

THE 51ST STATE—THE “STATE OF DENIAL”: A COMPARATIVE EXPLORATION OF PENAL STATUTORY RESPONSES TO “CRIMINAL” ELDER ABUSE IN CANADA AND THE UNITED STATES¹

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Elder abuse is a term common to both the Canadian and American lexicons. Its meaning is similarly debated, discourses around the identifiable types of elder abuse

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1. The title “The 51st State” as a state of denial was inspired by an interview on the Canadian Broadcasting Corporation with Kurt Vonnegut. *The Current* (Canadian Broadcasting Corporation radio broadcast Feb. 1, 2006), http://www.cbc.ca/thecurrent/media/200602/2006020/the_current_sec3.ram (last visited Mar. 13, 2006).

are consistent, and the aging demographics are nearly identical in both countries. Yet the similarities in the civil aspects of elder abuse and neglect debates do not extend into the criminal justice discourse. Rather, Canada and the United States have had very different experiences around issues of penal elder abuse legislation. In this article, based on a presentation given at the University of Illinois College of Law, the authors explore the differences in the criminal elder justice debate between the United States and Canada. They examine both legal discourses, substantive laws and structural underpinnings of Canadian and American experiences in criminal elder justice. They challenge Canadian legal silence and conclude that Canada must enter into a vigorous analysis of criminal justice issues regarding older adults. They suggest that current Canadian criminal laws may require reform in order to better respond to issues of elder abuse and neglect in the modern context.

I. Introduction

“Elder abuse” is a term that is widely used in both Canada and the United States. Scholars have similar debates over its meaning in both countries, and the aging demographics are nearly identical. Yet Canada and the United States have had very different experiences around issues of penal elder abuse legislation.

Notably, the United States has experienced a vibrant and substantive discussion of the issues related to the criminality of elder abuse over the course of approximately forty years. Many states have enacted specific penal statutes with “elder abuse” or “vulnerable adult” criminal charges; others have chosen to address the criminality of elder abuse by way of mandatory charging, “no drop” policies, judicial case management or elder-specific sentencing principles, or a combination of the foregoing.²

By contrast, the few whispers in Canada about elder abuse and criminality are primarily experiential and lacking in evidence-based research.³ Sometimes, silence must be examined even more thoroughly than debate.

This paper will examine Canadian and American differences in legal discourse and substantive law surrounding criminal elder abuse issues, in an attempt to explain the notable Canadian legal silence.

2. For an excellent discussion of the various American state responses, see Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77 (1998).

3. When discussed at all, these issues tend to be raised as anecdotal experience by older adults, specific lawyers, or law enforcement professionals. See *infra* Part II.B.

The key questions it will address are:

- What is the state of the law in Canada regarding criminal elder abuse or neglect, and what analogous, but elder specific criminal provisions, exist in the United States?
- What factors may have contributed to the differences in the Canadian and American experience related to criminal elder abuse and neglect?

This article by no means purports to provide an exhaustive analysis of the law in each American jurisdiction or of the storied American legal history leading to the strong institutions now in place for older Americans.⁴ Rather, it seeks to shed light on a dark void in Canadian legal discourse and to spark a debate around the relative merits of creating specific criminal elder abuse offenses in Canada.⁵ This exploration concludes that Canadians need to start the same public conversation that the Americans have been engaged in for nearly four decades.

This public debate in Canada will naturally be informed by different legal traditions, social values, and governmental infrastructures than those of the United States. As a result, Canadians may arrive at different conclusions on issues around criminal elder abuse than Americans. However, the need for a national discourse on this particular subject in Canada is both critical and long overdue.

4. See, e.g., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA (Richard J. Bonnie & Robert B. Wallace eds., 2003); Candace J. Heisler & Lori A. Stiegel, *Enhancing the Justice System's Response to Elder Abuse: Discussions and Recommendations of the "Improving Prosecutions" Working Group of the National Policy Summit on Elder Abuse*, 14(4) J. ELDER ABUSE & NEGLECT 31 (2002); Thomas J. Hierl, *The Prevention, Identification, and Treatment of the Elder Abuse Act of 1987: Is It a Proper Federal Response to Elder Abuse?*, N.Y.L. SCH. J. HUM. RTS. (1989); The American Bar Association Commission on Law and Aging, <http://www.abanet.org/aging> (last visited Mar. 13, 2006); Administration on Aging, http://www.aoa.dhhs.gov/eldfam/Elder_Rights/Elder_Abuse/Elder_Abuse.asp (last visited Mar. 13, 2006).

5. The Toronto-based Advocacy Centre for the Elderly is Canada's only legal aid office dedicated to advocating for older adults, and is jurisdictionally bound to Ontario. They have been a rare voice in calling for discussion on this subject. See, e.g., JUDITH WAHL & SHEILA PURDY, ADVOCACY CENTRE FOR THE ELDERLY AND COMMUNITY LEGAL EDUCATION ONTARIO (2005), available at <http://www.advocacycentreelderly.org/elder/pubs.htm>.

II. State of the Law

What is the state of the law in Canada regarding criminal elder abuse or neglect, and what analogous, but elder specific criminal provisions, exist in the United States?

A. Legal Frameworks

Unlike in the United States, where much of the criminal law is governed at the state level, Canada has a single governing penal statute. The Criminal Code⁶ (CC) is a comprehensive and universally applicable codification of all criminal offenses⁷ in Canada. Changes to the CC can only be made at the federal level, and once the statute is revised, application of the change is countrywide.⁸

As such, changes to the CC may be understood as normatively different from changes to American state criminal legislation. Indeed, something of the Canadian national identity is infused into CC changes. The statement “this is what we as a country have decided is criminal” has arguably greater, or at least different, heft than single-state penal changes. A government publication puts it this way: “Our laws mirror those values that all Canadians regard as important and demonstrate how they will be protected.”⁹

B. The Deafening Silence: Criminal Elder Abuse Discourse in Canada

The literature surrounding the criminality of elder abuse typically contains no more than vague or general statements. In one lengthy Health Canada report, the only substantive reference to the criminal sanction of elder abuse is the following: “A number of legal remedies are available to Canadians in dealing with the problem of elder abuse and neglect. General legal safeguards found in the Crimi-

6. Canada Criminal Code, *available at* <http://www.canlii.org/ca/sta/c-46/> (last visited Mar. 13, 2006).

7. There are some exceptions within other statutes which may provide criminal or quasi-criminal purview in limited matters.

8. It is also notable that in Canada any case may be appealed to the Supreme Court of Canada, including any type of criminal matter.

9. Statistics Canada, Canada E-book, http://142.206.72.67/04/04b/04b_000_e.htm (last visited Mar. 13, 2006).

nal Code deal with physical abuse, assault and neglect.”¹⁰ Notably, the Ministry of Health generated this foundational report, indicating that Canadians generally perceive elder abuse as a health, or possible civil law issue, rather than a criminal justice issue.

A similarly spartan review of the CC’s applicability to elder abuse cases can be found in the Canadian Department of Justice’s Fact Sheet.¹¹ Although it provides a list of the “many Criminal Code provisions that may be applicable in cases of abuse of older adults,” it also notes that, “to date, much of the response to abuse of older adults has focused on the welfare and protection of older adults.”¹²

Joan Harbison, who is somewhat more vocal on this issue, is one of the few Canadian academics engaged in a preliminary exploration of criminality and elder abuse in Canada.¹³ In a coauthored paper, Harbison and her colleagues write:

With some hesitation, we support the idea that the primary legal response to physical and sexual abuse should be through the criminal justice system. Taking such an approach breaks down the notion that “elder abuse” is a single phenomenon to which a single Act can adequately respond. It also helps eliminate age as a “master status[.]” defining all experiences relating to the elderly as essentially similar: violence should sometimes be treated simply as violence, and in particular spousal assault should be treated as spousal assault, whatever the age of the victim.¹⁴

10. L. McDONALD & A. COLLINS, HEALTH CANADA, FAMILY VIOLENCE PREVENTION UNIT, ABUSE AND NEGLECT OF OLDER ADULTS: A DISCUSSION PAPER 43 (2000).

