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## Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect

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**GOLDEN AGE IN THE GOLDEN STATE:  
CONTEMPORARY LEGAL DEVELOPMENTS  
IN ELDER ABUSE AND NEGLECT**

*Seymour Moskowitz\**

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## I. INTRODUCTION

Defining the appropriate relationship between generations has been a staple of the western philosophical canon for millennia. The Decalogue command to honor father and mother<sup>1</sup> is echoed in secular literature from Aristotle<sup>2</sup> and Virgil<sup>3</sup> to Dickens.<sup>4</sup> These ideas co-exist, however, with another stream of storytelling and historical record-keeping. Anthropologists have documented that killing the aged or abandoning them to die was not unusual.<sup>5</sup> Western literature, from Greek myths to modern fiction, is replete with child-parent conflict.<sup>6</sup> This stream details child-parent conflict,

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1. *Deuteronomy* 5:16; *Exodus* 20:12; *Leviticus* 19:3. This commandment follows immediately after the command to be holy and the instruction to keep the Sabbath. See *Exodus* 20:8-12. This is reinforced by the negative injunction against repudiating parents. See *Deuteronomy* 27:16; *Exodus* 12:17. *Proverbs* 20:20 threatens an abusive son: "your lamp will go out in utter darkness." Later, this attitude is repeated even more graphically. "The eye that mocks a father and scorns to obey a mother will be pecked out by the ravens of the valley and eaten by the vultures." *Proverbs* 30:17.

2. See ARISTOTLE, *NICOMACHEAN ETHICS* § 1163(b) (D.A. Rees ed., 1966).

3. See generally *THE AENEID OF VIRGIL* (Allen Mandelbaum trans., Bantam Books, 3d ed. 1981) (Aeneas is extolled for carrying Anchises, his father, on his shoulders as he traveled to Rome).

4. See generally CHARLES DICKENS, *GREAT EXPECTATIONS* (Edgar Rosenberg ed., 1999) (1861) (Mr. Wemmick, law clerk to the infamous attorney Jaggers, returns home each night to lovingly care for his deaf, elderly father in this great novel).

5. See Nancy Foner, *Caring for the Elderly: A Cross-Cultural View*, in *GROWING OLD IN AMERICA* 387-400 (Beth B. Hess & Elizabeth W. Markson eds., 1985) (discussing studies uncovering instances of killing and abandoning in various societies and pointing out that cultural attitudes about death influence these actions); see also Anthony P. Glascock & Susan L. Feinman, *Social Asset or Social Burden: An Analysis of the Treatment of the Aged in Non-Industrial Societies*, in *DIMENSIONS: AGING, CULTURE AND HEALTH* 13 (Christine L. Fry ed., 1981) (reporting a study finding killing in nineteen percent and abandonment in twelve percent of societies studied).

6. See Shulamit Reinharz, *Loving and Hating One's Elders: Twin Themes in Legend and Literature*, in *ELDER ABUSE: CONFLICT IN THE FAMILY* 25 (Karl A. Pillemer & Rosalie S. Wolfe eds., 1986).

abandonment of the elderly, and even parricide. In *King Lear*, Goneril proclaims:

Idle old man,  
That still would manage those authorities  
That he hath given away!—Now, by my life,  
Old fools are babes again; and must be used  
With checks as flatteries, when they are seen  
abused.<sup>7</sup>

The aged father in this timeless tragedy is continually neglected and abused by his daughters.

A great deal of appropriate attention has been paid in the last three decades to issues of child abuse and domestic violence,<sup>8</sup> but the United States—and indeed most of the world—has been slow to focus on comparable issues regarding the elderly. The titles of the most significant congressional reports on this subject are a good description of this lack of response. In 1981, the Select Committee on Aging of the United States House of Representatives issued a landmark report, “Elder Abuse: An Examination of a Hidden

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7. WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 3.

8. In a pioneering 1962 article, Doctor Kempe and colleagues called the medical community’s attention to the problem of physical child abuse and coined the term “battered-child syndrome.” Henry Kempe, M.D. et al., *The Battered-Child Syndrome*, 181 *JAMA* 17, 17–24 (1962). Within a few years volumes of research on child abuse were published. See Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 *COLUM. L. REV.* 679, 711 (1966). By 1974, Congress had passed the Child Abuse Prevention and Treatment Act, which provided federal financial incentives to create comprehensive state programs and procedures addressing child abuse and neglect. See 42 U.S.C. §§ 5101–5107, 5119 (2000). In the 1970s, spousal abuse and other forms of violence against women began to receive organized public and professional attention. The literature on domestic violence is vast. Among the earliest and best known works are: LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (Harper & Row 1979); Laurie Woods, *Litigation on Behalf of Battered Women*, 5 *WOMEN’S RTS. L. REP.* 7 (1978); and Terry L. Fromson, Note, *The Case for Legal Remedies for Abused Women*, 6 *N.Y.U. REV. L. & SOC. CHANGE* 135 (1977). A broad-based movement arose, including reform of the law and the development of social programs. See, e.g., DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 237–44 (1989); Naomi Hilton Archer, Note, *Battered Women and the Legal System: Past, Present and Future*, 13 *LAW & PSYCHOL. REV.* 145 (1989).

Problem,”<sup>9</sup> which attempted to define the nature of elder mistreatment and determine its extent. The 1981 Report focused on non-institutional settings and estimated four percent of the American aged population—roughly one million persons—might be victims of moderate to severe mistreatment every year. It concluded that while elder mistreatment was a “hidden problem,” it was widespread and largely unreported.<sup>10</sup> Ten years later, another House committee issued a second report, “Elder Abuse: A Decade of Shame and Inactivity.”<sup>11</sup> The 1990 Report determined the situation had worsened; elder mistreatment was increasing and an estimated five percent of the elderly—more than 1.5 million elderly persons—were abused yearly.<sup>12</sup> Ninety percent of states reported to the committee that the incidence of elder mistreatment was increasing.<sup>13</sup> Academic studies and administrative agencies confirm these estimates.<sup>14</sup>

The number of elderly mistreatment cases is compounded by several contemporary phenomena. First, the population of California, the United States, and indeed the world, is aging rapidly. In California, the elderly population will double between 1990 and 2020.<sup>15</sup> This trend reflects the demographics of the entire country. Persons over sixty-five are the fastest growing segment of our

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9. SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM XI (Comm. Print 1981) [hereinafter 1981 ELDER ABUSE HOUSE REPORT].

10. *See id.* at XIII–XIV.

11. SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 101ST CONG., ELDER ABUSE: A DECADE OF SHAME AND INACTION, XI (Comm. Print 1990) [hereinafter 1990 ELDER ABUSE HOUSE REPORT] (estimating more than 1.5 million persons may be victims of such abuse each year and the number is rising).

12. *See id.*

13. *See id.* at XIV.

14. *See, e.g.,* Karl A. Pillemer & David Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey*, 28 GERONTOLOGIST 51–57 (1988) (estimating 700,000 to 1,100,000 cases of elder mistreatment, excluding financial exploitation, from more than a decade ago).

15. *See* Off. of the Att’y Gen., St. of California Dep’t of Justice, *Elder Abuse in California*, available at [http://caag.state.ca.us/cvpc/fs\\_elder\\_abuse\\_in\\_ca.html](http://caag.state.ca.us/cvpc/fs_elder_abuse_in_ca.html) (last visited Oct. 29, 2002) [hereinafter *Elder Abuse in California*].

population.<sup>16</sup> Both the number of aged in this country and their percentage relative to the overall population have steadily increased. In 1900, there were 3.1 million people aged sixty-five and over, constituting four percent of the population.<sup>17</sup> By 1998, the elderly population had grown to 34.2 million, 12.5% of the total population, and the number is expected to increase to more than 40.1 million by 2010, almost 13.3% of the nation's total population.<sup>18</sup> The percentage of elderly in the United States population is further projected to reach 17.7% by 2020, and almost twenty-two percent by 2050.<sup>19</sup> Worldwide, one million people now turn sixty every month.<sup>20</sup> By 2050, the United Nations has estimated that one in five people (approximately two billion) will be sixty years of age or older.<sup>21</sup> As in the United States, people eighty and older are the fastest growing age group in the world.<sup>22</sup>

Second, in the United States, large numbers of the elderly now reside in specialized residential facilities—nursing homes—primarily operated by for-profit corporations.<sup>23</sup> This, in and of itself, does not

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16. See U.S. Dep't of Health and Hum. Services, Admin. on Aging, *Profile of Older Americans: 2001*, available at <http://www.aoa.gov/aoa/stats/profile/default.htm> (last visited Oct. 29, 2002).

17. See *id.*

18. See Susan Levine, *Aging Baby Boomers Pose Challenge: Preparations Needed for Coming Strain on Services*, *Census Report Says*, WASH. POST, May 21, 1996, at A09.

19. See U.S. SENATE SPECIAL COMM. ON AGING, 101ST CONG., *AGING AMERICA—TRENDS AND PROJECTIONS (ANNOTATED) 84–85* (Comm. Print 1990). Embedded within this general trend are two notable subfactors. First, the proportion of those over eighty-five years old is growing faster than the number of elderly in general. Although only one percent of the population in 1980 (2.2 million), this over-eighty-five segment doubled to two percent by 2000 (4.6 million). See LAWRENCE A. FROLIK & ALISON M. BARNES, *ELDERLAW: CASES AND MATERIALS 6–9* (2d ed. 1999). The segment will increase to more than five percent by 2050. See *id.* Second, the elderly population is predominantly female. At every year after age sixty-five, women outnumber men, and the ratio of women to men increases as the cohort ages. See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL 15–16* (1995).

20. See Emma Daly, *U.S. Says Elderly Will Soon Outnumber Young for First Time*, N.Y. TIMES, Apr. 9, 2002, at A6. The majority of people over sixty live in the developing world and a majority are women. See *id.*

21. See *id.*

22. See *id.*

23. See Jeff Danglo, *Nursing Home Statistics*, at <http://www.jeffdanger.com/statistics.htm> (last visited Oct. 29, 2002).

create a problem, but there is considerable evidence that aged (and disabled) persons in such institutions are at risk. Residents in nursing homes are a highly vulnerable population, often with multiple physical and cognitive impairments that require extensive care. Abuse and neglect are often what they receive. Nursing homes and residential care facilities for the elderly are highly regulated, but the efficacy of administrative enforcement has been questioned. In 1998, a General Accounting Office (GAO) Report noted that there were "significant care problems" in nearly one-third of all California nursing homes. In 1999, state surveys identified deficiencies in one-fourth of nursing homes nationwide.<sup>24</sup> Last March, the Health and Human Services (HHS) Inspector General, appearing before a House panel, identified nursing homes as an area of "great concern."<sup>25</sup>

But administrative enforcement of substantive law standards has rarely been the exclusive remedy for many American problems. Major public policy issues are routinely decided within the context of civil litigation in the United States.<sup>26</sup> The liability of tobacco companies to smokers and states to cover costs of smoking-related illnesses,<sup>27</sup> as well as school desegregation,<sup>28</sup> and liability for asbestos<sup>29</sup> are only a few examples of the importance of civil litigation in determining public policy. Dean Carrington has noted

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24. See U.S. General Accounting Office, *Nursing Homes: Additional Steps Needed to Strengthen Enforcement of Federal Quality Standards*, GAO/HEHS-99-46 (Mar. 18, 1999) [hereinafter 1999 GAO Report].

25. *Fiscal Year 2003 Budget Request: Hearing Before the House Subcomm. on Labor, Health & Human Services*, 107th Cong. 3-4 (2002) (testimony of Janet Rehnquist, Inspector General) available at <http://oig.hhs.gov/testimony/docs/2002/020305fin.pdf>.

26. De Tocqueville noted in the 1840s that law, lawyers, and the legal system are central ingredients in our American democracy. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., Vintage Books 1990) (1835). "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." *Id.*

27. See generally CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO, HOW THE STATES TOOK ON THE CIGARETTE GIANTS* 18 (1998) (stating that the tobacco industry "caved in to" \$368.5 billion of settlements by June 1997).

28. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

29. See, e.g., *Acands, Inc. v. Abate*, 710 A.2d 944 (Md. Ct. Spec. App. 1998) (workers harmed by exposure to asbestos brought products liability actions against manufacturers and distributors/installers of asbestos-containing products).

that Americans prefer private litigation over the administrative process. "Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy."<sup>30</sup> In elder abuse and neglect, civil damages suits have become an important means of addressing systemic problems.<sup>31</sup>

While this Article concentrates on mistreatment of the aged, it is important to note that most older persons are not abused or neglected. Many live independently or are cared for in a loving and professional manner by their families or others. Often that care is provided at great personal and societal expense. Nor should we categorize the aged in a negative, monolithic vision encompassing disability, incompetence, and demoralization. Each senior is unique, with a personal story. At the same time, the law should provide remedies where wrongs are perpetrated.

In many ways California provides an appropriate example of the problem of elder abuse and neglect and current efforts to address it. The state has a large and growing elderly population, with significant numbers of aged and disabled in nursing homes.<sup>32</sup> California statutes and case law have provided innovative remedies and instructive examples for the rest of the country on many topics. Yet much remains to be done. Five years ago, the California Department of Social Services and the GAO estimated that "225,000 incidents of adult abuse occur annually in the state, but only 44,000 or less than one-fifth are reported."<sup>33</sup>

There are many non-legal issues that are important to any consideration of elder abuse and neglect, such as the etiology of elder mistreatment and how prevention and treatment programs should be implemented,<sup>34</sup> education of the public and public policy makers,<sup>35</sup>

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30. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

31. See *infra* Part V.C.2.

32. See *Elder Abuse in California*, *supra* note 15.

33. *Elder and Dependent Adult Abuse: Analysis of S.B. 2199 Before the Sen. Rules Comm.*, 1997-98 Sess., available at [http://info.sen.ca.gov/pub/97-98/bill/sen/sb\\_2151-2200/sb\\_2199\\_cfa\\_19980830\\_142652\\_sen\\_floor.html](http://info.sen.ca.gov/pub/97-98/bill/sen/sb_2151-2200/sb_2199_cfa_19980830_142652_sen_floor.html) (Aug. 28, 1998).

34. See, e.g., Statement of Richard J. Bonnie before the U.S. Senate Committee on Finance, at <http://finance.senate.gov/hearings/testimony/>



and improving income and health services for the aged.<sup>36</sup> But this Symposium deals with legal issues, so this Article surveys selected legal developments nationally and in California. Parts II, III and IV analyze definitions, prevalence, and effects of elder abuse and neglect. Part V considers tort and other legal remedies available to mistreated seniors, including suits against perpetrators and professionals who fail to report suspected abuse. Part V.C discusses the quality of care in nursing homes and analyzes administrative regulation and civil litigation against skilled nursing facilities. Part VI shifts the focus to the criminal law and its significance to this problem. Part VII then surveys eight contemporary legal issues. Some of those issues involve nursing homes (e.g., criminal background checks, video cameras, retaliatory discharges, and minimum nurse staffing ratios), while other issues relate to society as a whole (e.g., expedited legal process for older persons, family violence, behavior-based inheritance rules, and a hearsay exception for elder abuse).

## II. DEFINITIONS

The four main types of elder mistreatment are physical abuse, psychological abuse, financial exploitation, and neglect.<sup>37</sup> No single

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061802rb2test.pdf (June 18, 2002) (recommending further research into elder mistreatment and prevention).

35. See, e.g., Laurel H. Krouse, *Elder Abuse*, at <http://www.emedicine.com/emerg/topic160.htm> (last modified June 5, 2001) (identifying public and professional awareness of elder abuse as special concerns).

36. See generally U.S. Dept. of Health and Human Services, *Administration on Aging*, at <http://www.aoa.gov> (last visited Oct. 29, 2002) (Web site dedicated to improving communications and health services for the aging, including retirement planning assistance and caregiver resources).

37. The current federal definition includes three major types of elder maltreatment—physical abuse, neglect, and exploitation—and clearly recognizes self-neglect as a form of neglect. See 42 U.S.C. § 3002 (2000). Under the federal statute, “abuse” is defined as the “willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or deprivation by . . . a caregiver, of goods or services . . . necessary to avoid physical harm, mental anguish, or mental illness.” *Id.* § 3002(13). “Neglect” is the “failure to provide for oneself the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness” or “the failure of a caregiver to provide the goods or services.” *Id.* § 3002(34). The term “exploitation” means “the illegal or

legal definition encompasses all varieties of elder abuse. Prohibited conduct may be acts of commission or omission, intentional or inadvertent. Whether behavior is labeled as abusive or as neglectful may depend on the frequency of the mistreatment, as well as its duration, intensity, and severity.<sup>38</sup>

Physical abuse is violent conduct resulting in pain or bodily injury.<sup>39</sup> Common examples include hitting, sexual molestation, physical or chemical restraints.<sup>40</sup> Psychological abuse is behavior

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improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain." *Id.* § 3002(24). A "caregiver" is an individual "who has the responsibility for the care of an older individual, either voluntarily, by contract, by receipt of payment for care, or as a result of the operation of law." *Id.* § 3002(19) (1994) (amended in 2000). Moreover, Section 3002(23) notes that "elder abuse" refers to "abuse . . . of an older individual" but does not specify any particular age. *Id.* § 3002(23) (2000). However, because other provisions under Title III of the Older Americans Act are applicable to people who are sixty years of age and older, it may be assumed that the congressional intent is to cover the elderly in the same age group with the new elder abuse prevention program. The language clearly implies that the federal elder abuse definitions cover both domestic and institutional abuse.

38. See Audrey S. Garfield, *Elder Abuse & the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 861, 872-74 (1991).

39. The Bible repudiates this behavior in the strongest terms. In ancient Israel striking a parent carried the death penalty. See *Exodus* 21:15.

40. Examples of documented physical abuse cases can be found in many sources, including the 1990 Elder Abuse House Report:

[A]n 80-year-old woman . . . was hospitalized with a serious knee injury. Her grandson had knocked her to the ground and stolen her car despite her protests. Reportedly, the grandson had been physically abusive to her on several occasions and had stolen other cars.

. . . [A] 70-year-old woman was beaten by her 32-year-old son, who did not contribute to the household expenses and whom she suspected of abusing alcohol and drugs. She said she was terrified of his unprovoked attacks and that he had broken her glasses and once attacked her in bed while she was sleeping. A social worker saw her badly bruised left breast, the result of the son punching her.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 11, at 3; see also CAL. WELF. & INST. CODE § 15610.63 (West 2001) (defining "[p]hysical abuse" as "[a]ssault . . . [b]attery . . . [a]ssault with a deadly weapon . . . [u]nreasonable physical constraint or prolonged or continual deprivation of food or water . . . [s]exual assault . . . [u]se of a physical or chemical restraint or psychotropic medication under [specified conditions]"); IDAHO CODE § 39-5302(1) (Michie 2002) (providing that "'[a]buse' means the intentional or negligent infliction of physical pain, injury or mental injury"); N.Y. SOC. SERV. LAW § 473(6)(a)

that induces significant mental anguish and may consist of threats to harm, to institutionalize, or to isolate the elder adult.<sup>41</sup> While the effects of physical abuse are usually visible, the effects of psychological abuse may be less obvious; however, psychological abuse can cause a wide range of responses including depression, nervous system disorders, fearfulness, physical illness, and in extreme cases, suicide.<sup>42</sup> Financial abuse or exploitation is theft or conversion of property by the elder's relatives, caregivers, or others; it can range from expropriating small amounts of cash to inducing the elder to sign away bank accounts or other property.<sup>43</sup> Financial

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(McKinney Supp. 2002) (stating that “[p]hysical abuse’ means the non-accidental use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.”).

41. *See, e.g.*, NEV. REV. STAT. ANN. 41.1395(4)(a)(1) (Michie 2002) (“Abuse’ means willful and unjustified infliction of pain, injury, or mental anguish . . .”); N.D. CENT. CODE § 50-25.2-01(1) (1999) (“Abuse’ means any willful act or omission of a caregiver . . . which results in . . . mental anguish . . .”).

Illustrative examples of psychological abuse in the 1990 Elder Abuse House Report follow:

An elderly woman . . . lived with her son, who was diagnosed as a paranoid schizophrenic and who suffered additional mental impairment from alcohol and drug abuse which began at about age 14. He tormented her in several ways, one day becoming angry, grabbing his mother's arm, twisting it and spinning her around in her wheelchair. He often threatened her verbally and was physically abusive. Once he crept up behind his mother and yelled, “I could make you have a heart attack!”

....

... [T]he nephew of an elderly woman threatened repeatedly to kill her and set fire to her ranch. On one occasion, he gave her a black eye and bruises when she refused to give him money.

*See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 11, at 17.

42. *See* U.S. SENATE SPECIAL COMM. ON AGING, 102D CONG., AN ADVOCATE'S GUIDE TO LAWS AND PROGRAMS ADDRESSING ELDER ABUSE: AN INFORMATION PAPER 3 (Comm. Print 1991).

43. “Financial abuse” in California includes a situation in which a “person or entity . . . takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult for a wrongful use[,] with intent to defraud . . . or in bad faith.” CAL. WELF. & INST. CODE § 15610.30; *see also* MISS. CODE ANN. § 43-47-5(i) (Supp. 2001) (“‘Exploitation’ shall mean the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage . . .”).

exploitation is often accompanied by physical or psychological abuse.<sup>44</sup> Neglect is the failure to fulfill a care-taking obligation necessary to maintain the elder's physical and mental well-being; examples include abandonment and denial of, or failure to provide, food or health-related services.<sup>45</sup> Neglect may be intentional or

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Illustrative examples of documented financial abuse cited in the 1990 Elder Abuse House Report include:

Muriel, an elderly woman . . . was being terrorized by her adopted son, who would often display his violent temper to obtain and then squander her money. The son and his wife gained control of Muriel's money by obtaining power-of-attorney, which allowed them to cash her Social Security and retirement checks each month and to gain access to her savings account. The pair bought a new boat, new car and other luxury items with his mother's money. Soon Muriel, now 78, was penniless.

. . . .

. . . [A]n elderly couple, both suffering from Alzheimer's disease, were the victims of actual and threatened abuse by their granddaughter. She cashed certificates of deposit worth \$35,000, although they were in her grandparents' names. The granddaughter has a history of violent behavior and had previously been admitted to Delaware State Hospital for psychiatric care.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 11, at 12-13.

44. See CAL. WELF. & INST. CODE § 15610.07. "Abuse of an elder or a dependent adult' means . . . neglect, [or] [t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering."

45. See, e.g., ARK. CODE ANN. § 5-28-101(3)(A) (Michie 1997). "Neglect' means [n]egligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult . . ." *Id.*

Illustrative examples of neglect cited in the 1990 Elder Abuse House Report include:

When apartment cleaners and painters entered an . . . apartment vacated by the tenants 3 weeks previously, they discovered an elderly woman in a back room. This stroke victim, in her mid-80's, was bedbound and incontinent, unable to call for help. Her relatives moved out one night, leaving her alone with a glass of water and one plate of food. The woman was found starving, dehydrated and lying in her urine and feces. She had seen no one in the 3 weeks since her family moved. She died in the hospital several days later. Relatives stated that they couldn't afford to take her along.

