

WHO WATCHES THE WATCHMEN: WILL A NATIONWIDE SYSTEM OF BACKGROUND CHECKS FOR NURSING HOME EMPLOYEES HELP CURB ELDER ABUSE?

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Elder abuse in nursing homes and other long-term care facilities stems primarily from the employees of the facilities. A key to preventing this abuse is ensuring that these employees are subject to background checks. The current checks vary from state to state, however, and are largely inadequate in some states. In this Note, Ms. Luther discusses the recent addition of Section 6201 of the Patient Protection and Affordable Care Act, which mandates a nationwide program of background checks, and analyzes whether section 6201 will be successful in preventing elder abuse. Ultimately, Ms. Luther recommends adding a background check for residents to section 6201, supplementing the system with additional checks, and requiring mandatory participation in the program to shore up protections for the elderly in long-term care facilities.

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I. Introduction

During a Senate hearing concerning combating elder abuse, Jennifer Coldren shared the story of her ninety-year-old grandmother's rape and assault at the hands of an employee of a long-term care facility in New York, and she noted that the experience left her family feeling "[d]isbelief, fear, numbness, pain, anger, bitterness, shock, outrage and [like] our hearts [were] broken."¹ Ms. Coldren's grandmother had always been friendly and cheerful, but after the attack, "she no longer smiled, cried all the time and had told [them] numerous times she wanted nothing more but to be an angel and for God to take her."² The real blow, however, came when Ms. Coldren learned that the incident could have been prevented by an effective and timely background check.³ The perpetrator had criminal convictions in his background and had been accused of sexual abuse during two prior employment situations in which he cared for the elderly and disabled.⁴

Even with multiple levels of protection, effective and timely background checks may fail to keep past and potential abusers out of direct patient access positions at long-term care facilities. As recently as September 2010, a series of nursing home compliance checks in Illinois found 124 residents and employees with active arrest warrants.⁵ Illinois has had a state background check program in place since the 1995 Health Care Worker Background Check Act.⁶ The initial version of the background check program included a state name-based check for criminal history, utilizing the Uniform Conviction Information Act (UCIA) and the Illinois Nurse Aide Registry.⁷

1. *Abuse of Our Elders: How We Can Stop It: Hearing on S. 1577 and S. 1070 Before the S. Special Comm. on Aging*, 110th Cong. 3-7 (2007) [hereinafter *Abuse of Our Elders*] (statement of Jennifer Coldren).

2. *Id.*

3. *Id.*

4. *Id.*

5. David Jackson, *Nursing Home Sweeps Find Residents with Arrest Warrants*, CHI. TRIB., Sept. 20, 2010, http://www.chicagotribune.com/2010-09-20/health/ct-met-nursing-home-madigan-20100920_Z_nursing-home-attorney-general-lisa-madigan-arrest-warrants.

6. See 225 ILL. COMP. STAT. ANN. 46 (West 1996).

7. *Id.* § 30. In the initial version of the program, potential health care workers were required to submit to a name-based check through the UCIA, and if their backgrounds were free from the specified criminal convictions in section 46/25, then their information was added to the Illinois Nurse Aide Registry. *Id.* § 30(a). A state fingerprint check was only done if requested by the potential worker to dispute the finding of disqualifying information in the name-based check. *Id.* § 35. A potential employer was required to check the Illinois Nurse Aide Registry be-

Stand-alone state programs have limited value, however, when it comes to tracking and identifying past and potential abusers who move between states. Illinois received funding in 2003 to participate in a pilot program for a national system of background checks for nursing homes.⁸ This program utilized all available abuse registries as well as state and federal criminal history background checks.⁹ Despite these protections, nursing homes in Illinois continue to employ persons with *active warrants*. Imagine the number of current nursing home employees with some other disqualifying feature that has eluded these compliance checks and that may be putting elderly residents in danger.

Growing out of the purported success of the pilot program, Section 6201 of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) mandates a nationwide program of state and federal criminal background checks and requires states to utilize each other's health care worker abuse registries.¹⁰ This system seems comprehensive but concerns remain about the completeness and validity of the state abuse registries,¹¹ provisional employment periods,¹² the appeals process, and the possibility that other residents also commit elder abuse.¹³

This Note explains the benefits and disadvantages of the nationwide system of background checks mandated by section 6201 of the ACA. Part II describes the current shortage of long-term care

fore hiring an employee, and if the employee's UCIA check was more than one year old, then the employer had to order another UCIA check and update the Nurse Aide Registry. *Id.* § 30(b).

8. CTRS. FOR MEDICARE & MEDICAID SERVS. (CMS), ABT ASSOCS. INC., EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM: FINAL REPORT, at i (2008) [hereinafter EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM], available at <https://www.cms.gov/reports/downloads/White8-2008.pdf>.

9. Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. 108-173, § 307, 117 Stat. 2066, 2257 (codified at 42 U.S.C. § 1395aa (2006)).

10. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 6201, 124 Stat. 119, 721 (2010) (to be codified at 42 U.S.C. § 1320a-7l(a)).

11. Amanda Bassen, *Patient Neglect in Nursing Homes and Long-Term Care Facilities in New York State: The Need for New York to Implement Programs and Procedures to Combat Elder Neglect*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 179, 201-02 (2009).

12. *Abuse of Our Elders* (statement of Jennifer Coldren), *supra* note 1, at 3-7 (noting that the employee who abused Ms. Coldren's grandmother had only worked at the facility for a short time, and even if a background check had been done, the report might not have been returned to the facility before the abuse occurred).

13. Gary Marx & David Jackson, *Tribune Watchdog Update: Nursing Home Safety*, CHI. TRIB., Aug. 4, 2010, <http://www.chicagotribune.com/news/local/ct-met-watchdog-updates-20100804,0,6767585.story>.

workers, defines elder abuse, and outlines the history of laws designed to improve long-term care facilities and curb elder abuse. Part III analyzes how section 6201 works and whether it can actually achieve its goal of preventing elder abuse by stemming the flow of workers who are past or potential abusers. Part III further examines possible negative repercussions of section 6201 and other potential causes of elder abuse that should be taken into account. Part IV recommends adding a background check for residents to section 6201, supplementing the current system with a check of the national Health Resources and Services Administration (HRSA) practitioner data banks, and requiring mandatory participation in the background check program.

II. Background

A. The Shortage of Long-Term Care Workers

Despite employment woes in other sectors, a shortage of long-term care workers continues and demand will likely increase over the next several decades.¹⁴ Four factors have influenced this shortage. First, the elderly population has grown rapidly and will continue to expand.¹⁵ The U.S. Census Bureau projects that the elderly population in the United States (persons sixty-five years and older) will double by 2050, reaching approximately eighty million elderly individuals.¹⁶ In 1994, one in eight individuals was elderly, but by 2030 the Census Bureau expects that one in five individuals will be elderly.¹⁷ Second, the long-term care population has become increasingly disabled, which requires long-term care workers to use complex technologies to care for their patients.¹⁸ Third, the labor force is growing more slowly than the elderly population.¹⁹ Karl Pillemer and Mark Lachs²⁰ predict that

14. Karl Pillemer & Mark S. Lachs, *The Crisis in the Long-Term Care Workforce*, 4 J. HEALTH CARE L. & POL'Y 294, 294 (2001).

15. *Id.* at 294-95.

16. Frank B. Hobbs, *Population Profile of the United States: The Elderly Population*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/pop-profile/elderpop.html> (last visited Jan. 28, 2011).

17. *Id.*

18. Pillemer & Lachs, *supra* note 14, at 295.

19. *Id.*

20. Lachs and Pillemer, who study the intersection of gerontology, medicine, aging, and long-term care, teach and research at Weill Cornell Medical College and Cornell University, respectively. See *Clinical Profile: Mark S. Lachs*, WEILL CORNELL MED. C., <http://www.med.cornell.edu/research/mlachs/index.html> (last visited

by 2025 the “caregiver ratio” will be one to one.²¹ The “caregiver ratio” is “the relationship between the size of the elderly population (who are likely to need care), and the number of ‘traditional’ caregivers—that is, working-age women.”²² Finally, immigration restrictions “reduce the labor pool.”²³

Some common categories of long-term care workers include: certified nursing assistants, home health aides, personal care aides, licensed practical or vocational nurses, and registered nurses.²⁴ The licensed practical nurses and registered nurses are considered separately from the other workers who are considered “unskilled” or “low-skilled” workers.²⁵ Direct patient access employees—for whom the majority of duties includes working closely with the elderly—are called a variety of names: direct care workers, personal care assistants, home care aides, home health aides, and certified nursing assistants.²⁶ These direct care employees work in a number of settings: “private homes, adult day centers, assisted living residences . . . and nursing homes.”²⁷ This Note will focus on direct patient access employees in long-term care facilities, most commonly called certified nursing assistants (CNAs), because they do the majority of the work in nursing homes and are the source of the bulk of long-term care workforce problems.

Certified nursing assistants comprise sixty to seventy percent of the nursing staff in long-term care facilities and perform eighty to ninety percent of the work.²⁸ In the nursing home setting CNAs provide direct care to residents by assisting with “activities of daily living, such as eating, bathing, dressing, and transferring from bed to chair. CNAs may provide skin care, take vital signs, answer residents’ call lights, and are expected to monitor residents’ well-being and re-

Jan. 28, 2012); *Human Ecology Bio Page: Karl Pillemer*, CORNELL U. C. HUM. ECOLOGY, <http://www.human.cornell.edu/bio.cfm?netid=kap6> (last visited Jan. 28, 2012).

21. Pillemer & Lachs, *supra* note 14, at 295.

22. *Id.*

23. *Id.* at 296.

24. *Id.*

25. ESTHER HERNÁNDEZ-MEDINA ET AL., AARP PUB. POL’Y INST., TRAINING PROGRAMS FOR CERTIFIED NURSING ASSISTANTS, at iii (2006), available at http://assets.aarp.org/rgcenter/il/2006_08_cna.pdf.

26. BERNADETTE WRIGHT, AARP PUB. POL’Y INST., DIRECT CARE WORKERS IN LONG-TERM CARE 1 (2005), available at http://assets.aarp.org/rgcenter/il/dd117_workers.pdf.

