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# An Act to Increase Penalties for Crimes of Elder Abuse

*Laura Randles*

## *Code Sections Affected*

Penal Code § 243.25 (new); § 368 (amended).  
AB 2140 (Simitian); 2002 STAT. Ch. 369.

## I. INTRODUCTION

On January 7, 1998, sixty-nine-year-old Dolores Holden and her daughter, Desiree Lu Balestra, started an argument over the phone.<sup>1</sup> That night Balestra came to her mother's house smelling of alcohol.<sup>2</sup> Later, Balestra entered her mother's room and began to verbally and physically assault her mother.<sup>3</sup> Balestra said, "I'm going to have some fun with you," and told her about a past roommate that she had "bloodied from head to toe."<sup>4</sup> For two hours Balestra assaulted her mother, biting her, pulling her hair, and beating her about her upper body.<sup>5</sup> Dolores went to her neighbor's house and called 911.<sup>6</sup> She survived, but sustained over eight thousand dollars worth of damages to her mouth.<sup>7</sup>

This scenario is one that is too familiar.<sup>8</sup> A 1996 study found "that approximately 450,000 elderly persons" were abused that year.<sup>9</sup> This number includes persons neglected by others and persons abused physically, sexually, emotionally, or financially.<sup>10</sup> Moreover, this abuse is not confined to convalescent homes; it is perpetrated by strangers on the street.<sup>11</sup> In almost ninety percent of the cases where the perpetrator is known, the person is a family member of the abused.<sup>12</sup> These numbers illustrate the need for reform in elder abuse law.

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1. See *People v. Balestra*, 90 Cal. Rptr. 2d 77, 78, 76 Cal. App. 4th 60, 61 (Ct. App. 1999) (describing the interaction between Balestra and her mother in this incident).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See *Balestra*, 90 Cal. Rptr. 2d at 79, 76 Cal. App. 4th at 62 (describing the testimony given by Holden's orthodontist).

8. See ADMINISTRATION ON AGING, THE NATIONAL ELDER ABUSE INCIDENCE STUDY, FINAL REPORT 1-20 (1998) [hereinafter ADMINISTRATION ON AGING FINAL REPORT], available at <http://www.aoa.gov/abuse/report/default.htm> (discussing the statistics related to the incidence of elder abuse during 1996).

9. *Id.* at 1.

10. See *id.* at 11-12 (defining various types of abuse).

11. *Id.*

12. See *id.* at 10 (discussing that perpetrators of elder abuse "were most frequently family members (89.6 percent), including the adult children (30.8 percent), spouses (30.3 percent), and a parent (24.0 percent)" and that the other 10 percent is inflicted by friends, neighbors, and service providers).

Chapter 369 responds to this need with greater protection for the elderly population. It mandates harsher penalties for those who batter elders and for those who knowingly put an elder into a position where abuse is foreseeable.<sup>13</sup> It also imposes harsher penalties for those who personally abuse an elderly person by neglecting or psychologically abusing them.<sup>14</sup>

## II. LEGAL BACKGROUND

### A. *The Problem*

“There are reports of domestic violence cases in which a third-party elder or dependent adult is battered along with the defendant’s intended target victim.”<sup>15</sup> In Santa Clara County, there was a recent case that prompted the District Attorney’s office to advocate a change in the law.<sup>16</sup> “The defendant was beating up his wife.”<sup>17</sup> When “[t]he wife’s [seventy]-year-old mother intervened, . . . the defendant shoved the [elderly] mother to the ground.”<sup>18</sup> In such a case, domestic abuse can be tried for a penalty enhancement from the normal punishment for battery.<sup>19</sup> Under the existing California Penal Code, the defendant can receive a greater punishment for beating his spouse than for beating her mother because elders are not recognized in the class of people for which a battery sentence may be enhanced.<sup>20</sup>

### B. *Existing Law*

Currently California law recognizes and penalizes battery and criminal negligence against an elder.<sup>21</sup> It also provides for special enhancements of probations for crimes committed against an elder.<sup>22</sup>

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13. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 1 (Apr. 2, 2002) (increasing the penalty for battery against an elder “from six months to one year” and for criminal negligence against an elder, “from six months in county jail and/or [one thousand dollars] to one year in county jail and/or [two thousand dollar fine].”).

