Breaking the Silence: Strategies for Combating Elder Abuse in California

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Nina Santo*

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred 2000; B.A., English and Social Sciences, Whittier College, 1988. Many thanks to Professors Jan Ellen Rein and Timothy M. Hurley for their thoughtful critiques of this Comment. Personal thanks to my children Jordan and Cameron, my husband Daniel, and to our parents, who have encouraged me in all my law school endeavors.
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Elder abuse is not a pretty subject: adult children kicking and hitting their parents, attacking them with knitting needles and knives, stealing their Social Security and retirement checks, and shamelessly neglecting [their] basic human needs.

Elder abuse flies in the face of all that is good and decent. It confounds the Commandment, "Honor thy father and mother:"

I. INTRODUCTION

During an argument with his 77-year-old father, George Curnutt "pointed a gun at his father and attempted to fire it. When the gun did not fire, [Curnutt] pistol-whipped, beat and kicked his father, causing serious injuries." In another incident, caregivers forced a 71-year-old woman to sign over power of attorney by threatening her at knifepoint; "[t]hey mortgaged her home and took more than $30,000 from her bank accounts." In 1981, the United States House of Representatives examined the problem of elder abuse for the first time. In 1990, the House reviewed the matter again, and determined that in the decade since the 1981 report, little progress had been made toward slowing this insidious problem.


5. See 1990 Decade of Shame, supra note 1, at 3 (noting, among a myriad of the report's "disturbing facts," that while approximately one in five incidents of elder abuse was reported in 1980, only about one in eight cases was reported in 1990); see also 1981 HIDDEN PROBLEM, supra note 4, at 1 (quoting Committee Chair
In fact, the 1990 report observed that more than 1.5 million elders, or roughly five percent of America's elderly, will be victimized by elder abuse each year.

Elder abuse is a particularly urgent concern in California, where the U.S. Census Bureau has predicted the elderly population will double between 1990 and 2020, from 3.3 million to more than 6.6 million. Not surprisingly, in light of the burgeoning number of elders, the California State Association of Counties (CSAC) documented that reports of abuse and neglect of adults rose more than 116% between 1984 and 1993. To gain some insight into the magnitude of California's elder abuse problem, consider that the California Department of Social Services reported approximately 44,700 cases of elder or dependent adult abuse in 1996. An estimated 180,000 instances of abuse went unreported that same year, for a total of roughly 225,000 abuse incidents. Meanwhile, funding for county Adult Protective Services programs, which monitor elder abuse reports, had fallen in the prior ten years, and staffing in Adult Protective Services programs had decreased statewide by twenty percent.

This Comment examines changes in California elder abuse reporting and prevention laws in the ten years since the 1990 House hearing, 1990 Decade of Shame, assessing areas in which progress has been made, and pointing out weaknesses remaining in California's elder abuse prevention and intervention system. This Comment observes that the trend in California law toward addressing elder abuse with legislation is a positive one. However, this Comment posits that because many acts of elder abuse occur where the abuser is a family member or otherwise known to the victim, traditional corrective measures, such as the

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6. The author is sensitive to the fact that persons aged 65 and older may prefer any one of a number of words or phrases to describe persons within their age cohort, including "older persons," "seniors," "senior citizens," "elders," and "the elderly." For purposes of consistency, this Comment will generally refer to persons aged 65 and older as "elders," in conformance with California statutory language. See, e.g., CAL. PENAL CODE § 368(g) (West 1999) (defining "any person who is 65 years of age or older" as an "elder") (emphasis added).
7. 1990 Decade of Shame, supra note 1, at 2.
8. CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2199, at 3 (June 23, 1998).
9. Id. at 7.
10. Id. at 3; see CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1780, at 2 (Apr. 21, 1998) (asserting that 225,000 incidents of elder abuse occur annually in California, yet in 1996, for example, fewer than 44,000 of these incidents were reported).
11. CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2199, at 3 (June 23, 1998).
13. 1990 Decade of Shame, supra note 1.
14. See infra Part IV.B (examining California's newest criminal laws against elder abuse); infra Part V (discussing civil liability for elder abuse in California); infra Part VI (assessing gaps in elder abuse prevention and intervention laws and services in California).
15. See infra Part VI (observing that mistreatment of elders continues despite laws increasing criminal penalties and civil liability for elder abuse, and positing new strategies to stop this trend).
imposition of civil and criminal liability, may be underutilized or unhelpful in many cases. Even presuming that civil and criminal remedies can be valuable tools in the fight against elder abuse, California's current civil and criminal remedies could be strengthened through tailored enforcement efforts. Finally, this Comment concludes that in order to make inroads against elder abuse in California, the State must provide adequate funding for existing programs, and California must tailor any future legislation and community efforts to (1) ensure access to Californians who need the protection of elder abuse laws, and (2) create and sustain an effective system of services that will both enforce the legal rights of abused elders and support the efforts of elderly Californians to live successfully, and independently, in the State's communities.

In Part II, this Comment examines the various roles elders have played in different historical and cultural contexts, and explains the development of the contemporary understanding of elder abuse. This Part also explores the "discovery" of the problem of elder abuse, and describes the pivotal congressional reports of 1981 and 1990 that have influenced the development of state elder abuse legislation across the country. Part III presents an overview of federal elder abuse legislation. Part IV describes California's criminal elder abuse laws, and examines efforts in communities within and outside of California to increase the effectiveness of criminal sanctions for elder abuse. Part V explores civil remedies, and examines California's most potent weapon against elder abuse in the civil arena: the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA). Part VI acknowledges that augmenting current criminal sanctions and civil remedies for elder abuse may make some inroads against elder abuse, but suggests California must take an altogether different approach to elder abuse legislation in order to strike at the heart of the problem. That is, the State must fully fund current service mandates, pass additional legislation, and encourage grass roots efforts, in order to

16. See infra text accompanying notes 213-15 (explaining that because abuse often occurs in a family setting, imposition of traditional legal liability may be ineffective at or insufficient in addressing this problem).
17. See infra Part IVE (examining how law enforcement strategies and criminal victim assistance programs can be tailored to serve the special needs of elderly victims); infra notes 249-55 and accompanying text (describing the social isolation of elders that interferes with the effectiveness of traditional social services programs in the battle against elder abuse).
18. Infra Part VI.
19. See infra Part II.A-B (offering a historical context for the contemporary problem known as elder abuse).
20. See infra Part II.C-D (examining the emergence of public awareness of elder abuse, and describing two pivotal documents produced by the House of Representatives, 1981 Hidden Problem and 1990 Decade of Shame, which have influenced the development of elder abuse laws nationwide).
21. See infra Part III (discussing various federal statutes and pending federal legislation addressing elder abuse issues).
22. See infra Part IV (summarizing California's criminal laws regarding elder abuse and illustrating how such laws might best be enforced to address elder abuse).
23. CAL. WELF. & INST. CODE §§ 15600-15631 (West 1991 & Supp. 2000); see infra Part V.B-D (examining the strengths and potential weaknesses of EADACPA in imposing civil liability for elder abuse).
24. Infra Part VI.
(1) increase access to services for individuals requiring the protection of elder abuse
laws, and (2) strengthen the existing infrastructure of community and social
services to prevent and successfully intervene in situations of elder and dependent
adult abuse.25

II. ELDER ABUSE IN PERSPECTIVE

A. Causes of Elder Abuse

A comprehensive look at the causes of elder abuse is beyond the scope of this
Comment.26 Although some evidence suggests elders have been abused throughout
the centuries,27 several aspects of contemporary living may work in concert to
create an environment ripe for abuse.28 Families, the traditional source of support
for the elderly, are less available to care for elder family members due to factors
such as greater geographic mobility, increases in women working outside the home,
and stresses on the family unit such as divorce and financial difficulties.29 Around
the world, cultural and religious mores that have encouraged family caregiving are
less effective today than in previous generations at motivating family caregiving
behavior.30 Where the abuser is a family member, any number of factors may precipitate
abuse, including resentment, stress, substance abuse, a family history of violence,
and the absence of caregiving support.31 The abuser may be overwhelmed by the
responsibility of caring for an infirm person, or of managing the financial burden
of supporting a dependent elder.32 Elders may not report abuse out of fear of
reprisals, unwillingness to make trouble, or a physical inability to report.33

25. See infra Part VI (opining that California must make an ongoing commitment of resources, pass
additional legislation, and encourage community efforts in order to stop the tide of elder abuse).
26. For a summary of theories from around the world regarding the causes of elder abuse, see generally
ELDER ABUSE: INTERNATIONAL AND CROSS-CULTURAL PERSPECTIVES 1-10 (Jordan I. Kosberg & Juanita L. Garcia
eds., 1995).
27. See Seymour Moskowitz, Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal
anthropological and documentary evidence indicating that elders have been treated harshly throughout history).
28. See 1990 Decade of Shame, supra note 1, at 97 (asserting that no one explanation serves to explain
elder abuse; abuse occurs as a result of multiple factors).
29. See Kosberg & Garcia, supra note 26, at 3 (observing that social and economic changes in the family
are limiting the family's role in caring for older family members).
30. See id. at 7 (explaining that even in countries with strong religious traditions of reverence for the
elderly—such as Buddhist Thailand, with its history of ancestor worship, and Israel and Mexico, where the Judeo-
Christian tradition requires children to honor their parents—today's adult children seem unwilling or unable to
care for their parents).
31. 1990 Decade of Shame, supra note 1, at 97.
32. 1981 HIDDEN PROBLEM, supra note 4, at xvi.
33. Id. at xv.
Demographic factors, such as increased life expectancy, lower birth rates, and improved medical care, may exacerbate the problem of abuse. Additionally, in skilled nursing facilities, incidents of abuse by caregivers may be attributed in part to the fact that staff members are typically “ill-trained, grossly overworked and very poorly paid.”

B. Recent Historical Context

In 1994, Americans aged sixty-five and older comprised nearly 12.5% of the U.S. population, or approximately 35.2 million persons; by the year 2010, these figures are expected to climb to 13.3% of the U.S. population, or 40.1 million persons. In California, the projected growth is even more dramatic—the U.S. Census Bureau predicts the State’s senior population will more than double in the next twenty years. As the age of America’s population increases, crimes and frauds perpetrated against the elderly seem to be stepping up similarly.

Elder abuse takes many forms, including physical, psychological, financial, and sexual abuse, as well as neglect. Women are more typically the subject of abuse than are men—perhaps because women live longer, and correspondingly spend...
more years dependent on the care of others. In general, elderly persons over age seventy-five are more likely victims than those under seventy-five.

Although child abuse gained national attention as early as the 1960s and spousal abuse took the spotlight in the 1970s, not until the late 1970s and early 1980s did elder abuse garner public recognition. In the 1970s, some early British studies examined elder abuse, coining the phrase “granny bashing.” Shortly thereafter, American studies began to indicate that elder abuse was a serious problem in this country, including Elder Abuse: An Examination of a Hidden Problem (1981 Hidden Problem), a report published by the U.S. House of Representatives, Select Committee on Aging, recommending states enact laws to address the problem.