27. *Id.*

28. HERNÁNDEZ-MEDINA ET AL., *supra* note 25, at 1.

port significant changes to nurses.”²⁹ CNAs are also charged with “providing comfort and companionship” and “providing oversight for people with cognitive and mental impairments.”³⁰

The working conditions for CNAs lead to high turnover rates as well as inadequate care for the nursing home residents.³¹ Long-term care facilities typically do not require CNAs to have a high school education,³² although approximately twenty-five percent of all direct care workers have some college education.³³ Additionally, CNAs undergo minimal training and usually receive low wages.³⁴ Federal law mandates a minimum of seventy-five hours of training, which must be completed along with a certification exam within the first four months of employment.³⁵ Some states require more, but critics consider the current minimum insufficient to cover all required topics.³⁶ CNAs earned a median hourly wage of \$11.56 in 2009, compared to \$15.95 for all occupations.³⁷ Few employers provide pension plans or health insurance to direct care workers.³⁸ Direct care workers are also injured on the job at a rate approximately 1.5 times the rate of injuries in the construction industry.³⁹ Many CNAs are invested in and are very satisfied by nursing, but the difficulty of the job creates high rates of stress, burnout, and turnover.⁴⁰ Not coincidentally, the most common causes of patient abuse and neglect are understaffing, low wages, poor training, and high turnover of the nursing staff in long-term care facilities.⁴¹

29. Pillemer & Lachs, *supra* note 14, at 296.

30. WRIGHT, *supra* note 26, at 1.

31. *Id.* at 2–3.

32. Pillemer & Lachs, *supra* note 14, at 297.

33. WRIGHT, *supra* note 26, at 1.

34. Pillemer & Lachs, *supra* note 14, at 300–01.

35. WRIGHT, *supra* note 26, at 2.

36. HERNÁNDEZ-MEDINA ET AL., *supra* note 25, at 2.

37. *Occupational Employment Statistics: May 2009 National Occupational Employment and Wage Estimates*, BUREAU LAB. STAT., http://www.bls.gov/oes/2009/may/oes_nat.htm#29_0000 (last visited Jan. 28, 2012). The actual category described by the Bureau of Labor Statistics consists of nursing aides, orderlies, and attendants in nursing homes. *Id.* This category consists mainly of CNAs in long-term care facilities. HERNÁNDEZ-MEDINA ET AL., *supra* note 25, at 2 n.5.

38. WRIGHT, *supra* note 26, at 1–2.

39. *See id.* at 2.

40. Pillemer & Lachs, *supra* note 14, at 299.

41. Bassen, *supra* note 11, at 184; Jennifer Marciano, *Mandatory Criminal Background Checks of Those Caring for Elders: Preventing and Eliminating Abuse in Nursing Homes*, 9 *ELDER L.J.* 203, 211 (2001) (noting that overworked CNAs cannot complete all required tasks, so residents are often neglected).

B. Elder Abuse

Elder abuse consists of the “physical, sexual, psychological, or financial abuse of the elderly.”⁴² Physical abuse includes hitting, slapping, kicking, pinching, and biting.⁴³ Psychological or emotional abuse includes “malicious oral, written, or gestured language” that may be “ridiculing, derogatory, humiliating, harassing, or threatening.”⁴⁴ Elderly patients may also suffer from neglect, which is the “failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.”⁴⁵ Other common forms of abuse or neglect include misuse of restraints and misappropriation of property.⁴⁶ Elder abuse and neglect in long-term care facilities frequently comes at the hands of nursing home staff, medical personnel, other patients, and family or visitors.⁴⁷ Because the nursing staff has direct patient access and CNAs act as primary caregivers to the residents, these employees are responsible for most forms of abuse.⁴⁸

C. History of Laws Meant to End Elder Abuse

Laws designed to curb elder abuse have been proposed and implemented, but comprehensive federal legislation has been slow in coming.⁴⁹ Professional forms of long-term care such as nursing homes originated in 1935 with the Social Security Act and continued with the development of Medicare and Medicaid in 1965.⁵⁰ In 1987, Congress passed the Nursing Home Reform Act (NHRA) as a part of the Omnibus Budget Reconciliation Act of 1987 to counter widespread abuse,

42. *Id.* at 209 (footnotes omitted); *see also* 42 C.F.R. § 488.301 (2010) (defining elder abuse as “the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish”).

43. Marciano, *supra* note 41, at 210.

44. *Id.* For more details about the variety of elder abuse and neglect as well as the warning signs, see *What is Elder Abuse?*, ADMIN. ON AGING (Oct. 8, 2009, 12:47 PM), http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/EA_Prevention/whatIsEA.aspx.

45. 42 C.F.R. § 488.301.

46. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., RESIDENT ABUSE IN NURSING HOMES: UNDERSTANDING AND PREVENTING ABUSE 8 fig.3 (1990) [hereinafter RESIDENT ABUSE IN NURSING HOMES], *available at* <http://oig.hhs.gov/oei/reports/oei-06-88-00360.pdf>.

47. *Id.* at 15 fig.8.

48. *Id.* at 14.

49. Bassen, *supra* note 11, at 194 (“While Congress has held hearings for over twenty-five years attempting to address elder abuse, no bill has been passed that provides adequate protection for the elderly.”).

50. Marciano, *supra* note 41, at 207; Pillemer & Lachs, *supra* note 14, at 294.

neglect, and inadequate care in nursing homes.⁵¹ The NHRA requires nursing homes to make certain services available, guarantees nursing home residents certain rights, and can impose sanctions on nursing homes for failure to comply with these requirements.⁵² In the late 1990s, several groups performed studies to determine why many nursing homes provided substandard care and put their residents at risk.⁵³ These studies identified problems in the nursing home enforcement system, and in 1998, President Clinton announced the Nursing Home Initiative to counteract enforcement problems.⁵⁴ The Initiative requires staggered nursing home inspections, more frequent inspections for repeat offenders, immediate sanctions for second offenders, and the availability of civil monetary penalties for each violation.⁵⁵ The Initiative also facilitates investigation of complaints by speeding up the process.⁵⁶

Piecemeal attempts have been made through the federal government and within individual states to improve upon the standards detailed in the NHRA and to fill in the gaps leading to inadequate nursing home care. The federal government requires states to establish nurse-aide registries that publicly list information about CNAs.⁵⁷ These listings include any training undergone; competency evaluations completed; and findings of abuse, neglect, or misappropriation of property.⁵⁸ Findings may vary from informal findings by state agencies to criminal convictions for resident abuse and neglect.⁵⁹

Other federal laws address elder abuse from different angles by funding state programs that create community resources for the elderly. Congress passed the Older Americans Act in 1965 to create and

51. Martin Klauber & Bernadette Wright, *The 1987 Nursing Home Reform Act*, AARP PUB. POL'Y INST. (Feb. 2001), http://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html.

52. *Id.* Services include: "periodic assessments for each resident[,] a comprehensive care plan for each resident[,] nursing services[.]" and many others. *Id.* Residents' rights include: "freedom from abuse, mistreatment, and neglect"; "freedom from physical restraints"; privacy; "to be treated with dignity"; and many others. *Id.*

53. Bernadette Wright, *Federal and State Enforcement of the 1987 Nursing Home Reform Act*, AARP PUB. POL'Y INST. (Feb. 2001), http://www.aarp.org/home-garden/livable-communities/info-2001/federal_and_state_enforcement_of_the_1987_nursing_home_reform_act.html.

54. *Id.*

55. *Id.*

56. Marciano, *supra* note 41, at 208.

57. Requirements for Nursing Facilities, 42 U.S.C. § 1396r(e)(2) (2006).

58. *Id.*

59. Marciano, *supra* note 41, at 219.

implement community social services for the elderly.⁶⁰ One aspect of this legislation includes protection of vulnerable elders through Adult Protective Services and the Long-Term Care Ombudsman Program.⁶¹ Adult Protective Services investigates incidents of abuse and arranges for services to protect elderly victims.⁶² The Long-Term Care Ombudsman Program also investigates elder abuse, specifically in nursing homes, board and care homes, assisted living facilities, and other adult care facilities.⁶³ The ombudspersons work to resolve individual complaints and to make changes at the local, state, and national levels.⁶⁴ The Elder Justice Act—proposed for seven years and finally passed as a part of the Affordable Care Act in 2010—builds on the Older Americans Act.⁶⁵ The Elder Justice Act provides federal resources to states so that states can create an infrastructure to “prevent, detect, treat, understand, intervene in and, where appropriate, prosecute elder abuse, neglect and exploitation.”⁶⁶ It also increases funding for Adult Protective Services and the Long-Term Care Ombudsman Program.⁶⁷

Individual states have also attempted piecemeal legislation to protect nursing home residents. Many states designed their own certification procedures for CNAs that increase the number of training hours above the number mandated by the federal government.⁶⁸ In-

60. *Older Americans Act*, ADMIN. ON AGING (Dec. 27, 2010, 10:20 PM), http://www.aoa.gov/aoaroot/aoa_programs/oaa/index.aspx.

61. *Elder Rights Protection: What If I Suspect Abuse, Neglect, or Exploitation?*, ADMIN. ON AGING (Nov. 9, 2010, 3:29 PM), http://www.aoa.gov/aoaroot/aoa_programs/elder_rights/EA_Prevention/WhatToDo.aspx.

62. *Id.*

63. *Elder Rights Protection: Long-Term Care Ombudsman Program (OAA, Title VII, Chapter 2, Sections 711/712)*, ADMIN. ON AGING (Oct. 21, 2011, 2:33 PM), http://www.aoa.gov/aoaroot/AoA_Programs/Elder_Rights/Ombudsman/index.aspx.

64. *Id.*

65. *Nursing Home Transparency, Elder Justice Act Swept into Law with Health Care Reform Bill*, NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE (Mar. 26, 2010), <http://www.theconsumervoice.org/node/302>.

66. *Elder Justice Act*, NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, <http://www.theconsumervoice.org/advocate/issueindex/featuredissues/elderjusticeact> (last visited Jan. 28, 2012).

67. Press Release, The Elder Justice Coal., Elder Justice Bill Clears Congress, Obama to Sign into Law (Mar. 22, 2010), available at <http://www.theconsumervoice.org/sites/default/files/advocate/action-center/Elder-Justice-Coalition-March%2022-2010.pdf>.