11. DEP’T OF JUST. CAN., ABUSE OF OLDER ADULTS: A FACT SHEET (2006), http://www.justice.gc.ca/en/ps/fm/adultsfs.html#_edn39 (last visited Mar. 13, 2006).

12. *Id.* Criminal Code provisions that may apply in cases of financial abuse include: theft (§§ 323, 328–332, 334), criminal breach of trust (R.S.C. § 336), extortion (R.S.C. § 346), forgery (R.S.C. § 366), fraud (R.S.C. § 380(1)). Criminal Code sections that might apply in cases of physical and sexual abuse include: failure to provide the necessities of life (R.S.C. § 215), criminal negligence causing bodily harm or death (R.S.C. §§ 220–221), unlawfully causing bodily harm (R.S.C. § 269), manslaughter (R.S.C. §§ 234, 236), murder (R.S.C. §§ 229–231, 235), counseling suicide (R.S.C. § 241), assault (R.S.C. §§ 265–268), sexual assault (R.S.C. §§ 271–273), forcible confinement (R.S.C. § 279(2)), breaking and entering (R.S.C. § 348), unlawfully in a dwelling (R.S.C. § 349). Some of the Criminal Code provisions that may apply in cases of psychological abuse include: criminal harassment (R.S.C. § 264), uttering threats (R.S.C. § 264.1), harassing telephone calls (R.S.C. § 372(2)–(3)), intimidation (R.S.C. § 423).

13. Charmaine Spencer, Adjunct Professor and Research Associate at Simon Fraser University’s Gerontology Research Centre has also written extensively on the subject.

14. JOAN HARBISON ET AL., HEALTH LAW INST., MISTREATING ELDERLY PEOPLE: QUESTIONING THE LEGAL RESPONSE TO ELDER ABUSE AND NEGLECT: SUMMARY DOCUMENT 43 (1995).

While Harbison and her colleagues reluctantly admit to a role for criminal justice in some cases of elder abuse, they do not consider the possibility of advocating for elder abuse crimes. Rather, they seek to demarginalize older adults and declassify them in the eyes of the law.

Harbison's feminist research on issues of elder abuse generated this observation:

Despite provisions which would allow for prosecution, little use has been made of the existing Canadian criminal code [sic] to address those suffering mistreatment as victims of illegal acts relating to financial abuse or fraud or physical or sexual assault. This appears to follow strongly held beliefs among older people that abuse should be contained within the family As well, under-resourced police departments have "been slow to recognize the need to develop initiatives for dealing with seniors[.]"¹⁵

In another paper, she reluctantly identifies a "limited number of situations where professional intervention should be mandated or warranted,"¹⁶ including "those few situations where sufficient evidence to lay charges is provided willingly by the older person to support legal intervention following criminal activity (e.g., physical assault, fraud)"¹⁷ However, this analysis does not consider the American experience, where adaptations in prosecutorial policies have been developed to overcome these kinds of barriers.

This may leave the reader with the impression that Canadian elder abuse literature in general is narrow and undeveloped. However, that is not the case. It is simply that the Canadian discourse remains almost exclusively focused on issues of "civil" elder abuse, to the exclusion of a criminal analysis.¹⁸ Only murmurs of a criminal justice response to elder abuse exist in the Canadian discourse. For example, noted Canadian criminology academic Rob Gordon¹⁹ writes,

Applying the criminal law may be counterproductive and may attract resistance on the part of the victim of abuse who does not want to see a family member punished. Further, criminal justice

15. Joan Harbison, *The Changing Career of 'Elder Abuse and Neglect' as a Social Problem in Canada: Learning from Feminist Frameworks?*, 11(4) J. OF ELDER ABUSE & NEGLECT 66 (1999).

16. Joan Harbison, *Models for Intervention for "Elder Abuse and Neglect": A Canadian Perspective on Ageism, Participation, and Empowerment*, 10(3/4) J. OF ELDER ABUSE & NEGLECT 11 (1999).

17. *Id.*

18. Issues of "civil" elder abuse include adult protection/guardianship, financial abuse, estates, trusts, health law, aging in place, and so forth.

19. Rob Gordon is the current Director of the School of Criminology at Simon Fraser University.

intervention might not work terribly well if the abuse victim is mentally incapable of giving evidence against his or her abuser.²⁰

These comments may be correct. However, evidence-based research is needed to parse statistical and evidentiary findings from common “elder abuse mythologies.” It is this imbalance in the literature that this paper seeks to both unveil and redress. In summary, the Canadian legal literature around criminal justice approaches to elder abuse and neglect is in its infancy.²¹

C. Whispers in the Dark: Selected Criminal Provisions in Canada and the United States

No specific criminal elder abuse charges exist in Canada. However, specific provisions of the CC that might be seen to apply more directly to older or vulnerable adults include the following:

- Section 331—“Theft by person holding power of attorney”²²
- Section 718.2—“Other sentencing principles”²³
- Section 215—“Duty of persons to provide the necessaries”²⁴

20. Robert M. Gordon, *Adult Protection Legislation in Canada: Models, Issues and Problems*, INT’L J.L. & PSYCHIATRY 117, 132 (2001).

21. See generally GOV’T OF NEW BRUNSWICK, ADULT VICTIMS OF ABUSE PROTOCOLS (2005), <http://www.gnb.ca/0017/Protection/Adult/index-e.asp> (plain language description of offenses and possible defenses, regarding possible crimes against older adults in the abuse or neglect arena).

22. Canada Criminal Code, R.S.C. § 331 (2005) (“Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.”).

23. Canada Criminal Code, R.S.C. § 718.2 (2005) (“A court that imposes a sentence shall also take into consideration the following principles: (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, (ii) evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner . . .”).

24. Canada Criminal Code, R.S.C. § 215 (2005) (“(1) Every one is under a legal duty. . . (c) to provide necessaries of life to a person under his charge if that person (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and (ii) is unable to provide himself with necessaries of life. (2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if (a) with respect to a duty imposed by paragraph (1)(a) or (b), (i) the person to whom the duty is owed is in destitute or necessitous circumstances, or (ii) the failure to perform the duty endangers the life

1. THEFT BY PERSON HOLDING POWER OF ATTORNEY (SECTION 331)

Canada has a historical criminal charge of theft under power of attorney, a rarely used provision of the CC, stemming from a codification of a particular type of property theft with an added element of breach of fiduciary duty.²⁵ While it may be true that theft under a power of attorney might proportionally affect older Canadians more than other demographic groups, section 331 is unhelpful in addressing the most common situations of power of attorney abuse.

While it is true that civil remedies do exist around misuse of a power of attorney, these remedies address victim outcomes and damages. By contrast, this paper seeks to address the criminal aspect of financial/power of attorney abuse, which is “abuser-specific,” and centers around issues of punishment, deterrence, and social harm reduction.

Section 331, which holds only a narrow purview over fraudulent sales, mortgages, pledges, or other dispositions of real or personal property and the resultant conversion of the asset, is awkward, overly narrow and poorly drafted. Section 331 is not an “elder abuse” criminal offence, nor does it have any common-law “elder abuse” history.

By contrast, several American jurisdictions have robust examples of penal legislation devoted to crimes of financial abuse against older or vulnerable adults, inclusive of theft of monies under a power of attorney. For example, the Florida elderly financial abuse statute captures the narrow theft provision under section 331 of the CC as well as a myriad of financial elder abuse crimes.²⁶ The Florida laws

of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or (b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently. (3) Every one who commits an offence under subsection (2)(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.”).

25. *R. v. Fulton*, [1900] 5 C.C.C. 36, 36 (Que. QB).

