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# The Prevention, Identification and Treatment Act of 1987: Is It a Proper Federal Response to Elder Abuse?

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**THE PREVENTION, IDENTIFICATION,  
AND TREATMENT OF ELDER ABUSE ACT OF 1987:  
IS IT A PROPER FEDERAL RESPONSE  
TO ELDER ABUSE?<sup>1</sup>**

**I. INTRODUCTION**

A woman from Nevada related the abuse of her mother by her sister. When the abuses were reported to the legally appointed guardian, who was a good friend of the sister, they were ignored. The mother was beaten; when she was incontinent, feces were rubbed in her face as punishment. The abusive daughter would not allow a visiting nurse to clean or examine her and she suffered from bed sores. The mother was taken to the hospital where she died from complications and the abusive treatment by the daughter, who by this time had depleted the estate of her mother.<sup>2</sup>

A 72-year old Texas woman, legs and back covered with large open sores, stayed in a small room in the rear of her son's rented house on the outskirts of town. He claimed to be caring for her, but the visiting nurse thought otherwise. Her first few visits found the senile woman asleep on a wet mattress on the floor with half a banana or a chicken leg in her hand. The nurse knew she could not have eaten any of the food because she was unable to raise her arm. Later, the woman became so dehydrated that the nurse asked [the son] to take [his mother] to a hospital. [The son] refused until a doctor firmly ordered him to call an ambulance. The mother died a week later.<sup>3</sup>

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1. "Elder Abuse," for the purposes of this note, is defined as the "abuse, neglect, or exploitation" of a person who has attained the age of 60. H.R. 628, 100th Cong., 1st Sess. (1987) [hereinafter Elder Abuse Act].

2. HOUSE SELECT COMM. ON AGING, ELDER ABUSE: A NATIONAL DISGRACE, H.R. Doc. No. 502, 99th Cong., 1st Sess. 8 (1985) [hereinafter ABUSE REPORT]. This is an example of "physical" elder abuse. See *infra* note 38 and accompanying text.

3. ABUSE REPORT, *supra* note 2, at 10. This is an example of "neglect," a type of elder abuse. See *infra* note 39 and accompanying text.

[Finally],[a]n elderly woman who lived alone in squalid conditions was diagnosed as having senile dementia. She had cardiopulmonary insufficiencies that caused severe edema of feet and legs. Her condition deteriorated to the point that her legs were leaking body fluids and had developed ulcers, upon which rats and roaches had started to feed. Although her condition was life-threatening, she repeatedly refused hospitalization that her doctor recommended. Although a protective service worker obtained court-ordered medical services, the woman died within 36 hours of hospitalization.<sup>4</sup>

These tragic case histories are vivid examples of elder abuse, a problem in the United States that did not even have a name until the late 1970's. One survey has shown the possibility that over one million elderly Americans are being abused annually.<sup>5</sup> Furthermore, while over 40% of all reported abuse involves the elderly, less than 5% of the states' protective service budgets are committed to this age group.<sup>6</sup> This note will analyze the latest Congressional response to elder abuse; proposed legislation H.R. 628, known as the Prevention, Identification, and Treatment of Elder Abuse Act of 1987 (Elder Abuse Act).<sup>7</sup> This legislation would serve the primary function<sup>8</sup> of providing federal funds for state elderly protective service programs.<sup>9</sup> Such programs typically include provisions for evaluating the need for protective services, providing medical care, relocating an abused elder to a care facility, and transporting the elderly to care providers.<sup>10</sup> This note will focus on the Elder Abuse

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4. ABUSE REPORT, *supra* note 2, at 21. This is an example of "self-neglect," a type of elder abuse that occurs when the elderly person, and not a family member or caretaker, is the abuser. See *infra* note 39 and accompanying text.

5. ABUSE REPORT, *supra* note 2, at 5.

6. *Id.*

7. Elder Abuse Act, *supra* note 1.

8. *Id.* at 1. The bill's purpose would be "[t]o provide financial assistance for programs for the prevention, identification, and treatment of elder abuse, neglect, and exploitation." *Id.*

9. For example, Massachusetts defines "protective services" as "services which are necessary to prevent, eliminate, or remedy the effects of abuse to an elderly person." MASS. GEN. LAWS ANN. ch. 19A, § 14 (West Supp. 1987).

