

## Lawmaking by Public Welfare Professionals

Margaret Brinig, Gerald Jogerst, Jeanette Daly, Jeffrey Dawson and Gretchen Schmuck<sup>1</sup>

Usually when we think of law making, we think of the activities of Congress or state legislatures. Students of law and government may also think of the rule-making activities of federal<sup>2</sup> or state<sup>3</sup> bureaucracies. More recently, some attention has been paid to the lawmaking power known as prosecutorial discretion (the decision of whether or for what crimes to charge a criminal defendant)<sup>4</sup> or judicial discretion in sentencing.<sup>5</sup> However, so far most of this work has been theoretical or, at best, anecdotal. Further, far less attention has been paid to the ubiquitous activities of the bureaucrat who must decide whether or not to take action in a particular case, though a few articles in law and political science have addressed the topic recently.

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<sup>1</sup> College of Law, Department of Family Medicine, and Department of Public Health, University of Iowa. Many thanks to the research assistants who collected census data for this project. They include Nicholas Keppel and Sarah Koehler. Stephanos Bibas provided substantial advice and guidance.

<sup>2</sup> For just a sampling of the more recent, B.J. Sanford, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782 (2003) (arguing that it is illegal for administrative agencies to delay implementation of directives promulgated by outgoing presidents at the request of a new president. Further, these delays offer the judiciary a rare chance to review presidential rulemaking); William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 ADMIN. L. REV. 611 (2002) (discussing what the author calls a troubling aspect of the administrative process, the practice of ex parte Office of Management and Budget (OMB) participation in rulemaking, and the potential for judicial and legislative checks on that participation); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589 (2002) (analyzing consistency theory in federal rulemaking and arguing that notice and comment rulemaking actually diminishes genuinely effective public input by encouraging agency lock-in through premature commitment to a proposal).

<sup>3</sup> See, e.g., Donna E. Blanton, *State Agency Rulemaking Procedures and Rule Challenges*, 75-JAN FLA. B. J. 34 (2001) (discussing the recent struggles between the state legislature and the courts in trying to regulate administrative agencies and impose on them a duty to treat their policies as rules and apply those rules consistently); William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMINISTRATIVE LAW REVIEW 147 (1991); Arthur E. Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617 (1991) (arguing that state agencies should implement policies that are based on comprehensive rationality, in that they are politically acceptable, technically sound, lawful and fair).

<sup>4</sup> A recent incident involves the charging and indictment of Martha Stewart for securities fraud, and various criminal charges allegedly resulting from attempting to cover up this activity. See, e.g., USA Today, June 5, 2003.

<sup>5</sup> James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. R. 507 (2002) (discussing the usurpation by the Florida legislature of the Florida Supreme Court's rulemaking authority over the judicial branch through recent legislation and questioning whether the Supreme Court should assert its inherent control over the judicial branch).

This study looks systematically at bureaucratic discretion in a particular case: that of the detection and substantiation of domestic elder abuse, but then generalizes to other fields that feature administrative discretion. As with some other agencies, the social services officials who decide whether or not to police elder abuse are constrained. They suffer from lack of money, understaffing, and occasionally a real confusion of roles.<sup>6</sup> We will also see that even with the best of intentions and the elder's interest at stake they may be reluctant to enforce the law because they do not see a better situation for the elder.<sup>7</sup>

The law as it is written forbids abuse of dependent or vulnerable elders.<sup>8</sup> In the domestic (non-institutional) situation we consider here, all states charge adult protective

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<sup>6</sup> See, e.g., Iowa City Press Citizen 6/18/03.

<sup>7</sup> DAVID A. WOLFE, ELDER ABUSE INTERVENTION: LESSONS FROM CHILD ABUSE AND DOMESTIC VIOLENCE INITIATES, IN ELDER MISTREATMENT: ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA 501, 507 (Richard J. Bonnie & Robert B. Wallace, eds., National Research Council of the National Academies 2003), notes that "the dominant theme in most services to maltreating families remains that of protection, not treatment. This conundrum leaves inadequate services available to the larger number of parents who are at risk of child abuse or neglect and who could benefit the most from early intervention....".

<sup>8</sup> See, e.g., Cal. Penal Code § 368 (2002):

(a) The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

(b)(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars (\$6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years.

N.Y. Penal Law § 260.34 (McKinney, 2000) provides:

A person is guilty of endangering the welfare of a vulnerable elderly person in the first degree when, being a caregiver for a vulnerable elderly person:

1. With intent to cause physical injury to such person, he or she causes serious physical injury to such person; or

services investigators (usually an arm of the state health and human services departments) with collecting reports, investigating, and substantiating elder abuse.<sup>9</sup> If abuse is “founded,”<sup>10</sup> these written laws provide for criminal charges against the abuser,<sup>11</sup> services for the elderly victim,<sup>12</sup> appointment of a guardian,<sup>13</sup> and/or removal from the home situation.<sup>14</sup>

The law as it is enforced may require social service officials to act not only as distributors of adult protective services but also, perhaps even in the same family, as child protectors. In child welfare investigations, the written rules require that families be kept

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2. He or she recklessly causes serious physical injury to such person.  
Endangering the welfare of a vulnerable elderly person in the first degree is a class D felony.

<sup>9</sup> See, e.g., Del. Stat. Ti. 31 sec. 3904 (1), (6); NM Stat 27-7-19 (investigation, substantiation and written report). A complete list (with citations) appears at <http://www.elderabusecenter.org/default.cfm?p=statelaws.cfm#finding>. A listing of the mandatory reporting laws in Gerald F. Jogerst et al., *Required Elder Abuse Education for Iowa Mandatory Reporters*, 15 *J. Elder Abuse & Neglect* 1 15-21 & Appendix A (2003). For a discussion of the origin of the laws, and the effects of the legislation and regulations on investigations, substantiations, and bureaucratic efficiency, see Margaret F. Brinig et al., *The Public Choice of Elder Abuse Law*, 33 *J. LEGAL STUDS.* 517 (2004).

<sup>10</sup> This means that it is determined by the agency to have likely occurred. See, e.g., Ia. Code § 235B.9(i) (2001): “1. Dependent adult abuse information which is determined by a preponderance of the evidence to be founded, shall be sealed ten years after the receipt of the initial report of such abuse by the registry unless good cause is shown why the information should remain open to authorized access.”

<sup>11</sup> See, e.g., Conn. Gen. Stat. Ann. 17b-460: If as the result of any investigation...a determination is made that a caretaker or other person has abused, neglected, exploited or abandoned an elderly person, such information shall be referred in writing to the appropriate office of the state’s attorney, which shall conduct such further investigation, if any is deemed necessary and shall determine whether criminal proceedings should be initiated...

<sup>12</sup> See, e.g., Conn. Agencies Regs. 17b-461-1 (“services necessary to prevent abuse, neglect, exploitation, or abandonment;”); Del Stat. Tit. 39, sec. 3904(b)(including among other things “social casework, maintenance in own home through provision of home health care, etc., assistance in obtaining out-of-home services such as respite care, emergency housing and placement in a rest-residential home...”).

