

MANDATORY CRIMINAL BACKGROUND CHECKS OF THOSE CARING FOR ELDERS: PREVENTING AND ELIMINATING ABUSE IN NURSING HOMES

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It is estimated that over 1.6 million Americans are admitted into nursing homes every year. That number will only increase as the baby boomer generation continues to age. As this number increases, so too will the number of nursing home residents who are abused at the hands of those responsible for caring for them. In her article, Ms. Marciano addresses the abuses that nursing home patients suffer at the hands of certified nursing assistants and other nursing home employees. The article discusses past incidents of elder abuse and defines the different types of abuse that occur most frequently. Ms. Marciano examines the various federal and state laws that are already in place to protect nursing home patients and considers their effectiveness. She also analyzes other states' recent efforts at nursing home regulation and concludes that all states need to pass some legislation that would require background checks for all nursing home employees.

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I. Introduction

The elderly have lost respect in America. They are looked down upon as frail and helpless. All Americans should sit back and think about how they wish to be treated in old age. Many dream about an enjoyable retirement, not one where they are reduced to living in a nursing home with the possibility of being abused, beaten, raped, or robbed by the people who are employed to care for them. But these things do happen and will continue to happen in New York and around the country until those employees who commit these atrocities are weeded out of the system.

Americans should increase their awareness about the abuse that takes place in long-term health facilities. Elders are particularly vulnerable to abuse because of their susceptibility to illness.¹ As a result, they are at the mercy of those who care for them. Although this article focuses on abuse in long-term health care facilities, such abuse is not limited to that environment and often is inflicted upon the elderly by relatives or paid caretakers at home.

II. Background

Overwhelming numbers of individuals residing in nursing homes in New York and nationwide have been abused at the hands of the workers. Sadly, this abuse usually occurs over and over again. It has been reported that twenty-five percent of nursing home workers who are prosecuted for abuse or violence had prior criminal records including drug offenses, sex offenses, and assaults.² Although there are various remedies for elder abuse after the fact, prevention of such abuse is a much more satisfying solution. Such abuse can be curbed by enacting mandatory criminal background checks and drug testing of all people who are employed in nursing homes throughout America.

Despite the fact that elder abuse is not a popular topic of discussion, the issue is intermittently given attention by the broadcast

1. ROSALIE S. WOLF & KARL A. PILLEMER, *HELPING ELDERLY VICTIMS: THE REALITY OF ELDER ABUSE* 14 (1989).

2. Joe Calderone & Thomas Zambito, *Elderly Suffer Abuse and Worse: Staff Shortages Lead to Neglect*, *DAILY NEWS*, Dec. 17, 2000 at 6-7 [hereinafter *Elderly Suffer Abuse and Worse*] (investigating the abuse and neglect inflicted upon the thousands of elderly patients residing in New York City nursing homes).

media.³ Physical and emotional abuse has been covered on the nightly news, television magazine programs, and talk shows by a majority of the major networks.⁴ Most of these news reports are made possible with the use of hidden cameras, commonly referred to as “granny cams,”⁵ which bring home the stories of real victims who have been physically and emotionally abused, raped, assaulted, or robbed.⁶ Usually, a family member will install this equipment to monitor the quality of care received by a loved one, but will not advise the administration of the facility.⁷ Recently, Maryland unsuccessfully introduced a bill requiring nursing facilities to permit residents the use of video cameras in their room.⁸ Critics of the use of

3. See *Nursing Home Abuse Increasing* (CBS News broadcast, Jul. 31, 2001), available at <http://origin.cbsnews.com/now/story/0,1597,304038-412.shtml> (last visited Nov. 26, 2001) (stating that nursing home inspections often do not reveal the inadequacies of the care given and most problems go unreported).

4. See James Brennan, *Bad Press on Nursing Homes: Combatting Guilt by Association*, 7 BROWN U. LONG-TERM CARE QUALITY LETTER 1, 1 (1995) (citing, in particular, the ABC television program 20/20 which highlighted abuse in long-term facilities throughout the United States); *Nursing Home Abuse Increasing*, *supra* note 3. A CBS News Correspondent interviewed a seventy-five-year-old woman whose neck was dislocated by a nurse's aide who was upset to find the woman soiled herself. *Id.* The aide had previously been warned about rough treatment of patients and only received one year in jail after pleading guilty to elder abuse. See *id.*; see also *Nursing Homes Facing Problems in Oregon* (MSNBC, Dec. 11, 2000), <http://www.msnbc.com/local/kmtr/62232.asp> (last visited Nov. 26, 2001); *Are You a Good Daughter?* (The Oprah Show, Oct. 21, 1999), available at http://www.oprah.oxygen.com/tows/pastshows/tows_1999/tows_past_19991021.html (last visited Nov. 26, 2001). The show focused on the strain a family, particularly daughters, goes through when a loved one is placed in a nursing home. *Id.* Even though abuse is found in one of four nursing homes, it may be the only option for some families. See *id.*

5. See Douglas J. Edwards, *All Eyes Are on Granny Cams*, 49 NURSING HOMES 27, 27 (2000) (discussing the increased use of video monitoring equipment in residents' rooms); Michael J. Stoil, *Fighting a Modern Legend: Prospective Employee Record Checks*, 49 NURSING HOMES 6, 6 (2000) (discussing news reports that relay instances of nursing home employees who have been caught stealing on hidden cameras).

6. See Brennan, *supra* note 4, at 1 (discussing the range of emotions experienced by the viewers who watch these television segments).

7. See *Granny Cams: Catching Nursing Home Abuse on Tape* (Good Morning America, Feb. 15, 2001), available at http://www.more.abcnews.go.com/sections/gma/goodmorningamerica/gma010215_nursing_home_cameras.htm (last visited Nov. 13, 2001) [hereinafter *Catching Nursing Home Abuse on Tape*]; see also Edwards, *supra* note 5, at 27 (discussing the various reasons families install such cameras, predominantly for checking up on the staff of the facility when they cannot be present).

8. H.B. 433, 2001 Leg., 415th Sess. (Md. 2001); see also *Catching Nursing Home Abuse on Tape*, *supra* note 7. If the so-called Grannycam bill was passed in Maryland, it would have been the first state giving residents the right, at their own expense, to install surveillance cameras in their rooms. *Id.* Patients could not have

this equipment argued that it would deter qualified people from remaining in this industry when there is the possibility of liability.⁹ Conversely, advocates of the “granny cam” argued that if nothing wrong is done no liability would exist.¹⁰

Although incidents of abuse are habitually ignored, this does not mean that they do not occur.¹¹ Nurses’ aides are able to slip through the cracks and move from state to state finding employment without even an eyelash batted at their prior acts of violence against residents.¹² Measures must be taken to curb and eventually eliminate such rampant patient abuse. The purpose of this discussion is not to undermine those individuals who truly desire to help make the last days of the lives of their patients more enjoyable. Instead, this article focuses on the elderly patients who are not fortunate enough to be cared for by these concerned individuals and have reason to fear for their safety. In order for the states to protect their elderly citizens who reside in nursing homes, mandatory criminal background checks and drug testing should be performed on all prospective as well as current employees of nursing homes.

III. Discussion

A. Regulation of Nursing Homes

It is estimated that more than 1.6 million Americans reside in nursing homes throughout the United States every year.¹³ In the past,

been denied access to the facility for installing such equipment. *Id.* The legislation required that roommates must consent, and it also required that a sign warning visitors that monitoring is taking place be displayed. *Id.*; see also Barbara Hengstebeck, *Why Not Put Video Cameras in Nursing Homes?*, TAMPA TRIB., July 21, 2001, at 17 (stating that similar legislation introduced in Arkansas, Texas, and Florida failed and arguing that residents should be able to install camera equipment if this is to be considered their “real home”).