14. *Id.*

15. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 5 (June 18, 2002).

16. See *id.* at 6 (describing the case that initiated this legislation).

17. *Id.*

18. *Id.*

19. See CAL. PENAL CODE § 243(e)(1) (West 1999) (including spousal abuse as one form of battery for which an enhanced penalty may be applied).

20. See generally CAL. PENAL CODE § 243 (West 1999 & Supp. 2003) (dictating the punishment for battery and indicating enumerated classes for which battery may have an increased penalty including, but not limited to, peace officers, nurses, emergency medical technicians and spousal abuse).

21. See generally *id.* (defining battery, imposing a penalty of up to two thousand dollars, six months in county jail, or both and situations in which battery may require an enhanced penalty which currently does not include elders); *id.* § 368 (West 1999) (defining criminal negligence against an elder and dictating the penalty to be imposed as that of a misdemeanor); *id.* § 667.9 (West 1999 & Supp. 2003) (describing the crimes that when committed against an elder may receive enhanced penalties, and dictating that these crimes will be enhanced if committed twice).

22. See generally *id.* § 12022.7 (West 2000 & Supp. 2003) (dictating an additional penalty for one who

### 1. Battery

California law defines battery as, “any willful and unlawful use of force or violence upon the person of another.”<sup>23</sup> The penalty for a battery is a fine not more than two thousand dollars, not more than six months in a county jail, or both.<sup>24</sup> In addition, the California Penal Code creates certain violations that have an increased penalty when committed against a person identified in a protected group.<sup>25</sup> These violations include battery against peace officers, firefighters, nurses, lifeguards, and others.<sup>26</sup> These enumerated penalties include extended jail time and enhanced monetary penalties.<sup>27</sup> In addition, “when a battery is committed . . . and serious bodily injury is inflicted . . . , the battery is punishable . . . for two, three, or four years.”<sup>28</sup>

### 2. Criminal Negligence

California law protects elders and dependent adults by imposing specific penalties for violations against them. The Legislature has found that elders and dependent adults may be confused, incompetent, or impaired in other ways, precluding them from effectively protecting themselves and thus deserving of special protection.<sup>29</sup> Under existing law, a person commits a misdemeanor when he knowingly puts an elder or dependent adult in a position where their physical or mental health is in jeopardy, excluding circumstances likely to cause great bodily harm or death.<sup>30</sup> This crime is punishable by a fine of one thousand dollars, six months in a county jail, or both.<sup>31</sup> If great bodily harm or death is likely to occur under these circumstances, the penalty is increased to a fine not greater than six thousand dollars, imprisonment for no more than one year, or both.<sup>32</sup>

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inflicts great bodily injury on a person over the age of seventy); *id.* § 1203.09 (West 1982 & Supp. 2003) (describing enhancements and penalties a judge may impose when enumerated crimes are committed against a person over the age of sixty).

23. *Id.* § 242 (West 1999).

24. *See id.* § 243(a) (dictating the punishment for battery).

25. *See id.* § 243(b)-(c) (identifying the groups of persons for which the penalty may be increased when a battery is committed against them).

26. *See CAL. PENAL CODE* § 243(b)-(c).

27. *See generally id.* § 243.

28. *Id.* § 243(d).

29. *See id.* § 368(a) (West 1999) (stating that the Legislature protects elders and dependent adults because they

are deserving of special consideration and protection, not unlike the special protection, not unlike the special protections provided for minor children, because [they] may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court. . . .).

30. *See id.* § 368(c) (defining the situations in which elder abuse constitutes a misdemeanor).