10. See, e.g., FLA. STAT. ANN. § 415.102(14) (West Supp. 1988); CONN. GEN. STAT. ANN. § 46a-14(3) (West 1986).

Act's provision requiring a state to have a mandatory elder abuse reporting statute in order for these programs to qualify for federal funding.<sup>11</sup>

## II. BACKGROUND

In 1977, it was predicted that the 1980's would be the "Decade of Concern for the Battered Parent."<sup>12</sup> At the time the phrase was coined, little was known about why the elderly were abused by their children and other caretakers.<sup>13</sup> This lack of knowledge was attributed to the fact that little research had been performed in the area of elder abuse.<sup>14</sup> Recognition of elder abuse was as uncommon as recognition of child abuse had been in 1961 when child abuse was first declared a syndrome.<sup>15</sup>

The first major study identifying elder abuse as a social problem and a syndrome was published in 1979.<sup>16</sup> This study described elder abuse as the physical, psychological, and material abuse of older persons.<sup>17</sup> A subsequent study added neglect as a form of elder abuse.<sup>18</sup>

In 1978 concern for the victims of elder abuse first surfaced in Congress. The Select Committee on Aging began a three year study of the problem which culminated in a landmark report in 1981.<sup>19</sup> This report revealed the possibility that over one million

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11. Elder Abuse Act, *supra* note 1, § 4(b)(2)(B). "In order for a state to qualify for assistance under this subsection, such State shall . . . (B) provide for the mandatory reporting of known and suspected instances of elder abuse, neglect, and exploitation . . ." *Id.*

12. S. STEINMETZ, *THE CYCLE OF VIOLENCE* xxi (1977). This work also referred to the 1960's as the decade of the "battered child" and the 1970's as the decade of the "battered spouse." *Id.*

13. Katz, *Elder Abuse*, 18 J. FAM. L. 695 (1979-80).

14. *Id.* at 695 n.2. "This lack of attention is a function of a lack of information and data." *Id.*

15. *Id.* at 695-96 n.2 (quoting Renvoize, *Granny Bashing* in *WEB OF VIOLENCE* 155 (1978)).

16. M. BLOCK & J. SINNOTT, *THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY* (1979) [hereinafter BLOCK & SINNOTT STUDY].

17. *Id.* at 78.

18. Lau & Kosberg, *Abuse of the Elderly by Informal Care Providers*, 299 *AGING*, Sept.-Oct. 1979, at 10, 11. Neglect also means self-neglect, and includes an elderly person's "excessive use of alcohol or drugs, grossly improper diet, refusal to accept medical care or medical recommendations, or a refusal to eat." *Id.*

19. HOUSE SELECT COMM. ON AGING, *ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM*, H.R. Doc. No. 277, 97th Cong., 1st Sess. (1981) [hereinafter EXAMINATION].

elderly persons were being abused annually by family members or institutional caretakers, such as nursing homes or hospital personnel.<sup>20</sup>

Less than a year earlier, on June 11, 1980, a bill addressing *adult* abuse was introduced to the House.<sup>21</sup> This bill, H.R. 7551, contained essentially the same provisions as the Elder Abuse Act,<sup>22</sup> with one notable difference: H.R. 7551 did not require that the states have mandatory reporting laws.<sup>23</sup> Though H.R. 7551 and subsequent adult and/or elder abuse bills introduced in Congress<sup>24</sup> have garnered some support, none have become law.<sup>25</sup>

Elder abuse has been addressed as a corollary issue in two related pieces of legislation, the Child Abuse Amendments of 1984<sup>26</sup> and Older American Act Amendments of 1984.<sup>27</sup> Under the Child Abuse Amendments of 1984, the Family Violence Prevention and Services Act provides that grants may be given to the states to fund family violence programs.<sup>28</sup> "Family violence" under this legislation encompasses elder abuse.<sup>29</sup>

The Older American Act Amendments of 1984 require that if a state has a program providing elder abuse prevention and treatment services, "the [s]tate plan must assure that any area agency

20. *Id.* at 5.