9. *Catching Nursing Home Abuse on Tape*, *supra* note 7; see also Edwards, *supra* note 5, at 27 (quoting the associate director of public affairs at American Association of Homes and Services for the Aging (AAHSA), “[t]he caregivers basically would be on videotape all day long. I don’t think any of us would like to work with a video camera trained on us all the time.”).

10. See *Catching Nursing Home Abuse on Tape*, *supra* note 7.

11. See *Elderly Suffer Abuse and Worse*, *supra* note 2, at 6–7 (“Problems are too often met with silence from the State Health Department.”).

12. Peter Eisler, *Chaotic System Lets Many Slip Through the Cracks*, USA TODAY, Feb. 21, 1994, at 01A (uncovering that nurses’ aides who have been barred from working in one nursing home because of abuse can often obtain a job by moving from one state to another).

13. S. REP. NO. 106-293, at 206 (2000); see also HEALTH CARE FIN. ADMIN., REPORT TO CONGRESS: INTERIM REPORT ON NURSING HOME QUALITY OF CARE AND

the federal government left the control of nursing homes to the states. Now, however, the federal government takes part in the regulation.¹⁴ The federal government first became involved with nursing homes with the passing of the Social Security Act of 1935, which prohibited payment of government funds to nursing homes who fail to satisfy state licensure requirements.¹⁵ In 1959, when the quality of care and conditions in nursing home facilities became questionable, a joint effort was made with the states to reform nursing home care.¹⁶ In 1965, federal funding of nursing homes became possible with the enactment of Medicare and Medicaid.¹⁷ Pressure mounted throughout the 1970s to increase the standards in nursing homes.¹⁸ Today, in response to those concerns, if a nursing home is found to neglect its residents, it may face fines, the loss of all Medicare or Medicaid funds, and the cancellation of its provider agreements.¹⁹

Inspections of nursing homes are routinely performed to ensure facility compliance with health codes.²⁰ These inspections generally

IMPLEMENTATION OF THE NURSING HOME INITIATIVE (Fall 2000), <http://www.hcfa.gov/medicaid/reports/rpfall00.pdf> (last visited Nov. 26, 2001) [hereinafter HCFA REPORT]; *Nursing Home Abuse Increasing*, *supra* note 3.

14. Jeffrey Spitzer-Resnik & Maya Krajcinovic, *Protecting the Rights of Nursing Home Residents: How Tort Liability Interacts with Statutory Protections*, 19 NOVA L. REV. 629, 630 (1995) (discussing nursing home regulations, in particular, those directed at protecting residents from abuse, neglect, or mistreatment).

15. Social Security Act of 1935, Pub. L. No. 90-248, 81 Stat. 234(C) (providing that “[n]o federal funds shall be paid to any State . . . during which such nursing home is determined not to meet fully all requirements of the State for licenses as a nursing home”).

16. Angela Snellenberger Quinn, *Imposing Federal Criminal Liability on Nursing Homes: A Way of Deterring Inadequate Health Care and Improving the Quality of Care Delivered?*, 43 ST. LOUIS U. L.J. 653, 656–60 (1999).

17. *Id.*; see also Harry S. Margolis, *A Proposal for Reform of Medicaid Rules Governing Coverage of Nursing Homes Care*, 9 STAN. L. & POL’Y REV. 303, 304–05 (1998) (discussing the major sources of nursing home funding including Medicare and Medicaid).

18. Quinn, *supra* note 16, at 656–60.

19. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330; see also Quinn, *supra* note 16, at 659 (stating that in order to receive their Medicare or Medicaid funding, nursing homes must comply with the Omnibus Budget Reconciliation Act (OBRA 87), which mandates that nursing homes “‘care for residents in such a manner and in such an environment as will promote the enhancement of the quality of life of each resident’” and “‘provide services to attain or maintain the highest practicable physical, mental and psychological well-being of each resident, in accordance with a written plan of care.’”). See generally Richard Gundling, *Federal Government Increases Oversight of Nursing Homes*, HEALTHCARE FIN. MGMT., Sept. 1999, at 62 (categorizing the regulations issued regarding nursing homes by the federal government in 1995 as the “nation’s toughest-ever nursing home enforcement regulations”).

20. See Quinn, *supra* note 16, at 660.

occur repetitively on the same days and times.²¹ As a result, many serious problems are concealed and never revealed by these inspections. In order to uncover those problems that are usually well hidden when the staff is aware that an inspector is coming, the President's Nursing Home Initiative was launched in July 1998.²² Under the initiative, inspections are carried out sporadically to ensure that the nursing home is being run according to the standards set by the law.²³ The Initiative also addresses the slow investigation of complaints, the re-admittance of facilities into the Medicare/Medicaid programs after being expelled, and the problems of rampant dehydration, malnutrition, and abuse in nursing homes.²⁴ Preliminary findings show that these policies have been implemented successfully in most states, resulting in more citations for failure to prevent bedsores and abuse.²⁵ However, whether those citations will result in a significant decrease in abuse remains to be seen.

The elderly are also entitled to protection under the Federal Omnibus Budget Reconciliation Act (OBRA 1987), also known as the Nursing Home Amendments Act,²⁶ which includes the following rights: to sleep in a clean bed and be bathed with clean bath linens; to be comfortable; and to enjoy safe sound levels, temperature and lighting.²⁷ Common sense dictates that the elderly should enjoy these rights without this Act. Considering, however, the number of facilities that depart from these standards, it was necessary for the government to enforce them through OBRA 1987.²⁸

In addition to the administrative regulations, a major portion of the law regulating nursing homes pertains to ensuring that individuals maintain their sense of dignity after being admitted to a facility.²⁹ For example, New York has adopted a "Bill of Rights" for all nursing home residents that requires the residents be treated in

21. See HFCA REPORT, *supra* note 13, at E1.

22. *Id.*

23. *Id.* at 2.

24. The Nursing Home Initiative was designed to improve the conditions at nursing homes. See *id.* at E-1.

25. See S. REP. NO. 106-293, at 226 (2000).

26. See 42 U.S.C. § 1395i-3 (1994).

27. George S. Ingalls et al., *Elder Abuse Originating in the Institutional Setting*, 74 N.D. L. REV. 313, 319 (1998) (discussing the federal provisions regulating treatment of residents in nursing homes).

28. See *id.* at 313-15.

29. See *id.* at 316.

accordance with its terms.³⁰ The Bill is to be displayed in a conspicuous place, at wheelchair height, where all residents and visitors can see it.³¹ It requires as one of its terms that each patient be free of physical or mental abuse.³² There is also a federal Resident Bill of Rights providing for the same rights.³³

B. What is Elder Abuse?

A nursing home is supposed to provide nursing care to “sick, invalid, infirm, disabled or convalescent persons” who reside in the facility.³⁴ Nevertheless, this does not always take place, and, consequently, the elderly resident becomes a victim of abuse. Elder abuse is defined as the “physical,³⁵ sexual,³⁶ psychological,³⁷ or financial abuse³⁸ of the elderly or otherwise causing the deprivation of

30. See N.Y. PUB. HEALTH § 2803-c (McKinney 1993 & Supp. 2001); VINCENT J. RUSSO & MARVIN RACHLIN, *NEW YORK ELDER LAW PRACTICE* § 12.27 (2001) [hereinafter RUSSO].

31. N.Y. PUB. HEALTH § 2803-c; N.Y. COMP. CODES R. & REGS. tit. 10, § 415.3(a)(5) (2001).

32. N.Y. PUB. HEALTH § 2803-c(3)(h); see also RUSSO, *supra* note 30, at § 12.20; Kathleen T. Zellner, *Nursing Home Reform Legislation Signed into Law*, 21 J. HEALTH L. 78, 78 (1988) (discussing certain rights that residents are guaranteed by law, including the right “to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for the purposes of discipline or convenience.”).