<sup>13</sup> See, e.g., Conn. Gen. Stat. Ann. 17b-456: If the Commissioner of Social Services finds that an elderly person is being abused, neglected, exploited or abandoned and lacks capacity to consent to reasonable and necessary protective services, he may petition the Probate Court for appointment of a conservator...

<sup>14</sup> See, e.g., Del. Stat. Tit. 31 sec. 3903(f): “The Department shall make continuing provisions in each county for the shelter of those persons who are determined to be in temporary need of such protection pursuant to ...this title. In providing this service, the Department may utilize existing resources such as state institutions; it may contract for bed space in private facilities; and it may utilizes the resources of rest (family care and residential) homes for those clients not requiring medical care.”

together if at all possible consistent with the protection of the child.<sup>15</sup> No such rule or policy<sup>16</sup> keeps elders in their home situations. The alternative may be less familiar and less personal nursing home care, which the elder may vehemently not want.<sup>17</sup>

Furthermore, many of the field workers charged with doing the investigations were trained and hired originally to do child welfare work.<sup>18</sup> For them, Adult Protective Service (APS) investigations may be an unfamiliar and unwelcome additional duty, one

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<sup>15</sup> Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115, codified as amended, 42 U.S.C. §§ 671, 675, 473A, 1320a-9. 629a (1994 & Supp. V 1995-2000); set forth in part and discussed in CARL SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES AMERICAN CASEBOOK SERIES 1004-1006 (2d ed., West Group 2000), and further discussed in Marcia Lowery, *Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN'S J. LEGAL COMMENT. 447 (1997) (arguing that child welfare and adoption standards are interpreted as if there could be a single set of standards to govern all cases; the author argues that the correct results could differ widely based on the facts in each case, from the child staying with the family, to temporary removal, to permanent adoption, and that child welfare statutes should reflect the possibilities of different results). Sec. 2 (a)(ii), (II) provides that the "reasonable efforts" to reunify the family will not be necessary where the child has been subjected to aggravated circumstances, as defined by state law, and including abandonment, torture, chronic abuse and sexual abuse, or where the parental rights with respect to a sibling have been terminated involuntarily. States must initiate or join proceedings to terminate parental rights when children under 10 have been in foster care for 18 months of the most recent 24 months, unless the child is being cared for by a relative or the state documents a compelling reason for determining that filing a termination petition would not be in the best interests of the child, or the state has failed to provide to the child's family such services as the state deems appropriate. Id. Sec. 3.

<sup>16</sup> There is a constitutionally supported presumption that parents serve their children's best interests, articulated in such Supreme Court cases as *Parham v. J.R.*, 442 U.S. 584 (1979) (no need for pre-commitment hearing involving substantial due process protection when parents "voluntarily commit" a child to a psychiatric institution despite the stated concern that parents could "railroad" difficult children); and *Troxel v. Granville*, 530 U.S. 57 (2000) (state and third parties cannot interfere with the decisions about visitation made by a fit parent acting in an intact family because of parental autonomy).

The policy supporting family autonomy is described in *Kilgrew v. Kilgrew*, 107 So. 2d 885, 889 (Ala. 1958) ("It would be anomalous to hold that a court of equity may sit in constant supervision over a household and see that either parent's will and determination in the upbringing of a child is obeyed, even though the parents' dispute might involve what is best for the child.") See generally Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733 (2001)

<sup>17</sup> "All my life, I have feared being neglected in a nursing home, and now I know what it is like . . . . I don't want anyone else to suffer like this." Jonathan Riskind & Lee Leonard, *State Might Narrow Scope of Nursing- Home Abuse Suits*, COLUMBUS DISPATCH, March 5 2002 at 1A (quoting Helen Love, who suffered abuse in a nursing home in California).

<sup>18</sup> Certainly protection against child abuse has a much longer history. For example, family violence activities funded by the Center for Disease Controls, Family Violence Branch, have just added funding for elder abuse projects within the last two years. See Eben M. Ingram, Expert Panel Recommendations on Elder Mistreatment Using a Public Health Framework, 15 J. Elder Abuse & Neglect 45, 46 (2003).

Wolfe, *supra* note 7, at 501 states: "Efforts to understand and deal with abuse of the elderly by family members or other caregivers are reminiscent of where the study of child abuse and woman abuse was 20 years ago."

that seems less attractive because children in trouble can be placed in happier situations and show real improvement,<sup>19</sup> while the elder will ultimately deteriorate and sooner, rather than later, die. Thus the elder who has been abused may not get to a “better place.”<sup>20</sup>

Discretion given to legal agents, regardless of the type, proves integral to the phenomenon we study here. In our system of government, both the executive and judicial branches of government have opportunities to exercise discretion. Discretion, and concern about abuses of it, has concerned policy makers since the founding of the republic. For example, one of the most important constitutional law cases, *Marbury v. Madison*<sup>21</sup> concerns the Presidential power to pardon, which gives virtually unlimited discretion to the chief executive.<sup>22</sup>

Judges have tremendous discretion over the cases they hear, for their decisions aren’t reversed on appeal unless “clearly erroneous,”<sup>23</sup> arbitrary and capricious,”<sup>24</sup> or “abuses of discretion.”<sup>25</sup> Yet the Federal sentencing guidelines were developed to

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<sup>19</sup> Margaret F. Brinig, *Moving toward a First-Best World: Minnesota's Position on Multiethnic Adoptions*, 28 WM. MITCHELL L. REV. 553 (2001) (exploring the reasons behind Minnesota’s decision to favor racial matching in adoption placements despite federal legislation requiring states to ignore race in favor of swifter permanent placement of children); Wolfe, *supra* note 7, at 507.

<sup>20</sup> This is the goal of the child welfare system, according to the Child Welfare League. See A Family’s Guide to the Child Welfare System 96 (2003), downloaded from [www.cwla.org/childwelfare/fg10.pdf](http://www.cwla.org/childwelfare/fg10.pdf).

<sup>21</sup> 5 U.S. 137, 165-66 (1803).

<sup>22</sup> Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L. J. 85, 148 (2002) (exploring the nature and scope of the presidential pardoning power and concluding that some pardon challenges are justiciable questions and that the slight limitations to the pardoning power may be just enough to prevent abuses).

<sup>23</sup> See, e.g., *Blakely v. Washington*, 124 S. Ct. 25341, 2535 (2004) (sentencing under Washington law)

<sup>24</sup> See, e.g., *Dept. of Transp. v. Public Citizen*, 124 S. Ct. 2204, 2206 (setting aside decision of agency not to prepare an environmental impact statement).

