an overall American attitude that elderly contribute nothing to society. In general, for Americans, the word elderly “promote[s] the idea that the members of this group are inherently ineffectual and undesirable.”¹³⁵ This attitude, developed through the industrialization, libertarianism, and egalitarianism at the turn of the nineteenth century,¹³⁶ is likely a contributing factor in the rise of elder abuse and neglect. Taking cues from the East, America can change this attitude through legislation imposing legal consequences to ignoring a moral duty.

B. *Social and Legal Implications of a Duty to Aid in the U.S.*

Subsequent to the *Heitzman* ruling in California, Susan Heitzman’s attorney spoke out opposing any law that would impose a legal duty on adult children.¹³⁷ He reasoned that because of the prevalence of family violence in the United States it would be unfair to impose responsibility on children who were abused by their parents.¹³⁸ Despite the high incidence of child abuse, the

¹³³ *Id.*

¹³⁴ See e.g. DAVID N. WEISSTUB, ET AL., AGING: CARING FOR OUR ELDERLY 8, 22 (2001), “The rewards of parent care notwithstanding, parent care can also be overwhelming, infuriating, isolating, and unappreciated. In other words, we can speak of the *burden* of caregiving.”

¹³⁵ Alan Pope, *The Elderly in Modern Society: A Cultural Psychological Reading* 1 JANUS HEAD (Spring 1999), available at <http://www.janushead.org/JHspg99/pope.cfm>.

¹³⁶ *Id.*

¹³⁷ Jane Glenn Haas, *Ruling Fuels Elder-Abuse Debate*, ORANGE COUNTY REG., Jan. 16, 1995 at B1.

¹³⁸ *Id.*

majority of adult children were not abused and therefore do not have that defense to inaction toward protecting their parents from an abuser.¹³⁹ Leading elder law authority, Marc Hankin, finds absurdity in the fact that adult children must not come to their abused parents' aid.¹⁴⁰

Many reasons exist as to why adult children should not owe the same duty to their parents as their parents owed them as minor children, but imposing a duty to aid or protect with knowledge or reasonable suspicion of abuse or neglect is a reasonable alternative. Providing care to an older person may, on the surface, seem similar to caring for a child, and in some ways it is. Tasks like preparing meals, bathing, and assisting in personal hygiene are typical of both.¹⁴¹ Despite this similarity, the differences can be overwhelming to those who undertake the care of a dependent elderly person.

The emotional aspects of caring for an ailing parent differ vastly from those of caring for a growing child. The care of a child is often a planned, or at least anticipated, event for which parents are able to properly prepare, both financially and emotionally.¹⁴² But the responsibility of caring for a parent often occurs suddenly, after a traumatic event such as a fall or a stroke.¹⁴³ When caring for a child, the parent does so with the motivation of teaching and helping the child to grow, knowing that someday that child will be an independent adult.¹⁴⁴ Conversely, caring for a parent is done knowing that each day may require more care and increased responsibilities, eventually ending with death of the parent, not independence.¹⁴⁵ The stress for the caregiver in this circumstance is not just the stress of providing adequate care,

¹³⁹ According to the American Academy of Pediatrics, one in twenty children are abused in the United States each year. http://www.medem.com/MedLB/article_detailb.cfm?article_ID=ZZZ3S3DRUDC&sub_cat=355, (last visited Aug. 30, 2006).

¹⁴⁰ *Id.* Marc Hankin is the author of multiple California statutes on elder protection laws.

¹⁴¹ Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 365 (2004).

¹⁴² *Id.* at 368.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 365.

¹⁴⁵ *Id.* at 365-66.

but the stress of coming to terms with the end of a parent's life.¹⁴⁶

Proximity to the parent also complicates an adult child's ability to care for aging parents. America is a mobile country and adult children rarely live in the same cities, or even the same states, as their parents.¹⁴⁷ Families are learning to deal with the challenges of long-distance caregiving. An estimated thirty percent of caregivers live at least an hour away from their elderly family member.¹⁴⁸ In addition, the high rate of divorce may create additional obstacles in caring for the Baby Boomer generation with parents living apart, but both needing care.¹⁴⁹ For all of the above reasons, it may not be fair to require adult children to care for their parents. Nevertheless, even with obstacles such as distance, other family commitments, jobs and finances, a law requiring children to take action to provide safety for an abused or neglected parent can make a world of difference in the lives of everyone affected.