68. Marciano, *supra* note 41, at 218. As of 2001, New York required 100 hours of training while the federal minimum is 75 hours of training. *Id.* As of 2004, Delaware and Oregon required 150 hours of training; Alaska required 140 hours; and Arizona, Florida, Idaho, Virginia, and West Virginia each required 120 hours.

creased training should equate to better care because lack of training factors heavily into elder abuse and neglect by causing stress to the CNA and unsafe situations for the residents.⁶⁹ Each state may also choose to mandate intra-state criminal background checks for CNAs and other health care workers.⁷⁰ As of 2001, thirty-three states required statewide criminal background checks on CNAs,⁷¹ and as of 2004, forty states required similar background checks.⁷² In a March 2011 study, the Department of Health and Human Services Office of the Inspector General (OIG) found that most states required some type of background check, but eight states still do not have a background check requirement for workers in long-term care facilities.⁷³ In addition, states vary with respect to which employees they check—CNAs, CNAs and licensed nurses, or all staff.⁷⁴

With the shortage of workers, growing elder population, and prevalence of elder abuse, long-term care facilities require stronger measures to protect their defenseless residents from abuse and exploitation.

LONG TERM CARE CMTY. COAL. (LTCCC), CERTIFIED NURSE AIDE SCREENING AND CONTINUING EDUCATION: A NATIONAL SURVEY OF STATE REQUIREMENTS WITH RECOMMENDATIONS FOR IMPROVEMENTS 7 (2004), available at <http://www.ltccc.org/publications/documents/CNAReqmtsApril2004.pdf>.

69. Bassen, *supra* note 11, at 184.

70. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., NURSING FACILITIES' EMPLOYMENT OF INDIVIDUALS WITH CRIMINAL CONVICTIONS, at ii (2011) [hereinafter EMPLOYEES WITH CRIMINAL CONVICTIONS], available at <http://oig.hhs.gov/oei/reports/oei-07-09-00110.pdf> (noting that there is no federal requirement for nursing facilities to conduct criminal background checks).

71. Marciano, *supra* note 41, at 219 (proposing a national network of mandatory criminal background checks for long-term care facility employees two years before the MMA pilot program and nine years before the passage of section 6201 of ACA).

72. LTCCC, *supra* note 68, at 7.

73. EMPLOYEES WITH CRIMINAL CONVICTIONS, *supra* note 70, at 3 tbl.1 (noting that ten states require FBI and statewide background checks: AK, AZ, DE, ID, MI, MS, NM, NV, NY, and TN; thirty-three states require just the statewide background check: AR, CA, DC, FL, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MN, MO, NE, NH, NJ, NC, OH, OK, OR, PA, RI, SC, TX, UT, VA, VT, WA, WV, WI; and eight states have no background check requirement: AL, CO, CT, HI, MT, ND, SD, WY).

74. *See id.* at 16.

III. Analysis

A. The 2003 MMA Pilot Program

Senator Herb Kohl (D-WI) introduced the Patient Safety and Abuse Prevention Act (PSAPA) at each session of Congress from 1997 through 2009.⁷⁵ He and the members of the Senate Committee on Aging designed the PSAPA to set up a nationwide program of background checks on direct patient access employees in long-term care facilities.⁷⁶ Senator Kohl has diligently attempted to pass this legislation because of the vulnerability and frailty of the elderly population and his strong desire to protect that population from abuse and exploitation.⁷⁷

The PSAPA finally received a trial run in 2003 in the form of a three-year pilot program under Section 307 of the Medicare Prescription Drug Improvement and Modernization Act (MMA).⁷⁸ Seven states received funding to participate: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin.⁷⁹ The Centers for Medicare and Medicaid Services (CMS) ran the pilot program from January 2005 to September 2007.⁸⁰ The program required participating states to run a battery of name-based checks in state abuse registries and state criminal databases as well as a national fingerprint check.⁸¹ These procedures are described in more detail *infra* Section III.C.

Over the course of the three-year pilot program, the checks disqualified over 7,000 applicants for direct patient access positions at long-term care facilities.⁸² These applicants either had a history of

75. STAFF OF S. SPECIAL COMM. ON AGING, 110TH CONG., BUILDING ON SUCCESS: LESSONS LEARNED FROM THE FEDERAL BACKGROUND CHECK PILOT PROGRAM FOR LONG-TERM CARE WORKERS 15–16 fig.5 (2008) [hereinafter BUILDING ON SUCCESS] (according to the table, Senator Kohl attempted to pass PSAPA each session of Congress from the 105th through the 111th).

76. *Issues: The Patient Safety and Abuse Prevention Act*, S. SPECIAL COMM. ON AGING, http://aging.senate.gov/issues/elderfraud/patient_abuse_prevention.cfm (last visited Jan. 28, 2012).

77. See Press Release, S. Special Comm. on Aging, Senators Introduce Bill to Protect Elderly from Predators in the Long-Term Care Workforce (March 18, 2009), available at <http://aging.senate.gov/record.cfm?id=309994>.

78. BUILDING ON SUCCESS, *supra* note 75, at 17.

79. *Id.*

80. *Id.*

81. MMA, Pub. L. No. 108-173, § 307(b)(2), 117 Stat. 2066, 2257.

82. *Issues: The Patient Safety and Abuse Prevention Act*, *supra* note 76.

abuse against the elderly or a history of violent crimes.⁸³ The Senate Committee on Aging declared the pilot program a huge success, noting that all seven pilot program states voluntarily decided to continue the program at their own expense.⁸⁴

1. PRE-PILOT PROGRAMS

Each of the seven states entered the pilot program with some type of background check program already in place.⁸⁵ The pre-pilot programs varied by state, but the states designed them to protect children and vulnerable adults and to centralize and organize the process of performing background checks.⁸⁶ For example, Illinois instituted the Health Care Worker Background Check Act (HCWBCA) in 1995, which required name-based checks on certain types of potential health care employees.⁸⁷ These employees fell under the generic title “nurse aides,” which included home health care aides, nurse aides, personal care assistants, private duty nurse aides, student nurses, day training personnel, and other employees in similar health-related occupations.⁸⁸ The HCWBCA required that background check information be entered into the Illinois Nurse Aide Registry and that the information be updated if the information was more than one year old when checked by a potential employer.⁸⁹ The HCWBCA applied to a specified list of health care employers, including community living facilities, life care facilities, long-term care facilities, and home health agencies among others.⁹⁰ The pilot program under Section 307 was designed to be flexible so that it would build on and enhance each state’s pre-pilot background check program.⁹¹

83. *Id.* (noting that the pilot program “prevented more than 7,000 applicants with a history of substantiated abuse or a violent criminal record from working with and preying upon frail elders and individuals with disabilities in long-term care settings”).

84. *Id.*

85. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 7.

86. *Id.* at 8.

87. *See generally* 225 ILL. COMP. STAT. 46 (1995).

88. *Id.* § 10.

89. *Id.* § 30(a)–(b).

90. *Id.* § 15.

91. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 12.

2. FACILITIES COVERED BY THE PILOT PROGRAM

Although all the states involved already performed background checks for some types of nursing facilities,⁹² section 307 mandated coverage over a specified list of long-term care facilities or providers.⁹³ Under section 307(g)(5)(A), a long-term care facility or provider is defined as: skilled nursing facilities, nursing facilities, home health agencies, providers of hospice care, long-term care hospitals, providers of personal care services, residential care providers, and intermediate care facilities for the mentally retarded (ICF/MR).⁹⁴ Section 307 also allowed states to expand the list to include any other facilities or providers of long-term care services.⁹⁵ During the pilot program, Illinois performed background checks on employees in four types of facilities: skilled nursing facilities, intermediate care facilities for people with mental retardation (ICF/MR), home health agencies, and hospitals with long-term care units or swing beds.⁹⁶ Michigan included group homes, homes for the aged, and hospice facilities among others.⁹⁷ Alaska performed background checks on a wide variety of facilities including personal care agencies, residential child care, treatment and recovery facilities, respite care, ambulatory surgical centers, outpatient physical therapy facilities, direct entry midwifery centers, free-standing birth centers, and foster homes among others.⁹⁸ These wide variations in the types of facilities covered likely come from the state programs that were in place before the implementation of section 307.⁹⁹

3. EMPLOYEES CHECKED BY THE PILOT PROGRAM

As with the facilities, each state chose which types of employees it wanted to check in its pre-pilot program. In Illinois, the pre-pilot program under the HCWBCA covered certain types of direct care workers, but it did not require background checks for licensed individuals.¹⁰⁰ Section 307 required background checks on the broad

92. *Id.*

93. MMA, Pub. L. No. 108-173, § 307(g)(5)(A), 117 Stat. 2066, 2261.

94. *Id.*

95. *Id.* § 307(g)(5)(B), 117 Stat. 2066, 2261–62.

96. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 190 tbl.7.16.

97. *Id.* at 195 tbl.7.22.

98. *Id.* at 182 tbl.7.5.

99. *Id.* at 7–8.

100. *Id.* at 41.

group of “direct patient access” employees.¹⁰¹ Direct patient access employees are defined as “any individual (other than a volunteer) that has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider, as determined by a participating State for purposes of conducting the pilot program in such State.”¹⁰² During the pilot program, Illinois performed background checks on CNAs, kitchen workers, personal care workers, cleaners, wait staff, clerical workers, janitors, physical therapists, and many others—just as it had before the pilot program.¹⁰³ Additionally, the legislature amended the HCWBCA to include licensed professionals to comply with section 307, so Illinois also performed background checks on registered nurses and licensed practical and vocational nurses.¹⁰⁴

B. Results of the Pilot Program

Part of section 307 required CMS to supervise an evaluation to review procedures, assess costs, examine benefits and concerns, determine whether unintended consequences with respect to the size of the workforce might result, and evaluate the effectiveness of the background checks.¹⁰⁵ Although the pilot states each had their own procedures for implementing the program and compiling data, CMS standardized the data elements to measure the outcome of the background checks across the seven states.¹⁰⁶ Of the 204,339 background checks completed and submitted to CMS between April 2006 and September 2007, 7,463 prospective or current employees were disqualified (3.7%).¹⁰⁷ An additional 269 prospective or current employees were initially disqualified but were cleared after the states’ appeals processes.¹⁰⁸ Twenty-four of these were cleared because the appeals process

101. MMA, Pub. L. No. 108-173, § 307(b)(1), 117 Stat. 2066, 2257.

102. *Id.* § 307(g)(4), 117 Stat. 2066, 2261.

103. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 191 tbl.7.17.

104. *Id.* at 42, 191 tbl.7.17.

105. MMA, Pub. L. No. 108-173, § 307(e), 117 Stat. 2066, 2260.

106. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 177.