C. A “Hidden Problem” Uncovered in 1981

When the House Select Committee on Aging released its 1981 Hidden Problem report, the Committee estimated that, in a given year, one in every twenty-five older Americans would fall prey to elder abuse. The report indicated that elder abuse was a growing concern, occurring only slightly less frequently than child abuse, and found that most states lacked effective programs to protect their elderly citizens. In fact, although child abuse occurred just three times as often as elder abuse, state budgets typically committed less than seven percent of their protective service budgets to protecting older citizens, while allocating almost eighty-seven percent of these funds to combat child abuse. Although twenty-six states had so-called adult protective service laws, only sixteen of these states mandated any reporting of elder abuse. Significantly, the House report indicated that legislators in most states believed that their adult protective service laws were not meeting the needs of their citizens, and favored national legislation to establish model mandatory reporting requirements. The report concluded that states should provide the

41. See 1990 Decade of Shame, supra note 1, at 97 (asserting that women may be more likely than men to suffer abuse because women spend a greater number of years in later life dependent upon the care of others).
42. Id.
43. Garfield, supra note 40, at 863-64.
44. Moskowitz, New Remedies, supra note 37, at 53.
45. 1981 HIDDEN PROBLEM, supra note 4, at xvii.
46. See id. at xiv (declaring that each year, four percent of America’s elderly may suffer abuse).
47. See id. (alerting the public to “tremendous gaps in State legislation” addressing elder abuse).
48. Id. at xvi. The remaining protective service funds, approximately seven percent, went toward services for adults under age 65. Id.
49. See id. at xvi-xvii (finding a lack of consistency, even among mandated reporting states, as to who must report and what penalties apply when mandated reporters fail to divulge incidents of suspected abuse).
50. See id. at xvii (indicating that states also favored passage of federal legislation that would have offered incentives to states incorporating mandatory reporting provisions into their adult protective services statutes). Significantly, in the 1990 Decade of Shame report, Subcommittee Chairperson Roybal observed that in 1980, the subcommittee recommended enacting elder abuse legislation akin to the Child Abuse Prevention Act of 1974, but by 1990, the Congress had yet to enact such a statute. 1990 Decade of Shame, supra note 1, at 2. Certainly, elders
services of trained staff to assist elders identified through protective services programs, and called for the passage of federal laws to provide funds to assist these state and local programs instituted to prevent and treat elder abuse.\footnote{51}

D. 1990 Elder Abuse Track Record: A “Decade of Shame”

Encouraged by the prospect of federal funding to support elder abuse prevention and intervention services, many states revised their procedures to comply with the federal legislation contemplated by the drafters of the 1981 \emph{Hidden Problem} report.\footnote{52} Significantly, as of 1990, forty-two states and the District of Columbia had enacted statutes implementing adult protective services and mandatory reporting of elder abuse, a dramatic increase from the sixteen states with laws in place regarding abuse of adults prior to 1980.\footnote{53} However, the anticipated federal legislation, which would have assisted states in identifying, treating, and preventing elder abuse, had not materialized by 1990.\footnote{54} Meanwhile, \emph{Elder Abuse: A Decade of Shame and Inaction (1990 Decade of Shame)},\footnote{55} a follow-up to the 1981 \emph{Hidden Problem} report, concluded that elder abuse was on the upswing nationwide, with 500,000 more instances of abuse per year than had been identified in 1980.\footnote{56}

Although elder abuse was increasing, the percentage of state budgets allocated to address the problem declined from 6.6\% in 1980 to less than four percent by 1989.\footnote{57} Over the same period, Social Services Block Grants,\footnote{58} the mainstay of adult protective services funding, were cut by more than thirty percent.\footnote{59} Furthermore, \emph{1990 Decade of Shame} confirmed that reported abuse cases represented just a fraction of actual elder abuse incidents; studies suggested that only one out of every

\footnote{51. See 1981 \emph{Hidden Problem}, supra note 4, at xvii (calling for passage of the Prevention, Identification and Treatment of Elder Abuse Act of 1981, H.R. 769, 97th Cong. (1981), which, if it had passed, would have provided federal funds specifically for programs to prevent, identify, and treat elder abuse).

\footnote{52. See 1990 \emph{Decade of Shame}, supra note 1, at 94 (implying that states modified their adult protection laws after the release of the 1981 \emph{Hidden Problem} report in hopes of qualifying for anticipated federal funds to combat elder abuse).

\footnote{53. \textit{Id.}}

\footnote{54. \textit{Id.}}

\footnote{55. \textit{Supra} note 1.

\footnote{56. \textit{1990 Decade of Shame}, supra note 1, at 95.

\footnote{57. \textit{Id.} at 98.}}

\footnote{58. Since 1981, Congress has utilized the Social Services Block Grant program as its primary mechanism to direct federal funds to the states for adult protective services. \textit{Id.} at 99.

\footnote{59. \textit{See id.} (indicating that since 1981, Social Services Block Grant funding decreased by approximately one-third, accounting for direct cuts and inflation).}}
eight cases of elder abuse was actually reported, possibly reflecting some victims' reluctance to report due to feelings of shame, or a fear of reprisals by the abuser.60

As 1981 Hidden Problem had recommended ten years previously, 61 1990 Decade of Shame proposed "a coordinated national effort to confront elder abuse."62 Through such an effort, the federal government could assist states in elder abuse prevention and intervention through services such as the national Clearinghouse on Elder Abuse and a toll-free hotline for collecting abuse reports and fielding questions about elder abuse.63 Additionally, the 1990 report supported legislation that would have allocated funds to assist caregivers of chronically ill family members64 in an effort to reduce the likelihood of abuse while enabling elders to remain in their own homes, and out of institutional settings, as long as possible.

III. FEDERAL ELDER ABUSE LAW

Despite strong recommendations in both 1981 Hidden Problem and 1990 Decade of Shame, Congress has failed to enact the elder abuse protection statutes proposed in these reports.65 However, some federal programs do exist to protect elders and dependent adults from abuse, both in California and nationwide.66 One general program for elders living in the community and those in long-term care settings is the federally funded ElderCare Locator, a toll-free phone number for older persons and others seeking information about services and assistance for older persons.67 In addition to the ElderCare Locator, the Administration on Aging, an agency of the U.S. Department of Health and Human Services (HHS), has also established the National Center on Elder Abuse, to conduct research regarding elder abuse, neglect, and exploitation, and to provide training and technical assistance to

60. *Id.* at 97.
61. *Supra* notes 46-51 and accompanying text.
62. See 1990 Decade of Shame, *supra* note 1, at 99 (suggesting that Congress should pass legislation to grant federal funds to states with mandated reporting laws, and provide other sorts of nationwide elder abuse prevention and public information programs).
63. *Id.*
64. See *id.* (implying that the availability of assistance to in-home caregivers would reduce the likelihood that the stress of caring for a chronically ill individual might lead the caregiver to commit acts of abuse).
65. See *id.* at 94 (indicating that although elder abuse legislation similar to the Child Abuse Prevention and Treatment Act of 1974 had been proposed in every congressional session since the 97th Congress, such legislation had yet to be enacted as recently as 1990). Absent a federal infusion of funding, states have struggled, and in some cases failed, to allocate sufficient funds for elder abuse services. *Id.* at 96; see also Moskowitz, *Saving Granny*, *supra* note 27, at 84 n.34 (observing that "[a] very scaled down and poorly funded National Center on Elder Abuse was included in the Older Americans Act of 1992," but funding for that program appears to be in some jeopardy).
66. See *infra* notes 67-91 and accompanying text (providing a sampling of federal programs and services that address elder abuse).
local and regional elder abuse programs. Additionally, the Older Americans Act (OAA) earmarks funds for the states specifically to assist in the prevention and treatment of elder abuse, neglect, and exploitation.

A. Federal Protections for Elders in Long-Term Care Settings

In 1971, acting in response to concerns about the quality of skilled nursing facilities for elderly and dependent adults, President Nixon proposed an initiative to improve conditions for individuals residing in skilled nursing facilities. Among the nation’s first efforts at elder abuse prevention, Nixon’s eight-point initiative called for the use of state “ombudsmen” to improve the quality of care in nursing homes. In 1978, amendments to the federal OAA required each state to conduct an ombudsman program via the “aging network” of state and area agencies on aging. Funded with federal, state, and county matching funds, California’s long-term care ombudsman programs are the principal link to elder abuse prevention services for the State’s institutionalized elderly and dependent adults. In addition, to combat abuse in skilled nursing facilities, Congress passed the Nursing Home Reform Act as part of the Omnibus Budget Reconciliation Act of 1987 (OBRA).

68. See id. (describing the National Center on Elder Abuse in the context of various programs funded by the United States Department of Health and Human Services to address the problem of violence against women, including the problem of elder abuse).


70. See 42 U.S.C.A. § 3058(j)(b) (West 1994) (asserting that federal funds under this subsection are allocated to develop and strengthen state programs for prevention of and treatment for elder abuse); see also 45 C.F.R. § 1321.63(a)(7) (1998) (indicating that some funds may also be available for elder abuse services under Title III of the OAA); infra Part IV.B (describing OAA-funded programs that support elders’ efforts to maintain autonomy and independence while living at home in the community).

71. Elizabeth B. Herrington, Strengthening the Older Americans Act’s Long-Term Care Protection Provisions: A Call for Further Improvement of Important State Ombudsman Programs, 5 ELDER L.J. 321, 331 (1997).

72. See id. at 331 (defining “ombudsman” as having been derived from a nineteenth century Swedish concept whereby an impartial individual designated by the government would listen to complaints about the government and attempt to resolve disputes).

73. See supra note 69 (describing the purpose of the OAA). The State Long-Term Care Ombudsman program was established under sections 307(a)(12) and 712 of the Older Americans Act. Pub. L. No. 95-478, § 307(a)(8), 92 Stat. 1513, 1524-25 (1978) (codified at 42 U.S.C.A. 3027(a)(12), 3058(g) (1994)).

74. See Herrington, supra note 71, at 332 (observing that under the auspices of the OAA, the nationwide “aging network” promotes and provides supportive services for older persons).

75. See generally id. at 332-34 (outlining the history and development of long-term care ombudsman programs that operate within the “aging network” of state and area agencies on aging, and demonstrating the critical role of the long-term care ombudsman program in detecting and remediating cases of elder abuse in long-term care facilities; nationally, approximately 12,000 trained volunteers serve as long-term care ombudsmen).

According to the Nursing Home Reform Act, a skilled nursing facility can only qualify for funding if it provides “services to obtain or maintain the highest practicable physical, mental, and psychological well-being of each resident.” The Act also contains a “Residents Bill of Rights” declaring basic rights of residents, and propounding requirements for care in skilled nursing facilities. Facilities that fail to meet requirements of care upon state review, or “survey,” are subject to sanctions such as the withholding of federal funds, the assessment of civil penalties of up to $10,000 per day of non-compliance, and the appointment of temporary management personnel at the facility. Of course, such provisions only guarantee patient safety and security to the extent that they are successfully enforced.

B. Federal Support for Elders Living at Home in the Community

In 1974, Title XX of the Social Security Act introduced mandated state adult protective services (APS) programs to safeguard non-institutionalized elders and dependent adults. This federal social services block grant program has funded APS programs nationwide in an effort to prevent abuse and neglect, help individuals maintain self-sufficiency, and reduce premature institutionalization. Despite significant reductions in federal Title XX block grant funding beginning in the 1980s, APS agencies, now largely state-funded, “remain the primary referral source for elderly mistreatment reports.”

In addition to APS programs, since 1965, the federal OAA has provided grants to the states to develop and support community services to help older persons maintain “[f]reedom, independence, and the free exercise of individual initiative in planning and managing their own lives.” For elderly persons living at home in the community, services such as those supported by the OAA may help prevent premature institutionalization. Because elders might not seek assistance in an abusive situation for fear that reporting an abusive family member will lead to their

78. Id. § 1395(i)-3(c)-(h).
79. Id. § 1395(i)-3(h)(2)(B)(i)-(iii).
80. See infra Part V.C (discussing a report of the General Accounting Office, California Nursing Homes: Care Problems Persist Despite Federal and State Oversight, and observing that improved enforcement efforts are needed).
83. Moskowitz, Saving Granny, supra note 27, at 84; see supra note 59 and accompanying text (noting a 30% reduction in social services block grant funding in the 1980s).
84. See supra notes 69-70 and accompanying text (describing the OAA).
86. See Evelyn R. Florio et al., One-Year Outcomes of Older Adults Referred for Aging and Mental Health Services by Community Gatekeepers, 7 J. CASE MGMT. 74, 82 (1998) [hereinafter Florio et al., One Year Outcomes] (observing that clients referred for assistance through this elder services program may continue to live at home in the community).
own institutionalization, supportive services such as these, which assist an elder in retaining autonomy, would seem to be a critical tool in preventing abuse. However, the OAA funding authorized under Title VII for Elder Abuse Prevention amounted to just $4,732,000 nationwide in federal fiscal year 1999. In fact, legislative authority for the OAA expired four years ago, and, absent passage of a reauthorization bill in the 106th Congress, social services agencies nationwide, charged with administering the various social services and elder abuse prevention programs sponsored by the OAA, are not guaranteed continued funding. This uncertainty regarding federal funding is particularly detrimental to elder abuse prevention efforts in the community at large, where licensing and other regulatory protocols applicable in long-term care settings are not available to provide protections against abuse.