26. See FLA. STAT. ANN. § 825.103 (West 2000) (“(1) ‘Exploitation of an elderly person or disabled adult’ means: (a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who: (1) Stands in a position of trust and confidence with the elderly person or disabled adult; or (2) Has a business relationship with the elderly person or disabled adult; or (b) Obtaining or using, endeavoring to ob-

are elder specific, attuned to the literature, and include serious penalties expressing that state’s denunciation of crimes against older adults.²⁷

In the Florida legislation, the very purpose of the statute is to acknowledge perceived moral and societal normative differences present in crimes against older or vulnerable persons. Not only is the range of offences captured vastly expanded, compared to the Canadian provision, but the provision is not limited to any one specific instrument such as a power of attorney. Rather, the intent of the legislation is to address the often subtle financial exploitation of older or vulnerable adults in all its varied forms.

In Canada, power of attorney abuse is generally considered a matter of civil “breach of trust.” In Florida, by contrast, it is a matter of criminal exploitation. The legislation emerged from a vigorous debate on the issues of criminal elder abuse, which may have been informed by the robust elder law programs at academic institutions

tain or use, or conspiring with another to obtain or use an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent. (2)(a) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$100,000 or more, the offender commits a felony of the first degree, punishable as provided in § 775.082, § 775.083, § 775.084. (b) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$20,000 or more, but less than \$100,000, the offender commits a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084. (c) If the funds, assets, or property involved in the exploitation of an elderly person or disabled adult is valued at less than \$20,000, the offender commits a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.”); *see also id.* § 825.104 (“It does not constitute a defense to a prosecution for any violation of this chapter that the accused did not know the age of the victim.”); *id.* § 825.105 (“This chapter is not intended to impose criminal liability on a person who makes a good faith effort to assist an elderly person or disabled adult in the management of the funds, assets, or property of the elderly person or disabled adult, which effort fails through no fault of the person.”); *id.* § 825.106 (“In a criminal action in which an elderly person or disabled adult is a victim, the state may move the court to advance the trial on the docket. The presiding judge, after consideration of the age and health of the victim, may advance the trial on the docket. The motion may be filed and served with the information or charges or at any time thereafter.”).

27. In Florida, the maximum penalty for exploitation of an older or vulnerable adult’s funds, assets or property valued at \$100,000 or more is thirty years incarceration. *Id.* §§ 775.082(3), (6), 825.103(2)(a). While Canadians might learn valuable lessons from their Florida counterparts, aspects of the legislation, such as lengthy custodial sentences, might offend concepts of fundamental justice and the “Canadian” notion of appropriate sentencing.

such as Stetson University, as well as by the demographics of the Florida populace. While Canadians may not wish to follow in this same path, and indeed may not have the internal academic institutions and demographic factors to mold the development of this type of provision, they should at least be made aware of the marked difference in both intent and quality of penal statutory provisions as found in Florida.

It is time that Canadians consider their values and beliefs in relation to issues such as criminal financial abuse. Canadians may not come to the same conclusions as their American counterparts, but they should be engaged in an informed debate of these criminal issues.

2. OTHER SENTENCING PRINCIPLES (SECTION 718(A)(I))

In Canada, given the absence of specific elder abuse crimes, one might assume that the socially reprehensible nature of crimes involving older adults may best be emphasized through the use of sentencing provisions in section 718.2 of the CC. These provisions allow the trier of fact to consider mitigating or aggravating principles found in an underlying charge such as assault, theft, and similar crimes.²⁸

A more common example of the use of section 718.2 sentencing principles in Canada can be found in the spousal assault context. In Canada, charges for spousal or “domestic partner” assault are under the general assault²⁹ provisions of the CC (Part VIII).³⁰ Upon conviction, the court has discretion to apply domestic assault sentencing principles found in section 718.2(a)(ii).³¹ These specific domestic assault sentencing principles were the result of a rigorous discourse and public debate of the issues, led by proponents of the feminist movement.

At first it might appear that section 718.2(a)(i) provisions might adequately redress cases of crimes against older adults given that age is included in the basket-clause of other aggravating factors.³² However, it is important to stress that in order for this section to be applied, an abuser must already have been charged and successfully prosecuted with some underlying “basic offence” (such as assault or

28. Canada Criminal Code, R.S.C. § 718.2(a) (2005).

29. Sexual is its own specific offense.

30. Canada Criminal Code, R.S.C. § 265.

31. *Id.*, R.S.C. § 718.2(ii).

32. Or conversely, for cases of older offenders.

theft). A central issue in the elder abuse discourse is that the traditional criminal charges are not only underused, but rather are not seen to apply to older adults. Older adults become, in effect, second-class citizens, not protected under the criminal law in the same way as their younger counterparts.

Assuming that the hurdle of a successful conviction of some underlying base offense can be overcome, a prosecutor³³ arguing for the application of section 718.2(i)(a) must show “that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor.”³⁴

Proving or rebutting motivation of bias, prejudice, or hate based on age seems again to miss the point. One hardly imagines the average case of criminal elder abuse as a scenario where the abuser makes it clear, especially to criminal standards, that the actions taken were thus motivated by ageism. It is notably different for a person to commit a crime such as assault, based on a specific motivation of ageism (i.e., “I am hitting you and stealing your bag because you are old, and I hate old people.”). Rather, it seems far more probable that older or vulnerable adults may be targeted by criminals because of a perceived ease of gain from the crime (i.e., “I am hitting you and stealing your bag because I perceive that you have things of value and you will not easily be able to stop me.”).

Section 718.2 has occasionally been used in cases of crimes against older adults, notably in cases of home invasion.³⁵ This particular crime is generally understood to be different from a regular break-and-enter/theft crime, in that there is a “premeditated confrontation with the victim with the intent to rob and/or inflict violence on the occupants of the household.”³⁶ Studies have shown that older Canadians are nearly three times more likely to be victims of this type of crime.³⁷ However, a review of case law uncovers the inherent short-

33. Prosecutors are commonly referred to as “Crown Counsel,” with either a federal or provincial jurisdiction, and analogous to American district attorneys. Crown Counsel act on behalf of the government and are not elected.

34. Canada Criminal Code, R.S.C. § 718.2.

35. *R. v. Whicher*, [2002] 165 C.C.C. (3d) 535 (B.C. C.A.).

36. Melanie Kowalski, CANADIAN CENTRE FOR JUSTICE STUDIES BULLETIN, CAT. NO. 85F0027XLE, at 3 (June 2002), available at <http://www.gnb.ca/0017/protection/Adult/index-e.asp>.

37. *Id.*

comings of section 718.2(a)(i) in cases of criminal elder abuse or neglect.

In the case of *R. v. Harris*,³⁸ the Nova Scotia Court of Appeal³⁹ noted that the accused had pleaded guilty to robbery and assault in the course of a home invasion. The trial court found that the perpetrators targeted a street largely populated by elderly and potentially wealthy residents.⁴⁰ The court of appeal affirmed the trial judge's finding that section 718.2 should specifically be applied to denounce unlawful conduct and to deter persons from committing "the type of offence where people prey on elderly people in their own homes with actual or potential for violence."⁴¹ However, the court did not make clear what impact the older age of the victims per section 718.2(a)(i) had on sentencing.

Judicial statements have also been made to the effect that section 718.2 is not an exclusive list of factors which can be considered by the court. In *R. v. Wismayer*⁴² the Ontario Court of Appeal held that "[t]he opening words of [section] 718.2 itself direct the court to take into account any relevant aggravating or mitigating circumstances."⁴³ In a highly publicized home invasion case, a five-member panel of the British Columbia Court of Appeal made value judgments to the effect that the case they were reviewing was "about a crime less heinous than those recent breaking and entering [cases] in which the perpetrators have offered violence to frail, elderly householders. Nonetheless, all breaking and entering [cases] accompanied by robbery are grave."⁴⁴ This obiter dictum leaves the impression that the same home invasion crime would somehow be worse if it occurred against elderly victims, but there is no indication of how this hint at judicial values impacts sentencing. And there is no evidence-based Canadian research to show that age as an aggravating factor has had any impact in the few cases which consider the older age of the victim in section 718.2(a)(i) sentencing.

Canadians already do not view "jail time" as the most desirable judicial outcome, and Canadian courts have already conceded that the

38. *R. v. Harris*, [2000] 142 C.C.C. (3d) 252 (N.S. C.A.).