21. H.R. 7551, 96th Cong., 2d Sess., 126 CONG. REC. 26,190 (1980). This legislation was primarily intended "[t]o provide financial assistance for programs for the prevention, identification, and treatment of *adult* abuse, neglect, and exploitation." *Id.* (emphasis added).

22. See, Elder Abuse Act, *supra* note 1. For example, the word "elder" in the Elder Abuse Act replaced the word "adult" in H.R. 7551. *Id.* Otherwise, the terminology is virtually identical.

23. H.R. 7551 provided, in pertinent part, that "[i]n order for a State to qualify for assistance under this subsection, such State shall . . . provide for the reporting of known and suspected instances of adult abuse, neglect, and exploitation . . ." H.R. 7551, 96th Cong., 2d Sess., 126 CONG. REC. 26,190 (1980), § 4(b)(2)(B). Compare *id.* (no provision mandating adult abuse reports) with Elder Abuse Act, *supra* note 1, § 4(b)(2)(B) (providing for mandatory reporting).

24. H.R. 769, 97th Cong., 1st Sess. (1981); H.R. 3833, 98th Cong., 1st Sess. (1983); H.R. 5425, 99th Cong., 2d Sess. (1986). All of these proposed bills have been referred to various committees and subsequently failed to pass the House.

25. One possibility for the non-passage of the various elder abuse bills could be the cost. Significantly, the Elder Abuse Act contains a provision, absent in earlier versions, which limits federal funding to 50% of the costs of a state's protective services. See Elder Abuse Act, *supra* note 1, § 4(b)(2)(H).

26. Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10412 (Supp. 1987).

27. Older American Act Amendments of 1984, 42 U.S.C. §§ 3001-3058d (Supp. 1985).

28. Family Violence Prevention and Services Act, 42 U.S.C. § 10402(a)(1) (Supp. 1987).

29. *Id.* § 10408(1)(b) (Supp. 1987).

carrying out elder abuse prevention activities will conduct its program consistent with [s]tate law and be coordinated with existing [s]tate adult protective services activities."<sup>30</sup>

Though Congress has paid some attention to the elder abuse program, its response has been called "inadequate."<sup>31</sup> Primarily because of the lack of federal funding and inflation, states have been restricted in providing elderly abuse protective services.<sup>32</sup> For example, in 1984, a House Select Committee on Aging survey showed that while the average state protective service budget was \$26,934,868, the amount spent on protecting the elderly was only \$1,336,519, or about 5% of the allotted budget.<sup>33</sup> Thus, in 1984, each state spent about \$2.90 per elderly resident for protective services.<sup>34</sup>

### III. ANALYSIS OF CURRENT PROPOSED ELDER ABUSE LEGISLATION

On January 21, 1987, Congressman Boner of Tennessee, along with several other sponsors,<sup>35</sup> introduced the Elder Abuse Act. The act's stated purpose would be "[t]o provide financial assistance for programs for the prevention, identification, and treatment of elder abuse, neglect, and exploitation, to establish a National Clearinghouse on Elder Abuse, and for other purposes."<sup>36</sup>

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30. ABUSE REPORT, *supra* note 2, at 44. The state must opt to undertake such a program in order to be eligible for federal funds. *Id.*

31. *Id.* at 43.

32. *Id.* at 5. "Since 1981, the primary source of Federal funding for protective services, the Social Services Block Grant, has been cut in real terms nearly one fifth by direct cuts and inflation." *Id.*

33. *Id.* at 34. Thirty-six states were included in this survey. Fourteen states and the District of Columbia were excluded because they (1) did not respond to the survey; (2) responded but did not furnish information; or (3) did not have an amount budgeted for elderly protective service. *Id.* at 27-29. The bulk of the surveyed states' protective service budgets were spent on child protective services. *Id.* at 34. Out of \$1.023 billion spent overall, \$855,511,000 was spent on child protective services. *Id.*

34. *Id.* at 5. In contrast, about \$22.00 per child was spent by the states that responded to the survey for child protective services. *Id.* This note does not suggest that less money should be expended for child abuse protective services. Its purpose is to show the need for more federal funding for elder abuse protective services.

35. Other sponsors were Representatives Gordon, Bentley, Crockett, Fish, Horton, Howard, Kaptur, Kolter, MacKay, Roe, Roybal, Scheuer, Smith, and Visclosky. Elder Abuse Act, *supra* note 1, at 1.