107. *Id.* at 208 tbl.7.38.

108. *See id.* at 208 tbl.7.38 (describing the appeals process as either rehabilitation review or an appeal based on errors in the criminal record).

uncovered an error in the criminal records.¹⁰⁹ The remaining 245 were cleared after a program of rehabilitation review.¹¹⁰

In addition, 38,400 prospective or current employees voluntarily withdrew from the hiring process (18.8%).¹¹¹ As demonstrated by Alaska's report, states' pools of voluntary withdrawals generally included: prospective employees who failed to complete authorization or disclosure forms, those who failed to submit fingerprints, and those who withdrew while the background check was pending.¹¹² This report seemed to indicate that a thorough screening process not only disqualifies those with a criminal background or history of abuse but may also deter others with similar backgrounds from applying or may encourage their voluntary withdrawal.¹¹³

The CMS evaluation, however, could not quantitatively address whether a national background check program would reduce elder abuse because the states participating in the pilot program did not include data related to abuse, neglect, and misappropriation of property.¹¹⁴ The link between removing certain people from employment in long-term care facilities and an actual reduction in incidence of elder abuse cannot be verified by this study.

CMS did, however, implement a qualitative survey, which seemed to indicate that stakeholders—those in charge of long-term care facilities—felt that the background check program protected residents by “weed[ing] out the bad people.”¹¹⁵ Some stakeholders complained that the process was time-consuming and costly or that the fingerprint check added nothing to the already comprehensive name-based checks.¹¹⁶ One stakeholder, however, commented: “If you get one hit, it's worth it.”¹¹⁷

CMS also surveyed the stakeholders to determine what they thought about unintended consequences of the checks; for example, a possible reduction in the long-term care workforce.¹¹⁸ Most stakeholders felt that the background check requirement did not deter qualified workers from entering the long-term care workforce because

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 178.

113. *Id.* at 227.

114. *Id.* at 224.

115. *Id.* at 224–25.

116. *Id.* at 226–27.

117. *Id.* at 226.

118. *Id.* at 227–28.

most workers are aware that states have a name-based background check requirement and the fingerprint-based check did not add much of an extra burden.¹¹⁹

C. The 2010 ACA Nationwide Program Under Section 6201

Finally, in 2010, the Patient Safety and Abuse Prevention Act (PSAPA) was folded into section 6201 of the new health care bill: the Affordable Care Act.¹²⁰ Sponsored by Senator Kohl and added to the ACA by Senator Debbie Stabenow (D-MI), section 6201 expanded the pilot program into a nationwide program of background checks for direct patient access employees in long-term care facilities.¹²¹

1. CHANGES FROM THE PILOT PROGRAM

The nationwide program retains essentially the same structure as the pilot program under section 307 of the MMA.¹²² States that did not originally participate in the pilot program can join by agreeing to conduct background checks that fulfill the requirements of the program,¹²³ and the previously participating states will continue to use the programs they implemented during the pilot period.¹²⁴ The states must partially self-fund the program to receive federal matching funds of three times the amount the state provides.¹²⁵ Section 6201 still covers all the same long-term care facilities and providers as the pilot program, only adding providers of adult day care to the list.¹²⁶ Further, the provision that allows participating states to add any provider of long-term care services that they want and can afford to cover

119. *See id.*

120. *See Nursing Home Transparency, Elder Justice Act Swept into Law with Health Care Reform Bill*, *supra* note 65. *See generally* ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 721–27 (2010) (to be codified at 42 U.S.C. § 1320a-7l).

121. *Nursing Home Transparency, Elder Justice Act Swept into Law with Health Care Reform Bill*, *supra* note 65; *see* ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 721 (to be codified at 42 U.S.C. § 1320a-7l(a)).

122. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 721 (to be codified at 42 U.S.C. § 1320a-7l(a)). *See generally* MMA, Pub. L. No. 108-173, § 307, 117 Stat. 2066, 2257.

123. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 722 (to be codified at 42 U.S.C. § 1320a-7l(a)(1)(A)).

124. *Id.* § 6201, 124 Stat. 119, 722 (to be codified at 42 U.S.C. § 1320a-7l(a)(1)(B)).

125. *Id.* § 6201, 124 Stat. 119, 724–25 (to be codified at 42 U.S.C. § 1320a-7l(a)(5)) (capping the match for newly participating states at \$3 million and for previously participating states at \$1.5 million).

126. *Compare id.* § 6201, 124 Stat. 119, 725–26 (to be codified at 42 U.S.C. § 1320a-7l(a)(6)(E)), *with* MMA, Pub. L. No. 108-173, § 307(g)(5)(A), 117 Stat. 2066, 2261.

did not change.¹²⁷ The only major change to the definition of a “direct patient access” employee clarifies that these individuals have “duties that involve (or may involve) one-on-one contact with a patient or resident of the facility or provider.”¹²⁸

2. DISQUALIFYING INFORMATION

Under the program’s requirements, each state must provide mechanisms for performing a battery of background checks on current or prospective employees that look for disqualifying information.¹²⁹ Disqualifying information can be either a “conviction for a relevant crime” or a “finding of patient or resident abuse.”¹³⁰

A conviction for a relevant crime includes any federal or state criminal conviction for a specified set of offenses.¹³¹ Listed in the Social Security Act, these specified offenses include convictions for program-related crimes, convictions related to patient abuse, felony convictions relating to health care fraud, and felony convictions relating to controlled substances.¹³² A relevant crime can also be any other offense that the individual state wants to add to its list of relevant

127. Compare ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 726 (to be codified at 42 U.S.C. § 1320a-7l(a)(6)(E)(x)), with MMA, Pub. L. No. 108-173, § 307(g)(5)(B), 117 Stat. 2066, 2261–62.

128. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 725 (to be codified at 42 U.S.C. § 1320a-7l(a)(6)(D)).

129. *Id.* § 6201, 124 Stat. 119, 722 (to be codified at 42 U.S.C. § 1320a-7l(a)(3)(A)).

130. *Id.* § 6201, 124 Stat. 119, 725 (to be codified at 42 U.S.C. § 1320a-7l(a)(6)(B)).

131. *Id.* § 6201, 124 Stat. 119, 725 (to be codified at 42 U.S.C. § 1320a-7l(a)(6)(A)) (noting that the specified offenses are listed in the Social Security Act (42 U.S.C. § 1320a-7 (2006))).

132. Social Security Act, 42 U.S.C. § 1320a-7(a) (describing the types of offenses that would result in mandatory exclusion if these convictions were found in the employee’s background check). The Social Security Act also provides for permissive exclusion in which the individual *may* be excluded with the following disqualifying information in his or her background check: convictions relating to fraud; convictions relating to obstruction of an investigation or audit; misdemeanor convictions relating to controlled substances; license revocations or suspensions; exclusions or suspensions under federal or state health care programs; claims for excessive charges or unnecessary services; fraud, kickbacks, and other prohibited activities; entities controlled by a sanctioned individual; failure to disclose required information; failure to supply requested information on subcontractors and suppliers; failure to supply payment information; failure to grant immediate access; failure to take corrective action; default on health education loan or scholarship obligations; individuals controlling a sanctioned entity; and making false statements or misrepresentation of material facts. *Id.* § 1320a-7(b)(1)–(16). Because the mandatory and permissive exclusions in the Social Security Act are meant to exclude individuals *and* entities from participating in any federal health care program, the categories are likely broader than what would be necessary to exclude employees from working in long-term care facilities under the ACA. See *id.* § 1320a-7(a)–(b).

crimes.¹³³ For example, Illinois's list of disqualifying offenses during the pilot program included murder-related offenses, sexual assault, battery, abuse, neglect, theft, financial exploitation, forgery, pretending to be a nurse, and controlled substance offenses.¹³⁴ In addition, Illinois excluded employees with kidnapping, child sexual offenses, home invasion, ritual mutilation, forgery, arson, receiving stolen credit cards, unlawful use of weapons, and food tampering in their background checks.¹³⁵

Each state also assigned each crime an expiration date for when the prior conviction would no longer exclude the individual from health care employment.¹³⁶ For example, murder-related offenses, aggravated battery, criminal sexual assault, and abuse or gross neglect of a long-term care facility resident all result in a lifetime ban in Illinois.¹³⁷ Many crimes have a disqualifying effect that lasts five years from the date of conviction, including financial identity theft, burglary, reckless discharge of a firearm, and receiving stolen credit cards.¹³⁸ Illinois also allowed certain crimes to disqualify a potential employee for only one year from the date of conviction, including misdemeanor unlawful use of a weapon, misdemeanor aggravated assault, and pretending to be a nurse.¹³⁹ Because the pilot program allowed states to experiment with different methods, each state chose a different arrangement of expiration dates.¹⁴⁰ In New Mexico, for example, all relevant crimes result in a lifetime ban such that no crime listed in its relevant crime matrix has an expiration date.¹⁴¹

Disqualifying information also includes a finding of patient or resident abuse. A finding of patient or resident abuse must be a substantiated finding by a federal or state agency that the employee has

133. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 725 (to be codified at 42 U.S.C. § 1320a-7l(a)(6)(A)).

134. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 114.

135. *Id.*

136. BUILDING ON SUCCESS, *supra* note 75, at app. B 51-56.

137. *Id.* at app. B 53.

138. *Id.* at app. B 54.

139. *Id.*

140. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 9 (noting that the seven pilot states "varied with respect to whether disqualifying convictions resulted [in] a lifetime or time-limited ban on employment").

141. BUILDING ON SUCCESS, *supra* note 75, at app. B 51.

committed abuse, neglect, or misappropriation or any other act that the state wants to add to the list of patient or resident abuse.¹⁴²

3. MAIN FEATURES OF SECTION 6201: BACKGROUND CHECKS AND A “RAP BACK” PROCEDURE

The main feature of the section 6201 background check program requires the long-term care facility to obtain state and national criminal history background checks by completing a full complement of background investigations.¹⁴³ These investigations include name-based checks into the state’s abuse and neglect databases as well as the abuse and neglect databases of any state where the employee previously resided.¹⁴⁴ Further, long-term care facilities must check the state’s criminal history records.¹⁴⁵ The program also requires a name-based check for disqualifying information stemming from informal proceedings through state agencies.¹⁴⁶ Finally, the investigation concludes with a fingerprint check using the Federal Bureau of Investigation’s (FBI) Integrated Automated Fingerprint Identification System to identify any federal criminal history records.¹⁴⁷

The other main feature of section 6201 requires the states to experiment with “rap back” procedures to reduce duplicative background checks.¹⁴⁸ The program would not be as efficient and cost-effective if the employees had to be re-checked periodically to update the background information. Section 6201 does not prescribe a specific procedure but suggests that states test methods that would allow state law enforcement agencies to quickly and efficiently notify the long-term care facility of any new violations by an employee after the facility conducts the initial criminal background check.¹⁴⁹

The background check process seems extremely comprehensive and should, as stakeholders indicated after the pilot program, “weed out the bad people.”¹⁵⁰ Before the passage of section 6201 many states,

142. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 725 (2010) (to be codified at 42 U.S.C. § 1320a-7l(a)(6)(C)).