39. The Nova Scotia Court of Appeal is the highest court in that province.

40. *Harris*, [2000] 142 C.C.C. (3d) at 255.

41. *Id.* at 264.

42. [1997] 115 C.C.C. (3d) 18 (Ont. C.A.).

43. *Id.* at 40.

44. *R. v. Bernier*, [2003] 177 C.C.C. (3d) 137 at 143 (B.C. C.A.).

“general deterrent effect of incarceration has been and continues to be somewhat speculative and that there are other ways to give effect to the objective of general deterrence.”⁴⁵ Meanwhile, there are few, if any, nonincarcerative sentencing alternatives with a specific focus on older or vulnerable adult victims.⁴⁶ Alternatives to incarceration are an available sentencing option for the Canadian judiciary; however, specific alternatives do not capture the socially normative difference in victimizing older adults.⁴⁷

A review of the case law suggests that the advanced age of the victim is actually only a minor factor in an array of considerations that determine one’s sentence. Even in such high-profile cases as “home invasions,” which are more common than other robberies for older adults,⁴⁸ the old age or vulnerability of the victim is not a significant focus of the sentencing decision. Consequently, the age or vulnerability of the victim may simply fall “off the radar.” As such, section 718.2(a)(i) applicability may actually have the effect of diluting the impact of age as a factor in assessing the gravity of crimes against older adults. There is a need for critical analysis in this area, as well as more precise legislative drafting, to allow older victims to be both statistically visible and judicially acknowledged.

The judiciary has simply not adopted the use of sentencing provisions under section 718.2(a)(i) to address crimes against older adults. In part, this may be due to the fairly broad discretion Canadian judges exercise in sentencing. Canadians have not embraced a system of minimum or mandatory sentences in their criminal courts.⁴⁹ Moreover, there is little exposition as to the weight and effect the victim’s older age has on sentencing.

The preceding discussion challenges the efficacy of using section 718.2 in elder abuse criminal cases. Its usefulness and effect is some-

45. *R. v. Wismayer*, [1997] 115 C.C.C. (3d) at 20 (although, in this case the court was discussing the use of conditional sentences under section 742.1 of the Criminal Code).

46. However, some research is being done on these questions by such scholars as Dr. Robert Gordon at Simon Fraser University. Centre for Restorative Justice, <http://www.sfu.ca/crj/about.html#what> (last visited Mar. 13, 2006).

47. There are some alternative sentencing provisions or local programs which may focus on vulnerable victim impact, however.

48. Kowalski, *supra* note 36.

49. Minimum sentences exist only in very specific crimes. Compare, e.g., Canada Criminal Code, R.S.C. ch. C-34, § 218 (2005) (minimum punishment for murder), with Canada Criminal Code, R.S.C. ch. C-46, § 213 (1985) (punishment for prostitution is not listed), and Canada Criminal Code, R.S.C. ch. C-34 § 62 (2005) (has only maximum punishment for seditious offenses).

what dubious. The language of motivation of bias and hate based on age does not strike to the core of criminal elder abuse in modern society, which is far more directed in nature. Nor does it seem, as best as one can divine from the paucity of research on the subject, that application of sentencing principles may affect postsentencing outcomes more generally. At best, it may be understood as a provision of formal equality;⁵⁰ at worst, it can be seen as rhetorical legislation.

By contrast, the state of Arizona has specific sentencing principles addressing issues of age or vulnerability in Title 13 of the Arizona Revised Statutes. Section 13-702(C) states that a judicially noticed “aggravated circumstance” in sentencing principles must include the age or disability of the victim.⁵¹

In California, a far more complex sentencing system exists. Californians have layered “elder specific” sentencing guidelines on top of “elder specific” criminal offenses.⁵² Mandatory sentencing is established for crimes against older adults or disabled persons.⁵³ The California legislature has been unambiguous in its condemnation of the repugnant nature of crimes against older adults. The state has even codified a sliding scale of iniquity: the older or more disabled a victim is, the worse it is to commit a crime against them.⁵⁴

In comparison, Canada has no “elder specific” charges, nor does it have any real “elder specific” sentencing principles. The section 718.2(a)(i) provisions are vague, weak, and rarely used in regards to older age as a specific aggravating factor.⁵⁵ Adding to this hurdle, the Canadian sentencing provisions require proof of motivation of hate or bias absent in American sentencing considerations.⁵⁶

3. DUTY OF PERSONS TO PROVIDE THE NECESSARIES (SECTION 215)

The provisions of section 215 provide a whisper of a more American criminal elder neglect approach.

50. Rather than affecting substantive equality or justice, sentencing principles treat all groups the same.

51. ARIZ. REV. STAT. ANN. § 13-702(C)(13) (2001 & Supp. 2005) (“The victim of the offence is at least sixty-five years of age or is a disabled person as defined by section 38-492.”).

52. CAL. PENAL CODE § 368 (1999 & Supp. 2006).

53. *Id.* § 368(b).

54. *Id.* § 368 (stating harsher punishments if the victim is over seventy).

55. *See infra* Part II.C.3.

56. Canada Criminal Code, R.S.C. § 718.2 (2005).

Historically, charges under the “failure to provide the necessities of life” provision of the CC were overwhelmingly cases involving harm caused by the neglect of children. A preliminary and exploratory line of cases, however, is developing around the duty of care owed by adult children or caregivers to vulnerable adults under their charge.

In *R. v. Middleton*,⁵⁷ a 1997 case, a sixty-one-year-old man was on trial for failure to provide the necessities of life for his fifty-six-year-old mildly disabled cohabitant who had suffered a fracture.⁵⁸ The woman remained untreated, injured, and ill in the presence of the applicant, who watched her slowly die of her injuries.⁵⁹ While not specifically an elder abuse case, it does represent some movement towards an understanding of the duty of care owed to vulnerable adults in the criminal context.

In 2000, the Ontario Court of Justice heard the case of *R. v. Swereda*,⁶⁰ in which two professional caregivers at a group home left a thirty-one-year-old severely mentally disabled man out for hours in brutally cold weather, which caused him bodily harm. After reviewing the general principles of section 215 and foundational case law⁶¹ in the area, the court held that in this case, the “duty of care was profound. It extended to all aspects of Mr. Kireto’s life and well being at all times. He is an extremely helpless and vulnerable person and should not have been subjected to this kind of treatment.”⁶² The court expands the notion of duty of care to certain (in this case vulnerable) adults to fiduciary levels.

In the case of *R. v. Chappell*,⁶³ Madam Justice Matheson delivered oral reasons on sentencing in a rare case of criminal elder neglect

57. *R. v. Middleton*, [1997] O.J. No. 2758 (Ont. C.A.) (challenging the constitutionality of the reverse burden provision in section 215). The court held that sections to have sufficient importance to be justified are upheld. *Id.* ¶ 58. Subsequently, the reverse burden provision was held to be unconstitutional in the case of *R. v. Curtis*, [1998] 123 C.C.C. (3d) 178 (Ont. C.A.).

58. *Middleton*, [1997] O.J. No. 2758 ¶¶ 4–7.

59. *Id.* ¶¶ 5–7.

60. *R. v. Swereda*, [2000] O.C.J. Lexis 97 (May 26, 2000) ¶¶ 1–23.

61. *R. v. Naglik*, [1993] 83 C.C.C. (3d) 526 at 538 (includes the seminal judgment of the Right Honourable Chief Justice Lamer (as he then was) on the interpretation of section 215).

62. *Swereda*, [2000] O.C.J. Lexis 97 ¶ 42.