Of course, any federal funding in support of elder abuse prevention and intervention is helpful to California's efforts to address these problems. However, because of (1) the absence of certainty regarding continued full funding under the OAA, (2) the limited amount of federal dollars available nationwide, even under a reauthorized OAA, and (3) funding reductions in federal social services block grants, much remains to be done at state and local levels to combat elder abuse, in both community and long-term care settings.

87. See Garfield, supra note 40, at 879 (suggesting that an elder may decline to report abuse due to "a reasoned decision that remaining in the abusive situation is preferable to facing alternatives such as eventual institutionalization").
88. See supra note 70 (citing statutory authority for elder abuse programs funding under the OAA).
89. See Older Americans Act Appropriation Information (visited July 15, 1999) <http://www.aoa.dhhs.gov/oaas/oopp.html> (copy on file with the McGeorge Law Review) (explaining that for fiscal year 1999, "$7,449,000 of Title VII funds [were] earmarked for the Ombudsman Program and $4,732,000 of Title VII funds [were] earmarked for Elder Abuse Prevention").
90. See JIM KOLBE, Kolbe Co-Sponsors Bill to Reauthorize Older American Act, Which Will Ensure Full Funding of Essential Programs for Seniors, FEDERAL DOCUMENTS CLEARINGHOUSE, INC., Jan. 12, 1999, available in 1999 WL 2221676 (asserting that programs at risk if the OAA is not reauthorized in 1999 include "meals on wheels, home care, transportation assistance, elder abuse protection[,] . . . adult day care, legal assistance, counseling and respite care"). According to Arizona Congressman Jim Kolbe, who is co-sponsoring the bill to reauthorize this Act, OAA-funded programs "enable seniors to live independently and avoid the high cost of publicly financed nursing home care." Id.
91. See supra Part III.A (describing various federal and local regulatory measures targeting skilled nursing facilities).
While federal law provides some funding for both elder abuse prevention and support for victims of elder abuse,\textsuperscript{92} criminal sanctions and other penalties for abusers have remained largely within the realm of state law.\textsuperscript{93}

A. California’s General Criminal Framework for Elder Abuse

California’s primary criminal statute addressing elder abuse is Penal Code section 368.\textsuperscript{94} This section penalizes “[a]ny person who . . . willfully causes or permits any elder or dependent adult . . . to suffer . . . unjustifiable physical pain or mental suffering.”\textsuperscript{95} In cases involving failure to act to prevent elder abuse, the California Supreme Court has borrowed from common law principles of tort law to assess what types of relationships will impose a legal duty to prevent infliction of pain or suffering from being inflicted by another upon an elder under Penal Code section 368(a).\textsuperscript{96} In \textit{People v. Heitzman},\textsuperscript{97} the Court declared that while section 368(a) does not specifically define those persons under a duty to protect the elderly, only persons with a special relationship, as defined by tort law, with the elder individual have a duty to act to prevent abuse.\textsuperscript{98}
B. Augmented Criminal Sanctions for Abusers

California’s Chapter 936, enacted during the 1998 California Legislative session, augments criminal penalties for perpetrators of elder abuse.\(^{99}\) Chapter 936 declares that “crimes against elders and dependent adults are worthy of special consideration and protection.”\(^{100}\) In light of the Legislature’s special findings, Chapter 936 increases the criminal penalty for causing physical pain, mental suffering, or willful endangerment of an elder or dependent adult to as much as four years.\(^{101}\) Likewise, false imprisonment of an elder or dependent adult, where perpetrated by violence, menace, fraud, or deceit, is punishable by imprisonment of up to four years.\(^{102}\) Under prior law, false imprisonment perpetrated in the manner described above was punishable by a fine of up to $1,000, imprisonment for as many as three years, or both, with no distinction between sentencing for cases in which the victim was an elder or dependent adult as opposed to an independent adult under the age of sixty-five.\(^{103}\)

Opponents of augmented sentencing based on the age of the victim argue that statutes such as Chapter 936 are unfair to defendants, and conversely, that they perpetuate a form of ageism by implying that a person aged sixty-five or older is somehow more victimized than a person under age sixty-five subjected to the same crime.\(^{104}\) Proponents of age-related sentencing enhancements respond to charges such as this by asserting that the crime of elder abuse is so insidious and pervasive that it merits the special sentencing provisions.\(^{105}\) Such sentencing guidelines are

\(^{99}\) See infra notes 100-03 and accompanying text (describing significant aspects of Chapters 936 and its intended impacts).

\(^{100}\) CAL. PENAL CODE § 368(a) (West Supp. 1999) (asserting that “the Legislature finds and declares” that elders and dependent adults deserve special protection under the law because they “may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves”).

\(^{101}\) Id. § 368(b)(1).

\(^{102}\) Id. § 368(2); id. § 237(b); see CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1715, at 2 (June 23, 1998) (defining false imprisonment, under existing California law, as the “unlawful violation of the personal liberty of another”).


\(^{104}\) See CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1715, at 4 (June 23, 1998) (indicating that the California Attorneys for Criminal Justice opposed Chapter 935 on the premise that “[a] person should not automatically be subject to a higher sentence simply because the victim is 65 years [sic] rather than 64, when other circumstances do not support the increased sentence’’”). Note that an earlier version of SB 1715, ultimately enacted as Chapter 935, included a sentence enhancement provision identical to that enacted in Chapter 936. SB 1715, § 2 (as amended Aug. 24, 1998). Cf. Garfield, supra note 40, at 878-79 (observing that “[t]he aged do not, by definition, become incompetents who need protection from themselves and others”); id. at 878 (describing critics of mandatory reporting of elder abuse as believing that the practice “infantilizes elders and encourages the already pervasive ageism in our society”).

\(^{105}\) See, e.g., CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1715, at 3 (June 23, 1998) (indicating that a letter of support from the City of Los Angeles stated that “elder abuse often starts with the abuser isolating the victim in order to take control of their [sic] finances and is then followed by other forms of abuse,” and thus Los Angeles supports statewide measures, such as Chapter 936, that help ensure the safety and welfare of the elderly).
not unique to California; in fact, many states consider a victim’s advanced age as a factor that merits enhanced criminal punishment for the defendant.106

C. New Consequences for Abusers in the Probate Arena

Although not a criminal sanction per se, another enhanced consequence for elder-abusers emerged in California during the 1998 Legislative Session in the form of Chapter 935.107 Chapter 935 prevents an individual from inheriting from, or acting as a fiduciary for, an elder or dependent adult who is unable to manage her affairs, if the individual has been convicted of or found liable for specified acts of abuse by clear and convincing evidence.108 By prohibiting abusers from inheriting from or acting as fiduciaries for their abused, Chapter 935 takes a significant step beyond existing California probate law, which had already prohibited a person who feloniously and intentionally killed a decedent from inheriting property from the estate.109

Chapter 935 provides that in determining whether to permit an individual to inherit from or act as a fiduciary for an abused elder or dependent adult conservatee, the court should consider three factors: the legal capacity of the conservatee to make the proposed transaction; the relationship of the conservatee to the prospective donee; and the conservatee’s past donative actions.110 This latter factor proposed in Chapter 935 appears to take into consideration the possibility that, in certain cases, elder or dependent adults may knowingly choose to provide financially for persons who abuse them.111

106. See, e.g., DEL. CODE. ANN. tit. 11 § 84(e)(2) (1996) (imposing an augmented sentence “if the victim is 60 years of age or older”); NEV. REV. STAT. ANN. § 193.167(1),(2) (Michie 1997) (providing that when a defendant perpetrates particular crimes against persons aged 65 or older, the defendant should be imprisoned “for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime”).

107. See infra notes 108-11 and accompanying text (detailing Chapter 935’s impact on California probate law).


109. Id. § 250.

110. Id. § 2583 (providing that “the court shall take into consideration all relevant circumstances” in determining whether to authorize or require a proposed action under this section).

111. See Garfield, supra note 40, at 879 (indicating that “an elder’s seemingly irrational nonaction actually may reflect a reasoned decision that remaining in the abusive situation is preferable to facing alternatives such as eventual institutionalization”); see also Suzanne J. Levitt & Rebecca J. O’Neill, A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect, and Exploitation: One Legal Clinic’s Experience, 5 ELDER L.J. 195, 196 (1997) (observing that difficulties in assisting victims of elder abuse may occur due to factors such as an elder’s dependence upon abusers for emotional or physical assistance).
D. Expanded Categories of Reportable Elder Abuse

Another California law passed in 1998, Chapter 980, enhances protections for elders and dependent adults by expanding the categories of reportable types of elder abuse to include abandonment, isolation, neglect, and financial abuse. Prior to Chapter 980, existing law required mandated reporters to report only actual or apparent physical abuse, not isolation, financial abuse, or neglect. The definition of “mandated reporter” is also expanded by Chapter 980 to include any person who has assumed full or intermittent care for an elder or dependent adult. To streamline the process of reporting, investigating, and prosecuting elder abuse that occurs in long-term care facilities, Chapter 980 requires that reports of abuse or neglect in long-term care facilities be forwarded immediately to the State Department of Health Services, and that reports of criminal abuse or neglect in long-term care facilities be forwarded as well to the Bureau of Medi-Cal Fraud. Where the alleged abuse has occurred in a state mental hospital or developmental center, the incident must be reported to investigators of the State Department of Mental Health, the State Department of Developmental Services, or a local law enforcement agency, and reports of known or suspected criminal activity must be forwarded as soon as practicable to the Bureau of Medi-Cal Fraud. In addition, Chapter 980 declares that training regarding how and when to report suspected incidents of criminal elder abuse in a facility setting will be provided by the Bureau of Medi-Cal Fraud. Mandated reporters who violate Chapter 980 by willfully failing to report “physical abuse, abandonment, isolation, financial abuse or neglect of an elder or dependent adult” can be sentenced to up to one year in county jail.

112. See CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1780, at 3 (Apr. 21, 1998) (asserting that Chapter 980’s expansion of the definition of reportable elder abuse to include neglect, financial abuse, abandonment, and isolation enhances protections for elderly individuals and dependent adults).

113. See CAL. WELF. & INST. CODE § 15630(b)(1)(I) (West Supp. 2000) (requiring mandated reporters to disclose known or suspected instances of physical abuse, abandonment, isolation, financial abuse, or neglect of an elder or dependent adult).


115. CAL. WELF. & INST. CODE § 15630(a) (West Supp. 2000). Prior law had limited the definition of “mandated reporter” to include only professional care custodians, health practitioners, and employees of county protective services agencies or law enforcement agencies who have knowledge of abuse, or have reason to believe abuse had occurred. 1985 Cal. Stat. ch. 1120, sec. 10, at 3769-70.

116. CAL. WELF. & INST. CODE § 15630(b)(1)(A) (West Supp. 2000); see CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1780, at 2-3 (Apr. 21, 1998) (noting that prior procedures, calling for the local ombudsman to “verify” allegations of abuse prior to contacting the Bureau of Medi-Cal Fraud, frequently resulted in the loss of physical evidence, and suggesting that Chapter 980’s provision requiring immediate reporting to the Bureau of Medi-Cal Fraud should improve the Bureau’s ability to prosecute elder abuse cases).


118. Id. § 15653.5.
fined up to $5,000, or both. Furthermore, Chapter 980 emphasizes the confidential nature of abuse reports, and clarifies how and to whom reports of elder abuse may be disclosed.