33. 42 C.F.R. § 483.10 (2001).

34. N.Y. PUB. HEALTH § 2801(2).

35. “[T]he term abuse shall mean inappropriate physical contact with a patient or resident of a residential health care facility, while such patient or resident is under the supervision of the facility, which harms or is likely to harm the patient or resident.” N.Y. COMP. CODES R. & REGS. tit. 10, § 81.1(a).

36. Sexual abuse has been defined by the Department on Aging as “touching, fondling, sexual threats, sexually inappropriate remarks, or any other sexual activity with an older person when the older person is unable to understand, unwilling to consent, is threatened or is forced to engage in sexual behavior.” Suzanne J. Levitt & Rebecca J. O’Neill, *A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect and Exploitation: One Legal Clinic’s Experience*, 5 ELDER L.J. 195, 204 (1997).

37. The Department of Aging defines emotional (psychological) abuse as: “verbal assaults, threats of maltreatment, harassment, or intimidation so as to compel the older person to engage in conduct from which he has a right to abstain or to refrain from conduct in which the older person has a right to engage.” Levitt & O’Neill, *supra* note 36, at 204.

38. Thousands of older Americans are tarnished by financial abuse. See Susan J. Aziz, *Protect Yourself Against Elder Financial Abuse*, SENIOR LIVING MAG., <http://www.businesslife.com/slm/articles/summer00/abuse.html> (last visited Nov, 26, 2001). Elders often hide the fact that they were abused due to feelings of shame or fears of reprisal. See *id.* Often they do not know where to obtain assistance and may not even know that it has occurred. See *id.*

their human rights by their relatives or caretakers.”³⁹ Examples of physical abuse include hitting, slapping, kicking, pinching and biting.⁴⁰ Emotional abuse may be in the form of malicious oral, written, or gestured language and may be construed by a reasonable person to be ridiculing, derogatory, humiliating, harassing, or threatening.⁴¹

Patient abuse is usually suspected when death results under suspicious circumstances, the patient has unexplainable physical injuries, or the patient starts to act unusually without other signs of dementia.⁴² These may be indications that the health and safety of the patient is endangered.⁴³ Confinement to an area within the unit, or the use of restraints, may also constitute abuse if not done for the safety of the resident or for others.⁴⁴ Restraints such as vests, waist belts, lap cushions, and lap trays are often used improperly.⁴⁵ These restraints used to “control” the resident often create increasingly undesirable behavior among already confused and agitated older residents.⁴⁶ All Medicaid and Medicare certified facilities must adhere

39. H.R. Doc. No. 277-97, at 1 (1981).

40. See generally Robert A. Polinsky, *Criminalizing Physical and Emotional Elder Abuse*, 3 *ELDER L.J.* 377, 410 (1995).

41. See *id.* at 410.

42. Symptoms of physical abuse include, but are not limited to: bruises, black eyes, welts, lacerations, broken bones, open wounds, untreated injuries, laboratory findings of medication overdoses, sudden change of behavior and refusal of the caregiver to allow visitors, and if the individual still resides at home, relatives not allowing visitors in the home. HON. EDWIN KASSOFF & CHARLES ROBERT, *ELDER LAW AND GUARDIANSHIP IN NEW YORK* § 2:58 (2000).

43. Changes in behavior such as becoming upset or agitated, extremely withdrawn, noncommunicative or nonresponsive, unusual behavior usually attributed to dementia may be signs of abuse, in particular psychological abuse. See KASSOFF & ROBERT, *supra* note 42, § 2:60; see also Daniel M. Gitner, *Nursing the Problem: Responding to Patient Abuse in New York State*, 28 *COLUM. J.L. & SOC. PROBS.* 559, 560 (1995).

44. See Julie A. Braun & Elizabeth A. Capezuti, *The Legal and Medical Aspects of Physical Restraints and Bed Side-Rails and Their Relationship to Falls and Fall-Related Injuries in Nursing Homes*, 4 *DEPAUL J. HEALTH CARE L.* 1, 3 (2000). Physical restraints include “any manual method or physical or mechanical device, material, or equipment attached or adjacent to the resident’s body that the individual cannot remove easily which restricts freedom of movement or normal access to one’s body.” *Id.*

45. See *id.* at 29. A Texas nursing home was sued after a seventy-six-year-old resident with dementia died after suffering third degree burns over fifty-six percent of his body. *Id.* He was found ablaze by workers who responded to his screams for help. *Id.* The decedent’s surviving heir claimed the nursing home placed the resident in a restraint vest without a physician’s order in violation of federal and state regulatory rules and procedures. *Id.*

46. The use of these restraints can also lead to a plethora of problems for the elderly resident, a few examples of which are chronic constipation, pressure sores,

to the general requirement that patients be free from restraints, unless deemed necessary by a doctor's written orders specifying the circumstances and duration of the use.⁴⁷

Abuse may not always be as blatant as the examples set forth above. Besides the different types of physical abuse that take place, neglect, another form of abuse, is a major factor in the deterioration of the condition of many elderly residents.⁴⁸ Residents who are not capable of speaking up for themselves are often uncared for. Some examples include: being left without food or water, developing untreated bedsores as a result of lying in the same position for too long, incurring rashes from sitting in feces, and other generally preventable ailments.⁴⁹ Aides claim they are overworked and cannot complete all their required tasks in a shift.⁵⁰ Due to the shortage of nurses' aides, workers are often forced to "choose between feeding one patient, changing a second, or bathing a third."⁵¹

C. Who Provides the Care to Patients?

Elderly patients in nursing homes typically do not have the capacity to carry out tasks for themselves. These individuals need assistance with daily activities such as dressing, bathing, eating and toileting.⁵² Although nurses and doctors oversee the medical

lower extremity edema, and cardiopulmonary de-conditioning. *Id.* at 3. "For years, uncooperative and agitated residents have been physically restrained in order to manage their behavior." *Id.*

47. *See id.* at 34.

48. *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 81.1(c) (2001).

Failure to provide for timely, consistent, safe, adequate and appropriate services, treatment, and/or care to a patient or resident of a residential health care facility while such patient or resident is under the supervision of the facility, including but not limited to: nutrition, medication, therapies, sanitary clothing and surroundings, and activities of daily living.

Id.

49. *See* Quinn, *supra* note 16, at 656-60 (reporting on the causes of premature deaths among nursing homes residents in the United States).

50. Peter Eisler, *Aides' Nursing-Home Work Called Field's Most Difficult*, USA TODAY, Feb. 21, 1994, at 2A [hereinafter *Aides' Nursing-Home Work Called Field's Most Difficult*] (discussing the responsibilities of nurses' aides coupled with the complication of "tantrums thrown with the passion of a child and the strength of an adult").

51. *See id.* (stating that aides have to choose between which jobs to complete first and whenever something goes wrong, they are the ones who "take the brunt of the complaints").

52. *See* Gitner, *supra* note 43, at 564 (discussing the type of daily assistance patients in long-term care facilities usually need).

condition of the patients, nurses' aides are the primary caretakers of the residents.⁵³ Because these individuals are the ones caring for the patients on an around the clock basis, it is important that those hired to work in such facilities are fit for the job.