36. Elder Abuse Act, *supra* note 1, at 1.

An "elder," for purposes of the Elder Abuse Act, is defined as a person who has reached the age of 60.<sup>37</sup> "Abuse" is defined as "the willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm or pain or mental anguish; or the willful deprivation by a caretaker of goods or services which are necessary to avoid physical harm, mental anguish, or mental illness."<sup>38</sup> "Neglect" is defined as "the failure to provide for oneself the goods or services which are necessary to avoid physical harm, mental anguish or mental illness or the failure of a caretaker to provide such goods or services."<sup>39</sup> Finally, "exploitation" is the illegal or improper act or process of a caretaker using the resources of an elder for monetary or personal benefit, profit, or gain.<sup>40</sup>

Such all-encompassing definitions, however, while facially appearing to address the elder abuse problem, may instead create a double-edged sword to hinder the fight against it. At least one report cautioned against the use of overbroad definitions<sup>41</sup> because "the relief fashioned is often broader than necessary and may constitute an unnecessary, unwise, and unethical, if not unconstitutional, invasion of the older adult's independence."<sup>42</sup> Another commentator warned that "vague, sweeping, and circular definitions" of elder abuse essentially legislate "against unkindness to the elderly."<sup>43</sup> Thus, overbroad definitions can be an unwelcome intrusion into an elderly person's life and at the same time be so protective as to be unenforceable.

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37. *Id.* § 3(2). Several state statutes have defined an "elder" as a person who is 60 years of age and older. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-14(1) (West 1986); MASS. GEN. LAWS ANN. ch. 19A, § 14 (West Supp. 1989); WIS. STAT. ANN. § 46.90(1)(c) (West 1987). Conceivably, if a state defined an "elder" as a person younger than age 60, such a person would not be eligible for the services funded by the Elder Abuse Act. Alternatively, if a state defined an "elder" as one who has reached an age older than 60 years old, the state would have to lower this age to 60 in order to eliminate the gap period between the federal and state minimum ages.

38. Elder Abuse Act, *supra* note 1, at § 3(1). Terms such as "unreasonable" and "willful" could be construed broadly or narrowly, depending on who is the decision-maker (*e.g.*, protective service agency investigator).

39. *Id.* § 3(5).

40. *Id.*

41. Faulkner, *Mandating the Reporting of Suspect Cases of Elder Abuse: An Inappropriate, Ineffective, and Ageist Response to the Abuse of Older Adult*, 16 FAM. L.Q. 69, 74 (1982).

42. *Id.* at 74.

43. Katz, *supra* note 13, at 714-15.

For example, the Elder Abuse Act's definitions of "abuse" and "neglect" include mental illness as a form of harm. As one commentator pointed out, the symptoms of mental illness found in older persons may be "organic . . . in origin" and unrelated to an abusive situation.<sup>44</sup> Attempts to interpret such definitions may prove to be "subjective" and could result in "unwarranted intervention" in the lives of the elderly.<sup>45</sup>

The National Clearinghouse on Elder Abuse (Clearinghouse), under the supervision of the Secretary of Health and Human Services (Secretary), would serve as a conduit for research activities,<sup>46</sup> informational programs,<sup>47</sup> training materials,<sup>48</sup> and technical assistance<sup>49</sup> relating to elder abuse, neglect, or exploitation.

More significant is that the Secretary would be authorized to issue grants to states to use in their elder abuse prevention and treatment programs.<sup>50</sup> The states would have to satisfy certain requirements, however, to qualify for the available monies.<sup>51</sup> Under the Elder Abuse Act, a state elder abuse law must provide immunity from prosecution, under state or local law, to those who report elder abuse to the appropriate authorities.<sup>52</sup> This protection, common in virtually all state elder abuse reporting statutes, insulates the abuse reporter from any legal consequences that may result from the report.

In addition, the appropriate state agency would be required to investigate an elder abuse report and, if necessary, provide protective services to the victim.<sup>53</sup> The agency must also demonstrate that it has effective administration, training procedures, and personnel.<sup>54</sup> Any records kept must be confidential to ensure the victim's privacy<sup>55</sup> and the state law must provide that law enforcement

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44. *Id.* at 715.