<sup>25</sup> See, e.g., *Ash v. ACLU*, 124 S. Ct. 783, 2785 (2004)(award of preliminary injunction issued under Child Online Protectin Act)

constrain discretion in sentencing,<sup>26</sup> limiting federal sentencing judges to 25% ranges allowed by the sentencing grid.<sup>27</sup> Even poverty lawyers must daily decide which of their many potential clients to represent at hearings, exercising discretion that will critically affect the lives of these people.<sup>28</sup>

Prosecutorial discretion has been the focus of criticism and commentary for more than forty years.<sup>29</sup> A recent criticism by Angela Davis<sup>30</sup> notes that “prosecutors daily exercise practically unlimited discretion and engage in similar controversial investigative practices [to the independent counsel].”<sup>31</sup> Davis asserts that such discretion leads to abuses based upon race and class,<sup>32</sup> citing cases such as *United States v. Armstrong*,<sup>33</sup>

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<sup>26</sup> Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Grail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 657 (2003) (arguing that the Federal Sentencing Guidelines and the use of fact-finding during sentencing have forced judges to ignore the traditional goals behind the imposition of prison sentences).

<sup>27</sup> *Id.* at 676.

<sup>28</sup> Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L. J. 2567 (1993) (critiquing the widespread use of discretion and ethical judgment by poverty lawyers in case selection and strategy in poverty law cases).

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Over forty years ago, Kenneth Karst observed, “and this is by no means an indictment of our attorneys general, any high political official may be expected to approach rather cautiously the investigation of charges that respectable trustees are guilty of wrongdoing or even mismanagement.” Kenneth L. Karst, [The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility](#), 73 *Harv. L. Rev.* 433, 478-79 (1960).

Cited in Evelyn J. Brody, WHOSE PUBLIC? PAROCHIALISM AND PATERNALISM IN STATE CHARITY LAW ENFORCEMENT, 79 *Ind. L.J.* 937 (2004).

<sup>30</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *IOWA L. REV.* 393 (2001) (comparing the powers, practices, and policies of the independent counsel with those of ordinary state and federal prosecutors and concluding that any distinctions between Kenneth Starr’s alleged abuses during his investigation of President Clinton and the activities of normal prosecutors are illusory); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521, 1560-1572 (1981) (suggesting a need to reexamine the broad and casual acceptance of prosecutorial discretion and arguing that the current scope of discretion is unjustifiably broad not only in terms of the principles of fairness, equity, and accountability on which our system of criminal justice is based, but also in terms of those considerations thought by the supporters of prosecutorial discretion to justify its existence).

<sup>31</sup> *Id.* at 397.

<sup>32</sup> Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13 (1998) (examining prosecutorial discretion as a cause of racial inequality in the criminal justice system and arguing the prosecutors make decisions that contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime).

<sup>33</sup> Davis, *supra* note 32, at 32 (citing *United States v. Armstrong*, 517 U.S. 456, 470 (1996)).

which based a selective prosecution claim on a study showing the government failed to prosecute non-black defendants for cocaine and crack-related offenses.

Daniel Richman reviewed prosecutorial discretion using an administrative law perspective to understanding the enforcement bureaucracy.<sup>34</sup> Richman notes that the ability of one U.S. Attorney's Office to take cases from another jurisdiction reduces the ability of each office to leverage its gate keeping power into control of those agencies' agendas.<sup>35</sup> Richman also discusses the "culture clash" between prosecutors and the investigative agents with whom they must work.<sup>36</sup> William Stuntz criticized the unfettered discretion of prosecutors (as opposed to judicial discretion) noting that the problem is caused because "strong legislative supremacy and strong prosecutorial discretion don't mix—they produce the kind of power imbalance that reinforces rather than corrects itself."<sup>37</sup>

Of course, though observations about prosecutorial discretion are instructive, the problem studied here is a bit different. The APS workers surveyed do not themselves handle the criminal cases, which are referred to local law enforcement.<sup>38</sup> The burden of proof for a "founded" case of elder abuse need not rise to the same level as the "beyond a

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<sup>34</sup> Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 750 (2003) (showing how the iterated interactions between agents (police) and prosecutors will affect investigative and adjudicative decisionmaking and the allocation of enforcement resources and suggesting that the distinctive incentives of prosecutors and agents can most productively be harmonized if the two enforcement elements are seen as mutually monitoring members of a working group.).

<sup>35</sup> *Id.* at 760.

<sup>36</sup> *Id.* at 789-791. This may be true of the Adult Protective Services workers described here as well, though such an investigation is beyond the scope of the present study.

<sup>37</sup> William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828, 839 (2002) (arguing that prosecutorial discretion cannot simply be abolished, and even were it possible, abolition would probably do more harm than good. But prosecutorial power can be reined in, by reining in substantive criminal law).

<sup>38</sup> See, e.g., Conn. Gen. Stat. Ann. 17b-460: If as the result of any investigation...a determination is made that a caretaker or other person has abused, neglected, exploited or abandoned an elderly person, such information shall be referred in writing to the appropriate office of the state's attorney, which shall conduct such further investigation, if any is deemed necessary and shall determine whether criminal proceedings should be initiated...

reasonable doubt” standard required under the criminal system.<sup>39</sup> The focus is on protection of the elder and provision of services, not on retribution, deterrence and other goals of the criminal justice system.<sup>40</sup> In fact, because the emphasis differs, APS workers have been criticized for failing to preserve evidence needed for subsequent criminal prosecutions.<sup>41</sup> This criticism leads to calls for teams of investigators, one member of which who would be associated with the local law enforcement community.<sup>42</sup> Cooperation between social services and law enforcement is advantageous for the victim but difficult for the professionals who are unlikely to master both a service plan and a crime focus during the investigation.<sup>43</sup>

Turning once again to a more generalized discussion of discretion, we note that in 1987, Gary Bryner wrote that elaborate efforts designed to constrain discretion in regulatory agencies has become something like a national obsession, and has undermined the effectiveness of regulatory programs without decisively narrowing the scope of discretion.<sup>44</sup> He pointed out that the new requirements have elaborated on administrative law and procedure to ensure fairness to and participation by affective groups, that agencies have been required to perform extensive scientific and cost-benefit analyses to

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<sup>39</sup> Compare Donna Coker, *Enhancing Autonomy For Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1, 58 (1999)(protective orders in domestic violence cases).

<sup>40</sup> See, e.g., [People v. Farrar, 52 N.Y.2d 302, 305-06 \(1981\)](#); see generally Michael J. Stacchini, Note, *Nichols v. United States: Narrowing The Sixth Amendment Guarantee To Counsel*, 75 B.U. L. REV. 1233, 1252-53 (1995); Comment, Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis Of An Intermediate-Level Penal Sanction*, 135 U. PA. L. REV. 771, 778-79 (1987).

<sup>41</sup> I heard this myself from a practicing attorney in an alumni conference at the University of Iowa, held in the fall of 2003. Compare Lucy S. McGough, *Good Enough For Government Work: The Constitutional Duty To Preserve Forensic Interviews Of Child Victims*, 65 L. & CONT. PROBS. 179, 193 (2002)(child abuse and testimony of child victim).

<sup>42</sup> Wolfe (2003), supra note 7 at 512.

<sup>43</sup> B.K. Payne, B.L. Berg, & J. Toussaint, J., *The Police Rresponse to the Criminalization of Elder Abuse: An Exploratory Study*, 24 POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES & MANAGEMENT, 605 (2001).