63. *R. v. Chappell* (Apr. 17, 2000) Charlottetown Docket No. CSC-17642, (P.E.I. S.C.) (on file with The Elder Law Journal).

charged under section 215.⁶⁴ This case, which garnered some local media attention,⁶⁵ surrounded issues of neglect of a sixty-two-year-old woman with multiple sclerosis by her thirty-five-year-old paid caregiver in a private home setting. This was a case of egregious neglect resulting in severe bedsores (which became septic),⁶⁶ pneumonia, malnutrition, and dehydration, ultimately causing death.⁶⁷

The accused pleaded guilty, which is why this case is neither widely known nor cited. Transcripts of the oral sentencing, however, show that the decision of Madam Justice Matheson contains some of the most powerful judicial statements on criminal elder neglect in Canada. She held that:

This is not just a case of neglect. This is case of neglect which eventually contributed to the death of a sick and elderly person. Failure to denounce this conduct in the strongest terms would not meet one of the fundamental purposes of sentencing Our society cannot condone such conduct in any manner and a denunciatory sentence is called for in this case. Given the number of elderly people in this jurisdiction, the court must send out a clear message that those being cared for in unsupervised settings in private homes, or private care must not be neglected and those who do neglect such elderly people will be punished. A conditional sentence would not send out the necessary denunciatory message.⁶⁸

64. The author most gratefully acknowledges the assistance of Ms. Cindy Wedge of the PEI Crown Attorney's office in locating and providing a transcript of the oral reasons for sentencing in this case.

65. See Nigel Armstrong, *City Woman Faces Charges of Elder Abuse in Death: Thelma Jean Chappell, 35, Is Charged with Causing Bodily Harm by Criminal Negligence and Failure to Provide Necessaries of Life to Isabel Gerard, a Person Under Her Care*, THE GUARDIAN (Charlottetown), Dec. 11, 1999, at A2; Nigel Armstrong, *Judge Rules Chappell Stays in Jail Pending Appeal in Death of Senior*, THE GUARDIAN (Charlottetown), May 2, 2000, at A3; *Chappell Withdraws Appeal to Island Court: Woman Had Been Sentenced to a Year in Jail for Failing to Provide the Necessaries of Life to Isabel Gerard Who Died*, THE GUARDIAN (Charlottetown), May 20, 2000, at A2 [hereinafter *Chappell Withdraws Appeal*]; *Relatives of Elderly City Woman Sue Caretakers over Death*, THE GUARDIAN (Charlottetown), May 4, 2000, at A5; Ron Ryder, *Negligent Caregiver Sentenced to One Year in Jail and Probation*, THE GUARDIAN (Charlottetown), Apr. 20, 2000, at A3; *Tearful Accused Apologizes to Family of Dead Woman: Thelma Jean Chappell Faces Sentencing on Failing to Provide the Necessaries of Life for Isabel Gerrard, a Woman in Her Care*, THE GUARDIAN (Charlottetown), Apr. 18, 2000, at A8; *Woman Facing Elder Abuse Trial*, THE JOURNAL-PIONEER (Summerside), Dec. 11, 1999, at A3; *Woman Pleads Guilty for Failing to Take Care of Elderly Person Under Her Charge*, THE GUARDIAN (Charlottetown), Feb. 16, 2000, at A2.

66. *R. v. Chappell*, (Apr. 19, 2000) Charlottetown Docket No. CSC-17642, (P.E.I. S.C.), at para. 4 (on file with *The Elder Law Journal*).

67. *Id.* at para. 22.

68. *Id.*

In this case, a one-year custodial and eighteen-month probationary sentence was handed down.⁶⁹ What is also notable about this case, beyond the section 215 analysis, is that the judge referred to sentencing principles under section 718.1 and section 718.2 in some detail. However, despite a specific “sentencing principles” discussion in her decision, no reference whatsoever was made in the course of that analysis to the age of the victim. Comments on the age and medical vulnerability of the victim were general in nature or located in her section 215 analysis. This case encapsulates how section 718.2 “age” provisions are largely rhetorical in Canada, and how the current legislative drafting captures neither the nature nor the reality of criminal elder abuse or neglect.

The most important trial of criminal elder neglect to be prosecuted under section 215 is the very recent case of *R. v. Peterson*, a 2005 decision of the Ontario Court of Appeal.⁷⁰ Notably, no analysis or consideration of *R. v. Chappell* was given in the course of this judgment, likely because *Chappell* never went to trial, and the reasons were delivered orally.

In *Peterson*, the accused was a forty-one-year-old man who severely neglected the care of his elderly father, aged eighty-four at the time of the incident in 2000. Madam Justice Weiler noted for the majority some of the egregious facts of the case:⁷¹ “[t]his appears to be the first case to reach an appellate court in which the meaning of the phrase ‘under his charge’ in [section] 215(1)(c) as between an adult child and his parent is in issue.”⁷² The majority decision largely limited its analysis to the concept of being “under the charge” of another. What distinguishes this case in the context of an elder abuse analysis is the partially dissenting judgment of Mr. Justice Borins, who would have substituted a custodial sentence for a conditional sentence.⁷³

In the first judicial interpretation of section 215 regarding an adult child’s criminal responsibility to a parent, Mr. Justice Borins

69. The matter initially was marked for appeal. A Chambers judgment of the Honourable Chief Justice Carruthers held that the Ms. Chappell would remain incarcerated pending appeal. *R. v. Chappell*, [2000] 46 W.C.B. (2d) 193 (P.E.I. C.A.). The appeal was subsequently dropped. *Chappell Withdraws Appeal*, *supra* note 65, at A2.

70. *R. v. Peterson*, [2005] 201 C.C.C. (3d) 220 (Ont. C.A.).

71. At trial, counsel agreed that the reverse burden was unconstitutional and that the burden indeed rested on the prosecution to prove the essential elements of the charge beyond a reasonable doubt. *Id.* at 224 n.1.

72. *R. v. Peterson*, [2005] 201 C.C.C. (3d) 220 at 230 (Ont. C.A.).

73. *Id.* at 238.

held that the pivotal issue is whether a parent is under the charge of his or her child. He found that

the duty or responsibility of a child to be the caregiver of his or her aging parent and the criminalization of the failure to provide the required standard of care are based on late 19th century legislation that is completely unsuitable in the 21st century. The problem arising from the failure of the legislation to provide any guidance in respect to where one is in the charge of another is apparent from the analysis undertaken by Weiler J.A. to breathe life into “charge” within the meaning of [section] 215(1)(c).⁷⁴

Mr. Justice Borins then took the notable step of calling for legal discussion and legislative reform on issues of criminal elder abuse. Markedly, he brings into his judgment American demographic statistics, reports of powerful American seniors’ advocacy groups, and quotes American populist news media to support his reasoning. He writes:

In my view, contemporary legislation is required to deal with the issue of parent/child role reversal, which is one of the results of human longevity. An estimated 22.4 million households in the United States—nearly one in four—are providing care to a relative or friend aged fifty or older according to a 1997 survey by the National Alliance for Caregiving and the American Association of Retired Persons. It is likely that adults born between 1946 and 1965 will spend more years caring for a parent than for their children. As Susan Dominus pointed out in an article in *The New York Times Magazine*, “[t]he philosophical impact [of human longevity] on family dynamics will be profound, as parents continue to lean on children long past retirement themselves, and people in their 80s learn what it means, at that age, to still be somebody’s child.”

In an article, “Longer Lives Reveal the Ties that Bind Us” (*The New York Times*, October 2, 2005), David Brooks points out that between now and 2050, the percentage of the population above age eighty-five is expected to quadruple. Brooks quotes Dr. Leon Kass, the former Chairman of the President’s Council on Bioethics, as stating, “The defining characteristic of our time seems to be that we are both younger longer and older longer.” To which Brooks adds:

Parents have to spend more time preparing their children for the new economy and children have to spend a lot more time caring for their parents when they are old. In other words, technology, which was supposed to be liberating, actually creates more dependence. We spend more of our lives while young and old dependent upon others, and we spend more time in between caring for those who depend on us.⁷⁵

74. *Id.* at 240.

75. *Id.*

Although these data and comments apply to the United States, there is little doubt that they also apply to Canada. This is why it is no longer satisfactory to rely on legislation designed for another era and another purpose to define what contemporary society requires of its members who have aging parents in need of care. Children of aging parents no doubt accept that their parents require some form of care, be it in respect to financial affairs or personal care. As the elderly lose their ability to remain self-sufficient, their adult children are gradually required to assume caregiving responsibilities.