45. *Id.*

46. Elder Abuse Act, *supra* note 1, § 2(b)(1).

47. *Id.* § 2(b)(2).

48. *Id.* § 2(b)(3).

49. *Id.* § 2(b)(4).

50. *Id.* § 4(b)(1).

51. *Id.* § 4(b)(2)(A)-(J).

52. *Id.* § 4(b)(2)(A).

53. *Id.* § 4(b)(2)(C).

54. *Id.* § 4 (b)(2)(D).

55. *Id.* § 4(b)(2)(E).

officials, courts of competent jurisdiction, and state agencies providing human services cooperate when dealing with elder abuse cases.<sup>56</sup> The state must allow the elder to participate in decisions regarding his or her welfare and provide the elder with the least restrictive alternatives.<sup>57</sup>

The Elder Abuse Act would also require, in a departure from past legislation of this type, that a state pay 50% of the cost of elder abuse protective service programs with non-federal funds<sup>58</sup> and the aggregate state monetary support received for those programs could not be less than the amount spent in the twelve months immediately preceding enactment of the Elder Abuse Act.<sup>59</sup> A state clearinghouse would have to be established to inform the general public about the elder abuse problem, including prevention and treatment methods.<sup>60</sup> Finally, the state must provide for mandatory reporting of known *and* suspected cases of elder abuse, neglect, and exploitation.<sup>61</sup> It is this Elder Abuse Act requirement, mandatory reporting of known or suspected elder abuse, that is the focus of this paper.

#### IV. MANDATORY REPORTING OF ELDER ABUSE

The Elder Abuse Act would require that, in order to receive federal funding, a state must have mandatory reporting laws in effect.<sup>62</sup> In the first and most influential elder abuse study, Block and Sinnott concluded that mandatory reporting statutes are "essential" to root out hidden cases of elder abuse.<sup>63</sup> Block and Sinnott drew an analogy between elder abuse and the seemingly similar problem of child abuse, and suggested that identification of

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56. *Id.* § 4(b)(2)(F).

57. *Id.* § 4(b)(2)(G).

58. *Id.* § 4(b)(2)(H).

59. *Id.* § 4(b)(2)(I).

60. *Id.* § 4(b)(2)(J).

61. *Id.* § 4(b)(2)(B).

62. *Id.* Mandatory reporting laws require that specified professionals (*e.g.*, doctors) report known and suspected cases of elder abuse to proper state authorities. *Id.* As a result of such a report, some state protective service authorities investigate to determine if elder abuse has occurred and recommend the appropriate protection and/or treatment provided by law. *See, e.g.*, ALA. CODE § 38-9-8 (Supp. 1988); ALASKA STAT. § 47.24.010(a) (1984).

63. Block & Davidson, *Proposed Mandatory Reporting Law*, in BLOCK & SINNOTT STUDY, *supra* note 16, at 97.

the abuse is necessary to properly provide protection and treatment.<sup>64</sup> The similarities between children and the elderly include dependence on others for their "most basic needs,"<sup>65</sup> the "stressful and draining emotional, financial, and physical demands [both make] 26on their caretakers"<sup>66</sup> and the assumption often made by both groups that a loving family will care for them.<sup>67</sup> A recommendation in a report to the House Select Committee on Aging echoed the opinion of the Block and Sinnott study.<sup>68</sup> Reliance on the Block and Sinnott study would seem to account for the presence of the mandatory reporting requirement in the proposed Elder Abuse Act.

Another reason for mandatory reporting has been suggested. Some commentators feel that the elderly will not go to the proper protective service authorities on their own volition.<sup>69</sup> An elderly person may deny that the abuse has occurred<sup>70</sup> or be resigned to such behavior.<sup>71</sup> The elderly person may also be afraid to report abuse because of the possibility of either retaliation by the abuser or physical displacement from a familiar environment.<sup>72</sup>

A majority of states, in order to comply with the anticipated requirements of a federal elder abuse law, and thus qualify for federal grants, have enacted elder abuse statutes that include mandatory reporting provisions.<sup>73</sup> Today, thirty-eight states have mandatory reporting requirements as part of their adult protective service statutes.<sup>74</sup>

Since the Block and Sinnott "pro mandatory requirement"

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64. *Id.*

65. Katz, *supra* note 13, at 716.

66. *Id.*

67. *Id.*

68. "[With regard to assisting the states in combating elder abuse,] the Congress may wish to consider legislation analogous to the Child Abuse Prevention, Identification, and Treatment Act of 1974. The bill would provide Federal funds to States which had mandatory reporting laws . . . ." ABUSE REPORT, *supra* note 2, at 5.