D. Findings of Abuse

In December 2000, the condition of New York nursing homes was investigated by a daily newspaper that reported in a series of articles the plight of nursing home residents who had been raped, beaten, or neglected by aides with criminal backgrounds.⁵⁴ Highlighted in one of these investigative articles was the story of a sixty-nine-year-old woman suffering from dementia who was sexually abused by a male nurse's aide, Arturo Martinez.⁵⁵ Mr. Martinez had four prior arrests and worked as a nurse's aide for twelve years.⁵⁶ Another aide working on the floor heard "agitated sounds" coming from the victim's room and reported the incident.⁵⁷ The aide reported seeing Martinez "leaning over" the woman's bed, his right hand "in motion inside [the patient's] diaper."⁵⁸ Martinez was not assigned to care for this woman, and when confronted about the situation he responded that he was "just playing with her."⁵⁹

This is not the only documented case of sexual abuse taking place in a New York nursing home. In a Newburgh, New York, nursing home, a male aide with a prior history of robbery and assault convictions sexually assaulted an eighty-one-year-old woman with

53. *Aides' Nursing-Home Work Called Field's Most Difficult*, *supra* note 50, at 2A (stating aides work the front lines and even though they do the most work, they earn the least); *see also* Kathleen T. Zellner, *Nursing Home Reform Legislation Signed into Law*, 21 J. HEALTH L. 78, 78 (1988) (recognizing that nurses' aides will provide the majority of care to the residents in nursing homes).

54. *Elderly Suffer Abuse and Worse*, *supra* note 2, at 6 ("Thousands of elderly patients across New York City are warehoused in understaffed nursing homes where they suffer from neglect, malnutrition, dehydration, abuse and—in some cases—premature death, a Daily News investigation has found."); *see also Gov Pushes for Probe of Nurse's Aides*, N.Y. DAILY NEWS, Jan. 4, 2001, at 6 [hereinafter *Gov Pushes for Probe of Nurse's Aides*].

55. Joe Calderone & Thomas Zambito, *Dangerous Caregivers*, N.Y. DAILY NEWS, Dec. 17, 2000, at 7 (uncovering the story of a man who worked for twelve years in a Jamaica, Queens, nursing home despite his criminal record).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

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Alzheimer's disease.⁶⁰ The woman suffered severe wounds which required stitches. That evidence eventually led to the aide's conviction, even though the elderly resident could not communicate effectively in order to testify against her attacker.⁶¹

Another disturbing report of abuse occurred in Rochester, New York, where police say a twenty-nine-year-old woman was raped in her bed at a long-term care facility.⁶² She was in a coma at the time and as a result of the rape was impregnated.⁶³ The primary suspect is a nurse's aide with a prior police record who also has been charged with abusing a forty-nine-year-old patient.⁶⁴

Unfortunately, the examples of abuse do not end here. There are numerous accounts of elders being abused at the hands of nurses' aides in nursing homes throughout the United States.⁶⁵ In most of these situations, it is likely that the abuse could have been prevented if the nursing home employer had delved deeper into the prospective employee's background. However, it is not likely that the prospective employee would admit to such prior abuse if asked on an application.⁶⁶ Indeed, this situation illustrates the immediate necessity for the adoption of the proposed criminal background checks for nurses' aides across the country.

E. Proposed Mandatory Criminal Background Checks in New York

Politicians have intervened by calling for reform of nursing home regulations. In response to the *Daily News* exposé, George E. Pataki, Governor of New York, has proposed criminal background

60. Peter Eisler, *Nursing Home System Lax on Bad Aides*, USA TODAY, Feb. 21, 1994, at 2A [hereinafter *Lax on Bad Aides*].

61. *Id.* (reporting that New York does not require criminal background checks and most job applicants are never going to admit that they have been convicted).

62. Mike Pezzella, *In Coma for 10 Years, She's Pregnant: Rapist Sought via Mass Blooding*, BIOTECHNOLOGY NEWSWATCH, Jan. 15, 1996 (discussing the case of a woman in a coma for ten years who was discovered to be five months pregnant in a Rochester Facility which opened thirteen months prior to the incident).

63. *Id.*

64. *See id.*

65. *See, e.g.*, Gitner, *supra* note 43, at 565-66.

66. *See* Eliot Spitzer, Editorial, *Nursing Homes Must Check Crime Histories*, N.Y. DAILY NEWS, Dec. 28, 2000, <http://www.nydailynews.com/2000-12-28/News> [hereinafter Spitzer].

checks of “all nursing home and home care employees.”⁶⁷ The mandated checks have been proposed in order to ensure “the best possible care for our loved ones.”⁶⁸ This was not a new proposal.⁶⁹ A proposal to make background checks mandatory for nurses’ aides has been introduced every year in the state legislature since 1996.⁷⁰ A prior version of this bill was passed in the state Senate, but it died in the Assembly’s Health Committee.⁷¹ The Attorney General of New York, Eliot Spitzer, pointed out that elder abuse is not an isolated incident, making it important for nursing homes to screen employees through acquisition of criminal history checks from the state Division of Criminal Justice Service.⁷² In a similar effort to deter patient abuse, President Clinton advocated “prison sentences of up to ten years for individuals and fines for nursing-home chains of up to two million dollars for each home where residents are neglected or abused.”⁷³

Additionally, the Senate Aging Committee proposed requiring criminal background checks on all employees and establishing a national registry of nursing home workers who have abused patients.⁷⁴ This proposal was the result of a report that utilized some records from the Federal Bureau of Investigation to check one thousand employees from “eight randomly selected Maryland nursing homes.”⁷⁵ That report found that some “nurses, nurses’ aides,

67. *Gov Pushes for Probe of Nurse’s Aides*, *supra* note 54, at 6; accord H.B. 4733, 224th Leg. Sess. (N.Y. 2001).

68. *Gov Pushes for Probe of Nurse’s Aides*, *supra* note 54, at 6.

69. See Joe Calderone & Thomas Zambito, *Gov Revives Checks on Nurse Aides*, N.Y. DAILY NEWS, Jan. 7, 2001, at 39 (discussing Governor Pataki’s proposal of mandatory background checks in nursing homes revived after being tossed around Albany for years).

70. *Id.*

71. *Id.*

72. Spitzer, *supra* note 66 (discussing measures that need to be taken in order to prevent future incidents of abuse in nursing homes by employees with criminal backgrounds).

73. *Clinton Unveils Measures to Protect the Elderly*, N.Y. TIMES, Apr. 17, 1999, at 27 (reporting on President Clinton’s proposal to “investigate, prosecute and punish” those who abuse older Americans in nursing homes).

74. Monica A. Preboth & Shyla Wright, *Quantum Sufficit Just Enough*, 58 AM. FAM. PHYS. 1951, 1951 (1998) (discussing a proposed website by the Senate Aging Committee where family members may check the results of unannounced inspections of nursing homes and criminal backgrounds of employees who have abused residents).

75. See Am. Political Network, *Politics and Policy Nursing Home Workers: Focus on Senate Hearing Today* (1998), 9/14/98 APN-He 5 (WESTLAW) (noting that the study revealed that nursing home employees were guilty of “assault, child abuse, robbery with a deadly weapon and illegal drug sales”).

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food service workers, housekeepers and maintenance workers” were guilty of “assault, child abuse, robbery with a deadly weapon and illegal drug sales.”⁷⁶ Currently, there is no real screening of health care workers.⁷⁷ Because there is no national list of “bad aides,” these individuals are able to take advantage of the slow system and move from state to state, obtaining jobs in nursing homes.⁷⁸

The law permits nursing homes to voluntarily fingerprint applicants⁷⁹ and run background checks for a fifteen-dollar fee.⁸⁰ Despite the fact that private nursing home owners in the state have enjoyed \$1.3 billion in profits between 1996–98 many New York nursing homes do not participate.⁸¹ Commentators suggest that nursing homes are in the business of making as much money as possible while spending as little as possible and providing what is often the most minimum level of care.⁸²

A Department of Health survey revealed that New York City’s 176 nursing homes are staffed at levels nineteen percent below the

76. *Id.* (reporting on the focus of the U.S. Senate Special Committee on Aging hearing held on September 14, 1998, which considered whether nursing homes should be required to conduct criminal background checks of employees).

