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Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California

Audrey S. Garfield

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Note

Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California

by

AUDREY S. GARFIELD

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Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California

by

AUDREY S. GARFIELD*

With the burgeoning of the elderly population nationwide and in California in particular, problems peculiar to the elderly demand increased attention and resources from both the political process and the public. Elder abuse, undoubtedly, is one of these problems. It is estimated that five percent of the elder population or more than 1.5 million elders nationwide may be abused each year.¹ In California there were approximately 12,000 reports of elder abuse during 1986-1987, an almost forty-five percent increase in the number of reports from the previous year.² The number of vulnerable elderly in California also continues to grow at an accelerated pace. In 1985 there were 2.8 million Californians age sixty-five or older, and by the year 2000 this number is projected to reach 3.8 million.³ Since 1983, when California passed its first piece of legislation directly addressing the problem of elder abuse, the state's elder abuse laws have remained largely unchanged. Despite California's reputation as a state that spearheads legal reform and irrespective of the extraordinary growth of the elderly population in California, other states have taken the lead in enacting more detailed and carefully drafted statutes that more thoughtfully address the delicate problems involved in balancing the needs and rights of the abused elderly with the interests of states in protecting their citizens. This Note critically examines California's response to the problem of elder abuse in domestic or noninstitutional settings. The Note reviews other states' legislative responses to the problem, compares California Adult Protective Services legislation with the general provisions found in these statutes, and concludes that California's present system is in need of change.

* Member Third Year class; B.A. 1986, University of Rochester.

1. *Elder Abuse: A Decade of Shame and Inaction, Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 101st Cong., 2d Sess. 3 (1990) [hereinafter *Elder Abuse House Hearings*].

2. Dresslar, *Programs to Treat, Prosecute "Elder Abuse" Criticized*, L.A. Daily J., Nov. 8, 1988, at 1.

3. *Protecting the Silent Population: Remediating Elder and Dependent Adult Abuse*, RECOMMENDATIONS OF THE COUNTY WELFARE ASSOC., 1 (Mar. 1988) [hereinafter *Silent Population*].

The Note first outlines the contours of the problem of elder abuse including its background and causes, as well as the more commonly encountered types of abuse. It then briefly explains what adult protective services are, outlines their role in the context of the elder abuse problem, and explores elder abuse-related adult protective services legislation nationwide. The Note then reviews the problem of elder abuse in California. It surveys the scope of California's elder abuse problem and assesses the state's responses to the problem, including past statutory schemes, unsuccessful amendments to those schemes, and recently proposed amendments. The review ends with a discussion of California's present Adult Protective Services laws. Finally, the Note evaluates California's present Adult Protective Services scheme in light of other states' responses and proposes amendments to the existing law that would improve the law by better addressing the problem and the balance that must be struck between state interests and protection of individual rights.

I. Elder Abuse: Its History and Scope

Understanding the history and scope of the elder abuse problem is important to appreciate fully its urgency. Since the scope of the problem is directly affected by the number of elderly Americans, this Part begins with a broad look at the "greying" of the American, and particularly the Californian, public. The focus then shifts to a discussion of the unearthing of elder abuse as a national problem and an explanation of its nature.

A. Growth of the Elderly Population

By 1980 more than twenty-five million Americans were age sixty-five years or older⁴ and 2.9 million were older than eighty.⁵ In 1990 almost thirteen percent of the population of the United States, over 31 million Americans, were over the age of sixty-five⁶ and by the year

4. Comment, *A Response to the Problem of Elder Abuse: Florida's Revised Adult Protective Services Act*, 14 FLA. ST. U.L. REV. 745, 746-47 (1986) (authored by Christine Metcalf).

5. CONSERVATORSHIP OF THE ELDERLY: RECOMMENDATIONS FOR ITS INTERFACE WITH PROGRAMS AND SERVICES FOR OLDER CALIFORNIANS (Report to the Senate Subcommittee on Aging, prepared for the Senate Office of Research by Marquart Policy Analysis Assoc.) at 1 (1988) [hereinafter CONSERVATORSHIP RECOMMENDATIONS].

6. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 16 (110th ed. 1990) [hereinafter 1990 STATISTICAL ABSTRACT] (table no. 18, "Projections of the Total Population by Age, Sex, and Race: 1989 to 2010").

2000 that number is expected to reach approximately thirty-five million, thirteen percent of the total population.⁷

Compared to the national figures, an even more dramatic increase in the elderly population has occurred in California over the past two decades, and the rate of increase is expected to accelerate. Between 1985 and 1990, the age group from sixty-five to seventy-four increased by sixteen percent and the age group of seventy-five years and older increased by nineteen percent.⁸ Furthermore, between 1980 and 2000 the eighty and older age group is projected to increase by ninety-four percent and the eighty-five and older group is projected to increase by 138%.⁹ Today, ten percent of the nation's elderly population resides in California.¹⁰ The future growth of California's elderly population is expected to be greater than that nationwide because, compared with the national average, California has fewer citizens under the age of eighteen and more individuals between the ages of eighteen and forty-four.¹¹ Assuming members of the younger generations remain in California as they age, this imbalance will contribute further to the growth of the state's elderly population. As a result of these peculiarly Californian trends, the problems affecting the elderly will become more acute in California, sooner and with greater intensity, than in the U.S. at large.¹²

B. The Discovery, Prevalence, and Causes of Elder Abuse

Following the "discovery" of child abuse and neglect in the 1960s¹³ and spousal abuse in the 1970s,¹⁴ elder abuse crept into the American

7. *Id.* The population over 85 years old, which was approximately 2.2 million in 1980, is estimated to grow to approximately 4.6 million by 2000. *Id.* at 37 (table no. 41, "Population 65 Years Old and Over, By Age Group and Sex, 1960 to 1988, and Projections, 1990 and 2000").

8. CONSERVATORSHIP RECOMMENDATIONS, *supra* note 5, at 1.

9. *Id.*

10. *Elder Abuse House Hearings*, *supra* note 1, at 4 (statement of Edward R. Roybal, Chairman, Subcomm. on Health and Long-Term Care).

11. COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY, THE LITTLE HOOVER COMMISSION'S REPORT ON COMMUNITY RESIDENTIAL CARE FOR THE ELDERLY 8 (1989) [hereinafter LITTLE HOOVER COMMISSION'S REPORT].

12. CONSERVATORSHIP RECOMMENDATIONS, *supra* note 5, at 2; LITTLE HOOVER COMMISSION'S REPORT, *supra* note 11, at 7-8. Over the decade from 1979 to 1989, the California general population was projected to have grown more than 20%, the 65 or older population was to have increased by 45%, and the 85 or older population was to have increased by approximately 68%. CONSERVATORSHIP RECOMMENDATIONS, *supra* note 5, at 55.

13. See Katz, *Elder Abuse*, 18 J. FAM. L. 695, 704 (1979-1980).

14. See generally SPOUSE ABUSE: A SELECTED BIBLIOGRAPHY (1978) (compiled by C. Johnson, J. Ferry & M. Kravitz) (collection of works written in the 1970s that discuss and explore the problem of spousal abuse and the role of government in addressing the problem).

conscience in the late 1970s and early 1980s. The British took note of the problem of elder abuse as early as 1975 and a British doctor christened it "granny bashing."¹⁵ By the late 1970s numerous American studies began to surface which indicated that elder abuse is a serious national problem in the United States as well.¹⁶

In 1981 one of these initial studies, a report published by the House of Representatives Select Committee on Aging, offered the first intensive national investigation of the problem of elder abuse.¹⁷ The report concluded that elder abuse, although a "hidden problem," is a national scourge and recommended that states enact laws to address the problem.¹⁸ The report determined that four percent of the American elderly population, roughly one million of the nation's elderly, may be victims of moderate to severe abuse.¹⁹ The Committee found that physical abuse, including negligence, is the most common type of abuse, followed by financial abuse, abusive abrogation of basic constitutional rights, and finally psychological abuse.²⁰ Notably, differing types of abuse often were reported simultaneously in a given case.²¹ The study also concluded that elder abuse, although propor-

15. Burston, *Granny-Battering Letter*, 1975 BRIT. MED. J. 592; see also J. RENVOIZE, WEB OF VIOLENCE: A STUDY OF FAMILY VIOLENCE 113-27 (1978).

16. See, e.g., HOUSE SELECT COMM. ON AGING, 97TH CONG., 1ST SESS., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, (Comm. Print 1981) [hereinafter ELDER ABUSE HOUSE REPORT]; THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY (M. Block & J. Sinnott ed. 1979) [hereinafter Block & Sinnott]; Lau & Kosberg, *Abuse of the Elderly by Informal Care Providers*, AGING, Sept.-Oct. 1979, at 10; LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, ELDER ABUSE IN MASSACHUSETTS: A SURVEY OF PROFESSIONALS AND PARAPROFESSIONALS (1979) (prepared by H. O'Malley, H. Segars, R. Perez, V. Mitchell & G. Kneupfel).

These early studies generally found that the "typical" abused elder was a widow over 75 years old who lived with an adult child upon whom she was significantly dependent, who was significantly mentally or physically impaired, and who had little financial independence. See, e.g., Block & Sinnott, *supra*, at 75-76; Lau & Kosberg, *supra*, at 11-12. The studies conducted during those years also noted that the abuser often was one of the elder's children. Block & Sinnott, *supra*, at 77; Lau & Kosberg, *supra*, at 12. More recent studies of the problem contradict these findings at least in some respects. See, e.g., Pillemer & Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey*, 28 THE GERONTOLOGIST 51, 51-57 (1988) (noting, for example, that their research found half the victims of elder abuse were men and that spouses perpetrate at least half of the abuse).

17. ELDER ABUSE HOUSE REPORT, *supra* note 16, at xiv.

18. *Id.* at xiii-xiv.

19. *Id.* at xiv-xv.

20. *Id.* at xv. The Committee report contained its own specific definitions of what constitutes abuse within each of these categories. *Id.* at 3, 7-8, 13-14, 24, 26-30, 30-34. The types of behavior that are included within the meaning of "abuse" or "neglect" vary from state to state. See *infra* notes 63-81 and accompanying text (discussing various types and definitions of abuse and neglect as they appear in state adult protective services laws).

21. ELDER ABUSE HOUSE REPORT, *supra* note 16, at xv.

tionally as prevalent as child abuse, is far less likely to be reported.²² A 1986 comprehensive nationwide study conducted by the American Public Welfare Association in cooperation with the National Association of State Units on Aging confirmed that the total number of reports of suspected or alleged abuse or neglect has increased significantly since the release of the 1981 House Report.²³ The 1986 study indicated that twenty-six of the thirty states surveyed showed an increase in elder abuse reports.²⁴

More than a decade after the 1981 House Report, the House of Representatives Select Committee on Aging's Subcommittee on Health and Long-Term Care released the most recent congressional assessment of the nation's elder abuse problem. The title of the Subcommittee's hearing and report, "Elder Abuse: A Decade of Shame and Inaction,"²⁵ aptly summarizes not only the Subcommittee's findings but also the nation's response to the problem of elder abuse since the first House of Representatives hearings on the problem were held in 1978 and the first report was issued in 1981. This recent congressional inquiry was conducted to review the current knowledge regarding the problem and its prevalence, as well as to assess the adequacy of state and federal responses to elder abuse.²⁶

The Subcommittee concluded that the incidence of elder abuse is increasing nationally and that five percent or more than 1.5 million elderly persons may be abused yearly.²⁷ This figure represents a one percent or 500,000-case increase over that reported in the 1981 House Report.²⁸ The Subcommittee found that elder abuse is far less likely to be reported than is child abuse. It determined that only one of every eight cases of elder abuse, as compared with one of every three cases of child abuse, is reported;²⁹ this figure represents a decrease from the 1981 House Report estimate that one in five cases of elder abuse is reported.³⁰ Like the 1981 House Report, the 1990 Subcommittee Report also surveyed the types of abuse, profiled the victims and abusers,

22. *Id.* at xiv.

23. ELDER ABUSE PROJECT, AMERICAN PUBLIC WELFARE ASS'N (APWA), NAT'L ASS'N OF STATE UNITS ON AGING (NASUA), A COMPREHENSIVE ANALYSIS OF STATE POLICY AND PRACTICE RELATED TO ELDER ABUSE vii-viii (1986) [hereinafter AMERICAN PUBLIC WELFARE REPORT].

24. *Id.* at viii.

25. *Elder Abuse House Hearings*, *supra* note 1.

26. *Id.* at 94.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

gathered data regarding reporting of abuse, and attempted to determine the causes of elder abuse.³¹

The Subcommittee Report further noted that forty-three states have enacted statutes or adult protective services laws that provide for mandatory reporting of elder abuse; this number represents a substantial increase over the sixteen states with such legislation in 1981.³² The Subcommittee added, however, that state implementation and enforcement of these laws have been hampered by a lack of correlative legislation providing financial support for these purposes.³³ The findings generally pointed to the gaping discrepancy between the money allocated to adult protective services and child abuse services; for example, in 1989, on average nationwide, services for victims of child abuse received \$45.03 per child resident, as compared to a paltry \$3.80 allocated to protective services for the elderly per elderly resident.³⁴ The Subcommittee stressed that without additional federal funding the states will remain unable to begin effectively to ameliorate the elder abuse problem. Actually, since 1980 the major source of federal funding for state adult protective services programs, the Social Services Block Grant, has been cut directly or reduced because of inflation by almost one-third.³⁵

The Subcommittee Report concluded by offering a number of policy options for Congress and the states to consider. The Subcommittee advocated a coordinated national effort whereby the federal government would assist states by providing them federal funds. This plan would include the passage of the "Prevention, Identification, and Treatment of Elder Abuse Act of 1989."³⁶ The Act would create a national center on elder abuse, which among other functions would: disseminate annual summaries of recent research regarding elder abuse; maintain an information clearinghouse on programs for prevention, identification, and treatment of elder abuse; and compile, publish, and disseminate training materials for personnel working in elder abuse

31. *Id.* at 96-97.

32. *Id.* at 96; *see infra* notes 82-137 and accompanying text (discussing mandatory reporting laws); *cf.* AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at vi (in addition, most states reported that they have regulations in place to implement their state legislation on elder abuse).

33. *Elder Abuse House Hearings, supra* note 1, at 96.

34. *Id.* The Subcommittee added that the 62% increase from the 1980 allocation was due only to inflation. *Id.*; *see infra* notes 117-127 and accompanying text (discussing the discrepancy between funding Adult Protective Services and Child Protective Services in the nation and particularly in California).

35. *Elder Abuse House Hearings, supra* note 1, at 96; *see also infra* note 125 (further discussing the causes and implications of federal funding cuts).

36. H.R. 220, 101st Cong., 1st Sess. (1989) [hereinafter H.R. 220], *reprinted in Elder Abuse House Hearings, supra* note 1, at 7.

prevention, identification, and treatment.³⁷ Finally, and perhaps most importantly, the Act would provide federal matching funds to states with existing elder abuse programs and distribute new funds to states that meet certain enumerated conditions.³⁸

Although an in-depth discussion of the causes of elder abuse is beyond the scope of this Note, a brief review of some of the numerous theories advanced to explain the incidence of abuse helps one understand its prevalence in our society today.³⁹ The economic, physical, and emotional stress suffered by those living with a dependent elderly individual often has been cited as a major contributor.⁴⁰ According to the 1981 House of Representatives Report on Elder Abuse, "[m]ost experts do appear to believe . . . that a major precipitating factor [of elder abuse] is family stress. Meeting the daily needs of a frail, dependent elderly relative may be an intolerable burden for family members."⁴¹

Although it is clear that incidences of elder abuse are not limited to lower economic classes or certain ethnic or racial groups, lack of financial resources often is a factor which provokes stress that can lead to abusive behavior. For a family with a fixed income and strict budget, the additional financial burden of providing daily care for an ailing or disabled elderly parent with increasing medical costs can become overwhelming, precipitating physical abuse and neglect.⁴²

Similarly, the poor timing of the added responsibility of caring for an ailing elder often is a factor. The elderly parent's need for care often becomes acute when the adult child is nearing retirement and looking forward to relaxation, or as one author notes, during the

37. *Id.* §§ 2(b)(1)-(3).

38. *Id.* § 4.

39. For a discussion of the causes of elder abuse, see generally Galbraith, *Elder Abuse: An Overview*, in ELDER ABUSE: PERSPECTIVES ON AN EMERGING CRISIS 15-22 (1986); Kosberg, *Preventing Elder Abuse: Identification of High Risk Factors Prior to Placement Decisions*, 28 THE GERONTOLOGIST 43 (1988); Suito & Pillemer, *Explaining Intergenerational Conflict When Adult Children and Elderly Parents Live Together*, 50 J. MARRIAGE & FAM. 1037 (1988).

40. Steinmetz, *Battered Parents*, SOCIETY, July-Aug. 1978, at 54-55.

41. ELDER ABUSE HOUSE REPORT, *supra* note 16, at 59; see also Katz, *supra* note 13, at 703; Lau & Kosberg, *supra* note 16, at 13. The 1990 House Subcommittee Report recommended passage of H.R. 2263, "The Long-Term Care Act," which would, among other things, provide long-term care services in the home to the chronically ill and thereby provide assistance and relief to those who care for dependent and chronically ill elderly. *Elder Abuse House Hearings*, *supra* note 1, at 99.

42. ELDER ABUSE HOUSE REPORT, *supra* note 16, at 61-62; Block & Sinnott, *supra* note 16, at 53; Katz, *supra* note 13, at 701; Lau & Kosberg, *supra* note 16, at 13. Stress engendered by the high cost of living and other economic realities is exacerbated by the fact that women, who often traditionally have been and currently are the primary care providers for elderly in homes, increasingly are now members of the work force; they have even less time and patience to negotiate the special needs of an elderly individual. Block & Sinnott, *supra* note 16, at 53.

“launching stages” for the adult child’s own children or family when the adult child has the added financial responsibilities of a child’s college or wedding expenses.⁴³

Other noted contributors to the incidence of abuse include increased life expectancy,⁴⁴ retaliation or patterns of family violence,⁴⁵ ageism,⁴⁶ lack of community resources,⁴⁷ alcohol use, drug use, mental

43. Steinmetz, *supra* note 40, at 54; *cf.* ELDER ABUSE HOUSE REPORT, *supra* note 16, at 63 (adult children resent the intrusion of dependent parents when the child may himself be in his 50s or 60s and have his own medical problems and less strength to handle the elder’s increased demands); Block & Sinnott, *supra* note 16, at 53 (noting that increasing numbers of adult daughters work outside the home and thus have less time for care-giving); Katz, *supra* note 13, at 701-02 (in some cases, a long-term unhappy relationship between parent and child can compound the difficulty of providing care for an elderly parent); Lau & Kosberg, *supra* note 16, at 13 (as the life span increases, caregivers themselves more often are elderly).

44. Increased life expectancy means the time period during which an elder is dependent on domestic caretakers for assistance is extended. *See* ELDER ABUSE HOUSE REPORT, *supra* note 16, at 63. According to one study, “It may be that the increasing presence of the elderly and their rolelessness is a likely contributor to their own vulnerability. It is now likely that in old age, people will be dependent upon their children or grandchildren longer than their children were dependent upon them.” *Id.* at 64 (quoting R. Douglas, T. Hickey & C. Neil, *A Study of Maltreatment of the Elderly and Other Vulnerable Adults*, Univ. of Mich., Institute of Gerontology (1980)).

The increased life expectancy that is relevant here is not life expectancy as measured at birth. Rather, the pertinent figure is the number of years that today’s elder would be expected to survive. Life expectancies as measured in this manner have risen significantly over the past 20 to 30 years. *See* Longino, Soldo, & Manton, *Demography of Aging in the United States*, in *GERONTOLOGY: PERSPECTIVES AND ISSUES 19* (K. Ferraro ed. 1990) (noting, for example, that the average life expectancy for individuals age 65 rose from 13.9 years in 1965, to 16.1 in 1970, and 16.9 years in 1985).

45. This explanation characterizes elder abuse as part of a cycle of family violence: a pattern, consistent with other types of family violence, in which the abuser has suffered real or perceived mistreatment by his parents or caregivers earlier in life and who now reverses the behavior. Lau & Kosberg, *supra* note 16, at 13; *see also* ELDER ABUSE HOUSE REPORT, *supra* note 16, at 59-60 (children who were abused by a parent have a one in two chance of later abusing their parents).

46. “Ageism” is the bias and prejudice society harbors against the elderly. It includes the widespread negative perceptions of and attitudes toward older persons and their role in society. Ageism is most prevalent in industrial urbanized societies that exclude the elderly from participating in and contributing to society. Block & Sinnott, *supra* note 16, at 57-58; *see* ELDER ABUSE HOUSE REPORT, *supra* note 16, at 60; Katz, *supra* note 13, at 703-04. According to a Harris poll report,

the image of older people held by the public at large is a distorted one tending to be negative and possibly damaging. The media, with coverage of the elderly poor, the elderly sick, the elderly institutionalized and the elderly unemployed or retired, may be protecting and reinforcing stereotypes of elderly and myths of old age.

Galbraith, *supra* note 39, at 21 (citation omitted).

47. Support systems for in-home care providers are inadequate to relieve some of the pressures on families providing care for the elderly. Block and Sinnott note that a range of resources could be offered to the caretaker and elder that would relieve some of the stress engendered by the dynamics of the situation. Possible resources include home-related services such as nursing care and home-aides; meal delivery; day care and respite services; transportation

illness, and other characteristics that leave care providers unable to make appropriate judgments and perceptions.⁴⁸

II. The States' Responses to Elder Abuse

Between 1973 and January 1981, prior to publication of the House of Representatives first report on elder abuse, only sixteen states enacted legislation focusing on the problem of abuse of adults, and these laws addressed the problem of abuse of *all* adults eighteen and older; until 1979 none was specific to elders.⁴⁹ By 1980, immediately before the first House Report, only five states had passed statutes specifically aimed at protecting elders. By 1985—and no doubt as a result of the congressional attention and national publicity that the problem finally received in the early 1980s—that number mushroomed to forty-four.⁵⁰ Today fifty states, including California, have enacted some type of legislation that addresses the problem of elder abuse.⁵¹

A. A Starting Point: What Are Adult Protective Services?

Adult protective services (APS) traditionally are defined as “a system of preventive, supportive, and surrogate services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation.”⁵² An adult protective services law is a statute that establishes an APS system. Most states include elder abuse provisions in their already existing adult protective services legislation.⁵³

services; counseling and other mental health services; and educational programs regarding care of the elderly. See Block & Sinnott, *supra* note 16, at 93.

48. Lau & Kosberg, *supra* note 16, at 13. The authors note that these non-normal caregivers may include schizophrenic, retarded, or alcoholic children as well as those who are elderly and senile themselves and not aware of their behavior and its effects. *Id.*; see also ELDER ABUSE HOUSE REPORT, *supra* note 16, at 64-65; Katz, *supra* note 13, at 702; Pillemer & Finkelhor, *Causes of Elder Abuse: Caregiver Stress Versus Problem Relatives*, 59 AM. J. ORTHOPSYCHIATRY 179, 185-86 (1989). But see Pedrick-Cornell & Gelles, *Elder Abuse: The Status of Current Knowledge*, 31 FAM. REL. 457, 462-63 (1982) (arguing that this theory has not been supported by research).

49. Miller & Dodder, *The Abused: Abuser Dyad: Elder Abuse in the State of Florida*, in ELDER ABUSE PRACTICE AND POLICY 166-67 (R. Filinson & S. Ingman ed. 1989).

50. *Id.* The rapid proliferation of state elder abuse legislation after the 1981 House Report is worth noting as it illustrates the nation's ability to respond to an urgent national problem when it is called upon to do so. One can only hope that the latest House Report noting the *growth* of the problem since 1981 will have the same motivating effect.

51. This figure includes the District of Columbia and Guam as “states.” Only Puerto Rico has no laws addressing elder abuse. AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at vi.

52. Regan, *Intervention Through Adult Protective Services Programs*, 18 THE GERONTOLOGIST 250, 251 (1978).

53. As of 1986, 15 states had legislation that specifically addressed the problem of elder

Although the content of APS laws varies from state to state, each adult protective services system typically includes two main components: coordinated provision of services for adults determined to be at risk of abuse, and the actual or potential power (of the state or a local governmental entity) to intervene legally in an individual's life and make decisions for him.⁵⁴ This power usually is invoked when an elder is deemed incapable of making decisions for himself, is personally in danger, or is dangerous to others. In some states the power includes the ability to intervene when an elder refuses services or is deemed incapable of consenting.⁵⁵

In addition to these general categories, elder abuse APS statutes ordinarily contain any combination of more specific sections including but not limited to who is covered by the statute (*i.e.*, elders only or elders and dependent adults); provisions for mandatory reporting of abuse; guidelines for investigation of abuse; provisions regarding involuntary as well as emergency intervention; and definitions of abuse, neglect, and exploitation.

A number of states' laws exclusively address the problem of elder abuse.⁵⁶ Other states not only have these exclusive statutes but also have other laws that cover elder abuse.⁵⁷ In conjunction with existing elder-abuse-specific or adult protective services laws, some states also use domestic violence statutes to protect elderly from abuse⁵⁸ and yet

abuse. *Id.*; *see, e.g.*, ALASKA STAT. §§ 47.24.010-.100 (1990) (Protection of the Elderly); IDAHO CODE §§ 39-5301 to -5312 (1985 & Supp. 1990) (Elderly Abuse, Exploitation, Neglect and Abandonment Reporting Act); MONT. CODE ANN. §§ 53-5-501 to -525 (1989) (Montana Elder Abuse Prevention Act). For ease of reference, this Note will use the term "APS law" to denote APS laws that relate either exclusively or partly to elder abuse.

54. Regan, *supra* note 52, at 251; *see also* SENATE SPECIAL COMM. ON AGING, 95TH CONG., 1ST SESS., PROTECTIVE SERVICES FOR THE ELDERLY: A WORKING PAPER 3-4 (Comm. Print 1977) [hereinafter WORKING PAPER].

55. WORKING PAPER, *supra* note 54, at 18-19; *see infra* notes 208-240 and accompanying text.

56. *See, e.g.*, ALASKA STAT. §§ 47.24.010-.100 (1984); NEV. REV. STAT. ANN. §§ 200.5091-.5099 (Michie 1986).

57. In Illinois, for example, both the Illinois Elder Abuse and Neglect Act and the Domestic Violence Act of 1986 serve the needs of abused elderly. *See, e.g.*, ILL. ANN. STAT. ch. 23, para. 6601-12 (Smith-Hurd Supp. 1989) (Illinois Elder Abuse and Neglect Act); ILL. ANN. STAT. ch. 40, paras. 2311-2 to 2313-5 (Smith-Hurd Supp. 1990) (Illinois Domestic Violence Act of 1986).