. . . .

. . . [A]n 84-year-old man was found in a urine-soaked, feces-covered bed. He had a staph infection. His care was supposed to be handled by his 50-year-old, low-functioning daughter, who was totally

negligent, resulting from the caretaker's own infirmity or ignorance. It can arise from an overwhelmed or dysfunctional care-giving system, the isolation of the elder, refusal of the elder to accept assistance, or other complex and multi-faceted causes.<sup>46</sup>

In 1991, the California legislature enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA or the "Elder Abuse Act"), supplementing existing statutory protection for these groups.<sup>47</sup> Under the EADACPA the elderly are defined as individuals that are age sixty-five and above, and a "[d]ependent adult' [is any California resident] between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights . . . or who is admitted as an inpatient to a 24-hour health [care] facility . . . ."<sup>48</sup> The statute defines abuse broadly.<sup>49</sup> In addition, a

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financially dependent on him. She fought the notion of placing him in a nursing home because she would be left without financial support if that happened.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 11, at 8.

46. "Neglect" includes "[t]he negligent failure [by any caretaker] to exercise [the] degree of care that a reasonable person . . . would exercise," including assistance in "personal hygiene, or in the provision of food, clothing, or shelter . . . medical care . . . [and protection] from health and safety hazards." CAL. WELF. & INST. CODE § 15610.57. Self-neglect refers to an individual's failure to provide himself or herself with the necessities of life such as food and shelter. *See id.* Classifying self-neglect as abuse is controversial because it may result from society's failure to provide for the needs of the elderly or from an autonomous lifestyle choice of a competent but eccentric individual.

Illustrative examples of self-neglect cited in the 1990 Elder Abuse House Report include:

[A] 62-year-old mildly retarded man was trying to care for his wheelchair-bound mother in her home, which had been ravaged by fire. Both slept on bare mattresses on dirt floors. About 65 cats, chickens, dogs and rabbits ran in and out of the house. The son got their water from a nearby mountain stream and buried their waste in the yard.

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... [P]aramedics responded to a call and found a 95-year-old woman lying in a pool of urine, wrapped in a blanket. When they tried to move her, her skin came off in layers.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 11, at 7.

47. *See* CAL. WELF. & INST. CODE §§ 15600–15657.2.

48. *Id.* § 15610.23.

care custodian's deprivation of goods or services "necessary to avoid physical harm or mental suffering" is actionable.<sup>50</sup> Potential defendants include perpetrators within the family and a range of third parties. A physician, for example, who conceals a patient's severe bedsores and opposes medically necessary hospitalization commits elder abuse.<sup>51</sup>

### III. PREVALENCE

As noted earlier, the best official and academic estimates are that approximately 1.5 to 2 million cases of moderate to severe mistreatment occur each year.<sup>52</sup> In almost ninety percent of incidents where the perpetrator is known, it is a family member; two-thirds of perpetrators are adult children or spouses.<sup>53</sup> Although women represent fifty-eight percent of persons over sixty years of age, they comprise more than seventy-six percent of those subjected to abuse and neglect.<sup>54</sup> Moreover, the most vulnerable and fastest growing segment of the aged, those eighty years and over, are abused and neglected at two to three times their proportion in the elderly population. The "oldest-old" are also victims of more than one-half of neglect cases.<sup>55</sup>

The elderly population in California is growing rapidly. There are presently 4.9 million Californians over the age of sixty.<sup>56</sup> By 2020, the number of senior citizens is expected to double to nine million.<sup>57</sup> Along with its growing numbers of aged, California

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49. "'Abuse' . . . means either of the following: (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering." *Id.* § 15610.07(a).

50. *Id.* § 15610.07(b).

51. *See Mack v. Soung*, 80 Cal. App. 4th 966, 95 Cal. Rptr. 2d 830 (Ct. App. 2000).

52. *See* 1990 ELDER ABUSE HOUSE REPORT, *supra* note 11, at XI.

53. *See* National Center on Elder Abuse, The National Elder Abuse Incidence Study, pt. 5 *Conclusions*, available at <http://www.aoa.gov/abuse/report/H-Conclusions.html> (last visited Oct. 29, 2002) [hereinafter National Elder Abuse Incidence Study].

54. *See id.*

55. *See id.*

56. *See* Office of the Attorney General, State of California Department of Justice, at [http://caag.state.ca.us/cvpc/fs\\_elder\\_abuse\\_in\\_ca.html](http://caag.state.ca.us/cvpc/fs_elder_abuse_in_ca.html) (last visited Oct. 29, 2002).

57. *See id.*

reports an increase in cases of reported elder abuse. California Adult Protective Services (APS), using data from September 1999 through February 2000, found that the number of reported cases of elder abuse rose fourteen percent.<sup>58</sup> Of the 19,697 reported cases alleging elder and dependent abuse during that six-month period, APS was able to confirm 8861 cases.<sup>59</sup> Isolating the reports of elder abuse, APS estimated a monthly average of 872 confirmed cases.<sup>60</sup>

Moreover, testimony during consideration of California Senate Bill 2199 reported that the state's service and reporting standards in adult protective services were almost non-existent, in stark contrast to very explicit standards for child protective services.<sup>61</sup> Senate Bill 2199 amended a number of California statutes involving elder abuse.<sup>62</sup> It created a statewide APS program for elder abuse reporting with minimum standards for all counties. Responsibilities of personnel in reporting and investigating cases of elder abuse were also added.<sup>63</sup>

With the advent of uniform reporting standards and definitions of abuse, some counties have reported dramatic increases in the prevalence of elder and dependent abuse. Santa Clara County, for instance, has experienced a forty percent increase in reports of elder and dependant abuse since 1997.<sup>64</sup> Further, approximately ninety

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58. *New Directions for Elder and Dependent Adult Abuse and Adult Protective Services in California: A Six Month Review*, 4, available at <http://www.dss.cahwnet.gov/research/res/pdf/APSPub.pdf> (last visited Oct. 29, 2002).

59. *See id.* at 16 (indicating that 7331 of the 19,697 reported cases were inconclusive and the remaining 3505 cases were unfounded).

60. *See id.* at 21. Out of this average, 234 cases involved financial abuse, 200 reported neglect, 213 cited psychological or mental abuse, and 172 complained of physical abuse. *See id.* at 24.

61. *See* Office of Senate Floor Analyses, *SB 2199 Senate Bill Analysis*, available at [http://info.sen.ca.gov/pub/97-98/bill/sen/sb\\_2151-2200/sb\\_2199\\_cfa\\_19980830\\_142652\\_sen\\_floor.html](http://info.sen.ca.gov/pub/97-98/bill/sen/sb_2151-2200/sb_2199_cfa_19980830_142652_sen_floor.html) (last visited Oct. 29, 2002).

62. "An act to amend Sections 15610.07, 15610.10, 15610.17, 15610.30, 15610.55, 15610.57, 15630, 15633, 15640, 15650, 15658, and 15659 of, to add Section 15653.5 to, and to add Chapter 13.5 (commencing with Section 15760) to Part 3 of Division 9 of, the Welfare and Institutions Code, relating to adult abuse." S.B. 2199, 1998 Leg. (Cal. 1998), available at [http://info.sen.ca.gov/pub/97-98/bill/sen/sb\\_2151-2200/sb\\_2199\\_bill\\_19980929\\_chaptered.html](http://info.sen.ca.gov/pub/97-98/bill/sen/sb_2151-2200/sb_2199_bill_19980929_chaptered.html) (last visited Oct. 29, 2002).

63. *See* CAL. WELF. & INST. CODE §§ 15760–15766 (West 2001).

64. *See* Matthew B. Stannard, *Crackdown on Abuse Of Seniors: Santa Clara County Offers a Blueprint*, S.F. CHRON., Apr. 4, 2001, at A-17.

percent of the 500 victims were abused by family members, making prosecution difficult.<sup>65</sup> California Department of Justice statistics show that violent crime against seniors is down, but estimate that one in twenty elderly persons will be a victim of neglect or physical, psychological, or financial abuse.<sup>66</sup>

The National Center on Elder Abuse has collected data from states since 1986.<sup>67</sup> Although differing definitions of elder abuse and varying reporting requirements by agencies complicates data collection, the Center reports that states received 117,000 reports of domestic abuse in 1986.<sup>68</sup> The number increased to 293,000 in 1996, and the latest preliminary data for 1999-2000 indicated that states received 470,709 reports of elder abuse, a sixty-two percent increase from 1996.<sup>69</sup> Until uniform systems are in place, however, a truly accurate report of prevalence and incidence data remains impossible to achieve on a national level.

#### IV. EFFECTS OF ELDER ABUSE AND NEGLECT

Elder maltreatment often has a devastating impact on its victims. Because of their age, health, or limited resources, the aged typically have few options for resolving or avoiding the abusive situation. Their physical frailty makes them more vulnerable to physical or other abuse, and poor health often accentuates the problem.<sup>70</sup> An

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65. *See id.*

66. *See id.*

67. *See Elder Abuse, Neglect and Exploitation: A Hidden National Tragedy: Hearing Before the Spec. Comm. on Aging, 107th Cong. (2001)* (statement of Sara C. Aravanis, Director of the National Center on Elder Abuse), available at 2001 WL 21756070.

68. *See id.* The National Association of Adult Protective Services Administrators December 2001 Survey Report regarding State APS Data Management Systems found that only one of the fifty states, Texas, could respond to all the questions about the capability of their data systems. Most states were in different stages of data system development. *See id.*

69. *See id.*

70. While it would be inaccurate to describe the vast population over sixty-five with one generalization, physical decline eventually becomes an aspect of the aging process. *See generally* ROBERT C. ATCHLEY, *SOCIAL FORCE AND AGING* 91 (5th ed. 1988) (chronic health problems increase dramatically in this age group); DAVID A. TOMB, *GROWING OLD: A HANDBOOK FOR YOU AND YOUR AGING PARENT* 15-40 (1984) (discussing the changes in appearance, sensation, internal changes, psychological, and social changes that occur as humans age).



older person may have limited ability to recover from financial exploitation because of a fixed income or a short remaining life span. The loss of a home lived in for many years may be particularly traumatic because of its familiarity, memories, and the ordeal of being moved.

Unsurprisingly, abuse and neglect seems to be correlated with a higher death rate. A study conducted by Dr. Mark Lachs and colleagues compared abused and neglected elders with others who never came to the attention of Protective Services.<sup>71</sup> Mistreated elders were 3.1 times more likely to die than their non-mistreated counterparts.<sup>72</sup> Even after adjusting for factors known to predict death, such as chronic diseases, the risk of death from mistreatment and self-neglect remained elevated. Those experiencing mistreatment were more than three times as likely to die than those who did not. The study suggested that elder mistreatment is as dangerous to the health and well-being of older adults as many chronic diseases associated with death and disability.<sup>73</sup> One county in California reports that victims of financial abuse have mortality rates three times those of non-victims.<sup>74</sup>

## V. SUITS AGAINST PERPETRATORS AND PROFESSIONALS

### A. *Damage Actions Against Perpetrators*

In appropriate cases damage actions against perpetrators may bring some measure of redress to victims. A largely unused legal tool is the traditional tort suit. Physical or sexual abuse is a battery.<sup>75</sup> Negligence suits are obviously appropriate in many neglect situations. Misuse of the elder's funds may be attacked by theories including conversion or fraud. There are particularly useful civil

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71. See Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428 (1998).

72. See *id.*

73. See *id.*

74. See Stannard, *supra* note 64, at A-17.

75. "An actor is liable to another for battery if: (a) he acts intending to cause a harmful or offensive contact . . . and (b) a harmful contact . . . directly or indirectly results." RESTATEMENT (SECOND) OF TORTS § 13 (1977).

tools in situations where the abuser occupied a fiduciary status such as trustee, guardian, conservator, or power of attorney.<sup>76</sup>

Traditional torts in California are augmented by the 1992 Elder Abuse and Dependent Adult Civil Protection Act.<sup>77</sup> EADACPA provides for enhanced or additional remedies in civil actions if it is proven by “clear and convincing evidence” that the defendant is guilty of recklessness, oppression, fraud, or malice in the commission of the abuse.<sup>78</sup> The legislative findings that prompted these remedies reflect a clear-eyed perception of the problem in California and throughout the country.<sup>79</sup> The legislature found and declared that infirm elderly and dependent adults are a “disadvantaged class,” and few civil cases are brought in connection with their mistreatment because of problems of proof, court delays,

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76. A fiduciary relationship exists where “special confidence is reposed in one who is bound in equity and good conscience to act in good faith with due regard to the interest of the person reposing the confidence.” *People v. Riggins*, 132 N.E.2d 519, 522 (Ill. 1956).

[I]n all matters connected with [the] trust a trustee is bound to act in the highest good faith toward all beneficiaries, and may not obtain any advantage over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind . . . . An attorney who acts as counsel for a trustee provides advice and guidance . . . to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary.

*Morales v. Field*, 99 Cal. App. 3d 307, 316, 160 Cal. Rptr. 239, 244 (Ct. App. 1979) (citations omitted).

Attorneys who participate in misconduct may have licensure sanctions imposed on them. *See, e.g., In re Smith*, 572 N.E.2d 1280 (Ind. 1991) (upholding suspension from practice of two attorneys who drafted instruments used in fraudulent transactions); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (1999) (“A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.”). *See generally* Jonathan Federman & Meg Reed, *Abuse and the Durable Power of Attorney: Options for Reform*, GOV'T LAW CENTER, ALBANY LAW SCHOOL (1994) (advocating the merits of legislative and administrative protections for victims of durable power of attorney abuse).

77. CAL. WELF. & INST. CODE §§ 15600–15657.3 (West 2001).

78. *Id.* § 15657.

79. *See id.* §§ 15600(a)–(n).

and the lack of incentives to bring these cases.<sup>80</sup> The intent of the statute was to enable interested persons to engage private attorneys to represent victims and to make litigation economically feasible.<sup>81</sup> As a result, EADACPA suits have no cap on non-economic damages, allow punitive damages, include postmortem recovery for pain and suffering,<sup>82</sup> and mandate attorney fees and costs.<sup>83</sup>

Under EADACPA, if the victim dies before the lawsuit ends, the suit can be maintained by the executor or administrator, if any, or by the victim's successors in interest.<sup>84</sup> Fees for the services of a conservator litigating an elder's claim and continuation of a pending action by the elder's personal representative or successor are available.<sup>85</sup> In addition, if a conservator has been previously appointed, the Act extends jurisdiction to the court which deals with probate conservatorships.<sup>86</sup> As a result, courts skilled in dealing with issues, such as capacity, memory, and undue influence, which often emerge with the elderly, are the proper forum for such suits.

In *Delaney v. Baker*,<sup>87</sup> the California Supreme Court had to determine the applicability of the EADACPA remedies when the suit was against a health care provider whose actions are arguably subject to the more restrictive relief offered to those injured by professional negligence.<sup>88</sup> The court held that to obtain the remedies available in section 15657, "a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct."<sup>89</sup> Some of the difficulty in distinguishing between "neglect" and professional negligence is because many nursing homes and health care providers provide custodial functions that can be considered as professional medical care.<sup>90</sup> The court observed

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80. *See id.* § 15600(h).

81. *See id.* § 15600(j).

82. *See id.* § 15657(b).

83. *See id.* § 15657(a).

84. *See id.* § 15657.3(c); *see also* ARA Living Centers-Pac., Inc. v. Superior Court, 18 Cal. App. 4th 1556, 23 Cal. Rptr. 2d 224 (Ct. App. 1993).

85. *See* CAL. WELF. & INST. CODE § 15657.3(d).

86. *See id.* § 15657.3(b).

87. 20 Cal. 4th 23, 971 P.2d 986, 82 Cal. Rptr. 2d 610 (1999).

88. *See* CAL. WELF. & INST. CODE § 15657.2.

89. *Delaney*, 20 Cal. 4th at 31, 971 P.2d at 991, 82 Cal. Rptr. 2d at 615.

90. *See id.* at 35, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617.

that “the Elder Abuse Act’s goal was to provide heightened remedies for . . . ‘acts of egregious abuse’ against elder and dependent adults,” while “negligence in the rendition of medical services to elder and dependent adults [is] governed by laws specifically applicable to such negligence.”<sup>91</sup> The statute requires liability to be proved by a heightened “clear and convincing evidence” standard.<sup>92</sup> The court must consider all relevant factors in determining whether the action is to be brought under EADACPA or is subject to the limits imposed by the Medical Injury Compensation Reform Act (MICRA). Attorney fee considerations include: (1) “[t]he value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained”; (2) “[w]hether the defendant took reasonable and timely steps to determine the likelihood and extent of liability”; and (3) “[t]he reasonableness and timeliness of any written settlement offer.”<sup>93</sup>

Outside the institutional context, i.e., nursing homes and hospitals, few cases employing civil tort or EADACPA remedies may be found in the published California reports.<sup>94</sup> I suspect a variety of reasons are responsible for this lack of precedent. Recovery is often unfeasible against perpetrators, whether family or

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91. *Id.* at 35, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617.

92. CAL. WELF. & INST. CODE § 15657.

93. *Id.* § 15657.1.

94. A LEXIS search of cases relating to sections 15600–15657 of the California Welfare and Institutions Code was conducted in the California Appellate and Supreme Court database using the following terms and connectors search: wel! w/3 Inst! w/ 5 156! and elder abuse. A total of thirty-five cases were found applying the EADAPA to a variety of defendants. Half of the cases involved claims against institutions such as nursing homes and hospitals. *See, e.g., Delaney*, 20 Cal. 4th 23, 971 P.2d 986, 82 Cal. Rptr. 2d 610.

Other cases alleged elder abuse by fiduciaries. *See, e.g., Darone v. Cary*, Nos. A092829/A093661, 2002 Cal. App. Unpub. LEXIS 4993 (Ct. App. Jan. 11, 2002); *Kennedy v. Closson*, No. B144199, 2001 Cal. App. Unpub. LEXIS 2083 (Ct. App. Oct. 31, 2001); *see also Black v. Fin. Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445 (Ct. App. 2001).

In addition, there were numerous decisions regarding attorney fees after cases involving EADACPA. *See, e.g., Conservatorship of Walker*, No. B149726, 2002 Cal. App. Unpub. LEXIS 3200 (Ct. App. Mar. 12, 2002); *Conservatorship of Levitt*, 93 Cal. App. 4th 544, 113 Cal. Rptr. 2d 294 (Ct. App. 2001); *Conservatorship of Gregory*, 80 Cal. App. 4th 514, 95 Cal. Rptr. 2d 336 (Ct. App. 2000); *ARA Living Ctrs.-Pac., Inc.*, 18 Cal. App. 4th 1556, 23 Cal. Rptr. 2d 224.

third parties, who are judgment proof or have limited resources. Elder abuse is often hidden; wrongful behavior is rarely revealed to those outside the family circle.<sup>95</sup> Parents often fail to report maltreatment because of the “shame and stigma of having to admit they raised such a child. . . . Instead they react with denial, psychological acquiescence, and passive acceptance.”<sup>96</sup> Fear and illness also deter participation in the legal process.<sup>97</sup> Often, the victim and the abuser are in a mutually dependent relationship, and the victim has no other caretaker.

Psychological and sociological factors also contribute. The aged person may desire to “save face” and thus be unwilling to create or exacerbate intrafamilial conflicts. Embarrassment, shame, and lack of third-party support often explain the failure to seek legal recourse.<sup>98</sup> Other contributing factors are fear of institutionalization, feelings of powerlessness, or lack of self-esteem.<sup>99</sup> In addition, the fact that abused and neglected elderly people tend to be socially isolated is itself a barrier to reporting because they have fewer contacts and weaker support systems.<sup>100</sup> Some feel that abusive

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95. See, e.g., 1990 ELDER ABUSE HOUSE REPORT, *supra* note 11, at 42 (estimating only one in every eight cases of elder abuse is ever reported); Karl A. Pillemer & Rosalie S. Wolf, *Domestic Violence Against the Elderly*, in *CONTROVERSIES IN FAMILY VIOLENCE* 237–50 (R. Gelles & D. Loesike eds., 1993).

96. Katheryn D. Katz, *Elder Abuse*, 18 J. FAM. L. 695, 711 (1980).

97. See Suzanne K. Steinmetz, *Dependency, Stress and Violence Between Middle Aged Caregivers and Their Elderly Parents*, in *ABUSE AND MALTREATMENT OF THE ELDERLY* 134–49 (Jordan I. Kosberg ed., 1983).

98. See, e.g., National Elder Abuse Incidence Study, *supra* note 53, (“Elderly persons who are unable to care for themselves, and/or are mentally confused and depressed are especially vulnerable to abuse and neglect as well as self-neglect.”); Steinmetz, *supra* note 97, at 134–49.

99. See A. Paul Blunt, *Financial Exploitation of the Incapacitated: Investigation & Remedies*, 5 J. OF ELDER ABUSE & NEGLECT 19–32 (1993) (discussing feelings of powerlessness and lack of self-esteem among elderly victims); David P. Matthews, Comment, *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 PEPP. L. REV. 653, 661–67, 674–75 (1998) (positing that many abused elders do not come forward on their own and that mandatory reporting and proper support services will help them).

100. See National Elder Abuse Incidence Study, *supra* note 53. See generally Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (examining the artificiality of the public/private distinction); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L.

treatment is normal<sup>101</sup> or that recourse through the law is unavailable or unavailing.<sup>102</sup>

*B. Suits Against Professionals Who Fail to Report Suspected Elder Abuse and Neglect*

1. Mandatory reporting laws

Nationally, forty-four jurisdictions have enacted mandatory reporting laws.<sup>103</sup> These statutes seek to create social and legal interventions in elder mistreatment cases by (1) requiring certain individuals<sup>104</sup>—e.g., physician, nurse, mental health professional, social worker—with “reasonable belief” or “suspicion” to report the information to designated public authorities;<sup>105</sup> (2) providing immunity from liability for those reporting in good faith;<sup>106</sup> and (3) initiating investigative and treatment services by Adult Protective Services or other agencies.<sup>107</sup> The categories of reportable types of

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REV. 973 (1991) (exploring “the ways in which concepts of privacy permit, encourage and reinforce violence against women.”).

101. See, e.g., L.W. Griffin, *Elder Mistreatment Among Rural African-Americans*, 6 J. OF ELDER ABUSE & NEGLECT 1 (1994).

102. See, e.g., Blunt, *supra* note 99; Howard Holtz & Kathleen K. Furniss, *The Health Care Providers Role in Domestic Violence*, TRENDS IN HEALTH CARE L. & ETHICS, Spring 1993, at 47–50.

103. See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 165–67, 185–92, app. A & E (1998) (listing all states and statutes).