77. See *Elderly Suffer Abuse and Worse*, *supra* note 2, at 6 (stating that nurses’ aides in New York are not subjected to mandatory criminal background checks); Spitzer, *supra* note 66 (“Under current law, there is very little oversight of nurses’ aides and other health care workers who provide much of the direct care to patients.”).

78. *Lax on Bad Aides*, *supra* note 60, at 2A (reporting on the six-month survey of the Gannett News Service which found that criminals with records of violence and theft usually have no problem moving state to state working with the elderly).

79. See A.B. 2131-224, Reg. Sess. (N.Y. 2001). The proposal authorizes nursing homes to request fingerprints to verify employee statements regarding their criminal backgrounds. Stoil, *supra* note 5, at 6 (stating that the law permits nursing homes to engage in voluntary fingerprinting for a fee to be done by the local sheriff and checked against FBI files of felons).

80. Thomas J. Prohaska, *Checks Sought for All Nursing Home Job Seekers*, BUFFALO NEWS, Sept. 27, 1999, at 5B (discussing the fact that nursing homes are not required to have criminal background checks done but it is something that they want to do).

81. Joe Calderone & Thomas Zambito, *Fat Cats Feeding on Nursing Homes*, N.Y. DAILY NEWS, July 31, 2000, 2000 WL: 22605481 (discussing the “personal fortunes” stashed by nursing home owners while skimping on funding necessary for adequate staffing). The article also lists the top ten profits for nursing homes in New York City in 1998. *Id.* Among the top are: Sheepshead Nursing and Rehabilitation: \$6,870,629; Clove Lakes Health Care Rehabilitation Center, Staten Island: \$6,164,000; Dry Harbor Nursing Home, Queens: \$4,473,300. *Id.*

82. See Quinn, *supra* note 16, at 656–60 (citing Clifford E. Cardone, *Battling Nursing Home Neglect: Finding the Right Legal Pieces*, 44 LA. B.J. 508, 508 (1997), which argues that profit has trumped health and dignity).

national average.⁸³ Compounding the problem of the potential for hiring prior criminals in health care facilities is the lack of funds, staffing cutbacks, and a tight labor market, which does not allow enough aides to be hired to adequately care for residents.⁸⁴ Due to inadequate funding, nursing homes claim they are unable to attract experienced, reliable workers and are forced to settle for newly certified aides who do not have the minimum experience necessary to deal with frail, helpless, elderly individuals.⁸⁵ Often, these aides are foreign born or come from out of state, which makes it difficult for employers to discover what kind of backgrounds these individuals may be hiding.⁸⁶ In addition, working with the elderly may be frustrating, especially when the diseases the residents are afflicted with render them totally incapacitated or difficult to control.⁸⁷ To make matters worse, a majority of nursing home residents do not have visitors to speak up for them when they no longer can.⁸⁸ Nevertheless, the presence of these unfortunate circumstances should not indicate to an abusive employee that one is free to abuse the patient without fear of liability.⁸⁹

83. See *Elderly Suffer Abuse and Worse*, *supra* note 2, at 6 (finding that many homes for the elderly do not hire enough aides to “pay attention to the needs of their patients”).

84. See *id.*; see also Gitner, *supra* note 43, at 567 (discussing a number of factors leading to abuse and neglect of the elderly including underfinancing and understaffing of nursing homes.); Quinn, *supra* note 16, at 656–60 (discussing reasons for high turnover rates of staff in nursing homes such as the staff feeling overworked and underpaid).

85. See *Elderly Suffer Abuse and Worse*, *supra* note 2, at 6 (“Nursing home officials say New York’s robust economy has made it harder than usual for homes to attract reliable workers for backbreaking jobs that pay little more than minimum wage.”); Quinn, *supra* note 16, at 662–63 (stating that “the nursing home staff is often under-trained to deal with the medical, emotional and psychological needs of nursing home residents.”); see also Peter Eisler, *For Many, the Sin Is Omission*, USA TODAY, Feb. 21, 1994, at 1A (quoting an Oklahoma ombudsman who said that many homes “don’t do anything but check to see if the person’s breathing and can walk”).

86. See *Elderly Suffer Abuse and Worse*, *supra* note 2, at 6 (citing Larry Krasin, an attorney who handles patient abuse cases, stating that “[t]hey are hiring people right off the boat who have no training . . . [I]t’s absolutely ridiculous.”).

87. See *Aides’ Nursing-Home Work Called Field’s Most Difficult*, *supra* note 50, at 2A (discussing the difficulties of this particular field of nursing intensified by patients whose frustration and despair is often directed at those providing the most care for them in a day).

88. Quinn, *supra* note 16, at 662 n.84.

89. See *id.* at 662 (“Nursing homes residents, some of the most vulnerable members of our society, are often alone with no relatives or visitors to demand that they receive appropriate medical care.”).

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Other factors exist that may lead to poor quality of care. One such factor is substance abuse by employees.⁹⁰ Ten to fifteen percent of employees are chemically dependent.⁹¹ Nursing home owners have particular reason to be alarmed by this percentage because pharmacies may be located on site at some facilities.⁹² At a minimum, the patient's individual prescription drugs are kept within the building, sometimes in each individual's unit.⁹³ In spite of these factors, testing for such abuse in the workplace remains a controversial issue and may lead to union involvement.⁹⁴

Impairment of a nursing home employee by drugs and/or alcohol has led to disastrous results, placing the safety of the patients at risk.⁹⁵ For example, in New York, a nurse's aide failed to properly secure a ninety-five-year-old patient in a lift chair who later died as a result of his injuries.⁹⁶ The aide had previously been arrested on charges of criminal possession of a controlled substance.⁹⁷ Another aide convicted ten years ago of stealing medicine, was arrested in 1999 for stealing a patch that released painkillers from a seventy-three-

90. See generally James W. Cooper, *Keeping Scheduled Drugs Secure in the Nursing Home*, NURSING HOME, July 1, 1994, 241994 WL 28887982 (stating that there is the potential for "pilferage and diversion" and nursing homes are not immune to such activity).

91. See James W. Cooper, *Chemical Substance Impaired Health Care Professionals*, NURSING HOME & SENIOR CITIZEN CARE, Sept. 1990, at 6 (discussing chemical substance abuse among health care professionals).

92. See generally Cooper, *supra* note 90 (explaining that institutions which keep scheduled drugs have to adhere to an ongoing process of exercising heightened awareness when ordering, dispensing and monitoring medications).

93. See Cooper, *supra* note 91 (relaying the story of a thirty-four-year-old licensed nurse who was caught taking a patient's propoxyene-acetaminophen combination product and was dismissed from the facility—her license was suspended and she died six months later of a mixed overdose).

94. See Kenneth May, *Drug-testing in the Nursing Home*, 37 NURSING HOME 9, 9 (1988). While states were considering making drug testing mandatory, they had to balance the privacy rights of the employees and union issues, especially if the nursing home is required to bargain with the union before instituting a drug testing policy. See *id.*

95. Press Release, Office of New York State Attorney General Eliot Spitzer, Registered Nurse Pleads Guilty to Patient Abuse (Feb. 9, 2000), <http://www.oag.state.NY.US/press/2000/feb/feb09a.00.html> (last visited Nov. 26, 2001) [hereinafter Press Release] (releasing information about a registered nurse who pled guilty to stealing the patient's duragisic patch); see also *Dangerous Caregivers*, *supra* note 56.

96. *Dangerous Caregivers*, *supra* note 56.