As a result of rising life expectancy, the child who becomes his or her parent’s caregiver, is often well within the “senior citizen” age category. In addition, given that the age at which children are conceived is rising, the expectation is that there will be a sizeable group of children who will face a double “necessaries” duty in respect to both their children and their parents, raising, perhaps, the need to choose between the welfare of their children and their parents. It is, therefore, of critical importance that if the duty to care for an aging population continues to be within the ambit of the criminal law, that care is taken to clearly define what constitutes criminal neglect or penal negligence.⁷⁶

In analyzing the new elder abuse and neglect interpretations under section 215, Mr. Justice Borins grants that “determining the level of responsibility that an adult child should bear for an elder parent together with defining the appropriate standard of care are difficult and challenging issues.”⁷⁷ He then specifically queries whether these issues should continue to be governed by criminal law.⁷⁸ Drawing from the American legislation, he highlights modern legislative frameworks “related to elder abuse and elder care, entrenching a defined duty of care”⁷⁹ and particularly notes with approval the legal systems in place in California, Illinois, and Massachusetts regarding both civil and criminal liability.⁸⁰

Mr. Justice Borins’s comments seem to call for a more thorough debate in Canada on issues of criminal and civil elder abuse and neglect. Drawing particular attention to the vibrant American discourse, his concern focuses on the need for Canadians to predictably socially

76. R. v. Peterson, [2005] 201 C.C.C. (3d) 220 at 241 (Ont. C.A.).

77. *Id.* at 241–42.

78. *Id.* at 242.

79. *Id.*

80. *Id.*

order their lives and to be able to clearly understand filial duties of care. His comments indicate that the use of section 215 for criminal elder abuse cases is blurring the line and twisting existing penal provisions to suit this “new” range of cases. Rather, he appears to suggest either new CC provisions to deal with elder abuse cases or a re-drafting of specific provisions to more correctly define the crime.

The future of elder abuse and neglect under section 215 is uncertain. An appeal in *R. v. Peterson* has been denied by the Supreme Court of Canada.⁸¹ Yet even the appellate level decision in the case is remarkable for several reasons.⁸² First, it represents a preliminary acknowledgment that elder abuse and neglect crimes might somehow be normatively different than the bare underlying offenses alone. Second, one may read this case as calling for specific legislative reform to the Canadian CC. Third, it calls on Canadians to review American criminal elder justice discourse, to inform future Canadian debate on these issues.

Whether these issues are best addressed by the Supreme Court of Canada, rather than at the grassroots or parliamentary level, is uncertain. However, as the case becomes more widely recognized, it may spark public debate on criminal elder abuse issues. These judicially seeded comments may result in a germination of discourse around the rights and roles of older Canadians within the criminal justice system.

Again, by contrast, several American states have drafted penal provisions on criminal elder abuse and neglect. In Illinois, provisions pertaining to “criminal abuse or neglect of an elderly person or person with a disability”⁸³ are detailed in nature. While Canadians strain to hear bare whispers of some form of nascent criminal “elder neglect” case law under section 215, residents of Illinois have a complete codification of specific elder abuse and neglect crimes clearly stated in their penal law.⁸⁴ Additionally, this legislation enumerates and particularizes the concept of “necessaries” of life.⁸⁵ Canadian laws barely

81. *R. v. Peterson*, [2005] 201 C.C.C. (3d) 220 (Ont. C.A.), *leave to appeal to S.C.C. refused*, 2006 Carswell Ont 1198.

82. *Id.*

83. 720 ILL. COMP. STAT. ANN. 5/12-21 (West 2005) (outlining acts and omissions constituting criminal abuse or neglect of an elderly person or person with a disability as well as detailed definitions).

84. *See* 320 ILL. COMP. STAT. ANN. 20/1-20/14 (West 2005).

85. *Id.* at 20/2(g).

test the criminal “elder neglect” waters; Illinois law appears to elevate neglect to the same level as overt harms.

Lastly, Canadian section 215 law is narrowly focused and subject to judicial interpretation of the oblique notion that the victim must have been “under the charge” of the accused. By contrast, Illinois criminal elder abuse and neglect penal laws are clearly written, and are significantly broader in scope. They even confront issues such as abandonment, harassment, and interference with personal liberty.

The Illinois model is an important one to consider, not only for its particularized criminal provisions, but also for the important multidisciplinary approach taken. The Illinois State TRIAD published its Model Protocol for Law Enforcement *Responding to Elderly Crime Victims* on January 22, 1998.⁸⁶ TRIAD was a national initiative funded by the American Association of Retired Persons, the International Association of Chiefs of Police, and the National Sheriffs’ Association.⁸⁷ TRIADs were developed throughout Illinois on smaller scales, followed thereafter by establishing a statewide TRIAD program.⁸⁸ The nearly eighty-page report has information on all aspects of criminal elder abuse, including response networks, police officer protocols, governing legislation, and demographic statistics.⁸⁹

While the TRIAD is of interest as a management model, it is also of particular importance to Canadians as it encapsulates decades of vibrant, active, and multidisciplinary discourse. Canadians, on the other hand, are on the brink of deciding whether to break this legal silence.

D. Straining to Hear: The State of the Law in Canada Evaluated

Charges under the CC section 331 are almost never laid, nor does this provision speak to contemporary experiences of elder abuse and neglect. Sentencing provisions under section 718.2 largely fall wide of any understanding of criminal elder abuse in modern society and might actually do a disservice to older adults by masking the issue with formal equality language. Section 215 shows some early promise in cases which sound in the realm of “elder neglect,” rather

86. ILL. STATE TRIAD, RESPONDING TO ELDERLY CRIME VICTIMS (1998), available at http://www.popcenter.org/problems/Supplemental_Material/Financial%20crimes/IllinoisStateTRIAD_1998.pdf.

87. *Id.* at 1.

88. *Id.*

89. *See id.*

than elder abuse. Still, a judicial obiter dictum about the need for law reform for elder abuse and neglect in the CC, as well as an analysis of the American models, is an important legal development in Canada. While nascent, this seed of judicial comment may take root in Canadian discourse.

III. Explaining the Differences

What factors may have contributed to the differences in the Canadian and American experience related to criminal elder abuse and neglect?

A. The Comparative Landscape

Much has been said about the ongoing and imminent generational aging both in Canada and the United States and how sheer demographics make issues affecting older adults of importance to both countries. In Canada, national statistics indicate that by 2031, nearly one out of every four Canadians will be over the age of sixty-five.⁹⁰ In some provinces, such as British Columbia, that same figure will be reached considerably earlier.⁹¹ American demographics are analogous.⁹² While Canada's citizenry is approximately one-tenth the size of the American population,⁹³ the "civil"⁹⁴ elder abuse and neglect literature remains similar both in scope and issue analysis.⁹⁵

The populations of both countries are also strongly interrelated and "cross-border" in character. These mobile populations include a familiar subset of older adults actively enjoying lengthy stays or semi-permanent residence in both countries.

When commencing comparative research in this area, one might instinctively assume similarity in "criminal" elder abuse and neglect

90. Statistics Canada, *Population Projections for Canada, Provinces and Territories, 2005 to 2031*, Dec. 15, 2005, <http://www.statcan.ca/Daily/English/051215/d051215b.htm> (last visited Mar. 13, 2006).

91. *Id.*

92. By 2020 it is projected that persons over the age of sixty-five will be 17.7% of the population and by 2050 will be 25% of the population. U.S. DEP'T. OF COM., BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 16, 37 (110th ed. 1990) (tbl.18, Projections of the Total Population by Age, Sex and Race: 1989 to 2010).

93. Current American statistics put the American population at 296,410,404. U.S. CENSUS BUREAU, POPULATION ESTIMATES, CENSUS 2000 (2005).

94. In contrast, this paper seeks to address "criminal" elder abuse issues.

95. Although Americans and Canadians often come to different conclusions, the range of issues is largely consistent across the border.

discourse. This is not the case. Americans have been engaged in a vibrant debate over the pros and cons of the appropriateness, legitimacy, and efficacy of creating criminal elder abuse and neglect penal charges, or specific sentencing provisions. Canada, on the other hand, has a comparative dearth of literature on the topic. The rest of this paper seeks to explore some possible explanations for the relative Canadian legal silence.