Opponents of early drafts of Chapter 980 expressed concerns about the bill’s inclusion of neglect as a reportable condition in a long-term care facility, observing that “indicators of neglect are not the same in a facility as in the community.” The opponents explained that in a long-term care setting, some indicators of neglect, such as malnutrition or dehydration, might be the result of deteriorating health, and not neglect at all. Chapter 980 in its final form addresses these concerns by indicating specific instances in which a mandated reporter shall not be required to report a suspected incident of abuse, including instances wherein the elder or dependent adult is the subject of a properly executed care plan and the reporter reasonably believes the injury was not the result of abuse. Additionally, Chapter 980 carves a similar reporting exception from the general rule in cases in which an elder or dependent adult who has been diagnosed with dementia, mental illness, or other incapacity reports an uncorroborated incident of abuse, and the mandated reporter is reasonably certain that no abuse has occurred.

Unfortunately, such reporting exceptions have potential for misuse by unscrupulous care providers. In a circumstance wherein the victim of abuse is particularly isolated by means of dementia or other incapacity, these provisions leave the decision to report in the hands of facility staff who may themselves have perpetrated the abuse of which the adult has complained. These aspects of Chapter 980 will require careful monitoring to ensure that they do not become

119. See CAL. WELF. & INST. CODE § 15630(h).
120. See id. § 15633(a) (providing that reports of suspected abuse may be disclosed to members of multidisciplinary teams of health, social services, and law enforcement professionals working together to prevent abuse and identify or treat victims of elder abuse).
121. See CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1780, at 4 (Apr. 21, 1998) (noting that opponents of the bill argued that indicators of neglect are different in a long-term care facility than in the community at large).
122. See id. (reporting the assertions of opponents of Chapter 980 that assessing neglect in a long-term care facility by the same standard used to measure neglect in the community would expose long-term care providers to excessive liability).
123. See CAL. WELF. & INST. CODE § 15630(b)(3)(A)(i)-(iv) (West Supp. 2000) (describing conditions under which a mandated reporter would not be required to report an incident as suspected abuse in a long-term care facility, such as where an injury occurs within the context of a properly executed plan of care).
124. See id. § 15630(b)(2)(A)(i)-(iv) (describing conditions under which a mandated reporter would not be required to report an incident as suspected abuse, such as when an elder or dependent adult diagnosed with a mental illness, dementia, or other incapacity reports an uncorroborated injury and the mandated reporter reasonably believes the abuse did not occur).
125. Cf. CALIFORNIA NURSING HOMES: FEDERAL AND STATE OVERSIGHT INADEQUATE TO PROTECT RESIDENTS IN HOMES WITH SERIOUS CARE VIOLATIONS, HEARINGS BEFORE THE U.S. SENATE SPECIAL COMMITTEE ON AGING, 98th Cong. 1 (1998) [hereinafter OVERSIGHT INADEQUATE] (concluding that “a significant number of California nursing homes . . . are not sufficiently monitored to guarantee the safety and welfare of nursing home residents”). Implicit in this testimony is the notion that depending on nursing homes to self-regulate to prevent and report elder abuse would be unwise.
reporting loopholes; indeed, the Legislature should reconsider the wisdom of such exceptions in a future legislative session.

The California Attorneys for Criminal Justice (CACJ) opposed Chapter 980 because of its provisions mandating the reporting of suspected financial abuse.126 CACJ argued that because such provisions permit the reporting of an elder or dependent adult’s financial matters, they invade the privacy of an elder or dependent adult.127 In contrast, the American Association of Retired Persons (AARP) has observed that this sort of provision balances “the individual’s autonomy and self-determination with state protection of those persons who cannot protect themselves.”128 Several other groups supported Chapter 980, including the County Welfare Directors Association of California, California Long Term Care Ombudsman Association and the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).129 AFSCME, indicated it supported Chapter 980 because the bill would help to ensure that elderly individuals receive the “care and treatment they deserve in their later years.”130 Nationwide, among the fifty states and the District of Columbia, all but three list suspected financial abuse as reportable mistreatment under the relevant abuse-reporting statute.131

E. Improving Efforts to Prosecute Abusers

In 1998, the California Legislature gave law enforcement officials a variety of new tools to combat elder abuse, including: (1) expanding reportable categories of abuse to include abandonment, isolation, neglect, and financial abuse,132 and (2) authorizing the imposition of a four-year prison term for perpetrators who use violence, threats, fraud, or deceit to falsely imprison an elder or dependent adult.133 However, in order to fulfill the promise of these statutes to the state’s citizens, California and its various counties must renew efforts to catch and prosecute

126. CALIFORNIA SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1780, at 5 (Aug. 14, 1998) (reporting CACJ’s argument that under Chapter 980, “the privacy of all elder and dependent adults is threatened, as their financial transactions may be reported without their knowledge or consent”).

127. Id. at 4.

128. CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2199, at 7 (June 23, 1998) (citing the support of the AARP for SB 2199’s regulation of financial abuse). SB 2199’s provision to amend California Welfare and Institutions Code § 15630(h) to regulate financial abuse was superseded by the provision enacted by Chapter 980. Compare 1998 Cal. Legis. Serv. ch. 946, sec. 8, at 5491-92, with CAL. WELF. & INST. CODE § 15630(h) (West Supp. 2000).

129. CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1780, at 4 (Apr. 21, 1998) (listing the names of agencies voicing support for AB 1780).

130. Id. (referencing the comments of AFSCME in support of AB 1780).

131. See Moskowitz, Saving Granny, supra note 27, at 170-73 (surveying state mandatory reporting statutes).

132. CAL. WELF. & INST. CODE § 15630(b)(1); see also supra Part IV.D (describing the provisions of Chapter 980, and explaining that this new statute enhances protections for abuse victims by expanding those categories of abuse falling under mandatory reporting requirements).

133. CAL. PENAL CODE § 368(e) (West 1999); id. § 237(b).
abusers. To that end, two elder abuse law enforcement programs that might be adapted to suit the needs of localities throughout California include the Delaware Attorney General’s Elder Abuse and Exploitation Project and the San Diego District Attorney’s Elder Abuse Prosecution Unit. The following sections explore those programs and examine them in the context of California’s battle against elder abuse.

1. Delaware Elder Abuse and Exploitation Project

In 1993, despite APS investigations of more than 200 cases of financial abuse against elders in Delaware, few cases had resulted in criminal prosecutions due to a shortage of resources and a widespread belief in the law enforcement community that financial abuse should be addressed in civil, not criminal, actions. However, in 1996, with the support of a federal grant, Delaware initiated an Elder Abuse and Exploitation Project (the Project), and in 1997, under the direction of a full-time prosecutor, the project prosecuted twenty-five cases and achieved a conviction rate of 100%. The goal of the Project is coordination of referrals and investigations of elder abuse in a domestic setting.

Eighty-four percent of cases referred to the Project involved financial exploitation. According to Delaware Deputy Attorney General Timothy H. Barron, these cases can be relatively easy to prosecute because, unlike most crimes, where evidence can be hard to find, financial abuse almost invariably involves a paper trail. Because a review of Delaware case files revealed that fifty percent of Delaware’s cases of financial exploitation in 1997 involved losses by the victim in excess of $50,000, the Project recommended a change in Delaware’s sentencing guidelines for financial exploitation. Since that recommendation was made, Delaware law has been amended, and perpetrators who cause losses in excess of

134. The programs mentioned here are examples, offered for illustrative purposes, and are not the only such programs of their kind. Information about law enforcement and other programs targeting elder abuse in particular communities is usually available through the local police or sheriff’s department or a local information and assistance program.


136. Id. Note that in Delaware, all criminal prosecutions are conducted by the state attorney general. Id. at 34 n.2. However, a program similar to that in place in Delaware might be duplicated in California at the county prosecutor level.

137. Id. at 38.

138. Id. at 36.

139. See id. (indicating that while successful prosecution of most crimes often depends on testimonial evidence at trial, financial abuse cases typically involve a paper trail of forged checks, bank statements, and loan documents).

140. See id. at 37 (observing that when the Barron article was published, crimes resulting in losses of $500 or more were subject to presumptive sentences of 12 months’ probation, but that the project had proposed that crimes resulting in losses of $10,000 or more be subject to incarceration).
$10,000 are more likely to face incarceration than would have been the case under prior law.\textsuperscript{141}

In addition to investigation and prosecution, the Project provides a victim’s advocate to assist victims during criminal prosecution, track investigations and case referrals, and provide information and assistance to community groups regarding elder abuse.\textsuperscript{142} The Project coordinates efforts between the Attorney General’s Office and the Division of Services for Aging and Adults with Physical Disabilities to offer services to victims of elder abuse.\textsuperscript{143} In addition, the Attorney General’s office supports community projects such as the Triad\textsuperscript{144} program, available in counties across the United States, which focuses on prevention of crimes and exploitation of the elderly through a coordinated effort of retired volunteers and local law enforcement agencies.\textsuperscript{145}

\textbf{2. San Diego County Elder Abuse Prosecution Unit}

San Diego County’s Elder Abuse Prosecution Unit, selected as a model program by the California Office of Criminal Justice Planning, involves a team of prosecutors, criminal investigators, and a counselor to spearhead elder abuse prosecutions in San Diego County.\textsuperscript{146} Cases prosecuted by this Unit run roughly fifty percent physical abuse and fifty percent financial abuse, including one theft by a care provider amounting to a loss of more than $200,000.\textsuperscript{147} The San Diego program is notable for its special care for elderly crime victims, including transportation to and from court appearances and the creation of a special “senior waiting room” at the court house, including an oxygen source and wheelchair

\textsuperscript{141} In 1999, the Delaware Legislature enacted a law increasing penalties for crimes of exploitation against infirm adults depending upon the value of the resources taken such that any person guilty of taking resources valued at more than $10,000 but less than $50,000 is guilty of a Class D felony, and “if the value of the resources is $50,000 or more[,] the person shall be guilty of a Class C felony.” DEL. CODE ANN. tit. 31, § 3913(b) (1999).

\textsuperscript{142} \textit{See} Barron, \textit{supra} note 135, at 38 (explaining the role of the victim’s advocate in Delaware program).

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} The Triad program, jointly sponsored by the AARP, the International Association of Chiefs of Police and the National Sheriffs Association, enlists retired persons to assist in law enforcement efforts to reduce crime and exploitation of the elderly. Barron, \textit{supra} note 135, at 38. Since the program’s founding in 1988, more than 600 counties across the United States have implemented Triad councils, called SALT, an acronym for Seniors and Law Enforcement Together, in order to reduce crime against the elderly in their communities. \textit{See National Sheriffs Association, Triad at NSA (visited July 14, 1999) <http.//www.sheriffs.org/triad.htm> (copy on file with the McGeorge Law Review).}

\textsuperscript{145} Barron, \textit{supra} note 135, at 37-38.

\textsuperscript{146} Pfingst, \textit{supra} note 2, at B11 (describing the Elder Abuse Prosecution Unit as a "lightning rod" for elder abuse cases).

\textsuperscript{147} \textit{See id.} (indicating that the Unit’s physical abuse cases included incidents of rape, muggings, assault and murder).
accommodations. Stressing that elder abuse is more than a law enforcement issue, San Diego District Attorney Paul Pfingst has encouraged his community to develop public/private partnerships to combat elder abuse.

California’s 1998 enactment of criminal sentence enhancements and expanded categories of reportable abuse has broadened the legal framework within which law enforcement officials may work to stop perpetrators of elder abuse. However, the statutes themselves are only a framework. Ultimately, local establishment of special programs like the Delaware Elder Abuse and Exploitation Project and the San Diego County Elder Abuse Unit—tailored to serve the needs of elder victims and prosecute abusers—may make criminal sanctions for abusers an effective deterrent by promoting community involvement and instilling trust among the elderly in elder abuse prevention efforts.