143. *Id.* § 6201, 124 Stat. 119, 722 (to be codified at 42 U.S.C. § 1320a-7l(a)(3)(A)).

144. *Id.*

145. *Id.*

146. *Id.* (providing examples such as “proceedings conducted by State professional licensing and disciplinary boards and State Medicaid Fraud Control Units”).

147. *Id.*

148. *Id.* § 6201, 124 Stat. 119, 722–23 (to be codified at 42 U.S.C. § 1320a-7l(a)(3)(B)).

149. *Id.*

150. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 225 (internal citations omitted).

at a maximum, performed a criminal background check¹⁵¹ and an intra-state abuse registry check.¹⁵² Some states, like Alabama and Colorado, did nothing.¹⁵³ Even for states that performed both of these checks, a key feature of section 6201 is the abuse registry check in the employee's state of prior employment. Without this inter-state abuse registry check, employees with a history of abuse in one state could move to another, and the new state's background check would not detect the prior bad acts.¹⁵⁴ Moreover, the "rap back" procedure saves the long-term care facilities time and money in monitoring the status of current employees. Finally, the federal fingerprint check facilitates nationwide criminal background checks. Prior to section 6201, a long-term care facility had to specially request a background check from the FBI, but these requests were rare.¹⁵⁵

The background check's veneer of completeness falls away, however, on closer examination of the individual state abuse registries, and, to a lesser extent, the state and federal criminal history records. The state abuse registries frequently have holes and may not include current or accurate information.¹⁵⁶ During the pilot program, 0.11% of completed background checks resulted in the prospective employee being cleared after rehabilitative review or an appeals process.¹⁵⁷ A total of 115 appeals challenged the background check's ac-

151. Marciano, *supra* note 41, at 219 (stating that as of 2001, thirty-three states required criminal background checks); LTCCC, *supra* note 68, at 7 (stating that as of 2004, forty states required criminal background checks).

152. See Marciano, *supra* note 41, at 224–26. Around 2001, New Jersey relied on the New Jersey Aide Registry, a database for certification information and abuse history of nurses' aides, and Ohio relied on its Nurse Aide Registry with twenty-four hour per day telephone access. *Id.* Florida, however, abolished its requirement that long-term care facilities check potential employees for prior incidents of abuse. *Id.*

153. EMPLOYEES WITH CRIMINAL CONVICTIONS, *supra* note 70, at 3 tbl.1.

154. See *Many Shortcomings Exist in Efforts to Protect Residents from Abuse: Testimony Before the S. Spec. Comm. on Aging*, 107th Cong. 9 (2002) [hereinafter *Many Shortcomings Exist*] (statement of Leslie G. Aronovitz, Director, Health Care, Program Administration and Integrity Issues), available at <http://www.gao.gov/new.items/d02448t.pdf> ("Consequently, individuals who have committed disqualifying crimes—including kidnapping, murder, assault, battery, and forgery—may be able to pass muster for employment by crossing state lines."); see also Marciano, *supra* note 41, at 219 (advocating for a national network of background checks "to ensure that employees who prey upon the elderly in one state are not able to do so elsewhere").

155. *Many Shortcomings Exist*, *supra* note 154, at 9 (statement of Leslie G. Aronovitz).

156. Bassen, *supra* note 11, at 201–02.

157. See EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 208 tbl.7.38.

curacy,¹⁵⁸ and twenty-four of these were cleared.¹⁵⁹ These may seem like small numbers, but keep in mind that the pilot program encompassed only seven states and collected data for only two years. Imagine the number of mistakes that can occur when background checks are done and data is collected across fifty states over a longer period of time. Moreover, many states interpret the CMS definition of abuse differently;¹⁶⁰ an employee who has no history of abuse in one state may have a history of incidents that would be considered abuse in another state. The complexity involved in tracking employees' backgrounds can only increase as states amend their definitions of abuse over the years.

Additionally, gaps in the abuse registries often occur because the process for updating the registry allows the employee accused of abuse to have a hearing to reconsider, which delays the update to the registry by an average of five to seven months.¹⁶¹ Many long-term care facilities also delay reporting abuse to the state agency responsible for updating the registry.¹⁶² During these delays, a CNA can move to another state, find a new direct patient access position, and commit acts of abuse, neglect, or misappropriation.

4. PROVISIONAL EMPLOYMENT AND THE APPEALS PROCESS

The participating states must comply with all the background check requirements in section 6201(a)(3), but they generally have the freedom to design whatever programs they want to meet these requirements and monitor compliance.¹⁶³ Section 6201 requires two further general procedures to round out the background check process: a period of provisional employment and an appeals process.¹⁶⁴

158. The appeals challenged the accuracy of both the state abuse registries and the state and federal criminal background checks. *Id.*

159. *Id.*

160. *Many Shortcomings Exist*, *supra* note 154, at 6 (statement of Leslie G. Aro-novitz) (examining the abuse registries in three states and noting that "incidents not considered abusive in Georgia and Pennsylvania . . . could be considered abusive in Illinois").

161. *Id.* at 10.

162. *Id.* at 11 (examining the abuse registries in three states and noting, "the homes in Pennsylvania notified the state late 60% of the time; in Illinois, late almost half of the time; and in Georgia, late about 40% of the time").

163. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 723 (2010) (to be codified at 42 U.S.C. § 1320a-7l(a)(4)).

164. *Id.* § 6201, 124 Stat. 119, 723 (to be codified at 42 U.S.C. §§ 1320a-7l(a)(4)(B)(iii), (a)(4)(B)(iv)).

Each state must allow a period of provisional employment for sixty days or less while the criminal history background check is completed.¹⁶⁵ Provisional employment is also allowed during the pendency of an appeal as long as the employee is subject to direct on-site supervision.¹⁶⁶ Further, the state must also design an appeals process in which a provisional or regular employee can challenge the accuracy of background check information.¹⁶⁷ Each state may specify criteria under which the appeal is examined, and these criteria must include, “consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual”¹⁶⁸

The allowance for provisional employment and an appeals process provides some much-needed flexibility in a program that otherwise might be unduly harsh. There may be fully qualified employees with disqualifying information revealed through background checks, but for a variety of reasons that information should not disqualify them from working with the elderly.¹⁶⁹ Further, the abuse registries and the criminal history records could be wrong (as discussed *supra* in III.C.3.). The appeals process may allow these employees the opportunity to prove that they are eligible to work in long-term care facilities.

For example, all states in the pilot program allowed prospective employees to appeal the accuracy of the background check information.¹⁷⁰ Also, five of the pilot states used rehabilitation review programs as a part of the appeals process.¹⁷¹ The rehabilitation review procedures varied from state to state but typically consisted of a three-person committee deciding whether the prospective employee posed a risk to patient safety.¹⁷² With the goal of ensuring “that a single rela-

165. *Id.* § 6201, 124 Stat. 119, 723 (to be codified at 42 U.S.C. § 1320a-7l(a)(4)(B)(iii)).

166. *Id.*

167. *Id.* § 6201, 124 Stat. 119, 723 (to be codified at 42 U.S.C. § 1320a-7l(a)(4)(B)(iv)).

168. *Id.*

169. For example, in Nevada, a misdemeanor conviction for skinny dipping is counted as disqualifying information because it was classified as a sexually related crime, thus banning that individual from ever working in health care. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 130.

170. *Id.* at 125.

171. *Id.* at 126.

172. *Id.* at 127.

tively minor mistake not be held against someone for their entire life," the committee usually examined several factors, including: time passed since the crime; employment history; the applicant's age when the crime was committed; any references; and evidence of rehabilitation such as treatment programs, community service, and volunteer work.¹⁷³ Several states also tested a system of time limits for certain crimes such that when a specified amount of time had passed, the applicant was automatically eligible for employment.¹⁷⁴ The rehabilitative review process can be time-consuming, however, and the individualized reviews may be unnecessary if the state implements a reasonable time limits approach.¹⁷⁵ On the other hand, rehabilitative review increases fairness, decreases the workforce shortage, and provides employment opportunities for those who committed crimes when they were young.¹⁷⁶

Provisional employment periods were intended to limit the impact of the background check program on the workforce shortage.¹⁷⁷ The pilot program in section 307 of the MMA did not provide a maximum amount of time for the provisional employment periods and only specified that the time period extend until completion of the background check.¹⁷⁸ Because it could take up to several months for the background checks to be completed, stakeholders reported feeling vulnerable if their state program allowed the provisional employee to work in a direct patient access position during that time period.¹⁷⁹ The sixty-day limit prescribed in section 6201 likely stemmed from this discomfort.

The provisional period can have a positive impact on the workforce shortage by allowing prospective employees to begin work while the background check or appeals process is pending. If potential employees knew that they had to sit at home for up to two months before beginning work, that might discourage them from applying for CNA positions at long-term care facilities.¹⁸⁰ Most stakeholders inter-

173. *Id.*

174. *Id.* at 126.

175. *Id.* at 130.

176. *Id.* at 129.

177. *Id.* at 122.

178. MMA, Pub. L. No. 108-173, § 307(c)(3)(B)(ii)(I), 117 Stat. 2066, 2259.

179. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 123.

180. *Id.* at ii.

An additional 38,400 records were withdrawn prior to a final fitness determination decision. Some of the withdrawals were likely by ap-

viewed after the pilot program liked the flexibility of a provisional employment period.¹⁸¹ A sixty-day provisional period, even if less than the possible time period under the pilot program, remains worrisome, however, because a lot of damage can be done in sixty days. One stakeholder expressed concern about what could be done by a “violent predator” in a week: “That person can scope out the people and the building, notice the jewelry, possessions, come in and clean these people out and disappear.”¹⁸² As Ms. Coldren indicated in her testimony before the Senate Committee on Aging, the man that abused her grandmother had only worked in the facility for a short time. “[A] lot of damage can be done in that time. My [g]randmother’s story is an example of what that time frame can do.”¹⁸³ Although having this comprehensive system of background checks is better than never finding out that an employee has a criminal or abusive history, it is still not comforting to know that a loved one could be cared for by an abuser for up to two months.