58. *See, e.g.*, GA. CODE ANN. §§ 53-701 to -706, 99-5201 to -5203 (Harrison Supp. 1989) (Georgia Domestic Violence Act); ILL. ANN. STAT. ch. 40, paras. 2311-2 to 2313-5 (Smith-Hurd Supp. 1990) (Illinois Domestic Violence Act of 1986); ME. REV. STAT. ANN. tit. 19, §§ 761-771 (1981 & Supp. 1989) (Maine Domestic Violence Act). Although an exhaustive discussion of California's domestic violence laws is beyond the scope of this Note, a brief discussion of the availability of this avenue of relief is important. In California, the Domestic Violence Prevention Act provides elders with a supplemental remedy to that found in the California

others have provisions in their penal codes that provide for criminal prosecution of elder abusers.⁵⁹ States' definitions of those protected under APS laws also vary. Some provide protection for all adults over eighteen who are impaired, incapacitated, or otherwise disabled.⁶⁰ Other statutes refer only to "elderly" individuals, with "elderly" typically

APS laws. See CAL. CIV. PROC. CODE §§ 540-553 (West 1990). Under the Act, an elder may obtain a restraining order with or without notice to an alleged abuser upon an affidavit that shows reasonable proof of a past act or acts of abuse. *Id.* § 545. The Act provides that such an order may be granted to "any family or household member who prior to or at the time such order is granted, was actually residing with the person or persons [to] whom such order is directed." *Id.* A family or household member includes, among others, "a spouse, former spouse, parent, child, . . . or any other person who regularly resides in the household" or did so within the past six months. *Id.* § 542(c).

According to one source, "The restraining order is probably the most important civil tool we have for protecting the abused elderly . . . It can be used not only in instances where abuse has already occurred, but when there have been threats or attempts of physical abuse." *Elder Abuse Awareness*, April 1988, at 1 (newsletter of the San Francisco Institute on Aging at Mount Zion Hospital and Medical Center, coordinating agency to San Francisco's Consortium for Elder Abuse Prevention) (Mary Anne Morgan ed.) [hereinafter *Elder Abuse Awareness*] (statements of Nancy Rasch-Chabot, San Francisco attorney specializing in elder law). Obtaining a restraining order is a relatively simple task and offers a quick means of ameliorating potentially dangerous circumstances. See generally *id.* at 2-4 (discussing the application for and issuance of restraining orders in the context of elder abuse).

An in depth discussion of the use of domestic violence laws as tools for dealing with the elder abuse problem is beyond the scope of this Note, which focuses on the function of adult protective services in negotiating the problem of domestic or noninstitutional elder abuse.

59. See, e.g., CAL. PENAL CODE § 368 (West 1988) (imposing criminal penalties on both elder caregivers and individual noncaregivers). California Penal Code § 368(a) punishes any individual who: "under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder . . . with knowledge that he . . . is an elder . . . to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or . . . willfully causes or permits the person or health of the elder . . . to be injured, or willfully causes or permits . . . [him] to be placed in a situation such that his . . . person or health is endangered. . . ." *Id.* These offenses are punishable by a maximum of one year imprisonment in county jail or two to four years in state prison. *Id.*

In addition to criminal penalties for a felony conviction of actual infliction of physical pain or mental suffering, under § 368 it is a misdemeanor to permit an elder to remain in a situation in which he "may be endangered." *Id.* § 368(b).

Finally, the section provides that a caretaker of an elder who violates any provision of law proscribing theft or embezzlement with respect to an elder's property is subject to imprisonment and fines. *Id.* § 368(c). The provisions in § 368 are similar to some penal-like provisions that appear within other states' APS laws. See *infra* notes 165-173 and accompanying text. For additional information regarding prosecution of alleged elder abuse offenders under Penal Code § 368, see *Elder Abuse Awareness*, *supra* note 58, at 5-7; Leonard, *Prosecuting Crimes Against Elders: A Guide for California Prosecutors*, PROSECUTOR'S BRIEF, Spring 1989, at 8-9; cf. Heiseler, *Working With Community Agencies to Successfully Prosecute Elder Abuse Cases*, PROSECUTOR'S BRIEF, Spring 1989, at 5-6 (discussing the prosecutor's need to work with community groups, including public agencies and private organizations, to prosecute abuse cases successfully).

60. See, e.g., ARK. STAT. ANN. § 5-28-101(1) (Supp. 1989); MINN. STAT. ANN. § 626.557(2)(b) (West Supp. 1990); MISS. CODE ANN. § 43-47-5(m) (Supp. 1990).

defined either as sixty years and older⁶¹ or sixty-five years and older.⁶²

B. Adult Protective Services Statutes

A background on the substance of APS laws in other states is crucial to a critical examination of California's APS response to elder abuse. The following sections discuss the general provisions found in state APS statutes that are applied in the context of elder abuse.

(1) Definitions of Abuse, Neglect, and Exploitation

The definitions of what constitutes elder abuse vary widely. Typically the broad categories include physical, psychological, fiduciary, and sexual abuse or exploitation as well as neglect;⁶³ the definitions of each type of abuse vary within these respective categories.

All states that have APS legislation include physical harm in their definitions of abuse. States may distinguish, however, between instances of willful infliction of physical abuse and negligent infliction or failure to prevent the physical abuse.⁶⁴ A more limited number of states consider infliction of mental anguish or psychological injury a form of abuse.⁶⁵ Among those that do, some definitions only include those cases that require medical attention; others do not specify such a requirement.⁶⁶ As one commentator noted, psychological abuse is common and its omission in many state statutes is unfortunate.⁶⁷ He

61. See, e.g., ILL. ANN. STAT. ch. 23, para. 6602(e) (Smith-Hurd Supp. 1989); MASS. GEN. LAWS ANN. ch. 19A, § 14 (West Supp. 1990); MO. ANN. STAT. § 660.250 (Vernon 1988).

62. See, e.g., ALASKA STAT. § 47.24.100(6) (1990); TEX. HUM. RES. CODE ANN. § 48.002(1) (Vernon 1990).

63. See, e.g., IDAHO CODE § 39-5302 (1985) (abandonment, abuse, exploitation, mental injury, and neglect defined); ME. REV. STAT. ANN. tit. 22, § 3472 (Supp. 1989) (abuse, neglect, exploitation, and sexual exploitation defined); ELDER ABUSE HOUSE REPORT, *supra* note 16, at 1 (physical, sexual, psychological or financial abuse of the elderly or otherwise causing the deprivation of their human rights by their relatives or caretakers). *But see* ALASKA STAT. § 47.24.100 (1990) (no definition of exploitation); IOWA CODE ANN. § 235B.1 (West Supp. 1990) (neglect not included in definition).

64. See, e.g., ARK. STAT. ANN. § 5-28-101(2) (Supp. 1989) (willful or negligent acts); IOWA CODE ANN. § 235B.1(1) (West Supp. 1990) (willful or negligent acts or omissions resulting in physical injury); MISS. CODE ANN. § 43-47-5(a) (Supp. 1990) (willful infliction of physical pain or injury).

65. See, e.g., ALASKA STAT. § 47.24.100(2) (1990); MICH. COMP. LAWS ANN. § 400.11(a) (West 1988); MINN. STAT. ANN. § 626.557(2)(d)(2) (West Supp. 1990).

66. Compare ALASKA STAT. § 47.24.100(2) (1990) (requires medical attention) with MICH. COMP. LAWS ANN. § 400.11(a) (West 1988) (no medical attention required) and MINN. STAT. ANN. § 626.557(2)(d)(2) (West Supp. 1990) (same).

67. Traxler, *Elder Abuse Laws: A Survey of State Statutes*, in ELDER ABUSE: PERSPECTIVES IN AN EMERGING CRISIS 139, 152 (1986).

notes, however, that failure to include psychological abuse may be attributed to a number of factors. These include problems in defining the term, investigating the abuse, and providing the necessary services, as well as the difficulty of taking into consideration differing individual levels of tolerance for psychological abuse.⁶⁸ A few states recognize unreasonable confinement as a form of potential elder abuse;⁶⁹ even fewer define abuse as including intimidation.⁷⁰ A number of states also include sexual abuse either within the general abuse definition or consider it as a separate category of abusive behavior.⁷¹

Almost all states include neglect in their APS laws. Neglect typically is defined as the failure to provide or deprivation of basic needs such as clothing, food, shelter, supervision, and care for physical and mental health.⁷² Some states merely have a negligence level of culpability for actionable neglect;⁷³ others require willfulness.⁷⁴ Eleven states consider self-neglect⁷⁵ as a variety of neglect that may warrant protection and either designate it as a separate category of neglect or include it within the general definition of neglect.⁷⁶

Exploitation also is a common element in these provisions. It usually is defined as the illegal or improper use of a vulnerable or in-

68. *Id.* But see Katz, *supra* note 13, at 715. As with reporting psychological abuse in the context of child abuse, there are "immense social and constitutional questions" involved in creating a system of mandated reporting of emotional injury or neglect of elders. Moreover, in the case of an elderly person it may be "more difficult to determine whether symptoms of emotional damage are organic, functional or situational in origin." *Id.* (citation omitted).

69. See, e.g., ME. REV. STAT. ANN. tit. 22, § 3472(1) (Supp. 1989); MISS. CODE ANN. § 43-47-5(a) (Supp. 1990).

70. See, e.g., TEX. HUM. RES. CODE ANN. § 48.002(2) (Vernon 1990).

71. See, e.g., HAW. REV. STAT. § 349C-1 (1985 & Supp. 1989) (sexual abuse not specifically defined but included in general definition of abuse); ILL. ANN. STAT. ch. 23, para. 6602 § 2(a) (Smith-Hurd Supp. 1989) (same); see also ME. REV. STAT. ANN. tit. 22, § 3472.15 (Supp. 1990) (separate definition of sexual abuses or exploitation as "contact or interaction of a sexual nature involving an incapacitated or dependent adult without that adult's consent.").

72. See, e.g., ME. REV. STAT. ANN. tit. 22, § 3472(11) (Supp. 1989); MICH. COMP. LAWS ANN. § 400.11(e) (West 1988).

73. See, e.g., FLA. STAT. ANN. § 415.102(13) (West Supp. 1990) (using a "reasonably prudent person" standard); IDAHO CODE § 39-5302(8) (1985) (same).

74. See, e.g., MD. FAM. LAW CODE ANN. § 14-101(l)(1) (Supp. 1989).

75. The definition of self-neglect varies in those states that include it as part of their APS statutes. Maryland's definition is exemplary and defines self-neglect as "the inability of a vulnerable adult to provide [himself] . . . with the services: (1) that are necessary for the vulnerable adult's physical and mental health; and (2) the absence of which impairs or threatens the vulnerable adult's well-being." *Id.* § 14-101(p)(1)-(2); see also N.H. REV. STAT. ANN. § 161-D:3(VII) (Supp. 1990).

76. Compare ALA. CODE § 38-9-2(8) (Supp. 1990) (included under definition of neglect) and FLA. STAT. ANN. § 415.102(13) (West Supp. 1990) (same) and KY. REV. STAT. ANN. § 209.020(7) (Michie/Bobbs-Merrill Supp. 1990) (same) with MD. FAM. LAW CODE ANN. § 14-101(p) (Supp. 1989) (separate definition for self-neglect).

capacitated elder, his resources, or property for the exploiter's or another's monetary profit or personal advantage.⁷⁷ At least one state defines exploitation more restrictively as a caretaker's improper use of funds that have been paid by the government to an adult or his caretaker.⁷⁸ This definition has been criticized as too narrow because it fails to protect the elder's personal resources from exploitation.⁷⁹

Varying definitions of abuse, neglect, and exploitation unfortunately hinder an accurate determination of the true extent of the problem. As one author noted, "[A]cceptance of a definition should be followed by research to accurately quantify the extent of the problem. Agreement on definition is essential in order to compare various research studies and to fashion responses."⁸⁰ More importantly, overbroad definitions may lead to implementation of relief programs that are more intrusive than necessary and that may unconstitutionally invade the elder's independence.⁸¹

(2) *Mandatory Reporting*

Mandatory reporting provisions were the first major laws enacted in response to the problem and continue today to be the mainstay of most state elder abuse laws. Almost all state APS laws mandate a wide variety of professionals to report known or suspected cases of elderly abuse.⁸² The "professionals" most often include health care and social service professionals including law enforcement officers, social workers, physicians, and nurses. Some states list in detail those persons required to report,⁸³ and others mandate anyone with knowledge or

77. See, e.g., MISS. CODE ANN. § 43-47-5(i) (Supp. 1990).

78. See TENN. CODE ANN. § 71-6-102(8) (1987).

79. Comment, *supra* note 4, at 751-52.

80. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 71 (1982).

81. *Id.* at 80. The danger of an overbroad definition is that it may enlarge the scope of the problem inappropriately, thereby statistically overdramatizing the need for relief. As a result the relief fashioned may be broader than necessary and may constitute an unnecessary, unwise, or unethical—if not unconstitutional—invasion of the older adult's independence. See *id.*

82. See, e.g., ME. REV. STAT. ANN. tit. 22, § 3477 (Supp. 1989); MICH. COMP. LAWS ANN. § 400.11(a) (West Supp. 1990); see also *Elder Abuse House Hearings*, *supra* note 1, at 96 (noting that 43 states, including the District of Columbia, have enacted mandatory reporting provisions).

83. See, e.g., MASS. GEN. LAWS ANN. ch. 19A, § 15(a) (West Supp. 1990) (physician, medical intern, dentist, nurse, family counselor, probation officer, social worker, policeman, firefighter, emergency medical technician, licensed psychologist, coroner, registered physical therapist, registered occupational therapist, osteopath, podiatrist, executive director of a licensed home health agency, or executive director of homemaker service agency).

reasonable cause to believe that abuse has occurred to report the incident.⁸⁴ Mandatory reporters typically are granted immunity from any criminal or civil liability they might otherwise incur.⁸⁵ Some states grant absolute immunity, but others require that the report be made without malicious intent and in good faith to qualify for complete immunity.⁸⁶ In a number of states mandated reporters actually may be prosecuted or fined for failure to report when required.⁸⁷

The majority of states either provide a guarantee of anonymity⁸⁸ or confidentiality for reporters of abuse or enumerate specific circumstances under which the name of a reporter may be divulged.⁸⁹ Some states stipulate that the reporter may be compelled or asked to divulge his identity during the course of a subsequent investigation.⁹⁰ Confidentiality or anonymity protects reporters and encourages reporting by those who otherwise might be hesitant for fear of retaliation or discovery by the alleged abuser or abused.⁹¹ In addition to the man-

84. Notably, most states attach a reasonableness standard to reporting requirements and do not require actual knowledge of abuse. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-454(A) (Supp. 1989) (reasonable basis); FLA. STAT. ANN. § 415.103(1)(a) (West Supp. 1990) (knows, or has reasonable cause to suspect); MISS. CODE ANN. § 43-47-7(1) (Supp. 1990) (“[A]ny person having reasonable cause to believe that a vulnerable adult . . . is being abused, neglected or exploited shall report such information.”); TEX. HUM. RES. CODE ANN. § 48.036(a) (Vernon 1990) (“[A] person having reasonable cause to believe that an elderly or disabled person is in the state of abuse, exploitation, or neglect shall report the information to the department.”). A few states have no mandatory reporting requirement. *See, e.g.*, WIS. STAT. ANN. §§ 55.001-55.07 (West 1987 & Supp. 1989).

85. *See, e.g.*, MINN. STAT. ANN. § 626.557(5) (West Supp. 1990); N.M. STAT. ANN. § 27-7-31 (1989).

86. *See, e.g.*, MINN. STAT. ANN. § 626.557(6) (West 1983) (“A person who intentionally makes a false report under the provisions of this section shall be liable in a civil suit for any actual damages suffered by the person . . . so reported and for any punitive damages set by the court or jury.”); OKLA. STAT. ANN. tit. 43A, § 10-104(E) (West Supp. 1990) (willful or reckless false reporting leads to liability in civil suit for actual and punitive damages).

87. *See, e.g.*, ARK. STAT. ANN. § 5-28-202 (1987); IOWA CODE ANN. § 235B.1(11) (West Supp. 1990). Critics charge that these provisions rarely are used and do not enhance effective reporting. ALLIANCE DIVISION OF CATHOLIC CHARITIES OF SYRACUSE, AN ANALYSIS OF STATES’ MANDATORY REPORTING LAWS ON ELDER ABUSE 9 (1983) [hereinafter ALLIANCE REPORT].

88. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-15(b) (West 1986) (reporter need not give name at all); HAW. REV. STAT. § 349C-2(d) (Supp. 1989) (same).

89. *See, e.g.*, FLA. STAT. ANN. § 415.107(2)-(4) (West Supp. 1990) (name of reporter only released to employees of responsible APS department, central registry, or state attorney upon written consent of reporter and if necessary to protect elder; to criminal justice agency investigating the alleged abuse; to the alleged perpetrator or victim; or pursuant to either a court subpoena or grand jury subpoena, among others); MO. ANN. STAT. § 660.263 (Vernon 1988) (same); *see also* GA. CODE ANN. § 88-1908a (Harrison 1986) (identity not released except with permission of reporter or in judicial proceeding).

90. *See, e.g.*, IDAHO CODE § 39-5303(5) (1985).

91. AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at 149.

datory reporting provisions, statutes often encourage voluntary reporting by other individuals.⁹²

Mandatory reporting provisions outline the time frame within which reporters must make the report to the designated authority or authorities.⁹³ The required contents of each report also are detailed in many statutes.⁹⁴ The authorities designated to receive reports vary and it is common for a statute to name more than one agency as responsible for receiving reports of abuse.⁹⁵

To enable individuals to report incidents of abuse at any hour, a number of statutes mandate the establishment of a twenty-four-hour reporting system. Florida and Mississippi, for example, each have a single statewide toll-free telephone number to which all reports of abuse are directed. The hotline must be staffed seven days per week, twenty-four hours per day.⁹⁶ Implementation of programs providing for twenty-

92. See, e.g., ARK. STAT. ANN. § 5-28-203(a)(3) (Supp. 1989); ME. REV. STAT. ANN. tit. 22, § 3479 (Supp. 1989).

93. Most states require oral reports with a follow-up written report. See ALA. CODE § 38-9-8(a)(1) (Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 3477(2) (Supp. 1990). Some statutes fail to specify a required method. See, e.g., ALASKA STAT. § 47.24.010(a) (1990); IDAHO CODE § 39-5303 (1985). Others simply require that reports be made in "any reasonable manner." See, e.g., CONN. GEN. STAT. ANN. § 46a-15(a) (West 1986). The time frames within which to make written reports vary from "as soon as possible" to one week after the initial report. See, e.g., MINN. STAT. ANN. § 626.557(4) (West Supp. 1990) (oral report due immediately and written report "as soon as possible"); MASS. GEN. LAWS ANN. ch. 19A, § 15(a) (West Supp. 1990) (written follow-up within 48 hours of oral report); VT. STAT. ANN. tit. 18, § 1153 (Supp. 1989) (written and oral, one week).

94. The requested information may include any number of the following items: the name and address of the abused elderly, the reporter, the alleged abuser, and the elder's caregiver; information relating to the nature and extent of the harm; the basis for the reporter's knowledge; and any other information the reporter believes may be helpful in the investigation. See, e.g., ALASKA STAT. § 47.24.010(b) (1990); FLA. STAT. ANN. § 415.103(1)(b) (West Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 3477(2) (Supp. 1989).

95. California, for example, names five agencies as possible report recipients, including county adult protective services, local law enforcement, long-term care ombudsman coordinators, certain licensing agencies, and the Bureau of Medi-Cal Fraud. CAL. WELF. & INST. CODE § 15630 (West Supp. 1990); cf. MINN. STAT. ANN. § 626.557(3) (West Supp. 1990) (police department, county sheriff, local welfare agency, or appropriate licensing or certifying agency). The majority of states designate the state human, social service, or welfare agency as the report receiving agency. See, e.g., FLA. STAT. ANN. § 415.103(1)(a) (West Supp. 1990) (State Department of Health and Rehabilitative Services Central Registry); KY. REV. STAT. ANN. § 209.030(3) (Michie/Bobbs-Merrill 1982) (Department for Social Services of the Cabinet for Human Resources). A number of statutes designate local social service or welfare agencies to receive reports. See, e.g., MD. FAM. LAW CODE ANN. § 14-302(a)(1) (Supp. 1989); MICH. COMP. LAWS ANN. § 400.11a(1) (West Supp. 1990). Many states assign at least some responsibility for receiving reports to local law enforcement agencies. See, e.g., MINN. STAT. ANN. § 626.557(3) (West Supp. 1990) (local police department or county sheriff, among others, may receive reports); S.C. CODE ANN. § 43-29-50(a) (Law. Co-op. 1985) (county sheriff's office or chief county law enforcement officer in the county where the person resides or is found).

96. FLA. STAT. ANN. § 415.103(3)(a) (West Supp. 1990); MISS. CODE ANN. § 43-47-7(6)

four-hour assistance can prove invaluable in the event of an emergency.

To date, much of the literature discussing elder abuse laws has focused on those provisions mandating reporting of elder abuse and has offered numerous criticisms of their requirements.⁹⁷ One major criticism is that mandatory reporting provisions are inappropriately modeled after child abuse reporting laws. State intervention in the case of child abuse is based on the doctrine of *parens patriae*,⁹⁸ which is the traditional role of the state to act as sovereign and guardian over persons who cannot care or speak for themselves.⁹⁹ The doctrine is rooted in medieval England, where guardianship of the person and property of a mentally disabled individual initially was the responsibility of the lord and then eventually was imposed on the Crown by statute.¹⁰⁰ Modern day guardianship proceedings, involuntary provision of medical services, and involuntary provision of elder abuse adult protective services all are based on the state's *parens patriae* obligation or power.¹⁰¹ State intervention under these circumstances hinges on a determination that the individual is mentally incompetent or incapacitated and on the state's responsibility to intervene, protect, and preserve those who cannot care or speak for themselves.¹⁰² In the case

(Supp. 1990); cf. MASS. GEN. LAWS ANN. ch. 19A, § 16(b) (West Supp. 1990) (the department of elder affairs must establish a mechanism for receipt of reports on a 24-hour per day basis).

97. See Crystal, *Elder Abuse: The Latest "Crisis,"* 88 PUB. INTEREST 56, 59-60 (1987); Faulkner, *supra* note 80, at 76-91; Katz, *supra* note 13, at 710-15; Comment, *supra* note 4, at 752-54; Note, *Mandatory Reporting of Elder Abuse*, 14 FORDHAM URB. L.J. 723, 735-53 (1986) (authored by Dyana Lee).

98. Faulkner, *supra* note 80, at 76.

99. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

100. See Faulkner, *supra* note 80, at 76; Horstman, *Protective Services For The Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 218-219 (1975). For additional discussion on the historical underpinnings of the *parens patriae* doctrine, see *id.* at 218-19; WORKING PAPER, *supra* note 54, at 28-29; Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405, 1409-13 (1979); cf. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 570-73 (1972) (discussing the development of protective procedures for assisting the mentally disabled elderly).

101. See, e.g., CONSERVATORSHIP RECOMMENDATIONS, *supra* note 5, at 8-9 (discussing *parens patriae* application in guardianship or conservatorship context).

102. See *id.* at 8. Defining "incapacity" or "incompetence" is problematic in the context of either guardianship proceedings or the involuntary provision of adult protective services to individuals thought to be trapped in abusive situations. These problems are discussed in detail in a later section of this Note. See *infra* notes 209-240 and accompanying text.

Notably, the state's *parens patriae* interest does not include a general license for the government to control individuals' lives in the name of helping its citizens. *United States v. Charters*, 829 F.2d 479, 494 (4th Cir. 1987). In the context of decisions regarding provision of involuntary medical treatment, the court in *Charters* noted that

the government's *parens patriae* goal of protecting the well being of its citizens is

of a child "[t]he law acts to protect . . . [him] against . . . [his] own ignorance, helplessness, and vulnerability."¹⁰³ Unlike an adult, who is presumed to be competent to make his own basic life decisions,¹⁰⁴ a child is assumed to require a guardian with custodial authority.¹⁰⁵ Critics argue that mandatory reporting laws presume, solely on the basis of advanced years, that the elderly are incompetent and unable to know when they need or want outside assistance.¹⁰⁶ Requiring reporting of elder abuse infantilizes elders and encourages the already pervasive ageism in our society.¹⁰⁷

More broadly, mandatory reporting is one of a number of provisions in APS statutes that is criticized because it deprives elderly citizens of their rights to self-determination. The legitimacy of state intervention under *parens patriae* turns on a determination of mental incapacity. Intervention through mandatory reporting of suspected abuse cannot be justified or supported since the age of an individual is the only criterion considered before the reporter is mandated to override the individual's right to self-determination. To presume that every adult over the age of sixty-five is unable to decide what is best for himself is an absurd proposition. As one author put it, "once the age of majority is reached the decision-making power over one's life belongs to the individual; [and] that power is not lost by virtue of old age alone. The aged do not, by definition, become incompetents who

realized . . . by allowing the greatest latitude to the decisions of the individual patient. . . . If an individual is competent . . . [his] informed decision presumptively is the best decision for that individual—for the individual is in the best position thoroughly to assess and evaluate the circumstances of his own life

Id. at 494-95.

103. Katz, *supra* note 13, at 717 (footnote omitted). According to two commentators, mandatory reporting of child abuse is based on three assumptions: (1) children are incompetent, helpless, and vulnerable; (2) children are at the mercy of their caretakers; and (3) society has a protectible interest in children. Palincsar & Cobb, *The Physician's Role in Detecting and Reporting Elder Abuse*, 3 J. LEGAL MED. 413, 433 (1982) (footnote omitted).

104. See, e.g., *Charters*, 829 F.2d at 494-95 ("[I]n accordance with the well settled principle . . . 'the law will presume sanity rather than insanity, competency rather than incompetency; [and] . . . that every man is sane and fully competent until satisfactory proof to the contrary is presented.'" (citing 41 AM. JUR. 2D *Incompetent Persons* § 129, at 665 (1968))). The law assumes that adults are free to live as they choose as long as they do not hurt others. Faulkner, *supra* note 80, at 79; Katz, *supra* note 13, at 717-18. If an individual is harming others the state may have a duty to intervene under its police power in order to protect the health, safety, and welfare of its citizens. Police power, in contrast with *parens patriae*, is "[t]he power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).

105. Crystal, *supra* note 97, at 59-60.

106. *Id.* at 60; Faulkner, *supra* note 80, at 79; Katz, *supra* note 13, at 718-19.