<sup>44</sup> GARY C. BRYNER, *BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 2* (Pergamon Press, 1987).

support their decisions, and that both Congress and the executive have intensified political oversight of agency rulemaking. Meanwhile, he argued, although these changes have increased the costs and length of time required to navigate the administrative process, they have had no systematic effect on substantive policy.<sup>45</sup>

Moreover, political scientists raise two concerns about discretion.<sup>46</sup> First, administrators may use their discretion to limit access to benefits and protection.<sup>47</sup> Second, because decisions may be influenced by moral or political judgments, discretion may be used to discriminate or harm specific categories of clients.<sup>48</sup> For example, internal bureaucratic procedures play an important role in defining the right to information under Canadian freedom of information statutes.<sup>49</sup> Likewise, the “good cause” requirement allowing deviation from child support enforcement (in cases where the recipient fears abuse from the obligor or where the child had been conceived as the result of incest or rape)<sup>50</sup> allows discretion that is sensitive to political influences.<sup>51</sup>

Discretion on how to spend money at local school district level allowed administrators to

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<sup>45</sup> Id. at 117-18.

<sup>46</sup> Lael R. Keiser & Joe Soss, *With Good Cause: Bureaucratic Discretion and the Politics of Child Support Enforcement*, 42 AM. J. POL. SCI. 1133, 1134 (1998) (finding that use of the good cause exception which allows a custodial parent to refuse to seek child support was “systemically affected by partisan control of state governments, the values of state administrators, the funding decisions of elected officials, and the levels of demand on the bureaucracy”).

<sup>47</sup> Id. (citing Michael Lipsey, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3-5 (1984)).

<sup>48</sup> Id. (citing Yaheskel Hasenfeld, *Power in Social Work Practice*, 61 Soc. Serv. Rev. 469 (1987) and Gideon Sjoberg et al, *Bureaucracy and the Lower Class*, 50 SOC. & SOC. RES. 325 (1966)).

<sup>49</sup> Alasdair Roberts, *Administrative Discretion and the Access to Information Act: An “Internal Law” on Open Government*, 45 CANADIAN PUB. ADMIN. 175 (2002) (finding that requests for government information from the media or political parties are subject to longer delays and tougher decisions on disclosure).

<sup>50</sup> The current good cause exception is at 42 U.S.C. § 602(a)(7)(2003); see generally Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence have Improved Victims’ Access to Child Support and TANF*, 14 HASTINGS L.J. 47, 49 (2003).

<sup>51</sup> Keiser and Soss, *supra* note 35 at 1147.

discriminate racially in hiring and in directing black students to less desirable educational programs.<sup>52</sup>

Our study reveals both types of concerns mentioned by Keiser and Soss. First, despite the mandate of the statutes and regulations, the investigators apparently limited the protection available to some dependent elders where they were not convinced that the involvement of APS would benefit them.<sup>53</sup> Secondly, administrators who might be biased in favor of child protective services instead of APS but who were assigned to do both did not investigate or substantiate as many cases of elder abuse.<sup>54</sup> Though we do not have access to the amounts spent in APS on the local level, we are certain that material resources play a strong role in shaping administrative performance.<sup>55</sup> Thus because they are acting under conditions of scarcity, they are pushed into a variety of strategies for conserving and rationing resources,<sup>56</sup> which strategies translate into understaffing.<sup>57</sup> Overburdened workers distributing scarce resources may simply ignore clients' needs.

This, of course, is the rub: in a time of financial constraint, what goals have the highest priority? Where the goals of the supervising agency or legislature are obscure, those who implement them have great authority to do whatever they wish. Where they are set forth in legislation, rules, or directives, the bureaucrats implementing the goals will tend to follow these stated goals explicitly. Our conclusion is that state legislatures,

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<sup>52</sup> Kenneth J. Meier, Joseph Stewart, Jr. & Robert E. England, *The Politics of Bureaucratic Discretion: Educational Access as an Urban Service*, 35 AM. J. POL. SCI. 145 (1991) (arguing that school desegregation plans face lower levels of white resistance than in years past and should be expanded in scope).

<sup>53</sup> See *infra*, Tables 2 & 5.

<sup>54</sup> See *infra*, Tables 2 & 5.

<sup>55</sup> Charles Barrileaux, Richard Reiock, & Robert E. Crew, Jr., *Measuring and Comparing American States' Administrative Characteristics*, 24 ST. & GOV'T REV. 441 (1992).

<sup>56</sup> MICHAEL LIPSKY, MICHAEL, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES*. (Russell Sage Foundation 1980).

<sup>57</sup> JEFFREY M. PROTAS, *PEOPLE-PROCESSING: THE STREET-LEVEL BUREAUCRAT IN PUBLIC SERVICE BUREAUCRACIES* (Lexington Books 1979). Lynn Okamoto, *House Panel OKs Budget-Cutting Bill: Local Governments, Children's Advocates Not Happy*, DES MOINES REGISTER, April 23, 2003 at B1.

and the bureaucrats who administer their programs, must pay careful attention to the messages they send about elder abuse. If in fact protecting elders from abuse is a priority, as it is for us, both levels of state government must send clear signals about how their goals are to be implemented. They must also decide on strategies: protective or preventative. Currently, most state governments apparently have chosen the protective strategy, which may not be what either the elders want nor what makes the investigators most comfortable. Policymakers must make their commitments and choices clear both in terms of the wording of statutes and regulations and in terms of funding and personnel adequate for the task.

### *Methods*

The collaborators on this study, after obtaining University of Iowa Institutional Review Board approval, employed two methods to obtain data involving domestic elder abuse at the local level: a mailed survey and a compilation of state elder abuse data. Data gathered for analysis included, first, answers to a questionnaire from a caseworker in each APS office in the country, which differentiated investigative structure and investigator characteristics and, second, reports of the number of domestic elder abuse reports, investigations, and substantiations at the lowest reporting level for each state and the District of Columbia for 1999 or fiscal year 1999-2000.

Elder abuse data originally comes from an administrative office whose employees investigate allegations of elder abuse. The state structure for each office varies. There may be one office per county, as in Wisconsin, an office that covers more than one county, as in Iowa, an office that covers parts of counties, as in New Mexico, or an office that covers numerous cities in many counties, as in Massachusetts. Data on elder abuse

are collected using these different structures and this data is then compiled at the state level to generate an annual report. Thus, the data generated may be at the county level, the city level, or a district level that has numerous counties or a part of a county. When we use the term, “data at the lowest reporting level,” we denote the elder abuse reports, investigations, and substantiations of investigations at whichever lowest reporting entity the state provided, based upon its individual system.

### *Elder Abuse Data*

In November, 2000, the authors sent each state APS administrator a letter requesting specific data for this study. Data requested included the numbers of domestic elder abuse<sup>58</sup> reports, investigations, and substantiation of investigations at the lowest reporting entity for 1999 or fiscal year 1999-2000. The reporters were asked to omit institutional abuse numbers and numbers of abuse against people age 18-59 years of age.