Several states in the pilot program attempted to cure this problem by requiring a higher level of supervision during the provisional period.¹⁸⁴ Both provisional and new employees in these states participated in orientation programs, were paired with other CNAs, or were given assignments that did not require one-on-one care with patients in their rooms.¹⁸⁵ These policies increased the safety of the residents during the provisional period, but the expense of training people who might ultimately be disqualified by the background check may make this type of policy unfeasible in practice.¹⁸⁶

The states participating in the pilot program were allowed great flexibility in designing the procedures for provisional employment and the appeals process. The provisional employment programs varied as to when the provisional employment period began, how much supervision the provisional employee required, and whether the pro-

plicants who were deterred from having a background check because they knew that they would be disqualified, however, there is no estimate of numbers, and other withdrawals were likely due to unrelated reasons.

Id.

181. *Id.* at 123.

182. *Id.*

183. *Abuse of Our Elders*, *supra* note 1, at 3–7 (statement of Jennifer Coldren).

184. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 124.

185. *Id.*

186. *Id.*

visional employee could work during an appeal or just during a pending background check.¹⁸⁷ All states allowed appeals on the accuracy of the background check information, but those that had rehabilitation review programs differed as to the types of crimes that could be reviewed, how a prospective employee requested review, how the review was conducted and its time frame, and the factors examined when determining whether the applicant had been rehabilitated.¹⁸⁸ With all of these options, newly participating states can pick and choose which methods will best serve that state's needs while not reducing the size of the workforce, retaining fairness to prospective employees, and maintaining resident safety.

5. OTHER FEATURES

In addition to designing and implementing the programs described above, each state must also designate a single state agency to oversee the entire process.¹⁸⁹ This state agency becomes responsible for coordinating the various background checks, safeguarding the privacy of that background information, reporting information quickly to long-term care facilities, reporting convictions to the national database for health care fraud and abuse,¹⁹⁰ defining which employees are "direct patient access employees," specifying disqualifying offenses, and testing "rap back" procedures to reduce duplicative checks.¹⁹¹

Section 6201 also requires an extensive evaluation process like the one required by section 307 of the MMA.¹⁹² The provision charges the Inspector General of the Department of Health and Human Resources (HHR) with conducting a full evaluation of the nationwide program.¹⁹³ The evaluation examines procedures, assesses costs, and

187. *Id.* at 122–23.

188. *Id.* at 125.

189. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 723–24 (2010) (to be codified at 42 U.S.C. § 1320a-7l(a)(4)(B)(v)).

190. See *The Data Bank: National Practitioner*, HEALTH RESOURCES & SERVICES ADMIN., <http://www.npdb-hipdo.hrsa.gov> (last visited Jan. 29, 2012) (describing the National Practitioner Data Bank (NPDB)—which was established in 1986 under the Healthcare Quality Improvement Act and became operational in 1990—and the Healthcare Integrity and Protection Data Bank (HIPDB)—which was established in 1996 under Section 1128E of the Social Security Act and became operational in March 2000).

191. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 723–24 (2010) (to be codified at 42 U.S.C. § 1320a-7l(a)(4)(B)).

192. *Id.* § 6201, 124 Stat. 119, 726 (to be codified at 42 U.S.C. § 1320a-7l(a)(7)).

193. *Id.* § 6201, 124 Stat. 119, 726 (to be codified at 42 U.S.C. § 1320a-7l(a)(7)(A)(i)).

determines whether unintended consequences with respect to the size of workforce might result.¹⁹⁴ Moreover, the study must evaluate the effectiveness of the background checks with respect to any actual reduction in incidents of elder abuse, neglect, or misappropriation of property.¹⁹⁵ The nationwide program receives funding from 2010 to 2012, and HHR has 180 days to submit the results of the evaluation to Congress.¹⁹⁶

D. Problems with Section 6201

1. POTENTIAL NEGATIVE REPERCUSSIONS

As the evaluation of the pilot program showed, a comprehensive set of background checks will prevent those with a history of criminal convictions or abuse from working in direct patient access positions in long-term care facilities. It seems likely, although it has not been proven quantitatively, that eliminating these people from the health care workforce will lead to a reduction in elder abuse. At the very least, the program provides peace of mind for those in charge at long-term care facilities.¹⁹⁷

On the other hand, a background check program must necessarily be under-inclusive because it only weeds out the people with bad backgrounds. It cannot predict which employees may in the future commit elder abuse, neglect, or misappropriation of property. The background check program may lead to a false sense of security, preventing long-term care facilities from keeping a close enough watch on its employees.

The program also runs the risk of being over-inclusive by preventing fully qualified prospective employees from working when they have a criminal history, no matter how inconsequential or unrelated the prior convictions are to working with the elderly. The provisional employment period and appeals process go a long way to pro-

194. *Id.* § 6201, 124 Stat. 119, 726 (to be codified at 42 U.S.C. § 1320a-71(a)(7)(A)(ii)).

195. *Id.* § 6201, 124 Stat. 119, 726 (to be codified at 42 U.S.C. § 1320a-71(a)(7)(A)(ii)(IV)).

196. *Id.* § 6201, 124 Stat. 119, 727 (to be codified at 42 U.S.C. §§ 1320a-71(b)(1) & (a)(7)(B)).

197. See EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 225–26. Several stakeholders responded positively about the pilot program: “(The program) provides a level of screening (not protection, but screening), due diligence, peace of mind.” *Id.* “(Background checks) provide a sense of security for customers.” *Id.*

vide flexibility for these individuals, especially if the state provides not only an appeal for an incorrect background check but also a system for rehabilitative review. In addition, the one-year, five-year, and ten-year expiration dates for different types of crimes offer prospective employees an opportunity to work in health care provided they can wait out the expiration period. Even with the flexibility built-in to provisional employment, the appeals process, and the expiration dates, these background checks under section 6201 may still have some negative repercussions. Because CNAs are not required to have a high level of education,¹⁹⁸ these workers may find it difficult to get other jobs if they are prohibited from working in long-term care facilities. The long-term care facilities will have continuing difficulty finding employees because of the workforce shortage.¹⁹⁹ Fewer CNAs means a more difficult job for the entire staff at a long-term care facility, which in turn lowers the quality of care for patients and residents.²⁰⁰

Nevertheless, it pays to err on the side of caution, especially given the frailty and vulnerability of the elderly population. Possible side effects on disqualified applicants and on the size of the workforce can be overlooked if the net result is fewer incidents of elder abuse. Moreover, an increasingly stringent process of employee review may discourage potential abusers from applying.

2. NO PROTECTION FROM OTHER RESIDENTS

Long-term care facilities increasingly house younger people (persons age twenty-two to sixty-four) with mental illnesses who may pose a threat to the elderly population in these institutions.²⁰¹ Section 6201 only addresses direct patient access employees and does not help

198. Pillemer & Lachs, *supra* note 14, at 297.

199. *Id.* at 294.

200. Marciano, *supra* note 41, at 211. "Due to the shortage of nurses' aides, workers are often forced to 'choose between feeding one patient, changing a second, or bathing a third.'" *Id.* (internal citations omitted).

201. Marx & Jackson, *supra* note 13. Although Illinois may be an outlier with much higher numbers, many of its nursing homes "house younger adults with mental illness, including thousands of felons." *Id.* These younger residents are responsible for countless violent assaults on the elderly residents despite being required to undergo background checks and psychological screenings before being intermingled with the elderly population. *Id.*

screen fellow patients who may also be a significant source of abuse.²⁰²

In the 1960s many states closed their mental hospitals.²⁰³ During the next several decades, a variety of legislation and court decisions granted greater resources to the disabled and mentally ill for either private care or to maintain autonomy by being allowed to live in community-integrated settings.²⁰⁴ This process of deinstitutionalization led many states to move mentally ill residents of all ages into nursing homes rather than trying to implement community-based treatment for these patients.²⁰⁵ Although most deinstitutionalized patients moved to nursing homes, the rest went to group homes, jails, juvenile detention facilities, or ended up homeless.²⁰⁶

The estimated number of mentally ill patients in nursing homes is nearly impossible to determine, and the OIG refers to this group as an "unidentified population."²⁰⁷ The OIG estimated that in 1995, nursing homes contained approximately 12,000 younger mentally ill residents.²⁰⁸ In a 2001 study, the OIG carefully examined conflicting sets of data that counted anywhere from 5,745 to 17,919 of this type of resident.²⁰⁹ The Associated Press commissioned a study by CMS in 2008 that estimated 125,000 younger mentally ill residents were in

202. In a 1990 study by the Office of the Inspector General in which principle entities in thirty-five sample states were interviewed, seventeen percent of respondents believed that other patients are the primary source of physical abuse of long-term care facility residents. RESIDENT ABUSE IN NURSING HOMES, *supra* note 46, 15 fig.8. Moreover, thirteen percent of respondents believed that other patients are the primary source of verbal and emotional abuse and eighteen percent believed that other patients are the primary source of misappropriation of property. *Id.*

203. 'Tragic Results' What Can Happen When the Mentally Ill Live in Nursing Homes, CHI. DAILY HERALD, Mar. 23, 2009, at 3, available at 2009 WLNR 7834992 (noting that this deinstitutionalization occurred for a variety of reasons, including poor conditions, improved drug treatments for the mentally ill, and civil rights lawsuits).

204. NURSING HOME SAFETY TASK FORCE: FINAL REPORT, at iv (2010).

205. *Id.*; 'Tragic Results' What Can Happen When the Mentally Ill Live in Nursing Homes, *supra* note 203.

206. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at iv.

207. See generally OFFICE OF THE INSPECTOR GEN., YOUNGER NURSING FACILITY RESIDENTS WITH MENTAL ILLNESS: AN UNIDENTIFIED POPULATION (2001) [hereinafter YOUNGER NURSING FACILITY RESIDENTS], available at <http://oig.hhs.gov/oei/reports/oei-05-99-00701.pdf>. "We cannot conclusively determine the number of younger nursing facility residents with mental illness." *Id.* at 9.