31. *See id.* § 368 (dictating the penalty for criminal negligence committed against an elder).

32. *See CAL. PENAL CODE*. § 368(b)(1) (indicates enumerated circumstances under which the penalty

### 3. *Enhancements and Probations*

A judge may also enhance sentences for elder abuse.<sup>33</sup> A person who commits a crime that is listed in section 667.9 of the California Penal Code against a person who is sixty-five years old or older may receive a one-year enhancement if the crime is committed with knowledge of the victim's age.<sup>34</sup> When someone commits any one of the enumerated offenses and already has a prior conviction for any one of these acts, a two-year enhancement shall be applied.<sup>35</sup> A person who inflicts great bodily injury on a person over seventy years of age shall receive a five-year enhancement of the punishment proscribed for the felony.<sup>36</sup>

In addition to laws dictating initial punishment and sentence enhancements, a California judge can deny probation.<sup>37</sup> Persons that commit crimes where great bodily injury occurs, such as murder, robbery, kidnapping, rape, and others against persons over the age of sixty may be denied parole and suspension of sentences.<sup>38</sup>

## III. CHAPTER 369

Chapter 369 gives elders the same protection as other enumerated classes of people by enhancing the penalty for battery against an elder.<sup>39</sup> It also protects those who are in the care of nursing home facilities or families by increasing the penalty for criminal negligence.<sup>40</sup>

### A. *Battery Against an Elder*

Chapter 369 includes elders among the list of classes of people that are protected by the possibility of greater penalties for battery.<sup>41</sup> As a result a judge could impose a penalty of a fine not to exceed two thousand dollars, by

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may be increased from that of a normal misdemeanor).

33. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 6 (June 18, 2002).

34. *See* CAL. PENAL CODE, § 667.9(a), (c) (West 1999 & Supp. 2003) (describing the crimes to be enumerated including mayhem, kidnapping, robbery, and rape).

35. *See id.* § 667.9(b) (stating that a perpetrator who commits any of these enumerated crimes for the second time shall receive an enhanced penalty).

36. *See id.* § 12022.7(c) (West 2000 & Supp. 2003) (dictating an additional penalty for this situation).

37. *See generally id.* § 1203.09(f) (West 1982 & Supp. 2003) (describing enhancements and penalties that a judge may impose on top of the traditional penalty).

38. *See id.* § 1203.09 (a)-(b) (including other restrictions a judge may impose when great bodily injury occurs).

39. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 6-7 (June 18, 2002).

40. *See* CAL. PENAL CODE § 368(c)-(d) (defining criminal negligence against an elder as, "[a]ny person who . . . willfully causes or permits any elder or dependent adult to suffer . . . unjustifiable physical pain or mental suffering" and the penalty for such acts).

41. *See id.* § 243.25 (enacted by Chapter 369) (increasing the penalty for a battery against an elder).

imprisonment for no more than one year, or both.<sup>42</sup> This adds to the common battery penalty of a fine not more than two thousand dollars, not more than six months in a county jail, or both.<sup>43</sup>

### B. Criminal Negligence Where the Victim Is an Elder

Chapter 369 imposes a greater penalty for criminal negligence concerning an elder. It increases penalties for violations of section 368 of the Penal Code, which imposes penalties for criminal negligence against an elder when committed under circumstances or conditions not likely to produce great bodily harm or death.<sup>44</sup> The crime is still a misdemeanor, but the punishment increases from a fine of not more than one thousand dollars, six months in a county jail, or both<sup>45</sup> to a penalty of one year in prison, a fine of six thousand dollars, or both.<sup>46</sup> This enhanced penalty only applies to a second offense or in a subsequent commission of this type of offense.