All state APS administrators were contacted within two weeks of the initial letter. Georgia and North Dakota reported that they had no data to provide. Colorado provided data but was unsure of its accuracy. The Colorado data was ultimately not used in the study. Seven states provided data only at the statewide level: Alaska, Indiana, Michigan, Mississippi, North Carolina, Tennessee, and Vermont. States that provided data at the lowest reporting level did so at the county or district level. Twenty-five states provided data at the county level, and 16 states provided data at the district level. Rhode Island was unable to provide self-neglect data; otherwise all states provided comprehensive

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<sup>58</sup> This included all types of abuse such as physical abuse, exploitation, neglect, sexual abuse, abandonment, emotional abuse, and any other categories specified in state law.

numbers for abuse. The data collection process was completed in 13 months, with an average of 25 telephone calls and a range of 1 to 32 calls per state to obtain the data.<sup>59</sup>

### *Questionnaire*

The collaborators then mailed a survey designed to differentiate investigative structure and investigator characteristics. Prior to mailing, permission to conduct the survey was sought from each state's APS administrator. Forty-five of the states' administrators (44 states and the District of Columbia) provided permission. Montana's APS administrator allowed the survey to be sent only via email.

Five states (Michigan, Missouri, South Carolina, South Dakota, and Tennessee) did not grant permission for questionnaires to be sent to each local office. Three of those states (Michigan, Missouri, and Tennessee) completed one questionnaire representing all APS offices in the state. Data collected from these three states were not used in the final analysis. South Dakota offered to complete the questionnaires in a group meeting. However, this format was not acceptable to the study team. North Dakota could not participate because there were no adult protective service offices in the state.

The word investigator is used throughout this analysis. Caseworker or APS worker terms were usually avoided because the focus of the research was on the investigation of elder abuse and the questionnaire was about the investigations, not the provision of services. As noted previously, caseworkers and APS workers typically provide services in addition to investigating allegations.

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<sup>59</sup> See Jogerst et al., *AJPH* 2003, for further details.

### *Instrument*

The research team developed a 23-item questionnaire entitled "State Elder Abuse Investigations" for use in this study. Demographic items included respondent's position title, age, gender, length of employment in current position, level of education, and full-time or part-time work status. Other items pertained to investigations conducted by the agency, such as the use of abuse screens, the number of full-time equivalent investigators, and whether the agency offered and used a curriculum (that is, a formal program of instruction about elder abuse investigation).

The questionnaire underwent initial revisions following suggestions generated by the geriatric assessment clinic team (physicians, nurse practitioner, social worker, and nurse) and the research review team (University of Iowa Department of Internal and Family Medicine). The questionnaire was then pilot tested by ten social workers, each of whom works with elder and adult abuse investigations in the Iowa City, Iowa area. Following feedback from the social workers, the collaborators made final revisions to the survey.

### *Mailings and Telephone Follow-up*

An APS director, supervisor, or investigator from each APS office was sent a questionnaire. The first mailing of 1,860 questionnaires resulted in a return of 728 surveys (39%). A second mailing was sent to those who had not yet returned the first survey. Of the 1,191 offices that received the second mailing, 366 (31%) returned the survey. Following the second mailing, surveys from the first mailing were received, thus some APS offices inadvertently received a second mailing. Surveys returned from the second mailing were cross-referenced with those received from the first mailing. In cases of duplication, surveys returned from the first mailing were used. In total, 1,056 surveys (60%) were returned by mail.

Twenty questionnaires were emailed from their administrator to investigators housed in different offices in Montana; eight were returned by email. A “reminder” questionnaire was emailed a month later to the 12 investigators who did not return the first questionnaire. None of the second emailed surveys were returned.

Two rounds of follow-up telephone calls were made to 701 offices that had not returned a questionnaire from either mailing. The first round of calls resulted in 216 completed surveys and the second round resulted in another 129 completions. During the telephone calling sessions, we realized that some offices had been re-districted, so the actual number of offices to receive the questionnaires was 1,763.

All three methods of data collection resulted in the completion of 1,409 questionnaires, for a final return rate of 80%. Survey response rates ranged from 36% in Utah to 100% in nine states.

### *Dependent and Independent Variables*

There were four dependent variables for the initial analysis. The first three were rates: 1) elder abuse report rates, 2) investigation rates, and 3) substantiation rates. These rates were determined by dividing the number of reports, investigations, and substantiations, respectively, by the total elder population of the unit. The fourth dependent variable is the substantiation ratio, determined by dividing substantiations by investigations. Total elder population covered by the APS statute was 60 years and older for all states except California, Maryland, and Nebraska, where it was 65 years and older, and for Alabama, which was 55 years and older. Population data were obtained from the April 1, 2000 U.S. Census.<sup>60</sup> For this study, a report means an allegation of abuse received by APS.<sup>61</sup> An investigation is conducted after a report is received to evaluate the potential victim. Substantiation means that the investigator finds that abuse actually exists (is founded) according to state law.

The independent (predictor) variables included questions from the survey regarding the investigative system, educational requirements, investigator characteristics, and demographic data. Investigative system items included whether or not the office used abuse screens,<sup>62</sup> whether the same person investigated both child and adult cases, the number of full time equivalents investigating child and elder abuse allegations, the respondent's opinion about whether an elderly person is better off after intervention, and

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<sup>60</sup> These are available on the Census Website, [www.census.gov](http://www.census.gov).

<sup>61</sup> Reports are not studied or discussed in this paper, but are discussed in other work of the collaborators.

<sup>62</sup> For example, the Maine Partners for Elder Protection website includes the following: A combination of paper and electronic brief screens administered during routine medical appointments will identify patients 60 years and older that are at risk of elder abuse, neglect, or exploitation. An elder care specialist will assess and respond to patient need. Education workshops and information will be provided to PCPs in the region as well as AAA staff.

<http://www.umaine.edu/mainecenteronaging/mepep.htm>

the respondent's opinion about whether elder abuse is reported and substantiated adequately. Educational requirement items included the department's curriculum for elder abuse evaluations, and the length of any curriculum. Investigator characteristics items included the investigators' minimum academic level of education, the percent of investigators with education beyond the minimum requirements, and the investigators' area of educational training. Demographic items included respondent's position title, age, gender, length of employment in current position, level of education, and full-time or part-time work status. We also considered various district demographic variables, obtained from government web sites.

### *Analyses*

This article looks at the effect of discretion and other variables on three outcomes: investigation rates, substantiation rates, and the ratio between the two, all measured at the local reporting unit level. To improve normality for formal analyses of the former two outcomes, a fourth-root transformation was applied to the investigation and substantiation rates, but this was not necessary for the ratio.

Simple Pearson correlations showed a significant (and negative) correlation between whether investigators considered both child and dependent adult abuse within their offices and whether they felt that elders were "usually better off" after adult protective services investigations.