107. See *supra* note 46 (discussing ageism).

need protection from themselves and others."¹⁰⁸ Mandatory reporting laws, however, in effect assume that an abused elder does not seek assistance because he is unable or incompetent to do so. If an elderly individual will not report, laws dictate that someone else should do so.¹⁰⁹ This assumption fails to recognize 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.¹¹⁰

The existence of mandatory reporting provisions is troublesome particularly because a number of courts, employing a variety of rationales, have recognized that a competent adult has the right to refuse medical treatment even if such refusal means imminent death.¹¹¹ The

108. Katz, *supra* note 13, at 717-18. The breadth (and perversity) of a presumption that the mere fact of advanced years equates with an inability to decide matters regarding one's own well-being and needs is all too obvious to the author. An extreme application of the presumption illustrates its breadth.

Five of the nine Justices presently on the United States Supreme Court are over the age of 65. These "elderly" individuals have been entrusted with the responsibility of deciding matters of profound importance that affect the lives of many (if not all) Americans. In light of their presumed ability to make decisions that affect the lives of so many other individuals, it is ironic, to say the least, that these same individuals would be presumed to be unable to decide whether or not they need assistance under most state APS laws and as such would be subject to mandatory reporting laws. Although the example is extreme and there are undoubtedly some elders that indeed may require such extreme intervention and assistance, the overbreadth of these provisions is clear and their implication degrading to an entire class of individuals in our society.

109. *See id.* at 711; Lau & Kosberg, *supra* note 16, at 14.

110. Katz, *supra* note 13, at 711 (46% of the abused elders who received protective services eventually were institutionalized in nursing homes). "Since institutionalization of the elderly frequently leads to premature death, the elderly have good reason to fear the consequences of state intervention." *Id.*; *see also* Crystal, *supra* note 97, at 65 (the most significant long-term outcome of intervention was a higher rate of mortality; apparently the social service intervention often resulted in nursing home placement, and once in institutions the elders tended not to live as long); Lau & Kosberg, *supra* note 16, at 14 (Elders may remain in abusive situations "by choice, because of counter balancing factors or because the alternatives [such as institutionalization] appear more negative or frightening.").

111. Some courts have held that this right is based on an individual's right of privacy found in the penumbras of the Bill of Rights as it was announced by the United States Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). *See, e.g.*, *Satz v. Perlmutter*, 362 So. 2d 160, 163 (Fla. Dist. Ct. App. 1978); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220, 224 (1984); *cf. Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 739-40, 370 N.E.2d 417, 424 (1977) (an incompetent person's constitutional right to privacy may be asserted by that individual's guardian); *In re Quinlan*, 70 N.J. 10, 39-40, 355 A.2d 647, 663, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (same). *But see Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2851 n.7 (1990). *Cruzan* noted the likelihood that any right to refuse medical treatment is grounded in an individual's liberty interest under the due process clause of the fourteenth amendment and is not part of the constitutional right to privacy. If this is the case then the vitality of the above-mentioned state court decisions basing this right on the federal constitutional right

individual's right to decide whether or not he wishes to remain in an

to privacy is called into question.

To date, the United States Supreme Court has not expressly decided whether a competent person has a constitutionally protected right to refuse life sustaining treatment or life-saving hydration or nutrition. The Court's decision in *Cruzan*, however, made it clear that the Court would recognize such a right. In *Cruzan* the Court considered whether a Missouri statute that required clear and convincing evidence of an incompetent patient's wishes as to the withdrawal of treatment comported with the requirements of the due process clause of the United States Constitution. *Cruzan*, 110 S. Ct. at 2852; see also *id.* at 2856 (O'Connor, J., concurring); *id.* at 2865 (Brennan, J., dissenting). In deciding the case the Court declined to assess whether an individual has a constitutionally protected right to refuse lifesaving hydration and nutrition. Instead the Court noted that "for purposes of this case, we assume that the United States Constitution would grant a competent person [such] a constitutionally protected right" *Cruzan*, 110 S. Ct. at 2852. Perhaps not surprisingly in light of the Court's recent disdain for the constitutional "right to privacy," see, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3043 (1989), the majority noted it likely would analyze the right to refuse treatment as a liberty interest falling within the purview of the fourteenth amendment due process clause. *Cruzan*, 110 S. Ct. at 2851 n.7. The Court further stated "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan*, 110 S. Ct. at 2851. Although a balancing of this liberty interest against the relevant state interests could have yielded the answer to the Court's constitutional inquiry, the Court expressly avoided answering this question. Subsequent to the Supreme Court's decision in *Cruzan*, a Missouri county probate judge determined that, based on additional evidence put forth by the petitioners regarding Nancy Cruzan's expressed wishes when she was alive, the petitioners had satisfied the clear and convincing evidence requirement of the Missouri statute that was upheld by the Supreme Court. See Malcolm, *Judge Allows Removal of Woman's Feeding Tube*, N.Y. Times, Dec. 15, 1990, at 1, col. 2. Nancy Cruzan died on December 26, 1990.

Notably, the *Cruzan* decision has prompted Congress to pass a federal law that will take effect sometime in November 1991 and potentially may have a great impact on the elderly. The Patient Determination Act requires that patients entering a federally funded hospital or nursing home receive written information regarding state laws and their rights to refuse treatment and about the institution's practices to enable the individual to choose an institution that will honor his wishes. Moreover, the Act requires institutions to record whether the patient has chosen in writing to reject life support should its use become necessary. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

Despite the likelihood that the right to refuse treatment does not fall within the federal constitutional right to privacy, California courts are among those state courts that have determined that the right to refuse treatment exists under the privacy provisions contained in their respective state constitutions. See, e.g., *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 301 (1986); *Bartling*, 163 Cal. App. 3d at 195, 209 Cal. Rptr. at 224.

The right to refuse treatment also has been upheld based on the common law right to autonomy. See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972); *In re Conroy*, 98 N.J. 321, 348, 486 A.2d 1209, 1223 (1985); *In re Storar*, 52 N.Y.2d 363, 376-77, 420 N.E.2d 64, 70-71, 438 N.Y.S.2d 266, 272-73, cert. denied, 454 U.S. 858 (1981). It also has been upheld based solely on the competence of the patient, see, e.g., *Erickson v. Dilgard*, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (1962), and on the constitutional right to freedom of religious practice. See, e.g., *In re Osborne*, 294 A.2d 372, 374 (D.C. 1972); *In re Estate of Brooks*, 32 Ill. 2d 361, 372-73, 205 N.E.2d 435, 442 (1965). In addition, some courts have found that the right to refuse treatment is a corollary of the common law doctrine of informed consent. "Informed consent recognizes that implicit in the decision regarding treatment is the right to informed consent including knowing, competent,

abusive situation or seek assistance is, of course, not analogous to a competent individual's right to refuse medical treatment when such treatment is futile. Undoubtedly, an argument can be posited that state intervention in the former circumstance is not as intrusive because the right to remain in an abusive situation implicates a far less significant interest, be it a liberty or privacy interest, than does the right to determine whether one will live or die. The analogy is useful, however, if only to illustrate the irony that a competent elder's right to self-determination and autonomy permits him to decide to end his life but, under mandatory reporting provisions, will not empower him to decide whether he wants or needs outside assistance to extricate himself from an abusive situation. As one author aptly put it, "If the individual has the right to decide whether to refuse medical care even though that refusal may end in death, there surely is a right to make less life-threatening choices regarding personal eating habits, dress, appearance, cleanliness, and other elements of ones lifestyle."¹¹²

Mandatory reporting laws originally were enacted on the theory that to curb abuse, victims first had to be found and identified.¹¹³ The belief that cases needed to be "found" was based on early studies which indicated that abused elderly would not seek help for themselves. One study, for example, asserted that "[p]ride, embarrassment, fear, isolation, lack of access to services, and mental confusion are

and voluntary consent to the procedure or treatment. See, e.g., *Canterbury*, 464 F.2d at 779-83; *In re Estate of Longeway*, 133 Ill. 2d 33, 44-45, 549 N.E.2d 292, 297 (1989); *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). In *Cobbs*, the court stated that "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment." *Id.* at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513. Notably, a number of courts have held that a competent patient's right to refuse medical treatment is not lost because of subsequent incompetency and that a surrogate decisionmaker may assert an incompetent's right to self-determination whether that right is based on a constitutional liberty interest, *Cruzan*, 110 S. Ct. at 2852, or a privacy interest, see *In re Drabik*, 200 Cal. App. 3d 185, 207-09, 245 Cal. Rptr. 840, 853-55, *cert denied*, 488 U.S. 958 (1988); *In re Peter* by Johannig, 108 N.J. 365, 372-77, 529 A.2d 419, 422-25 (1987).

In California the right to refuse treatment has been codified in the Natural Death Act. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1990). The Act permits a terminally ill adult to execute an advance directive for the withholding or withdrawal of life-sustaining procedures. *Id.* § 7188. In the context of elder abuse it is particularly interesting to note that in passing the Act the legislature expressly recognized that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care." *Id.* § 7186.

112. Katz, *supra* note 13, at 720 (footnote omitted).

113. Block & Sinnott, *supra* note 16, at 97. The Block and Sinnott report urged states to adopt mandatory reporting provisions. *Id.*; see also ELDER ABUSE HOUSE REPORT, *supra* note 16, at 127 ("states may wish to consider enacting mandatory reporting legislation . . . to provide specific protections to the elderly equal to those provided to children"); Katz, *supra* note 13, at 705 (noting the fear that elder abuse victims will be unprotected unless a third party recognizes and reports the abuse).

all obstacles to [elderly] acknowledging . . . abuse and seeking professional assistance."¹¹⁴ More recent commentaries, however, conclude that mandatory reporting actually is not "finding" cases that otherwise would not be reported.¹¹⁵ One Maryland study indicated that ninety-five percent of reported cases were already known to agencies and that in many states most reports of abuse come from nonmandated reporters.¹¹⁶

One major assumption of any mandatory reporting system is that adequate services will exist within the community to assist the abused individual and to help find solutions for the problem of abuse.¹¹⁷ Unfortunately, the services available to aid victims of elder abuse are severely limited.¹¹⁸ In the area of child abuse such services and funding have proved lacking¹¹⁹ and the level of concern regarding fiscal allocations for services for abused elders is even less adequate.¹²⁰ The American Public Welfare Association's fifty-state survey indicated that, of the states with some form of elder abuse legislation, only eleven specifically appropriate funds for elder abuse-related services.¹²¹ Moreover, among these eleven states the appropriations vary greatly from a paltry twenty thousand dollars to six million dollars annually.¹²² The figures included in the May 1990 Report of the House Subcommittee on Health and Long-Term Care further reinforce the states' failure to devote sufficient funds to justify the imposition of mandatory reporting requirements. Compared to an average state budget of more than fifty-three million dollars annually for child protective services, elderly protective services receive on average slightly over \$2.29 million per year.¹²³ California's fiscal support of APS is equally grim. Ac-

114. Lau & Kosberg, *supra* note 16, at 11. The 1981 House Elder Abuse report specifically christened elder abuse a hidden problem. ELDER ABUSE HOUSE REPORT, *supra* note 16, at xiii; see also Steinmetz, *supra* note 40, at 55 (Battered elders often refuse to report the abuse for fear of retaliation, lack of alternative shelter, and fear of the unknown.).

115. See ALLIANCE REPORT, *supra* note 87, at 17; Crystal, *supra* note 97, at 63; Faulkner, *supra* note 80, at 78.

116. See Crystal, *supra* note 97, at 63. Research supports the contention that physicians in particular have not reported incidences of elder abuse. B. HARRIS & J. POERTNER, ABUSE AND NEGLECT OF THE ELDERLY IN ILLINOIS: INCIDENCE AND CHARACTERISTICS, LEGISLATION AND POLICY RECOMMENDATIONS, 1-60 to -61 (1981).

117. Faulkner, *supra* note 80, at 77.

118. See *Elder Abuse House Hearings*, *supra* note 1, at 96.

119. See Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458 (1978).

120. See Note, *supra* note 97, at 733; *Elder Abuse House Hearings*, *supra* note 1, at 96.

121. AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at 14.

122. *Id.*

123. *Elder Abuse House Hearings*, *supra* note 1, at 101 (Table No. 2, "1989 State Budgets for Protective Services").

ording to one source, "Since the early 1980's California's financial commitment to the protection of elders . . . at risk of abuse and exploitation has essentially held static, making no serious attempts to either keep pace with inflation or address an increasing volume of protective services referrals."¹²⁴ Moreover, in California a competition for funding and services between Child Protective Services and Adult Protective Services, which began in the early 1980s and continues today, has contributed to the drastic underfunding problem presently plaguing programs to assist abused elders.¹²⁵ Enactment of mandatory

124. *Silent Population*, *supra* note 3, at 1-2; *see also id.* at 4 (graphs displaying the dramatic increase in APS demand and the equally dramatic drop in purchasing power of funds allocated for APS).

125. *Id.* at 2. California Representative Edward R. Roybal, Chairman of the House of Representatives Subcommittee on Health and Long-Term Care, stated at the May 1990 Hearings:

I have been told by officials in my own state of California that although the state mandates that elder abuse be reported, the funding to identify and assist such victims is nearly non-existent. . . . While it is shameful that California spends only \$59 per child resident annually for protective services, it is a disgrace that the state devotes less than \$3 per elderly person for protective services for that age group.

Elder Abuse House Hearings, *supra* note 1, at 4. According to the 1990 House Report, California's 1989 state budget for child protective services totalled \$443,100,000 as compared with \$7,920,000 for elderly protective services. *Id.* at 101 (Table No. 2 1989 State Budgets for Protective Services).

California's diminishing financial commitment to remedying the elder abuse problem is clearly insufficient especially in light of the abundant commitment to Child Protective Services. Yet, the inadequacy of funding also must be viewed, at least in part, as somewhat beyond the state's ability to control. The lack of funding can be viewed as a product of the political climate of the 1980s and the Reagan Administration's "New Federalist" program which adversely affected the financial status of all states, not just California. During the 1980s the federal government's contribution to state and local budgets dropped from a 25% contribution in the late 1970s to 17% today; a drop that necessarily has transferred more fiscal responsibility to the states. deCouray Hinds & Eckholm, *80s Leave States and Cities in Need*, N.Y. Times, Dec. 30, 1990, at 1, col. 1. These authors note that "[f]rom 1984 to 1988, the strong economy helped state and local governments raise money to continue programs that had lost Federal support. But now as the economy sours, states are saddled with heavier social responsibilities and few options to pay for them." *Id.* The federal block grants to California, which support programs including APS, were among those slashed during this period. *Elder Abuse House Hearings*, *supra* note 1, at 96.

California and other states face yet another financial roadblock to increasing APS funding in the future. In light of the huge California budget deficit, it not only is unlikely that state allocations will compensate for the cuts in federal funding, but also is clear that those funds are less likely to be increased above current spending levels. The present budget deficit totals at least \$6 billion and that figure continues to grow larger. Kershner & Lucas, *Sacramento Faces Budget Battle*, S.F. Chron., Jan. 4, 1991, at A2, col. 1. According to one source, the discrepancy between revenues and costs of services for 1991 is estimated to be between \$6 billion and \$9 billion as compared with the \$3.6 billion cash shortfall of summer 1990. *Id.*; *see also* deCouray Hinds & Eckholm, *supra* (discussing the negative impact of state budget deficits on financing state social services and other programs).

Despite the fact that New Federalism and a huge state deficit may offer some explanation

reporting laws in California, coupled with the cutbacks of almost a decade ago, has compounded the problem with a sixty-four percent increase in demand for adult protective services.¹²⁶ Without funding for services, mandatory reporting is meaningless and inappropriate. State intervention can be justified only if assistance is available to combat the reported abuse.¹²⁷

A final area of concern regarding mandatory reporting is its effect on privileged communications between professionals such as physicians and their clients or patients. Many mandated reporters are professionals who have an obligation to uphold their clients' statutory privilege to confidential communications.¹²⁸ Specific provisions within reporting laws expressly abrogate many of these privileges.¹²⁹ As a general principle, abrogation of the privileges alone is not necessarily offensive since often there are exceptions to these privileges. Incursions on the physician-patient privilege, for example, are justified if necessary to protect society from crime—by exposing criminal offenders—or to protect those who are unable to care for themselves—as in cases of child abuse.¹³⁰ Any exception in the case of elder abuse, however, is not tailored to protect society from crime,¹³¹ but rather is based on the familiar assumption that because of their age elders cannot protect themselves. The incursions on these privileges ultimately are examples of yet another instance in which ageism is encouraged.¹³² Abrogation of these privileges reinforces the underlying

for the minimal commitment to the elder abuse problem, the disproportionate allocation of those funds that *do* exist is inexcusable and remains subject to criticism.

126. *Silent Population*, *supra* note 3, at i.

127. As one author notes:

Most of the recently enacted elder abuse statutes, while mandating new reporting and investigative activities, do not appropriate new funds either for these activities themselves or for services to address the needs—of “victim,” “aggressor” or commonly both At best, such legislative responses constitute tokenism, while at worst they raise the prospect of a “cure” that may be worse than the “disease.”

Crystal, *supra* note 97, at 64.

128. *See, e.g.*, CAL. EVID. CODE § 954 (West 1966 & Supp. 1990) (attorney-client privilege); *Id.* § 1014 (West Supp. 1990) (psychotherapist-patient privilege); *Id.* §§ 1030-1034 (West 1966) (clergyman-penitent privilege).

129. *See, e.g.*, FLA. STAT. ANN. § 415.109 (West Supp. 1990) (overriding privilege between any professional person and his patient or client except between attorney and client).

130. Faulkner, *supra* note 80, at 82-83.

131. *Id.* at 83 (It is unlikely “that a victim of elder abuse is a participant in a crime, unless passivity in the face of assault is criminal. Furthermore, the perpetrator of the ‘crime’ . . . is unlikely to commit it against members of the general public.”). Although arguably an elder abuser who abuses in an institutional setting may commit similar abusive acts or “crimes” against members of the “society” (defined as the society of the institution), it is unlikely that an abuser abusing in a domestic or noninstitutional setting is a threat to other potential elderly victims.

132. Faulkner, *supra* note 80, at 83.

presumption that as a class elders are like infants and perpetuates the already distorted perception of the elderly as helpless.

In addition to fears that such provisions promote ageism, critics also worry that abridgement of these privileges will discourage elders from seeking medical or other assistance from those professionals who are required to report believed instances of abuse.¹³³ Elders often choose not to seek assistance against abuse because they legitimately fear eventual institutionalization.¹³⁴ If an elder believes his doctor will report suspected abuse to the authorities and thereby set in motion a process that may end with his being removed from his home, the elder understandably is reluctant to seek much-needed medical attention.¹³⁵ Others have voiced concern that abrogation of privileges will discourage the abuser from seeking professional help such as psychological counselling.¹³⁶ Critics theorize that an abuser who knows that his treating physician is obliged to report abuse will be deterred from seeking the very assistance, such as in-home help caring for the elder and counseling for himself, that may help him end his abusive behavior.¹³⁷

(3) *Central Registries*

A number of statutes mandate the establishment and maintenance of a central registry,¹³⁸ a centralized listing of all abuse reports and

133. *Id.* at 84; Palincsar & Cobb, *supra* note 103, at 437; *cf.* Note, *supra* note 97, at 750 n.145 (evidence gleaned from experiences in the child abuse setting indicates that the clergyman-penitent relationship also may be among those adversely affected by these provisions).

134. *See supra* note 110.

135. Faulkner, *supra* note 80, at 84.

136. Note, *supra* note 97, at 751.

137. *Id.* at 751. The same author notes that similar arguments were raised in the aftermath of *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 2d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), in which the California Supreme Court held that a psychotherapist has a duty to warn a potential victim or the authorities if he suspects or knows that a patient presents a serious danger of violence to another. Note, *supra* note 97, at 751 n.147. The author also suggests that, as has been found through research regarding the effect of child abuse legislation, professionals might not report to avoid disrupting the treatment process. *Id.* at 751 & n.148; *see also* Faulkner, *supra* note 80, at 84.

Some commentators have argued that a physician may be liable in an action for negligence if he does not report suspected abuse. Palincsar & Cobb, *supra* note 103, at 424. This fear is based on the holding in a California case, *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976), that a pediatrician could be held liable for negligently failing to report a suspected incident of child abuse. *Id.* at 399, 551 P.2d at 389, 131 Cal. Rptr. at 69. These commentators argue that doctors who fail to report suspected cases of elder abuse may be liable under a *Landeros*-like analysis. Palincsar & Cobb, *supra* note 103, at 424.

138. *See, e.g.*, ARK. STAT. ANN. § 5-28-201 (1987); FLA. STAT. ANN. § 415.103(3) (West Supp. 1990); MISS. CODE ANN. § 43-47-7(6) (Supp. 1990); MO. ANN. STAT. § 660.263(5) (Vernon 1988).

information regarding any subsequent investigations, to which certain statutorily authorized individuals may gain access.¹³⁹ Broadly stated, the purpose of a registry is to receive and maintain reports of abuse in a manner that facilitates rapid access and recall of the information reported, of subsequent investigations based on those reports, and of other relevant information.¹⁴⁰

There are numerous benefits to maintaining a central registry and many supporters feel that establishment of a centralized data system is essential for the success of any elder abuse prevention program.¹⁴¹ An investigator with access to the central registry is able to determine if an alleged abuser is a known previous abuser, and likewise, if the abused elder was reported as abused on other occasions.¹⁴² Moreover, a registry "can help uncover patterns of probable abuse by an abuser when the actual evidence available is insufficient to prove abuse but there is reason to suspect . . . [that it] has occurred."¹⁴³ If, for example, an individual was reported as a suspected abuser in ten different cases over the course of a year but no single investigation yielded sufficient evidence to confirm a charge of abuse, the abuser's record as a whole could be used to support a charge of abuse. This pattern could not be discerned readily, if at all, in a system in which county welfare agencies or other independent local agencies maintain separate files on individual cases of abuse and there is no central repository or facile exchange of information. Conversely, within a central registry system, a recurring suspect abuser could be spotted easily and subsequently monitored in the event the alleged abuser continues to reappear as a near-abuser in the future.

Central registries for elder abuse can be particularly useful in those states where the APS laws either designate more than one agency as responsible for investigating instances of abuse¹⁴⁴ or mandate coordination and consultation among investigatory bodies.¹⁴⁵ Registries can

139. See *infra* notes 151-157 and accompanying text (regarding who may gain access to central registry records).

140. MO. ANN. STAT. § 660.263(5) (Vernon 1988).

141. AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at 132; Note, *supra* note 97, at 763 & n.229.

142. AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at 132.

143. *Id.*

144. See, e.g., FLA. STAT. ANN. § 415.104(1) (West Supp. 1990); MD. FAM. LAW CODE ANN. § 14-303(c) (Supp. 1988).

145. See, e.g., MINN. STAT. ANN. § 626.557(13) (West 1983) (mandating coordination between police and local welfare agency during investigation and with reciprocal notification upon receipt of a report of abuse); *id.* § 626.5571 (West Supp. 1990) (establishing multidisciplinary adult protection teams for use in case consultation and information sharing); cf. MD. FAM. LAW CODE ANN. § 14-303(e) (Supp. 1989) (parties participating in the investigation may share pertinent client information).

make access and coordination efforts run more smoothly when more than one agency is handling elder abuse reports because information on any given case will be accessible to all involved in the investigation.

Finally, central registries can provide "a resource for the evaluation, management, and planning of preventive and remedial services for aged persons,"¹⁴⁶ and assist in developing public education programs.¹⁴⁷ This expectation is bolstered by the success of similar registries in helping manage reports of child abuse. The central registry mechanism has proved useful in monitoring the performance of protective services, coordinating treatment efforts, and facilitating research and development by creating statistical data.¹⁴⁸ Perhaps the only drawback in establishing a central registry is the cost of setting up and maintaining the system.

(4) Confidentiality

A major concern in handling reports of abuse, whether or not they are organized in a central registry, is maintenance of confidentiality once the reports have been received and recorded. Central registries play an important role in this respect,¹⁴⁹ as do other specific statutory provisions that address confidentiality in states without registry systems. As noted above, confidentiality or anonymity protects all reporters and encourages hesitant reporters.¹⁵⁰

Almost all states restrict the access to elder abuse records in some manner. Most statutes stipulate that the report and all information gathered during the subsequent investigation are not public record.¹⁵¹ Some specifically list individuals who have a right of access; among these are the victim, certain agencies involved in the investigation such as local law enforcement and administrative agencies, the court,¹⁵² and

146. FLA. STAT. ANN. § 415.103(3)(a)(5) (West Supp. 1990); see also ALLIANCE REPORT, *supra* note 87. Notably, a number of states have an exception to the general confidentiality rule so that information in the registry "may be made available to bona fide and approved research groups solely for the purpose of scientific research." *E.g.*, ARK. STAT. ANN. § 5-28-213(d) (1987).

147. AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at 132.

148. Note, *supra* note 97, at 741 n.89. Iowa prescribes that reports of dependent adult abuse (including elder abuse) be collected, maintained, and disseminated by expanding the central registry already in use for child abuse. IOWA CODE ANN. § 235B.1(7)(a) (West Supp. 1990).

149. One author contends that states with central registries have more detailed procedures for maintaining confidentiality of case records and authorization of access to them. Traxler, *supra* note 67, at 156.

150. See *supra* notes 88-91 and accompanying text.

151. See, *e.g.*, ALASKA STAT. § 47.24.050(a) (1990); N.M. STAT. ANN. § 27-7-29(A) (1989); TEX. HUM. RES. CODE ANN. § 48.083 (Vernon 1990).