## IV. ANALYSIS

The possibility of penalty enhancement imposed by Chapter 369 should reduce repeat offenses against elders. There is a large recidivism rate in perpetrators of elder abuse and little deterrence for re-offenders because of the small penalties that are currently in place.<sup>47</sup> The enhanced penalties, from a fine not to exceed one thousand dollars,<sup>48</sup> not more than six months in a county jail, or both,<sup>49</sup> to a fine of not more than two thousand dollars, one year in county jail, or both, should prevent these re-offenders from repeating these types of offenses.<sup>50</sup>

While deterring repeat offenders, Chapter 369 should also affect those who may be inclined to offend for the first time. Chapter 369 accomplishes this by demonstrating the seriousness of elder abuse in two manners. First, Chapter 369

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42. See *id.* (enacted by Chapter 369) (dictating the punishment a judge may impose for battery against an elder).

43. *Id.* (enacted by Chapter 369).

44. See *id.* § 368 (amended by Chapter 369) (defining criminal negligence against an elder and imposes a penalty of up to one year in prison, a fine of two thousand dollars, or both).

45. See CAL. PENAL CODE § 368(c) (West 1999 & Supp. 2002) (dictating the existing penalty for criminal negligence committed against an elder).

46. *Id.* § 368 (amended by Chapter 369).

47. See Letter from Paul Gerowitz, Public Affairs Director, Protection & Advocacy, Inc., to Assemblymembers Joseph Simitian and Patricia Bates (Apr. 1, 2002) [hereinafter Gerowitz letter] (on file with the *McGeorge Law Review*) (stating, "it is our opinion that perpetrators receive little punishment and are likely to reoffend.").

48. See CAL. PENAL CODE § 368(c) (the penalty for criminal negligence is only a fine not to exceed one thousand dollars as opposed to two thousand dollars).

49. See CAL. PENAL CODE § 19 (West 1999) (dictating the penalty for a misdemeanor, such as a non-enumerated battery).

50. See Gerowitz Letter, *supra* note 47 (stating, "it is our opinion that perpetrators receive little punishment and are likely to reoffend.").

imposes stricter penalties than those already in existence.<sup>51</sup> Second, elder abuse is placed in an enumerated category alongside peace officers, nurses, emergency medical technicians, and other groups of import to society.<sup>52</sup> Elders are also grouped with children, a highly protected group of persons in modern society.<sup>53</sup> These changes may increase public awareness of the crime and deter first-time offenders.<sup>54</sup>

However, Chapter 369 may not have the desired effect. First, there are already penalties in place for elder abuse.<sup>55</sup> As a result, the slight increase in penalties may not result in greater deterrence.<sup>56</sup> Second, regardless of the available penalties, elder abuse may not be reported.<sup>57</sup> One reason that elders do not report incidents of elder abuse is that the perpetrator is often a family member, making it difficult for the abused to report.<sup>58</sup> In addition, prosecutors also seem reluctant to prosecute because the penalty in existence is more of a “slap on the wrist” than adequate punishment.<sup>59</sup> Prosecutors may find it difficult to find a section of the Penal Code that describes the particular offense that adequately punishes the offender.<sup>60</sup> However, Chapter 369 should give prosecutors incentive to prosecute because there are clearly defined violations and harsher penalties.<sup>61</sup>

Another possible problem with Chapter 369 is that counties may not be able to handle the increased jail time. Chapter 369 specifically increases misdemeanor penalties when perpetrated against an elder.<sup>62</sup> Chapter 369 could result in

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51. See Letter from Susan S. Williams, President, San Mateo County Commission on Disabilities, to Assemblymember Simitian (May 23, 2002) [hereinafter Williams Letter] (on file with the *McGeorge Law Review*) (stating that, “elder and dependent adult abuse is a serious crime and the criminal penalties for these crimes should reflect the seriousness and serve as a deterrent.”).

52. See generally CAL. PENAL CODE § 243 (West 1999 & Supp. 2003).

53. *Id.* § 368(a) (West 1999 & Supp. 2002).