104. See, e.g., ALA. CODE § 38-9-8(a) (2002) (“All physicians and other practitioners of the healing arts or any caregiver having reasonable cause to believe that any protected person has been subjected to physical abuse, neglect, exploitation, sexual abuse, or emotional abuse shall report or cause a report to be made . . . .”); ARIZ. REV. STAT. ANN. § 46-454(A) (West 1998) (“A physician, hospital intern or resident, surgeon, . . . psychologist, [or] social worker, . . . who has a reasonable basis to believe that abuse or neglect of the adult has occurred . . . shall immediately report or cause reports to be made . . . .”).

105. See, e.g., ALA. CODE § 38-9-8(a)(1) (“An oral report . . . followed by a written report [shall be made] to the county department of human resources or to the chief of police . . . .”).

106. See, e.g., ALA. CODE § 38-9-9 (“Any person, firm or corporation making or participating in the making of a report . . . shall in so doing be immune from any liability . . . .”).

107. See, e.g., ARIZ. REV. STAT. ANN. § 46-454(B) (“If the public fiduciary is unable to investigate the contents of [the] report, [they] shall immediately forward the report to a protective services worker.”).

elder abuse include physical and psychological abuse, financial abuse, abandonment, isolation, and neglect.<sup>108</sup>

In California, any person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult is a mandated reporter; regardless of whether that person receives compensation, "including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, or employee of a county adult protective services agency or a local law enforcement agency."<sup>109</sup> Previously, mandatory reporting in California was limited to physical abuse.<sup>110</sup> Senate Bill 2199 expanded the mandate to include such things as financial and mental abuse, neglect, abandonment, isolation,<sup>111</sup> and required investigation after a report.<sup>112</sup> Doctors, law enforcement personnel, psychologists or mental health professionals, and caretakers (whether individual or institutional) are included.<sup>113</sup> Mandated reporters in California who fail to report abuse, abandonment, isolation, financial abuse, or neglect of an elder or dependent adult can be sentenced to up to six months in county jail, fined up to \$1,000, or both.<sup>114</sup> If the violation is willful, penalties are increased.<sup>115</sup>

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108. See Moskowitz, *supra* note 103, at 90–94, 165–67, 185–92, apps. A & E.

109. CAL. WELF. & INST. CODE § 15630(a) (West 2001). A 1998 amendment expanded mandatory reporters to include any person who has assumed full or intermittent care for an elder or dependent adult.

110. See *id.* § 15630.

111. See *id.* § 15610.07.

112. See *id.* § 15630. Before S.B. 2199 the statutes authorized rather than required investigation in section 15630.

113. If the alleged abuse has occurred in a long-term care facility, reports are to be forwarded immediately to the State Department of Health Services, and reports of criminal activity in long-term care facilities must be forwarded to the Bureau of Medi-Cal Fraud. See *id.* § 15630(b)(1)(A).

114. Under section 15630(h), "[f]ailure to report physical abuse, abandonment, isolation, financial abuse, or neglect of an elder or dependent adult, in violation of this section, is a misdemeanor, punishable by not more than six months in the county jail or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment." *Id.* § 15630(h).

115.

Any mandated reporter who willfully fails to report physical abuse, abandonment, isolation, financial abuse, or neglect of an elder or dependent adult . . . where that abuse results in death or great bodily

Unfortunately, there is much evidence to indicate that mandated reporters rarely comply. Many studies report that these statutes are ignored.<sup>116</sup> In a survey of direct service workers trying to discover or treat elder maltreatment, not one group of professionals—e.g., doctors, nurses, social workers—achieved even a rating of “somewhat helpful.”<sup>117</sup> The reasons for non-compliance are many and varied. Physicians’ inactions are illustrative. Many doctors are unaware of how maltreatment is defined or procedures for dealing with it.<sup>118</sup> Reporting is further deterred by fear of involvement in legal proceedings, particularly court appearances, arousing the anger of the abuser and concern about loss of confidentiality.<sup>119</sup>

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injury, is punishable by not more than one year in a county jail or by a fine of not more than five thousand dollars (\$5,000) or by both . . . .

*Id.*

116. In a recent study in Michigan of 17,238 cases of possible elder abuse reported to authorities during 1989-1993, physicians’ reports were only two percent of the total. See Dorrie E. Rosenblatt et al., *Reporting Mistreatment of Older Adults: The Role of Physicians*, J. AM. GERIATRICS SOC’Y, Jan. 1996, at 65-66. Many victims are treated at hospital emergency departments, but these physicians are often unsure even about the mechanisms for reporting. See also B.E. Blakely et al., *Improving the Responses of Physicians to Elder Abuse and Neglect: Contributions of a Model Program*, 19 J. GERONTOLOGICAL SOC. WORK 35, 37 (1993) (discussing a model program for improving elder abuse reporting by physicians); Carolyn Lea Clark-Daniels et al., *Abuse and Neglect of the Elderly: Are Emergency Department Personnel Aware of Mandatory Reporting Laws?*, 19 ANNALS OF EMERGENCY MED. 970 (1990) (asserting, based on physician surveys, that “[m]any medical professionals are either unaware of state mandatory reporting laws or choose to disregard them.”).

117. B.E. Blakely & Ronald Dolon, *The Relative Contributions of Occupation Groups in the Discovery and Treatment of Elder Abuse and Neglect*, 17 J. GERONTOLOGICAL SOC. WORK 183, 189-94 (1991).

118. In an Alabama study, sixty percent of doctors believed an experienced physician could accurately diagnose cases of elder abuse. However, the study also showed that seventy-seven percent expressed doubt about the definition of abuse; over one-half reported they were not sure that Alabama had procedures for dealing with abuse, and sixty percent were uncertain of the procedure for reporting abuse cases. See R. Stephen Daniels et al., *Physician’s Mandatory Reporting of Elder Abuse*, 29 THE GERONTOLOGIST 321, 325 (1989).

119. Many doctors reported they were deterred from reporting by the necessity of court appearances, by fear of arousing the anger of the abuser, and by concern about loss of confidentiality. See *id.* at 325. Another study found that the majority, seventy percent, of physicians in North Carolina and Michigan were uninformed about the existence of their states’ mandatory reporting laws. See James G. O’Brien, *Elder Abuse and the Primary Care Physician, Elder Abuse: Barriers to Identification and Intervention*, 114 MED.



Although professionals often fear potential liability from those named in such reports, the objective legal situation provides little basis for such fears. All states provide immunity from liability for those reporting in good faith,<sup>120</sup> and such immunity is particularly strong in California.<sup>121</sup> In *Easton v. Sutter Coast Hospital*,<sup>122</sup> the son and daughter-in-law of an aged patient sued the hospital, emergency medical technicians, physician, and the nurse who had treated the parent. The medical personnel had reported suspected elder abuse to

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TIMES 60, 63 (1986) (paper presented at the 1985 Annual Meeting of Gerontological Society of America). Furthermore, doctors are not more accurate than others in their diagnoses. Comparison of substantiation rates showed no significant differences between physician reports and other professional reporting sources. See Rosenblatt, *supra* note 116, at 65–70. Many victims are treated at hospital emergency departments, but physicians are often unsure even about the mechanisms for reporting. See Clark-Daniels, *supra* note 116, at 970–77. Numerous other observers confirm that elder abuse laws have had little impact on physicians' failures to report. See, e.g., Carolyn Cochran & Sally Petrone, *Elder Abuse: The Physician's Role in Identification and Treatment*, 171 ILL. MED. J. 241, 241–46 (1987) (suggesting elder victims of domestic violence tend to be overlooked by physicians); Mark Lachs, *Preaching to the Unconverted: Educating Physicians About Elder Abuse*, 7 J. ELDER ABUSE & NEGLECT 1, 1–2 (1995) (arguing that physicians have been absent in the role to protect the elderly); see also NAT'L ELDERCARE INST. ON ELDER ABUSE AND STATE LONG TERM CARE OMBUDSMAN SERV., *ELDER ABUSE TRAINING PRIORITIES: TARGETS, OPPORTUNITIES, AND STRATEGIES* 65 (1993) (stating fear of litigation as a concern of physicians in failing to report elder abuse).

Illustrative is the testimony of an Emergency Department Head Nurse to a congressional committee:

I took an informal poll this morning of about 10 emergency department staff at Maine Medical Center, which sees about 45,000 patients a year, 10,000 of whom are pediatric. So in a 35,000 adult population, you can imagine a good many of those are dependent adults. I asked the staff, in the last year, how many adult protective DHS referrals they made, and the answers were from zero to one each. And I think that some of the ones who said "one" were probably trying to please me and may have been stretching back more than a year.

*Society's Secret Shame: Elder Abuse and Family Violence: Hearing Before the Special Comm. on Aging, U.S. Senate, 104th Cong. 39 (1995)* (statement of Emmy Hunt, Head Nurse, Emergency Department, Maine Medical Center).

120. State statutes providing protections for mandated reporters are collected in Moskowitz, *supra* note 103, app. H at 202–04.

121. See CAL. WELF. & INST. CODE § 15634(b).

122. 80 Cal. App. 4th 485, 95 Cal. Rptr. 2d. 316 (Ct. App. 2000).

state authorities.<sup>123</sup> The appellate court held that the nurse's report was privileged even though he had made his report to the physician rather than to the authorities,<sup>124</sup> and the physician's report was privileged even though he did not personally observe the alleged victim.<sup>125</sup> "The plain meaning of the statutory language is that for mandated reporters the truth or falsity of the report is of no moment—the privilege is absolute."<sup>126</sup>

Four states have created an explicit civil cause of action by statute for failing to report suspected elder abuse or neglect: Arkansas, Iowa, Michigan, and Minnesota.<sup>127</sup> These statutes have not been tested in litigation involving elder abuse and neglect. The duty and breach of duty elements needed to establish liability under these statutes varies, but in all four states the damages must have been proximately caused by the failure to report.<sup>128</sup>

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123. *See id.* at 489, 95 Cal. Rptr. 2d at 318.

124. *See id.* at 492, 95 Cal. Rptr. 2d at 320.

125. *See id.* at 494, 95 Cal. Rptr. 2d at 322. Although not protected at the time, the physician's reliance on the nurse's information was in the process of being expressly permitted by amended section 15630(b)(1) of the California Welfare and Institutions Code, which now provides that "[a]ny mandated reporter who . . . has observed or has knowledge of an incident that reasonably appears to be physical abuse . . . shall report." *See also* *Easton v. Maready*, No. A093279, 2001 Cal. App. Unpub. LEXIS 1231, at \*2–6 (Ct. App. Nov. 28, 2001) (summary judgment granted on the basis of governmental immunity to sheriff and other officials in suit alleging federal civil rights violations).

126. *Easton*, 80 Cal. App. 4th at 492, 95 Cal. Rptr. 2d at 320.

127. *See* ARK. CODE ANN. § 5-28-202(b) (Michie 1997 & Supp. 2001) ("Any person or caregiver required by this chapter to report a case of suspected abuse, neglect, or exploitation who purposely fails to do so shall be civilly liable for damages proximately caused by the failure."); IOWA CODE ANN. § 235B.3(10) (West 2000 & Supp. 2002) ("A person required by this section to report a suspected case of dependent adult abuse who knowingly fails to do so is civilly liable for the damages proximately caused by the failure."); MICH. COMP. LAWS § 400.11e(1) (2001) ("A person required to make a report pursuant to section 11a who fails to do so is liable civilly for the damages proximately caused by the failure to report, and a civil fine of not more than \$500.00 for each failure to report."); MINN. STAT. ANN. § 626.557(7) (West 1983 & Supp. 2002) ("A [mandated reporter] who negligently or intentionally fails to report is liable for damages caused by the failure.").

128. *See, e.g.*, MINN. STAT. ANN. § 626.557(7) (describing when damages are available against a mandated reporter).

## 2. Common law negligence liability

As noted earlier, professionals rarely comply with mandatory reporting statutes, and criminal enforcement of these statutes is rare. A search of reported California appellate decisions found not one review of such a criminal prosecution in 2001.<sup>129</sup> The reasons for this are complex. Prosecutors are rarely aware of the failure to report. Even when they do become aware, prosecutors are loathe to proceed against white-collar professionals. Moreover, difficulties in securing evidence for these cases, i.e., the victim's reluctance to testify or a disability that renders testifying difficult, likewise makes criminal prosecution unlikely.

The mandatory reporting statute could, however, be used in a different way. Older persons who have been injured by repeated instances of maltreatment could sue professionals—e.g., emergency room doctors, nurses, social workers—who failed to report the suspected elder abuse or neglect to the appropriate authorities.<sup>130</sup>

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129. In April 2002, however, a California nursing home administrator was convicted for failure to report an assault against a patient by an employee of the nursing home. *See* Press Release, Office of the Attorney General, Attorney General Lockyer Announces Criminal Conviction of Nursing Home Administrator, (Apr. 19, 2002), *available at* <http://caag.state.ca.us/newsalerts/2002/02-041.htm> (last visited Oct. 29, 2002).

130. Exceptions do exist; section 15630(c)(2) of the California Welfare and Institutions Code provides that:

(A) A mandated reporter who is a physician and surgeon, a registered nurse, or a psychotherapist, as defined in Section 1010 of the Evidence Code, shall not be required to report, pursuant to paragraph (1), an incident where all of the following conditions exist:

(i) The mandated reporter has been told by an elder or dependent adult that he or she has experienced behavior constituting physical abuse, abandonment, isolation, financial abuse, or neglect.

(ii) The mandated reporter is not aware of any independent evidence that corroborates the statement that the abuse has occurred.

(iii) The elder or dependent adult has been diagnosed with a mental illness or dementia, or is the subject of a court-ordered conservatorship because of a mental illness or dementia.

(iv) In the exercise of clinical judgment, the physician and surgeon, the registered nurse, or the psychotherapist, as defined in Section 1010 of the Evidence Code, reasonably believes that the abuse did not occur.

(B) This paragraph shall not be construed to impose upon mandated reporters a duty to investigate a known or suspected incident

These professionals are typically insured and not judgment proof.<sup>131</sup> Lack of detection (diagnosis) or intervention (treatment) often results in additional injury because elder abuse, like spouse and child abuse, typically follows cyclical patterns with the victim being mistreated again—often more severely.<sup>132</sup> “Mistreatment is likely to escalate in frequency and severity over time. The long-term trajectory of abuse is such that if intervention is not initiated after abuse is first observed in a clinic or examining room, the chances are good that it will continue.”<sup>133</sup> Numerous protocols reflecting professional standards and other tools for assessing mistreatment are available to doctors,<sup>134</sup> nurses,<sup>135</sup> social workers and caregivers,<sup>136</sup> health care workers,<sup>137</sup>

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of abuse and shall not be construed to lessen or restrict any existing duty of mandated reporters.

CAL. WELF. & INST. CODE § 15630(b)(2)(A).

131. See generally Martin Ramey, *Putting the Cart Before the Horse: The Need to Re-examine Damage Caps in California's Elder Abuse Act*, 39 SAN DIEGO L. REV. 599 (2002) (discussing medical malpractice insurance costs and limitations in elder abuse cases).

132. See American Medical Association, Council on Scientific Affairs, *Elder Abuse & Neglect*, 257 JAMA 966, 966–71 (1987); see also HELEN O'MALLEY ET AL., *ELDER ABUSE IN MASSACHUSETTS: A SURVEY OF PROFESSIONALS AND PARAPROFESSIONALS* 10 (1979) (estimating that seventy percent of reported cases involved repeated instances of abuse).

133. Lorin A. Baumhover & S. Colleen Beall, *Prognosis: Elder Mistreatment in Health Care Settings*, in *ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT AND INTERVENTION* 241, 248 (Loren A. Baumhover & S. Colleen Beall eds., 1996).

134. See SARA C. ARAVANIS ET AL., *AMERICAN MEDICAL ASSOCIATION DIAGNOSTIC AND TREATMENT GUIDELINES ON ELDER ABUSE AND NEGLECT* 11–12 (1992) [hereinafter *AMA ELDER ABUSE GUIDELINES*]; see also Mark S. Lachs & Terry Fulmer, *Recognizing Elder Abuse and Neglect*, 9 *CLINICS IN GERIATRIC MED.* 665 (1993) (discussing need for written protocols and better training of staff); Teri Randall, *AMA, Joint Commission Urge Physicians Become Part of Solution to Family Violence Epidemic*, 266 *JAMA* 2524 (1991) (discussing ways to increase awareness of physicians with regards to violence being the cause of health problems).

135. See, e.g., Jeanne Floyd, *Collecting Data on Abuse of the Elderly*, *J. OF GERONTOLOGICAL NURSING*, Dec. 1984, at 11–15 (discussing data on elder abuse); Sue Haviland & James O'Brien, *Physical Abuse and Neglect of the Elderly: Assessment and Intervention*, *ORTHOPEDIC NURSING*, July/Aug. 1989, at 11–19.

136. See, e.g., M. J. QUINN & S. TOMITA, *ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSES AND INTERVENTION STRATEGIES* (1986) (discussing an intervention model for treatment).

and law enforcement professionals<sup>138</sup> to establish the standard of care applicable. California Welfare and Institutions Code section 15630 requires a paid or professional caregiver to report if he or she:

[H]as observed or has knowledge of an incident that reasonably appears to be physical abuse, abandonment, isolation, financial abuse, or neglect, or is told by an elder or dependent adult that he or she has experienced behavior constituting physical abuse, abandonment, isolation, financial abuse, or neglect, or reasonably suspects that abuse . . . in a long-term care facility [shall report] to the local ombudsman or the local law enforcement agency<sup>139</sup> [or if] in a place other than [a long-term care facility] . . . to the county adult protective services agency.<sup>140</sup>

California Penal Code section 11160 requires health practitioners to report to law enforcement if they know or reasonably suspect that an elder is suffering from an injury due to "assaultive or abusive conduct."<sup>141</sup> Section 11160(d)(23) specifically enumerates elder abuse as a form of "assaultive or abusive conduct" for reporting purposes.<sup>142</sup> As such, failure to diagnose and report reasonably recognizable cases of abuse or neglect should be held to be malpractice.

California has solid precedent to support this theory. Common law has long established that a civil action may be implied from violation of a criminal statute. In *Angie M. v. Superior Court*,<sup>143</sup> the California Supreme Court held that violation of a criminal statute provides a civil cause of action even if no specific civil remedy is

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137. See, e.g., TERRY T. FULMER & TERRENCE A. O'MALLEY, *INADEQUATE CARE OF THE ELDERLY: A HEALTH CARE PERSPECTIVE ON ABUSE AND NEGLECT* 25 (1987) (discussing manifestations of inadequate care); Holly Ramsey-Klawnsnik, *Recognizing and Responding to Elder Maltreatment*, *PRIDE INST. J. OF LONG TERM HOME CARE*, Spring 1995, at 12 (discussing guidelines for recognizing elder abuse).

138. See, e.g., R. NASH, *ELDER ABUSE: INFORMATION FOR LAW ENFORCEMENT OFFICERS* (Ill. Dep't of Aging, Chicago 1986).

139. CAL. WELF. & INST. CODE § 15630(b)(1)(A). The Long Term Care Ombudsman is defined in California Welfare and Institutions Code section 9700 et seq.

140. *Id.* § 15630(c)(4).

141. CAL. PENAL CODE § 11160(a)(2) (West 2000).

142. *Id.* § 11160(d)(23).

143. 37 Cal. App. 4th 1217, 44 Cal. Rptr. 2d 197 (Ct. App. 1995).

provided in the criminal statute. Any injured member of the public for whose benefit the statute is enacted may bring the action.<sup>144</sup> In *Tarasoff v. Regents of the University of California*,<sup>145</sup> a psychotherapist counseled a patient who threatened an identifiable former girlfriend.<sup>146</sup> The therapist never warned the young woman, and she was subsequently murdered. Her parents sued, alleging the failure to warn constituted professional malpractice.<sup>147</sup> The California Supreme Court held that a therapist treating a mentally ill patient owes a duty of reasonable care to warn threatened persons against foreseeable danger created by the patient's condition.<sup>148</sup> The therapist need not predict such violence with absolute accuracy, but only needs to exercise reasonable skill and care, as defined by the standard of practice in that profession.<sup>149</sup>

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144. *See id.* at 1224, 44 Cal. Rptr. 2d at 202 (citing *Michael R. v. Jeffrey B.*, 158 Cal. App. 3d 1059, 1067, 205 Cal. Rptr. 312, 318 (Ct. App. 1984); *Laczko v. Jules Meyers, Inc.*, 276 Cal. App. 2d 293, 295, 80 Cal. Rptr. 798, 799 (Ct. App. 1969); and 5 WITKIN, SUMMARY OF CAL. LAW, Torts § 9, at 65–67 (9th ed. 1988)). *But see* *Fischer v. Metcalf*, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989) (holding no implied cause of action under Florida mandatory elder abuse reporting statute).

145. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

146. *See id.* at 432–33, 551 P.2d at 341, 131 Cal. Rptr. at 21–22. The defendant-therapist took a number of affirmative steps, including asking the police to detain the patient, which they briefly did, and initiating commitment proceedings, which were later stopped. *See id.*

147. *See id.*

148. *See id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. The duty to act to protect such an endangered person emerged from the relationship between the physician or therapist and the patient, and was breached by the failure to act. *See id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23. The justification for this obvious breach in confidentiality by a professional is the state's interest in protecting public safety and potential victims. *See id.* at 440–41, 551 P.2d at 346–47, 131 Cal. Rptr. at 26–27. “[T]he common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim . . . [T]he relationship between a therapist and his patient satisfies this requirement . . .” *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23; *see also* *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980) (finding the psychotherapist-patient relationship gives rise to an affirmative duty to third persons). *But see* *Boynton v. Burglass*, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991) (rejecting *Tarasoff* duty to warn).

149. *See generally* *Bradley v. Ray*, 904 S.W.2d 302 (Mo. Ct. App. 1995) (discussing cases approving *Tarasoff* result); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311 (Ohio 1997) (psychiatrist-outpatient relationship justifies duty to protect third parties); *Schuster v. Altenberg*, 424

The *Tarasoff* reasoning is applicable to elder abuse or neglect. If a professional should have identified elder mistreatment—e.g., in medical treatment of the victim or through treatment of the abuser in psychological counseling—a duty to act to forestall future harm akin to *Tarasoff* is created.<sup>150</sup> In this instance, however, a mere warning to the victim is likely to be ineffective in preventing further harm for several reasons. First, the aged person, of course, typically already knows of the threat; what is needed is intervention, not a warning. Second, the presence of state systems for investigating reports and instituting remedial measures places a truly minimal burden on the professionals; the report mandated by statute is simply made to the appropriate agency.<sup>151</sup> Moreover, the relationship between a treating professional and the victim of abuse is far closer than that which created the affirmative duty in *Tarasoff*. The professional usually has examined and treated the victim, and often will have concrete evidence of both past and ongoing harm.