69. See Lau & Kosberg, *supra* note 18, at 12-13 (fifty-two of fifty-six cases of abuse were not reported).

70. *Id.* at 13. "Denial was often related to protecting the abuser, denying a problem existed, or psychologically refusing to acknowledge the problem." *Id.*

71. *Id.* "Resignation appeared to be a more conscious (and verbalized) acquiescence to the abuse . . . ." *Id.*

72. S. STEINMETZ, *supra* note 12, at 55.

73. Note, *Mandatory Reporting of Elder Abuse: A Cheap But Ineffective Solution to the Problem*, 14 FORDHAM URB. L.J. 723, 766-71 (1986).

74. *Id.* at 766-71.

report, however, arguments have emerged questioning the adoption of mandatory reporting, and even voluntary reporting, of elder abuse.<sup>75</sup> As early as 1980, Professor Katheryn Katz found fault with adapting child abuse reporting statute models<sup>76</sup> to the elder abuse problem:

The assumptions underlying child abuse reporting laws are that state intervention is essential and that successful treatment of both parents and children is possible. An unarticulated assumption underlying the demand for elder abuse reporting statutes is that the child abuse reporting statutes are accomplishing their stated aims. In light of our experience with child abuse reporting statutes over the past eighteen years, these are questionable assumptions.<sup>77</sup>

Those against reporting laws have several concerns. One such concern is that reporting laws, while producing questionable results as elder abuse data collecting tools, are causing unwanted and possibly unconstitutional invasions of privacy.<sup>78</sup> The state protective service intervention necessitated by an elder abuse report is one such invasion.<sup>79</sup>

Another problem could arise once the state agency determines that elder abuse has occurred. Many states give the abused elderly the power of consent over any protective services that may be employed.<sup>80</sup> The state agency, however, may still proceed with such services, despite an elder's wishes to the contrary. Generally, state protective service statutes provide that if there is reasonable cause for the state agency to believe that the abused elder lacks capacity to consent to receiving protective services the state agency may

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75. See Katz, *supra* note 13, at 705; Faulkner, *supra* note 41 ; Note, *supra* note 73.

76. See, e.g., CONN. GEN. STAT. ANN. § 17-38a (West Supp. 1988).

77. Katz, *supra* note 13, at 705.

78. *Id.* at 719-20. "If we believe that the aged enjoy the same fundamental rights of privacy, personal autonomy, and freedom of religious or ethical beliefs as other adults, we must respect their choices, even if they hasten death." *Id.*

79. *Id.* at 719. In contrast, because a child is presumed incompetent in our society, the state may constitutionally intervene when an abusive situation exists between the child and his or her caretakers. *Id.* at 717. In other words, "the child remains as voiceless as ever." *Id.*

80. See Note, *supra* note 73, at 766-71.

petition the court for the purpose of obtaining consent.<sup>81</sup> Other statutes impose standards that merely require an "unwillingness" by an abused elder to accept the protective services before a state agency may proceed with such services.<sup>82</sup> The Elder Abuse Act, under section 4(b)(2)(G), would require that any state wishing to receive federal grant money would have to "provide that the elder participate in decisions regarding his or her own welfare, and provide that the least restrictive alternatives are available to the elder who is abused, neglected, or exploited."<sup>83</sup> As stated earlier, even though the elder may refuse the state-mandated protection, the state may still attempt to override that refusal by petitioning the court. The elderly person who ultimately must accept state protective service treatment may be far from relieved over being removed from surroundings that, while not perfect, were familiar.<sup>84</sup> On the contrary, the elder may feel a loss of self-image over being treated as a child.<sup>85</sup> "The ability to refuse assistance, even in the form of an investigation, is as important to self-image as the ability to seek and secure that assistance."<sup>86</sup>

An alternative to the Elder Abuse Act's mandatory reporting requirement is the elimination of any reporting requirement, or in

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81. ALASKA STAT. § 47.24.030(a) (1988) (elder must consent to protection unless there is reasonable cause to believe that the elder is incapacitated).