54. Williams Letter, *supra* note 51.

55. See generally CAL. PENAL CODE § 12022.7 (West 2000 & Supp. 2003) (dictating an additional penalty for one who inflicts great bodily injury on a person over the age of seventy); *id.* § 1203.09 (West 1982 & Supp. 2003) (describing enhancements and penalties a judge may impose when enumerated crimes are committed against a person over the age of sixty).

56. See ASSEMBLY COMMITTEE ON AGING AND LONG TERM CARE, COMMITTEE ANALYSIS OF AB 2140, at 3 (Apr. 22, 2002) (noting that the California Attorneys for Criminal Justice oppose this bill stating that “current law already provides for adequate punishment for persons convicted of battery against an elder.”).

57. See Administration on Aging, *Elder Abuse Prevention*, available at [www.aoa.gov/factsheets/abuse.html](http://www.aoa.gov/factsheets/abuse.html) (last visited June 7, 2002) (copy on file with the *McGeorge Law Review*) (stating that “[a]most four times as many new incidents of abuse . . . were not reported as those that were reported to and substantiated by adult protective services agencies.”).

58. See ADMINISTRATION ON AGING FINAL REPORT, *supra* note 8, at 7.

59. See Williams Letter, *supra* note 51 (supporting the enhancement of penalties for those who abuse elders as a means to increase prosecution of these crimes).

60. *Id.*

61. See *id.* (stating that “[b]y increasing the criminal penalties, AB 2140 will motivate prosecutors to prosecute those perpetrators, knowing that they will not get off with just a slap on the wrist.”).

62. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 1 (Apr. 2, 2002) (discussing the existing laws and the changes that Chapter 369 will make to them).

increasing the burden on overcrowded county jails.<sup>63</sup> In addition to overcrowding county jails, Chapter 369 may also drain other county resources that deal with elder abuse, such as programs for prevention.<sup>64</sup>

## V. CONCLUSION

The elderly population is a group of persons in need of protection from abuse.<sup>65</sup> Chapter 369 responds by increasing penalties for battery and criminal negligence against an elder.<sup>66</sup> These new penalties should deter future offenders and decrease the recidivism rate while promoting prosecution of these crimes.<sup>67</sup>

However, there are potential side effects to increasing penalties. Chapter 369 may increase the problems of overpopulation in county jails<sup>68</sup> and drain other resources that could discourage elder abuse in different ways.<sup>69</sup> In addition, Chapter 369 may not be effective because there are already penalties for these crimes.<sup>70</sup> Still, these arguments, when balanced against Chapter 369, are overshadowed by the need to protect the growing and much abused elderly population in our society.<sup>71</sup> Chapter 369 addresses the seriousness of elder abuse by imposing harsher penalties and equating elders with other protected classes in society.<sup>72</sup> As a result, Chapter 369 should deter elder abuse and increase prosecution of these crimes when they occur.

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63. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 8 (June 18, 2002) (describing the possible burden on the counties).

64. See Letter from Steve Birdlebough, Legislative Advocate, Friends Committee on Legislation of California, to Senator Bruce McPherson, Chair, Senate Public Safety Committee (June 14, 2002) [hereinafter Birdlebough Letter] (on file with the *McGeorge Law Review*) (opposing AB 2140 because, "escalation of penalties drains resources from more worthy efforts to deal with offenses that are affect[ing] elderly people.").

65. ADMINISTRATION ON AGING FINAL REPORT *supra* note 8, at 1.

66. CAL. PENAL CODE § 243.25 (enacted by Chapter 369); *id.* § 368 (amended by Chapter 369).

67. See Williams Letter, *supra* note 51 (writing in support of AB 2140).

68. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 8 (June 18, 2002).

69. See Birdlebough Letter, *supra* note 64.

70. *Supra* Part II.

71. See ADMINISTRATION ON AGING FINAL REPORT, *supra* note 8.

72. See Williams Letter, *supra* note 51; SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2140, at 5-6 (June 18, 2002) (discussing the enumerated classes that warrant a harsher penalty and the need to include elders in this category).