The best-known instance of liability of a professional for failure to meet statutorily required reporting is the California Supreme Court's 1976 decision in *Landeros v. Flood*.<sup>152</sup> A child was brought to a hospital with a spiral fracture of the tibia and fibula, apparently caused by a twisting force for which there was no natural explanation.<sup>153</sup> The child also had bruises and abrasions over her entire body, and exhibited other symptoms of "battered child syndrome."<sup>154</sup> The physician failed to diagnose mistreatment and failed to report the case to the proper authorities.<sup>155</sup> The child was returned to her parents and severely beaten again, suffering permanent physical injury.<sup>156</sup> Subsequently, the child's guardian *ad litem* brought a malpractice action against both the physician and the

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N.W.2d 159 (Wis. 1988) (psychiatrist had duty to tell police of patient's dangerousness); Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties*, 60 MO. L. REV. 749 (1995); Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97 (1994).

150. See, e.g., IOWA CODE ANN. § 235B.3(1) (West 2000 & Supp. 2002) (creating liability if duty to report is breached).

151. See *id.*

152. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).

153. See *id.* at 405, 551 P.2d at 391, 131 Cal. Rptr. at 71.

154. *Id.* at 405–06, 551 P.2d at 391, 131 Cal. Rptr. at 71.

155. See *id.* at 406, 551 P.2d at 391, 131 Cal. Rptr. at 71.

156. See *id.*

hospital.<sup>157</sup> The California Supreme Court held the physician could be liable for the child's subsequent injuries.<sup>158</sup> The court also upheld the claim on the theory that violation of California statutes requiring reporting of suspicious injuries demonstrated the physician's failure to exercise due care.<sup>159</sup> The fact that such reporting was not customarily done by doctors was brushed aside by the court.<sup>160</sup>

The reasoning in *Landeros* may be applicable to appropriate cases of unreported elder abuse/neglect. Although the aged are presumed competent and could self-report, the dynamics of many abusive situations prevent free choice by the victim.<sup>161</sup> Much elder abuse is cyclical, making it reasonably foreseeable that mistreatment will be repeated and increased injury suffered.<sup>162</sup> As Professors Baumhover and Beall note, "[b]ecause many victims of elder mistreatment are out of touch with the outside world, a clinical examination and subsequent intervention may be the only opportunity to prevent further abuse."<sup>163</sup> The potential defendants in cases of failure to diagnose or report include licensed professionals, such as doctors, nurses and social workers, as well as others who are statutorily required to report elder abuse. In addition, their employers, e.g., hospitals, clinics, nursing homes, and community agencies, may also be liable under vicarious liability theories.

In elder abuse litigation, the defendant is being sued for malpractice and could utilize the protections provided by the Medical Injury Compensation Reform Act of 1975 (MICRA).<sup>164</sup> "Health care provider" is defined in Civil Code section 3333.2(c)(1) and includes

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157. *See id.* at 405, 551 P.2d at 390, 131 Cal. Rptr. at 70.

158. *See id.* at 412, 551 P.2d at 396, 131 Cal. Rptr. at 76.

159. *See id.* at 414, 551 P.2d at 397, 131 Cal. Rptr. at 77.

160. *See id.* at 409–10, 551 P.2d at 393–94, 131 Cal. Rptr. at 73–74.

161. *See, e.g.,* Jordan Kosberg & Daphne Nahmiash, *Characteristics of Victims and Perpetrators and Milieus of Abuse and Neglect*, in *ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT & INTERVENTION* 31, 41–43 (Lorin A. Baumhover & S. Colleen Beall eds., 1996) (indicating lack of social support, family disharmony, family violence, financial difficulties, and living arrangements as some of the reasons for elder abuse). *See also supra* text accompanying notes 89–95.

162. *See* Kosberg & Nahmiash, *supra* note 161, at 42.

163. Baumhover & Beall, *supra* note 133, at 250.

164. *See* CAL. CIV. CODE § 3333.1 (West 2001); *see also* Medical Injury Compensation Act, 1975 Cal. Stat. 3949 (limiting the amount an attorney can recover under contingency fee arrangements and the amount recoverable for non-economic losses).



physicians, nursing homes, hospitals, or health facilities licensed pursuant to Health and Safety Code sections 1200 et seq. and section 1440.<sup>165</sup> Professional negligence is defined as a “negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death . . . .”<sup>166</sup> Numerous limitations upon recovery are imposed.<sup>167</sup> In contrast with EADACPA actions, non-economic recoveries are limited to \$250,000,<sup>168</sup> evidence of collateral sources are admissible,<sup>169</sup> and the defendant may obtain periodic payments for awards in excess of \$50,000.<sup>170</sup> The amount that an attorney may recover in contingency fee cases has statutory limitations.<sup>171</sup> In addition, section 425.13 of the California Code of Civil Procedure provides that if an action “aris[es] out of . . . professional negligence,” the plaintiff must obtain leave of court before making a claim for punitive damages against the defendant.<sup>172</sup> Severe time limits as to when such a motion can be made are also imposed.<sup>173</sup>

### 3. Negligence per se

It has previously been argued that mandatory reporting statutes create a duty on the part of the professional to act when reasonable belief or suspicion should be aroused by injuries, the general condition of the patient, inconsistencies between explanations and injuries, or other circumstances. Failure to report to designated state authorities in such a situation constitutes common law

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165. See CAL. CIV. CODE § 3333.2(c)(1).

166. *Id.* § 3333.2(c)(2).

167. See *id.* § 3333.2(b).

168. See *id.*

169. See *id.* § 3333.1(a).

170. See CAL. CIV. PROC. CODE § 667.7(a) (West 1987 & Supp. 2002).

171. See CAL. BUS. & PROF. CODE § 6146 (West 1991).

172. CAL. CIV. PROC. CODE § 425.13(a).

173. Currently, this issue is before the California Supreme Court in the case of *Covenant Care, Inc. v. Superior Ct.*, 89 Cal. App. 4th 928, 107 Cal. Rptr. 2d 291 (2001), *rev'g* 31 P.3d 1269, 112 Cal. Rptr. 2d 257 (2001). However, the fourth district has ruled that a section 425.13 motion is necessary in the case of *Cnty. Care & Rehab. Ctr. v. Superior Ct.*, No. RIC-322908 (Cal. Ct. App. Apr. 4, 2000), available at <http://www.elder-abuse.com/pdf/E025228a.pdf> (last visited Oct. 29, 2002).

malpractice.<sup>174</sup> A court may find that these circumstances do more than create an implied civil cause of action against the mandated reporter. A plaintiff may be able to establish a presumption of negligence by applying the doctrine of negligence per se,<sup>175</sup> codified at California Evidence Code section 669(a).<sup>176</sup>

Pursuant to this section, the failure of a person to exercise due care creates a presumption if: (1) the person violated a statute; (2) the violation proximately caused death or injury to a person or property; (3) the death or injury resulted from an occurrence of the nature which the statute was designed to prevent; and (4) the person suffering the death, personal injury, or injury to property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.<sup>177</sup> The non-reporting professional seeking to avoid this presumption must prove—to the trier of fact—that it is more probable than not that the violation of the statute was both reasonable and justifiable under the circumstances.<sup>178</sup>

On the other hand, if the proponent of the presumption fails to establish any of these five elements, he or she may still recover

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174. *See, e.g.*, *Alejo v. City of Alhambra*, 75 Cal. App. 4th 1180, 1189, 89 Cal. Rptr. 2d 768, 774 (1999).

175. *See, e.g.*, *Klein v. BIA Hotel Corp.*, 41 Cal. App. 4th 1133, 1140, 49 Cal. Rptr. 2d 60, 64 (Ct. App. 1996) (health and safety regulations define standard of care, the violation of which is negligence per se).

176. CAL. EVID. CODE § 669(a) (West 1995).

177. *Id.* § 669. The first two elements, if disputed, present questions of fact for the jury, whereas the last two generally present questions of law. *See, e.g.*, *Capolungo v. Bondi*, 179 Cal. App. 3d 346, 224 Cal. Rptr. 326 (Ct. App. 1986); *see also* Law Revision Commission Comment to Cal. Evid. Code § 669 (establishing that a presumption of negligence arises when the conditions listed in section 669 are met). *See generally* NANCY HERSH & WARD SMITH, CALIFORNIA CIVIL PRACTICE: TORTS §1.28 (2002) (indicating factors when a presumption of negligence is created).

178. This would require proof that the person violating the statute “did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law . . . .” CAL. EVID. CODE § 669(b)(1). As one court noted:

The phrase “who desired to comply with the law” does not mean one who . . . is a law-abiding person, but rather refers to one who, although he or she desired to comply with the particular statute in issue, was faced with other circumstances which prevented compliance or justified noncompliance.

*Casey v. Russell*, 138 Cal. App. 3d 379, 385, 188 Cal. Rptr. 18, 22 (Ct. App. 1982).

damages by proving negligence apart from any statutory violation.<sup>179</sup> A recent California appellate decision in the related area of child-abuse reporting provides an example. In *Alejo v. City of Alhambra*,<sup>180</sup> three-year-old Alec Alejo lived with his mother and her boyfriend, Mike Gonzalez.<sup>181</sup> Alec's father became concerned about abuse of the child.<sup>182</sup> Alejo went to the police department to report the abuse and even offered to take the police to the home where Alec and his mother lived.<sup>183</sup> The police failed to conduct an investigation; six weeks later, Gonzalez severely beat Alec causing "total and permanent disability."<sup>184</sup> Alejo sued the police officers and the City.<sup>185</sup>

The court held that the police officer's failure to investigate or report a reasonable suspicion of child abuse could be negligence per se despite that police owe no duty to individual members of the general public, absent a special relationship or a statute creating a special duty.<sup>186</sup> California Penal Code section 11166(a)<sup>187</sup> creates this duty by requiring that any mandatory reporters (including police officers) with knowledge, or reasonable suspicion,<sup>188</sup> of child abuse must report it to a child protective agency as soon as practically possible.<sup>189</sup> Based on the mandatory language of the statute, the court held that the legislature intended to impose a mandatory duty on police officers to investigate and report known or reasonably suspected child abuse.<sup>190</sup> The court stated that "a physician's statutory duty to report when it 'appears' to her a child has been . . .

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179. See *Nunneley v. Edgar Hotel*, 36 Cal. 2d 493, 501, 225 P.2d 497, 502 (1950) (plaintiff permitted to recover even though her injury was not of the type to be prevented by statute).

180. 75 Cal. App. 4th 1180, 89 Cal. Rptr. 2d 768 (Ct. App. 1999).

181. See *id.* at 1183, 89 Cal. Rptr. 2d at 770.

182. See *id.*

183. See *id.*

184. *Id.* at 1184, 89 Cal. Rptr. 2d at 770.

185. See *id.*

186. See *id.* at 1185, 89 Cal. Rptr. 2d at 771.

187. CAL. PENAL CODE § 11166(a) (West 2000 & Supp. 2002).

188. "Reasonable suspicion . . . means . . . it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training or experience, to suspect child abuse." *Alejo*, 75 Cal. App. 4th at 1186, 89 Cal. Rptr. 2d at 771-72.

189. See CAL. PENAL CODE § 11166(a).

190. See *Alejo*, 75 Cal. App. 4th at 1188, 89 Cal. Rptr. 2d at 773.

abuse[d] and a police officer's statutory duty to report when she 'reasonably suspects' a child has been . . . abuse[d] are not rationally distinguishable for purposes of imposing liability under the negligence per se doctrine."<sup>191</sup>

### C. Suits Against Nursing Homes

#### 1. History and administrative oversight

More than 1.7 million Americans reside in nursing homes throughout the United States each year.<sup>192</sup> The quality of that care is the subject of extensive administrative regulation and enforcement, along with private civil litigation. The nursing home industry has a unique history, and its current operation is a matter of both national and state concern.<sup>193</sup>

Until the second half of the twentieth century, most elderly and disabled had been cared for at home or at governmental institutions. As early as 1601, English law mandated reciprocal obligations among family members, including the responsibility of children to provide financial support for their parents.<sup>194</sup> Carried to the colonies, Elizabethan "poor law" served as the prototype for colonial welfare systems and later for numerous legislative policy choices.<sup>195</sup> Until

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191. *Id.* (relying on *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal. App. 3d 245, 258–59, 226 Cal. Rptr. 2d 361 (Ct. App. 1987)). The court was not persuaded by the argument that the police force would be over burdened. The court explained that the officers would be required to report and investigate only those cases where is it objectively reasonable to suspect child abuse. *See id.* at 1188–89, 89 Cal. Rptr. 2d at 773–74.

192. *See, e.g.*, Paul Emrath, *Seniors' Housing: Supply & Demand*, HOUSING ECON., April 1999, at 9.

193. The HHS has identified nursing homes as an area "of great concern." Dept. of Health & Human Servs., *Fiscal Year 2003 Budget Request: Hearing Before the House Appropriations Comm. on Labor, Health & Human Services*, 107th Cong. (2002) (testimony of Janet Rehnquist, Inspector General) available at 2002 WL 373620 (last visited Oct. 30, 2002).

194. The Elizabethan Poor Relief Act of 1601 mandated that the "father and grandfather and the mother and grandmother, and the *children of every poor, old, blind lame, and impotent person,*" support that relative to the extent of his or her ability. An Act for the Relief of the Poor, 43 Eliz. 1, c.2, § 6 (1601) (Eng.) (emphasis added).

195. *See generally* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 291–

the New Deal in the 1930s,<sup>196</sup> states initiated relief systems based on the English model outlined above.<sup>197</sup> When family support was unavailing, the poor, including the elderly, were sometimes auctioned off to work for private families.<sup>198</sup> Cities and counties began to operate “poor houses” for the sick and the aged.<sup>199</sup> These institutions proved both expensive and ineffective, and by the Great Depression the federal government entered the field.<sup>200</sup>

In 1935, the original Social Security Act prohibited cash payments to any “inmate” of a public institution,<sup>201</sup> and the federal government began to pay for care and services provided by private institutions.<sup>202</sup> But the real development of nursing homes as a concentrated, private industry began with the creation of the Medicare and Medicaid programs in 1965.<sup>203</sup> The infusion of federal and state dollars spurred rapid growth.<sup>204</sup> The size of the industry today may be gauged by noting that in 1997 nursing home care costs were the third largest expenditure in the more than \$1 trillion spent in the United States on health services and supplies.<sup>205</sup>

Long-term care is now a heavily regulated industry, at least in terms of the number of agencies involved and the level of detail in

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317 (1963) (tracing importation of English poor law system into the American legal system).

196. See, e.g., Title IV of the Social Security Act of 1935, Aid to Families with Dependent Children (AFDC), Pub. L. No. 74-271, 49 Stat. 620, 627 (codified as amended at 42 U.S.C. §§ 601–619 (2000)) (creating a federal-state minimum monthly subsistence payment system to families meeting eligibility criteria).

197. See generally Daniel R. Mandelker, *Family Responsibility Under the American Poor Laws: I*, 54 MICH. L. REV. 497, 497–532 (1956) (reviewing family responsibility laws in the United States that were based on the English model).

198. See Eric Bates, *The Shame of Our Nursing Homes*, THE NATION, Mar. 29, 1999, available at 1999 WL 9306974.

199. See *id.*

200. See *id.*

201. Title IV of the Social Security Act of 1935, 49 Stat. at 620, 621.

202. See Bates, *supra* note 198.

203. Margaret M. Flint, *Nursing Homes*, in BASIC ELDER LAW 561–62 (1998).

204. See Bates, *supra* note 198.

205. See Center for Disease Control and Prevention, *National Health Expenditures: Table 116*, at <http://www.cdc.gov/nchs/products/pubs/pubd/hus/listables.pdf#112> (last visited Oct. 29, 2002) [hereinafter *National Health Expenditures*].

the rules applied to it.<sup>206</sup> There are numerous types of long-term care facilities,<sup>207</sup> but I shall confine this Article to skilled nursing facilities—i.e., nursing homes. To operate, nursing homes must be licensed by their state.<sup>208</sup> Almost all participate in the Medicare and Medicaid programs.<sup>209</sup> How effective the administrative regulation is in ensuring quality of care is hotly debated. Despite thousands of rules and survey inspections, conditions in many nursing homes are unacceptable.<sup>210</sup>

Nursing homes are *sui generis*. Although they share some characteristics of acute care hospitals and large state facilities, their economic structure, funding sources, and operations are very different.<sup>211</sup> The residential nature of nursing homes and the extraordinary levels of disability of their population combine to create great needs of highly vulnerable residents in institutional settings. In many instances, the placement of an individual in a nursing home is functionally involuntary; no alternative in the

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206. See, e.g., The Older Americans Act, Amendments of 2000, Pub. L. No. 106-501, 114 Stat. 226 (codified as amended at 42 U.S.C. § 3001 (2000)) (declaring the care and integrity of the agency as a duty of the governments of the United States, the states, and their political subdivisions).

207. California has many “Residential Care Facilities for the Elderly” (RCFE), which are governed by CAL. HEALTH & SAFETY CODE §§ 1569–1569.87 (West 2000).

208. CAL. HEALTH & SAFETY CODE § 1418(d) states that a license to operate is “issued under Chapter 2 [commencing with section 1250] or Chapter 8.6 [commencing with section 1760] for a long-term health care facility.” *Id.* § 1418(d).

209. To participate, they must be certified by the federal government and must enter into provider agreements with the federal government. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (codified as amended at 42 U.S.C. §§ 1395i-3, 1396(r) (2000)).

210. In recent years, state surveys conducted in the nation’s 17,000 plus nursing homes identified deficiencies that harmed residents or placed them at risk of death or serious injury in more than one-fourth of nursing homes nationwide. See 1999 GAO Report, *supra* note 24.

211. For example, unlike hospitals and large state facilities, nursing homes focus on caring for “older individuals who do not need the intensive medical care provided by hospitals, but for whom receiving such care is no longer feasible.” GAO Report to Special Committee on Aging, U.S. Senate, *California Nursing Homes: Care Problems Persist Despite Federal and State Oversight*, GAO/HEHS-98-202, at 1 (July 1998) [hereinafter 1998 GAO Report]. The federal government funds these homes through Medicare and Medicaid, but they are most often privately funded. See *id.*; see also Danglo, *supra* note 23.

community exists. This combination of factors creates a great need for a high quality of care, but public inspections<sup>212</sup> and private tort litigation<sup>213</sup> provide a contrary view in many instances.

The public interest in the operation of this industry is readily apparent. Aside from the vulnerability of the residents, in 1995 Medicare and Medicaid paid for fifty-seven percent of all nursing home care.<sup>214</sup> With the rapid increase in the number of the elderly, it is foreseeable that the number of residents and the amount spent on long-term care facilities will increase dramatically over the course of the coming decades.<sup>215</sup>

In 1999-2000, fifty-five percent of the nursing facilities in the United States were owned or operated by national chains.<sup>216</sup> Sixty-seven percent of all facilities were for-profit, the remainder either nonprofit or government-owned entities.<sup>217</sup> There is also a high degree of concentration in a few corporations. Beverly Enterprises, Inc. reported 466 nursing facilities in operation for the 2001 fiscal year,<sup>218</sup> which equates to 2.7% of the 17,000 nursing homes nationally and five percent of the multi-facility chain market.<sup>219</sup> Other large corporations similarly own and operate hundreds of facilities, with six companies controlling almost 2000 nursing homes, or twenty-one percent of the multi-facility chain market.<sup>220</sup>

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212. See *infra* notes 225–233 and accompanying text.

213. See *infra* notes 235–243 and accompanying text.

214. See Katherine Levit et al., *National Health Expenditures*, 18 HEALTH CARE FINANCING REV. 17 (1996).

215. See AHCA, *Facts & Trends: The Nursing Facility Sourcebook 2001* vii, available at <http://www.ahca.org/research/nfs/nfs2001-execsum.pdf> (last visited Oct. 29, 2002).

216. See *id.* at viii.

217. See *id.*

218. This figure was even higher before the company sold their Florida facilities. See SEC FORM 10-K, available at [http://www.beverlynet.com/beverly\\_internet/investor/corporate\\_info/annual\\_reports/2001+10-k.pdf](http://www.beverlynet.com/beverly_internet/investor/corporate_info/annual_reports/2001+10-k.pdf) (last visited Oct. 29, 2002).

219. See *id.*

220. See, e.g., Sun Healthcare Group, Inc., at <http://www.sunh.com/Production/shg/index.asp> (last visited Oct. 29, 2002) (indicating that Sun Healthcare Group owns eighty facilities in California and 240 facilities nationwide); Genesis Health Ventures, *Financial Information*, available at <http://www.ghv.com/Financial/default.htm> (last visited Oct. 29, 2002) (indicating that Genesis runs about 300 nursing homes and assisted living facilities across the country); HCR Manor Care, *2001 Annual Report*, available at <http://www.hcr-manorcare.com/investor/annual.asp> (last visited Oct. 29,

Nursing homes in California are governed by the Long-Term Care, Health, Safety and Security Act of 1973.<sup>221</sup> In addition, extensive regulations can be found in Title 22 of the California Code of Regulations.<sup>222</sup> If the nursing home obtains payments from Medicare or Medicaid, it must also comply with federal regulations.<sup>223</sup> These regulations impose a minimum duty of care for the residents and can be used as jury instructions to identify the nursing home's obligations.<sup>224</sup>

A GAO report in 1998 found that a significant number of California nursing homes were not sufficiently monitored to guarantee the safety and welfare of their residents.<sup>225</sup> Nearly one-third of the California nursing homes in the GAO analysis—407 of the 1370 reviewed—were cited for care violations classified as “serious” under federal or state deficiency categories.<sup>226</sup> The report noted that care problems found in federal and state data are likely to be understated. Department of Health and Safety (DHS) surveyors cited about ten percent of California homes—accounting for over 17,000 resident beds—twice in consecutive annual reviews for violations involving harm to residents.<sup>227</sup> Astonishingly, the national average was slightly worse.<sup>228</sup> Despite this average, administrative agencies closed only sixteen of the 1370 California homes, and most

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2002) (indicating that HCR owns 300 nursing homes in thirty-one states); Kindred Healthcare, *Investor Information*, at [http://www.vencor.com/investor\\_info.htm](http://www.vencor.com/investor_info.htm) (last visited Oct. 29, 2002) (highlighting that Kindred operates approximately 290 nursing home facilities in thirty-two states); *c.f.* Press Release, Office of the Attorney General, Attorney General Lockyer Announces Enforcement Action Against Largest Provider of Nursing Home Care in California, *available at* <http://caag.state.ca.us/newsalerts/2001/01-098.htm> (Oct. 4, 2001) [hereinafter Enforcement Action].

221. CAL. HEALTH & SAFETY CODE §§ 1417–1417.4 (West 2000).

222. *See, e.g.*, CAL. CODE REGS. tit. 22, § 8045 (2002) (establishing civil penalties for violations against the Long-Term Care Ombudsman), § 58082 (auditing regulations for the California Partnership for Long-Term Care), § 97005(d) (defining long-term care facilities).

223. *See* 42 C.F.R. §§ 483.1—483.480 (2001).

224. *See* Conservatorship of Gregory, 80 Cal. App. 4th 514, 95 Cal. Rptr. 2d 336 (Ct. App. 2000).