152. See, *e.g.*, KY. REV. STAT. ANN. § 209.140 (Michie/Bobbs-Merrill 1982) (information

(in some states) bona fide and approved researchers.¹⁵³ A number of states mandate total confidentiality;¹⁵⁴ others provide that information may be released with the victim's permission.¹⁵⁵ Some states penalize individuals who are responsible for revealing confidential records to unauthorized parties.¹⁵⁶

It is not difficult to understand the abused's interest in confidentiality. An abused individual may be ashamed of or embarrassed by his circumstances and perhaps fearful of the consequences of seeking help—either because reporting will sever his only family link or because he fears his abuser may retaliate. As one author notes, confidentiality "is essential to protect the rights and sensibilities of the family members involved in such proceedings, since these records often contain information about very private aspects of family life."¹⁵⁷

Yet, it is important to acknowledge that the abused are not the only persons who deserve protection. An alleged abuser is not deemed guilty merely by virtue of an accusation. Protecting an alleged abuser from public scrutiny seems fair, especially since reports subsequently may be deemed unfounded or unsubstantiated. A distinction must be drawn between alleged abusers who have been reported by mandated or voluntary reporters and criminal suspects who have been arrested based on probable cause. Although criminal defendants may have a lesser confidentiality interest, alleged abusers are not necessarily criminal defendants.¹⁵⁸ Confidentiality provisions must strike a balance between these privacy interests and the need for certain individuals, such

available to alleged abuser provided the informant's name is withheld; persons within the department of social services and other agencies; persons with a legitimate interest in or responsibility to the case; the court, pursuant to an order; and the alleged abused person); see also ILL. ANN. STAT. ch. 23, para. 6608 (Smith-Hurd Supp. 1989) (information available to state department on aging, law enforcement agency investigating report, physician who has a patient he reasonably suspects may be abused, the adult reported or his guardian provided the guardian is not the alleged abuser, the court, grand jury, bona fide researchers, and coroner); TENN. CODE ANN. § 71-6-118 (1987) (release only by court order). One author has observed that in some states the list of personnel and agencies permitted access to these records may be too long to maintain confidentiality. Traxler, *supra* note 67, at 155-56.

153. See, e.g., ARK. STAT. ANN. § 5-28-213(d) (1987); ME. REV. STAT. ANN. tit. 22, § 3474(2)(F) (Supp. 1989).

154. See, e.g., HAW. REV. STAT. § 349C-8 (1985 & Supp. 1989).

155. See, e.g., IDAHO CODE § 39-5305 (1985 & Supp. 1990) (access to confidential records only with consent of elder or legal representative).

156. MISS. CODE ANN. § 43-47-7(e) (Supp. 1990); N.Y. PENAL LAW § 200.5095(2) (McKinney 1988) (willfully permitting release of any information to persons or agencies not permitted access is a misdemeanor).

157. Note, *supra* note 97, at 748.

158. Of course, some reported abusers also may be criminal defendants if they are charged under the state's penal provisions that impose criminal penalties for elder abuse. See *supra* note 59 and accompanying text.

as those investigating charges of abuse, to have ready access to the information to formulate responses and assist needy elders.

(5) *Expungement of Records*

The majority of APS statutes have few provisions designed to assure that the rights of alleged perpetrators or victims of abuse are protected. Other than the confidentiality provisions, only a few states with central registry systems provide additional means of protection for alleged abusers. Select states provide for amendment of reports or expungement of records from the registry if the reports are determined to be inaccurate or unsubstantiated.

The language and detail of the provisions vary. A number merely provide that once a report is deemed "unsubstantiated," all records relating to that report must be expunged.¹⁵⁹ Others permit an alleged abuser (or victim) to request that an inaccurate or unsubstantiated report be corrected or expunged.¹⁶⁰

Although expungement mechanisms are useful, more elaborate means of shielding the accused are preferable and have been implemented in a handful of states.¹⁶¹ Among the statutes that afford the alleged abuser the most protection are those with central registry systems that classify all investigated reports of abuse as unsubstantiated, confirmed, or containing some indication of abuse but insufficient evidence to confirm the report.¹⁶² Even better are those statutes that

159. See, e.g., ARK. STAT. ANN. § 5-28-212 (1987); IDAHO CODE § 39-5303(3) (1985 & Supp. 1990).

160. See, e.g., MICH. COMP. LAWS ANN. § 400.11d(3) (West 1988) (once investigation is completed any person who is the subject of a report may request the director to correct an inaccurate statement or clearly identify an unsubstantiated statement); VT. STAT. ANN. tit. 18, § 1155(d) (1982 & Supp. 1990) (may request expungement of unsubstantiated reports).

161. In this respect, Florida has taken the lead and established one of the most comprehensive systems for handling reports of abuse and assuring that the rights of an alleged abuser remain untrammled. See FLA. STAT. ANN. § 415.103(3)(b)-(d) (West Supp. 1990); see also NEB. REV. STAT. § 28-720 to -724 (1989) (information identifying subjects of unfounded reports shall be expunged; subjects of a report shall be provided with a copy of the report upon request and shall have the right to a hearing if a request to amend or expunge information is denied).

162. See, e.g., FLA. STAT. ANN. § 415.103(3)(c) (West Supp. 1990). A "confirmed" designation indicates that abuse, neglect, or exploitation has occurred and the perpetrator has been identified. *Id.* § 415.102(5). An "indicated" designation means that a subsequent investigation has determined that some indication of abuse, neglect, or exploitation exists. *Id.* § 415.102(11). An "unfounded" designation means the investigation established that no indication of abuse, neglect, or exploitation exists. *Id.* § 415.102(15); see also NEB. REV. STAT. § 28-720 (1989) (cases classified as "court substantiated," "petition to be filed," "investigation inconclusive," or "unfounded report").

contain fixed procedures by which the accused may challenge these classifications or the contents of the registry. These procedures include, but are not limited to, notice of the classification assigned to a given report of abuse, the opportunity to request amendment or expunction of inaccurate or inconsistent records, and notice of any amendments to or expunctions of the record.¹⁶³ Finally, some states define time frames within which certain records must be expunged.¹⁶⁴ Such expungement procedures serve two important functions. Foremost, provided the records exist long enough to enable authorities to discern a pattern of near-substantiated instances of abuse by a given recidivist alleged abuser, such procedures protect alleged abusers from possible exposure to ridicule and discrimination in the unlikely event unsubstantiated records leak out. Secondly, such expungement procedures undoubtedly promote administrative efficiency.

(6) *Penalties for the Abuser*

The majority of state APS laws do not prescribe penalties against the perpetrator. State statutes outlining penalties vary with respect to

163. See, e.g., FLA. STAT. ANN. § 415.103(3)(c)-(e) (West Supp. 1990). Florida requires that both the alleged perpetrator and victim be notified of the assigned classification upon completion of the investigation. *Id.* § 415.103(3)(c). If the record is found to be inaccurate, the Department of Health and Rehabilitative Services is mandated to amend or expunge the inaccurate information and to notify the alleged perpetrator and victim of any such changes. *Id.* § 415.103(3)(d)(1). The alleged perpetrator or victim may request such an amendment or expungement. *Id.* § 415.103(3)(d)(2). Notice to the alleged perpetrator of a confirmed report must include the following information: that the report has been confirmed; that the individual may request amendment or expunction within 30 days of the classification; that he may request more information regarding the report; and that failure to ask for a timely amendment or expunction means the alleged abuser agrees not to contest the classification. *Id.* § 415.103(3)(d)(3). Notably, the alleged abuser still may request that the confirmed report be set aside if he does so within a year of his failure to request timely amendment or expunction, but only if such failure was due to excusable neglect or fraud. *Id.* § 415.103(3)(d)(4). If a requested amendment or expunction is either denied or not acted upon within 30 days, the Florida statute provides that the alleged perpetrator has a right to an administrative hearing to contest the determination. At the hearing the burden of proof rests on the department to prove by a preponderance of the evidence that the perpetrator committed the abuse. Failure to request such hearing means the accused does not contest the classification. If the hearing results in the classification being upheld it shall remain "confirmed." *Id.* § 415.103(3)(d)(5); see also NEB. REV. STAT. § 28-723 to -724 (1989).

164. See, e.g., FLA. STAT. ANN. § 415.103(3)(c) (West Supp. 1990) (all information related to "unfounded" reports shall be expunged within one year after the case is so classified and all information related to an "indicated" report shall be expunged seven years from the date of the last indicated report concerning any person named in the report); MASS. GEN. LAWS ANN. ch. 19A, § 23(b) (West Supp. 1990) (within three months of a determination that the report is unsubstantiated, either the report and all information gathered as a result of it shall be destroyed or all personal identifiers shall be removed); VT. STAT. ANN. tit. 18, § 1155(c) (1982 & Supp. 1990) (destruction of all records relating to a given elderly individual not sooner than 90 days after his death).

who may be held accountable for abuse, neglect, or exploitation and with respect to the penalty assessed against the perpetrator. In most states an abuser is guilty of a misdemeanor and may be fined or imprisoned.¹⁶⁵ The class of misdemeanor and the fine or penalty assessed vary considerably among the statutes and within some statutes, depending sometimes on the type of abuse perpetrated and on the identity of the perpetrator.¹⁶⁶ Fines for misdemeanors generally range from five hundred to ten thousand dollars and the term of imprisonment is typically no longer than one year.¹⁶⁷ Finally, a number of states classify some types of elder abuse as felonies and consequently impose stricter penalties.¹⁶⁸

Most often the statutes define those who may be held liable as the elder's caretaker or any other person who willfully commits an abusive act or omission.¹⁶⁹ "Caretaker" typically is defined as an individual or facility responsible for the care of a vulnerable adult as a result of family relationship, voluntarily, by contract, or by agreement.¹⁷⁰

Provisions that limit liability to caretakers as well as those that extend it more broadly to "anyone" have been criticized. Limiting liability to caretakers acknowledges that caretakers, who presumably have assumed the responsibility for care, should be held accountable. Unfortunately this narrow reading ignores the fact that the abuse and exploitation can be, and often is, perpetrated by those who do not have formal caretaking responsibility for the elder.¹⁷¹ "The dubious

165. See, e.g., S.C. CODE ANN. § 43-29-41 (Law. Co-op. 1985); TENN. CODE ANN. § 71-6-117 (1987).

166. See, e.g., ARK. STAT. ANN. § 5-28-103 (1987). In Arkansas the abuser is guilty of a Class D felony if the abuse results in great bodily harm, permanent disability, or permanent disfigurement; of a Class B misdemeanor if he permits physical or mental health of an adult to be materially endangered; and of a Class C misdemeanor if he negligently deprives an adult of food, shelter, or medical treatment. See also KY. REV. STAT. ANN. § 209.990 (Michie/Bobbs-Merrill 1982 & Supp. 1990); NEV. REV. STAT. ANN. § 200.5099 (Michie 1986); cf. VT. STAT. ANN. tit. 18, § 1159 (Supp. 1989) (not classified as a "misdemeanor" or "felony" per se but abuser fined up to \$10,000, or imprisoned up to one year, or both).

167. See, e.g., S.C. CODE ANN. § 43-29-41 (Law. Co-op. 1985) (fined between \$500 and \$5,000, or imprisoned for 90 days to five years); TENN. CODE ANN. § 71-6-117 (1987) (fined no more than \$1,000, imprisoned for no greater than 11 months and 29 days, or both).

168. See, e.g., ARK. STAT. ANN. § 5-28-103 (1987); KY. REV. STAT. ANN. § 209.990 (Michie/Bobbs-Merrill 1982 & Supp. 1990).

169. See, e.g., ARK. STAT. ANN. § 5-28-103 (1987) ("whoever"); KY. REV. STAT. ANN. § 209.990 (Michie/Bobbs-Merrill 1982 & Supp. 1990) ("anyone" and "caretaker"); MISS. CODE ANN. § 43-47-19 (Supp. 1990) ("any caretaker or other person"); NEV. REV. STAT. ANN. § 200.5099 (Michie 1986) ("any adult person"); VT. STAT. ANN. tit. 18, § 1159(a)-(b) (Supp. 1990) ("any person" and "caretaker").

170. See, e.g., ALASKA STAT. § 47.24.100(3) (1990); MISS. CODE ANN. § 43-47-5(c) (Supp. 1990); TENN. CODE ANN. § 71-6-102(5) (1987).

171. Comment, *supra* note 4, at 752.

constitutionality” of statutes that cast a wider net of liability also has been raised.¹⁷² One author is particularly disturbed by the vague definitions of the circumstances or relationships between the alleged perpetrator and the victim of neglect that give rise to liability. He notes that the concept of neglect implies a disregard of a duty of care, which the law usually does not impose even on family members except for spouses. The author finds that there have been few criminal prosecutions under the laws, that the possibility of such prosecutions is a poor defense for these “Draconian penalties,” and that the laws both breed lack of respect for the law and encourage selective prosecution.¹⁷³

(7) *Investigations*

All state statutes provide for some type of initial investigation after a report of alleged abuse is received. The laws vary with respect to which agency has responsibility for conducting this investigation. The majority of statutes name the state human services, social services, or welfare department as the entity with primary responsibility.¹⁷⁴ A number of statutes assign this responsibility to the local welfare agency¹⁷⁵ or law enforcement agency.¹⁷⁶ Depending on the type of suspected harm, many statutes provide for certain reports to be referred to a specific agency for investigation. For example, law enforcement agencies or the district attorney’s office often are referred cases involving suspected violations of the state’s penal code or danger of imminent grave bodily harm.¹⁷⁷ Jurisdiction over abuse investigations

172. Crystal, *supra* note 97, at 62-64.

173. *Id.*

174. See, e.g., ALASKA STAT. § 47.24.020(a) (1990) (Department of Health and Social Services); IDAHO CODE § 39-5303(3) (1985) (Idaho Department of Health and Welfare); MISS. CODE ANN. § 43-47-9(1) (Supp. 1990) (State Department of Public Welfare).

175. See, e.g., MD. FAM. LAW CODE ANN. § 14-303(a) (Supp. 1989); cf. MICH. COMP. LAWS ANN. § 400.11b (West 1989) (social services department).

176. See, e.g., MO. ANN. STAT. § 660.261 (Vernon 1988) (department of social services shall either investigate or refer report to appropriate law enforcement agencies).

177. See, e.g., FLA. STAT. ANN. § 415.104(1) (West Supp. 1990) (if during the investigation the department believes the abuse was perpetrated by a second party it shall contact the appropriate criminal justice agency, which will conduct a criminal investigation concurrent with the protective services investigation); MD. FAM. LAW CODE ANN. §§ 14-303(c), 14-304(a) (Supp. 1989) (if a representative from the local department of social services believes an emergency exists he may contact local law enforcement officials); N.H. REV. STAT. ANN. § 161-D4(II) (Supp. 1990) (requiring referral of all cases of serious bodily injury to the department of justice or county attorney).

sometimes is determined by the type of locale where the suspected abuse is alleged to have occurred. The fact that the reported abuse took place in a long-term care facility, for example, often will dictate the agency responsible for the investigation.¹⁷⁸ Some states assign investigatory responsibility to whichever agency receives the initial report of abuse.¹⁷⁹ Other states fail to address clearly who ultimately is responsible for the investigation.¹⁸⁰ In most states more than one agency has jurisdiction to conduct an investigation¹⁸¹ and cooperation between or among these entities is encouraged or mandated to ensure efficient and appropriate handling of cases.¹⁸²

The time frame within which an investigation must be initiated also varies. The specific time limits delineated in the statutes range from within twenty-four hours of receiving the report to ten days thereafter.¹⁸³ Many states do not establish a specific time frame, requiring an investigation to begin "promptly."¹⁸⁴ The significance of when an investigation commences varies with the abusive situation. If the report indicates the situation is an emergency the response time clearly must be shorter. Conversely, for less time sensitive allegations, such as financial exploitation, a longer response time may be adequate

178. *See, e.g.*, ARK. STAT. ANN. § 5-28-210(a) (Supp. 1989) (investigation involving endangered adult resident in a long-term care facility conducted by sheriff or Office of Attorney General).

179. *See, e.g.*, NEV. REV. STAT. ANN. § 200.5093(5) (Michie 1986).

180. *See, e.g.*, S.C. CODE ANN. §§ 43-29-10 to 43-29-100 (Law. Co-op. 1985).

181. *See, e.g.*, FLA. STAT. ANN. § 415.104(1) (West Supp. 1990); MD. FAM. LAW CODE ANN. § 14-303(c) (Supp. 1989).

182. *See, e.g.*, IOWA CODE § 235B.1(7)(b) (West Supp. 1990) (county attorneys, law enforcement agencies, multidisciplinary teams, and social services in the state shall cooperate and assist in the evaluation upon the request of the department of human services); MD. FAM. LAW CODE ANN. § 14-303(c) (Supp. 1989) (on request by the local department of social services, the local state's attorney or the appropriate law enforcement agency shall assist in the investigation); *see also* MINN. STAT. ANN. § 626.557(13) (West 1983 & Supp. 1990) (police department, county sheriff, and local welfare department agency shall cooperate in their investigation).

183. *See, e.g.*, FLA. STAT. ANN. § 415.104(1) (West Supp. 1990) (all investigations to begin within 24 hours); MD. FAM. LAW CODE ANN. § 14-303(a) (Supp. 1989) (within five days for regular report and within 24 hours for an emergency).

184. *See, e.g.*, IDAHO CODE § 39-5303(3) (1985) ("prompt and thorough evaluation"); LA. REV. STAT. ANN. § 14:403:2(E)(1) (West 1986 & Supp. 1990) ("promptly"). Notably, in some states the required time frame for commencement of an investigation varies based on an initial determination whether the report of abuse requires an immediate investigation or the report indicates that an emergency exists. *See, e.g.*, FLA. STAT. ANN. § 415.103(5)(b) (West Supp. 1990) ("prompt" initiation of an investigation if initial review determines report requires immediate onsite protective investigation); MD. FAM. LAW CODE ANN. § 14-303(a) (Supp. 1989) (begin thorough investigation within five working days if report not indicative of an emergency situation; within 24 hours if it is).

and indeed wise since it would free up more resources to respond to more urgent reports. Some states also provide a time constraint within which each investigation must be completed. In Florida, for example, the investigation must be completed within thirty days of the initial report.¹⁸⁵

The scope of an investigation varies from state to state. The majority of such provisions require the investigator to visit the alleged abuse victim.¹⁸⁶ Many statutes also list the information to be gathered during the interview and investigation. Usually these include an analysis of the nature, scope, and extent of the abuse, identification of the individual responsible for the abuse, identification of the elder's caretaker and family members, and an evaluation of the home or residential environment.¹⁸⁷ The investigation also may encompass a medical, psychological, psychiatric, social, vocational, or educational review,¹⁸⁸ or an analysis of the immediate and long-term risk to the aged individual.¹⁸⁹

Unfortunately, the majority of state APS laws do not address whether consent of the elder who is the subject of the investigation is required or whether an elder has the right to refuse to consent to an investigation.¹⁹⁰ In these states it appears that no consent is required for an investigation to be conducted regardless of the elder's capacity to consent. A handful of states, however, directly acknowledge and protect the elder's, or his caretaker's, right to refuse such an investigation. Under these provisions, if an elder refuses consent or withdraws consent to an investigation, the investigation must be terminated immediately.¹⁹¹ Nevertheless, among the states that accord the elder

185. FLA. STAT. ANN. § 415.104(2) (West Supp. 1990); *see also* MD. FAM. LAW CODE ANN. § 14-303(d) (Supp. 1989) (within 30 days or within 10 days if an emergency exists).

186. *See, e.g.*, ALASKA STAT. § 47.24.020(a) (1990) (personal interview unless the elder is unconscious or otherwise physically or mentally impaired to such an extent he cannot answer); CONN. GEN. STAT. ANN. § 46a-16(a) (West 1986) (visit to elder and consultation with individuals having knowledge of the facts of the particular case); ILL. ANN. STAT. ch. 23, para. 6605 (Smith-Hurd Supp. 1989) (same).

187. *See, e.g.*, ARK. STAT. ANN. § 5-28-210(c) (1987); FLA. STAT. ANN. § 415.104(1) (West Supp. 1990); LA. REV. STAT. ANN. § 14:403.2 (West 1986 & Supp. 1990); MICH. COMP. LAWS ANN. § 400.11b(3) (West Supp. 1990).

188. *See, e.g.*, ARK. STAT. ANN. § 5-28-210(c) (1987); MICH. COMP. LAWS ANN. § 400.11b(3) (West Supp. 1989).

189. FLA. STAT. ANN. § 415.104(1)(d) (West Supp. 1990).

190. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-16 (West 1986); HAW. REV. STAT. § 349C-3 (Supp. 1989); LA. REV. STAT. ANN. § 14:403.2(E)(1) (West 1986 & Supp. 1990); MO. ANN. STAT. § 660.260 (Vernon 1988); *cf.* MASS. GEN. LAWS ANN. ch. 19A, § 18 (West Supp. 1990) (no consent required for investigation, but elderly shall receive written notice that assessment is being conducted and shall have the right to review the file and the report developed as a result of the assessment).

191. *See, e.g.*, ALASKA STAT. § 47.24.020(c) (1990); CAL. WELF. & INST. CODE § 1565(a)

this control, most also provide that under certain circumstances, an investigation may continue despite the elder's stated wishes. Kentucky, for example, provides that absent consent from the elder or his caretaker, a search warrant to enable the investigation to continue may issue on probable cause that the elder is being abused.¹⁹² Moreover, in Alaska, although an investigation must be terminated upon the elder's request, if the investigating department has reasonable cause to believe that the elder is incapacitated, the department may petition the court for appointment of a temporary guardian to obtain consent to conduct an investigation.¹⁹³

The question whether an elder's consent must be obtained for an investigation to go forward is similar to that addressed earlier in the context of mandatory reporting provisions; concerns of elder autonomy must be balanced against the state's perceived interest in the appropriate exercise of its *parens patriae* power.¹⁹⁴ Since the elderly in our society are presumed to be competent adults, it can be argued that at least in the context of a noncriminal investigation, they should have the legally recognized right to refuse to cooperate in the investigation and certainly be given the opportunity to refuse access to their homes. Conversely, an argument can be made that some kind of investigation must be conducted regardless of the elder's consent, at least to determine whether the elder has the capacity to refuse an investigation or whether the elder is refusing the investigation out of fear or intimidation caused by a third party. Making such a determination may be in both the elder's and the state's interests.

A better system would permit an investigation to go forward without the express consent of the elder at least to the point at which the APS investigator can conclude, in accordance with both a specific definition of incapacity and a set of criteria for its determination, whether the elder is capable of consenting and whether he has been the victim

(West 1990); KY. REV. STAT. ANN. § 209.030(6) (Michie/Bobbs-Merrill 1982); VT. STAT. ANN. tit. 18, § 1154(b) (Supp. 1989).

192. KY. REV. STAT. ANN. § 209.030(6) (Michie/Bobbs-Merrill 1982).

193. ALASKA STAT. § 47.24.020(c) (1990).

194. See *supra* notes 97-112 and accompanying text. Investigations conducted under the state's *parens patriae* authority, including investigations conducted in nonemergency situations in which it is feasible to solicit consent from the elder, must be distinguished from those emergency situations in which obtaining consent to investigate may not be feasible and actually may be unreasonable. In emergency situations in which there is an imminent threat to life or of grave bodily injury, the state's power to act does not derive from *parens patriae* but rather from its duty to preserve the lives of its citizens. The distinction between the state's right to act in a nonemergency versus an emergency situation is not borne out as much in the provisions regarding investigation of alleged elder abuse as it is in the actual provision of protective services.

of undue influence.¹⁹⁵ If the elder has capacity and was not coerced, his wishes must be heeded. If he is not capable or was intimidated, the APS agency must petition the court for an order. The order, on a showing that the elder is incapacitated or unduly coerced into giving consent, would enjoin the elder to cooperate and permit the agency to go forward with the investigation on the grounds that the elder is incapable of consenting or would enjoin the third party from interfering with the elder's ability to consent freely.

Many statutes have provisions that specifically address the question of what may be done when an investigator, in an attempt to conduct his investigation or personal interview with the elder, is denied access to the alleged victim. Most laws only deal with the situation in which the elder's caretaker refuses to allow the investigator access to the elder;¹⁹⁶ some provide mechanisms for gaining entry when anyone, including the elder, denies entry.¹⁹⁷ Provisions that deal solely with the circumstances under which a caretaker is impeding access would appear not to offend notions of the elder's self-determination. These sections presumably are aimed only at situations in which the elder already has consented to the investigation and its commencement or continuation is thwarted by acts of a third party. Provisions allowing access when the elder refuses, in contrast, are troublesome for the same reasons investigations without consent are difficult to justify: they potentially could override a capable elder's rights to self-determination.

Both the legal basis and procedures for an investigator's entry into the elder's home vary. Some states provide that any nonconsensual entry should be made only by a protective services worker with police assistance.¹⁹⁸ A number only permit such entry if a warrant is issued based on probable cause.¹⁹⁹ Others require a lesser showing of "rea-

195. Except in an emergency, a determination that an elder is "incapacitated" or lacks capacity to consent is the primary means by which adult protective services are provided on a nonconsensual basis. There is a great deal of controversy over what the appropriate definition of incapacity should be in this context and who should be responsible for applying it. See *infra* notes 209-240 and accompanying text. Similar concerns regarding a carefully drafted definition also adhere in the context of investigations.

196. See, e.g., ARK. STAT. ANN. § 5-28-210(c)(6) (Supp. 1990); FLA. STAT. ANN. § 415.104(1) (West Supp. 1990); MISS. CODE ANN. § 43-47-9(1) (Supp. 1990).

197. See, e.g., HAW. REV. STAT. § 349C-3 (Supp. 1989); MICH. COMP. LAWS ANN. § 400.11b(4) (West Supp. 1990); MO. ANN. STAT. § 660.270 (Vernon 1988). The Hawaii provisions even penalize individuals who prevent access to the elder, prescribing that any person who intentionally or knowingly obstructs or interferes with the investigating department's access to or communication with the elder is guilty of a misdemeanor.

198. See, e.g., FLA. STAT. ANN. § 415.104(1) (West Supp. 1990); HAW. REV. STAT. § 349C-3 (Supp. 1989).

199. See, e.g., ME. REV. STAT. ANN. tit. 22, § 3483(1) (Supp. 1990) (if court has appointed

sonable suspicion," with or without a warrant, for a protective services worker accompanied by an officer to enter the premises.²⁰⁰ Some provisions stipulate that the court order the caretaker to allow entrance for the investigation.²⁰¹

(8) *Provision of Services*

Once an investigation is completed or the elder requests assistance, provision of protective services may be recommended for the elder. APS statutes typically contain at least some provisions that are aimed at providing services to needy adults. These services are designed to assist elders in whatever way they require, while also permitting the elder to continue residing in the community. A detailed discussion of the variety and adequacy of the services offered in the "services" portion of adult protective services is beyond the scope of this Note; however, the following discussion briefly describes the contours of what constitutes "services."

The services component generally includes some combination of health, social, psychological, medical, and legal assistance.²⁰² These services are not intended to function as random aids administered by unrelated agencies. Rather, the goal is to render coordinated services and assistance through a caseworker, usually a social worker, who can assess the individual's needs and combine the various programs and community resources to meet those needs.²⁰³ The services offered vary and often include visiting nurses, clinical services, special transportation, and hot home-delivered meals.²⁰⁴ These services are intended, among other things, to alleviate or prevent harm resulting from elder abuse. The availability of services depends on the funding allocated by the state to assist abused elders. As was discussed in the context

a guardian and the ward or caretaker refuses to relinquish care or custody, a law enforcement officer may enter the property with a warrant based on probable cause to believe the ward is there); MO. ANN. STAT. § 660.270 (Vernon 1988) (warrant issued if probable cause exists that the eligible adult faces a likelihood of serious physical harm and is in need of protective services and that the investigator has been prevented by another person from investigating).