208. *Id.* at i.

209. *Id.* at ii.

nursing homes nationwide.²¹⁰ Not only are these numbers inconsistent, but these studies only counted the patients in Medicare and Medicaid funded long-term care facilities.

This inability to count the number of younger mentally ill patients occurs at the state level as well. Illinois is an example writ large because its nursing homes contain the highest number of younger mentally ill residents.²¹¹ In 2009, the Illinois Department of Healthcare and Family Services estimated this population at about 14,000 residents.²¹² In 2010, Governor Quinn's Nursing Home Safety Task Force estimated that 22,000 people with serious mental illnesses currently lived in Medicaid-reimbursed nursing homes.²¹³

Because the number of younger mentally ill patients in nursing homes is unclear, it is even more difficult to estimate the amount these residents contribute to elder abuse and neglect. There have been several highly publicized incidents in which younger patients with dementia, depression, bipolar disorder, or a history of violence and aggression started a fire in the nursing home, beat a roommate to death, or raped a fellow resident.²¹⁴ It is important to avoid the misconception that people with mental illnesses have a higher propensity toward violence, and, in fact, these mentally ill residents often suffer from other residents' violent behavior.²¹⁵ The danger to older residents stems from a combination of younger mentally ill patients, patients of all ages with violent backgrounds, inadequate levels of staffing, and inappropriate and inadequate treatment for the spectrum of mentally ill patients placed in the nursing home.²¹⁶

Long-term care facilities do engage in a screening process for their younger mentally ill patients upon entry.²¹⁷ The Omnibus Budget Reconciliation Act of 1987 mandates a psychiatric evaluation for in-

210. Johnson, *supra* note 203.

211. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at xx-xxi (using numbers from a 2009 Associated Press article).

212. Melissa Westphal, *Mental-Health Plan Opts for Homes Over Nursing Homes*, ROCKFORD REGISTER STAR, Apr. 9, 2009, <http://www.rrstar.com/news/x549602414/Program-helps-mentally-ill-with-housing-search>.

213. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at iv.

214. Johnson, *supra* note 203.

215. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at 3.

216. *Id.* at 3, xix-xx. "The combination of younger, active residents with older, frail adults leads to possibilities for violence that could be avoided. This mix of populations becomes more toxic when nursing home residents with mental illness do not receive the care and treatment essential to avoid anti-social behavior." *Id.* at 3.

217. YOUNGER NURSING FACILITY RESIDENTS, *supra* note 207, at 1.

coming residents with a likely mental illness diagnosis under the Pre-admission Screening and Resident Review (PASRR) program.²¹⁸ Some states, including Illinois, provide an extra level of review.²¹⁹ In 2006, Illinois amended its Nursing Home Care Act to include an Identified Offender Program designed to identify incoming residents with prior criminal convictions.²²⁰ The program requires nursing homes to perform a name-based criminal background check within twenty-four hours of a resident's admission.²²¹ If the check identifies the potential resident as an "identified offender,"²²² then the Department of Public Health must perform a Criminal History Analysis.²²³ This analysis examines the resident's criminal and clinical history, and a forensic psychologist then determines that potential patient's risk level to others.²²⁴

Although it is important that these screening processes continue, they must be improved in execution and enforcement. The federal PASRR program has stringent requirements that most long-term care facilities struggle to meet.²²⁵ A 2007 study by the OIG indicated that

218. *Id.* "This process was designed to divert psychiatric patients from nursing facilities and prevent the inappropriate admission and retention of people with mental disabilities, thereby eliminating the use of nursing homes for individuals with chronic mental illness." *Id.* at 2.

All individuals who apply to or reside in Medicaid nursing facilities are required to receive a Level I screen to identify suspected serious mental illness. Those suspected of having serious mental illness must receive a Level II PASRR to confirm that they have serious mental illness, to determine whether they require nursing facility services, and to determine whether they require specialized services.

OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., PREAMMISSION SCREENING AND RESIDENT REVIEW FOR YOUNGER NURSING FACILITY RESIDENTS WITH SERIOUS MENTAL ILLNESS, at i (2007) [hereinafter PREAMMISSION SCREENING AND RESIDENT REVIEW], available at <http://oig.hhs.gov/oei/reports/oei-05-05-00220.pdf>.

219. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at vi.

220. *Id.* at v.

221. 210 ILL. COMP. STAT. 45/2-201.5(b) (2011); NURSING HOME SAFETY TASK FORCE, *supra* note 204, at vii. If the name-based check is inconclusive, the nursing home must perform a fingerprint-based check. *Id.*

222. 210 ILL. COMP. STAT. 45/1-114.01; NURSING HOME SAFETY TASK FORCE, *supra* note 204, at vii (summarizing the definition of an identified offender as a person convicted of a listed felony offense; a registered sex offender; or a person serving a term of parole, mandatory supervised release, or probation for one of the listed felony offenses).

223. 210 ILL. COMP. STAT. 45/2-201.6.

224. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at v.

225. PREAMMISSION SCREENING AND RESIDENT REVIEW, *supra* note 218, at ii. While almost all facilities were able to meet all federal requirements for the Level I screen, only five percent of facilities were able to meet timing and content requirements. *Id.*

nursing homes have difficulty performing the screening process on time, incorporating mental health service recommendations into the resident's care plan, and considering alternative placements other than the nursing home.²²⁶ State programs like Illinois's Identified Offender Program that screen residents' criminal histories suffer from similar flaws as the background check programs for direct care workers: background checks are not initiated or completed in a timely manner, a criminal background check only lists convictions and not arrests or other pertinent information, and there is no database for tracking residents who commit crimes against other residents.²²⁷

3. NO CHECK OF THE NATIONAL ABUSE DATABASES

The Health Resources and Services Administration (HRSA) maintains two practitioner data banks: the National Practitioner Data Bank (NPDB) and the Healthcare Integrity and Protection Data Bank (HIPDB).²²⁸ The NPDB contains information about physicians, dentists, and other health care practitioners such as any adverse licensure actions, clinical privileges actions, professional society membership actions, medical malpractice actions, exclusions from participation in Medicare or Medicaid, and registration actions taken by the U.S. Drug Enforcement Administration.²²⁹ The HIPDB contains information about health care providers, suppliers, or practitioners that relates to fraud or abuse in health insurance or the delivery of health care.²³⁰ The NPDB and HIPDB essentially act as a federal abuse registry, and a recent expansion of the information these databases collect allows hospitals, nursing homes, and other health care organizations access to information about all health care practitioners—including CNAs and other direct care workers.²³¹ The data banks also have a process called Continuous Query similar to the "rap back" procedure required

226. *Id.*

227. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at xviii.

228. *The Data Bank: National Practitioner*, *supra* note 190.

229. HEALTH RES. & SERVS. ADMIN., NPDB GUIDEBOOK D-1 (2001), available at <http://www.npdb-hipdb.hrsa.gov/resources/NPDBGuidebook.pdf>.

230. *Id.*

231. Health Res. & Servs. Admin., *Legislation and Regulations: How Does Section 1921 Affect My Organization?*, DATA BANK, <http://www.npdb-hipdb.hrsa.gov/resources/section1921.jsp> (last visited Jan. 29, 2012) [hereinafter *Legislation and Regulations*] (referring to "nurse aides," a general category that would include CNAs).

by section 6201.²³² Continuous Query allows for continuous querying of the data banks so that a facility will receive a report within twenty-four hours when new information is entered about any of its enrolled employees.²³³

Section 6201 does not require a check of either of these national data banks. While the provision does require long-term care facilities to check a prospective employee's background in states of prior residence,²³⁴ a national abuse registry check would add an extra layer of protection to the checks already being done. Some concerns exist with respect to the completeness and accuracy of these data banks.²³⁵ The NPDB and HIPDB rely on information provided by state agencies and licensing boards, but each state operates differently, which makes consistent reporting difficult.²³⁶ In early 2010, the Health and Human Services Secretary, Kathleen Sebelius, identified these gaps and missing data in the data banks and reached out to non-compliant state agencies.²³⁷ The agencies were given strict deadlines to explain why they were not in compliance and to correct the issues.²³⁸ If the data banks can be brought up to complete compliance, they would be a valuable addition to the section 6201 background check procedure.

IV. Resolution and Recommendation

Section 6201 of the Affordable Care Act provides necessary upgrades to the state background check programs for direct patient access employees in nursing homes that most states had in place prior to its passage. Although all states had different background check programs for CNAs—if they had them at all—a traditional scheme included a name-based, in-state criminal history check and a name-

232. Health Res. & Servs. Admin., *Continuous Query Formerly Known as Proactive Disclosure Service (PDS), DATA BANK*, <http://www.npdb-hipdb.hrsa.gov/hcorg/pds.jsp> (last visited Jan. 29, 2012).

233. *Id.*

234. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 722 (2010) (to be codified at 42 U.S.C. § 1320a-7l(a)(3)(A)).

235. Charles Ornstein & Tracy Weber, *Inept Caregivers Slip Past Net*, CHI. TRIB., Feb. 22, 2010, <http://www.chicagotribune.com/health/chi-caregiver-database-100222-story,0,3221930,print.story> (declaring the data banks “dangerously incomplete” and “most likely missing thousands of serious disciplinary actions against health providers in the last decade”).

236. *Id.*

237. Health Res. & Servs. Admin., *Reporting: About Reporting Compliance, DATA BANK*, <http://www.npdb-hipdb.hrsa.gov/news/reportingComplianceBackground.jsp> (last visited Jan. 29, 2012).

238. *Id.*

based, in-state abuse registry check. The traditional program was non-comprehensive, slow, and unwieldy. Several features of section 6201 greatly enhance the traditional background check program by making it more comprehensive, faster, and agile. Participating states must now perform criminal history and abuse registry checks in all states of the prospective employee's prior employment. Also, the states must perform an FBI fingerprint check when it was only available upon request before. The "rap back" program and the maximum sixty-day period for provisional employment improve the timeliness and responsiveness of the program.

Although there is a concern that these tightened strictures may increase the direct care worker shortage by making many potential workers ineligible, several of section 6201's provisions provide flexibility for these workers. The provisional employment period allows potential employees to start work while the background check is pending, the appeals process allows potential employees to correct mistakes in the criminal history and abuse registry databases, and many states have a matrix of expiration dates so that certain crimes do not result in a lifetime ban.