225. *See* 1998 GAO Report, *supra* note 211, at 3.

226. *Id.* at 3.

227. *See id.* at 4.

228. *See id.* at 3.



of those were quickly reinstated.<sup>229</sup> Between July 1995 and May 1998, California's DHS gave about ninety-eight percent of non-compliant homes a grace period to correct deficiencies, often without further disciplinary action.<sup>230</sup> Non-compliant homes that DHS identified as having harmed or put residents in immediate danger have little incentive to sustain compliance, once achieved, because they may face no consequences for their next episode of non-compliance.<sup>231</sup>

These problems in administrative oversight of California homes were increased by predictability of the dates of onsite reviews, highly questionable record-keeping, and survey limitations. Federal nurse evaluators found serious care problems that state surveyors did not find, including unaddressed weight loss, improper pressure sore treatment, and ineffective continence management.<sup>232</sup> The federal study indicated that thirty-four residents—more than half of the sample—of sixty-two who died received unacceptable care.<sup>233</sup>

## 2. Civil damage actions

Independent of administrative enforcement, civil litigation brought by, or on behalf of, a resident against a nursing home has increased dramatically during the past two decades in California and elsewhere.<sup>234</sup> The potential for this type of litigation has always been present, but such suits were previously rare. Now they have multiplied, as have recoveries. The average award in nursing home negligence cases is reported to have nearly doubled between 1987 and 1994, from \$238,285 to \$525,853.<sup>235</sup> Juries are increasingly apt to return large awards against the owners and operators of nursing homes. In 2000, the top verdict against a nursing home was \$20 million. In 2001, in contrast, there were five verdicts higher than

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229. *See id.*

230. *See id.* at 13. Of sixteen homes terminated between 1995–98, fourteen were reinstated, eleven of those under the same ownership as before the termination.

231. *See id.* at 12.

232. *See id.* at 18.

233. *See id.* at 3.

234. *See infra* notes 238–52 and accompanying text.

235. *See* Thomas D. Begley, Jr., *Nursing Home Law and Litigation*, 156 N.J. L.J. 120 (Apr. 12, 1999).

that, including one for \$312.7 million in Texas.<sup>236</sup> Punitive damages obviously increase the size of many of these awards and are clustered in certain states, especially Florida, California, Mississippi, and Texas.<sup>237</sup> These cases draw great public attention. The growing number of nursing home cases reflect numerous factors: statutory causes of action in many states, including California; the availability of statutory attorneys' fees for successful litigants; a growing elderly population; and heightened awareness of the plight of the elderly, particularly in institutional settings.<sup>238</sup>

In looking beyond the individual factual scenarios, a striking pattern emerges. Many cases revolve around dramatic incidents—i.e., a single error or omission which produces grave injury or death. These include patients who are unsupervised—e.g., burns, drowning, suffocation, strangulation. Habitual neglect cases—e.g., malnutrition, dehydration, ulcers—also reflect lack of care on an ongoing basis. Verdict studies, such as one supplied by the Indiana Trial Lawyers Association,<sup>239</sup> list average nursing home verdicts and settlements from \$400,000 for assaults to nearly \$1 million for decubitus ulcers.<sup>240</sup> A Florida study done by insurers reported a \$455,000 average Florida claim.<sup>241</sup> These are dramatic results, yet further thought and analysis produces a far more complicated reality. First, there is no single database that captures all nursing home jury verdicts—including the frequent judicial reduction of awards—or settlement figures.<sup>242</sup> Are plaintiff losses or pre-trial settlements for relatively small amounts of money included in these compilations?

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236. See *NLJ Verdicts: 100 Top Verdicts of the Year*, N.L.J. Litigation Services Network, at [http://www.verdictsearch.com/news/specials/0204verdicts\\_charts.jsp](http://www.verdictsearch.com/news/specials/0204verdicts_charts.jsp) (Feb. 4, 2002).

237. See *id.*

238. See Timothy A. Rowe, *Nursing Home Personal Injury or Just Nuisance-Value Cases*, *THE INDIANA LAWYER*, Nov. 10, 1999.

239. See *id.*

240. See *id.*

241. See General Colgne, *Re: Nursing Home Claims: Lessons from the Losses* (Apr. 2001), available at <http://www.grc.com> and <http://www.fhca.org>.

242. However, it should be noted that a number of states have enacted legislation that prohibits protective orders by courts. See, e.g., FLA. STAT. ANN. § 69.081(3) (West Supp. 2002); TEX. R. CIV. P. 76a (Vernon Supp. 2002). In California, a weaker measure is presently embroiled in a major legislative fight. See S.B. 11, 2001 Leg., Reg. Sess. (Cal. 2001) ("Secret Settlements" bill).

A few very large awards may skew average or median results. Second, verdicts are often reported without taking later settlements or judicially mandated reductions of verdicts into account. Third, many negotiated settlements include confidentiality clauses, keeping them out of public view altogether.<sup>243</sup>

I decided to try to get an overview of nursing home cases by examining all nursing home cases reported on Westlaw and the specialized Andrews Nursing Home Litigation Reporter for the year 2001.<sup>244</sup> I make no claim that these cases represent the universe of nursing home liability cases. Clearly there are many more, but the results are nonetheless interesting. Fifty-nine cases were found. A few cases, to be sure, produced very large jury verdicts or settlements.<sup>245</sup> Quite a few others, on the other hand, were defendant

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243. The vast majority of cases in both federal and state courts are never tried. Only eleven percent of cases in the federal courts end after trial. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 636. The number of trials is even less in state courts. Jury trials were only two percent of the 762,000 tort, contract, and real property cases disposed by state courts of general jurisdiction in the seventy-five largest counties in the United States in 1992. See U.S. Department of Justice, Bureau of Justice Statistics, *Civil Jury Cases and Verdicts in Large Counties*, in CIV. JUST. SURV. OF ST. CTS., 1992, 1 (1995); see also New York State Bar Association Public Policy Report, *A Rising Tide of Torts?*, N.Y. ST. B.J., Apr. 1999, at 41 (reporting that of 88,781 tort suits disposed of in the New York trial courts in 1996, only 3088, or 3.5%, ended in a jury verdict or a judge's decision, indicating they went to trial); Susan K. Gauvey, *ADR's Integration in the Federal Court System*, MD. B.J., Mar.-Apr. 2001, at 37 ("[T]he vast majority of cases do not go to trial and have never gone to trial."). When cases settle, particularly in health care, confidentiality agreements are often demanded. See generally Laurie Kratky Doré *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 384-94 (1999) (discussing the critical nature of confidentiality to settlement of civil law suits).

244. See Andrews Nursing Home Litigation Reporter (ANNHLTGR), available at <http://www.westlaw.com>.

245. See, e.g., Sauer v. Advocate, Inc., No. CIV 2000-5 (Ark. Cir. Ct. July 27, 2001) (awarding \$78.43 million jury verdict against nursing home chain to family of ninety-three year old Alzheimer's resident who died of dehydration at one of its facilities); see also Fuqua v. Horizon/CMS Healthcare Corp., No. 98-CV-1087 (N.D. Tex. Feb. 23, 2001) (awarding federal jury verdict of \$312.7 million to estate of nursing home resident who developed numerous pressure sores and suffered from malnutrition at nursing home).

victories after trials<sup>246</sup> or dispositive motions.<sup>247</sup> These fifty-nine cases did not show an overwhelming number of plaintiff victories.

A large number of the cases reported by these sources involved contentious discovery issues.<sup>248</sup> Given the very fact-specific nature of these cases, I suspect pre-trial investigation created numerous bare-knuckled battles about access to information, despite the fact that many records are available through public channels. Another large set of cases involved other procedural issues, such as statute of limitations and enforceability of arbitration agreements.<sup>249</sup>

## VI. CRIMINAL LAW

### *A. Crime Against Aged Persons*

The vast majority of the elderly in the United States live in the community and, thus, are subject to the same possibilities of crime as other age groups. Many view the elderly as particularly vulnerable

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246. *See, e.g.*, *Moylan v. Sarasota Health Care Ctr.*, No. 2000-5138 (Fla. Cir. Ct. Oct. 16, 2001) (Florida jury returning verdict for nursing home); *Caron v. Richmond Healthcare*, No. 0000-1257-05 (Fla. Cir. Ct. Mar. 18, 2001) (jury verdict for nursing home in suit charging failure to perform CPR); *Dodson v. Heritage Geriatric Hous. Dev., Inc.*, No. 98-CV-1194 (Tex. Dist. Ct. Apr. 6, 2001) (finding no negligence after the death of resident following complications from an operation to repair fractured hip); *Stennett v. LynnHaven IX*, No. 99-5-00425 (Tex. Dist. Ct. Jan. 29, 2001) (finding no liability where resident died following complications from misplaced feeding tube).

247. *See, e.g.*, *Foster v. Vantage Healthcare Corp.*, 4 No. 9 ANNHLTGR 3 (Fla. Cir. Ct. Dec. 12, 2001), at <http://www.westlaw.com> (directing verdict for nursing home); *King v. Crowell Mem'l Home*, 622 N.W.2d 588 (Neb. 2001) (granting directed verdict in favor of nursing home in choking death of resident); *Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex. Ct. App. 2001).

248. *See, e.g.*, *Crawford v. Care Concepts, Inc.*, 625 N.W.2d 876 (Wis. 2001) (nursing home required to answer interrogatories as to existence of any prior incidents involving non-party resident; physician-patient privilege does not cover information concerning past violent conduct); *see also* *Ebony Lake Healthcare Ctr. v. Tex. Dep't of Human Servs.*, 62 S.W.3d 867 (Tex. Ct. App. 2001) (production of records denied); *In re Family Hospice, Ltd.*, 62 S.W.3d 313 (Tex. Ct. App. 2001) (plaintiff expert required to provide notes in response to defendant's discovery requests).

249. *See, e.g.*, *Alcott Rehab. Hosp. v. Superior Court*, 93 Cal. App. 4th 94, 112 Cal. Rptr. 2d 807 (Ct. App. 2001) (statute of limitations tolled where plaintiff was incompetent); *Morton v. Madison County Nursing Home Auxiliary*, 761 N.E.2d 145 (Ill. 2001) (dismissal of wrongful death suit because of failure to serve agent within time allowed).

to crime, but the reality is that the incidence of many crimes is far lower against aged persons than other age groups.<sup>250</sup> Conversely, the elderly are disproportionately victimized by other forms of crime.<sup>251</sup> Fear of crime is, however, a very serious reality in the lives of many elderly persons.

Surprisingly, violent crimes—e.g., murder, rape, kidnapping, and assault—are committed far less often against elderly persons than other age groups.<sup>252</sup> There are approximately five incidents of violent crime against persons over sixty-five per 1000 in this age group.<sup>253</sup> In contrast, persons between sixteen and sixty-four record fifty-six incidents of violent crime per 1000 persons.<sup>254</sup> On the other hand, elders are particularly susceptible to crimes motivated by economic gain such as robbery, intimidation, vandalism, forgery, fraud, burglary, and motor vehicle theft.<sup>255</sup> Nearly fifty percent of all crime against the elderly is property related.<sup>256</sup>

A second aspect of crime and the elderly is abuse and neglect. Conceptually, almost every form of elder mistreatment corresponds to common law or statutory crimes. Physical abuse, for example, could be assault, battery, or perhaps even attempted murder; financial exploitation may be theft, larceny, or extortion. By criminalizing elder mistreatment, society proclaims that such violence is not acceptable, despite its prevalence.<sup>257</sup> “[T]he criminal code reflects . . . some notion of the moral sense of the community . . . .”<sup>258</sup> Once the illegality of such behavior is recognized, the criminal law can be enforced aggressively to protect the victim and to hold the offender publicly accountable.

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250. See Kimberly A. McCabe & Sharon S. Gregory, *Elderly Victimization: An Examination Beyond the FBI's Index Crimes*, RESEARCH ON AGING, May 1998, at 367–71.

251. See *id.*

252. See *id.*; see also U.S. Department of Justice, Bureau of Statistics, *Age Patterns of Victims of Serious Violent Crime* (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/apvsvc.pdf> (last visited Oct. 29, 2002).

253. See Elizabeth King, *Elderly Less Likely to be Victims of Violent Crime*, CORRECTIONS TODAY, April 2000, at 146.

254. See *id.*

255. See McCabe & Gregory, *supra* note 250, at 363.

256. See *id.*

257. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 125 (1993).

258. *Id.*

Moreover, abuse, neglect, and financial exploitation of older persons have been made specific crimes in many jurisdictions.<sup>259</sup> Some state statutes make serious physical abuse or neglect a separate offense.<sup>260</sup> Most states allow the advanced age of a victim to be considered as an aggravating factor in sentencing because of the older persons' vulnerability to crime as well as the enhanced effect that crime has on them.<sup>261</sup> Others designate various crimes, including assault, battery, and robbery as more serious offenses when committed against an elderly person.<sup>262</sup> Moreover, if the victim of a crime is particularly vulnerable, a judge may take that into account

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259. *See, e.g.*, TENN. CODE ANN. § 71-6-117 (1995) ("It is unlawful for any person to willfully abuse, neglect or exploit any adult within the meaning of the provisions of this part. Any person who willfully abuses, neglects or exploits a person in violation of the provisions of this part commits a Class A misdemeanor."); WYO. STAT. ANN. § 35-20-109 (Michie 2001) ("A person who abuses, neglects, exploits or abandons a disabled adult is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars (\$1000.00) . . .").

260. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 265, § 13K(e) (West 2000) ("Whoever, being a caretaker . . . permits serious bodily injury to such elder or person with a disability, or wantonly or recklessly permits another to commit an assault and battery upon such elder . . . shall be punished by imprisonment in the state prison for not more than ten years or . . . in the house of correction for not more than two and one-half years . . ."); *see also* DEL. CODE ANN. tit. 31, § 3913 (1997 & Supp. 2000) (intentional abuse causing "bodily harm, permanent disfigurement or permanent disability" is a Class D felony); KY. REV. STAT. ANN. § 209.990(2) (Michie 1998) (knowing abuse or neglect by a caretaker is a Class C felony).

261. *See, e.g.*, FLA. STAT. ANN. § 784.08(2) (West 2000), which reads in pertinent part:

Whenever a person is charged with committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, regardless of whether he or she knows or has reason to know the age of the victim, the offense for which the person is charged shall be reclassified as follows:

- (a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.
- (b) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
- (c) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

262. *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 621, 832, 841 (imposing an augmented sentence if the victim is sixty-two years of age or older); *see also* NEV. REV. STAT. ANN. 193.167(1), (2) (Michie 2000) (imposing an augmented sentence if the victim is sixty-five years of age or older).

when imposing a sentence, even without specific statutory authorization.<sup>263</sup> Perceived wealth and physical weakness combine to make the elderly inviting targets; furthermore, their living arrangements often leave them dependent and isolated.<sup>264</sup> In sum, the physical, financial, and behavioral impacts of crime on the elderly, by caretakers or strangers, are much greater than upon younger victims.<sup>265</sup>

### B. California Penal Law

California Penal Code section 368 penalizes “[a]ny person who . . . willfully causes or permits any elder or dependent adult . . . to suffer . . . unjustifiable physical pain or mental suffering.”<sup>266</sup> The California Elder Abuse Act sets forth provisions similar to those contained in Penal Code section 368.<sup>267</sup> Under Penal Code section 368(c), it is a misdemeanor to treat an elder under circumstances likely to cause great bodily harm or death or in circumstances where the elder’s person or health “may be endangered.”<sup>268</sup>

The constitutionality of Penal Code section 368 was tested in *People v. Heitzman*,<sup>269</sup> where the daughter of an elderly man was charged with elder abuse.<sup>270</sup> The defense was that the statute failed to provide fair notice regarding who might be criminally liable for “willfully . . . permitting” an elderly person to suffer pain.<sup>271</sup> The California Supreme Court interpreted the statute to apply only to a “person who, under existing tort principles, has a duty to control the conduct of the individual who is directly causing or inflicting abuse

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263. See, e.g., DEL. CODE. ANN. tit. XI, §§ 621, 832, 841.

264. See Jordan I. Kosberg, *Victimization of the Elderly: Causation and Prevention*, 10 VICTIMOLOGY 376, 377–80 (1985).

265. See ROBERT J. SMITH, THE INT’L FEDERATION ON AGEING, CRIME AGAINST THE ELDERLY: IMPLICATIONS FOR POLICYMAKERS AND PRACTITIONERS 18–21 (1979).

266. CAL. PENAL CODE § 368(b)(1) (West 2000 & Supp. 2002).

267. CAL. WELF. & INST. CODE § 15656 (West 2001).

268. CAL. PENAL CODE § 368(c). The California Code defines an elder as a person sixty-five years of age or older, and a “dependent adult” is someone between eighteen and sixty-four years of age “who has physical or mental limitations which restricts his or her ability to carry out normal activities or to protect his or her rights.” *Id.* §§ 368(g), (h).

269. 9 Cal. 4th 193, 886 P.2d 1229, 37 Cal. Rptr. 2d 236 (1994).

270. See *id.* at 194–96, 886 P.2d at 1231–32, 37 Cal. Rptr. 2d at 238–39.

271. *Id.* at 196, 886 P.2d at 1233, 37 Cal. Rptr. 2d at 240.

on the elder or dependent adult.”<sup>272</sup> Section 368 was thus constitutional, but since the evidence did not show defendant had the kind of “‘special relationship’ with the individuals alleged to have directly abused the elder victim that would give rise to a duty on her part to control their conduct, she was improperly charged with a violation of section 368(a).”<sup>273</sup>

California Penal Code section 368(a) declares that “crimes against elders and dependent adults are deserving of special consideration and protection.”<sup>274</sup> The statute increases the penalty for causing physical pain, mental suffering, or willful endangerment of an elder or adult by as much as four years.<sup>275</sup> Other crimes, e.g., false imprisonment, committed against elder or dependent adults also carry enhanced penalties.<sup>276</sup>

Last year, the HHS recognized California Attorney General, Bill Lockyer, for the performance of the state’s elder abuse prosecutorial program against nursing homes.<sup>277</sup> In the last three years, Attorney General Lockyer has expanded the staff of the Bureau of Medi-Cal Fraud and Elder Abuse (BMFEA),<sup>278</sup> which has resulted in quadrupling the number of cases filed.<sup>279</sup>

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272. *Id.* at 194, 886 P.2d at 1231, 37 Cal. Rptr. 2d at 238.

273. *Id.*

274. CAL. PENAL CODE § 368(a) (legislative findings indicate that elders and dependent adults deserve special protection because they may be “confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves.”).

275. *See id.* § 368(b)(1).

276. *See id.* §§ 237(b), 368(f). *But see* *People v. Adams*, 93 Cal. App. 4th 1192, 113 Cal. Rptr. 2d 722 (Ct. App. 2001) (Section 368(b)(3)(A) was applicable only to the crime of elder abuse defined in section 368(b)(1) and could not be read as a general enhancement applicable to any crime committed against an elderly person.).

277. *See* Enforcement Action, *supra* note 220.

278. *See id.* (noting that twenty new prosecutors and investigators have been added since Lockyer took office in 1999).

279. *See id.* One significant case involved a civil and criminal action against Sun Healthcare Group, Inc. The company had 100 citations, including severely dehydrated patients in a San Mateo facility with no air conditioning. This deficiency resulted in two deaths and six patients suffering from serious heat-related conditions during a heat wave in June 2000. Patients suffered severe dehydration, heat exhaustion, and heat stroke. Some patients’ body temperatures rose to over 106 degrees. *See id.*

The settlement agreement of the civil suit included requirements that the company install an adequate air conditioning system in the San Mateo facility,



A number of California counties have instituted special programs to counter crime against the elderly. San Diego County's Elder Abuse Prosecution Unit combines a team of prosecutors, criminal investigators, and a counselor to facilitate prosecutions of elder abuse.<sup>280</sup> The Unit takes special measures to make an elderly crime victim's experience in the criminal justice system less traumatic and burdensome—e.g., transporting victims to and from court appearances, establishing a special “senior waiting room” at the courthouse that has oxygen and wheelchair accommodations.<sup>281</sup> These measures help deter elder mistreatment by ensuring that appropriate prosecutions are successful.

The California Commission on Peace Officer Standards and Training (POST) develops training for California law enforcement agencies to increase awareness of the forms and indicators of elder abuse, evidence collection and case building, and the relationship to other forms of abuse such as family violence.<sup>282</sup> POST certifies minimum standards for law enforcement competency and statewide guidelines to help law enforcement officers become more familiar with domestic violence—including elder domestic violence.<sup>283</sup>

A significant aspect of the intersection between elders and the criminal law is fraud, especially telemarketing fraud, which has a

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comply with applicable state and federal regulations, increase staff training considerably, and report its progress annually to the Attorney General. *See id.* Another case involved the break-up of a fraudulent certified nurse assistant (CNA) testing scheme. *See* Press Release, Office of the Attorney General, Attorney General Lockyer Announces Illegal Scheme to Sell Nurse Assistant Licenses Shut Down by Multi-Agency “Operation Safe Care” (May 16, 2002), available at <http://caag.state.ca.us/newsalerts/2002/02-061.htm> (last visited Oct. 29, 2002). Seventy-eight people were arrested, most were charged with misdemeanors. The two organizers of the scheme were arrested and charged with felony conspiracy. *See id.*

280. *See* Paul J. Phingst, *Helping the Victims of Elder Abuse*, SAN DIEGO UNION-TRIB., May 20, 1998, at B11.

281. *Id.*

282. *See* CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING, LEGISLATIVE TRAINING MANDATES, (2001), at <http://www.post.ca.gov/TRAIN/Legmandates.doc> (last visited Oct. 29, 2002).

283. *See id.* This Web site offers Domestic Violence, Domestic Violence Update, and Elder and Dependant Abuse courses that require certification. These courses incorporate California Penal Code sections 13515, 13519, and 13519(g).

particularly dramatic negative impact on the aged.<sup>284</sup> Other articles in this Symposium develop this topic in great depth. Suffice it to note here that Americans over the age of fifty lose an estimated \$14.8 billion every year to fraudulent telemarketers.<sup>285</sup> The American Association of Retired Persons (AARP) reports that fifty-six percent of the victims of telemarketing fraud are aged fifty or older.<sup>286</sup> According to the FBI, seventy-eight percent of the companies engaged in telemarketing fraud purposefully target seniors in their scams.<sup>287</sup>

## VII. CURRENT LEGAL DEVELOPMENTS AND ISSUES

In this Section, I discuss eight of the most important current legal developments and issues. Given the structure of our conference, I purposefully disregard a host of programmatic, medical, and geriatric questions.

### A. *Criminal Background Checks in Nursing Homes*

A developing response to elder abuse and neglect is mandatory criminal record checks for nursing home staff. A majority of the fifty states now have laws requiring criminal background checks of persons applying for employment as caregivers of older adults.<sup>288</sup>

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284. See Seniors Safety Act of 1999, S. 751, 106th Cong. § 2(a)(7).