97. *Id.*

year-old patient.⁹⁸ The aide admitted to using the narcotic patch herself and was fired as a result.⁹⁹

F. Aide Certification and the Abuse Registry

Nurses' aides are required to perform a requisite amount of training to obtain certification.¹⁰⁰ In New York, nurses' aides are required to undergo at least 100 hours of training, thirty of which must be performed in a nursing home.¹⁰¹ The nursing home is responsible for ensuring that such certification has taken place and that the aides are competent to complete the tasks they will be assigned.¹⁰² The tasks assigned to aides are practically the same from state to state with minor variations.¹⁰³ These tasks include: repositioning bed-ridden and chair-bound patients every two hours, cleaning incontinent patients and the patient's clothing and linens after they have become wet or soiled, checking restrained patients every thirty minutes, providing three meals a day, and making sure the water temperature does not exceed 120 degrees Fahrenheit when bathing patients.¹⁰⁴ Some states have additional requirements that are beneficial to the patients. For example, Tennessee provides that residents receive direct one on one care with an aide each day.¹⁰⁵

In addition to ensuring completion of a certification program, states are required to set up abuse registries.¹⁰⁶ The registries list

98. Press Release, *supra* note 95.

99. *Id.*

100. Zellner, *supra* note 32, at 78 (stating that federal standards require that every nurse's aide must receive at least seventy-five hours of training in nursing and residents' rights.).

101. See *Elderly Suffer Abuse and Worse*, *supra* note 2, at 6 ("Still, certified nurses' aides are required by the state to undergo less training than cosmetologists (1,000 hours and nail specialists (250 hours).").

102. See Zellner, *supra* note 32, at 78 (stating nursing homes are required to check each aide's qualifications to complete specified tasks).

103. See, e.g., John W. Bellflower, Jr., *Respecting Our Elders: Can Tennessee Do More to Protect Its Elder Population from Institutional Abuse and Neglect?*, 66 TENN. L. REV. 819, 824-25 (1999) (discussing what tasks are to be performed by nurses' aides).

104. *Id.*

105. See TENN. CODE ANN. § 68-11-803(c)(23) (1996). The Code requires that each aide "provide a minimum of two . . . hours of direct care to each patient every day" and that the time dedicated to each patient include "four-tenths (0.4) hours of licensed nursing personnel time." § 68-11-803(c)(23).

106. See 42 U.S.C. § 1396(r)(e)(2) (1994). This list is to be comprised of all individuals who have successfully completed a nurse's aide training and competency evaluation program approved by the state. *Id.*

information about each aide, such as the aide's name, address, date of birth, social security number, and training programs successfully completed.¹⁰⁷ "Findings" of instances of resident abuse, mistreatment or neglect, or criminal convictions for the same are included in the registry.¹⁰⁸ Once this list is finalized, the nursing home may then choose qualified aides for employment.¹⁰⁹ In doing so, nursing homes may obtain proof of certification from the state registry.¹¹⁰ Aides with "findings" are, in theory, not to be employed by nursing homes in the state.¹¹¹ However, this does not prevent the aide from seeking employment elsewhere because the state databases are not linked to each other.

Currently, thirty-three states require criminal background checks, however, the check is limited to statewide records of nurses' aides and usually does not include other prospective employees or current staff.¹¹² All states must start by providing for mandatory criminal background checks. However, the effort to prevent abuse cannot stop there. A national network must be set up to ensure that employees who prey upon the elderly in one state are not able to do so elsewhere.

G. Reporting Cases of Elder Abuse

New York Public Health Law § 2803-d requires that certain health care professionals, including physicians, psychologists, pharmacists, certified social workers, physical therapists and other concerned individuals report incidents of physical abuse or cases of neglect if they "have reasonable cause to believe" that a patient of a residential health care facility has been abused, mistreated, or

107. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.31 (2001).

108. *Id.*; see also *Lax on Bad Aides*, *supra* note 60, at 2A ("Despite tens of thousands of complaints each year of patient abuse, neglect and theft, less than 1% of aides have been disciplined since the profession was regulated in 1987.").

109. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.31.

110. *Id.* Certification may be checked by telephoning or writing to the NY State RHC Nurse Aide Registry. *Id.*

111. See Peter Eisler, *Chaotic System Lets Many Slip Through the Cracks*, USA TODAY, Feb. 21, 1994, at O5A.

112. See Spitzer, *supra* note 66 ("More than two-thirds of the states have laws requiring criminal background checks of nurses' aides and other health care workers."); see also OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., SEMI-ANNUAL REPORT APR. 1, 1998-SEPT. 30, 1998, at 51.

neglected by the staff of such facility.¹¹³ The statute mandates that suspected cases of abuse be reported to the department within forty-eight hours by telephone and in writing.¹¹⁴ Any person who is required to make such a report and fails to do so will be found guilty of unprofessional conduct in the practice of his or her profession.¹¹⁵ The statute warns that criminal sanctions will be imposed upon those found guilty of willfully committing an act of patient abuse.¹¹⁶ The penalty, however, does not seem to fit the crime. The abuser faces only a misdemeanor charge, which carries a sentence of one year or less or a fine not to exceed \$2000 or both.¹¹⁷

New York has also adopted a private cause of action entitling a nursing home resident to a certain amount of compensatory damages for each day that the resident is injured because the resident's rights or benefits were denied.¹¹⁸ This compensation will be equivalent to no less than twenty-five percent of the daily per-patient rate or the average daily total charges per patient for the facility.¹¹⁹ Considering the nature of the abuse often inflicted, it is hard to put a price on the resident's injuries. These monetary penalties do not make the abused patient whole again. Patients are often affected emotionally by abuse and physical manifestations may not always be apparent. Further complicating the situation, it is conceivable that many types of abuse the elderly suffer from are undetectable. For instance, sexual abuse

113. See N.Y. PUB. HEALTH § 2803-d(1) (McKinney 1993 & Supp. 2001). The complete list of who is required to report instances of abuse is:

any operator or employee of such facility, any person who, or employee of any corporation, partnership, organization or other entity which, is under contract to provide patient care services in such facility, and any nursing home administrator, physician, medical examiner, coroner, physician's associate, specialist's assistant, osteopath, chiropractor, physical therapist, occupational therapist, registered professional nurse, licensed practical nurse, dentist, podiatrist, optometrist, pharmacist, psychologist, certified social worker, speech pathologist and audiologist.

Id.; see also *Miller v. DeBuono*, 689 N.E.2d 518, 519-20 (1997).

114. N.Y. PUB. HEALTH § 2803-d(3). The report shall include, the name of the operator of the facility if known, the name of the alleged subject and the nature of the alleged physical abuse, mistreatment or neglect if known. *Id.*

115. *Id.* § 2803-d(5).

116. *Id.* §§ 12-b(2), 2803-d (7).

117. *Id.* § 12-b(1).

118. *Id.* § 2801-d(1) to (10).

119. *Id.* § 2801-d(1) to (10); see also Resnik & Krajcinovic, *supra* note 14, at 633 (focusing on New York's private right of action for nursing home residents and the damages they are entitled to).

may leave no physical injury, however, patients violated in this way are left to live their own personal nightmare.

1. PROBLEMS WITH ESTABLISHING ABUSE

There is minimal criminal case law on the subject because patients rarely have the ability to obtain legal help.¹²⁰ Even if they do, prosecutors have a difficult time securing criminal convictions because by the time the resident admits an employee abused him/her, important evidence may be lost.¹²¹ The courts that have heard such cases note that patient abuse is one of the most serious forms of misconduct that can be committed by an employee of a skilled nursing facility.¹²² But when cases have gone forward, the aides are often acquitted for lack of evidence.¹²³ As a result, it is imperative that family members and friends be privy to the signs of abuse and detect and report it as soon as possible.¹²⁴

A factor inhibiting convictions is the fear of reprisals by the employees, which leaves residents and others hesitant to report instances of abuse.¹²⁵ If the resident has nowhere else to go, she may feel trapped and resign herself to the idea that what she is going through is the lesser of two evils. Residents and family members must be aware of the services that are available when it is necessary to report this type of treatment.¹²⁶ One such resource, the internet,

120. See Gitner, *supra* note 43, at 562–63.

121. See *id.*

122. See *Welch v. Weinstein*, 494 N.Y.S.2d 374, 375 (N.Y. App. Div. 1985) (holding that because abuse is such a serious matter, the penalty of termination is not “shocking to one’s sense of fairness”).