V. CIVIL LIABILITY FOR ELDER ABUSE

A. Civil Liability Generally

Criminal sanctions and other penalties for elder abuse operate in conjunction with laws imposing civil liability for elder abuse. Many forms of elder abuse can be litigated as traditional tort law causes of action; for example, financial abuse may be raised as fraud, or physical abuse as battery. At least one scholar has proposed that malpractice theories may be employed to pursue civil actions against mandated reporters who fail to report suspected abuse. However, elderly victims of abuse frequently have minimal damages to claim in the form of lost earnings, and often may not benefit from claims for medical expenses “because of third-party payor liens.” In fact, a claim for pain and suffering damages against the abuser may be an elder’s “only viable claim with any deterrent effect.” However, in most states, including California, pain and suffering damages are not typically recoverable after

148. See id. (observing that because elderly crime victims are frequently called to testify against their abusers, important aspects of the San Diego program include providing for the victim’s safety if he or she testifies, and quelling his or her fears of reprisal).

149. See id. (encouraging public attendance at a Conference on Elder Abuse sponsored by the San Diego County Board of Supervisors).

150. See Moskowitz, Saving Granny, supra note 27, at 102 (asserting that traditional civil actions are sometimes successful against elder-abusers).

151. See id. at 80-81 (suggesting that civil liability and professional discipline for non-reporting mandated reporters may increase compliance with mandated reporting statutes).

152. Kelly J. McDonald & Stanley J. Marks, Fighting Back for Elder Abuse Victims, ARIZ. ATT’Y, Dec. 1997, at 20, 33. Due to contractual subrogation clauses, third-party payors, such as a health insurance companies or health maintenance organizations, are often involved in an insured’s litigation against a tortfeasor, and typically receive “part of the tort settlement or verdict.” Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 10-11 (1970).

153. McDonald & Marks, supra note 152, at 33.
the death of the victim.\textsuperscript{154} One irony of this sort of limitation on pain and suffering recovery is that an elder’s abuser might escape civil liability by either causing the death of the victim or delaying litigation sufficiently to forestall a conclusion of the case before the victim dies from other causes.\textsuperscript{155}

B. The Elder Abuse and Dependent Adult Civil Protection Act

To address this and other weaknesses in traditional civil actions against elder-abusers, the California Legislature enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA).\textsuperscript{156} This Act provides for the reporting of actual or suspected abuse of an elder, delineates special requirements for mandated reporters, and authorizes APS to conduct investigations and provide other services in response to elder abuse reports.\textsuperscript{157} As discussed in Part IV.D, supra, implementation of Chapter 980 into the EADACPA should dramatically impact the reporting aspect of elder abuse law, both in the civil and criminal arenas.\textsuperscript{158}

Perhaps most significantly, though, EADACPA “help[s] victims engage lawyers to take their cases”\textsuperscript{159} by creating new remedies, including a 1991 provision establishing an exception to the general rule prohibiting recovery of post-death damages by successors in interest for egregious cases of elder abuse.\textsuperscript{160} Specifically, EADACPA permits recovery of up to $250,000 for pain, suffering, or disfigurement when the person with a cause of action for elder abuse dies before final judgment.\textsuperscript{161} Additionally, the Act requires courts to award attorney’s fees and costs to successful plaintiffs.\textsuperscript{162}

\textsuperscript{154} See id. at 34 (referencing ARIZ. REV. STAT. ANN. § 14-3110 (1997)); see also CAL. CIV. PROC. CODE § 377.34 (West Supp. 2000) (indicating that in civil actions continued after the death of the victim, damages for pain and suffering are not recoverable).

\textsuperscript{155} See McDonald & Marks, supra note 152, at 33 (musing upon the “irony and injustice” of laws that motivate an abuser to delay litigation until the death of the elderly victim).

\textsuperscript{156} CAL. WELF. & INST. CODE §§ 15600-15631 (West 1991 & Supp. 2000); see S. B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts § 291, at 376 (9th ed. 1988) (stating that by enacting EADACPA, the Legislature intended to encourage reports of suspected abuse, promote the collection of data to assist the state in determining how to aid victims, and “grant protection to persons reporting abuse”).


\textsuperscript{158} See supra Part IV.D (describing how Chapter 980 enhances protections for victims of elder abuse by expanding the categories of reportable abuse to include abandonment, isolation, neglect, and financial abuse).

\textsuperscript{159} See CAL. WELF. & INST. CODE § 15600(j) (West Supp. 2000) (declaring that the intent of the Legislature in adding sections 15657 to 15657.3 was “to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults”); Moskowitz, New Remedies, supra note 37, at 56 (referencing California Welfare and Institutions Code sections 15657 through 15657.3 to buttress the same premise).

\textsuperscript{160} CAL. WELF. & INST. CODE § 15657(b) (West Supp. 2000).

\textsuperscript{161} Id.

\textsuperscript{162} See id. § 15657(a) (awarding attorney fees where the defendant is determined to be “guilty of recklessness, oppression, fraud, or malice” in perpetrating abuse); id. § 15657.05(a)(1) (providing an award of attorney fees when an elder is abducted by the abuser); id. § 15657.1 (establishing the factors a court should consider in determining the amount of an attorney fee award).
EADACPA was premised in part upon a legislative finding that elder abuse cases were rarely pursued as civil actions "due to problems of proof, court delays, and [a] lack of incentives for attorneys to take such cases,"163 Enhanced remedies available through EADACPA for reckless, oppressive, or fraudulent conduct include post-mortem recovery for pain and suffering and attorney's fees.164 These enhanced remedies are critical incentives for several reasons. As indicated previously,165 due to the length of time required for litigation, an elderly plaintiff may not survive until the case reaches final judgment,166 and thus defendants whose victims die before judgment may actually receive a windfall by avoiding pain and suffering costs.167 Additionally, absent a statutory fee-shifting provision, victims may not be able to retain an attorney to pursue their cases, no matter how flagrant the abuse.168

EADACPA applies generally to cases involving elderly victims of abuse, regardless of whether the victim is living at home in the community or in a long-term care setting.169 However, California's elderly victims have faced judicial obstacles blocking achievement of full recovery under the EADACPA where the abusive act arose in the context of provision of medical services in long-term care facilities.170 Achieving full EADACPA recovery for victims abused in long-term care settings is particularly important, in light of well-documented reports of extensive abuse and neglect of elderly persons residing in skilled nursing facilities.171

163. Id. § 15600(h) (West Supp. 2000).
164. Id. §§ 15657-15657.3.
165. Supra Part V.A.
166. See Moskowitz, New Remedies, supra note 37, at 56 (observing that provisions such as post-mortem recovery for pain and suffering help reverse disincentives and assist parties in bringing civil actions in elder abuse cases).
167. See id. (observing that "[i]n some states the death of the abused elder person cuts off recovery for pain, suffering or disfigurement").
168. See id. (reporting that "many victims are unable to obtain a lawyer, even when the abuse is obvious and shocking," absent a fee-shifting provision).
169. See CAL. WELF. & INST. CODE § 15600(i) (West Supp. 2000) (stating that EADACPA instructs law enforcement and other appropriate agencies to protect endangered elders and dependent adults, and not limiting this protection to either institutionalized or non-institutionalized elders).
170. See infra notes 199-207 and accompanying text (offering a synopsis of the California Supreme Court decision in Delaney v. Baker, 971 P.2d 986 (Cal. 1999), which clarified that a health care provider who acts with reckless neglect toward an elder is subject to enhanced civil penalties under EADACPA).
171. See infra notes 173-77 and accompanying text (detailing published reports of abuse and neglect in California nursing homes).
C. Why Enhanced Remedies Are Needed in the Long-Term Care Arena

In 1990, 1.6 million of America's 1.9 million nursing home residents were over age sixty-five. In California, on any given day, elders and dependent adults occupy more than 141,000 resident beds in approximately 1,400 nursing homes. According to a report submitted to the Special Committee on Aging of the United States Senate, of those roughly 141,000 California nursing home residents, approximately “3,000 . . . died in more than 900 California nursing homes in 1993 as a result of malnutrition, dehydration, sepsis from improperly treated urinary tract infections and other serious conditions for which they did not receive acceptable care.” In response to allegations of such gross breaches of care, the Special Committee on Aging of the United States Senate commissioned a report by the General Accounting Office (GAO) to analyze the quality of care in California nursing homes. The GAO report concluded that despite federal and state oversight, “a significant number of California nursing homes . . . are not sufficiently monitored to guarantee the safety and welfare of nursing home residents.” Unfortunately, this finding was not a surprise. A study published in 1989 revealed that forty percent of nursing home personnel surveyed admitted that in the previous year they had psychologically abused a resident at least once, and ten percent of personnel surveyed admitted to physically abusing a resident.

The California Attorney General’s Bureau of Medi-Cal Fraud investigates and prosecutes abuse in the nearly ninety percent of California’s long-term care facilities that receive Medi-Cal funding. However, the State Attorney General often receives abuse reports long after an incident has transpired, when evidence is

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172. Moskowitz, New Remedies, supra note 37, at 53. The nation’s nursing home population increased 24.2% between 1980 and 1990. Id.
173. See Oversight Inadequate, supra note 125, at 1 (statement of William J. Scanlon, Director, Health Financing and Systems Issues, Health, Education, and Humans Services Division, General Accounting Office) (indicating that the federal Health Care Financing Administration (HCFA) and California’s Department of Health Services (DHS) monitor care in 1,400 California nursing homes).
174. Id. (statement of William J. Scanlon, Director, Health Financing and Systems Issues, Health, Education, and Humans Services Division, General Accounting Office).
178. See New Bill on Elder Abuse, PRECINCT REP., Feb. 19, 1998, at A1, available in 1998 WL 11490582 (reporting that nearly 90% of California’s long-term care facilities receive Medi-Cal funding); see also CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1780, at 3 (Apr. 21, 1998) (observing that prior to the enactment of AB 1780, California provided no specific time frame in which abuse reports needed to be forwarded to the Department of Medi-Cal Fraud).
typically insufficient to support prosecution, due to healed injuries and lost evidence.179

D. EADACPA as Applied to Health Care Providers

While federal and state officials revamp procedures for detecting abuse,180 nursing home residents and their families increasingly seek civil remedies for abuse in skilled nursing facilities.181 However, until 1999, California Courts of Appeal had split as to whether the enhanced remedies of EADACPA would apply in cases where plaintiffs proved elder abuse in the form of reckless or oppressive conduct in the provision of medical services to a resident of a long-term care facility.182 The California Supreme Court granted review in two cases, and resolved the matter with its decision in Delaney v. Baker (Delaney II).183

In Mueller v. Saint Joseph Medical Center,184 the Court of Appeal for the Second District determined that the plaintiffs, who claimed their deceased family member was a victim of willful misconduct by his hospital and physicians, were excluded from recovering under the EADACPA because their claims were “based

179. See CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1780, at 3 (Apr. 21, 1998) (indicating that delays in reporting have resulted in lost evidence and thwarted prosecutions). AB 1780, enacted in 1998 as Chapter 980, addresses this concern with a provision requiring that reports of criminal activity in skilled nursing facilities be reported to the Bureau of Medi-Cal Fraud “as soon as is practical.” CAL. WELF. & INST. CODE § 15630(b)(1)(B) (West Supp. 2000).

180. See Oversight Inadequate, supra note 125, at 15 (statement of William J. Scanlon, Director, Health Financing and Systems Issues, Health, Education, and Humans Services Division, General Accounting Office) (recommending that the HCFA “revise its guidelines for states in order to reduce predictability of on-site reviews,” improve identification of care problems, and eliminate grace periods for facilities with “a history of serious and repeat deficiencies”).

181. See Gail Diane Cox, End of Life Valued: Suits Alleging Abuse or Wrongful Death of Nursing Care Patients Draw Big Settlements and Awards, NAT’L LJ., Mar. 2, 1998, at A1 (quoting Steven M. Levin, former chair of the American Trial Lawyers Association’s nursing home litigation group, as reporting that “[n]ursing home abuse is one of [the] few growth areas in litigation”).