285. See *id.*

286. The American Association of Retired Persons, *Facts About Fraudulent Telemarketing*, at <http://www.aarp.org/fraud/1fraud.htm> (last visited Oct. 29, 2002).

287. See *Telemarketing Fraud: Hearings Before the House Judiciary Subcomm. on Crime*, 104th Cong. (1996) (statement of Charles L. Owens, Chief, Financial Crimes Section), available at 1996 WL 193802.

288. See ALASKA STAT. § 18.20.302 (Michie 2000); ARIZ. REV. STAT. ANN. § 36-411 (West Supp. 2001); CAL. HEALTH & SAFETY CODE § 1522(a)(1) (West 2000 & Supp. 2002); CONN. GEN. STAT. ANN. § 19a-491b(c) (West 1997 & Supp. 2002); DEL. CODE ANN. tit. 16, § 1141(c) (Supp. 2000); FLA. STAT. ANN. §§ 400-5572, .619, .071, .4174, 471, 506, 943-0542 (West 2002); GA. CODE ANN. § 31-7-351(a) (Harrison 1998 & Supp. 2001); 225 ILL. COMP. STAT. ANN. 46/1, 5, 10, 15, 25, 30, 35, 50 (West 1998 & Supp. 2000); IND. CODE ANN. § 16-28-13-4 (West 1998 & Supp. 2001); KY. REV. STAT. ANN. §§ 216.787, .789, .793 (Michie 1998 & Supp. 2001); LA. REV. STAT. ANN. §§ 40:1300.52—.54 (West Supp. 2002); MASS. GEN. LAWS ANN. ch. 6, § 172C, E (West Supp. 2002); MINN. STAT. ANN. § 245A.04 Subd. 3 (West 1998 & Supp. 2002); MO. ANN. STAT. §§ 210.909(4), 210.903 (West Supp. 2002); N.J. STAT. ANN. § 26:2H-84(a) (West Supp. 2002); N.M. STAT. ANN. §§ 29-17-2-5

These statutes vary in many particulars. Several states explicitly forbid nursing homes and other facilities from hiring applicants who have a record of criminal convictions.<sup>289</sup> Missouri classifies the hiring of such persons as a misdemeanor.<sup>290</sup> Texas and Pennsylvania also have established a barrier to obtaining employment as a caregiver based on past convictions for designated crimes.<sup>291</sup> Several states mandate fingerprint checks as part of the background investigation.<sup>292</sup> In Massachusetts those providing services for older persons in the home or other community settings must make criminal offender record information available to the public.<sup>293</sup>

Applicants for licenses to operate facilities are also subject to criminal investigation in some states. Current California law makes fingerprinting and background checks of employees mandatory to obtain a license to operate a community care facility.<sup>294</sup> Nursing homes fall within this category.<sup>295</sup> Criminal records must thus be obtained for administrators, supervisors, anyone residing in the

(Michie Supp. 2000); N.C. GEN. STAT. §§ 114-19.3, 131E-265 (2002); OKLA. STAT. ANN. tit. 63, § 1-1950.1-3 (West 1997 & Supp. 2002); 35 PA. CONS. STAT. ANN. §§ 10225.502-508 (West Supp. 2000); R.I. GEN. LAWS § 23-17-34 (2002); S.C. CODE ANN. § 40-35-230(D) (Law. Co-op. Supp. 2001); TENN. CODE ANN. § 71-2-403 (Supp. 2001); TEX. HEALTH & SAFETY CODE ANN. § 250.004(a) (Vernon 2002); UTAH CODE ANN. § 26-21-9.5 (1998 & Supp. 2001); VA. CODE ANN. § 32.1-126.01 (Michie 1997 & Supp. 2000); WASH. REV. CODE ANN. § 74-39A.050(7) (West 2001); WIS. STAT. ANN. § 50.02 (West 1997 & Supp. 2001); WYO. STAT. ANN. § 7-19-201(a) (Michie 1999).

289. See ALASKA STAT. § 18.20.302; ARIZ. REV. STAT. ANN. § 36-411; CAL. HEALTH & SAFETY CODE § 1522(a)(1); DEL. CODE ANN. tit. 16, § 1141(e); N.J. STAT. ANN. § 26:2H-84(b).

290. See MO. ANN. STAT. § 660.317(6) (West 2000).

291. See 35 PA. CONST. STAT. ANN. § 10225.503; TEX. HEALTH & SAFETY CODE ANN. § 250.003 (Vernon 2001).

292. See, e.g., ALASKA STAT. § 18.20.302.

293. See MASS. GEN. LAWS ANN. ch. 6, § 172C (“[A]ny individual who will provide care, treatment, education, training, transportation, delivery of meals, instruction, counseling, supervision, recreation or other services in a home or community[-]based setting for an elderly person . . .”).

294. See CAL. HEALTH & SAFETY CODE ANN. § 1522(a); see also *id.* § 1502 (stating that nursing homes fall within the definition of community care facilities).

295. See *id.* § 1502(a)(1). Like California, Massachusetts requires background checks for volunteers, as well as paid employees. See MASS. GEN. LAWS ANN. ch. 6, § 172C. Other states do not include volunteers under the statutory rubric and some explicitly exclude volunteers from the background check requirement. See VA. CODE ANN. § 32.1-126.01A (Michie 2001).

facility who is not a client, and any employee or volunteer “who has contact with the clients.”<sup>296</sup> These individuals must submit two sets of fingerprints: one for the State Department of Social Services to search police records and one to the Department of Justice to search the criminal records of the FBI.<sup>297</sup> The government agencies must notify the facility of any criminal record information within fourteen days of receiving the fingerprints.<sup>298</sup> Once a criminal background clearance has been obtained, it may be transferred from one facility to another.<sup>299</sup> Failure to submit fingerprints or to obtain a clearance by transfer results in a \$100 penalty against the facility per violation.<sup>300</sup> Individuals who have been convicted of specified crimes shall be immediately terminated,<sup>301</sup> unless the Department grants an exemption.<sup>302</sup> Exemptions may be issued by the Department of Social Services acting on its own,<sup>303</sup> or at the request of the facility<sup>304</sup> or employee<sup>305</sup> if it determines that the person is of good character.<sup>306</sup> Individuals convicted of other crimes, except

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296. CAL. HEALTH & SAFETY CODE § 1522(b)(1).

297. *See id.* §§ 1522(a)(1), (a)(4)(E).

298. *See id.* § 1522(c)(2).

299. *See id.* § 1522(h)(1).

300. *See id.* § 1522(c)(1). The facility still must submit the fingerprints. *See id.*

301. Section 1522(c)(3) of the California Health and Safety Code provides that if a person:

has been convicted of, or is awaiting trial for, a sex offense against a minor, or has been convicted for an offense specified in Section 243.4 [sexual battery], 273a [child abuse and endangerment], 273d [corporal punishment or injury of a child], 273g [immoral practices in presence of children], or 368 [elder abuse, including theft or embezzlement of property] of the Penal Code, or a felony, the State Department of Social Service shall notify the licensee to act immediately to terminate the person’s employment, remove the person from the community care facility, or bar the person from entering the community care facility.

*Id.* § 1522(c)(3).

302. *See id.*

303. *See id.* § 1522(c)(4).

304. *See id.* § 1522(c)(3).

305. *See id.* § 1522(c)(5).

306. *See id.* § 1522(g)(1). Factors considered in the Department’s character determination are “the age, seriousness, and frequency of the conviction or convictions.” *Id.* § 1522(c)(4).

minor traffic violations, may be permitted to work while an exemption is being considered.<sup>307</sup>

California's provision granting a state agency power to permit exemptions is not unique. Illinois also requires criminal background checks and stipulates a process for waiver that would allow an applicant to be hired despite a conviction.<sup>308</sup> Likewise, New Jersey allows disqualified employees to petition the Commissioner of Health & Senior Services for a hearing to establish either that the record was inaccurate or that the employee is rehabilitated.<sup>309</sup> These state exceptions are made via state agency review, rather than employer determinations.<sup>310</sup>

Mandatory criminal background checks raise issues of potential employees' rights.<sup>311</sup> A Pennsylvania appellate court has recently ruled that the state's prohibition of individuals with certain criminal convictions from nursing home employment violates the state constitution.<sup>312</sup> The court emphasized that the statute bars these individuals without allowing for case-by-case determinations.<sup>313</sup> Because some excluded employees may make very good caregivers, "no rational relationship exists between the classification imposed upon Petitioners and a legitimate governmental purpose."<sup>314</sup> The dissent noted the importance of the government's interest in

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307. See *id.* § 1522(c)(3).

308. See 225 ILL. COMP. STAT. ANN. 46/25 (West Supp. 2002).

309. See N.J. STAT. ANN. § 26:2H-84(c).

310. In contrast, Georgia allows nursing homes fairly wide discretionary power in hiring employees with criminal records. See GA. CODE ANN. § 31-7-351(a). Georgia does require criminal background checks and provides that "[a] nursing home shall not employ a person with an unsatisfactory [criminal record] determination." *Id.* However, Georgia does not define what penal convictions make employees ineligible, presumably leaving that determination to the employer. See also Gail Chirmoff Conway, "There Oughtta Be a Law": A Survey of Legislative Responses to Elder Abuse, 35 CLEARINGHOUSE REV. 41, 45 (2001) (discussing the Georgia statute which allows nursing homes to hire persons with criminal records).

311. See Danielle N. Rodier, *Law Protecting Elderly, Mentally Challenged Ruled Unconstitutional*, 24 PA. L. WKLY. 1417 (2001).

312. See *Nixon v. Commonwealth*, 789 A.2d 376 (Pa. Commw. Ct. 2001). The state constitution provides citizens with the right to engage in any common life occupation, a right not found in the U.S. Constitution. See also Rodier, *supra* note 311 (discussing the historical and legal background of *Nixon* and its future implications).

313. See *Nixon*, 789 A.2d. at 378.

314. *Id.* at 382.

protecting older citizens<sup>315</sup> and asserted that an imperfect law is not necessarily an unconstitutional one.<sup>316</sup> Nevertheless, this case may motivate other jurisdictions to include exceptions in their mandatory criminal background checks similar to California.

*B. "Granny Cams" in Nursing Homes*

Given the condition of many nursing homes<sup>317</sup> and studies reporting large and increasing amounts of elder abuse and neglect in these institutions,<sup>318</sup> it is not surprising that many have advocated the deployment of video cameras to protect residents. Proponents argue that a number of other employees have cameras in their working environment,<sup>319</sup> and that cameras can deter untoward incidents and preserve a record of what transpired in these institutions.<sup>320</sup> Cameras can aid in prevention and detection of elder abuse, a crime that is seriously underreported.<sup>321</sup> Moreover, only residents that request or consent to monitoring will have such devices in their rooms.

Opponents of video cameras and other electronic monitoring in nursing homes warn that the presence of such devices will disturb the trusting relationship between nursing staff and residents.<sup>322</sup> Nursing home administrators claim that neither residents nor employees want

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315. *See id.* at 383–84 (Flaherty, J., dissenting).

316. *See id.* at 385.

317. *See supra* notes 241–252 and accompanying text.

318. In a July 2001 report on nursing homes nationwide, the House Committee on Government Reform drew this conclusion:

Abuse of nursing home residents is a widespread and significant problem. In the last two years, nearly one out of every three nursing homes in the United States has been cited for violating federal standards established to prevent abuse. In over 1600 of the nursing homes cited, the violations caused actual harm to residents or placed residents in immediate jeopardy of death or serious injury.

Tom Zucco, *The Sleepless Eye*, ST. PETERSBURG TIMES, Apr. 18, 2002.

319. Notably bank employees, convenience store clerks, airport workers, and many others. *See id.*

320. *See id.*

321. A California legislative committee hearing noted that as much as eighty percent of all elder abuse goes unreported. *See Elder and Dependent Adult Abuse: Training to Identify Financial Abuse: Hearing on A.B. 109 Before the Senate Judiciary Comm.*, Cal. Assembly 109, 2001–2002 Reg. Sess. (Cal. 2001).

322. *See* Charles H. Roadman II, *Surveillance Cameras in Resident Rooms*, AHCA News Release, (Aug. 1, 2000), available at <http://www.ahca.org/brief/080100.htm> (last visited Oct. 29, 2002).

to be continuously filmed.<sup>323</sup> Insurers fear additional liability risks and lawsuits.<sup>324</sup>

It is unclear whether legislation is needed to operate such cameras, at least where the resident is not sharing a room with another person. Texas recently passed a law that requires nursing homes and related facilities to allow residents to install electronic monitoring devices in their rooms.<sup>325</sup> The monitoring is optional; either the resident or the resident's guardian must request the monitoring.<sup>326</sup> Likewise, the consent of any other residents residing in the same room is required.<sup>327</sup> The requesting resident or guardian is responsible for the cost to install and maintain the device<sup>328</sup> and must post a conspicuous notice at the entrance of the room.<sup>329</sup> Additionally, the institution must place a sign outside the facility stating that some rooms may be monitored.<sup>330</sup> The statute requires institutions to make reasonable accommodation for the monitoring,<sup>331</sup> but does not require moving the resident to a different room.<sup>332</sup> Institutions may not avoid compliance by refusing to admit or remove a resident because of their request to install monitoring devices.<sup>333</sup>

Though not the only state to consider such a measure,<sup>334</sup> Texas is the first to enact one.<sup>335</sup> A 2002 Maryland House bill would allow

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323. See Jessica Rappaport, 'Granny Cams' Under Surveillance, Tech TV (Apr. 15, 2002) at <http://www.techtv.com/news/culture/story/0,24195,3379593,00.htm> (last visited Oct. 29, 2002).

324. See Roadman, *supra* note 322.

325. See TEX. HEALTH & SAFETY CODE ANN. § 242.847(a) (Vernon 2001 & Supp. 2002).

326. See *id.* § 242.846(a).

327. See *id.* § 242.846(d).

328. See *id.* § 242.847(f) (electricity excepted).

329. See *id.* § 242.847(b).

330. See *id.* § 242.847(c).

331. See *id.* § 242.847(e).

332. See *id.* § 242.847(i).

333. See *id.* § 242.847(d).

334. See Jennifer Marciano, Note, *Mandatory Criminal Background Checks of Those Caring for Elders: Preventing and Eliminating Abuse in Nursing Homes*, 9 ELDER L.J. 203, 205 n.8 (2001).

335. See TEX. HEALTH & SAFETY CODE ANN. § 242.847(a).

nursing home residents to have video cameras in their rooms.<sup>336</sup> However, a similar bill died in committee last session and the current legislation seems similarly ill-fated.<sup>337</sup> Florida legislators have also been unsuccessful in enacting legislation on this issue.<sup>338</sup>

### *C. Expedited Legal Process for Older Persons*

Several states have enacted statutes to smooth the road to the courts and the legal process for older persons. A growing number of states, including California, allow for expedited trials when an elderly person is a witness or victim in a case.<sup>339</sup> These statutes are motivated by the unfortunate fact that elderly adults “are more vulnerable to and disproportionately damaged by crime.”<sup>340</sup> Expedited trials also increase the likelihood that an elderly person will be able to testify at trial, thereby avoiding evidentiary problems.<sup>341</sup> Like other legislation affecting elders, there is considerable variation among the states.

California law declares that criminal actions, in which a witness or victim is at least seventy years old or a dependent adult, shall be given precedence over other criminal trials.<sup>342</sup> The statute requires that trial shall begin within thirty days of arraignment, unless the

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336. *See Vera's Law: Hearing on H.B. 880 Before the House Comm. on Env'tl. Matters*, 416th Leg., 1st Reg. Sess. (Md. 2002), available at <http://mlis.state.md.us/2002rs/billfile/HB0880.htm> (last visited Oct. 29, 2002).

337. The 2002 bill was re-assigned to the Environmental Matters Committee, the same committee that considered the previous bill. In March the bill received an unfavorable report from the committee. *See id.*

338. *See S. 1714*, 104th Leg., 1st Reg. Sess. (Fla. 2002), available at <http://www.leg.state.fl.us/session/index> (last visited Oct. 4, 2002) (proposing a pilot program to allow video cameras in two nursing homes in the state). Florida's prior legislative session considered legislation requiring all nursing homes to allow residents to install such devices. The 2002 pilot program bill passed in the Senate, but subsequently died in the Committee on Rules, Ethics, and Elections. *See id.*

339. *See Conway*, *supra* note 310, App. C at 50 (listing twelve state statutes permitting accelerated trials).

340. COLO. REV. STAT. § 18-6.5-101 (2001).

341. *See* N.Y. C.P.L.R. § C3403:5 (McKinney Supp. 2002).

342. *See* CAL. PENAL CODE § 1048(b) (West Supp. 2002). Other cases given precedence include cases where a minor is a victim or when the alleged offense is forcible rape, incest, or other sexual crimes. *See id.*



court finds that a continuance is necessary.<sup>343</sup> Colorado's preferential trial date statute is similar to California's<sup>344</sup> but differs in that it applies only to elderly victims and sets the age requirement at sixty.<sup>345</sup> Some states assist older victims by abrogating traditional testimonial privileges, which might permit a physician not to testify at trial regarding details of a patient's condition or treatment.<sup>346</sup> Arkansas eliminates privileges in cases involving "abuse, sexual abuse, or neglect of an endangered or impaired adult."<sup>347</sup> In the District of Columbia, judges may waive privileges in cases involving persons who are "alleged or determined to be in need of protective services."<sup>348</sup>

Several states expedite civil cases upon the motion of an elderly party for a speedier trial.<sup>349</sup> These statutes are not limited to cases of personal injury, health issues, or financial exploitation. One elderly landowner successfully invoked this preferential New York trial rule to defend against a prescriptive easement.<sup>350</sup> In New York all that is needed for the court to grant this landowner's motion was proof of a birthdate.<sup>351</sup> Other states add more stringent conditions. Washington, for example, requires that the individual must be over

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343. *See id.* However, section 1048(c) states, "[n]othing in this section shall be deemed to provide a statutory right to a trial within 30 days." CAL. PENAL CODE § 1048(c).

344. *See* COLO. REV. STAT. § 18-6.5-105. "All cases involving the commission of a crime against an at-risk adult or an at-risk juvenile shall take precedence before the court, and the court shall hear these cases as soon as possible after they are filed." *Id.*

345. "'At-risk adult' means any person who is sixty years of age or older . . ." *Id.* § 18-6.5-102(i). Other states specify an age of sixty-five. *See* MICH. COMP. LAWS § 780.759(c) (2001); R.I. GEN. LAWS § 9-2-18 (1997).

346. *See, e.g.,* D.C. CODE ANN. § 6-2511 (1995) (providing that a judge may waive a privilege).

347. ARK. CODE ANN. § 5-28-104 (Michie 1997).

348. D.C. CODE ANN. § 6-2511. A few states have created hearsay exceptions for frail elders so that they need not testify in person at trial. *See, e.g.,* CAL. EVID. CODE § 1380 (West Supp. 2002) (allowing for unavailability of declarant if based on elder who "suffers from the infirmities of aging"). However, the Florida Supreme Court struck down Florida's attempt to create such an exception as violating the defendant's right to confrontation. *See* Connor v. State, 748 So. 2d 950, 960 (Fla. 1999); *see also* FLA. STAT. ANN. § 90.803(24) (West 1999).

349. *See, e.g.,* N.Y. C.P.L.R. § 3403(b); R.I. GEN. LAWS § 9-2-18.

350. *See* Lillianfeld v. Lichtenstein, 694 N.Y.S.2d 600, 602 (Sup. Ct. 1999).

351. The defendant in this case simply presented a birth certificate. *See id.*

seventy years old, frail, or terminally ill,<sup>352</sup> and produce additional evidence.<sup>353</sup> Nevada requires that the moving party have a “substantial interest in the case as a whole”<sup>354</sup> and produce “clear and convincing medical evidence” that the party “suffers from an illness or condition which raises substantial medical doubt that the party will survive for more than 6 months.”<sup>355</sup> Although most state statutes on this issue speak in relative terms of precedence, Nevada’s statute requires a hearing to be held within 120 days of the motion and the trial to be held within 120 days of the hearing.<sup>356</sup>

#### *D. Family Violence in Later Life*

There is little hard evidence about the extent of domestic violence and sexual assault in later life. Many believe, however, that excluding self-neglect cases, much elder abuse in non-institutional settings is actually family violence.<sup>357</sup> The 1998 National Elder Abuse Incidence Study (NEAIS), based on 1996 APS and sentinel study statistics, indicates that the largest categories of perpetrators in substantiated incidents of elder abuse are adult children (47.3%) and spouses (19.3%).<sup>358</sup> This pattern applied for the physical, emotional/psychological, and neglect categories of elder abuse, but not for financial/material exploitation.

Many of these cases involve long-term relationships, new relationships following a death or divorce with mistreatment now occurring, and long-term relationships with late onset of abuse

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352. See WASH. REV. CODE ANN. § 4.44.025 (West Supp. 2002).

353. The state practice guide suggests that the declaration in support of motion should contain the party’s physician, the specific reason an accelerated trial date is necessary, and a statement of why the opposing party will not be prejudiced by an earlier trial date. See 10 DAVID E. BRESKIN, WASHINGTON PRACTICE SERIES: CIVIL PROCEDURE FORMS AND COMMENTARY § 40.42 (3d ed. 2000).

354. NEV. REV. STAT. ANN. 16.025(1)(1998).

355. *Id.* 16.025(2).

356. See *id.* 16.025(3).

357. See generally Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later Life*, 8 ELDER L.J. 297, 299–300 (2000) (“[f]amily members or caregivers perpetrate the majority of elder abuse”).

358. See National Elder Abuse Incidence Study, pt. 4.3 *Characteristics of Elderly Victims, Reported to APS*, available at <http://www.aoa.gov/abuse/report/GFindings-02.htm> (last visited Oct. 29, 2002).

among others.<sup>359</sup> Some mistreatment cases clearly invite social service responses, e.g., abusers with limited capacity. Legal interventions may take second place to other professional services in such cases.

In California, the Domestic Violence Protection Act (DVPA) accords protection against assault and battery;<sup>360</sup> however, psychological abuse or financial exploitation and neglect are not included.<sup>361</sup> Domestic violence is abuse perpetrated against “a spouse, former spouse, cohabitant, former cohabitant, or a person with whom the suspect has had a child . . . [or] has had a dating or engagement relationship.”<sup>362</sup> Age is not specifically mentioned in the Act.

A mistreated senior may obtain an emergency or regular Order of Protection if there is an “immediate and present danger of domestic violence.”<sup>363</sup> Law enforcement officers who have reasonable grounds to believe an immediate danger of abuse exists may secure an ex parte emergency protective order.<sup>364</sup> Although the elderly are not explicitly included in California’s mandatory domestic violence arrest policy,<sup>365</sup> they fit easily in the statutory language.