In some ways, the discretion problem highlighted in this paper resembles the concerns that culminated in arguments for the Violence Against Women's Act

(VAWA).<sup>63</sup> Its proponents argued that specific legislation was needed because the general public, police, prosecutors and judges underestimated the extent and effect of attacks directed against women. Because they did so, judges were apt to focus on the actions of the victim leading to abuse<sup>64</sup> and, even when the criminal offense was proved, to pronounce sentences significantly less than the crimes deserved.<sup>65</sup> The upshot was that as a group or class women were disadvantaged.<sup>66</sup> VAWA was designed as a clear statement from Congress, which made the criminality of abusers' actions manifest and authorized sufficient money and education for law enforcement to tackle the problem.<sup>67</sup> Like partner violence, domestic abuse against the elderly tends to be ignored, blamed on the victim, or trivialized. Like violence by intimates, violence against the elderly is

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<sup>63</sup> Pub. L. No. 103-322, §40201, codified as amended at 42 U.S.C. § 3796gg(b)(2). *United States v. Morrison*, 529 U.S. 598 (2000), struck down as exceeding Congress' legislative authority under the Commerce Clause the civil remedy portion of the statutory scheme.

<sup>64</sup> Senator Biden, in introducing the Act, explained in 103d Congress 1<sup>st</sup> Session, Senate Report 103-138 – The Violence Against Women Act of 1993 – September 10, 1993 at 38:

Its goals are both symbolic and practical; the act is intended to educate the public and those within the justice system against the archaic prejudices that blame women for the beatings and the rapes they suffer; to the women the support and the assurance that their attackers will be prosecuted; and to ensure that the focus of criminal proceedings will concentrate on the conduct of the attacker rather than the conduct of the victim.

<sup>65</sup> *Id.* at 37-38:

The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence.

<sup>66</sup> Biden continued:

It is time for attacks motivated by gender basis to be considered as serious as crimes motivated by religious, racial, or political bias. The provision's purpose is to provide an effective anti-discrimination remedy for violently expressed gender prejudice.

*Id.* at 38.

<sup>67</sup> 42 U.S.C. § 3796gg(b)(2) provides in (b) Purposes for which grants may be used

Grants under this subchapter shall provide personnel, training, technical assistance, data collection and other equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women, and specifically, for the purposes of--

(1) training law enforcement officers, judges, other court personnel, and prosecutors to more effectively identify and respond to violent crimes against women, including the crimes of sexual assault, domestic violence, and dating violence;

(2) developing, training, or expanding units of law enforcement officers, judges, other court personnel, and prosecutors specifically targeting violent crimes against women, including the crimes of sexual assault and domestic violence...

directed in the main against women.<sup>68</sup> Violence against the elderly is also by definition directed against those in positions of dependence.<sup>69</sup> Dependents are elsewhere specifically recognized when they are children<sup>70</sup> or disabled.<sup>71</sup> This paper considers

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<sup>68</sup> Elder violence tends to be directed against women because they make up such a large percentage of those old enough to become dependent:

Number of Men per 100 Women by Age, for the 65 Years and Over Population:1990 and 2000

Age	1990	2000
65 years and over	67	70
65-74	78	82
75-84	60	65
85 years and older	39	41

Source: U.S. Census Bureau, Census 2000 Summary File 1; 1990 Census of Population, General Population Characteristics, United States (1990 CP-1-1).

<sup>69</sup> Many elder abuse statutes specifically focus prosecutions on those who abuse “dependent and vulnerable” adults, not just people who are over a certain age. For example, Ky Rev. Stat. 209.020 defines “Adult [in need of protection]” as: (a) A person eighteen (18) years of age or older, who because of mental or physical dysfunctioning, is unable to manage his own resources or carry out the activity of daily living or protect himself from neglect, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services. Miss. Code Ann. § § 43-47-5 (m) provides that:

“Vulnerable adult” shall mean a person eighteen (18) years of age or older or any minor not covered by the Youth Court Act who is present in the state and who, regardless of residence, is unable to protect his or her own rights, interests, and/or vital concerns and who cannot seek help without assistance because of physical, mental or emotional impairment.

<sup>70</sup> Legislation and cases protecting children frequently mention that juveniles are in a more vulnerable position than adults and need more compassion, understanding, and special treatment. *Bellotti v. Baird*, 443 U.S. 662, 633-39 (1978) (vulnerability and therefore need of special treatment of children who are pregnant); *DeShaney v. Winnebago Co. Dept. Soc. Servs.*, 489 U.S. 189 (1989); Personal Responsibility and Work Opportunity Act, 104 P.L. 193, 104th Cong., 2d Sess. (1996), establishing the Temporary Assistance for Needy Families Program; the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115, codified as amended, 42 U.S.C. §§ 671, 675, 473A, 1320a-9. 629a (1994 & Supp. V 1995-2000); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *HOFSTRA L. REV.* 547, 547 (2000) (“American lawmakers have had relatively clear images of childhood and adulthood--images that fit with our conventional notions. Children are innocent beings, who are dependent, vulnerable, and incapable of making competent decisions. Several aspects of the legal regulation of childhood are based on this account.”).

<sup>71</sup> See, e.g., *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (discrimination against the disabled is often the result of thoughtless and indifferent attitudes); Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (prohibition against discrimination in employment); Peter D. Blanck & Mollie W. Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 *VILL. L. REV.* 345, 368-69 & n.111 (1996) (examining emerging empirical information related to attitudes and behavior under Title I of the Americans with Disabilities Act, discussing the implications of the findings for future policymaking and implementation in this area); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571, 1606-07 (1996): “Vulnerable groups -- including children, persons with special needs, and those with mental disabilities -- like other disadvantaged groups in our society, may require special consideration from the courts in order to realize their rights. Therefore, courts have held that certain classes of vulnerable persons require special services tailored to their differing abilities in order to level the playing field and assure that access to the courts is truly meaningful.

whether adult protective service investigators, who are given great discretion under statutes and regulations, have incentives compatible with the interests of the elderly they serve. In particular, we investigate whether those who investigate both elder and child abuse receive hidden signals from lawmakers that elder abuse should not receive their highest priority.

Because we knew about the high correlation between variables for “same investigator” and “whether the elder is usually better off,” we did not include both variables in any equation as independent variables: in those where we wished to look at both together, we considered “usually better off” as the endogenous variable.<sup>72</sup> In other words, we treated it as a function of other factors including whether investigators were specialized or whether they handled both child and elder abuse.

First, we considered determinants of investigation rates. We first ran two very simple models to see whether the discretion variables of interest were significantly related to the investigation rates. State effect was adjusted for here, as in all the

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Studies of the over-inclusion of disabled children among the abused include: Margaret F. Brinig & F.H. Buckley, *Parental Rights and The Ugly Duckling*, 1 J. L. & FAM. STUD. 41, 56 (1999) (finding that victims of abuse are often different from other children, either because they are disabled or in need of ongoing care); William N. Friedrich & Allison J. Einbender, *The Abused Child: A Psychological Review*, 12 J. CLINICAL CHILD PSYCH. 244-56 (1983) (higher rates of abuse among disabled children); Lawrence E. Frisch & Frances A. Thoads, *Child Abuse and Neglect in Children Referred for Learning Evaluation*, 15 J. OF LEARNING DISABILITIES 583 (1982)(three times the expected number of abused children found in a learning disabled population in Hawaii); Elizabeth Krents et al., *Child Abuse and the Disabled Child: Perspectives for parents*, 89 THE VOLTA REVIEW 78, 83 (1987); William A. Friedrich & Jerry A. Boriskin, *The Role of the Child in Abuse: A Review of the Literature*, 46 AMER. J. ORTHOPSYCHIAT. 580, 583-84 (1987) (reporting that 25 to 55% of children in various studies of abused children were classified as mentally retarded.); Roger White et al., *Physical Disabilities as Risk Factors for Child Maltreatment: A Selected Review*, 51 AMER. J. ORTHOPSYCH. 93, 96 (1987) (showing positive relationship). See generally SHARON R. MORGAN, *ABUSE AND NEGLECT OF HANDICAPPED CHILDREN* (1987); Robert E. Emery & Lisa Laurman-Billings, *An Overview of the Nature, Causes and Consequences of Abusive Family Relationships: Toward Differentiating Maltreatment and Violence*, 53 AM. PSYCHOLOGIST 121, 126 (1998) (discussing a number of risk factors).