B. Who Do We Think We Are?: Founding Mythologies

Political humorists have noted that some of the fundamental differences between Americans and Canadians can be traced back to each country's beginnings: Americans fought a war of independence against their colonial oppressors; Canadians asked nicely if they could please have their own sovereign country.

While the irony has its limitations, it does strike to some of the structural roots of legal traditions and institutions in both countries. It is perhaps trite to note that the American system is one of radical individualism and elected representation with significant internal checks and balances. The Canadian governmental system, by comparison, works on a federal parliamentary basis, with a social welfare underpinning. Historically, Canadians have given their leaders more unchecked power⁹⁶ and appear to have more trust than their American counterparts that their basic financial, health, and social needs will be provided for by the Canadian social safety net.

C. In Whom We Trust: Appointed v. Elected Officials and the “Seniors’ Vote”

It can be argued that Canadians have a stronger history of government appointment and civil service than Americans. This is evidenced in our bicameral system. Canadians have an elected lower house (The House of Commons) and a federally appointed upper house (The Senate).⁹⁷ The mandate of the Senate is to provide a “sober

96. Although this is perhaps now arguable due to post-9/11 legislative developments in the United States such as the PATRIOT Act. *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat 272 (2001).

97. Long-standing political promises have been made regarding changing the appointed Senate to an elected one, especially by the newly elected minority Conservative government of Prime Minister Stephen Harper.

second look” at laws developed by the democratically elected officials of the lower house.⁹⁸

This relative comfort with nonelected persons wielding governmental power extends to the Canadian justice system. For example, Canadian prosecutors are not elected; rather they work within the “Crown Office” as legal civil servants in significant positions of influence and discretion. More notably, judges are appointed in Canada. The role of the independent judge is largely considered sacrosanct; Canadians often meet the notion of an elected judiciary with reactions ranging from incredulity to skepticism to horror.⁹⁹

The United States also has a bicameral system of government, but unlike the Canadian model, the American model has democratically elected representatives in both lower and upper houses. Additionally, the American Senate may exist for a different purpose than its Canadian counterpart. A Canadian appointed Senate has historically had a mandate of providing a sober, second look to any proposed Bill, and was conceived as a serious, calming, and nonpartisan body that would curb any radical steps taken at the House of Commons level. By contrast, the American Senate serves a very different purpose than its Canadian counterpart. It offers a form of elected balance in the democratic system, with more partisan influence and active governing involvement than its Canadian counterpart.

The difference in elected/appointed legal traditions has a concrete impact on the visibility of seniors’ issues in each country, through the impact of the “senior vote.” Seniors vote more regularly and more often than any other age group in both countries.¹⁰⁰ However, as discussed, Americans vote for many official positions of criminal justice power and influence, while Canadians do not. In the United States, depending on the jurisdiction and level of office, some police officials, prosecutors, and judges are elected. If candidates expect to remain in office, then engaging in discourse around issues that

98. See *Proceeding of the Standing Senate Committee on Energy, the Environment and Natural Resources Issue 15: Hearing on Bill C-23 Before the Standing Committee on Energy*, 35th Parliament, 2d Session (Mar. 12, 1997) (statement of Sen. Ron Ghitter, Chairman).

99. This is not to say that there are no Canadian voices lobbying for a reduction of appointments, including judicial appointments, but the history of civil service and appointment have been part of Canada’s historic governmental system.

100. Tucker Sutherland, *Seniors Are Consistent Voters, Increasingly Larger Share of Vote*, SENIOR J., Oct. 28, 2004, <http://www.seniorjournal.com/NEWS/Politics/4-10-28SeniorVote.htm>.

seniors care about, such as criminal elder abuse and neglect, simply makes good political sense.

Canadian seniors, like their American counterparts, vote more regularly and more often than any other sector of the Canadian population. However, Canadian police officials, prosecutors, and judges are all civil service based or appointed. These actors are not constrained by the effect of the senior vote, as they are neither forced to account to the wishes of voters, nor to stand for reelection for their continued employment. This difference may partially account for why a vibrant discourse on criminal elder abuse provisions exists in the United States, but not in Canada.

D. Lend Me Your Ears: Seniors' Lobbying Differences in Canada and the United States

Perhaps as a result of the heft and impact of the United States seniors' vote phenomenon, Americans have a much stronger seniors' lobby movement than their northern neighbors. American seniors are effectively organized in order to influence elected officials' voting patterns and are more able to put seniors' issues on the national agenda. Impressively, the American Association of Retired Persons boasts a membership of over 36 million,¹⁰¹ out of a total population of approximately 300 million U.S. citizens.¹⁰² Access to individual elected officials in the United States at least appears to be somewhat easier. Moreover, there are theoretically twice as many elected officials to lobby due to an American elected Senate.

Canadian lobbying appears to be far less concentrated or developed than in the United States. The Canadian Association of Retired Persons has a membership of only 400 thousand¹⁰³ out of a total Canadian population of approximately 32 million citizens.¹⁰⁴ The AARP

101. AM. ASS'N OF RETIRED PERSONS, 2004 ANN. REP. 7 (2004), *available at* http://assets.aarp.org/www.aarp.org_/articles/aboutaarp/AARP2004AnnualReport.pdf.

102. Population Div., U.S. Census Bureau, U.S. Popclock Projection, <http://www.census.gov/population/www/popclockus.html> (last visited Mar. 13, 2006).

103. Can. Ass'n of Retired Persons, *Advocacy: The Power to Do More*, <http://www.carp.ca/display.cfm?cabinetID=264&libraryID=58&documentID=1522&libID=89> (last visited Mar. 13, 2006).

104. Statistics Canada, *Population by Year, by Province and Territory*, <http://www40.statcan.ca/101/cst01/demo02.htm?sdi=population> (last visited Mar. 13, 2006).

has singular power and sway in the United States lobby movement;¹⁰⁵ on the other hand, CARP is not viewed as a powerful or central lobby organization.¹⁰⁶

Adding to the difficulty in lobbying, the Canadian parliamentary system has strong traditions of party discipline that can further frustrate the development of an influential seniors' lobby. It is a rare event for elected members of Canada's governing Parliament to vote against the party line. Failure of a proposed piece of major legislation in the Canadian Parliament amounts to a vote of no confidence, and the government may fall. With stakes this high, rebel Members of Parliament are typically harshly reprimanded for any disloyalty. Added to this, Bills introduced by private Members of Parliament have an extremely high attrition rate and are generally poorly received by the governing party as a whole. By convention, Bills are introduced by a member of the Cabinet.¹⁰⁷

Because of these legal traditions, lobby groups often have to either focus on the whole of the government body or win favor with the opposition parties in an effort to sway the majority. In minority governments, where no one party has the required number of seats to pass laws, deal making and conciliation are the order of the day. This may allow lobby groups to exert some pressure more easily in some circumstances, but in other cases it can make the situation even more difficult. That is not to say that lobbying does not occur in Ottawa. It does. However, it differs in nature, tone, and audience.

105. Glen Justice, *A New Battle for Advisors to the Swift Vets*, N.Y. TIMES, Feb. 21, 2005, at A1 ("AARP, the largest organization representing middle-aged and older Americans, is considered a major obstacle to Mr. Bush's Social Security plan in part because of its size and influence with the elderly.").

106. See *supra* text accompanying notes 101-02 (the relative membership of both organizations help exemplify this point). Certainly, there are many more organizations concerned with issues of seniors, from the national to the grassroots level. Yet none even compare to the influence that American seniors' lobby groups hold.

107. DEPOSITORY SERVS. PROGRAM, HOW A GOVERNMENT BILL BECOMES LAW: CANADA, <http://dsp-psd.pwgsc.gc.ca/Reference/queens-e-html> (last visited Mar. 13, 2006).