In many situations, removal of the abuser from the elder’s home presents immediate problems of care. The elder may be dependent upon the abuser. In weighing the options, the elder knows the choice is often between an abusive situation with the people he or she knows and often loves, or an institution with strangers. Moreover, beyond care and shelter needs, other issues exist for older victims of domestic violence, such as lack of income, loyalty to family, and competency determinations. Most existing domestic violence

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359. See Brandl & Meuer, *supra* note 357, at 299–300.

360. See CAL. PENAL CODE § 13700 (West 2000 & Supp. 2002).

361. See *id.* § 13700(a).

362. *Id.* § 13700(b). “Cohabitant” in the DVPA refers to “a person who regularly resides in the household.” CAL. FAM. CODE § 6209 (West 1994).

363. CAL. FAM. CODE § 6250 (West 1994 & Supp. 2002).

364. See *id.* § 6383.

365. See CAL. PENAL CODE § 13700 (promoting the goal of protecting all persons from domestic violence).

programs and shelters have difficulty coping with the special needs of the elderly.<sup>366</sup>

### *E. Retaliatory Discharges*

Absent collective bargaining agreements or civil service rules,<sup>367</sup> which provide a modicum of due process, American workers, including those in the health care industry, are hired as employees-at-will.<sup>368</sup> Employment is for an indefinite time and may be terminated by either party for any reason, or for no reason at all.<sup>369</sup> This ancient employment law doctrine has been altered by “whistleblower” statutes that provide reinstatement and back pay to discharged employees who have reported, or testified at proceedings against employer violations of environmental, safety, or other standards.<sup>370</sup> All but a few states have whistleblower protection laws, but great variability exists between these enactments. About two-thirds of

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366. See Denis Hamill, *Skip the Candy—Focus on the Woes*, N.Y. DAILY NEWS, May 9, 1999, at 6.

367. See, e.g., 5 U.S.C. § 2301(b) (2000).

368. The employment-at-will rule has been traced to an 1877 treatise on master-servant law. See H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (R.H. Helmholtz & Bernard D. Reams, Jr. eds., 1981) (1877).

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

*Id.*

369. See, e.g., *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 327, 8 P.3d 1089, 1095, 100 Cal. Rptr. 2d 352, 358 (2000) (“an employment is at will, and thus allows either party to terminate for *any or no reason*”).

370. Federal statutes include: Department of Defense Authorization Act, 10 U.S.C. § 2409(a) (2000); Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2622 (2000); Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3608 (2000); Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 815 (2000); Clean Water Act, 33 U.S.C. § 1367 (2000); Energy Reorganization Act of 1974, 42 U.S.C. § 585(a) (2000); Clean Air Act, 42 U.S.C. § 7622 (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610(a) (1994); see also *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 482 (3d Cir. 1993), *cert. denied*, 510 U.S. 964 (1993) (holding that internal whistle-blowing is protected).

these statutes protect only public sector employees and employees of state contractors.<sup>371</sup>

The scope of protection under these laws varies from state to state. Some require employees to report their concerns internally first and to give employers a reasonable time to correct alleged improprieties.<sup>372</sup> Statutes covering private sector employees are often limited in their scope.<sup>373</sup> Workers are protected from retaliation for disclosing or threatening to disclose violations of laws, rules, or regulations to any appropriate government agency.<sup>374</sup> Generally, employee complaints to public authorities will be protected if made in good faith and with reasonable belief in their truth, even if the factual assertions later prove to be incorrect.<sup>375</sup> California requires a sworn statement as to the truth or believed truth of the matters reported.<sup>376</sup>

New York recently amended its state labor law to include whistleblower protection specifically for health care employees.<sup>377</sup>

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371. *See, e.g.*, ALA. CODE §§ 36-26A-1 — -7 (2001); ALASKA STAT. §§ 39.90.100 — .150 (Michie 2000); ARIZ. REV. STAT. ANN. §§ 38-531 — -532 (West 2001); COLO. REV. STAT. §§ 24-50.5-101 — -107, 24-114-101 — -103 (2001); DEL. CODE ANN. tit. 29, § 5115 (1997); D.C. CODE ANN. §§ 1.616.11 — .19 (1991 & Supp. 1999); GA. CODE ANN. § 45-1-4 (2002); IDAHO CODE §§ 6-2102 — -2109 (Michie 1996 & Supp. 2002); IND. CODE ANN. § 4-15-10-4 (Michie 1996); IOWA CODE ANN. § 70A.29 (West 1999); KAN. STAT. ANN. § 75-2973 (1997); KY. REV. STAT. ANN. § 61.102 (Michie 1993 & Supp. 2001); MASS. GEN. LAWS ch. 149, § 185 (2002); MISS. CODE ANN. §§ 25-9-171 — -177 (1999); MO. ANN. STAT. § 105.055 (West Supp. 2002); OR. REV. STAT. §§ 659.505 — .550 (1999); S.C. CODE ANN. §§ 8-27-10 — -50 (Law Co-op. 2001); S.D. CODIFIED LAWS § 3-6A-52 (Michie 1994); TENN. CODE ANN. §§ 49-50-1401 — -1411 (1996 & Supp. 2001); UTAH CODE ANN. §§ 67-21-1 — -9 (2000); WASH. REV. CODE ANN. §§ 42.40.010 — .900 (West 2000); W. VA. CODE ANN. §§ 6C-1-1 — -8 (Michie 2000 & Supp. 2001); WIS. STAT. ANN. §§ 230.80 — .89 (West 2001).

372. *See, e.g.*, OHIO REV. CODE ANN. §§ 4113.52 — .99 (Anderson 2001 & Supp. 2001) (detailing the steps employees should take to report violations of law).

373. *See, e.g.*, FLA. STAT. ANN. §§ 448.101 — .104 (West 2002) (describing whistleblower protection for private sector employees).

374. *See id.*

375. *See, e.g.*, *Lastor v. City of Hearne*, 810 S.W.2d 742 (Tex. App. 1991).

376. *See, e.g.*, CAL. GOV'T CODE § 8547.8(a) (Deering Supp. 2002).

377. *See* A.B. 9454, 2001–2002 Reg. Sess. (N.Y. 2001), available at <http://assembly.state.ny.us/leg>. A.B. 9454 relates to Labor Law section 740(4). The employee must first bring the improper quality of patient/resident care to a supervisor's attention and afford the employer a "reasonable opportunity" to

The statute prohibits retaliatory personnel actions by certain health care employers, including nursing homes, against health care employees who in good faith disclose, or threaten to disclose, to a supervisor or public body, incidents that the worker reasonably believes constitute improper care.<sup>378</sup> In addition, it protects employees who refuse to participate in any activity, policy, or practice of the employer that the employee believes constitutes improper care.<sup>379</sup>

The EADACPA also contains a provision forbidding retaliatory actions by long-term care facilities against those who report elder abuse.<sup>380</sup> Unlike the generic whistleblower statute that protects employees who report any illegal activity,<sup>381</sup> the EADACPA protects residents, as well as employees, who report elder abuse.<sup>382</sup> Expelling a resident within 180 days of reporting a violation<sup>383</sup> or terminating an employee within 120 days of making a report raises a rebuttable presumption that the action is retaliatory.<sup>384</sup> Any facility that discriminates against an individual who reports abuse may be fined up to \$10,000.<sup>385</sup>

In addition to statutory protection, over the past two decades state courts have produced a body of doctrine that permits terminated workers to bring “wrongful discharge” actions for reinstatement or damages. While these suits are often based on traditional common

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correct any problems before seeking statutory protection against retaliation. *See id.* The bill reduces some of the barriers of going to court under existing whistleblower laws. For example, the bill allows reasonable belief of a violation rather than the actual knowledge standard in current law. *See id.* Courts may assess a civil penalty up to \$10,000 against employers who act in bad faith. *See id.* Funds collected will be deposited in the “Improving Quality of Patient Care Fund” created by this new law. *See id.*

378. *See id.*

379. *See id.*

380. *See* CAL. WELF. & INST. CODE § 15601 (West 2001).

381. “No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.” CAL. LAB. CODE § 1102.5(b) (West 1989).

382. *See, e.g.,* CAL. WELF. & INST. CODE § 9715(b) (West 1998) (Mello-Granlund Older Californians Act).

383. *See* CAL. HEALTH & SAFETY CODE § 1432(b) (West 2000).

384. *See id.* § 1432(c).

385. *See id.* § 1432(a).

law torts<sup>386</sup> or violations of anti-discrimination laws,<sup>387</sup> wrongful discharge claims can also be premised on several other theories—e.g., claims that the firing contravened “public policy,” breached an “implied contract,” or violated an “implied covenant of good faith and fair dealing.”<sup>388</sup>

All states except Alabama,<sup>389</sup> Florida,<sup>390</sup> Georgia,<sup>391</sup> Louisiana,<sup>392</sup> New York,<sup>393</sup> and Rhode Island<sup>394</sup> recognize some version of the public policy exception to the employment-at-will rule. Public policy protects employees (1) refusing to perform unlawful acts,<sup>395</sup> (2) reporting illegal activity (whistle-blowing),<sup>396</sup> (3) exercising legal rights,<sup>397</sup> and (4) performing public duties.<sup>398</sup> In an important decision, *Foley v. Interactive Data Corp.*,<sup>399</sup> the

386. *See, e.g.*, *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 496, 468 P.2d 216, 217, 86 Cal. Rptr. 88, 89 (1970) (intentional infliction of emotional distress); *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 316 (Mass. 1976) (intentional infliction of emotional distress).

387. *See generally* *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1364 (3d Cir. 1979) (alleging violation of section 301 of the Labor Management Relations Act and Pennsylvania public policy); *Shaffer v. Nat'l Can Corp.*, 565 F. Supp. 909, 909–10 (E.D. Pa. 1983) (asserting violations of the Pennsylvania Human Relations Act and claims of intentional infliction of emotional distress); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 823 (E.D.N.Y. 1980) (involving the Employee Retirement Income Security Act (ERISA) as well as common law torts); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 550 (N.H. 1974) (alleging breach of oral contract).

388. *Savodnik*, 488 F. Supp. at 824–26.

389. *See, e.g.*, *Williams v. Killough*, 474 So. 2d 680, 681 (Ala. 1985).

390. *See, e.g.*, *Scott v. Otis Elevator Co.*, 524 So. 2d 642, 642–43 (Fla. 1988).

391. *See, e.g.*, *Borden v. Johnson*, 395 S.E.2d 628, 630 (Ga. Ct. App. 1990).

392. *See, e.g.*, *Sampson v. Wendy's Mgmt., Inc.*, 593 So. 2d 336, 338 (La. 1992).

393. *See, e.g.*, *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89–90 (N.Y. 1983).

394. *See, e.g.*, *Pacheo v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) (*per curiam*).

395. *See, e.g.*, *Petermann v. Int'l Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (Ct. App. 1959).

396. *See, e.g.*, *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 178 (Pa. 1974).

397. *See, e.g.*, *Barns v. Workers' Comp. Appeals Bd.*, 216 Cal. App. 3d 524, 537, 266 Cal. Rptr. 503, 511–12 (Ct. App. 1989).

398. *See, e.g.*, *Wiskotoni v. Mich. Nat'l Bank-West*, 716 F.2d 378, 383 (6th Cir. 1983).

399. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); *see also* *Stevenson v. Superior Court*, 16 Cal. 4th 880, 894–98, 941 P.2d 1157, 1165–

Supreme Court of California stated that the policy on which a claim for discharge in violation of public policy is based must be “fundamental,” “substantial,” and “firmly established” at the time of the discharge, and it must involve a matter that affects society at large rather than a purely personal or proprietary interest of the employee or the employer.<sup>400</sup>

In the health care context, discharged employees have brought numerous cases alleging violation of public policy. An illustrative recent example is *Hausman v. St. Croix Care Center*.<sup>401</sup> The health care center fired its nurses after they reported suspected abuse of patients to a state ombudsman, as mandated by state law.<sup>402</sup> The Wisconsin Supreme Court found the discharges unlawful. “[P]ublic policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare.”<sup>403</sup>

In *McQuary v. Bel Air Convalescent Home, Inc.*,<sup>404</sup> a director of nursing alleged she was fired because she had threatened to report an instance of patient abuse to the health division.<sup>405</sup> The Oregon Appellate Court held that plaintiff stated a cause of action for wrongful discharge and that she only needed to prove that she had a good faith belief that abuse had occurred, rather than proof that abuse had actually occurred.<sup>406</sup> A well-known California case, *Maxwell v. Beverly Enterprises-California, Inc.*,<sup>407</sup> affirmed a jury verdict in favor of a social services director at a nursing home who was terminated in violation of public policy and the whistleblower

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67, 66 Cal. Rptr. 2d 888, 895–97 (1997) (setting out a four-part test based on *Foley*).

400. *Foley*, 47 Cal. 3d at 670–71, 765 P.2d at 380, 254 Cal. Rptr. at 218.

401. 571 N.W.2d 393 (Wis. 1997).

402. *See id.* at 395.

403. *Id.* at 397 (citations omitted).

404. 684 P.2d 21, 24 (Or. Ct. App. 1984).

405. *See id.* at 21.

406. *See id.* at 22.

407. 64 Cal. App. 4th 231, 962 P.2d 858, 75 Cal. Rptr. 2d 222 (Ct. App. 1998), *depublished*, 78 Cal. Rptr. 2d 523 (1998).



statute.<sup>408</sup> The court also awarded punitive damages.<sup>409</sup> Numerous recent cases have followed these patterns.<sup>410</sup>

### F. Behavior-Based Inheritance

The United States Supreme Court has never held the ability to devise property to be a federally protected constitutional right. Government has “broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause.”<sup>411</sup> Because the states have generally been loathe to impose restrictions upon testamentary freedom, behavior of the beneficiary toward the deceased is rarely a factor in determining the enforceability of a will, so long as the will was validly executed.<sup>412</sup> If no will exists, state intestate succession statutes determine the distribution of property.<sup>413</sup>

Courts and legislatures have, however, carved some exceptions to normal distribution of property upon death by (1) creating forced heirships aiding persons not satisfactorily provided for in a testamentary document,<sup>414</sup> and (2) extinguishing the inheritance

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408. *See id.* at 240, 75 Cal. Rptr. 2d at 232.

409. *See id.* at 233, 75 Cal. Rptr. 2d at 231.

410. *See, e.g.,* Roulston v. Tendercare, Inc., 608 N.W.2d 525 (Mich. Ct. App. 2000) (Social Services Director presented sufficient evidence to raise triable issue of fact with allegations that termination stemmed from reporting alleged abuse to state authorities.); Denton v. Silver Stream Nursing & Rehab. Ctr., 739 A.2d 571 (Pa. Super. Ct. 1999) (Director of Nursing stated a cause of action for wrongful discharge under state whistleblower laws when she reported to HHS that her employer was stealing patient funds.); Goodman v. Page, 984 S.W.2d 299 (Tex. Ct. App. 1998) (punitive and compensatory damages recovered against group home for discharging plaintiff after she filed report with her supervisor regarding allegations of abuse in group homes).

411. *Hodel v. Irving*, 481 U.S. 704, 717 (1987).

412. *See* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS & ESTATES § 7.3, at 283 (2d ed. 2001). Courts will refuse to probate a will if it was fraudulently made or if undue influence or duress was exercised upon the testator in its creation. *See id.* § 7.3, at 281–82. An exception to the ability to direct where one’s property goes after death, however, has been created where the will lacks social utility, such as an attempt to commit waste or destruction of the property. *See id.* § 3.10, at 168.

413. *See id.* § 2.1, at 42.

414. *See, e.g., id.* § 2.1, at 43–45. Most states have determined that certain responsibilities or relationships that the deceased had with others in life should not be disregarded after death. Virtually every state, for example, protects

rights of persons deemed to be “unworthy heirs.”<sup>415</sup> The latter codifies the common law principle that individuals should not benefit from their own evil.<sup>416</sup> In 1886 in an analogous context, the United States Supreme Court held that “it would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken.”<sup>417</sup> Another “unworthy heir” scenario is used by some jurisdictions to penalize parents who abandoned their children during the age of minority by preventing the parents from inheriting when the children die.<sup>418</sup> Connecticut, for example, bars a parent from inheriting from a deceased child if the parent abandoned the child as a minor and continued the abandonment until the child passed

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surviving spouses, especially spouses still raising children, from accidental or intentional disinheritance. *See id.*

415. The best-known example is a “slayer statute,” which extinguishes inheritance rights of a killer in the estate of a victim. *See id.* § 2.7, at 68–69.

416. *See* Brian W. Underdahl, Note, *Creating a New Public Policy in Estate of O’Keefe: Judicial Legislation Using a Slayer Statute in a Novel Way*, 44 S.D. L. REV. 828, 835 (1999).

417. *N.Y. Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886). The Uniform Probate Code, adopted by a majority of states, codifies this exception:

[A]n individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent’s estate, including an intestate share, an elective share, an omitted spouse’s or child’s share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent’s intestate estate passes as if the killer disclaimed his [or her] intestate share.

UNIF. PROBATE CODE § 2-803(b) (amended 1997), 8 U.L.A. 211 (1998 & Supp. 2002).

418. *See* MCGOVERN & KURTZ, *supra* note 412, § 2.9 at 89; *see also* Alison M. Stemler, Note, *Parents Who Abandon or Fail to Support Their Children and Apportionment of Wrongful Death Damages*, 27 J. FAM. L. 871 (1989). *See generally* Paula A. Monopoli, “Deadbeat Dads”: *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257 (1994) (discussing the costs and benefits of a behavior-based model of intestate succession). Some states ban recovery by parents who have abandoned or failed to support their children explicitly, but many others achieve the same goal by compensating parents based on their losses, which are not easily demonstrated by parents who have abandoned their children. *See id.* at 265–66. The first state to enact a law explicitly denying a parent the right to inherit was North Carolina in 1927. *See id.* at 267. Other states and territories that have enacted similar laws include Connecticut, Montana, New York, North Dakota, Ohio, Pennsylvania, Virginia, Puerto Rico, and the Virgin Islands. *See id.*

away.<sup>419</sup> Some states disqualify a spouse from inheritance if the spouse abandoned or refused to support the decedent.<sup>420</sup>

Adult children who have maltreated their indigent parents could also be viewed as unworthy heirs. Where one or more of the children have not provided support and care, or abused parents, inheritance rights should be determined in accordance with the conduct of the heirs and claimants.<sup>421</sup> This would add a financial incentive to existing social duties governing the relationship between adult children and their elderly parents.

California is the only state to have moved in this direction. California Probate Code section 259, effective January 1, 1999,<sup>422</sup>

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419. For example, see CONN. GEN. STAT. § 45a-439 (1999), which provides: Distribution when there are no children or representatives of them.

(a)(1) If there are no children or any legal representatives of them, then, after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the parent or parents of the intestate, provided no parent who has abandoned a minor child and continued such abandonment until the time of death of such child, shall be entitled to share in the estate of such child or be deemed a parent for the purposes of subdivisions (2) to (4), inclusive, of this subsection.

*Id.*

420. See, e.g., KY. REV. STAT. ANN. § 392.090 (Michie 1999); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 1999); VA. CODE ANN. § 64.1-16.3 (Michie 1995).

421. See Kymberleigh N. Korpus, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 532, 568-69 (2001).

422. See CAL. PROB. CODE § 259 (West 1999 & Supp. 2002). The statute reads:

(a) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) where all of the following apply:

(1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult.

(2) The person is found to have acted in bad faith.

(3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.

(4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.

bars persons found guilty of elder abuse and neglect from inheriting from their deceased victims by deeming such a person to have died before the victim and thus unable to inherit.<sup>423</sup> Likewise, persons who have falsely imprisoned<sup>424</sup> or perpetrated offenses against the testator by causing pain or mental suffering, endangering health, or stealing or embezzling property are barred from inheriting.<sup>425</sup> The California legislature justified the enactment with reasons similar to those justifying the “slayer statutes”—individuals should not benefit from their evil acts.<sup>426</sup> In fact, section 259 was an addendum to the California slayer statute, and legislative deliberations frequently associated it with that statute.<sup>427</sup>

California Probate Code section 259 is, however, only a “small step” toward an inheritance system that better reflects the behavior of the children and heirs.<sup>428</sup> To date, no cases have been reported under the statute, and few are likely in the future. Parents with minimal

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(b) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) if that person has been convicted of a violation of *Section 236 of the Penal Code* or any offense described in *Section 368 of the Penal Code*.

(c) Any person found liable under subdivision (a) or convicted under subdivision (b) shall not (1) receive any property, damages, or costs that are awarded to the decedent’s estate in an action described in subdivision (a) or (b), whether that person’s entitlement is under a will, a trust, or the laws of intestacy; or (2) serve as a fiduciary as defined in Section 39, if the instrument nominating or appointing that person was executed during the period when the decedent was substantially unable to manage his or her financial resources or resist fraud or undue influence. This section shall not apply to a decedent who, at any time following the act or acts described in paragraph (1) of subdivision (a), or the act or acts described in subdivision (b), was substantially able to manage his or her financial resources and to resist fraud or undue influence within the meaning of subdivision (b) of *Section 1801 of the Probate Code* and subdivision (b) of *Section 39 of the Civil Code*.

*Id.* (emphasis added).

423. *See id.*

424. *See* CAL. PENAL CODE § 236 (West 1991).

425. *See id.* § 368.

426. Korpus, *supra* note 421, at 569–70.

427. *See* S.B. 1715, 1998 Leg., Reg. Sess. (Cal. 1998) (“Slayer Statute”). Decedents who were “substantially able to manage [their] financial resources and to resist fraud or undue influence” are excepted, a blow to the freedom of testators to distribute their property as they wish. *Id.*

428. *See* Korpus, *supra* note 421, at 576.

resources or support are unlikely to be devising substantial amounts of property, unless that property is under the legal or de facto control of a third party, typically a family member.<sup>429</sup> Moreover, the statute requires that the disinherited heir be proven guilty of abuse or neglect by “clear and convincing evidence” before the barring provision is activated,<sup>430</sup> but standards of proof beyond the normal preponderance test of civil cases are typically difficult to meet. These factors make it unlikely that section 259 will have any significant effect.

The California statute does, however, initiate a debate about using inheritance laws to promote desirable social conduct and to deter undesirable conduct. It has been praised for its potential to punish, as well as to “prevent abuse, encourage reconciliation of families, and facilitate the strengthening of family bonds and private support systems.”<sup>431</sup> It may also motivate beneficiaries to report abuse to public authorities.<sup>432</sup> Furthermore, awareness of the costs of abusing an elderly relative may lead to greater self-vigilance, which, in and of itself, may eliminate some elder abuse.<sup>433</sup>

### *G. Hearsay Exception for Elder Abuse*

The physical, mental, or psychological condition of elderly victims of abuse and neglect often creates impediments to successful legal actions against perpetrators. Short life expectancy may also prevent testimony at trial. Four jurisdictions, including California, have attempted to confront this problem by legislatively creating exceptions to the hearsay rule.<sup>434</sup> States without a statutory exception sometimes use traditional hearsay exceptions to admit prior statements from the aged.<sup>435</sup>

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429. See generally CAL. PROB. CODE § 250 (explaining some aspects of disinheritance).