123. See *Hayes v. Axelrod*, 537 N.Y.S.2d 419, 420 (N.Y. App. Div. 1989) (holding it was “incredible as a matter of law” that a co-employee would wait until five days after the aide allegedly squeezed the scrotum of a patient while bathing him). The testifying aide told conflicting stories of where and how the incident took place also leading to the disposition of the case. *Id.*

124. See Gitner, *supra* note 43, 569–70. It is necessary for the resident to rely upon her own constitution to report the violence, or at minimum, rely on their family and/or friends who visit, because often there is a “code of silence” in the medical profession and colleagues are reluctant to report instances of abuse. See *id.*

125. *Id.* “Patients and families of patients in long-term care might fear retaliation by staff members and refuse to assist investigators.” *Id.*; see also *Lax on Bad Aides*, *supra* note 60, at 2A (quoting the deputy state attorney general in New York who said, “victims are incompetent” and “afraid of retaliation by the people they depend on”).

126. See, e.g., ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., LONG-TERM CARE OMBUDSMAN REPORT (1996), <http://www.aoa.dhhs.gov/>

provides valuable information to families who wish to report domestic or institutional instances of abuse of elders. Simply typing in a few key words will provide the user with the websites of state agencies who specialize in the area.¹²⁷

A third problem with abuse litigation involves issues of proof. Due to their deteriorating physical condition, patients usually make poor witnesses, making it difficult for the resident to prove that abuse occurred in the absence of other evidence.¹²⁸ Moreover, it is difficult to determine what injuries were sustained as a result of the abuse and what ailments were already present at the time the patient was admitted to the facility.¹²⁹ Again, it must also be considered that the effects of abuse will not always show on the surface.¹³⁰ Unless the patient has sustained serious bodily injury, bruises will not likely be apparent.¹³¹ These individuals are, however, injured emotionally and in most cases require extensive counseling.¹³²

2. PROBLEMS WITH REPORTING ABUSE

Government and state agencies are available for assistance if a patient has been abused.¹³³ In New York, the Department of Health investigates all complaints of patient abuse and decides whether to impose penalties when it is determined that an act of patient abuse has taken place.¹³⁴ The Senate Special Committee on Aging found that these agencies are usually pathetically slow to follow up on complaints, and as a result many facilities are never fined or penalized

ltombudsman/96OMBreprt.html (last visited Nov. 13, 2001) [hereinafter LONG-TERM CARE OMBUDSMAN REPORT].

127. See, e.g., www.aging.state.ny.us (providing links to relevant state departments such as the Department of Health, in addition to providing information to our elder population on how to remain healthy and active); www.elderabusecenter.org (providing a complete list of state-by-state toll free telephone numbers where elder abuse can be reported); www.aoa.dhhs.gov (displaying the Administration on Aging's accomplishments, such as elder abuse prevention programs).

128. Heath R. Oberloh, *A Call to Legislative Action: Protecting Our Elders from Abuse*, 45 S.D. L. REV. 655, 661 (1999/2000) ("Victims of elder abuse frequently suffer from decreased mental capacity, speech and hearing problems, as well as memory loss, making them poor witnesses.").

129. See Gitner, *supra* note 43, at 570 (pointing out that a patient may die before a trial begins); see also Oberloh, *supra* note 128, at 661.

130. Gitner, *supra* note 43, at 571.

131. *Id.*

132. See *id.*

133. *Id.* at 580.

134. *Id.*

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in any fashion for any violation.¹³⁵ The length of the investigation process coupled with the volume of complaints also inhibits the process.¹³⁶

Another avenue of relief may be sought through the Long-Term Care Ombudsman programs, which advocate the rights of patients in facilities in order to protect their health, safety, welfare, and other rights.¹³⁷ Considering the declining quality of treatment received by elders, there is an overwhelming necessity for this service, which is designed to effect change on a local, state, and national level.¹³⁸ The Ombudsman program operates in all fifty states, the District of Columbia, and Puerto Rico.¹³⁹ Ombudsmen are required to address all complaints and attempt to eliminate the cause of the problem by investigating the underlying causes.¹⁴⁰

Among the highest-ranking complaints in nursing facilities are those of physical abuse, accidents, improper handling and lack of dignity or respect by the staff.¹⁴¹ The Ombudsman receives these complaints and then directs the complaint through the proper channels.¹⁴² Although this is an alternative to the state and government agencies, it involves more of the same: waiting an extended amount of time for results when time itself is of the essence in order to effectuate the necessary remedies.

135. NATIONAL COUNCIL ON THE AGING, AGENCIES IGNORING REPORTS OF ELDER ABUSE, SENATE PANEL IS TOLD (1999), at http://www.ncoa.org/news/archives/elder_abuse_ignored.htm (last visited Nov. 13, 2001).

136. *Id.*

137. The long-term ombudsman program was created in the 1970s in order to identify and resolve problems on behalf of the residents in an effort to promote their overall well-being. ADMIN. ON AGING, LONG-TERM CARE OMBUDSMAN PROGRAM, <http://www.nap.edu/readingroom/books/rprp/summary.html> (last visited Nov. 23, 2001) [hereinafter OMBUDSMAN PROGRAM]. It originated as a Public Health Service demonstration in 1972 and was transferred to the Administration on Aging in 1974. Currently, it acknowledges the importance of the ombudsman program while pointing out the inadequacies of the system. *Id.*

138. See OMBUDSMAN PROGRAM, *supra* note 137.

139. See *id.* Each state was required to develop a Long-Term Care Ombudsman Program in the Older Americans Act. *Id.* During recent years, ombudsmen have been more receptive to the needs of the changing program. *Id.* These representatives of the elderly may either be paid staff members or volunteers. *Id.*

140. *Id.*

141. LONG-TERM CARE OMBUDSMAN REPORT, *supra* note 126.

142. See OMBUDSMAN PROGRAM, *supra* note 137.

H. Examples Set by Other States

1. FLORIDA

Elder abuse is not a problem unique to New York. Differing from state to state, legislatures have chosen whether to address the issue and set forth mandatory regulations.¹⁴³ Recently, Florida has abolished its policy requiring nursing homes, hospitals, and other health care facilities to check potential nurses and aides for prior incidents of abuse.¹⁴⁴ However, the lawmakers maintain that the bill will not change outcomes in most situations because only a fraction of those screened actually had a history of abuse.¹⁴⁵ They also contend that the elderly will be protected because employers will still be required to conduct criminal background checks.¹⁴⁶ Considering the reports of abuse that occur in nursing homes, it is unlikely that the elderly will be protected by this abolition and rather will remain the target of abuse.¹⁴⁷

A Florida Senate Committee wants to push the date back for a scheduled staff increase from January 1, 2002, to May 1, 2002, and make each county pay for a greater portion of the residents' care.¹⁴⁸ The delay would save the state twelve million dollars and if the counties contribute money to the care of the elderly, the state would save fifteen million dollars.¹⁴⁹ Under this bill, nursing homes would be required to provide 2.3 hours a day per patient by certified nursing assistants, 2.6 hours a day by 2003, and 2.9 hours in 2004.¹⁵⁰ Each

143. See, e.g., *infra* notes 160, 165 and accompanying text.

144. See *Law Ends Mandatory Elder Abuse Checks*, SUN-SENTINEL (Ft. Lauderdale), June 29, 2000, at 10B (citing a bill signed by Governor Jeb Bush which abolishes listing the names of offenders on the statewide adult abuse complaint registry).