200. See, e.g., HAW. REV. STAT. § 349C-3 (Supp. 1989).

201. See, e.g., ARK. STAT. ANN. § 5-28-210(6) (Supp. 1990) (court shall order the caretaker to allow access "upon cause shown"); MISS. CODE ANN. § 43-47-9(1) (Supp. 1990) (petition court to enjoin caretaker from interfering with the investigation); MO. ANN. STAT. § 660.270 (Vernon 1988) (petition for a warrant, seek an order to enjoin, or both).

202. AMERICAN PUBLIC WELFARE REPORT, *supra* note 23, at 153-57.

203. Regan, *supra* note 52, at 251; see also WORKING PAPER, *supra* note 54, at 20-21; REPORT TO THE LEGISLATURE, STATE OF CALIFORNIA, HEALTH & WELFARE AGENCY, DEP'T OF SOC. SERVICES, EVALUATION OF THE ADULT PROTECTIVE SERVICES AND ELDER/DEPENDENT ADULT EMERGENCY SHELTER DEMONSTRATION PROJECTS 54-55 (1988).

204. See WORKING PAPER, *supra* note 54, at 4.

of mandatory reporting, funding available to assist abused elders once their cases have been "discovered" is woefully inadequate nationwide, particularly in California.²⁰⁵

In most states protective services may be provided only if the elder consents. If consent is withdrawn, the services must terminate.²⁰⁶ Many states have procedures for dealing with a situation in which a caretaker or other person prevents protective services from being administered after the elder has consented to their provision.²⁰⁷ These sections do not pose the same problems as those that permit an investigation to go forward despite an elder's protests. Rather, these sections are designed to *effectuate* the elder's expressed desire to receive assistance. They allow the aid to be rendered unimpeded by a third party who wishes to prevent provision of services. These sections—unlike those provisions that permit an investigator to thwart the *elder's* desires to halt an investigation—do not offend notions of self-determination. Most states, however, stipulate that the state may provide protective services absent consent under certain circumstances. These provisions permit involuntary or nonconsensual intervention, based on the elder's "lack of capacity," and emergency intervention. The following sections explore these provisions and raise concerns regarding their application.

(9) *Involuntary or Nonconsensual Intervention*

The majority of state APS laws include an exception to the requirement of consent to services when the elder has been determined to be incapacitated.²⁰⁸ Although implementation of a carefully drafted provision permitting this type of intervention would not pose a serious threat to elder autonomy, there are a number of problems with many of the existing provisions.

a. A Definition of "Lacks Capacity to Consent," "Incapacity," or "Incompetence": Its Absence or Impropriety

The first and most fundamental problem with these provisions is that many of the statutes do not include a definition of "lacks capacity

205. See *supra* notes 117-127 and accompanying text.

206. See, e.g., ILL. ANN. STAT. ch. 23, para. 6609(a) (Smith-Hurd Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 3481(1) (Supp. 1989). Although the statutes do not so indicate, the author assumes that an elder who withdraws his consent to services must have the capacity to do so.

207. See, e.g., ALASKA STAT. § 47.24.030(b) (1990); N.M. STAT. ANN. § 27-7-23(B) (Supp. 1990); MO. ANN. STAT. § 660.275 (Vernon 1988); OKLA. STAT. ANN. tit. 43A, § 10-106(B) (West Supp. 1990).

208. See, e.g., ALASKA STAT. § 47.24.030(a) (1990); CONN. GEN. STAT. ANN. § 46a-19 (West Supp. 1990).

to consent” and there is no case law interpreting the meaning of the phrase as it relates to elder abuse victims.²⁰⁹ The absence of a definition leaves the door open to subjective and ad hoc determinations of capacity.²¹⁰ Furthermore, its absence is troubling because a finding of “lack of capacity” by the investigatory agency most often leads to the institution of temporary guardianship or conservatorship proceedings, which in turn may and often do result in a permanent guardianship or conservatorship.²¹¹ Guardianships and conservatorships not only strip elders of the right to make basic choices regarding daily living, but deny them the right to make more important life choices and ultimately diminish, if not extinguish, their fundamental rights to self-determination.

Of perhaps greater concern is the fact that some states do not even require a determination of “lack of capacity” before an elder may be required to receive services absent consent. A number of statutes stipulate that services be delivered with the elder’s consent unless the individual is “unable . . . to accept such services.”²¹² These statutes contain no definition of the vague and easily manipulated term “unable” and therefore create the same dangers that exist with the undefined phrase “lacks capacity to consent.” Even more disturbing are statutes that permit involuntary intervention when an elder “refuse[s] to consent”²¹³ or is “unwilling” to consent.²¹⁴ Clearly, the state’s assertion that it has the authority to provide services to an elder who is “unwilling” or who “refuses” them, without any determination that

209. See, e.g., ALA. CODE § 38-9-4 (Supp. 1990); CONN. GEN. STAT. ANN. § 46a-19 (West Supp. 1990); ILL. ANN. STAT. ch. 23, para. 6609(b) (Smith-Hurd Supp. 1990); KAN. STAT. ANN. § 39-1424(a) (1986).

A discussion of courts’ interpretations of the meaning of “lacks capacity to consent” or “incompetence” in the context of imposing a guardianship or conservatorship on an individual may provide insight with respect to future courts’ interpretations of these phrases in adult protective services laws. Although a later portion of this Note generally discusses the various definitions of incapacity or incompetence that are employed in guardianship statutes, see *infra* notes 216-239 and accompanying text, a substantial review of judicial opinions regarding the validity of these various definitions is beyond the scope of this Note. A clear and concise statutory definition of these terms is desirable as a starting point from which courts can launch their analyses.

210. See, e.g., Mitchell, *supra* note 100, at 1420-21; see also *infra* note 228 and accompanying text.

211. For a discussion of guardianship and conservatorship, see *infra* notes 245-278 and accompanying text.

212. ALA. CODE § 38-9-4 (Supp. 1990) (in such case, services are to be delivered upon order of the court); see also MD. FAM. LAW CODE ANN. § 14-307(b) (Supp. 1989).

213. KY. REV. STAT. ANN. § 209.100 (Michie/Bobbs-Merrill 1982).

214. ALA. CODE § 38-9-4 (Supp. 1990); see also MD. FAM. LAW CODE ANN. § 14-307(b) (Supp. 1989) (permitting intervention “if the individual is unwilling or unable to accept protective services voluntarily”).

the individual lacks the ability to make such a decision, is a blatant infringement on the elder's right to self-determination. This is clear not only in light of the established notion that a competent adult has the right to refuse treatment²¹⁵ and by the basic premise that an adult is presumptively competent, but also from the fact that the decision to refuse services is not by itself an indicator of incompetence.²¹⁶

Even with respect to those states that define "incapacity," "lack of capacity," or "incompetence," the substance of these definitions is subject to criticism. These criticisms are the same as those that have been levied against the employment of similar definitions in guardianship statutes.

Some states use old age to denote incapacity, which is a patently inappropriate practice. At least one state includes impairment by reason of "advanced age" in its adult protective services statute as one of the criteria for finding lack of capacity.²¹⁷ According to one recent comprehensive study of state guardianship laws, fifteen states list advanced age as one of the disabilities that comprise the definition of incapacity.²¹⁸ Using advanced years to rob elders of their rights to self-determination is unacceptable. As already discussed in the context of mandatory reporting, "[o]ld age is not a disease . . . [Nor] is it synonymous with mental weakness. The continuing use of old age as a triggering event for the loss of fundamental rights stigmatizes the entire class of elderly persons and imposes a built in handicap for aged individuals."²¹⁹

Definitions of incapacity or incompetence commonly are tied to the diagnosis of a particular medical condition, either a mental or physical infirmity. The statutes typically state that an adult is incom-

215. See *supra* note 111 and accompanying text.

216. See, e.g., *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. Ct. 1978). Notably, one state APS statute expressly recognizes this right. New York's code states that "refusal by the adult to accept protective services shall not in itself be sufficient evidence of . . . lack of capacity," and that "mental illness shall not in itself be sufficient evidence of such lack of capacity." N.Y. SOC. SERV. LAW § 473-a(1)(a)(ii) (McKinney 1983).

217. VA. CODE ANN. § 63.1-55.2 (1987); see also FLA. STAT. ANN. § 415.102(3) (West Supp. 1990) (aged person defined as someone suffering from the infirmities of aging as manifested, *inter alia*, by "advanced age"); Crystal, *supra* note 97, at 65 (identifying that elder abuse laws "frequently fail to distinguish between an individual's capacity for good judgment and simply being old.").

218. DETERMINING COMPETENCY IN GUARDIANSHIP PROCEEDINGS 6 (S. Anderer, N. Coleman, E. Lichtenstein & J. Parry ed. 1990) [hereinafter S. ANDERER]. The author notes, "Many states, however, have eliminated advanced age from their statutes, recognizing that it is not an illness or disability, and that it does not necessarily carry with it a decline in functional ability. When substantial decline does occur, it is the result of pathology rather than the healthy aging process."

Id.

219. Horstman, *supra* note 100, at 263; see also WORKING PAPER, *supra* note 54, at 36.

petent or incapacitated if "impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication."²²⁰ Fifteen state guardianship statutes define specific mental illnesses that render an individual incapacitated,²²¹ thirty-four states use more general terms to denote mental incapacity, and thirty-one refer to chronic drug use or intoxication.²²² Thirty-three states also include physical illness or disability within their definitions of incapacity or incompetence.²²³ One critic of this approach to defining incapacity or incompetence in the context of guardianship proceedings charges that employment of a medical model means that the question whether guardianship is appropriate is answered by medical experts who testify regarding matters lay persons cannot easily comprehend. He argues that courts conducting this medical inquiry

[i]nstead of concentrating on questions about the functional abilities or inabilities of the proposed ward, . . . concentrate[s] on the condition of [the elder's] mind, . . . measured not in terms of common sense behavior, but by medical opinion. Since the medical opinion often fails to connect its labels with any operative behavior, the [elder] is merely categorized by means of a conclusionary diagnostic label without further explanation. In short, medical disability has become confused with legal disability.²²⁴

Another author specifically criticizes determining incapacity solely by the diagnosis of physical illness. The author argues that "[a] determination of incapacity that results from physical illness in the absence of impairment of cognition or communication would appear to be inappropriate. If persons are cognitively intact—although they may need some level of physical assistance—they should be permitted to make their own decisions regarding assistance."²²⁵ The same author asserts that

[i]ncapacity is a legal—not a medical—decision. The legal concept of incapacity (or incompetence) does not have a ready analogue in the medical or mental health fields, and the standards used by professionals in those fields may differ widely from legal standards. The issue of capacity is one that should be presented to the court as a triable issue of fact. Input from health professionals should be sought, but the court bears the ultimate responsibility to assess evidence about the abilities and limitations of the proposed ward and to determine incapacity.²²⁶

220. N.M. STAT. ANN. § 27-7-16(K) (Supp. 1990); see also FLA. STAT. ANN. § 415.102(12) (West Supp. 1990); VA. CODE ANN. § 63.1-55.2 (1987).

221. S. ANDERER, *supra* note 218, at 4-5.

222. *Id.*

223. *Id.* at 5.

224. Horstman, *supra* note 100, at 227-28 (footnotes omitted).

225. S. ANDERER, *supra* note 218, at 5.

226. *Id.* at 7-8 (footnotes omitted); see also Friedman & Savage, *Taking Care: The Law*

Definitions that require a factual evaluation of the elder's ability to understand, communicate his needs, or make decisions as a measure of capacity also have been attacked as inadequately protecting elders' interests and as inappropriate measures of capacity. These definitions typically include language regarding the elder's "lack of capacity to comprehend the nature and consequences of remaining in a situation"²²⁷ or "lack[] of sufficient understanding or capacity to make or communicate responsible decisions."²²⁸ Some guardianship statutes also include the terms "responsible" or "effectively" in the language of similar provisions defining incapacity.²²⁹ These vague definitions, however, invite individual, subjective interpretation²³⁰ and instead of addressing the all important question whether an individual is capable of caring for himself, "base[] the determination on cognitive ability to make 'responsible' decisions . . . [and are] . . . vague and value-laden standard[s]."²³¹ Another commentator notes that "[t]he use of such terms allows for the intrusion of value judgment into the determination of incapacity. [They] turn the focus of the determination away from the person's capacity to engage in the decisionmaking process and toward an evaluation of the societal responsibility of the result of the person's decisions."²³²

of Conservatorship in California, 61 S. CAL. L. REV. 273, 283-84 (1988). These authors note that although conservatorships arguably only are justified when an individual is *mentally* impaired, their study indicated that "[i]n practice, it does not seem that conservatorship is as strictly limited to the mentally impaired as theory and [the California] statute might demand. Half or more wards were able to give 'intelligible' responses at the time of the annual review." *Id.*

227. N.Y. SOC. SERV. LAW § 473-a1(a) (McKinney 1983); *see also* ARK. STAT. ANN. § 5-28-301(a)(1) (1987).

228. MISS. CODE ANN. § 43-47-5(j) (Supp. 1990); *see also* ALASKA STAT. § 47.24.100(8) (1990); FLA. STAT. ANN. § 415.102(12) (West Supp. 1990). Numerous guardianship statutes also employ similar language. *See* S. ANDERER, *supra* note 218, at 7 (discussing variations on this language contained in guardianship statutes, including the most commonly used language, which is modelled after the Uniform Probate Code).

229. S. ANDERER, *supra* note 218, at 7.

230. Comment, *supra* note 4, at 757. For the author, in this context a subjective interpretation is one in which the party assessing the elder's capacity injects his own personal biases into the decisionmaking process or bases his decision on normative considerations. These subjective elements do not measure a particular individual's capacity but rather only probe whether the elder's behavior is idiosyncratic relative either to the individual assessor's norms or present societal norms. The author recognizes that no human assessing capacity can completely divorce himself from these subjective influences and that it is unlikely that a truly "objective" determination could ever be made. Yet, some models for determining incapacity do attempt to harness these variables better than others by providing mechanisms and frameworks that leave less room for individual bias and societal normative judgments to flourish.

231. NATIONAL PARALEGAL INST., *ELDER ABUSE AND NEGLECT: A GUIDE FOR PRACTITIONERS AND POLICY MAKERS* 120 (1981) [hereinafter NATIONAL PARALEGAL INST.].

232. S. ANDERER, *supra* note 218, at 7.

A final means employed to define an elder's capacity under APS laws includes an assessment of the elder's functional ability to care for himself. These provisions employ phrases such as "adequately providing for his own care,"²³³ "unable to perform or obtain services which are necessary to maintain physical and mental health,"²³⁴ and "to the extent the adult cannot effectively manage or apply that individual's estate to necessary ends."²³⁵ Unfortunately, as is the case with many definitions of incapacity that include an evaluation of the elder's ability to understand and communicate his needs, the functional definitions in APS statutes and guardianship laws also often include language that expressly injects a subjective element into the determination of functional ability.²³⁶ One author notes that employing a definition based on functional impairment alone is troubling.

The difficulty with functional statements used alone is that a deficit in a functional skill need not imply an inability to make decisions. For example, persons may not be able to feed or dress themselves, but may be capable of making decisions to ensure that they are fed and dressed.²³⁷

Another author notes his preference for an assessment of the elder's functional ability to care for himself in lieu of the medical model to which courts too often resort.²³⁸ Accordingly, the court's inquiry would focus on functional ability by exploring the potential ward's behavior through questions including: "Is he misplacing his Social Security check?", "Does he pay his heating bill?", "Does he care for his personal needs?", or "Has he arranged for someone to look after him?"²³⁹

The proper composition of the definition of incapacity or incompetence in both elder abuse related APS provisions and under guardianship provisions generally is (and should be) the subject of

233. ALA. CODE ANN. § 38-9-2(4) (Supp. 1989).

234. CONN. GEN. STAT. ANN. § 46a-14(2) (West 1986).

235. ME. REV. STAT. ANN. tit. 22, § 3472(10) (Supp. 1989). California's Probate Code has a similarly functionally-focused definition which refers to inability to "provide for his or her personal needs for physical health, food, clothing, or shelter." CAL. PROB. CODE § 1801(a) (West 1981). Language in many guardianship statutes similarly calls for an assessment of the proposed ward's functional abilities to care for himself or his property. See S. ANDERER, *supra* note 218, at 8-10.

236. See ME. REV. STAT. ANN. tit. 22, § 3472(10) (Supp. 1989) ("effectively manage"); S. ANDERER, *supra* note 218, at 8 (describing various subjective phrases found in guardianship provisions).

237. S. ANDERER, *supra* note 218, at 13 (footnote omitted).

238. Horstman, *supra* note 100, at 227-28; cf. CONSERVATORSHIP RECOMMENDATIONS *supra* note 5, at 33-34 (recommending, instead, an assessment of functional capacity measured through the use of a standard assessment instrument designed for that purpose); NATIONAL PARALEGAL INST., *supra* note 231, at 120.

239. Horstman, *supra* note 100, at 227 n.55.

great debate. That clear definitions and comprehension of these terms are essential, however, is not subject to debate. The stakes—an elder's right to self-determination and autonomy—are too high to respond otherwise.

In light of the criticisms levied against the existing definitions, a more reliable determination of incapacity would include a combination of factors. The following suggestions are not intended to serve as an exhaustive list of the essential elements of an incapacity assessment. Rather, given the criticisms noted above, they offer examples of some of the basic tenets that should underpin a proper assessment. One aspect of the incapacity inquiry should include an objective assessment of the elder's functional abilities. Furthermore, subsequent imposition of assistance in the APS or guardianship context (if such assistance is deemed necessary after this inquiry) would include only the least restrictive means of assisting the elder given his functional capabilities. Finally, the assessment must include not only a determination that the elder is unable to make or communicate decisions regarding his care, but also that this inability is the result of a demonstrated disorder or disability.²⁴⁰

b. Procedures for Involuntary or Nonconsensual Intervention

Two procedures are used most widely to impose involuntary services on abuse victims in the nonemergency setting. The majority of states use the traditional guardianship or conservatorship mechanisms that already exist within their probate codes.²⁴¹ Others have established a special procedure within their APS laws that operates independently of the guardianship or conservatorship sections of the probate code.²⁴² For the most part these procedures function in the same manner as guardianships and conservatorships. Most proceedings result in an order by the court designating an individual, organization, or agency to act as the functional equivalent of a guardian or conservator.²⁴³ Some critics argue that substituting these specific procedures for those in traditional guardianship statutes may provide insufficient due process protections.²⁴⁴ For this reason the discussion

240. S. ANDERER, *supra* note 218, at 22.

241. See, e.g., IDAHO CODE § 39-5304 (1985); ME. REV. STAT. ANN. tit. 22, § 3482 (Supp. 1989).

242. See, e.g., ALA. CODE § 38-9-6 (Supp. 1990); FLA. STAT. ANN. § 415.105(3) (West Supp. 1990); MISS. CODE ANN. § 43-47-13 (Supp. 1990).

243. See, e.g., ALA. CODE § 38-9-6(h) (Supp. 1990); FLA. STAT. ANN. § 415.105(3)(b) (West Supp. 1990); MISS. CODE ANN. § 43-47-13(3) (Supp. 1990); TENN. CODE ANN. § 71-6-107(b)(3), (c) (1987).

244. Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111, 1127-

of involuntary provision of services will focus on imposition of these services by way of guardianship or conservatorship proceedings. Any major deviations between the two procedures, however, will be noted.

In the states that use the existing probate system, the APS code typically directs that in the event an abused elder reasonably appears to lack capacity to consent, the investigating department seek appointment of a temporary guardian or conservator²⁴⁵ or, in some states, of a permanent guardian or conservator.²⁴⁶ The guardian or conservator has the authority to consent to protective services for the elder victim. A guardian traditionally is appointed to protect and care for a person and a conservator is appointed to protect and care for an estate.²⁴⁷ These terms, however, sometimes are used interchangeably. Moreover, different states statutorily may employ them differently. California, for example, calls an individual appointed to care for the person of an adult a conservator.²⁴⁸

To appoint a guardian the court must declare the individual "incapacitated," "incompetent," or unable to care for himself.²⁴⁹

28 (1981); see also Kapp, *Adult Protective Services: Convincing the Patient to Consent*, 11 LAW, MED. & HEALTH CARE 163 (Sept. 1983). Professor Regan argues that the due process protections included in much protective services legislation have "serious procedural flaws" and that "[t]he standards for intervention are still vague and conclusory." Regan, *supra*, at 1127 (footnotes omitted). He notes that once the court has signed its protective order, the intervenor (usually a public agency) is "rarely accountable to anyone, including the court" *Id.* Professor Kapp echoes Regan's concerns, arguing that

rarely do these special statutes require notice of the filing of the petition to the patient/client, the presence of the patient at the hearing, the person's right to counsel, or a specific evidentiary standard of proof Although a full hearing is contemplated and available, it frequently becomes the public agency's *ex parte* presentation of testimony to a sympathetic court which routinely issues the orders for protective services precisely as requested by the agency.

Kapp, *supra* at 235 (footnotes omitted).

245. See, e.g., ALASKA STAT. § 47.24.030(a) (1990); ILL. ANN. STAT. ch. 23, para. 6609 (Smith-Hurd Supp. 1990).

246. See, e.g., CONN. GEN. STAT. ANN. § 46a-20(a) (West 1986); IDAHO CODE § 39-5304 (1985); ME. REV. STAT. ANN. tit. 22, § 3482 (Supp. 1989).

247. 39 AM. JUR. 2D *Guardian & Ward* § 17 (1968) (guardianship defined); UNIF. PROB. CODE § 1-201(16) (1969) (guardian defined); *id.* § 1-201(6) (1969) (conservator defined); 39 AM. JUR. 2D *Guardian & Ward* § 22 (1968) (same).

248. CAL. PROB. CODE § 1800.3 (West Supp. 1990). Since states' uses of the terms guardianship and conservatorship vary widely, for convenience this Note will use the term guardianship to refer to both. For a discussion of the California conservatorship system, see CONSERVATORSHIP RECOMMENDATIONS, *supra* note 5; Friedman & Savage, *supra* note 226.

249. Krauskopf & Burnett, *The Elderly Person: When Protection Becomes Abuse*, TRIAL, Dec. 1983, at 60, 61-62; see also Regan, *Protective Services for the Elderly: Benefit or Threat*, in ABUSE AND MALTREATMENT OF THE ELDERLY: CAUSES AND INTERVENTIONS 279, 283 (J. Kosberg ed. 1983) According to Professor Regan, the court should make two findings before it appoints a guardian: (1) that a person suffers from a condition that affects his mental capacity and (2) that as a result of this condition, the individual is functionally disabled such

As discussed above, determinations of "incapacity" or "incompetence" vary depending on the particular state's statutory definition of these terms. The guardian essentially is authorized to act as the legal substitute of the ward.²⁵⁰ An unlimited guardianship reduces an elder to the status of a child and can deprive the elder of both personal rights and civil liberties.²⁵¹ The rights the ward loses typically include anything from the ability to structure one's own daily routine to the rights to contract, make gifts, execute wills, write checks, marry, and vote.²⁵²

Because the consequences of a guardianship or conservatorship appointment so drastically diminish an individual's rights, compliance with the requirements of due process must be meticulously enforced. The fourteenth amendment of the United States Constitution guarantees a proposed ward that he will not be deprived of "life, liberty or property without due process of law."²⁵³ Fundamental to due process of law is the right to be heard.²⁵⁴ To protect this right the United States Supreme Court has ruled that an individual must receive reasonably calculated notice of a pending action and an opportunity to present his objections.²⁵⁵ The notice provisions in guardianship statutes range from forty-eight hours notice to as much as ten days.²⁵⁶ Yet, few statutes require that the notice explain the se-

that he cannot care for himself or his property. *Id.* at 251. Regan cautions that courts place too much emphasis on the first factor and should pay more attention to the functional abilities of the proposed ward. *Id.* at 251-52. This problem is similar to that discussed above regarding the inappropriateness of a medical model for the definition of incapacity. *See supra* notes 220-239 and accompanying text. *See generally* S. ANDERER, *supra* note 218, at 4-15 (comprehensive discussion of the statutory standards employed).

250. WORKING PAPER, *supra* note 54, at 40.

251. *Id.* at 62.

252. *See id.* at 39-40; Krauskopf & Burnett, *supra* note 249, at 61; CONSERVATORSHIP RECOMMENDATIONS, *supra* note 5, at 57. Notably, a group of commentators asserts that adult protective services and guardianship are patently inappropriate under all circumstances and that the terms "mental incompetency" are misapplied to the elderly in guardianship proceedings. *See* Horstman, *supra* note 100, at 225-30 (discussing the "Abolitionist Model" of guardianship); *see also* Mitchell, *supra* note 100, at 1448. One commentator who espouses this position notes, "In a society which venerates liberty, conservatorship is an anachronism. Neither the interest in potential beneficiaries nor the interest of the state in having a better management position vis-a-vis the ward is justified." Alexander, *Who Benefits From Conservatorship?*, TRIAL, May 1977, at 30, 32; *see also* Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003 (1979) [hereinafter Alexander, *Premature Probate*] (urging use of living wills in lieu of guardianship as a means of returning the right to determine what is done with the ward's property and health to the individual to make such decisions when competent).

253. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

254. *Id.*

255. *Id.* at 314; *see also* *Lambert v. California*, 355 U.S. 225 (1957).

256. *See, e.g.*, OKLA. STAT. ANN. tit. 43A, § 10-108 (West Supp. 1990) (48 hours); UTAH

rious nature of the pending action²⁵⁷ or address "the problem of the confused client who may not appreciate the terms or importance of the legal document conveying the notice."²⁵⁸ Such an explanation is essential in this context. Moreover, because there is a possibility that an elder may not understand the nature or importance of the notice, guardianship statutes should mandate that the elder's spouse, attorney, caretaker, children, or next of kin also be served notice of the pending hearing.²⁵⁹ Furthermore, although not constitutionally required, some states require that the proposed ward be present at the hearing,²⁶⁰ and that an attorney representing the proposed ward also be present.²⁶¹ Some states provide for the appointment of coun-

CODE ANN. § 55-19-5(1)(c) (1986) (10 days). California requires that notice of the hearing on petition for appointment of a conservator be given at least 15 days before the hearing. CAL. PROB. CODE § 1822(a) (West Supp. 1990). Notice is a jurisdictional requirement, and if the requirement is not met the appointment may be void. *Grimbaum v. Superior Court*, 192 Cal. 528, 540-43, 221 P. 635, 640-41 (1923); *In re Guardianship of Peterson*, 84 Cal. App. 2d 541, 543, 191 P.2d 98, 99-100 (1948) (both decided under the predecessor statute to California Probate Code § 1822). In *Grimbaum*, the court noted that the notice requirement "rests upon the fundamental doctrine, as old as Magna Carta, that no person can be deprived of life, liberty, or property without due process of law . . ." 192 Cal. at 541, 221 P. at 640. Notice may not be waived, nor may the court consent to jurisdiction. See *In re Guardianship of Sullivan*, 143 Cal. 462, 466-67, 77 P. 153, 154 (1904); *In re Guardianship of Walters*, 37 Cal. 2d 239, 244, 231 P.2d 473, 476 (1951) (both decided under predecessor to California Probate Code § 1822).