E. Legal Multiculturalism: The Plurality of Canadian Legal Traditions

It is an oft-quoted observation that the United States is a “melting-pot” of cultures, ideas, and peoples.¹⁰⁸ Worldwide, Americans are Americans; they form a coherent whole. While past histories and traditions may be socially valued, the country of “fresh-start” immigration infuses its citizens with dominant cultural norms. It is not surprising, then, that Americans have only one substantive legal tradition.¹⁰⁹

Reflecting the historical strength and independence of the individual states, penal law is primarily generated at the state level. The result is that each state has a separate opportunity to decide for itself what is criminal within that state, as well as the appropriate punishment for engaging in criminal activity. As a result, changes to one state’s penal law do not impact citizens of other states.¹¹⁰

Canadians chose a different path. Canada has formally adopted a national identity of “multiculturalism.” The official stance on multiculturalism is

Canadian multiculturalism is fundamental to our belief that all citizens are equal. Multiculturalism ensures that all citizens can keep their identities, can take pride in their ancestry and have a sense of belonging. Acceptance gives Canadians a feeling of security and self-confidence, making them more open to, and accepting of, diverse cultures. The Canadian experience has shown that multiculturalism encourages racial and ethnic harmony and cross-cultural understanding, and discourages ghettoization, hatred, discrimination and violence. Through multiculturalism, Canada recognizes the potential of all Canadians, encouraging them to integrate into their society and take an active part in its social, cultural, economic and political affairs.¹¹¹

108. See, e.g., Reilly Capps, *Music That Speaks to Their Soul, Korean American Concert Celebrated a Century of Immigration*, WASH. POST, Jun. 29, 2003, at D4; David Warsh, *Republicans Hold the High Ground by Embracing Melting Pot Ideal*, WASH. POST, Nov. 6, 1991, at C3.

109. This tradition is the English common law. TONI M. FINE, *AMERICAN LEGAL SYSTEMS: A RESOURCES AND REFERENCE GUIDE* 3 (1997). It is noted however, that the state of Louisiana maintains French civil law traditions. *Id.* at n.2. Also, Native American Legal Scholars may validly disagree with this analysis. See generally FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (photo. reprint 1986) (1942) (describing in detail various American Indian legal systems).

110. The exception, naturally, is when the person or their property might be located in another state jurisdiction.

111. Canadian Heritage, *What Is Multiculturalism?*, http://www.canadianheritage.gc.ca/progs/multi/what-multi_e.cfm (last visited Mar. 13, 2006).

One result of Canadian multiculturalism is a broad mosaic of legal traditions. While a cherished aspect of the Canadian national identity, maneuvering within this multicultural system requires significant tolerance, sensitivity, and balance.

Canada generally has a common-law tradition, but for the province of Quebec, which is generally governed according to French Civil law. Since the 1997 landmark decision of *Delgamuukw v. British Columbia*,¹¹² Aboriginal law also now exists as a separate and equal legal tradition in Canada. Further, Canada's jurisdictional boundaries have recently changed. "Nunavut," Canada's newest territory, was created April 1, 1999.¹¹³ It is the ancestral homeland of the Inuit peoples, who also have distinct legal traditions. With such a myriad of perspectives to consider, changes to the CC are both deliberative and highly contentious. One small alteration in the CC, and the laws across a large country, with diverse legal traditions, are affected. Certainly these impediments can be overcome, but at some political cost.

These structural differences may be important in understanding why Canada has not engaged in either an active discourse on criminal elder abuse laws, nor effected any criminal charges, prosecutorial policies, or specific sentencing principles.

F. An Ear to the Keyhole, A Nose to the Windowpane: A Canadian Reflection on American National Elder Abuse Leadership

Americans have a national leadership structure around issues affecting older adults. During the development of the American "Great Society," seniors' issues rose to the national agenda. One result was the passing of the Older Americans Act of 1965.¹¹⁴ The OAA, and its subsequent amendments, still provide a national framework of rights, guarantees, and institutions for older Americans.

The OAA created both state and local offices, charging them with data collection duties.¹¹⁵ Area plans were also founded at both the state and local levels to identify and rectify issues adversely affect-

112. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

113. Government of Nunavut, *The Road to Nunavut: A Chronological History*, <http://www.gov.nu.ca/Nunavut/English/about/road.shtml> (last visited Mar. 13, 2006).

114. Older Americans Act of 1965, 42 U.S.C.A. §§ 3001-3058 (2005).

115. *See generally id.* § 3025.

ing older Americans.¹¹⁶ This information then flowed upwards to Washington for congressional funding. Once approved, monies then flowed back to the state and local levels for implementation of the area plans. The groundswell and trickle-down of information concerning the status of seniors throughout the United States may be seen as the genesis of the American criminal elder abuse discourse, in that the widespread nature of abuse, neglect, and exploitation of older adults was identified in these area plans. Additionally, concomitant with legal structures and funding comes an outflow of responsibilities.

No similar legal or funding structures for the widespread collection of data from the Provinces to Ottawa exists in Canada, and this may be a factor that accounts for the paucity of literature on Canadian criminal elder abuse issues and the failure of the Provinces to address these issues locally.¹¹⁷

American federal legislation on elder issues has not been static. The OAA has been updated and amended. Now, issues of elder abuse and neglect have been formalized in a new bill circulating in Washington. The proposed Elder Justice Act was introduced in revised form at the 109th Congress on November 15, 2005.¹¹⁸

One of the defined terms in this bill is “elder justice,” which includes societal “efforts to prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation and to protect elders with diminished capacity while maximizing their autonomy.”¹¹⁹

This bill is multifaceted in nature and multidisciplinary in scope. For example, one of the many national offices or bodies proposed in this Bill includes an “Office of Elder Justice” at the Administration on Aging.¹²⁰ Such an office would be established to “develop objectives, priorities, policies, and a long-term plan for elder justice programs and activities relating to the prevention, detection, training, treatment, evaluation, intervention, research, and improvement of the elder jus-

116. *See generally id.* § 3026.

117. My thanks to Allan Bogutz for his assistance in this aspect of the comparative analysis.

118. S. 2010, 109th Cong. (2005). The Elder Justice Act was originally introduced at the 108th Congress, 1st Session, Senate Bill 333, which was then referred to the Senate Committee on Finance. S. 333, 108th Cong. (2003). It was later reintroduced with revisions as noted above.

119. S. 2010, § 2201(6)(A).

120. *Id.* § 2211(a).

tice system in the United States.”¹²¹ The legislation would also establish a parallel office in the Department of Justice.¹²²

The Canadian experience offers virtually nothing in comparison. Elder criminal justice discourse has not developed past its infancy in Canada. National legislation of this type simply does not exist. This is, perhaps, understandable. With the weak seniors’ lobby movement, there is an understandable challenge to passing federal legislation. Added to this, many of the officials in the justice arena are either civil servants or appointed officials. Finally, Canada has a diversity of multicultural legal traditions to canvass and development of legislation can take years to realize.

IV. Conclusion: The 51st State—The State of Denial

“Concerns with justice rather than with remedial treatment and welfare should be the new priority. Elders possess rights as citizens. For the most part, they seem capable of exercising those rights”¹²³

Canadians do not deny the existence of elder abuse; rather, Canadians have developed a useful discourse on the civil and health aspects of the issue, analogous to that in the United States. What Canadians deny, through their silence, is that elder abuse and neglect might actually be a crime.

This paper does not suggest that the CC immediately be changed to reflect a specific elder abuse criminal provision. It does not even propose that the age of the victim be considered as a specific aggravating circumstance in sentencing. Rather, the goal of this paper is to unequivocally break the silence on this subject in Canada. Canadians must decide how to deal with crimes against older adults. They must decide in a way that is inherently reflective of Canada’s diverse and multicultural population, its own legal traditions, and its sense of national purpose. Compared to its closest neighbor, Canada lags forty years behind. It is time for Canadians to challenge themselves on this issue. It is time for Canadians to break their legal silence.

121. *Id.* § 2211(b)(2)(A)(i).

122. *Id.* § 2212(a).

123. MIKE BROGDEN & PREETI NIJHAR, CRIME, ABUSE AND THE ELDERLY 152–53 (2000).