Section 6201 does not guarantee perfect results. Criminal history and abuse registry databases can be wrong or incomplete. Long-term care facilities still struggle to complete background checks in a timely manner. In addition, individual states design their own programs, which—if these programs are not very good—means that other states cannot depend on the inter-state checks. Overall, however, section 6201 is an important step in the right direction, and it may take some time to see whether these provisions have the desired effect of reducing elder abuse.

In the meantime, section 6201 can be supplemented in three concrete ways. First, resident background checks can be added to the system of employee background checks. Second, participating states can also be required to check the national HRSA practitioner data banks. Third, participation in the background check program can be made mandatory.

All nursing home residents should be checked not only for mental illnesses but also for a criminal background. The current practice of performing a PASRR screening on all residents ensures some level of review so that mentally ill patients, especially the younger ones, can be placed in another facility, segregated from the rest of the popu-

lation, or given a special care plan.²³⁹ These screens are not being performed particularly well;²⁴⁰ moreover, mental illness does not necessarily equate with violent behavior.²⁴¹ Mentally ill residents with a criminal history, however, are more likely to pose a threat to elderly nursing home residents.²⁴² The Illinois Identified Offender program supplements the PASRR risk analysis with an in-state criminal history check so the facility can decide whether certain security measures should be implemented in that resident's care plan.²⁴³

This process could be replicated in all states by simply requiring background checks for residents as well as direct patient access employees within section 6201. Then the states could combine the criminal history check and the PASRR screen to fully evaluate each resident. The current version of the Identified Offender program only performs an in-state criminal history check on residents, but the Illinois Nursing Home Safety Task Force recommended adding a check for prior convictions in other states²⁴⁴—a check already required for employees by section 6201.²⁴⁵ Thus, combining efforts would strengthen existing state background checks on residents while providing a more comprehensive examination of potential abusers in nursing homes. The expense of adding resident background checks to section 6201 may be prohibitive as states must fund part of the background check program to receive matching federal funds.²⁴⁶ This modification may actually deter states from joining the program, which would likely cause more problems than adding the resident background check would solve. If, however, resident background checks can be added with relatively little expense, then that modification should be made.

Section 6201 should also be supplemented by requiring a check of the national Health Resource Services Administration (HRSA) practitioner data banks: NPDB and HIPDB. These databases already exist, run relatively smoothly, and have been expanded recently to add new

239. YOUNGER NURSING FACILITY RESIDENTS, *supra* note 207, at 1–2.

240. *See id.* at ii–iii.

241. NURSING HOME SAFETY TASK FORCE, *supra* note 204, at 3.

242. *Id.*

243. *Id.* at vi–vii.

244. *Id.* at 7.

245. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 722 (2010) (to be codified at 42 U.S.C. § 1320a-7l(a)(3)(A)).

246. *Id.* § 6201, 124 Stat. 119, 724 (to be codified at 42 U.S.C. § 1320a-7l(a)(5)(A)).

types of employees, more information, and increasing functionality.²⁴⁷ Because the NPDB and HIPDB collect information from all state abuse registries, a check of these databases would allow a more widespread and comprehensive abuse registry check than is currently possible. Although concerns about the completeness of these databases exist,²⁴⁸ a nationwide abuse registry check is still better than checks of only the current state and any states of prior employment, especially if the employee is not fully forthcoming about prior states in which he or she worked. Moreover, as more states “buy in” to section 6201, they hopefully will make efforts to improve their own health care worker abuse registries and comply with HRSA by submitting full records in a timely manner to the practitioner data banks. Finally, HRSA’s Continuous Query system of twenty-four hour querying can serve as one possible model for state “rap back” procedures. Again, a major barrier to this additional check is its expense. The HRSA databases are funded solely by subscriber fees, and they charge \$9.50 for a single name query of both databases.²⁴⁹ With the high turnover in the direct care workforce and potentially large numbers of employees to query,²⁵⁰ the expense of using HRSA to monitor all direct care workers in nursing homes could be prohibitive. Like the potential addition of resident background checks, if the HRSA check can be added with relatively little expense, or can be funded through federal dollars, then the modification should be made.

One final concrete adjustment can be made to section 6201: requiring mandatory participation for all states. Currently, the provision only gives funding to those states that enter the program; it does not force all states to participate.²⁵¹ If a state does not want to pursue funding,²⁵² then it does not get the matching funds and does not have

247. See *Legislation and Regulations*, *supra* note 231 (discussing the expansion of information that the data banks include); *The Data Bank: National Practitioner*, *supra* note 190 (discussing the NPDB, the HIPDB, and the Continuous Query system).

248. Ornstein & Weber, *supra* note 235.

249. Health Res. & Servs. Admin., *Billing and Fees*, DATA BANK, <http://www.npdb-hipdb.hrsa.gov/hcorg/billingAndFees.jsp> (last visited Jan. 29, 2012).

250. WRIGHT, *supra* note 26, at 2.

251. ACA, Pub. L. No. 111-148, § 6201, 124 Stat. 119, 724 (to be codified at 42 U.S.C. § 1320a-7l(a)(5)(A)(ii)) (describing federal matching funds for states that agree to participate in the program).

252. Heather Gillers, *State Relies on Nurses to Report Their Own Arrests, Convictions*, INDIANAPOLIS STAR, Aug. 5, 2010, <http://www.indystar.com/article/20100805/NEWS14/8050425/State-relies-on-nurses-to-report-their-own-arrests-convictions>. “[F]ederal officials told The Star last week that Indiana has

to participate in the background check program. During the initial program solicitation, the Centers for Medicare and Medicaid Services (CMS) requested letters of intent by June 25, 2010.²⁵³ Each state choosing to participate had to submit a grant application by August 9, 2010, and CMS notified successful applicants by September 30, 2010.²⁵⁴ CMS received letters of intent from twenty-seven states and complete grant applications from seventeen states.²⁵⁵ CMS began a fourth solicitation period in June 2011, allowing states to submit grant applications on a rolling basis through October 31, 2011.²⁵⁶ The more states that participate, the stronger each individual state's program will be. If a participating state cannot depend on the accuracy and completeness of a background check from a potential employee's state of prior employment, then the participating state's process is weakened. CMS strongly hinted that the program may be made mandatory in the future,²⁵⁷ and this cannot happen quickly enough as the current non-participating states may otherwise choose never to participate.

indicated it does not plan to apply for the background check money, which is available under the new federal health-care reform law." *Id.*

253. CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., NATIONWIDE PROGRAM FOR NATIONAL & STATE BACKGROUND CHECKS FOR DIRECT PATIENT ACCESS EMPLOYEES OF LONG TERM CARE FACILITIES AND PROVIDERS: INITIAL ANNOUNCEMENT 1 (2010).

254. *Id.* at 4.

255. CTRS. FOR MEDICARE & MEDICAID SERVS., ADVANCE NOTICE – SECOND OPPORTUNITY NATIONAL BACKGROUND CHECK FUNDING 1 (2010), available at <https://www.cms.gov/SurveyCertificationGenInfo/Downloads/cmsomemotostates.pdf>.

256. CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., NATIONWIDE PROGRAM FOR NATIONAL AND STATE BACKGROUND CHECKS FOR DIRECT PATIENT ACCESS OF LONG TERM CARE FACILITIES AND PROVIDERS: FIFTH ANNOUNCEMENT 1 (2011), available at <https://www.cms.gov/SurveyCertificationGenInfo/Downloads/nbgcpqmsoli.pdf>.

257. CTRS. FOR MEDICARE & MEDICAID SERVS., QUESTIONS AND ANSWERS ABOUT THE NATIONAL BACKGROUND CHECK PROGRAM FOR LONG TERM CARE FACILITIES AND PROVIDERS, 3–4 (2011), available at <https://www.cms.gov/SurveyCertificationGenInfo/Downloads/backgroundcheckqanda.pdf>.

We cannot offer a prediction as the likelihood that Congress, in the future, might enact requirements that States have a background check program in place in order to receive federal funding for health care programs. The best that we can offer are certain observations that a prudent State might wish to consider.

Id. at 3.

One final—although not necessarily simple—solution that falls outside the realm of section 6201 would require long-term care facilities to hire better direct care workers. Many advocates for elder justice ask why nursing homes set the bar so low for CNAs.²⁵⁸ “[N]ursing homes should strive to hire only those with *exceptional* qualifications, rather than merely looking to eliminate those with criminal convictions.”²⁵⁹ Nursing homes can attract better workers by offering higher pay, more extensive benefits, fewer and more flexible hours, increased training, and improved working conditions.²⁶⁰ The growing and critical shortage of long-term care workers necessitates providing strong incentives for individuals to choose such a demanding job.²⁶¹ Many efforts have been made at the federal, state, and provider levels to attract and retain qualified and dedicated direct care workers.²⁶² Whether these continued efforts will be accepted and integrated into everyday practice at long-term care facilities remains to be seen.²⁶³

V. Conclusion

Putting a loved one in a nursing home will always be a tough decision, only compounded by the fear that the loved one will suffer abuse or exploitation while living in the very place that should be a safe haven during declining years. Standards have been set for quality of care in nursing homes, enforcement of these standards is strictly monitored, and community resources have been provided for those who experience poor care; yet, elder abuse and exploitation still occurs. Section 6201 is one of many attempts to fill the loopholes that allow abusers access to the vulnerable elderly. Three modifications that would make section 6201 stronger include: performing background checks on residents, including a check of the national HRSA

258. Bassen, *supra* note 11, at 202.

259. *Id.*

260. See WRIGHT, *supra* note 26, at 1 (citing low pay, limited or no benefits, high workloads, unsafe working conditions, inadequate training, lack of respect from supervisors, lack of control over jobs, and few opportunities for advancement as reasons for high turnover in the direct care workforce).

261. See *id.* at 3.

262. *Id.* (describing federal programs to provide health insurance for direct care workers, training materials, and mentorship and apprenticeship programs; state programs to provide wages and benefits to direct care workers through Medicaid reimbursements, home ownership opportunities, and enhanced training; and provider efforts to provide mentoring and flexible work schedules).

263. *Id.* at 4.

practitioner data banks, and making the background check program mandatory. Any barriers to implementation of the background check program in all states need to be overcome because, as indicated by a stakeholder in the section 307 pilot program, "If I find just one candidate that would be disqualified . . . it would be worth all the work just to have our residents safe."²⁶⁴

264. EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM, *supra* note 8, at 226.