<sup>72</sup> That is, we thought it likely that being an investigator in both types of cases influenced whether the reporter felt the elder would usually be better off as a result of the intervention.

regression models.<sup>73</sup> Both variables in fact were statistically significant at .01,<sup>74</sup> having the same investigator coefficient negative and “usually better off” positive (Table 2). These equations predicted .07 and .09 of the variance in the investigation rate, respectively.

Tables 3 and 4 show regressions designed to handle the correlation between these two variables and to allow other variables to be introduced. Table 3 displays the equation predicting whether or not the investigator mailed the survey felt the elder was “usually better off” because of adult protective services. Having the same investigator handle both types of abuse rather than specialize again was significant and negative. Those who had worked for APS for long periods of time were also pessimistic about whether the elder usually profits from their services (significant at .028). The death rate from all alcohol-related causes in the reporting district, which we believe related to the actual abuse rate in the district, was negatively related to the “usually better off” variable (significant at .058), while the length of the formal elder abuse curriculum was positively related (though not achieving statistical significance).

The predicted probability of the investigator’s feeling the elder was “usually better off” obtained from the preceding regression was used as an independent variable in Table 4, along with other variables, and was able to explain .118 of the variance in investigation rates. Here, too, it was significant and positive as expected: if the investigator was optimistic about the effect of the abuse on the elderly victim, the rate of investigations increased. Another expected (and significant) predictor was the child poverty rate, which tends to be related to the amount of abuse. Two predictors had

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<sup>73</sup> There might be other things typical to a particular state that influenced the results. To account for this, the general profile for any given state was treated as a variable (and held constant).

<sup>74</sup> This means that there was less than one chance out of 100 that our result occurred by chance.

surprising signs. The variable for health care providers per population was negative, but not significant. The value of elder abuse investigators per elderly population was negative and significant at the .08 level. These negative relationships might be related to a lower level of abuse: potential abusers might be deterred either because they feared more reporting because of more health care professionals (usually mandatory reporters) or more investigators, or perhaps both variables reflect increased funding for elder care issues generally, and so a lower level of abuse because of more services.

Similarly, we ran simple and slightly more complicated regressions for the substantiation rates (Table 5). The simplest regressions (Models 1 and 2), which included the state effects and the two discretion variables of interest, again showed significant relationships (negative for “same investigator” and positive for “elder usually better off.” This time, they predicted just under five percent of the variance in each result. Two additional equations considered the effect of having specialized (different) or the same investigators with the addition of other variables (Models 3 and 4). Both considered the effect of the formal elder abuse curriculum on the substantiation rate, and in both this coefficient was significant and positive. Model 4 adds two additional variables, the elder poverty rate and the APS/elderly rate. The elder poverty rate is positive and significant, as one would suspect, since this is probably related to the amount of abuse itself or perhaps the general wealth in the state. The APS worker/population rate is negative and significant. Remember that this holds constant the effect of specialization in adult protective services: merely adding additional investigators does not apparently increase the substantiation rate. Again, this may be because of a deterrent effect, or may reflect the money generally available to support programs for the elderly.

Table 6, like Table 4, is a Two-Stage Least Squares regression using the predicted values for “elder usually better off” from Table 3, this time to predict substantiation rates. In this equation, the predicted value, state effect, the elder poverty rate and the rate of elder investigator/elderly population were variables of interest, and predicted .169 of the variance in substantiation rates. The predicted value, as expected, was positively and significantly related to the substantiation rate, as was the elder poverty rate. This time the rate of APS investigators was positive (though not significant).

Finally, Table 7 shows several models predicting the substantiation/investigation ratio, or which might be described as APS efficiency. Models 1 and 2 again show the simple regressions for the same investigator and “elder usually better off.” In neither of these was the discretion variable statistically significant. Model 3 therefore includes a number of other variables which are all positive and significant and together predict about ten percent of the variance in this ratio. These include the health care provider rate, the minimum academic requirements for the investigators, and the number of APS investigators/elderly population. The fact that there is a positive sign on this last variable means that hiring additional investigators does have a beneficial effect once the actual amount of abuse is controlled for (through the substantiation and investigation rates): it does make the investigations more efficient.

### *Discussion*

There is evidence of a wide variation for report, investigation, and substantiation rates across states and among counties. We are unaware of any nationwide study suggesting that actual elder abuse, considered on its own, should vary from state to state or county to county. In an earlier study by investigators from the University of Iowa,

Iowa county level community characteristics related to higher rates of investigated or substantiated elder abuse were population density, children in poverty, reported child abuse, and district.<sup>75</sup> Another investigator reported that in Massachusetts, areas with lower socioeconomic status of the older population, more community training of area professionals, higher agency service rating scores, and a lower community agency-protective service relationship score are more likely to have a higher rate of elder abuse reporting than affluent areas.<sup>76</sup> Our findings are certainly not inconsistent with these results.

We found that those respondents who perceived a person to be better off most of the time after investigation and intervention did have higher investigation and substantiation rates, signifying that investigator perceptions of efficacy do influence investigation and substantiation rates. If an investigator perceives that the elder will be helped, he or she is more likely to investigate and to find abuse.

The investigators' academic preparation as well as more training for their investigator role does seem to affect their efficiency to substantiate abuse (substantiation ratio). Specific training about elder abuse (what to look for and what should be done about it) apparently does have beneficial effects.

The only structural detail that predicted statistically significant higher investigation or substantiation rates was whether the reporting district used separate investigators for child and elder abuse cases. Those investigators only addressing elder

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<sup>75</sup> Gerald J. Jogerst et al., Community Characteristics Associated with Elder Abuse. 48 J. AM. GERIATRICS SOC. 513 (2000) (finding, among other things, that the child abuse rate and the proportion of children in poverty were good predictors of elder abuse).

<sup>76</sup> Rosalie S. Wolf & Donglin Li, Factors Affecting the Rate of Elder Abuse Reporting to a State Protective Services Program, 39 THE GERONTOLOGIST 222 (1999) (lower socioeconomic status, more training, less good relationship between community agency and served population had higher reporting).

abuse cases may acquire more experience and expertise about elder abuse than those investigating both child and elder abuse cases. Specialization thus leads to higher investigation and substantiation rates.