257. *But see* N.Y. SOC. SERV. LAW § 473-a5(b)(i) (McKinney 1983) (requires that notice contain the following language in bold type: "WARNING IF YOU DO NOT APPEAR IN COURT YOUR LIFE AND LIBERTY MAY BE SERIOUSLY AFFECTED. FOR FREE INFORMATION CONCERNING YOUR LEGAL RIGHTS CALL OR VISIT.").

California also attempts to indicate the seriousness of the pending court matter in the notice. The California Probate Code provides that if the petition for appointment of conservator is filed by someone other than the proposed conservatee, the court clerk must issue a citation directed to the proposed conservatee. Among the statements included in the notice is the following: "[s]uch adjudication may affect or transfer to the conservator the proposed conservatee's right to contract, in whole or in part, to manage and control property, to give informed consent for medical treatment, and to fix a residence . . . [and that] [t]he proposed conservatee may be disqualified from voting . . ." CAL. PROB. CODE § 1823(b)(2)-(3) (West 1981).

258. *Regan*, *supra* note 244, at 1118. See generally *Horstman*, *supra* note 100, at 237-41 (discussing notice to incompetents).

259. *Cf.* FLA. STAT. ANN. § 415.105 (3) (West Supp. 1990) (provides that notice of filing petition for guardianship be sent to elder, spouse, attorney, and if known, adult children or next of kin).

260. See, e.g., CAL. PROB. CODE § 1825(a)(1)-(2) (West 1981). In California, the proposed conservatee must attend the hearing except if he is out of state when served and is not the petitioner, or when he is unable to attend due to medical inability. *Id.* Although this presence technically is required, most states allow the court to waive the requirement if it is in the best interest of the proposed conservatee. As such, the hearing in effect becomes an *ex parte* proceeding. WORKING PAPER, *supra* note 54, at 38; *Horstman*, *supra* note 100, at 241-43.

261. *Horstman*, *supra* note 100, at 244-45; see WORKING PAPER, *supra* note 54, at 38; CONSERVATORSHIP RECOMMENDATION, *supra* note 5, at 33-34; *Krauskopf & Burnett*, *supra* note 249, at 61.

sel or a guardian *ad litem*,²⁶² arguably "because of the deprivation of individual liberty inherent in the nature of guardianship counsel is essential to guarantee due process in guardianship hearings."²⁶³

A trial by jury is not constitutionally required and in most states is not statutorily required.²⁶⁴ Finally, in *Addington v. Texas*²⁶⁵ the Supreme Court established that the standard of proof required to involuntarily commit an individual to a mental hospital is one of clear and convincing evidence. The Court refused to require proof beyond a reasonable doubt because of the lack of certainty and fallibility of a psychiatric diagnosis and the consequent possibility that a state might never be able to meet its burden of proof.²⁶⁶ Based on this reasoning, the Court probably would apply the same standard to guardianship proceedings.²⁶⁷

States that dictate procedures in their APS laws also employ a combination of due process protections. The responsible agency must petition the court to order protective services.²⁶⁸ The petition must allege facts sufficient to show that the elder needs protective services and that he lacks capacity to consent.²⁶⁹ Following receipt of the petition the court is required to set the case for hearing, sometimes within a given time period.²⁷⁰ The elder must be afforded notice of the hearing, usually a stated number of days before the hearing.²⁷¹

The statutes accord the elder any of a combination of the following rights relating to the hearing: the right to be present at the

262. Horstman, *supra* note 100, at 244-45; see WORKING PAPER, *supra* note 54, at 38. A guardian *ad litem* is an officer of the court who may or may not be a lawyer. He serves to represent the interests of mental incompetents during the course of litigation. Horstman, *supra* note 100, at 244 n.129.

263. Horstman, *supra* note 100, at 250.

264. WORKING PAPER, *supra* note 54, at 39. See generally Horstman, *supra* note 100, at 251 (an equal protection argument can be made to mandate a jury trial for proposed conservatees). Notably, trials of this sort rarely occur. Regan, *supra* note 249, at 252.

265. 441 U.S. 418 (1979).

266. *Id.* at 429.

267. See *id.* at 433.

268. See, e.g., ALA. CODE § 38-9-6(a) (Supp. 1990); FLA. STAT. ANN. § 415.105(3) (West Supp. 1990); MISS. CODE ANN. § 43-47-13(1) (Supp. 1990); TENN. CODE ANN. § 71-6-107(b)(1) (1987).

269. See, e.g., FLA. STAT. ANN. § 415.105(3) (West Supp. 1990); MISS. CODE ANN. § 43-47-13(1) (Supp. 1990); TENN. CODE ANN. § 71-6-107(b)(1) (1987).

270. See, e.g., FLA. STAT. ANN. § 415.105(3)(a) (West Supp. 1990) (hearing must be within 14 days of filing); MISS. CODE ANN. § 43-47-13(2) (Supp. 1990) (same). But see TENN. CODE ANN. § 71-6-107(b)(1) (1987) (no time period stipulated).

271. See, e.g., ALA. CODE § 38-9-6 (Supp. 1990); FLA. STAT. ANN. § 415.105(3)(a) (West Supp. 1990) (at least five days prior to hearing); MISS. CODE ANN. § 43-47-13(2) (Supp. 1990) (same); TENN. CODE ANN. § 71-6-107(b)(1) (1987) (at least 10 days prior to hearing).

hearing,²⁷² to be represented by private counsel,²⁷³ or to have the court appoint counsel if he is without representation.²⁷⁴ Moreover, a few states stipulate that the court shall appoint a guardian *ad litem* if the court determines that the elder lacks the capacity to waive the right to counsel.²⁷⁵ Notably, a number expressly require the court to find by clear and convincing evidence that the elder needs protective services and lacks capacity to consent.²⁷⁶

Despite the theoretical importance of constitutional guarantees and statutory privileges, the consensus is that the guardianship procedures are not effectively protecting prospective wards. Moreover, since the separate procedures contained within APS laws are essentially analogous to those found in guardianship statutes, their defects are similarly problematic. A recent Associated Press investigation of the nation's guardianship system "found a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity . . . [It also found that guardianship is] a legal tool meant to protect elderly and their property . . . [that] sometimes results instead in financial or physical mistreatment."²⁷⁷ The report found that in forty-four percent of the cases the proposed ward was not represented by counsel; in twenty-five percent

272. See, e.g., FLA. STAT. ANN. § 415.105(3)(a) (West Supp. 1990); MISS. CODE ANN. § 43-47-13(2) (Supp. 1990).

273. See, e.g., FLA. STAT. ANN. § 415.105(3)(a) (West Supp. 1990); MISS. CODE ANN. § 43-47-13(2) (Supp. 1990); TENN. CODE ANN. § 71-6-107(b)(2) (1987); cf. ALA. CODE § 38-9-6(a) (Supp. 1990) (no right to court-appointed counsel but right to appointment of guardian *ad litem*).

274. See, e.g., FLA. STAT. ANN. § 415.105(3)(a) (West Supp. 1990); MISS. CODE ANN. § 43-47-13(2) (Supp. 1990); TENN. CODE ANN. § 71-6-107(b)(2) (1987).

275. See, e.g., MISS. CODE ANN. § 43-47-13(2) (Supp. 1990); cf. TENN. CODE ANN. § 71-6-107(b)(2) (1987) (the court shall appoint counsel if the elder lacks capacity to waive this right).

276. See, e.g., FLA. STAT. ANN. § 415.105(3)(b) (West Supp. 1990); MISS. CODE ANN. § 43-47-13(3) (Supp. 1990).

277. Bayles & McCartney, *Guardianship Systems Often Victimize Their Wards*, L.A. Daily J., Sept. 25, 1987, at 6, col. 1. This article was one part of an Associated Press six-day series of special reports collectively entitled "Guardians of the Elderly: An Ailing System." The series brought to the fore the many problems and abuses inherent in the American guardianship system and the pressing need for national reform and uniform national standards to protect elderly wards from abuse. See ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, A REPORT BY THE SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 100th Cong., 1st Sess. (Comm. Print 1987) (citing the Associated Press articles extensively and endorsing the need for reform); see also Alexander, *Premature Probate*, supra note 252, at 1415-19; Rohan, *Caring for Persons Under a Disability: A Critique of the Role of the Conservator and the "Substitution of Judgment Doctrine,"* 52 ST. JOHN'S L. REV. 1 (1977). A detailed review of procedures used in conservatorship proceedings and an analysis of whether they satisfy procedural due process requirements is beyond the scope of this Note.

of the cases the files indicated there was no hearing held; and in forty-nine percent of the cases the ward was not present at the hearing.²⁷⁸

Critics also charge that the use of guardianship with its attendant infringement on individual liberty is too extreme a solution for most cases of elder abuse. In evaluating a proposed ward's competency, courts overemphasize mental capacity and ignore the need to find evidence of functional disability.²⁷⁹

Ultimately, although guardianship arguably may be appropriate when an individual clearly is incapacitated and unable to handle all aspects of daily life, the complete control that characterizes traditional guardianship is not warranted in cases in which an individual is only incapable with respect to certain functions. As one author aptly observed,

Many elderly people may need help only with certain recurring events, such as cashing checks or paying bills, or with certain transactions, such as selling a house . . . They need a flexible guardianship tailored to their individual capacity, one which allows them to retain control over activities they can perform unaided.²⁸⁰

More limited and flexible guardianship or intervention programs are better suited for most cases that involve the elderly.²⁸¹

Notably, a handful of APS statutes have followed somewhat the trend toward more limited intervention systems. This is indicated by specific provisions that require the state to employ the "least restrictive alternative" when it provides involuntary services.²⁸² The premise of the doctrine of the least restrictive alternative is that any substitute decisionmaking should intrude on individual autonomy only to the extent necessary in light of the elder's actual impairments and should place the least possible restrictions on individual liberties and civil rights.²⁸³

If the least restrictive alternative actually were employed each time an elder refused consent to services and was found to lack capacity, it would require the department to conduct an assessment to determine exactly how *capable* the elder is, including a careful determination of

278. Bayles & McCartney, *supra* note 277, at 6, col. 2.

279. This charge is similar to the arguments raised in defining incapacity. See *supra* notes 209-240 and accompanying text.

280. WORKING PAPER, *supra* note 54, at 40.

281. *Id.* Horstman, *supra* note 100, at 267; cf. Alexander, *Premature Probate*, *supra* note 252 (advocating abolishing guardianship in favor of living will substitutes).

282. See, e.g., KY. REV. STAT. ANN. § 209.100(2) (Michie/Bobbs-Merrill 1982); MO. ANN. STAT. § 660.250(5) (Vernon 1988); S.C. CODE ANN. § 43-29-30(2) (Law. Co-op. 1985). The principle of the least restrictive alternative also has been incorporated into determinations of incapacity under many state guardianship laws. See S. ANDERER, *supra* note 218, at 13-14.

283. See NATIONAL PARALEGAL INST., *supra* note 231, at 124.

what activities he remains able to do or decisions he remains able to make. The department then would tailor an intervention program specially for that individual to permit the elder to retain maximum autonomy. Inclusion of provisions calling for the least restrictive alternative in elder abuse laws without simultaneous reform of the guardianship and conservatorship provisions currently utilized to effect involuntary intervention is an inadequate solution. The "limited conservatorship" provisions in the California Probate Code successfully implement a least restrictive alternative system by tailoring the conservatorship process towards this end. The California limited conservatorship system, however, specifically was established to be used when providing protective services for the developmentally disabled and its provisions do not apply to either the temporary conservatorships or permanent conservatorship arrangements imposed on elder abuse victims in California.²⁸⁴

The California limited conservatorship provision also stipulates that an assessment of the proposed limited conservatee be conducted, with the proposed conservatee's consent, at a specially designated regional center.²⁸⁵ The center is required to submit to the court a written report with findings and recommendations. Most importantly, "[t]he report shall include a description of the proposed limited conservatee's specific areas, nature, and degree of disability, if any."²⁸⁶ The report also must include findings and recommendations that discuss the suitability of the proposed petitioning conservator to meet the needs of the proposed conservatee.²⁸⁷ Recent amendments to the Probate Code mandate that these reports remain confidential and that they may be released only to the proposed conservatee, his attorney, the attorney for the proposed conservator, or the conservator himself if he has no attorney, and to such other parties as the court orders.²⁸⁸

California limited conservatorships for the developmentally disabled allow for needed assistance and protection, but also carefully

284. CAL. PROB. CODE § 1801(d) (West Supp. 1991); see Friedman & Savage, *supra* note 226, at 287-88. The Act provides that:

limited conservatorships shall be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations.

CAL. PROB. CODE § 1801(d)(1) (West Supp. 1990).

285. CAL. PROB. CODE § 1827.5(a) (West 1991).

286. *Id.* The regional assessment center report is made in addition to the report of the court investigator, who is responsible for filing a report before a hearing on any proposed conservatorship. *Id.* § 1826.

287. *Id.* § 1827.5(a).

288. *Id.* § 1827.5(c)-(d).

assess each individual case with the goal of preserving individual rights. The extension of this flexible, limited conservatorship system into the area of all adult conservatorship proceedings—including those imposing conservatorships in the context of elder abuse cases—would seem logical since elders, like developmentally disabled adults, not only deserve to have their cases scrutinized closely but also often do not require the all-encompassing supervision of a general conservatorship. Moreover, the establishment of a limited conservatorship system likely would satisfy, at least to some extent, critics who charge that full conservatorship is too extreme a remedy for victims of elder abuse.

To date, none of the principles of the limited conservatorship have been incorporated into California's temporary or general conservatorship schemes, the methods by which conservatorships are imposed in the context of adult protective services for victims of elder abuse. Unfortunately, the legislative efforts in California to extend the limited conservatorship process to regular conservatorship proceedings, including those that originate as a result of elder abuse, have been unsuccessful. In 1988 Senator Henry J. Mello introduced a bill proposing to amend the Probate Code to require that the petition form that is filed to request appointment of a conservator be changed to require the petitioner to provide information assessing the proposed conservatee's functional ability.²⁸⁹ Former Governor George Deukmejian vetoed the bill on September 29, 1988.²⁹⁰ To date, no further legislative efforts have been made to amend the Probate Code in this manner.

(10) *Emergency Intervention*

One common exception to the rule that involuntary services may be provided only after formal guardianship or guardianship-like proceedings is the provision of short-term emergency services. Emergency provisions in APS laws most often constitute an exception to the rule that services only may be provided with the elder's consent although some state APS laws exclusively apply to elderly who are in the equivalent of an emergency situation. The New York APS laws, for example, only apply to "endangered adults," those individuals who are in a condition or situation that poses an imminent risk of death or serious physical harm and who lack the capacity to comprehend the consequences of remaining in the situation.²⁹¹ Emergencies typically

289. S. 2351, 1987-1988 Reg. Sess.

290. Cal. Senate Final History, S. 2351, 1987-1988 Reg. Sess.

291. N.Y. SOC. SERV. LAW § 473-a1(a) (McKinney 1983).

are defined as circumstances that “present a substantial risk of death or immediate and serious physical harm” to the elder.²⁹² Some states define an emergency to include a situation that poses a risk of death or immediate and serious physical harm to the elder *or to others*.²⁹³ Of particular concern are the definitions, employed by a few states, that are not limited to circumstances posing a risk of imminent danger to physical health but also include danger to mental health.²⁹⁴ It is highly questionable whether danger to mental health is a legitimate criteria for emergency intervention. As noted in the discussions regarding definitions of incapacity and determinations of incompetency, an accurate assessment of an individual’s mental health is elusive and susceptible to value-laden subjective determination.²⁹⁵ More fundamentally, definitions of “emergency” are vulnerable to constitutional attack on the grounds that they are unconstitutionally vague, overbroad, or both, and that they therefore violate the due process guarantees of the fourteenth amendment.²⁹⁶ In this respect, the inclusion and careful definition of some element of immediacy or imminence is essential to any definition of emergency.²⁹⁷ Although emergency intervention, by definition, is limited mainly to situations in which the elder is threatened by “imminent” or “immediate” death or great physical harm, most states do not define “imminent” or “immediate.” Such a definition is essential because otherwise the determination of what constitutes “imminence” or “immediacy” is left open to subjective interpretation of individual intervening police officers or social workers—a circumstance that in turn provides an opportunity for abuse of a mechanism that should be used sparingly and only when essential.²⁹⁸ The dictionary defines imminent as “ready

292. FLA. STAT. ANN. § 415.105(5) (West Supp. 1990); *see also* ARK. STAT. ANN. § 5-28-101(4) (Supp. 1989) (death or severe bodily injury without intervention); MISS. CODE ANN. § 43-47-5(f) (Supp. 1990).

293. *See, e.g.*, KY. REV. STAT. ANN. § 209.020(10) (Michie/Bobbs-Merrill Supp. 1990) (harm to himself or others); MD. FAM. LAW CODE ANN. § 14-101(e) (Supp. 1989) (same). Intervention to protect others is justified under the state’s police powers. *See supra* note 104 (discussing police power as compared with *parens patriae*).

294. *See, e.g.*, ILL. ANN. STAT. ch. 23, para. 6602(f) (Smith-Hurd Supp. 1989) (emergency defined as a situation with “conditions presenting a risk of death or physical, mental, or sexual injury.”); MASS. GEN. LAWS ANN. ch. 19A, § 14 (West Supp. 1990) (an emergency is “substantial risk of death or immediate and serious physical or mental harm”).

295. *See supra* notes 212-239 and accompanying text.

296. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (vague statute violates due process protections).

297. This especially is true in those states that provide for intervention with a subsequent validating hearing because a judge will not review the determination that an emergency exists. Police and APS workers must have a clear definition of emergency to determine when emergency intervention is permitted.

298. *See supra* note 230 and accompanying text.

to take place”²⁹⁹ and “immediate” as “near to or related to present time.”³⁰⁰ The emergency provisions should apply only in circumstances in which death or great physical injury to the elder is “ready to take place” or “near to or related to the present time” and the definitions employed in these statutes should expressly convey this meaning.

Arguably inclusion of these definitions does not eliminate the problem of subjective interpretation; one individual’s perception of whether death is “ready to take place” may vary from another’s. The purpose behind including more comprehensive definitions in this situation (and in any statute) is not necessarily to eliminate completely subjectivity, an impossible task especially in this circumstance. Still, inclusion of an express statement of what is considered “imminent” or “immediate” serves two important functions. First, as noted earlier in the context of defining “incapacitated,” more comprehensive guidelines or definitions at least can work towards establishing a framework that more effectively restrains individual discretion and subjectivity.³⁰¹ Second, especially in those states that allow immediate imposition of emergency services with a subsequent hearing (as discussed later in this section), a more exacting definition of emergency, including definitions of imminence or immediacy, is crucial. When an individual is to be deprived of his right to self-determination (even if only temporarily) without due process and an opportunity to be heard, every attempt must be made to assure that that intervention is confined to limited and clearly delineated circumstances.

The definition in the Tennessee Code is an example of a good starting point for drafting an appropriate definition: imminent danger of death “means conditions calculated to and capable of producing, within a relatively short period of time, a reasonably strong probability of resultant cessation of life if such conditions are not removed or alleviated.”³⁰² For inclusion of these more comprehensive definitions to be meaningful, the police officers, social workers, or other personnel intervening in these emergency situations should be experienced and trained in elder abuse emergency intervention and should have encountered abused elders in numerous and varied abusive situations so that they are able to recognize circumstances that pose an immediate threat of death or grave bodily injury.

States generally employ one of two procedures to administer emergency services. In the majority of states the agency must file a

299. THE MERRIAM-WEBSTER DICTIONARY 1130 (1976).

300. *Id.* at 1129.

301. See *supra* note 230 and accompanying text.

302. TENN. CODE ANN. § 71-6-102(4) (1987).

petition with the court and obtain an emergency court order *before* any emergency assistance may be provided.³⁰³ Other state codes permit emergency assistance to be administered without first obtaining a court order, but require that a petition be filed to obtain an emergency order within a mandated brief time period.³⁰⁴

The procedures for emergency intervention in states that require an initial court order are similar to those used in proceedings that impose involuntary services in a nonemergency context, with the exception that they generally provide fewer due process guarantees.³⁰⁵ Any measurement of the adequacy of emergency procedures against the requirements of due process, however, must consider one fundamental difference between the two situations. In the emergency context a different balance must be struck between the individual's right to self-determination and the state's substantial interest in protecting its citizens from death or grave bodily harm. In an emergency situation, the procedural due process requirement may be relaxed or may not apply at all.³⁰⁶ This relaxation, of course, is a sensible and necessary result: in a true emergency that poses a threat of imminent death or grave bodily harm, intervention after consent is obtained ultimately may be unnecessary since the endangered individual already may be irreparably injured or, even worse, dead.

303. See, e.g., ALA. CODE § 38-9-5 (Supp. 1990); OKLA. STAT. ANN. tit. 43A, § 10-108A (West Supp. 1990); TEX. HUM. RES. CODE ANN. § 48.061(b) (Vernon 1990); VA. CODE ANN. § 63.1-55.6A (1987).

304. See, e.g., ARK. STAT. ANN. § 5-28-301 (Supp. 1989); FLA. STAT. ANN. § 415.105(5)(b) (West Supp. 1990); MD. FAM. LAW CODE ANN. § 14-304 (Supp. 1989) (referring to Md. EST. & TRUSTS CODE ANN. § 13-709(a) (Supp. 1989)); MISS. CODE ANN. § 43-47-15(2) (Supp. 1990); cf. S.C. CODE ANN. § 23-1-220 (Law. Co-op. 1989) (law enforcement officer may take adult in life-threatening situation into custody and transport to place of safety).

305. See *supra* notes 241-276 and accompanying text.

306. Cf. *Michigan v. Clifford*, 464 U.S. 287 (1983); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Michigan v. Tyler*, 436 U.S. 499 (1978). In these cases the Supreme Court held that an exception to the constitutional warrant requirement under the fourth amendment exists under certain emergency circumstances. As Justice Stewart wrote for the *Mincey* majority,

the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid "The need to protect or preserve life or to avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."

Mincey, 437 U.S. at 392 (quoting *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963)). California courts similarly have recognized this premise. See *People v. Hill*, 12 Cal. 3d 731, 754, 528 P.2d 1, 19-20, 117 Cal. Rptr. 393, 410-11 (1974); *People v. Horack*, 3 Cal. 3d 720, 725-26, 478 P.2d 1, 4, 91 Cal. Rptr. 569, 572 (1970); *People v. Soldoff*, 112 Cal. App. 3d 1, 6-8, 169 Cal. Rptr. 57, 60-61 (1980); *People v. Clark*, 262 Cal. App. 2d 471, 475-76, 68 Cal. Rptr. 713, 717 (1968). In *Horack* the California Supreme Court noted that "[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose." *Horack*, 3 Cal. 3d at 725, 478 P.2d at 4, 91 Cal. Rptr. at 572 (quoting *People v. Roberts*, 47 Cal. 2d 374, 377, 303 P.2d 721, 723 (1956)).

Most codes require that the APS agency file a petition alleging that an emergency exists, the adult needs protective services, the individual is incapable of consenting, and no caretaker or other person authorized by law, such as a guardian, is available to consent to the provision of services.³⁰⁷ A number of statutes provide that a petition for emergency services may be filed not only when the elder seemingly lacks capacity to consent, but also when he "refuses" or "does not consent."³⁰⁸ These provisions, like those that permit adult protective services for a capable elder expressly refusing to consent to services in the nonemergency context, are troubling.³⁰⁹ Despite case law that expressly acknowledges an individual's right to make unreasonable decisions about his own care,³¹⁰ a court may be less likely to question the constitutionality of providing services without first obtaining consent in a life-threatening emergency.³¹¹

Statutes typically require that the elder (or his guardian or caretaker) receive notice of the scheduled hearing. Usually, notice must be given a set number of hours before the hearing.³¹² Some states, however, waive the notice requirement if reasonable attempts have been made to notify the adult, the court determines notice would be impracticable, or there is a showing that delay to satisfy the notice requirement would result in reasonably foreseeable death or serious physical harm.³¹³ Others do not require notice to the elder, a circumstance that essentially transforms the process into an *ex parte* proceeding.³¹⁴ The elder usually has the right to be present at the hearing

307. See, e.g., ALA. CODE § 38-9-5 (Supp. 1990); TEX. HUM. RES. CODE ANN. § 48.061(b) (Vernon 1990).

308. See, e.g., ALA. CODE § 38-9-5 (Supp. 1990) ("does not consent"); KY. REV. STAT. ANN. § 209.100(c) (Michie/Bobbs-Merrill 1982) (refuses to consent).

309. See *supra* notes 212-216 and accompanying text.

310. See *supra* notes 111-112 and accompanying text.

311. See *supra* note 306 and accompanying text. Notably, despite the likelihood that a court would uphold a time-limited emergency deprivation of a competent elder's right to make his own decisions regarding his personal care, a lengthy deprivation of this right without an adversary hearing may violate the elder's liberty rights under the due process clause of the fourteenth amendment. Cf. *North Georgia Fishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601 (1975) (impounding a bank account without notice or hearing violates due process); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole involves a loss of liberty that requires pre-deprivation notice and hearing).

312. See, e.g., KY. REV. STAT. ANN. § 209.110(3) (Michie/Bobbs-Merrill Supp. 1988) (notice to elder, caretaker, or guardian at least three days before hearing); OKLA. STAT. ANN. tit. 43A, § 808(C) (West 1979) (notice to elder at least 48 hours before the hearing); VA. CODE ANN. § 63.1-55.6 (1987) (notice to elder, spouse, and if none, next of kin at least 24 hours before the hearing).

313. See KY. REV. STAT. ANN. § 209.110(3) (Michie/Bobbs-Merrill 1982) (court determines impracticality); OKLA. STAT. ANN. tit. 43A, § 10-108(C) (West Supp. 1990) (result in physical harm); VA. CODE ANN. § 63.1-55.6(D) (1987) (reasonable attempts or result in physical harm).