182. Compare Delaney v. Baker, 69 Cal. Rptr. 2d 645, 652 (1997) [hereinafter Delaney I], review granted and opinion superseded by Delaney v. Baker, 951 P.2d 1183 (Cal. 1998) (holding that Welfare and Institutions Code section 15657.2 does not exempt application of Welfare and Institutions Code section 15657, which permits award of pain and suffering damages and attorney fees for an action of reckless neglect of an elderly against health care providers), with Mueller v. Saint Joseph Med. Ctr., 68 Cal. Rptr. 2d 668, 670, 672 (1997), review granted and opinion superseded by Mueller v. Saint Joseph Med. Ctr., 950 P.2d 59 (Cal. 1998) (holding that the civil remedies of the Elder Abuse Act do not apply against a defendant health care provider if the claim against the defendant is based on “alleged professional negligence,” because according to Welfare and Institutions Code section 15657.2, the Elder Abuse Act has no operation as to claims based on rendition of professional services by a health care provider). Delaney I involved particularly egregious facts: Plaintiff’s 88-year-old mother had died just four months after she had been admitted to a skilled nursing facility, simply for care of a fractured ankle. Delaney I, 69 Cal. Rptr. 2d at 646. At the time of her death, Plaintiff’s mother had “Stage III and Stage IV pressure ulcers (commonly known as ‘bedsores’) on her ankles, feet and buttock areas,” allegedly attributable to neglect she suffered while a resident of the facility. Id.

183. 971 P.2d 986 (Cal. 1999) [hereinafter Delaney II].

on” the defendants’ rendition of professional services, and thus EADACPA would not apply. However, in Delaney v. Baker (Delaney I), the Court of Appeal for the First District concluded that the enhanced remedies of the EADACPA, including recovery of attorney fees and post-mortem recovery for pain and suffering, should not be not precluded from application simply because the case might also be governed by statutes relating to damage limitations for professional negligence by health care providers. At the heart of the apparent disagreement between the First and Second District Courts is section 15657.2 of the Welfare and Institutions Code, which provides that “any cause of action for injury or damage against a health care provider . . . based on . . . alleged professional negligence[] shall be governed by those laws which specifically apply to those professional negligence causes of action.” The Mueller court, applying the Medical Injury Compensation Reform Act (MICRA) applicability test developed in Central Pathology Service Medical Clinic, Inc. v. Superior Court, concluded that EADACPA did not apply because the injury in question in Mueller was “directly related to the professional services provided by the health care provider.”

The Delaney I court, on the other hand, observed that where section 15657.2 refers to “laws which specifically apply to . . . professional negligence causes of action,” the Legislature was referencing statutes such as MICRA that “specifically limit their application to actions against a health care provider based on professional negligence.” The court then framed the question as “whether section 15657.2 states that MICRA statutes shall solely govern or shall also govern.” The Delaney I court, unwilling to assume “that the application of MICRA or EADACPA is an either-or proposition,” determined that section 15657 displaced only “statutes of general applicability” such as statutes “limiting damages

185. See id. at 672 (“These claims are . . . ‘based on’ the rendition of professional services[,] [and] . . . the Elder Abuse Act has no application to such claims.”).
187. See id. at 652 (“Section 15657 applies in this case even though Delaney’s action alleged that appellants as statutory health care providers rendered recklessly negligent care to Delaney’s mother.”).
188. CAL. WELF. & INST. CODE § 15657.2 (West Supp. 2000).
189. CAL. CIV. CODE § 3333.2 (West 1997).
190. 832 P.2d 924 (Cal. 1992).
191. Id. at 930. For purposes of determining the applicability of the Medical Injury Compensation Reform Act (MICRA), a cause of action “for damages arises out of the professional negligence of a health care provider if the injury for which damages are sought is directly related to the professional services provided.” Id.
193. Delaney I, 69 Cal. Rptr. 2d at 649. One relevant provision of MICRA establishes that in actions against health care providers “based on professional negligence,” an injured plaintiff’s recovery for non-economic losses may not exceed $250,000. CAL. CIV. CODE § 3333.2 (West 1997). Additionally, MICRA does not provide for awards of attorney fees to prevailing parties. Salgado v. County of Los Angeles, 967 P.2d 585, 597 (Cal. 1998); see CAL. CIV. PROC. CODE § 1033.5(e)(10)(B) (West Supp. 2000) (providing that generally a court may not award attorney fees to a prevailing party, absent statutory authorization to do so).
194. Delaney I, 69 Cal. Rptr. 2d at 649.
recoverable for a decedent’s injuries or death,” or general provisions limiting “recovery of attorney fees.”95 Viewing the case in this context, the First Appellate District Court declared that “EADACPA’s enhanced remedy provisions do not conflict with any specific provision of MICRA.”96 Thus, the Delaney I court concluded that “MICRA continues to govern claims against health care providers[,] . . . [but] if a finder of fact should conclude by clear and convincing evidence that such neglect was committed with ‘recklessness, oppression, fraud or malice,’ the provisions of MICRA do not preclude recovery of the enhanced remedies of section 15657.”197 The Delaney I court astutely observed that to apply EADACPA’s enhanced remedies to a non-health care provider defendant, but not to apply EADACPA if the defendant qualifies as a health care provider, “would yield . . . an anomalous result” and undercut “any deterrence value intended by the enactment of EADACPA.”198

Although rejecting the reasoning of the First Appellate District Court, the California Supreme Court in Delaney II agreed with the holding of the Court of Appeal that the enhanced remedies of EADACPA applied against the defendants in this case.199 Determining that the language of section 15657.2 was “ambiguous,” the Supreme Court examined the statute’s legislative history and declared that “those who enacted the statute thought that the term ‘professional negligence,’ at least within the meaning of section 15657.2, was mutually exclusive of the abuse and neglect specified in section 15657.”200 The position taken by the Delaney defendants and the Mueller court was that “the term ‘professional negligence’ covers all conduct ‘directly related to the professional services provided by the health care provider.’”201 The Supreme Court rejected that position and asserted that “‘reckless neglect’ under section 15657 is distinct from causes of action ‘based on’ professional negligence,” such that health care providers engaging in “reckless neglect” of their patients are indeed “subject to section 15657’s [enhanced] remedies.”202 In rejecting the Mueller court’s reliance on the Central Pathology MICRA applicability test,203 the Delaney II court asserted that the Supreme Court in Central Pathology “did not purport to universally define the phrase ‘arising out of professional negligence’”; rather, the Central Pathology court asserted that “the

195. Id.
196. Id.
197. Id. at 651 (quoting section 15657 of the California Welfare and Institutions Code).
198. Id. at 650.
199. Delaney II, 971 P.2d at 988.
200. Id. at 990.
201. Mueller, 68 Cal. Rptr. 2d at 671 (quoting Central Pathology Med. Clinic v. Superior Court, 832 P.2d 924, 931 (Cal. 1992)).
203. See supra note 191 (describing the MICRA applicability test developed by the California Supreme Court in the Central Pathology case).
scope of conduct afforded protection under MICRA . . . must be determined after consideration of the purpose underlying each of the individual statutes.” 204

The Delaney II court declared that to be eligible for section 15657 remedies, a plaintiff must offer “clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct.” 205 To state the converse, a defendant health care provider may act with “neglect” and avoid the enhanced penalties of EADACPA via the provision excepting acts “based on . . . professional negligence” in section 15657.2, unless the defendant’s conduct is “reckless” or perpetrated with “oppression, fraud[,] or malice.” 206 The court in Delaney II concluded that such a reading of the statutes is consistent with the legislative intent of EADACPA “to provide heightened remedies for . . . ‘acts of egregious abuse’ against elder and dependent adults.” 207

Thus, EADACPA’s enhanced remedies—available for several years to victims of elder abuse against perpetrators in all contexts outside the provision of health care services—are now likewise available to victims to fight abuse and neglect by health care providers, a particularly invidious form of elder abuse. The Supreme Court’s decision to apply EADACPA’s enhanced remedies to “reckless neglect” in the care of an elderly person regardless of whether or not the custodian is “a licensed care professional” 208 is particularly encouraging in light of the currently reported crisis in quality skilled nursing home care in California. 209

VI. PROBLEMS THAT REMAIN: ACCESS AND SERVICES TO ADDRESS ELDER ABUSE FOR ELDERS LIVING AT HOME IN THE COMMUNITY

Despite more than thirty years of public awareness of elder abuse, mistreatment of the elderly continues to affect millions of persons and families nationwide. 210 Unfortunately, legislation to date, including ever-increasing criminal sanctions and civil liability, has not slowed the alarming trend of violence and fraud against some of California’s most frail and vulnerable citizens. 211 To reduce incidents of elder

204. Delaney II, 971 P.2d at 997 (quoting Central Pathology Serv. Med. Clinic, Inc. v. Superior Court, 832 P.2d 924 (Cal. 1992)).
205. Id. at 991.
206. Id. at 993.
207. Id.
208. Id.
209. See Oversight Inadequate, supra note 125, at 14 (statement of William J. Scanlon, Director, Health Financing and Systems Issues, Health, Education, and Human Services Division, General Accounting Office) (reporting countless incidents in which “residents who needed help were not provided basic care—not helped to eat or drink; not kept dry, clean or free from feces and urine; not repositioned to prevent pressure sores; not monitored for the development of urinary tract infections; and not given medication when needed”).
210. See Moskowitz, New Remedies, supra note 37, at 56 (asserting that elder abuse “lurks in the shadows of society”).
211. Id.
abuse, the State must re-examine evidence regarding the likely causes and circumstances that trigger elder abuse.\textsuperscript{212}

As indicated in Part II, \textit{supra}, abuse often occurs within the family context, and among isolated elders.\textsuperscript{213} Often, the abused elder will not report an incident, perhaps out of shame that a loved one is the abuser, or for fear of reprisals.\textsuperscript{214} In fact, victims of elder abuse may actually “assist[ed] their abusers with cooking, cleaning, housing, and transportation.”\textsuperscript{215} Abusive family members may be struggling with complex issues, such as stress, “unemployment, alcohol and drug abuse, and crowded living conditions,” that may lead them to abuse or neglect an elderly parent.\textsuperscript{216}

Although abused elders may resist reporting abuse, a survey conducted in 1987 by the California Department of Social Services revealed that, of the cases of abuse reported during the study period, eighty-five percent of abuse victims were willing to accept some help, when it was offered, to address the abuse.\textsuperscript{217} Thus, this Comment asserts that the State should support and encourage communities to devise systems that will increase access to services for individuals needing the protection of elder abuse laws, and provide services that specifically address problems associated with both social isolation and family stress.

\textbf{A. Chapter 946: A Step in the Right Direction}

Chapter 946, enacted during the 1998 legislative session, takes a step toward providing and improving access to support services for abuse victims by requiring counties to provide services such as round-the-clock reporting systems, abuse investigations, social services, transportation, emergency shelter, and in-home assistance.\textsuperscript{218}

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\textsuperscript{212} See \textit{supra} Part II.A (examining factors that likely contribute to elder abuse, including increased life expectancy, changes in the family structure, and an absence of caregiving support in the home); see also \textit{supra} notes 62-64 and accompanying text (sketching a list of recommendations from the 1990 \textit{Decade of Shame} report, \textit{supra} note 1, to address elder abuse).

\textsuperscript{213} See \textit{supra} note 31 and accompanying text (observing that in cases of abuse within the family, factors such as resentment, stress, and substance abuse may contribute to abuse); see also \textit{supra} notes 29-30 and accompanying text (reporting that around the world, adult children are less likely to live with, and less willing to care for, elderly family members, than were adult children from previous generations).

\textsuperscript{214} See 1990 \textit{Decade of Shame}, \textit{supra} note 1, at 97 (invoking studies that indicate that “the son of the victim is most likely to be the abuser, followed by the daughter of the victim”).

\textsuperscript{215} Molly Dickinson Velick, \textit{Mandatory Reporting Statutes: A Necessary yet Underutilized Response to Elder Abuse}, 3 \textit{Elder L.J.} 165, 174-75 (citing a University of New Hampshire study indicating that family members will “stick together, both when the victim relies on the abuser and when the abuser depends upon the victim”).