It is reasonable and cost effective to have one caseworker conducting investigations of both child and elder allegations of abuse when the population served is sparse and there is only one caseworker. But it is evident from these findings that higher investigation and substantiation rates are possible for those investigators conducting only investigations of elder abuse rather than both child and elder abuse. These specialists in elder care will be more effective with more prior training in elder abuse.

#### *Conclusion*

In an era of shrinking state and local resources for domestic violence prevention and detection, governments face a critical question of how to best allocate scarce funds. This paper suggests some answers for treating family violence, and presents a model for evaluating other programs.

Some expensive programs produce very few results in terms of reporting, investigating, and substantiating elder abuse. For example, requiring a specific education or experience level (and therefore guaranteeing higher salaries) or even instituting an elder abuse training program (expensive in terms of personnel required, record keeping and time taken off field work) in and of themselves made no statistical difference. It also appears to make no difference whether the APS program is administered on the state or local level, or whether the investigators used screening devices as opposed to a more gestalt approach.

However, three factors do apparently contribute significantly to investigator effectiveness. The first, whether the investigator believes that intervention makes elders better off, sounds like a psychological issue. It probably reflects, however, the placement and program alternatives the survey respondents had available. Money could perhaps be saved from reducing education or training requirements and spent instead on services such as respite care and homemaking services for the caretakers. This is the response suggested from his work with other types of family abusers by Wolfe.<sup>77</sup>

Another very significant group of results involved specialization for APS personnel. Holding constant state effects including laws and socioeconomic characteristics, workers who specialized in APS (rather than doing both child and adult investigations) consistently did significantly better. Similarly, those with longer (as opposed to merely token) training programs also had higher rates of investigation and substantiation. The policy recommendation seems clear. Instead of worrying about training all social workers to detect elder abuse, we urge that the resources should be concentrated on the social workers exclusively focusing on APS.

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<sup>77</sup> Wolfe (2003), *supra* note 7 at 516-517.

**Table 1. Descriptive Statistics**

	N	Minimum	Maximum	Mean	Std. Deviation
Same Investigator Elder and Child	1393	0	1	.27	.443
Most Elders Better Off	1392	0	1	.69	.463
Length of Formal Elder Abuse Curriculum	825	1	6	3.97	1.188
Highest Academic Level	1395	1	7	3.00	.756
County High School Graduation Rate	1241	35.5	94.9	71.163	10.5637
Investigations Per Thousand Elders	1235	.0	150.0	6.132	8.2483
Substantiations Per Thousand Elders	1237	0	117	2.67	5.535
Ratio of Substantiations to Investigations	1196	.00	1.00	.3801	.28936
Health Care Providers Per Population	945	.00	.73	.0086	.03332
Elder Abuse Investigators Per Elderly Population	999	.0	13	.421	.8250
Valid N (listwise)	429				

**Table 2. Determinants of Investigation Rates.\* \*\***

Investigation Rate (4 <sup>th</sup> Root)	Model 1 R <sup>2</sup> =.07	Model 2 R <sup>2</sup> =.09
State Effects	-.001 (.001)	-.001 (.001)
Same Investigator for Child and Elder Abuse	-.281 (.033)**	
Investigator Feels Elderly Usually Better Off		.157 (.168)**
(Constant)	1.498 (.028)**	1.326 (.035)**

**Table 3. Logistic Regression: Determinants of Whether Elder Usually Better Off,  $R^2=.045$  (pre\_1)**

	B	S.E.	Sig.	Exp(B)
State Effect	.003	.006	.594	1.003
Same Investigator for Child and Elder Abuse	-.676	.207	.001	.509
Length of Employment of Respondent	-.002	.001	.028	.998
Alcohol Death Rate in County	-.013	.007	.058	.987
Length of Elder Abuse Curriculum	.126	.080	.118	1.134
Constant	1.272	.477	.008	3.570

**Table 4. 2SLS Investigation Rates, Same Investigator is exogenous, as are Length of Employment of Respondent, Alcoholism Rate, Length of Elder Abuse Curriculum.  $R^2=.118$ , system .360.**

Variable	B	Standard Error	Beta	T	Sig. T
State Effect	.002310	.001365	.093958	1.692	.0915
Predicted "Elder Usually better Off"	1.025403	.407341	.225811	2.517	.0122
Elder Abuse Investigators Per Elderly Population	-.207023	.118453	-.339145	-1.748	.0813
Child Poverty Rate	.013347	.004305	.359201	3.100	.0021
Health Care Providers Per Population	-.830454	.626349	-.070670	-1.326	.1857
(Constant)	.479362	.365341		1.312	.1903

**Table 5, Determinants of Substantiation Rates.\* \*\***

Substantiation Rate (4 <sup>th</sup> Root)	Model 1 R <sup>2</sup> =.048	Model 2 R <sup>2</sup> =.049	Model 3 R <sup>2</sup> =.119	Model 4 R <sup>2</sup> =.210	Model 5 R <sup>2</sup> =.094
State Effect	.008 (.001)**	.008 (.001)**	.012 (.002)**	.026 (.003)**	.030 (.013)*
Same Investigator for Child and Adult	-.126 (.046)**		-.128 (.053)**	-.507 (.140)**	
Elder Usually Better Off		.134 (.041)**			.899 (.068)*
Elder Poverty Rate				.030 (.007)**	
Child Poverty Rate					.049 (.023)*
Length of Curriculum on Elders			.082 (.020)**	.175 (.038)**	
(Constant)	.711 (.040)**	.590 (.048)**	.283 (.095)**	-.545 (.194)**	-.536 (.676)

**Table 6. 2SLS Determinants of Substantiation Rates Using Predicted Value from Table 3.**  
 $R^2=.169$ , system .419

Variable	B	Standard Error	Beta	T	Sig. T
Predicted Value of "Thinks Usually Better Off"	1.757272	.429018	.268147	4.096	.0000
Over 65 Poverty Rate	.030002	.010514	.326505	2.854	.0045
Rate of Elder Investigators Per Elderly Population	.039021	.038265	.050238	1.020	.3083
State Effect	.015946	.001711	.389462	9.321	.0000
(Constant)	-1.180330	.412473		-2.862	.0044

**Table 7. Determinants of Substantiation/Investigation Ratio.\*\***

Coefficients	Model 1 R <sup>2</sup> =.057	Model 2 R <sup>2</sup> =.058	Model 3 R <sup>2</sup> =.103
State Effect	.004 (.001)**	.004 (.001)**	.005 (.001)**
Same Investigator for Elder and Child Abuse		.020 (.023)	
Elder Usually Better Off	.025 (.020)		
Health Care Provider Rate			.990 (.422)**
Length of Formal Elder Abuse Curriculum			.030 (.011)**
Minimum Academic Requirements			.030 (.017)*
Number of Elder Abuse Investigators/Elderly Population			.041 (.089)*
(Constant)	.236 (.023)**	.249 (.019)**	-.045 (.074)

\*To improve normality, a fourth-root transformation was applied to the investigation and substantiation rates.

\*\*Standard errors are indicated in parentheses. + denotes significance at .10. \* denotes significance at .05. \*\* denotes significance at .01.