314. See ALA. CODE § 38-9-5 (Supp. 1990). Alabama provides that any relative or interested

and the right to private counsel.³¹⁵ In some states the court will appoint counsel if the elder cannot afford his own representation or lacks the capacity to waive his right to counsel.³¹⁶ Some states restrict the permissible contents of a court's emergency orders. These provisions often require court adherence to the doctrine of least restrictive alternative by ordering only those emergency services necessary to alleviate the emergency.³¹⁷ Moreover, many statutes specify whether the court is empowered to order any of the following measures: hospitalization, removal from or change of the elder's residence, forcible entry into the elder's home to administer assistance, and administering of medical treatment.³¹⁸ The statutes commonly stipulate that no person may be committed to a mental facility under these provisions³¹⁹ and that the issuance of the order shall not deprive the elder of any rights except to the extent validly provided for in the order.³²⁰ Finally, most states provide that the order is effective for a limited time period³²¹ and accord the elder the right to petition to have the order set aside or modified.³²²

The alternative means for administering emergency services is to provide the services first and later petition the court for an order that

party may appear to oppose the petition for an emergency order, but does not require that the elder, or anyone else, be provided with notice of the hearing. Instead, Alabama provides that the court give notice to the elder, his spouse, and other interested parties within 10 days *after* the order is issued. In addition, the notice must divulge the "present whereabouts" of the elder. Although such an *ex parte* proceeding may be constitutional under emergency circumstances, notice of its outcome should be required within a shorter time frame than the 10 day window provided in the Alabama Code, and the elder should be afforded an opportunity to challenge the court's determination in a subsequent hearing.

315. See, e.g., TENN. CODE ANN. § 71-6-107(a)(4) (1987); OKLA. STAT. ANN. tit. 43A, § 10-108(C) (West Supp. 1990).

316. See, e.g., N.M. STAT. ANN. § 27-7-27A(2) (Supp. 1990) (indigent right to counsel and independent medical, psychological, or psychiatric examination paid for by state); TENN. CODE ANN. § 71-6-107(a)(4) (1987) (indigent gets court costs and cost of representation); VA. CODE ANN. § 63.1-55.6E (1987) (indigent or lacks capacity to waive).

317. See, e.g., KY. REV. STAT. ANN. § 209.120(2)(a) (Michie/Bobbs-Merrill 1982); TEX. HUM. RES. CODE ANN. § 48.061(d) (Vernon 1990).

318. See, e.g., OKLA. STAT. ANN. tit. 43A, § 10-108(d)(2) (West 1979) (change in residence only if court specifically finds the action necessary); TEX. HUM. RES. CODE ANN. § 48.061(d) (Vernon 1990) (removal to other surroundings only as ordered; medical treatment); VA. CODE ANN. § 63.1-55.6B.2 (1987) (hospitalization; change of residence only as ordered).

319. See, e.g., OKLA. STAT. ANN. tit. 43A, § 10-108(D)(2) (West Supp. 1990); VA. CODE ANN. § 63.1-55.6(B)(2) (1987).

320. See, e.g., KY. REV. STAT. ANN. § 209.120(2)(c) (Michie/Bobbs-Merrill 1982); VA. CODE ANN. § 63.1-55.6B.5 (1987).

321. See, e.g., N.M. STAT. ANN. § 27-7-25B.3 (Supp. 1990) (initial order for 10 days renewable for up to 20 additional days); OKLA. STAT. ANN. tit. 43A, § 808(D)(3) (West 1979) (72 hours); TEX. HUM. RES. CODE ANN. § 48.061(e) (Vernon 1990) (initial 72 hour order may be renewed twice).

322. See, e.g., OKLA. STAT. ANN. tit. 43A, § 10-108(E) (West Supp. 1990); TEX. HUM. RES. CODE ANN. § 48.061(e) (Vernon 1990).

acts essentially to validate the intervention. As a general premise, if adequate safeguards are included to assure the elder's due process rights and rights to self-determination, this method not only is preferable to that discussed above, but also is more logical. Emergency intervention, by definition, is limited to situations in which the elder is threatened by *imminent* or *immediate* death or great physical harm. If emergency intervention is deemed necessary, then waiting for a court order to be issued before going to the aid of the ailing elder is clearly an irrational response. The more reasonable and natural response in these circumstances is to assist the elder in whatever way is necessary to remove the immediate peril and then, *after* the danger is abated, assure that the elder's rights to self-determination are not unduly infringed.

Once a police officer or a representative of the responsible social services agency has determined that an emergency exists and that the elder cannot consent, most of these statutes allow the officer or representative to take the elder into emergency protective custody and remove him from the dangerous circumstances. In addition, a few provisions specify that the elder should be transported to the appropriate medical or protective services facility.³²³ The Florida statute also contains a specific provision regarding emergency authorization of medical treatment.³²⁴

Once an elder has been taken into emergency custody, most statutes stipulate that a petition for an emergency order authorizing emergency services be filed with the court.³²⁵ Typically the petition must be filed within twenty-four to seventy-two hours after the initial intervention.³²⁶ These time frames appear to be reasonable. After an initial emergency services order is signed, a few states provide that the emergency services continue until the imminent danger is abated.³²⁷ Then the department must proceed under the provisions for involuntary nonemergency intervention.³²⁸ Other states stipulate that a pre-

323. See, e.g., ARK. STAT. ANN. § 5-28-301(a)(1) (1987) (emergency protective custody); FLA. STAT. ANN. § 415.105(5)(b) (West Supp. 1990) (may remove and transport to appropriate medical or protective services facility); MD. FAM. LAW CODE ANN. § 14-304(b)(2) (Supp. 1989) (police officer may transport to health facility); S.C. CODE ANN. § 23-1-220(C) (Law. Co-op. 1989) (law enforcement officer may remove to "place of safety").

324. See FLA. STAT. ANN. § 415.105(5)(c) (West Supp. 1990).

325. See, e.g., FLA. STAT. ANN. § 415.105(5)(b) (West Supp. 1990); MISS. CODE ANN. § 43-47-15(2) (Supp. 1990); S.C. CODE ANN. § 23-1-220(E) (Law. Co-op. 1989); cf. ARK. STAT. ANN. § 5-28-301(a)(2) (1987) (protective custody may not extend longer than 72 hours, at which time the standard protective services proceedings must be instituted).

326. See, e.g., FLA. STAT. ANN. § 415.105(5)(b) (West Supp. 1990) (24 hours); MISS. CODE ANN. § 43-47-15(2) (Supp. 1990) (48 hours).

327. See, e.g., MISS. CODE ANN. § 43-47-15(5) (Supp. 1990).

328. *Id.*

liminary hearing be held within forty-eight hours of the initial order to establish that probable cause exists to continue the emergency services.³²⁹

If probable cause is established, temporary custody is permitted to continue, usually for a specified time ranging from four to fourteen days.³³⁰ At the preliminary hearing stage the statutes do not specify a right to procedural due process. For this reason, the provision that permits a fourteen-day period of temporary custody without procedural due process protections is suspect, although the four-day period is less offensive. After the emergency order expires, a hearing with a variety of procedural protections must be held if the statute either requires the department to petition for a permanent protective services order or specifies that a hearing take place.³³¹

Part II illustrates that devising an APS system to aid victims of elder abuse requires a meticulously drafted statute that carefully balances the state's desire to assist citizens who are victims of elder abuse against the individual elder's rights to self-determination. The overview of the APS systems nationwide can serve as a measure by which to judge the adequacy of California's response to the problem of elder abuse through its APS legislation. Part III turns to a review of California's APS response.

III. Adult Protective Services in California

As discussed in Part I, ten percent of the nation's elderly population resides in California and the number of elderly Californians has increased dramatically over the past two decades; a rate of increase that is expected to accelerate.³³² In light of this growth, the problems of elderly Californians presently must be addressed and will continue to demand increased attention and resources. The first section below illustrates that elder abuse is one of these serious problems. The next section outlines the legislative history of California APS legislation as applied to victims of elder abuse. This review coupled with the next

329. See, e.g., ARK. STAT. ANN. § 5-28-301(2)(b) (1987); FLA. STAT. ANN. § 415.105(5)(e)(1) (West Supp. 1990).

330. See, e.g., ARK. STAT. ANN. § 5-28-301(c) (1987)(14 days); FLA. STAT. ANN. § 415.105(5)(e)(2) (West Supp. 1990) (four days). Florida places the following limitations on the temporary order issued at this stage: implementation of the least restrictive alternative; no change of residence unless necessary to remove the emergency; and, if removal is necessary, no transport to a facility for the acutely mentally ill. *Id.*

331. See, e.g., FLA. STAT. ANN. § 415.105(5)(f) (West Supp. 1990). The special provision within the Florida emergency intervention section provides for notice to the elder, his spouse, guardian, legal counsel, children, and next of kin at least 24 hours before the hearing.

332. See *supra* notes 8-12 and accompanying text.

section, which describes and assesses the present APS system along with some recent proposals for amendments, is designed to illustrate that California's APS legislation is ineffective as applied to victims of elder abuse. The legislation has failed to evolve since its inception in the early 1980s, and as a consequence, has not adequately addressed the multiple and complex issues that must be considered in well-drafted and thorough APS elder abuse legislation.

A. The Scope of the Problem: Who Are the Victims and the Abusers?

In 1987 there were 12,000 documented reports of elder abuse in California, a forty-five percent increase over those recorded in 1986.³³³ The number of elder abuse referrals to county welfare departments rose almost sixty-four percent—from approximately 50,000 cases to over 82,000—from 1983-1984 to 1986-1987.³³⁴ With the growth expected in the population of elderly Californians,³³⁵ this trend is likely to continue.

In July 1984, pursuant to legislative mandate, the California Department of Social Services conducted a Characteristics Survey of abused elders in California. The survey was comprised of questionnaires completed by county welfare departments regarding reported instances of elder abuse.³³⁶ The results of the study indicated that the abused elder typically was a white female, seventy-eight years of age,³³⁷ and that most often the alleged abuser was a white male with an average age of fifty-one. The abusers usually were family members, most often spouses or offspring.³³⁸

The abuse reported was predominately physical, followed by fiduciary, then of neglect, and least often mental.³³⁹ In almost half the

333. Dresslar, *Programs to Treat, Prosecute "Elder Abuse" Criticized*, L.A. Daily J., Nov. 8, 1988, at 1.

334. *Id.*

335. See *supra* notes 8-12 and accompanying text.

336. Although the survey also included reported instances of dependent adult abuse, a discussion of these findings is beyond the scope of this Note. Notably, the questionnaire was not directed toward self-abuse. DEPENDENT ADULT/ELDER ABUSE: CHARACTERISTICS SURVEY, STUDY MONTH OF JULY 1984, State of California, Health and Welfare Agency, Dep't of Soc. Services ii (1985) [hereinafter CHARACTERISTICS SURVEY, July 1984].

337. The study showed that 73% of the abused were women, 65.1% were white, 8.8% hispanic, and 7.5% afro-american. *Id.* at iii, Profile 3.

338. The study indicated that 46.5% of the abusers were male, and the sex of another 12.1% was unknown. The age of 43.1% of the sample abusers was unknown. Spouses comprised 15.5% and offspring 37.1% of the abusers. Notably, in 23.3% of the cases reported there was no family relationship between the abuser and the abused; rather "a caretaker, provider, housekeeper, or landlord type of relationship was identified." *Id.*

339. See *infra* notes 418-423 and accompanying text (discussing definitions of various types of abuse as defined in the California APS law).

cases more than one type of abuse was present and in a quarter of the cases the abuse was committed on a daily basis. An overwhelming amount of the abuse took place in a private residence.³⁴⁰ Eighty-five percent of those abused indicated that they would accept some services with respect to the abuse, and approximately ninety-four percent of these received adult protective services from the county welfare department.³⁴¹

The most recent data collected in California regarding elder abuse comes from a second Characteristics Survey that was conducted by the State Department of Social Services in December 1987.³⁴² The findings of this survey are substantially the same as those of the 1984 Characteristics Survey. The abused is typically a white seventy-eight-year-old female who lives in her own home.³⁴³ The abusers are still predominately white men with an average age of 48.5 years. Unlike the 1984 finding of predominately physical abuse, this survey indicated that fiduciary abuse was most prevalent and physical abuse secondary. The abuse reportedly took place sporadically in more than one-third of the cases.³⁴⁴

B. Legislative History

In the early 1980s the California Legislature, like many legislatures nationwide, responded to the newly documented incidence of elder abuse.³⁴⁵ In 1982 and 1983 lawmakers acknowledged that both dependent adults and elderly persons may be subjected to abuse, neglect, and abandonment and that the state has a responsibility to guard against such abuse. Consequently, the legislature passed two laws addressing the issue. The first piece of legislation, Assembly Bill 1805,³⁴⁶ focused on the dependent adult population.³⁴⁷ Its provisions encour-

340. Physical abuse was found in 45% of the cases, fiduciary abuse in 41.9%, neglect in 30.3%, and mental abuse in 26.5%. Cases of daily abuse comprised 27% of the survey and 86.2% of all reported cases of abuse occurred in a private residence. CHARACTERISTICS SURVEY, July 1984, *supra* note 336, at Table 8.

341. *Id.*

342. CHARACTERISTICS SURVEY OF DEPENDENT ADULT ELDER ABUSE VICTIMS, STUDY PERIOD OF FEB. 15, 1987 THROUGH MARCH 16, 1987, State of California, Health and Welfare Agency, Dep't of Social Services (1988).

343. The 1988 study, *supra*, also found that over two-thirds of the victims were disabled. The survey defined "disability" to include the developmentally, mentally, or physically disabled as well as the brain-impaired. The majority of those determined to be "disabled" were physically disabled. *Id.* at Table 4 ("Disability Status of the Abused").

344. *Id.* at iv.

345. See generally ELDER ABUSE HOUSE REPORT, *supra* note 16.

346. A.B. 1805, 1981-1982 Reg. Sess. (codified at CAL. WELF. & INST. CODE §§ 15600-15637 (West 1982)).

347. A dependent adult was defined as any person residing in the state, between the ages

aged but did not mandate health providers, social service workers, and community members in general to report suspected cases of abuse of dependent adults.³⁴⁸

In 1983 the legislature passed Senate Bill 1210,³⁴⁹ California's first law directed specifically at elder abuse. The main purpose of the law was to establish a system for mandatory reporting of instances of elder abuse. It closely resembled laws enacted in other states immediately after the House of Representatives Report on Elder Abuse was published in 1981. The mandatory reporting provisions set out in this law formed the basis for the similar mandatory reporting provisions that remain the predominant feature of California's APS laws today. The law defined elder abuse as "any one or more of the following acts which are inflicted by other than accidental means on an elder by another person: physical abuse, fiduciary abuse, neglect, or abandonment."³⁵⁰ Its provisions required an elder care custodian,³⁵¹ medical practitioner,³⁵² nonmedical practitioner,³⁵³ or employee of an elder protective agency³⁵⁴ to report by telephone and then in writing any suspected instance of physical abuse he observed within the scope of his employment.³⁵⁵ Physical abuse included any willful infliction of cruel or inhumane corporal punishment or injury by an individual responsible for care or custody of the elder.³⁵⁶ The statute did not mandate

of 18 and 64, who has physical or mental limitations that restrict his ability to carry out normal activities or to protect his rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. CAL. WELF. & INST. CODE § 15610(b)(1) (West 1982).

348. Assembly Bill 238 passed into law in 1985 and mandated the reporting of physical abuse of dependent adults. A.B. 238, 1985-1986 Reg. Sess. (codified at CAL. WELF. & INST. CODE §§ 15630-15637 (West Supp. 1990)).

349. S. 1210, 1983-1984 Reg. Sess. (codified at CAL. WELF. & INST. CODE §§ 9380-9386 (West 1983), *repealed by* 1986 Cal. Stat. 7691.3).

350. CAL. WELF. & INST. CODE § 9380(b) (West 1984).

351. An elder care custodian could be an administrator of a community care facility licensed to care for the elderly, a public assistance worker, a probation officer, a social worker, a licensed home aide, or an employee of an elder care institution, including personnel of residential care facilities, skilled nursing facilities, and intermediate care facilities. *Id.* § 9380(g).

352. A medical practitioner was defined as "a physician and surgeon, psychiatrist, psychologist, dentist, osteopath, podiatrist, chiropractor, resident, intern, nurse, pharmacist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code." *Id.* § 9380(h).

353. A nonmedical practitioner could be "a state or county public health employee who treats an elder for any condition, a paramedic, a coroner, a geriatric or family counselor, or a lawyer." *Id.* § 9380(i).

354. An elder protective agency was defined as "the State department of Social Services, a county probation department, a county welfare department, a police or sheriff's department, or a nursing home ombudsman." *Id.* § 9380(j).

355. *Id.* § 9381(a).

356. *Id.* § 9380(c). "Physical abuse includes, but is not limited to, direct beatings, sexual

reporting of fiduciary abuse,³⁵⁷ neglect,³⁵⁸ or abandonment;³⁵⁹ any person reasonably suspecting the occurrence of any of these, however, was encouraged to report it.³⁶⁰ Mandated reporters also were urged to report any known or suspected instances of mental suffering or danger to the emotional well-being of an elder, although descriptions of what constitutes either of these conditions were omitted from the text of the statute.³⁶¹ The statute also expressly abrogated the physician-patient and psychotherapist-patient privileges³⁶² and provided that a required reporter always was immune from both civil and criminal liability.³⁶³ Any other reporter also was immune unless the report was made falsely and the reporter knew or should have known it was false.³⁶⁴ A mandatory reporter who knowingly failed to make a required report was guilty of a misdemeanor punishable by a fine of up to \$1000.³⁶⁵

Finally, the law stipulated that elder protective services could not be provided without the consent of the elder abuse victim unless a violation of the Penal Code was alleged³⁶⁶ or the victim was determined to be so incapacitated that he could not legally give or deny consent, in which case a petition for temporary conservatorship or guardianship³⁶⁷ could be initiated under the Probate

assault, unreasonable physical constraint, or prolonged deprivation of food or water." *Id.* Notably, the definitions of abuse employed in Assembly Bill 1805 were the same as those used in Senate Bill 1210.

357. Fiduciary abuse included instances when any person in a position of trust with respect to the elder willfully steals, secretes, or appropriates the elder's property or money for uses outside the scope of that trust. *Id.* § 9380(d).

358. Neglect was defined as "the negligent failure of any person having the care or custody of an elder to exercise that degree of care which a reasonable person in a like position would exercise." Neglect included but was not limited to failure to assist in personal hygiene or in feeding and clothing; failure to provide medical care for physical or mental health needs; failure to protect from health and safety hazards; and failure to prevent malnutrition. *Id.* § 9380(e).

359. Abandonment was defined as "desertion or willful forsaking of an elder person by any person having the care or custody of that elder under circumstances in which a reasonable person would continue to provide care or custody." *Id.* § 9380(f).

360. *Id.* § 9381(b). Reasonable suspicion under this section is gauged by an objectively reasonable standard. *Id.*

361. *Id.* § 9381(c).

362. *Id.* § 9382(e).

363. *Id.* § 9385.

364. *Id.*

365. *Id.* § 9386.

366. *Id.* § 9383(b).

367. A temporary conservator or guardian is appointed in urgent situations pending the final determination of the court on a petition for the appointment of the actual guardian or conservator. CAL. PROB. CODE § 2250(b) (West Supp. 1990). A temporary conservatorship or guardianship is limited in duration to no longer than 30 days subject to adjustment by the

Code.³⁶⁸ Of particular interest is the fact that the statute failed to set out a definition of the term "incapacitated."³⁶⁹

The next major development in the evolution of California's APS laws came in 1985 when Senate Bill 129³⁷⁰ established the Adult Protective Services Demonstration Project. The bill provided that the State Department of Social Services select at least five counties in which to operate model projects designed to provide various adult protective services. The projects were implemented to "try new approaches to reform the existing Adult Protective Services system on a limited basis for a limited time with the goal of collecting data on the most effective and cost-efficient models for protecting . . . elders and keeping them as independent as possible."³⁷¹ The law required the model projects to include the following components: twenty-four-hour access to APS, investigation of reports of abuse, assessment of the client's need for services, assurance that services are received, crisis intervention, coordination with existing community resources, and programs for prevention of elder abuse.³⁷²

In 1985 the legislature also passed Assembly Bill 57,³⁷³ which established the Emergency Shelters for Elderly and Dependent Adult Abuse Victims Project. The bill required the State Department of Social Services to develop a program for the establishment of temporary emergency shelters and provision for counseling at the shelters for elderly (and dependent) adults who are victims of abuse, neglect, or abandonment.³⁷⁴ The law stipulated that the program be implemented on a pilot project basis in at least six counties.³⁷⁵

court. CAL. WELF. & INST. CODE § 2257 (West 1981). A temporary guardian or conservator has limited powers and duties as compared with those of a regular guardian or conservator. *Id.* §§ 2252-2253.

368. CAL. WELF. & INST. CODE § 9383(c) (West 1984), *repealed by* 1986 Cal. Stat. 7631.3.

369. *See supra* notes 209-239 and accompanying text (discussion of the perils inherent in leaving "lack of capacity" undefined or poorly defined).

370. S. 129, 1985-1986 Reg. Sess. (codified at CAL. WELF. & INST. CODE §§ 15710-15745), *repealed* Jan. 1, 1990 by 1987 Cal. Stat. ch. 1166, § 4.

371. CAL. WELF. & INST. CODE § 15710(e) (West Supp. 1990). The legislature acknowledged that the existing APS system was inadequate and also cited other problems with the then existing APS system including lack of the following: statewide standards for investigation, early intervention resources to assist caretakers, and structured, timely decisionmaking. *Id.*

372. *Id.* § 15721(e).

373. A.B. 57, 1985-1986 Reg. Sess. (codified at CAL. WELF. & INST. CODE §§ 13500-13505, *renumbered* Chapter 5.5 and *amended by* 1987 Cal. Stat. ch. 56, § 187, *repealed* Jan. 1, 1989 by its own terms).

374. *Id.* § 13500.

375. *Id.* § 13501. The law permitted the counties participating to contract with non profit organizations and private sector entities for the rendering of services under the pilot project in that county. *Id.* § 13503.5.

In December 1988, pursuant to legislative mandate, the Department of Social Services reported the findings of both model projects to the legislature. Its report recommended numerous changes aimed at fashioning "a statewide APS program which serves not only as a mechanism for reporting adult abuse, but also provides a service system responsive to the protective needs experienced by many elder . . . adults."³⁷⁶ One recommendation was the establishment of a twenty-four-hour, seven-day-a-week, toll-free crisis line or emergency telephone number within the county.³⁷⁷ Some counties also suggested that a twenty-four-hour in-person response system be implemented through an on-call system.³⁷⁸ The latter recommendation was based on the opinion that "emergency response is essential and similar in concept to a fire department—the use of the service is unpredictable, but vital to the victim when needed."³⁷⁹ The report also recommended that APS agencies would be the appropriate agencies to investigate reports of abuse in a statewide system³⁸⁰ and that appropriate initial response times for these investigations would range from "immediately" to ten days depending on the emergency nature of the report.³⁸¹ Furthermore, the report recommended encouragement of joint investigations with agencies including, among others, local law enforcement and mental and public health programs.³⁸² These investigations would include contacts with family and other relevant persons and, if feasible, an interview with the alleged abuser.³⁸³

The report also suggested that a "needs assessment," designed to identify the elder's specific protective service needs, be a mandatory component of a statewide system and that it be standardized.³⁸⁴ The needs assessment document would provide for an evaluation of the elder's physical, emotional, and mental functioning; economic and environmental factors; support systems and coping skills; factors precipitating the current situation; collateral contacts; and pertinent serv-

376. REPORT TO THE LEGISLATURE: EVALUATION OF THE ADULT PROTECTIVE SERVICES AND ELDER/DEPENDENT ADULT EMERGENCY SHELTER DEMONSTRATION PROJECTS, State of California, Health and Welfare Agency, Dep't of Social Services 53 (1988) [hereinafter REPORT TO THE LEGISLATURE].

377. *Id.* at 16-19. The recommendation noted the system could include use of an answering service after hours or on weekends and holidays. *Id.* at 18.

378. *Id.* at 16-17.

379. *Id.* at 17.

380. *Id.* at 23. This responsibility would be for investigations of reports of abuse occurring outside of a long-term care facility. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 24-26.

ice history. The development of a standardized mental competency tool also was recommended.³⁸⁵

Assurance of services, to be implemented by way of a service plan, also was suggested as a provision to be incorporated as part of any statewide APS system.³⁸⁶ A service plan is a written document prepared by a social worker that outlines the elder's service needs and delegates responsibility for each service.³⁸⁷ The report also recommended the establishment of a time-limited intervention system, a form of temporary intervention aimed at preventing or alleviating circumstances that pose a threat to the elder.³⁸⁸ Based on its experience with the model project, the Department of Social Services advocated establishing a system of emergency shelters that offer a range of care levels suited to individual elder needs.³⁸⁹ Additional recommendations included the development of community education programs to raise public awareness and understanding about elder abuse³⁹⁰ and APS coordination with existing community resources.³⁹¹ Finally, the report noted that the Department of Social Services "endorses the concept of a statewide automated system to capture APS case data and has included the standardization of pertinent case processing forms throughout [the] report to facilitate the future development of such a system."³⁹² Unfortunately, to date no legislation has been passed incorporating any of these recommendations into California's existing APS laws.

By 1986 mandatory reporting provisions were the mainstay of the California APS system and the model projects were underway. In Sep-

385. *Id.* at 26.

386. *Id.* at 27-36.

387. *See generally id.* The following services were among those discussed in the recommendation: counseling, case management, advocacy, referral to a medical-mental health center, in-home care, out-of-home care, transportation, money management-representative payee assistance, conservatorship referral, legal services, and emergency food. *Id.*

388. *Id.*

389. *Id.* Among the recommendations was the suggestion that motels or hotels could be used for elders who do not require supervision, board and care facilities for individuals that require 24-hour supervision, and skilled nursing facilities for any persons who need medical care. *Id.* at 41.

390. *Id.* at 45.

391. *Id.* at 49-52.