82. See, e.g., ALA. CODE § 38-9-4(a) (Supp. 1988). "All protective services shall be in conformity with the wishes of the person . . . unless the person is unable or unwilling to accept such services and if the person is unable or unwilling to accept such services, the court may order such services." *Id.*

83. Elder Abuse Act, *supra* note 1, § 4(b)(2)(G).

84. A hypothetical using the Alabama protective service statute may prove helpful. A widowed 70 year old woman, who lives with her middle-aged daughter and son-in-law, goes to her physician for her monthly checkup. The doctor notices that the woman has lost several pounds over the last few months and asks if she has been eating. She says everything is fine. The doctor, who resides in Alabama, a mandatory reporting statute state, must report cases of *suspected* as well as *known* elder abuse. Thus, he is compelled to report his patient's case to the state's protective service agency. He reports the case, a protective service agent investigates, and discovers that the woman is indeed not getting food regularly due to her daughter's tight financial circumstances. The protective service agent determines that this is elder abuse (neglect), and as such, the woman should be removed from her daughter's home. The elderly woman states that she is unwilling to accept this service. The protective service agent, based on the elderly woman's unwillingness, petitions the court to compel her to accept. Thus, despite her wishes to the contrary and without a showing of incapacity, the elderly woman must move out of her familiar environment.

85. Faulkner, *supra* note 41, at 90.

86. *Id.*

the alternative, a voluntary reporting requirement.<sup>87</sup> Under a voluntary reporting system, one would not be compelled by law to report suspected or known cases of elder abuse.<sup>88</sup> Interestingly, the Block and Sinnott study found that in ninety-five percent of the cases examined the abused elder voluntarily sought protection.<sup>89</sup>

In addition, the elder should have the power to accept or reject any treatment or protection offered by the protective service agency. Furthermore, the state should not be allowed to override the elder's lack of consent, unless the person is in fact incompetent. "Let those who want the state to do all kinds of things for the aged pursue their goal as they see fit. But for every hour they spend planning 'services' for the aged, let them spend two guaranteeing them the right not to receive but to reject these benefits."<sup>90</sup>

## V. CONCLUSION

Elder abuse is a problem which is national in scope.<sup>91</sup> The cases chronicled at the beginning of this note are graphic representations of the estimated one million incidents of elder abuse that occur annually in the United States.<sup>92</sup> Moreover, federal legislation is needed, primarily to provide states with funds to support woefully under-budgeted elder abuse protective service programs. The solution, however, should not be "hasty and ill-conceived [elder abuse] legislation."<sup>93</sup>

Mandatory reporting, which is a requirement of the proposed Elder Abuse Act, seems to be questionable, at best, as an elder abuse data-gathering tool. At its worst, it could result in unwanted and unconstitutional intervention into the lives of the elderly. It could also promote an ageist mentality which would result in the

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87. Katz, *supra* note 13, at 712. "If further research establishes that abused elders are capable of and are seeking protection . . . the solution may be voluntary prevention and treatment services . . ." *Id.*

88. See, e.g., WIS. STAT. ANN. § 46.90(4)(a)(1) (West 1987).

89. Block & Sinnott, *Methodology and Results*, in BLOCK & SINNOTT STUDY, *supra* note 16, at 79.

90. Katz, *supra* note 13, at 721-22 (quoting Szaz, *Symposium on the Aging Poor*, 23 SYRACUSE L. REV. 45, 82 (1972)).

91. ABUSE REPORT, *supra* note 2, at 5 (about 75% of the states said that the incidence of elder abuse was increasing).

92. *Id.*

93. Katz, *supra* note 13, at 705.

elderly being treated as children.

A better solution would be to put the decisions as to whether the state protective service agency should intervene in the hands of the elderly. Unlike the victims of child abuse, the elderly are adults and presumptively should be in charge of their own destiny. They should have the opportunity for protection and treatment programs if victims of elder abuse, but they should also have the opportunity to refuse these programs.

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