\textsuperscript{216} See \textit{id}. (observing that environmental factors may lead to abuse or neglect).

protective care as components of county APS programs.\(^\text{218}\) Significantly, although Chapters 936, 935 and 980—discussed supra at Parts IV.B, IV.C and IV.D, respectively—including numerous provisions designed to curb elder and dependent adult abuse,\(^\text{219}\) only Chapter 946 increases funding to county APS agencies or mandates that additional services be provided for victims of abuse.\(^\text{220}\)

To recommend appropriate APS program augmentations for inclusion in Chapter 946, the State of California Health and Welfare Agency, Department of Social Services evaluated the results of three pilot projects conducted in various California counties in the 1980s, and attempted to “present statewide program standards to improve the current APS Program.”\(^\text{221}\) In crafting the budgetary proposal to accompany Chapter 946, the County Welfare Directors Association of California (CWDA) proposed a funding level based on an estimated 223,000 adults at risk for abuse.\(^\text{222}\) The 223,000 figure was based on “California’s historic rate of dependent adult abuse and the elder abuse rate as determined in a federal General Accounting Office (GAO) study.”\(^\text{223}\) CWDA proposed a casework program model, incorporating tangible services such as shelter, respite, and transportation, and including provisions to improve partnerships and linkages with other programs and services serving similar client populations.\(^\text{224}\) This program model, largely adopted under Chapter 946, was developed in light of the results of three pilot projects funded by the State Legislature in various California counties during the mid-1980s.\(^\text{225}\) Analysis of the pilot projects culminated in the issuance of a Report to the

\(^{218}\) See CAL. WELF. & INST. CODE § 15630(b)(1) (West Supp. 2000) (requiring mandated reporters to report known or suspected instances of physical abuse, abandonment, isolation, financial abuse, or neglect of an elder or dependent adult); id. § 15760 (requiring county APS agencies to offer services including a twenty-four hour reporting system, abuse investigations, preventive social work activities, food, transportation, emergency shelter, in-home protective care, and a multidisciplinary team approach to elder abuse intervention services).

\(^{219}\) See generally CAL. PENAL CODE §§ 237, 368 (West 1999) (increasing penalties for false imprisonment of elders, and preventing abusers from inheriting or acting as fiduciaries for the abused); CAL. PROB. CODE § 259 (West Supp. 1999) (same); CAL. WELF. & INST. CODE §§ 15630, 15633 (West Supp. 2000) (expanding definitions of “abuse” and “mandated reporter,” streamlining reporting procedures, and increasing penalties for failures to report abuse); § 15655.5 (West Supp. 2000) (same).

\(^{220}\) See generally CAL. WELF. & INST. CODE §§ 15760-15763 (West Supp. 2000) (enacted by Chapter 946) (outlining the enhanced services authorized by Chapter 946).


\(^{223}\) Id.

\(^{224}\) See id. at 2 (positing that tangible services that can assist individuals in transitioning to safer home life situations should be incorporated into the casework-oriented APS program).

\(^{225}\) Letter from Frank J. Mecca, Executive Director, County Welfare Directors Association of California, to the Honorable Gray Davis, Governor, State of California 1 (June 15, 1999) [hereinafter Letter from Frank Mecca] (copy on file with the McGeorge Law Review) (outlining the development of the program model that was enacted by SB 2199 (Chapter 946)).
Legislature in 1988 evaluating the demonstration projects and documenting the need for a comprehensive statewide APS program.226

California Attorney General (then Senator) Bill Lockyer, author of Chapter 946, observed that prior to the enactment of Chapter 946, APS reporting standards were almost non-existent in California, with the counties required only to receive reports of elder abuse, not act upon them.227 The California State Association of Counties supported passage of Chapter 946, and noted that “funding for Adult Protective Services . . . has been virtually stagnant for over a decade,”228 although the 225,000 incidents of adult abuse now occurring annually in California represent more than a 1,000% increase in the number of abuse incidents as compared with the number of incidents reported in 1986-87.229 “California counties [have] lack[ed] the ability to respond to approximately eighty percent of these incidents.”230 By expanding reporting parameters for elder and dependent adult abuse and providing a necessary infusion of resources in adult protective services to support the statute’s increased reporting requirements, Chapter 946 provides significant reform to California’s elder and dependent adult abuse reporting and protection system.231

However, despite what Chapter 946 promises, in appropriating funding for the program, the State only half-heartedly delivers on its commitment of resources and expanded services.232 Chapter 946 limits implementation of enhanced services to the extent that funds are provided in the Annual Budget Act.233 Additionally, counties will not be required to pay any share of non-federal costs for the enhanced programs above expenditure levels that were required of each county in the 1996-97 fiscal year.234 When Chapter 946 was introduced in the Legislature, the cost per year

226. Id. For a complete analysis of the three pilot projects and specific results in the pilot counties, see generally REPORT TO THE LEGISLATURE, supra note 221.

227. CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2199, at 2 (June 23, 1998) (quoting California’s then-Senate President pro tempore Bill Lockyer as asserting that “the county service mandate is limited to receiving reports; [counties] are not required to provide any emergency/treatment services or even investigate these reports”). The report continues by observing that prior to the enactment of Chapter 946, Welfare and Institutions Code section 15640(a)(2) required APS units to prepare only a written report of possible criminal activity, and not launch an investigation, for suspected incidents of abuse other than physical abuse. Id.

228. Id. at 7.

229. 1998 Cal. Legis. Serv. ch. 946, sec. 1(a), at 5487 (propounding legislative findings regarding the astronomical increase in elder abuse incidents reported in 1998 as compared to incidents reported in 1982).

230. Id. sec. 1(b), at 5487 (providing a legislative declaration that California counties are inadequately equipped to address the high number of elder abuse incidents).

231. See CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2199, at 2 (June 23, 1998) (quoting Senator Lockyer’s assertion that Chapter 946 provides “a sweeping reform of both the state’s elder and dependent adult reporting laws and our Adult Protective Services program”).

232. See infra note 224 and accompanying text (outlining the augmented services that Chapter 946 provides to combat elder abuse). But see infra notes 234-35 (explaining that in 1999, the services of Chapter 946 were underfunded by as much as $50 million).

233. CAL. WELF. & INST. CODE § 15765 (West Supp. 2000) (noting that “this chapter shall be implemented only to the extent funds are provided in the annual Budget Act”).

234. Id. § 15764.
of enhanced adult protective services authorized by Chapter 946 was budgeted at approximately $70.3 million; however, later versions of the bill incorporated substantially smaller funding amounts. Ultimately, when the budget bill was signed by Governor Wilson, the appropriation for enhanced services under Chapter 946 amounted to just $20 million.

In an attempt to salvage the program, Chapter 946 was amended so that initiation of the enhanced services would be delayed until May of 1999, thus reserving the meager 1998-99 budget funds for expenditure over just May and June, the final two months of the State fiscal year. In the spring of 1999, County APS projects and local partners such as law enforcement, the district attorney’s office and community organizations initiated programs and services and prepared to implement the new mandates of Chapter 946 in anticipation of full funding for the program in the 1999-2000 budget.

At the same time, CWDA expressed concern that failure to fully fund the program would “undermine the existing, already overextended APS system by creating false expectations among mandated reporters . . . [and would] leave thousands of elderly and dependent adults . . . to suffer in silence.” Despite these concerns, the 1999-2000 State Budget signed by Governor Davis on June 29, 1999, incorporated just $45 million to fund Chapter 946-mandated services. The funding level approved by Governor Davis was premised upon an estimate of needed services extrapolated from the National Elder Abuse

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235. CALIFORNIA SENATE APPROPRIATIONS COMMITTEE, FISCAL SUMMARY OF SB 2199, at 1 (May 26, 1998) (indicating that the fiscal impact of Chapter 946 was anticipated to be $70 million per year in fiscal years 1999-2000 and 2000-01, and that the budget subcommittee had added $70.3 million to the General Fund to fund Chapter 946 expenditures).

236. See CALIFORNIA ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 2199, at 1 (Aug. 5, 1998) (indicating that at the time of this committee report, the budget bill proposed a $52.7 million increase for APS programs).

237. As signed by Governor Wilson, the Fiscal Year 1998-99 budget actually incorporated just $20 million to fund enhanced services under Chapter 946. See 1998 Cal. Stat. ch. 324, Item 5180-151-0001, at 31 (“deleting a $32,700,000 General Fund legislative augmentation and $25,154,000 in corresponding reimbursements to expand the Adult Protective Services Program,” and maintaining just $20 million for this purpose).

238. See CAL. WELF. & INST. CODE § 15765 (West Supp. 2000) (providing that Chapter 946 shall not become effective until May 1, 1999).

239. See id. (establishing May 1, 1999, as Chapter 946’s sunrise date).


241. Id. at 2.

242. See Item Vetoes of Senate Bill No. 160, SUPPLEMENTAL SENATE FILE: GOVERNOR’S VETOES § 106, at 62 (June 30, 1999) (stating, “I am reducing the $30,000,000 General Fund and $10,276,000 Reimbursements legislative augmentation for the Adult Protective Services (APS) program by $20,000,000 and by $8,986,000, respectively,” which, according to Governor Davis, left sufficient monies to “fully fund the APS program based on a recent nationwide study on elder abuse released by American Public Human Services Association”). In vetoing the additional funding the Legislature had appropriated for this program, the Governor noted that he was not funding “costs related to investigation of” “unsubstantiated cases excluded from the national study.” Id.; see Steven A. Capps, State Budget Signed by Davis, SACRAMENTO BEE, June 30, 1999, at A1 (asserting that the Governor’s budget cut “nearly a third” of the funding sought “to protect elderly and disabled adults from abuse”).
Incidence Study (NEAIS).\textsuperscript{243} However, CWDA had set aside this particular study in preparing its estimate of program costs, due to “significant methodological problems in extrapolating the study’s figures to California.”\textsuperscript{244} Only time will tell if the $45 million will sufficiently fund all services mandated under Chapter 946. However, Chapter 946 has created an expectation in the public that such enhanced services will be available to California’s elderly and dependent adults.\textsuperscript{245} In addition to concerns regarding unmet needs, upon realizing the discrepancy between Chapter 946’s broad mandate and its more modest funding level, potential non-mandated abuse reporters may hesitate to report possible abuse incidents out of a concern that if intervention programs lack adequate resources to improve an elder’s abuse situation, intervention might make matters worse.\textsuperscript{246}

Unfortunately, California has progressed only part way in the nearly ten years since Congressman Edward R. Roybal told the U.S. House Select Committee on Aging, “In my own state of California[,] . . . although the state mandates that elder abuse be reported, the funding to identify and assist such victims is nearly non-existent.”\textsuperscript{247} Full funding in future years for the supportive services programs of Chapter 946, as well as the development of innovative county and local programs that improve access, case management, and interagency coordination,\textsuperscript{248} will be required if California intends to strike at the heart of elder abuse.

\textsuperscript{243} See National Center on Elder Abuse, The National Elder Abuse Incidence Study, Final Report, September 1998 (visited July 15, 1999) <http://www.aoa.dhhs.gov/abusereport/main-pdf.htm> (copy on file with the McGeorge Law Review) (concluding that approximately 551,000 elders in the United States were abused, neglected, or self-abused in 1996). The executive summary of the NEAIS observes that “officially reported cases of elder abuse are only the ‘tip of the iceberg,’ or a partial measure of a much larger, unidentified problem.” Id. at 3. In light of this caveat, it is ironic that Governor Davis has relied on the NEAIS national statistics and not on the California statistics reported by the CWDA, which indicated a much higher incidence of abuse in California than that which the nationwide statistics provided by the NEAIS study suggest.