430. CAL. PROB. CODE § 259(a)(1).

431. Korpus, *supra* note 421, at 572.

432. See *id.* at 572–73 (noting that the statute may also lead to over-reporting, but concluding that this is a small price to pay for the benefits that will be reaped).

433. See *id.* at 573.

434. See CAL. EVID. CODE § 1380 (West Supp. 2002); DEL. CODE ANN. tit. 11, § 3516 (2001); FLA. STAT. ANN. § 90.803(24) (West 1999); 725 ILL. COMP. STAT. ANN. 5/115-10.3 (West 2001 & Supp. 2002).

435. See John W. Strong, MCCORMICK ON EVIDENCE § 253, at 389–92 (5th ed. 1999).

The legislative history of the California hearsay exception notes that crimes against elders have been a priority for law enforcement recently, but many cases with a high probability for successful prosecution fail because of the death or incapacitation of the victim.<sup>436</sup> Vulnerable elderly citizens are often targeted by criminals and investigation and prosecution often takes a long time.<sup>437</sup> A.B. 526 also notes that the elderly deserve special protection in the criminal process because they may be confused, on medications, or impaired.<sup>438</sup> As a result, the elderly are less likely to protect themselves, report criminal conduct, or testify in court on their own behalf.<sup>439</sup> Finally, videotaping a declarant's statement increases reliability by giving the court and the jury a direct opportunity to view the witness' demeanor and the reliability of the statement.<sup>440</sup>

California's elder exception admits hearsay evidence in criminal cases if the declarant is unavailable.<sup>441</sup> The judge, outside the presence of the jury, determines unavailability.<sup>442</sup> The out-of-court statement must be made by the alleged victim,<sup>443</sup> age sixty-five or older,<sup>444</sup> and be videotaped by a law enforcement official.<sup>445</sup> In

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436. See Daniel Pone, *Analysis for Assembly Floor, A.B. 526*, available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_0501-0550/ab\\_526\\_cfa\\_19990825\\_214318\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0501-0550/ab_526_cfa_19990825_214318_asm_floor.html) (Aug. 25, 1999). The author of A.B. 526, Assembly Member Zettel, considered both the Florida hearsay exceptions for child abuse victims and those found at section 1360 of the California Evidence Code.

437. See *id.*

438. See CAL. EVID. CODE § 1380(a)(6)(B).

439. See *id.*

440. The legislative history mentions that videotaping allows the judge and jury to evaluate the demeanor of the witness and reliability of the statement.

441. California Evidence Code section 1380 follows California Penal Code section 240 when defining a witness as "unavailable." In addition to establishing that the declarant is unavailable, section 1380 requires: (1) "circumstances which indicate [the statement's] trustworthiness"; (2) that the "statement was not the result of promise . . . threat, or coercion"; (3) that "there is no evidence that the unavailability of the declarant was caused by, aided by [or] solicited by . . . the party who is offering the statement"; and (4) "[t]he entire statement has been memorialized in a videotape recording made by a law enforcement official, *prior to the death or disabling of the declarant.*" *Id.* (emphasis added).

442. See *id.* § 1380(c).

443. See *id.* § 1380(a)(4).

444. See *id.* § 1380(a)(6)(A).

445. See *id.* § 1380(a)(3).

addition, the victim must be mentally or physically impaired at the time of the proceeding.<sup>446</sup> The court also considers trustworthiness factors such as the context in which the victim made the statement and whether there was any encouragement or undue influence employed.<sup>447</sup> Use of the exception requires notice to opposing counsel and corroborative supporting evidence.<sup>448</sup>

California's, Delaware's, and Illinois' elderly hearsay exceptions have yet to be reviewed by appellate courts.<sup>449</sup> Florida's elder abuse hearsay exception is applicable to both criminal and civil cases,<sup>450</sup> and mirrors the state's child abuse exception.<sup>451</sup> The statute was held unconstitutional in *Conner v. State*,<sup>452</sup> where the defendant was charged with armed burglary of a dwelling, robbery, and kidnapping.<sup>453</sup> The victim was an eighty-four-year-old man with poor eyesight, hearing loss, and occasional memory lapses.<sup>454</sup> He lived alone.<sup>455</sup> The defendant broke into the victim's home, tied him to a chair with suspenders, ransacked his house, threatened the aged victim with a gun, and robbed him of money and other property.<sup>456</sup> Statements were made to the police the day of the incident and again two weeks later.<sup>457</sup> The victim died three months after the crime,<sup>458</sup> but before the defendant's trial.<sup>459</sup>

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446. *See id.* § 1380(a)(6)(B).

447. *See id.* § 1380(a)(1), (2).

448. *See id.* § 1380(a)(5), (b).

449. A search was conducted of the California, Delaware, and Illinois appellate databases utilizing LEXIS online research. The search executed is as follows: (1) Terms and Connectors Search Terms "elder! or senior citizen w/10 abuse! or neglect! w/50 hearsay w/5 except!"; and (2) Natural Language Search Terms "elder or infirm abuse and 'hearsay exception.'" Moreover, a search of California evidence treatise materials found no discussion on the elder abuse exception to hearsay. *See* B.E. WITKIN., CALIFORNIA EVIDENCE § 220 (4th ed. 2000); *see also* HON. MARK B. SIMONS, SIMONS ON CALIFORNIA EVIDENCE § 2:110 (West 2001) (providing no discussion on the elder abuse exception to hearsay).

450. *See* FLA. STAT. ANN. § 90.803(24)(a).

451. *See id.* § 90.803(23).

452. 748 So. 2d 950 (Fla. 1999).

453. *See id.* at 952.

454. *See id.*

455. *See id.*

456. *See* *Conner v. State*, 709 So. 2d 170, 171 (Fla. Dist. Ct. App. 1998).

457. *See id.*

458. *See id.* at 952.

459. *See id.* at 171.

The Florida Supreme Court held that the hearsay exception facially violated the defendant's constitutional right to confrontation of witnesses<sup>460</sup> because it did not ensure the reliability of the prior statements and was overly broad.<sup>461</sup> Further, the state's reliance on competing policy interests in child abuse cases was unavailing in this context.<sup>462</sup> The *Conner* court noted that—at that time—no other state had an elder exception,<sup>463</sup> and favorably discussed an Illinois statute allowing a hearsay exception in cases of crimes against a profoundly mentally retarded person<sup>464</sup> as an acceptable example of a narrower statute that was constitutional.<sup>465</sup> The Florida Supreme Court's decision to look to other states for elder and other hearsay abuse exceptions suggests that had *Conner* been decided *after* California, Delaware, and Illinois added their exceptions—and been more narrowly drafted—the result may have been different.

Both Delaware and Illinois require a reliability determination by the court, corroborative evidence, evidence of trustworthiness, and notice to the defendant.<sup>466</sup> Illinois also requires a jury instruction

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460. *See id.* at 954 (citing U.S. CONST. amend. VI; FLA. CONST. art. I, § 16(a)).

461. *See id.* at 960.

462. *See id.* at 957–60. In comparing Florida's child hearsay exception to the elder hearsay exception, the state supreme court found: (1) the child hearsay exception narrowly applies to children mentally/physically age eleven or less, whereas the elder hearsay exception is only limited to the broad category of all adults age sixty or over; (2) the child hearsay exception limits the scope of testimony to statements describing the acts of abuse, while the elder hearsay exception allows statements as to any act of abuse, neglect, or exploitation; (3) statutorily proscribed reliability factors such as maturity, relationship to the abuser, and duration of abuse may guarantee the reliability of children's statements, but this is not necessarily true when applying the factors to statements of elderly adults; (4) children may not understand oaths and may be traumatized by testifying, factors not as common to adults; and (5) the hearsay exception was not "firmly rooted" under *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). *See Conner*, 748 So. 2d at 957–59. The child exception was upheld after the Confrontation Clause challenge. *See State v. Townsend*, 635 So. 2d 949, 956–58 (Fla. 1994); *see also Perez v. State*, 536 So. 2d 206, 209 (Fla. 1988) (holding Florida's statutory child hearsay exception constitutional).

463. *See Conner*, 748 So. 2d at 957.

464. *See* 725 ILL. COMP. STAT. ANN. 5/115-10 (West 1992).

465. *See Conner*, 748 So. 2d at 957 n.6.

466. *See* DEL. CODE. ANN. tit. 11, § 3516 (2001); 725 ILL. COMP. STAT. ANN. 5/115-10.3.



about the weight and credibility of the hearsay evidence admitted.<sup>467</sup> Delaware, unlike California, Florida, or Illinois, includes a lengthy list of specific trustworthiness considerations.<sup>468</sup> Overall, the California, Illinois, and Delaware statutes are narrower and include a number of important factors needed to ensure reliability. In addition, the Federal Rules of Evidence,<sup>469</sup> along with many other state evidence rules,<sup>470</sup> authorize broad residual and other exceptions allowing hearsay to be admitted in abuse cases.<sup>471</sup>

Finally, in an attempt to balance the confrontation rights of a defendant with victim testimony considerations—e.g., death, fear, incapacity—commentators have suggested that elderly witnesses should be able to testify via closed-circuit television from a remote location.<sup>472</sup> In *Maryland v. Craig*,<sup>473</sup> the U.S. Supreme Court allowed child sexual abuse victims to testify in this manner.<sup>474</sup> The reasoning in *Craig* should be applicable to crimes against the elderly in many circumstances. In *Coy v. Iowa*,<sup>475</sup> however, the Court found a Confrontation Clause violation when an Iowa court allowed a screen between the defendant and victims in a sexual abuse case.<sup>476</sup> The Court emphasized the importance of face-to-face confrontation

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467. See 725 ILL. COMP. STAT. ANN. 5/115-10.3(c).

468. See DEL. CODE ANN. tit. 11, § 3516(e). Trustworthiness factors in the Delaware statute include: victim's personal knowledge, communicative/cognitive abilities, motive for false statement, timing of statement, how many persons hear it, the nature and duration of abuse, whether statement was spontaneous or in response to questions, and whether extrinsic evidence exists to show that the defendant had the opportunity to commit the alleged act referenced in victim's statement. See *id.*

469. See FED. R. EVID. 807.

470. See COLO. R. EVID. 807; GA. CODE ANN. § 24-3-1(b) (2002); IDAHO R. EVID. 803(24), 804(b)(5); IOWA R. EVID. 5.803(24), 5.804(b)(5); MISS. R. EVID. 807; NEB. REV. STAT. ANN. § 27-803(23) (2000); N.M. STAT. ANN. §§ 11-803(X), 11-804(B)(5) (Michie 2000); N.C. GEN. STAT. § 804(b)(5) (2000); R.I. R. EVID. 803(24), 804(b)(5); WIS. STAT. ANN. § 908.045(6) (West 2000).

471. See *Forrest v. State*, 721 A.2d 1271, 1277 (Del. 1999); *State v. Goshay*, No. 63902, 1993 Ohio App. LEXIS 5551, at \*13 (Ohio Ct. App. Nov. 18, 1993); *State v. McFadden*, 458 S.E.2d 61, 64 (S.C. Ct. App. 1995).

472. See, e.g., J. Steven Beckett & Steven D. Stennett, *The Elder Witness—The Admissibility of Closed Circuit Television Testimony After Maryland v. Craig*, 7 ELDER L.J. 313 (1999).

473. 497 U.S. 836 (1990).

474. See *id.* at 860.

475. 487 U.S. 1012 (1988).

476. See *id.* at 1022.

in the adversary process.<sup>477</sup> The confrontation right, however, is not absolute and exceptions are allowed when necessary to further an important public policy.<sup>478</sup>

#### *H. Minimum Nurse Staffing Ratios in Nursing Homes*

A major controversy currently rages regarding nurse staffing ratios in nursing homes. “Nurse staffing” refers to all three categories of nurses: registered professional nurses (RNs), licensed practical nurses (LPNs), and nurse aides/nursing assistants (NAs).<sup>479</sup> The federal statute requires only that nursing homes provide “services and activities to attain or maintain the highest practicable . . . well-being of each resident . . . .”<sup>480</sup> This is extremely general, but the statute does provide that nursing homes must: (1) provide twenty-four-hour licensed nursing services to meet the needs of residents,<sup>481</sup> and (2) employ a registered professional nurse for eight consecutive hours per day, seven days a week.<sup>482</sup> Since these minimums do not specify population mix or type of facility, they amount to no regulation beyond a bare minimum. A major theme of suits against nursing homes—and some of the cases that have produced jury verdicts of many millions<sup>483</sup>—is that understaffing is a root cause of the maltreatment of vulnerable residents in these facilities.<sup>484</sup>

Aside from courtroom argumentation, are nursing homes understaffed and, if so, does this affect the quality of care? These questions have provoked congressional inquiry and massive research, but there is little immediate prospect of resolving the matter, at least at the federal level. Public Law 101-508 required the Secretary of

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477. *See id.* at 1016.

478. *See id.* at 1020. Necessity requires more than a simple presumption of trauma of the victim. *See id.*

479. *See* 42 U.S.C. § 1396r(b)(5) (2001).

480. *Id.* § 1396r(b)(2).

481. *See id.* § 1396r(b)(4)(C)(i)(I).

482. *See id.* § 1396r(b)(4)(C)(i)(II).

483. *See supra* notes 241–43 and accompanying text.

484. In California alone during fiscal year 1999–2000, “the California Department of Aging’s Long-Term Care Ombudsman’s Office received 3,728 complaints of elder abuse occurring in long-term care facilities.” Office of the Attorney General, State of California Department of Justice, *Elder Abuse in California*, at [http://caag.state.ca.us/cvpc/fs\\_elder\\_abuse\\_in\\_ca.html](http://caag.state.ca.us/cvpc/fs_elder_abuse_in_ca.html) (last visited Oct. 29, 2002).

HHS to report to Congress on the appropriateness of establishing minimum caregiver ratios for Medicare and Medicaid certified nursing homes.<sup>485</sup> In December 2001, the Secretary delivered the final report to Congress, but has since backed away from implementing its recommendations.<sup>486</sup>

The HHS report used data from a representative sample of ten states, including over 5000 facilities, to identify staffing thresholds below which quality of care was compromised and above which there would be no further benefit in quality.<sup>487</sup> Logistic regression was used to examine associations between incremental increases in staff and quality measures (e.g., urinary tract infections, incidence of pressure sores and skin trauma, weight loss).<sup>488</sup> The researchers concluded there was indeed a pattern of incremental benefits with increased nurse staffing until a threshold was reached.<sup>489</sup> Depending upon the type of residents and their problems, these thresholds ranged from 2.4 to 2.8, 1.15 to 1.30, and 0.55 to 0.75 hours/resident/day for nurses aides, licensed staff (RNs and LPNs combined), and registered nurses, respectively.<sup>490</sup> No quality improvements were observed for staffing levels above those thresholds, but quality was improved with incremental increases in staffing up to these thresholds.<sup>491</sup> However, specific case mix could influence levels for specific nursing homes. If these minimum staffing ratios were mandated, an astonishing ninety-two percent of all nursing homes would currently fall below one or more of these minimums.<sup>492</sup> Even if nursing homes did not come up to these minimums, increases in staffing would still result in substantial improvements.

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485. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

486. See generally HEALTH CARE FINANCING ADMINISTRATION (HCFA), REPORT TO CONGRESS: APPROPRIATENESS OF MINIMUM NURSE STAFFING RATIOS IN NURSING HOMES (Dec. 24, 2001) (examining the analytical justification for establishing minimum nurse staffing ratios for nursing homes) [hereinafter HCFA REPORT].

487. See *id.* at ES-1.

488. See *id.* at 14-56.

489. See *id.* at 9-17.

490. See *id.* at 9-10.

491. See *id.* at 9-18.

492. See *id.* at 14-56.

A simulation analysis utilizing data on nurse aide time expended in care of residents conservatively estimated that over ninety-one percent of nursing homes have nurse aide staffing levels below that identified as minimally necessary to provide needed care for their specific resident populations.<sup>493</sup> These minimum nurse aide levels assumed a “very highly motivated and productive nurse aide staff,”<sup>494</sup> but there is substantial doubt about those characteristics in the present workforce. Given the high turnover rate of nursing aides, lack of training, and questionable morale, the current staffing situation clearly cannot even approximate adequate care.<sup>495</sup>

Many states, including California, have gone beyond the federal legislation, creating more detailed staffing requirements in nursing homes.<sup>496</sup> California has the third highest nurse-to-patient staff standard, behind Arkansas and Delaware.<sup>497</sup> California uses a direct care-hour per patient rule: 3.2 hours/day/patient in skilled nursing facilities; 2.3 hours/day/patient in skilled nursing facilities with special treatment; 2.7 hours/day/patient in intermediate care facilities for the developmentally disabled; and 1.1 hours/day/patient in intermediate care facilities.<sup>498</sup> California raised its minimum standards effective January 2000.<sup>499</sup>

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493. *See id.*

494. *Id.* at 14–55, 14–56.

495. *See id.* at 14–53.

496. *See* National Citizens’ Coalition for Nursing Home Reform Laws: Regulations on Staffing, *Federal and State Minimum Staffing Requirements*, at [http://www.nccnhr.org/govpolicy/51\\_162\\_468.cfm#federaland](http://www.nccnhr.org/govpolicy/51_162_468.cfm#federaland) (Dec. 1999).

497. *See* 1999 Ark. Acts 1529 (requiring a ratio of one CNA per eight residents and one RN/LPN/LVN per thirty residents for day shift; one CNA per twelve residents and one RN/LPN/LVN per thirty residents for evening shifts; one CNA per eighteen residents and one RN/LPN/LVN per fifty residents for the night shift); CAL. WELF. & INST. CODE § 14110.7 (West 2002) (requiring 2.6 hours/patient for skilled nursing facilities; 1.9 hours/patient for skilled nursing facilities with special treatment programs; 0.9 hours/patient for intermediate care facilities; and 2.2 hours/patient for intermediate care facilities for the developmentally disabled); DEL. CODE ANN. tit. 16, § 1162 (2001) (requiring a ratio of one RN/LPN per fifteen residents and one CNA per eight residents for day shift; one RN/LPN per twenty-three residents and one CNA per ten residents for evening shift; one RN/LPN per forty residents and one CNA per twenty residents for night shifts). Delaware is considering an increase of its direct care standard to 3.67 hours of direct care per patient per day. *See id.* § 1162(d).

498. *See* CAL. WELF. & INST. CODE § 14110.7.

499. *See id.* § 14110.7(e).

The California Health and Safety Code requires that a “direct caregiver” be a registered nurse, licensed vocational nurse, psychiatric technician, or a certified nurse assistant.<sup>500</sup> By January 1, 2003, the Code requires regular posting of staff levels, including the current number of licensed and unlicensed nursing staff directly responsible for resident care in the facility.<sup>501</sup> Facilities are also required to post notices of remedies imposed for violations (e.g., failure to post, suspension of license, decertification for Medicare).<sup>502</sup> In addition, by January 2006, the DHS is required to consult with consumers, consumer advocates, recognized collective bargaining agents, and providers to evaluate current staffing standards and to determine whether the minimums should increase.<sup>503</sup> Should the DHS determine that staffing changes are needed to ensure quality care, it has the authority to adopt regulations increasing the staff ratios.<sup>504</sup>

Minimum staffing ratios are, of course, only one of a number of interrelated issues regarding quality of care in nursing homes. A major shortage of nurses currently exists in the United States.<sup>505</sup> Effective management and supervision of staff, the involvement of non-nursing staff, and other issues must be considered in assessing quality. Critically, if staffing is to be increased, and staff retained, increased costs will result. There is obvious disagreement among providers, public payers (Medicare and Medicaid), and private payers about how these additional costs will be distributed.<sup>506</sup>

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500. See CAL. HEALTH & SAFETY CODE § 1276.65(a)(1) (West 2000 & Supp. 2002).

501. See *id.* § 1276.65(2)(f).

502. See THE ADVOCATE: CALIFORNIA NURSING HOME REFORM, THE GOOD, THE BAD, AND THE UGLY!, CALIFORNIA ADVOCATES FOR NURSING HOME REFORM (CANHR), available at [http://www.canhr.org/publications/newsletters/advocate/adv\\_0900.htm](http://www.canhr.org/publications/newsletters/advocate/adv_0900.htm) (last visited Oct. 29, 2002).

503. See CAL. HEALTH & SAFETY CODE § 1276.65(2)(e).

504. See *id.*

505. For example, California “is expected to need 25,000 additional nurses to meet the projected demand for nursing services over the next six years. In California there are 566 working nurses per 100,000 population, the lowest in the nation (the national average is 798/100,000).” California Department of Health Services: *Nurse Staffing Requirements and the Quality of Nursing Home Care*, 18–19, at <http://www.dhs.ca.gov/inc/reports/NursingStaffReport.pdf> (June 26, 2001).

506. The HFCA Report itself concluded that it is not currently feasible to implement a minimum nurse staffing requirement because existing data are

## VIII. CONCLUSION

*Cast me not off in the time of old age;  
forsake me not when my strength faileth*<sup>507</sup>

Given the legal focus of this Symposium, this Article has analyzed contemporary legislative, administrative, and litigation developments in elder abuse and neglect. The legal system, however, has a difficult time remedying complex social, psychological, medical, and programmatic issues. As a practical matter, it is unrealistic in many circumstances for vulnerable elderly persons to enforce claims through the courts or regulatory processes. Cases lacking dramatic damage potential, large financial assets, or shocking facts are unlikely to attract attorneys who, of necessity, must work on contingent fee contracts. A host of other means must be devised and implemented to counteract the shocking amount of mistreatment of the aged in the United States. The public's awareness of this issue must be raised, research improved and increased, and appropriate services provided both to caregivers and the elderly. Additionally, a host of other issues exist. Despite the deterrent and redistributive functions of the law, this type of systemic problem is ill-suited to legal solution.

But the law can be a catalyst for creating change. Legislative bodies can make significant contributions. We should work to amend the federal Family and Medical Leave Act<sup>508</sup> to provide pay for caretakers of the elderly. Other public policy decisions could contribute to improving the plight of the elderly. Greater federal and state tax deductions for payments made to support elderly parents would ease the burden upon the "sandwich generation." Low-interest loan programs—similar to subsidized college expense loans—for children who wish to build additions to their homes for elderly relatives or to meet other care-taking needs would likewise support moral and legal duties with economic subsidies. Universal coverage of basic medical services, including prescription drugs, eyeglasses, hearing aids, and similar devices often not covered by Medicare would reflect a commitment to the support of seniors. This

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highly inaccurate and personnel may not be available. HCFA REPORT, *supra* note 486, at 14–60.

507. *Psalms* 71:9.

508. 29 U.S.C. § 2612 (2000).

list could be extended almost indefinitely. The possibility of litigation, with its inherent costs and large potential losses for the losers, is easily understood by most groups involved with the elderly and by the public. Maltreatment of older persons can, and must, be substantially reduced. If these opportunities are missed or ignored, further damage will occur to our elderly population and to our entire society.