392. *Id.* at ii. Also in 1985, Assembly Bill 1603 required the State Department of Social Services, in consultation with representatives from county government and other designated entities, to establish minimum guidelines for county adult protective service agencies to determine when an investigation of an allegation of elder abuse is warranted. It mandated that the Department of Justice develop uniform guidelines for local law enforcement assistance with investigation of allegations of elder abuse. A.B. 1603, 1985-1986 Reg. Sess. (codified at CAL. WELF. & INST. CODE § 15640(a) & (b) (West Supp. 1990)). For more information on these reports, see generally MINIMUM GUIDELINES FOR COUNTY WELFARE DEPARTMENTS: DEPENDENT AND ELDER ABUSE INVESTIGATIONS, STATE DEP'T OF SOCIAL SERVICES (1986) (amendments); GUIDELINES FOR THE INVESTIGATION OF ELDER AND DEPENDENT ADULT ABUSE, DEP'T OF JUSTICE, STATE OF CAL. (1988).

tember 1986 Assembly Bill 3988³⁹³ became law, consolidating and clarifying elder and dependent adult abuse reporting laws, requirements, and definitions. The bill repealed the provisions originally set out by Senate Bill 1210 on elder abuse reporting and amended the sections of Assembly Bill 238 that established mandatory reporting of dependent adult abuse. In their place it created a combined program that contained reporting requirements for both abused elders and dependent adults.³⁹⁴ The law clarified the roles of adult protective services, law enforcement agencies, and the long-term care ombudsman³⁹⁵ programs in handling reports of abuse. It also provided protections for mandated reporters, including confidentiality of reports and immunity from liability resulting from a report.³⁹⁶ It added misdemeanor penalties for those mandated reporters who failed to report instances of abuse when the circumstances required them to do so.³⁹⁷

With the exception of a number of smaller amendments to the APS legislation these developments constitute the bulk of the changes that have produced California's present APS legislation. In addition to these, however, a few proposed yet unsuccessful amendments to the APS laws are worthy of note. Senate Bills 2544³⁹⁸ and 2545³⁹⁹ were substantially similar and were introduced by Senator Rosenthal in February 1988.⁴⁰⁰ Both would have required each county to establish a

393. A.B. 3988, 1984-1986 Reg. Sess. (amending CAL. WELF. & INST. CODE §§ 15600-15601, 15610, 15620, 15630-35, 15640 (West Supp. 1990)).

394. *Id.*

395. The Office of the Ombudsman is the primary agency responsible for receiving and investigating reports of alleged abuse of elders who are residents of long-term care facilities. For the purposes of this Note examination of California APS is confined to legislation as it relates to abuse, neglect, and exploitation of elderly persons in domestic or noninstitutional settings. For further information regarding the role of the Ombudsman, see CAL. WELF. & INST. CODE §§ 9701-9740 (West Supp. 1990).

396. CAL. WELF. & INST. CODE §§ 15633.5-15634 (West Supp. 1990).

397. *Id.* § 15634(d). In addition to these particular changes to the APS laws, two other provisions passed in Assembly Bill 3988 relate to elder abuse although their resting place is not in the Welfare and Institutions Code with the APS provisions. One section amended the California Evidence Code section that affords the spousal privilege not to testify against one's spouse or to disclose a confidential communication. CAL. EVID. CODE § 972 (West Supp. 1990). The amendment made the privilege inapplicable in criminal proceedings in which one spouse is charged with a crime against the person or property of the other spouse, or of a child, parent, relative, or other cohabitant. *Id.* § 972(e)(1). This amendment clearly is helpful to California's victims of elder abuse since statistics indicate family members are among the prime abusers. The other provision amended a portion of the Penal Code to make it a crime to inflict unjustifiable pain or mental suffering on an elder or for the person having custody and control of a dependent adult to steal or embezzle the elder's property. CAL. PENAL CODE § 368 (West Supp. 1989).

398. S. 2544, 1988-1989 Reg. Sess. [hereinafter S. 2544].

399. S. 2545, 1988-1989 Reg. Sess. [hereinafter S. 2545].

400. The primary difference between the two bills was in the funds appropriated to effectuate their provisions. Senate Bill 2545 would have appropriated \$15 million from the

twenty-four-hour response system to protect elders who are in immediate danger of physical harm and exploitation.⁴⁰¹ The system would provide in-person or telephone response seven-days-a-week.⁴⁰² The bills also would have mandated minimum emergency services including information and referral services to assist elders in receiving community resources, counseling to stabilize the family situation, emergency transportation to a safe environment, emergency shelter, in-home care, and short-term case management.⁴⁰³ Both bills also mandated that county welfare departments respond immediately to any report of imminent physical danger to an elder residing in other than a long-term care facility.⁴⁰⁴ The proposed bills contained a few sections that are especially notable. The bills proposed that the social worker attempt to obtain consent to enter and attempt to meet privately with the elder, with a caregiver, attendant, or family member present only if requested by the elder.⁴⁰⁵ Moreover, one section provided that "[i]f there is probable cause to believe that a felony . . . has occurred and a county social worker has been denied entry to meet privately with the [elder] . . . , the county social worker may request that the local law enforcement agency seek a search warrant."⁴⁰⁶ Senate Bill 2545 emerged from Committee on November 30, 1988, but unfortunately, the legislature took no further action on it. Senate Bill 2544 was vetoed by former California Governor George Deukmejian on September 28, 1988.⁴⁰⁷ Notably, both bills were proposed before the Department of

General Fund to the Department of Social Services to cover state and county costs of the expanded emergency response program. *See id.* § 6(a) & (b). It was expected that General Fund costs of \$175,000 in 1988-1989 (half-year) and approximately \$350,000 in subsequent years would be required for the Department of Social Services to administer the emergency response system. *See Analysis of Senate Bill No. 2545*, Legislative Analyst, May 19, 1988 (on file at THE HASTINGS LAW JOURNAL) [hereinafter *Legislative Analysis*]. The analysis also projected that the mandated local program would cost at least \$8.5 million in 1988-1989 (half-year) and at least \$17 million annually in subsequent years to administer the emergency response program and provide services to victims of abuse. All these costs would be subject to state reimbursement. *Id.*

Senate Bill No. 2544 required no direct appropriation from the General Fund. Rather, the bill provided for each county welfare department to develop and transmit to the Department of Social Services a plan and budget identifying the elderly population in need of services and the monies they would require to implement the mandated project. S. 2544, *supra* note 398, § 6(c)(1). The bill provided that if the Department of Social Services did not reply to the county's request within 30 days the plan was to be deemed approved. Alternatively, the Department was empowered by the provisions to deny the plan and the funding. *Id.* § (6)(c)(2).

401. *Id.* § 4(a); S. 2545, *supra* note 399, § 3(a).

402. S. 2544, *supra* note 398, § 5(a); S. 2545, *supra* note 399, § 4(a).

403. S. 2544, *supra* note 398, § 5(a); S. 2545, *supra* note 399, § 4(a).

404. S. 2544, *supra* note 398, § 5(b); S. 2545, *supra* note 399, § 4(b).

405. S. 2544, *supra* note 398, § 3(a); S. 2545, *supra* note 399, § 2(a).

406. S. 2544, *supra* note 398, § 3(b); S. 2545, *supra* note 399, § 2(b).

407. *See* Governor's Office, Press Release on Veto of Senate Bill No. 2544 (Sept. 29, 1988).

Social Services reported back to the legislature with its findings regarding the model projects. In vetoing Senate Bill 2544 the Governor stated that he believed it was important "to examine the results of the . . . [pilot projects] prior to implementing the statewide requirements of adult protective services specified in this bill and expanding its costs."⁴⁰⁸ He did not cite any major problems, however, with the substance of the proposed law.

One other major APS bill, Senate Bill 84,⁴⁰⁹ was passed by the legislature in 1988 and subsequently vetoed by the Governor in October 1989.⁴¹⁰ This bill would have made essentially the same changes as Senate Bills 2544 and 2545 proposed.⁴¹¹ Although the adult protective services model pilot program was not scheduled to be completed until January 1, 1990, the Department of Social Services Report to the legislature on the projects already had been released as of March 1989 when this bill went to the Governor for his signature. Despite his earlier assertion that he was waiting for the report on the model pilot program before signing into law a statewide APS system, the Governor, with the report already published, vetoed this bill as well. This time he cited budgetary concerns as the reason for his veto and concluded that the merits of the legislation did not sufficiently outweigh the need to fund "top priority programs," although he failed to detail what these programs were.⁴¹²

Finally, there is one major piece of APS legislation currently pending in the Senate, Senate Bill 1047.⁴¹³ This bill essentially seeks to implement the recommendations made by the Department of Social Services in its Report to the legislature regarding the model projects. Absent, however, are the specific provisions included in both Senate Bill 2544 and Senate Bill 84 regarding access to the victim and application for a warrant if necessary.⁴¹⁴ Whether this bill will pass through the legislature is as yet unknown and perhaps even more questionable is whether the newly elected Governor Pete Wilson will continue with former Governor Deukmajian's funding of other "top priority programs." That Governor Wilson will be inclined toward allocating additional funds to APS is highly questionable in light of the dire financial

408. *Id.*

409. S. 84, 1988-1989 Reg. Sess. [hereinafter S. 84].

410. See Governor's Office, Press Release on Veto of Senate Bill No. 84 (Oct. 2, 1989).

411. Not surprisingly, with the legislature having groped for financing for these earlier programs, the major difference between Senate Bill 84 and bills 2544 and 2545 was the financing for the proposed programs. Among other fiscal provisions, the bill appropriated \$7.2 million from the General Fund. See S. 84, *supra* note 409, § 6; see also *id.* §§ 5(a), 7-9.

412. See Press Release, *supra* note 410.

413. S. 1047, 1989-1990 Reg. Sess. [hereinafter S. 1047].

414. See S. 2544, *supra* note 398, § 3.

status of the state's budget and the dirth of federal assistance.

C. California Adult Protective Services Laws Today

The current APS law in California remains predominately a mandatory reporting law that applies to both elders and dependent adults.⁴¹⁵ The declared purposes of the statute are threefold: to encourage reporting of suspected cases of abuse; to collect information on the numbers of victims, the circumstances surrounding the abuse, and any other data that would assist in establishing adequate services for the victims; and to provide protection for all individuals making bona fide reports of abuse.⁴¹⁶ Although part of the declared intent of the legislature is to take such actions as are necessary to protect the elder, correct the situation, and ensure the individual's safety,⁴¹⁷ the law undeniably is focused on handling reports from mandated reporters rather than on what should be done once a report is received.

The statute defines abuse of an elder as physical abuse,⁴¹⁸ neglect,⁴¹⁹ intimidation, cruel punishment, fiduciary abuse,⁴²⁰ abandonment,⁴²¹ other treatment resulting in physical harm or pain or mental

415. CAL. WELF. & INST. CODE §§ 15600(h), 15610(a) (West 1991). The Code defines an elder as "any person residing in this state, 65 years of age or older," *id.* § 15610(a), and a dependent adult as "any person residing in this state, between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age." *Id.* § 15610(b)(1). The definition of dependent adult also includes "any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code." *Id.* § 15610(b)(2).

416. *Id.* § 15601.

417. *Id.* § 15600(h).

418. Physical abuse includes assault, battery, assault with a deadly weapon or force likely to produce great bodily injury, and sexual assault as defined in the California Penal Code. It also includes unreasonable physical constraint; prolonged deprivation of food or water; and the use of physical or chemical restraint, medication, or isolation, other than as ordered, for the purpose of staff convenience, punishment, or for a longer time period than ordered. *Id.* § 15610(c)(1)-(6).

419. Neglect is defined as the failure of a person having care or custody of an elder adult to exercise the degree of care that a reasonable person in a similar position would exercise. *Id.* § 15610(d). Neglect includes, but is not limited to, failure to assist in personal hygiene; failure to provide food, clothing, shelter, medical care or for mental health needs; failure to protect from health and safety hazards; and failure to prevent malnutrition. *Id.* § 15610(d)(1)-(4).

420. Fiduciary abuse occurs when a person who has care or custody of the elder, or is in a position of trust to the elder takes, secretes, or appropriates money or property for purposes not in the due and lawful execution of that trust. *Id.* § 15610(f).

421. Abandonment is the desertion or willful forsaking of an elder by a custodian or caretaker under circumstances in which a reasonable person would not discontinue care. *Id.* § 15610(e).

suffering, or deprivation by a care custodian⁴²² of goods or services that are necessary to avoid physical harm or mental suffering.⁴²³ Its provisions mandate reporting of suspected or known instances of physical abuse⁴²⁴ by any care custodian, health practitioner,⁴²⁵ or employee of a county adult protective services agency⁴²⁶ or local law enforcement agency. The individual is required to telephone the county adult protective services agency or local law enforcement agency as soon as possible to report any known or suspected instances of physical abuse.⁴²⁷ The initial telephone contact is to be followed up within two days by a written report.⁴²⁸ Reporting of other types of known or suspected abuse is optional.⁴²⁹ The code also provides that any other person who reasonably suspects that an elder is the victim of abuse may report it to the county adult protective services agency.⁴³⁰

All reports of abuse are confidential and may not be disclosed to anyone other than specific classes of individuals for investigatory purposes.⁴³¹ The reporter is immune from civil and criminal liability that may arise as a result of the report, unless it is proven that the report was false and the reporter knew of its falsity.⁴³² Failure to report an instance of abuse, however, is a misdemeanor punishable by up to six months in jail, a fine of up to \$1000, or both.⁴³³ The law also provides that as a prerequisite for employment as a care custodian, health practitioner, or employee with an adult protective services agency or local law enforcement agency, an individual must sign a statement,

422. The Code defines a care custodian as an administrator or an employee who works directly with elders as part of his official duties at any one of an extensive list of public and private facilities that provide care for elders. *Id.* § 15610(h)(1)-(17).

423. *Id.* § 15610(g).

424. *Id.* § 15630(a).

425. *Id.* § 15610(i).

426. An adult protective services agency is defined as a county welfare department comprised of individuals who work with elders as part of their official duties, including support staff and maintenance staff. *Id.* § 15610(j).

427. *Id.* § 15630(a). Telephone reports shall include the name of the person reporting; the name, age, and present location of the elder; names and addresses of family or others responsible for the elder's care; the nature and extent of the elder's condition, if known; the date of the incident; and any other information including what led the reporter to suspect the abuse. Written reports are to be submitted on forms adopted by the Department of Social Services. *Id.* §§ 15630(a)(2), 15633(a)-(b).

428. *Id.* § 15630(a).

429. *Id.* § 15630(b).

430. *Id.* § 15631(a). Reasonable suspicion under this section is gauged by an objectively reasonable standard. *Id.* § 15631(b).

431. *Id.* § 15633.5. Any violation of these confidentiality provisions is a misdemeanor punishable by not more than six months in jail, by a fine of \$500, or by both. *Id.*

432. *Id.* § 15634(a)-(b).

433. *Id.* § 15634(d).

on a form provided and to be kept by the prospective employer, that he has knowledge of the provisions of the code requiring reporting of abuse and that he will comply with the provisions.⁴³⁴

Guidelines for investigating reported instances of abuse and providing services to abused elderly are outlined in the APS codes. Investigation of reported abuse is the responsibility of the county APS agency and the local law enforcement agency with jurisdiction, except in instances of physical and fiduciary abuse, in which case the investigation is the responsibility of the local law enforcement agency.⁴³⁵ In reported cases of physical abuse, the APS agency is required to report the case immediately or as soon as practicable to the local law enforcement agency with jurisdiction over the case. For all other types of abuse only a written report within two working days is required.⁴³⁶

Each county APS agency is required to maintain an inventory of all public and private service agencies available to assist victims of abuse.⁴³⁷ The inventory is to be used when the agency cannot fulfill the immediate needs of the victim or to serve the victim on a long-term follow-up basis.⁴³⁸ County APS agencies are required to file a monthly report to the State Department of Social Services detailing the reports of abuse received under these provisions.⁴³⁹

The code provides that an elder at any time may refuse or withdraw consent to either an investigation or to the provision of protective services.⁴⁴⁰ The county APS agencies are prohibited from acting without the alleged abuse victim's consent unless a violation of the Penal Code has been alleged.⁴⁴¹ If, however, an elder "is *so incapacitated* that he or she cannot legally give or deny consent to protective services, a petition for temporary conservatorship . . . may be initiated in accordance with Section 2250 of the Probate Code."⁴⁴² A definition of the phrase "so incapacitated that he or she cannot consent" is con-

434. *Id.* § 15632(a).

435. *Id.* § 15635(a). The code also provides that the Ombudsman coordinator or county APS agency should receive any reports of abuse that occur in a long-term care facility, unless the conduct involves criminal activity, in which case, it immediately should be reported to the local law enforcement agency. *Id.* § 15630(b). Moreover, if county APS, local law enforcement, or the Ombudsman determine that the abuse likely is being perpetrated by a health practitioner licensed under Division 2 (commencing with § 500) of the Business and Professions Code, they immediately shall report the information to the agency and it then shall investigate. *Id.* § 15630(e)(2).

436. *Id.* § 15630(a)(1).

437. *Id.* § 15635(b).

438. *Id.* The stated legislative intent here was to recognize that limited funds are available to resolve suspected cases of abuse.

439. *Id.* § 15630(j).

440. *Id.* § 15650(a).

441. *Id.*

442. *Id.* § 15650(b) (emphasis added).

spicuously absent from the list of definitions included in the code.

Under the California Probate Code, a conservator is to be "appointed for a person who is unable properly to provide for his or her personal needs for physical health, food, clothing, or shelter."⁴⁴³ A temporary conservatorship typically is instituted in urgent situations and is limited in duration to thirty days, subject to adjustment by the court.⁴⁴⁴ Upon the filing of a petition for a temporary conservatorship, notice of the proposed appointment must be personally delivered to the prospective ward unless the court, for good cause, orders otherwise.⁴⁴⁵ The code also provides that the appointment may be made with or without notice to other persons as the court may require.⁴⁴⁶ Although a temporary conservator has only limited powers and duties as compared with a regular conservator,⁴⁴⁷ the use of this temporary arrangement in the context of elder abuse is disturbing because it is designed expressly to act as a weigh station en route to imposition of a full conservatorship. The statute expressly provides that a temporary conservator is specifically appointed "to serve *pending the final determination* of the court upon the petition for the appointment of the [actual] . . . conservator."⁴⁴⁸ Institution of these proceedings is the only means by which the APS agency may either conduct an investigation or provide services when an elder refuses to consent. And, as has been discussed, guardianship has been criticized as an extreme and inappropriate response to the needs of abused elders.⁴⁴⁹

IV. Some Proposed Changes for California

A brief review of the provisions employed by other states in their handling of elder abuse through APS legislation calls into question the vitality of the APS laws in California. In the early 1980s, mandatory reporting provisions were popular and California, like so many states, quickly responded by passing a mandatory reporting law that currently remains the heart, and body for that matter, of the California APS system. As we near the ten-year anniversary of the "discovery" of elder abuse it is time to reevaluate the adequacy of this California law. The following are several proposed changes and additions that would help to bring California more in step with other states nationwide and offer a superior system for provision of protective services.

443. CAL. PROB. CODE § 1801(a) (West Supp. 1990).

444. *Id.* § 2257 (2) & (2)(b) (West 1981).

445. *Id.* § 2250(c).

446. *Id.*

447. *Id.* §§ 2252-2253.

448. *Id.* § 2250(b) (emphasis added).

449. See *supra* notes 250-252 and accompanying text.

A. Provision of Nonemergency Involuntary or Nonconsensual Services

Under the existing law the only way services may be imposed on a nonconsenting elder is by the appointment of a temporary conservator under the Probate Code. This action inevitably leads to the appointment of a regular conservator and, ultimately, to the stripping of the elder of the majority of his rights to self-determination. The extreme nature of a conservatorship is not necessary or appropriate in the vast majority of elder abuse cases.⁴⁵⁰ A better system would include two separate provisions within the present APS laws: one for nonconsensual emergency intervention and the other for nonemergency intervention without consent. The latter system would be a limited conservatorship arrangement modelled after the already existing limited conservatorship system used in California for the developmentally disabled.⁴⁵¹ The goal of such a system would be to allow abused elders to function with a maximum of independence, but also to receive the assistance they require. Like the limited conservatorship system already in place, these provisions would stipulate that a detailed assessment of the elder's mental, physical, psychological, and functional capabilities be conducted.

Although this recommendation could be implemented by amending the sections in the Probate Code regarding conservatorships, such an amendment seems unlikely in light of the former Governor Deukmajian's veto of Senate Bill 2351, which proposed similar, yet less drastic measures.⁴⁵² There remains, of course, the possibility that Governor Wilson would be more open to such a change. Consequently, a better approach would be to establish specific provisions within the existing APS laws that would allow for the county welfare agency to petition the court for a limited and individually tailored order imposing services on the unwilling, incapacitated elder. Such a provision would mandate the full panoply of procedural due process protections, including a hearing and notice to the party, his spouse, attorney, children, and next of kin. Notice should be given at least forty-eight hours before the hearing and should be specially drafted and printed to apprise fully the elderly individual of the gravity of the proceeding and assure his understanding of the consequences of a limited conservatorship. Moreover, the elder's rights at the hearing should be guarded carefully and should include the right to be present at the hearing, the right to legal representation (his own or appointed if he is indigent), the right to present evidence, and the right to examine and cross-ex-

450. See *supra* notes 277-290 and accompanying text.

451. See *supra* notes 284-290 and accompanying text.

452. See *supra* notes 289-290 and accompanying text.

amine witnesses. The order would be of limited duration and the law would stipulate not only that the elder has the right to appeal the order immediately, but that the court review the order within a mandated time period to assure that the services being provided are still necessary or adequate.

B. Defining "Incapacity"

Another concern raised by provisions imposing services on an elder who does not consent is the conspicuous and troubling absence of a definition of the term "incapacitated" in the code. Even if this provision is amended to incorporate a more flexible limited-conservatorship system, it still will require a determination that the adult is "so incapacitated that he or she cannot legally give or deny consent"⁴⁵³ before the county welfare department can petition the court for a services order. The consequences of the decision make subjective determination of the definition entirely unacceptable.⁴⁵⁴ The best definition of incapacitated involves a full assessment of the elder's functional as well as mental ability.⁴⁵⁵

The inquiry into the elder's functional abilities must be objective, not subjective. The definition of incapacity, therefore, should not include phrases such as "effectively" or "in his own best interest" when assessing the elder's functional abilities to manage his own affairs or direct others to do so. The assessment also must include a determination that the elder is unable to make or communicate decisions regarding his care and that this inability is the result of a demonstrated disorder or disability. Finally, the definition must incorporate the principle of the least restrictive alternative and include some language which communicates that the incapacitated elder retain all autonomy feasible in light of the outcome of the above inquiry into the elder's abilities. The conservatorship imposed must be tailored to the individual, as in the context of a limited conservatorship in California. Undoubtedly, a definition of incapacity that incorporates these tenets calls for a laborious and time-consuming inquiry. Yet ultimately there should be no question but that the incapacity inquiry must become a painstaking attempt to preserve the elder's rights to self-determination.

C. Emergency Intervention Without Consent

Another major gap in the present legislation is the absence of a defined procedure to be employed in an emergency situation. It first

453. CAL. WELF. & INST. CODE § 15650(b) (West Supp. 1990).

454. See *supra* note 249-252 and accompanying text.

455. See *supra* note 240.

should be noted that the establishment of a twenty-four-hour, seven-day-a-week emergency response system, as recommended by the Department of Social Services in its Report to the legislature,⁴⁵⁶ is essential to give meaning to any emergency intervention provisions. If a true emergency situation, one threatening imminent death or great bodily harm,⁴⁵⁷ does not come to the attention of the appropriate authorities within a short time period, the APS worker's assistance may not be able to avoid the threatened harm. One specifically designated and well-publicized place must exist where individuals can call at any time to receive emergency assistance.

Once California has established a statewide twenty-four-hour hotline for emergency reporting, the need for a specific procedure for emergency intervention and provision of services is apparent. The obvious first step is to draft an appropriate definition of "emergency." The best definition should include some element of imminence or urgency and only should include the likelihood of imminent physical danger. The problems inherent in employing a definition that requires an assessment of mental capacity are too great to justify its inclusion. "Imminent" also should be defined clearly in the statute. The following is an example of an adequate definition of emergency: An emergency situation is one in which an elder is living in conditions or is in a situation that presents a substantial risk or likelihood of imminent death or imminent serious physical harm to the elder. Imminent means that there is a strong probability that death or such serious physical harm is "ready to take place" within a relatively short period of time.

In addition to defining emergency, California should implement a procedure by which APS agencies may petition the courts for an emergency protective services order. The California provisions should be modelled after those in other states that allow emergency intervention *first* and then require that a petition be filed with the court to validate the continued provision of services.⁴⁵⁸ A system that would require a court order to be issued before the emergency assistance could be rendered is counterintuitive in a true emergency situation. Once an APS worker or law enforcement agent, trained in applying the newly implemented definition of emergency, determines he is confronted with an emergency situation, the new California emergency procedure would allow him to take the elder into protective custody. If entry into the

456. See *supra* notes 377-379 and accompanying text.

457. See *supra* notes 291-331 and accompanying text.

458. See *supra* text accompanying notes 322-331.

elder's home or elsewhere is required, it should be permitted by the terms of the statute. A procedure that requires a petition for an emergency order to be filed within twenty-four hours after the elder is taken into emergency custody suffices under emergency circumstances. The state's interests in protecting its citizens from death or great physical harm may be permitted to outweigh the elder's interest in self-determination when the intervention is time-limited and requires court validation within this short time period. Florida's provisions for emergency intervention are exemplary and serve as a model for a future California provision.⁴⁵⁹ They first provide that a petition for an order be filed within twenty-four hours of the intervention and then stipulate that a preliminary hearing be held to establish that probable cause exists to continue the emergency services.⁴⁶⁰ If probable cause is shown, a four-day temporary order may be issued.⁴⁶¹ This temporary order may impose only the least restrictive services necessary to remove the emergency, may include only a change of residence if necessary to remove the emergency, and may not include removal to a facility for the acutely mentally ill.⁴⁶² Upon the expiration of the temporary order, the new California system would provide that the APS agency could continue to provide services only under the newly revamped provisions for intervention without consent in nonemergency circumstances.

Conclusion

This Note has illustrated that the current California APS laws serving victims of elder abuse are ripe for amendment. The existence of elder abuse, one of our country's most detestable and shameful problems, is a surprise to many Americans. The magnitude of the problem and the difficult issues it presents with regard to an elder's right to self-determination and the state's interest in protecting its elderly citizens as well as the financial difficulties facing the state are matters that must be addressed and better resolved as we enter the new century, a century during which the ever-increasing aging population will and should wield even greater political power. The proposals in this Note provide a starting point; the rest is up to the California Legislature and Governor Pete Wilson and his veto pen.

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459. See FLA. STAT. ANN. § 415.105(5)-(6) (West Supp. 1990).

460. *Id.* § 415.105(b).

461. *Id.* § 415.105(c)(2).

462. *Id.* § 415.105(1).