\textsuperscript{244} See County Welfare Directors Ass’n of California, APS (SB 2199) Program Costs (1999) (unpublished report, on file with the McGeorge Law Review) (summarizing the methodology for development of SB 2199 (Chapter 946) caseload estimates, including reliance on the CWDA 1996 County Survey and 1998 budget estimate, as well as reports conducted in the United States and Europe, each consistently estimating a five percent abuse rate among the elderly).

\textsuperscript{245} See Garfield, supra note 40, at 882 (observing that despite the assumption that services will exist within a community to assist identified victims of abuse, supportive services for abused elders are often quite limited in scope and duration).

\textsuperscript{246} See Velick, supra note 215, at 168 (positing that even mandated reporters may hesitate to report abuse absent “adequate remedial resources”).

\textsuperscript{247} 1990 Decade of Shame, supra note 1, at 4 (quoting Representative Edward R. Roybal, subcommittee chairperson).

\textsuperscript{248} See id. (observing that interagency “[c]ooperation will lead to better coordination of scarce remedial resources”).
B. Improving Access to Services for At-Risk Elders at Home in the Community

As individuals age, economic, physical, emotional, or cognitive difficulties may act alone or in combination to impair their ability to live independently. Although many older adults have resources and support systems to help them deal with such problems, or can gain access to community agencies for assistance, others lack such resources or resist seeking help due to depression, dementia, or other difficulties. Victims of elder abuse often fit into the latter category, suffering from a combination of mental and physical impairments and living in social isolation without a functional support network. Such individuals do not typically seek outside services, and thus have not been well-served by traditional aging services programs.

For children, the school acts as a gatekeeper, identifying youngsters at risk for physical, psychological, or other problems, and linking these children to community resources and other services. Similarly, many workplaces offer employee assistance programs to identify and support employees whose personal difficulties are compromising job performance. To be truly effective, California’s elder abuse service delivery systems should adopt such pro-active methods to find and serve at-risk elderly and dependent adults.

In 1978, Spokane Mental Health, Elder Services Division, pioneered a unique approach, called the Gatekeeper Model, to connect the Division’s services with at-risk elderly and dependent adults. The Gatekeeper technique involves training nontraditional community referral sources to identify elders who may be experiencing problems that threaten their independence or compromise their safety. Community gatekeepers include police and fire department personnel,

250. Id. at 39.
251. See Moskowitz, New Remedies, supra note 37, at 53 (describing characteristics and risk factors for elder abuse).
252. See Evelyn R. Florio et al., A Model Gatekeeper Program to Find the At-Risk Elderly, 51. CASEMGR. 106, 106 (1996) [hereinafter A Model Gatekeeper Program] (observing that typical human services programs are passive in nature, relying on access methods such as information and referral and public education, which have proven ineffective in reaching isolated elders in need of services).
253. Ray Raschko, The Spokane Elder Care Program: Community Outreach Methods and Results 2 (unpublished manuscript, on file with the McGeorge Law Review).
254. Id.
255. See A Model Gatekeeper Program, supra note 252, at 106 (noting that aging services programs must “respond to the challenge of finding and serving at-risk individuals by adopting proactive case-finding techniques”).
256. See Florio & Raschko, supra note 249, at 42 (describing the Gatekeeper Model as an innovative method by which to overcome the access problems inherent in the task of serving isolated elderly and dependent adults).
257. Id.; see id. (explaining the Gatekeeper method for reaching isolated older adults who have no relatives or other caregivers to seek assistance on their behalf, and will not or cannot access services on their own).
meter readers, letter carriers, bank employees, and others who may regularly come in contact with isolated elders.258 Staff members from Spokane's Elder Services Division routinely visit work sites to train employees to recognize signs and symptoms of cognitive, emotional, behavioral, or other problems that might place an isolated older person at risk in the community.259

A study of the Spokane Gatekeeper Project reveals that community-based gatekeepers indeed reached a significant population of elders in need of assistance who had not accessed services via traditional referral sources.260 Individuals referred by gatekeepers tended to be unmarried, to live alone, and to be more socially isolated than others who were referred to the Elder Services Program through traditional sources.261

Because gatekeepers make social service referrals for individuals who have not asked for assistance, the issue exists as to whether gatekeepers violate an older person's right to privacy and self-determination.262 However, agencies sponsoring gatekeeper projects make clear that forcing assistance on an unwilling older person is not part of the program.263 Rather, once an individual is identified by a gatekeeper, elder services case managers, typically a social worker and a registered nurse, will visit the individual and establish a rapport.264 Case managers will conduct an assessment, and then collaborate with the identified individual to determine if community-based services, such as home-delivered meals, chore services, transportation, or legal assistance, might help maintain the older person's independence and autonomy and reduce the likelihood of premature institutionalization, abuse, and neglect.265 As noted previously, many elders welcome some level of assistance when service options are made known to them.266

The Gatekeeper Model is designed to meet broad mental health and social services needs of isolated elders.267 However, the gatekeeper construct has particular application as a means of preventing elder abuse, as recognized by Legal

258. Id. at 43.
259. See id. (explaining the gatekeeper training protocol, and providing examples of individuals who have received much-needed services due to referrals from community gatekeepers).
260. Id. at 37-38.
261. Id. at 50-51.
262. Id.
263. ELDER SERVICES, SPOKANE MENTAL HEALTH, GATEKEEPER TRAINING MANUAL 2 (1989) [hereinafter GATEKEEPER TRAINING MANUAL] (copy on file with McGeorge Law Review); see infra notes 274-76 and accompanying text (emphasizing that, whenever possible, service providers should defer to their elderly clients in determining whether, and to what extent, intervention services should be provided).
264. GATEKEEPER TRAINING MANUAL, supra note 263, at 11.
265. Id.
266. LEGAL SERVICES OF NORTHERN CALIFORNIA, COMMUNITY GATEKEEPERS FACT SHEET [hereinafter COMMUNITY GATEKEEPERS FACT SHEET] (copy on file with the McGeorge Law Review).
267. See supra text accompanying note 217 (reporting results of one study indicating that 85% of abuse victims surveyed were receptive to intervention in their own cases).
268. See Fiorio & Raschko, supra note 249, at 42 (observing that the Gatekeeper strategy targets individuals who are "experiencing not only physical but social and psychological problems as well").
Services of Northern California (LSNC). LSNC has designed a gatekeeper program to train community members to identify and refer frail, vulnerable individuals who are at risk for abuse and neglect. Once a person in need of medical, mental health, or other services is identified by a community gatekeeper through LSNC, professionals from the local APS program are contacted to provide necessary links to available community services.

More California communities and local policymakers should give serious consideration to incorporating something akin to the gatekeeper model into their elder abuse services delivery systems. A gatekeeper system can promote a more effective use of funding for community and aging services by fostering collaboration among services providers and private partners. Additionally, gatekeeping does not strain the budgets of its business partners. The program requires only that these private partners (1) contribute staff time to learn key warning signs for at-risk elderly individuals, and (2) expand their commitment to service to customers with whom they already enjoy a long-term business relationship.

C. Services to Support At-Risk Elders Living at Home in the Community

Once an individual is identified as a victim, or potential victim, of elder abuse, supportive services should be available to assist the elder in achieving an outcome appropriate to the individual’s unique circumstances and preferences. Providers should be careful to ensure that, whenever possible, elderly clients determine the degree and extent of assistance, or autonomy, they require to address the abusive situation. Specifically, service providers should take care to avoid “paternalistic interventions that encourage dependency and decrease autonomy.” Certainly, exceptions should exist for instances wherein a nonconsenting elder is in danger of imminent bodily harm. However, a victim of abuse might reasonably determine that remaining in a living situation with the abuser is preferable “to facing

269. COMMUNITY GATEKEEPERS FACT SHEET, supra note 266.
270. Id.
271. Id.
272. See Florio & Raschko, supra note 249, at 53-54.
273. See id. at 53 (explaining that gatekeeping benefits business partners by providing an affordable outlet for community service that maximizes employee involvement with customers and the community).
275. Whitton, supra note 50, at 482; see id. (concluding that members of the legal profession, in particular, should “strive to ensure that ageist stereotypes do not become rebuttable presumptions against which the elderly must defend themselves to maintain the same rights and privileges in society as the non-elderly”).
276. For a discussion of emergency and nonemergency involuntary intervention services, see generally Garfield, supra note 40, at 912-20, 934-37.
alternatives[,] such as eventual institutionalization.”

If that is the case, services could be adopted to facilitate this decision, except in dangerous circumstances. In fact, at least as far back as the 1990 Decade of Shame report, experts were recommending that “[in most cases of elder abuse[,] a family system approach may be the most appropriate intervention, with recognition that the needs of both the victim and perpetrator must be addressed.”

Such an approach should incorporate, in addition to emergency intervention, services such as respite care, counseling, telephone reassurance, and caregiver training.

Of course, as noted previously, funding to assist abused elders remains insufficient to meet demonstrated needs nationwide, and likely in California, as well. At the very least, the Legislature should make every effort to ensure that Chapter 946 is fully funded in 2000 and succeeding years. Moreover, to whatever extent they are funded—by state, federal, or other sources—elder abuse intervention services should be delivered in such a way as to ensure the highest level of autonomy and self-determination for the victim-client.

VII. CONCLUSION

Many factors, such as increased life expectancy and changes in family dynamics, may contribute to the problem of elder abuse. Since the “discovery” of elder abuse in the 1970s, state and federal lawmakers have attempted to craft legislation and design programs to address this dilemma. California enacted several laws in 1998 imposing additional criminal sanctions and other penalties on abusers. While these measures may provide some additional protection for elders and act as a deterrent for prospective abusers, their effectiveness, in large part, will depend on the adoption of innovative implementation strategies—such as those discussed at supra Part IV.D—tailored to take into account the special circumstances of elderly victims, who may be frail, institutionalized, or victimized by family members or other caregivers.

277. Id. at 879.

278. See 1990 Decade of Shame, supra note 1, at 364 (recommending a family systems approach as generally the most appropriate method of elder abuse prevention).

279. See id. at 368 (outlining the “ideal components of an elder abuse service system”).

280. See supra Part II.C-D (exploring the development of elder abuse laws, funding, and services over the past thirty years); see also Garfield, supra note 40, at 898 (describing funding available to assist abused elders in 1992 as “woefully inadequate”).

281. See Garfield, supra note 40, at 878 (observing that “[to presume that every adult over the age of sixty-five is unable to decide what is best for himself is an absurd proposition”).

282. See supra Part II.A-B (offering a brief look at the causes and context for the contemporary problem called elder abuse).

283. See supra Parts II-VI (examining and critiquing federal and state elder abuse statutes and service plans).

284. Supra Part IV.

285. Supra Part IV.
Certainly, California's EADACPA does offer victims of elder abuse some incentive to pursue civil remedies against abusers. The California Supreme Court's application of enhanced remedies under EADACPA to cases of "reckless neglect" perpetrated in the context of medical treatment is a step forward in ensuring that institutionalized elders can seek redress for egregious breaches of care. However, at the heart of the problem of the abuse of elders who live outside the walls of long-term care facilities, and perhaps central to the reason that efforts to combat elder abuse have as yet been unsuccessful, are the issues of family abuse and social isolation. California and its local communities should adopt pro-active plans to reach isolated elders living at home in the community, and offer elder abuse intervention and social services assistance. Supportive services to assist victims of elder abuse should be victim-directed, both in scope and duration. Furthermore, California must marshal resources—through public-private partnerships, interagency cooperation, and increased government funding—to ensure that adequate services exist to assist identified victims of elder abuse. Only then will California truly break the silence of this shameful secret.

286. Supra Part V.
287. Supra Part V.
288. See supra Part VI (suggesting that California should re-examine evidence regarding the likely causes and circumstances that trigger elder abuse, and tailor legislation to address these causes and circumstances).
289. See supra Part VI (positing that California should (1) engraft onto its elder abuse intervention system a method for enlisting community partners in identifying and referring individuals at risk for elder abuse, and (2) enhance support for social services programs for the elderly that increase independence, thus making elders less likely to become victims of abuse).
290. Supra Part VI.
291. Supra Part VI.