145. Stephen Nohlgren, *With End of Costly Registry, Will Elderly Pay?*, ST. PETERSBURG TIMES, July 5, 2000, at 1D (stating that the critics of the abuse registry referred to it as "inefficient and inexpensive").

146. *Id.* (stating that criminal checks might catch an abusing employee).

147. *Id.* (recounting the events that took place at St. Petersburg's Swanholm Living Center which resulted in the death of a resident after the nurse fed the resident a peanut butter and jelly sandwich when she was strictly limited by doctor's orders to a puree diet. The resident choked and died shortly thereafter and neither the nurse nor the supervisor notified the Department of Children and Families, the agency responsible for investigating medical neglect of the elderly.).

148. Mike Salinero & Lindsey Peterson, *Senate Panel Suggests on Elder Care*, TAMPA TRIB., Oct. 19, 2001, at 1 (stating that these proposals are controversial because the state is trying to resolve its financial crisis by placing more pressure on the local governments).

149. *Id.*

150. Jim Saunders, *Lawmakers Pass Nursing Home Bill at 11th Hour Shields Trade from Lawsuits*, FLA. TIMES-UNION, May 5, 2001, at A10.

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patient would also be entitled to an hour of care a day by a registered nurse, something that should already be in place but is not mandated by current law.¹⁵¹

Governor Jeb Bush has made it harder for residents and their families to recover in suits against nursing homes.¹⁵² Nursing homes no longer have to pay the resident's attorney's fees if the nursing home loses in court.¹⁵³ The new law also has made it more difficult to recover punitive damages.¹⁵⁴ Plaintiffs must now prove that the nursing home "intentionally or maliciously harmed a resident" making it unlikely the case will be pursued absent some type of catastrophic injury or death.¹⁵⁵ Even if successful, punitive damages will be capped at four million dollars in order to avoid what lawmakers viewed as outrageous jury awards.¹⁵⁶ The new law was aimed at limiting the number of suits that increased the cost of insurance as well as forced several nursing homes to file for bankruptcy.¹⁵⁷

2. NEW JERSEY

New Jersey also has laws in place to prevent elder abuse at the hands of nurses' aides. Nursing homes in that state are required to check the records of the New Jersey Aide Registry, a computerized database that stores information on nurses' aides.¹⁵⁸ The registry informs nursing homes whether an aide is certified and if there are any past instances of mistreatment, including a conviction or a finding of abuse, neglect, or misappropriation of a resident's property.¹⁵⁹ The

151. See generally Mark Hollis, *Nursing Home Suits Capped, New Law Raises Staffing Levels*, SUN-SENTINEL (Ft. Lauderdale), May 5, 2001, at 9B (reporting on this new bill which according to the bill's chief architect, Senator Ginny Brown-Waite (R), will "substantially improve the quality of care for all our elders").

152. See Greg Groeller & Jeff Kurerth, *Deadline Spurs Rush of Nursing Home Suits*, ORLANDO SENTINEL, Oct. 6, 2001, at A1 (discussing the large number of suits that were filed before the new law takes effect to cap punitive damages).

153. *Id.*

154. *Id.*

155. *Id.*

156. See *id.*

157. *Id.*

158. Lauren E. Handler & Thomas J. Rattay, *Nursing Home Injuries: Steps for Proving Liability*, N.J. LAW., Feb. 12, 2001, at A5 (providing an overview of lawsuits against nursing homes for abuse, neglect, or misappropriation of a resident's property).

159. *Id.*

nursing home is not allowed to employ a person with such a history.¹⁶⁰

3. OHIO

Background checks may not be enough to prevent what is happening to residents in nursing homes. A worker in an Ohio nursing home who was once convicted of gross sexual imposition confessed to killing a resident while administrators awaited the result of his background check.¹⁶¹ In addition, in 1998, the Department of Health barred 100 nurses' aides for life from working in any nursing home because the abuse discovered was so severe.¹⁶²

Ohio has proposed an alternative to waiting for possibly up to sixty days for a background check conducted by the Ohio Bureau of Criminal Identification and Investigation.¹⁶³ One bill would require the state to keep criminal histories on nurses' aides,¹⁶⁴ another would provide for electronic, in-house fingerprinting systems.¹⁶⁵ Currently, Ohio relies on a Nurse Aide Registry available around the clock by telephone to check whether or not the applicant has an unfavorable history.¹⁶⁶

I. National Standards Proposed to Regulate Those Caring for the Elderly

The Nursing Home Quality Protection Act was introduced to Congress on July 30, 2001, as a result of a study entitled *Abuse of Residents Is a Major Problem in U.S. Nursing Homes*.¹⁶⁷ The report calls

160. *Id.*

161. Holly Zachariah, *Push Is On to Bolster 1996 Law Requiring Background Checks*, COLUMBUS DISPATCH, July 8, 2001, at 8A (stating that nursing homes believe that if they hire someone before the background check is completed it is unlikely that anything will happen).

162. Christine V. Williams, *The Nursing Home Dilemma in America Today: The Suffering Must Be Recognized and Eradicated*, 41 SANTA CLARA L. REV. 867, 878 (2001) (discussing the number of aides who abuse residents and continue to do so despite the background checks).

163. Zachariah, *supra* note 161.

164. *Id.*

165. *Id.* (discussing the work of a patient advocate who says it is time to "tighten the hiring standards").

166. *Id.*

167. *Nursing Home Bill Introduced in House After Study Cites Increase in Abuse*, ANDREWS NURSING HOME LITIG. REP., Aug. 10, 2001, at 3 (summarizing the report on nursing home abuse prepared by the U.S. House of Representatives Government Reform Committee).

for an amendment of Title XIX of the Social Security Act that would “increase resources to nursing homes to hire more staff; institute minimum nurse staffing requirements; impose more severe restrictions on poorly performing nursing homes; require criminal background checks on employees; and increase disclosure of nursing home conditions on the Internet.”¹⁶⁸

The report is based upon the results of annual inspection reports as well as investigated complaints.¹⁶⁹ It found that incidents of physical, sexual, and verbal abuse have risen dramatically in the past five years.¹⁷⁰ According to the report, nursing homes are particularly remiss in investigating complaints and reporting instances of alleged resident abuse or neglect.¹⁷¹ The purpose of the proposed legislation is to ease the fear of nursing home residents.¹⁷² However, until the legislation is passed, there is little protection against abusers moving from state to state and still obtaining jobs.

IV. Conclusion

It is quite apparent that the hiring process of employees of nursing homes in New York and around the country is in desperate need of revision. These states must take immediate action and preserve the quality of life for nursing home residents. The industry is becoming rife with workers who do not respect the health, safety, and well-being of the elderly residents who have been placed in their care. It is not suggested that criminal background checks and drug testing of all nursing home employees will serve as a panacea. However, the institution of such requirements will significantly curb, and hopefully eliminate, the problem over time. Imposing criminal background checks will also allay the fears of the family members horrified at the thought that their loved ones are vulnerable to individuals who have struck before and most likely will strike again.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (“[S]tate inspectors asked a director of nursing about a female resident who appeared to be sexually abused, only to receive the response, ‘Maybe she fell on a broom.’”).

172. See *Evening News with Dan Rather: Congressional Report Finds Nursing Home Abuse* (CBS News television broadcast, July 30, 2001); see also *Nursing Home Abuse Increasing*, *supra* note 3.