C. Proposed Legislation

Child abuse laws can again be used as models to draft duty to aid statutes. Lawmakers can create a statutory duty where a common law duty does not exist. By adding specificity to California's repealed elder abuse statute, replacing "any person" with precise categories of people the issue of unconstitutionality due to vagueness is eliminated.¹⁵⁰ The statute might look something like this:

Any caregiver, guardian, custodian, or adult child of an elder or dependent adult who willfully causes or permits said elder or dependent adult, with actual or constructive knowledge, that he or she is an elder or dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering shall be guilty of a felony.¹⁵¹

¹⁴⁶ *Id.* at 366.

¹⁴⁷ WEISSTUB, ET AL., *supra* note 134, at 8.

¹⁴⁸ Smith, *supra* note 141, at 367.

¹⁴⁹ Weisstub, *supra* note 134, at 3.

¹⁵⁰ Cal. Pen. Code § 368a, *id.* at 102.

¹⁵¹ As each state classifies levels of felonies differently, the level imposed here would depend on the classification used by each particular state. The felony level should be one that would coincide with the state's child abuse penalties.

The duty to affirmatively act to aid or protect an aging parent may include reporting the abuse to an Adult Protective Service or other law enforcement; taking steps to remove the parent from the abusive situation, or assisting the parent in getting appropriate medical care, and may look like this:

Any caregiver, guardian, custodian, or adult child of an elder or dependent adult, who has knowledge or reason to know that the elder or dependent adult is in need of care or protection or is being neglected, has a duty to take affirmative actions to aid and protect said elder or dependent adult, which include, but are not limited to, filing a report with Adult Protective Services or other law enforcement agency, removing said elder or dependent adult from his or her abusive situation, or seeking immediate medical attention.

The extent of the duty owed to the parent will depend on a number of circumstances. Competency of the parent, competency of the adult child, the child's geographical or physical proximity to the parent, and knowledge of abuse or neglect should be considered in determining the extent of the child's duty and the statute may be drafted like this:

A caregiver, guardian, custodian, or adult child of an elder or dependent adult may be afforded limitation or relief of his or her duty to aid or protect said elder or dependent adult, and therefore has an affirmative defense through any of the following extenuating circumstances: incapacity of the caregiver, guardian, custodian, or adult child; incompetence of caregiver, guardian, custodian, or adult child; limited geographical or physical proximity to said elder or dependent adult; or estrangement from said elder or dependent adult.

Potential challenges to this proposed legislation may be in the definitions of such terms as "elder," "dependent adult," and "adult child." These terms must be carefully defined to not include or exclude those for whom the statute is unnecessary or unintended. In addition, the words "elder *or* dependent adult" may create a defensive challenge to the statute. Defense attorneys may argue that an elder and a dependent adult cannot be the same; either someone is an elder *or* someone is a dependent adult. Through careful definitions of the terms, the legislatures can avoid this challenge, by noting in the definitions that they are not necessarily exclusive terms. An elder can be a dependent adult and vice versa.

The above sections represent the bare bones of how effective elder abuse and neglect statutes should be drafted. Collabora-

ration between lawmakers, sociologists, psychologists, gerontologists, and the medical community needs to occur in order to encompass all of the complex aspects of aging that complicate the protection of America's seniors.

V. Conclusion

“If we as a society believe that families have at least some duty to provide for their members, broader legal definitions of affirmative duties are most likely to comport with our sense of moral responsibility.”¹⁵² Elder abuse is not going away and, without proper legislation, it will only get worse. Large numbers of elderly and fewer children to care for them will soon become a reality and the stresses that follow will cause this epidemic to become a pandemic. People like Robert Heitzman and Brooke As-tor deserve to live with dignity and self-respect, not suffer and die in filth and humiliation. Therefore, states need to take the initiative to create a statutory duty for adult children to aid and protect their elderly parents.

Lara Queen Plaisance*

¹⁵² Kohn, *supra* note 86, at 195.

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