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# PREVENTING RESIDENT-TO-RESIDENT ABUSE IN LONG-TERM CARE: TARGETING SEX OFFENDERS BUT MISSING THE MARK

Tobin A. Sparling\*

## INTRODUCTION

Resident-to-resident abuse in long-term care facilities rarely receives attention – with one exception:<sup>1</sup> Considerable publicity is generated by sporadic incidents when a sex offender living in a long-term care facility harms a fellow resident.<sup>2</sup> That sex offenders live in such facilities also has become the subject of regular investigative reporting in both the print and televised media, much of it quite sensational in tone.<sup>3</sup> In 2008, the Committee on Small Business of the United States House of Representatives held a hearing on the “Impact of Predators in

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1. PAMELA BROWN & JANE K. STRAKER, *Criminal Offenders in Ohio Nursing Homes: Facility Practices, Prevalence, and Problems*, BRIEF REP., (Scripps Gerontology Ctr., Oxford, Ohio), Jan. 2012.

2. *Id.*; *See, e.g., Enid Nursing Home Fined \$1.3 Million Over Resident Sex Offender's Actions*, TULSA WORLD, Apr. 12, 2013, [http://www.tulsaworld.com/news/state/enid-nursing-home-fined-million-over-resident-sex-offender-s/article\\_9c015b38-25bf-5fd5-ad04-34601bee6016.html](http://www.tulsaworld.com/news/state/enid-nursing-home-fined-million-over-resident-sex-offender-s/article_9c015b38-25bf-5fd5-ad04-34601bee6016.html); *see also* Hana Kim, *Lawsuit Accuses Maryville Nursing Home of Covering up Sexual Assault*, WATE 6 NEWS, Mar. 12, 2010, <http://www.wate.com/Global/story.asp?s=12133229&clienttype=printable>.

3. *See Sex Offenders Found Living in Area Nursing Homes*, WVEC.COM (last updated Oct. 30, 2009, 3:06 PM), <http://www.wvec.com/archive/67704437.html>; NICK PENZENSTADLER & KATE GOLDEN, *At Least 45 Sex Offenders Live in Wisconsin Nursing Homes, Records Show*, WIS. ST. J., Mar. 6, 2011, [http://host.madison.com/news/local/crime\\_and\\_courts/at-least-sex-offenders-live-in-wisconsin-nursing-homes-records/article\\_f41bcea7-0c5f-5eff-8653-160076dd1510.html](http://host.madison.com/news/local/crime_and_courts/at-least-sex-offenders-live-in-wisconsin-nursing-homes-records/article_f41bcea7-0c5f-5eff-8653-160076dd1510.html); *see also* Hurst Laviana, *Sex offenders Living in Kansas Nursing Homes*, THE WICHITA EAGLE, Apr. 16, 2013, <http://www.kansas.com/2011/10/16/2064099/sex-offenders-living-in-nursing.html>.

Long-Term Care Facilities on Small Business Operators.”<sup>4</sup> It addressed the concern that, “[a]s a result of insufficient data and conflicting regulations, sex offenders have managed to infiltrate many of our country’s nursing homes, and today millions of our most vulnerable citizens remain at risk.”<sup>5</sup> Since 2004, A Perfect Cause, an Oklahoma-based advocacy group for residents in long-term care, has focused its attention on the “issue of [p]redators in America[']s [n]ursing [h]omes and other long-term care facilities.”<sup>6</sup> These factors have made resident-to-resident abuse, to the extent the public discusses it at all, synonymous with the sex offender. The targeting of a single tree, however, misses the forest – namely, it draws attention to the sex offender and away from the problem of resident-to-resident abuse and its more prevalent causes, such as the effects of dementia.

This article examines the issues posed by the residency of sex offenders in long-term care facilities, and the responsive actions and proposals of legislators and advocates for the elderly. It acknowledges that the presence of sex offenders in long-term care facilities creates a challenge with which administrators of such facilities must reckon. The article asserts, however, that many of the current responses to this challenge are likely to prove ineffective, are unnecessarily stigmatizing reformed sex offenders, and/or are unconstitutional.

The article also argues that the targeting of sex offenders as the sole cause of resident-to-resident abuse, while ignoring the factors of dementia-related aggression and inappropriate sexual behavior, distorts the public’s perception of the pervasiveness of resident-to-resident abuse in long-term care. By so doing, it creates a tunnel vision, which impedes actions that might

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4. *Impact of Predators in Long-Term Care Facilities on Small Business Operators Before Investigations and Oversight Subcomm. on Small Bus.*, 110th Cong. 100-107 (2008).

5. *Id.* at 1 (Opening Statement of Hon. Jason Altmire, Chairman of the H.R. Comm. on Small Bus.).

6. *What We Do*, A PERFECT CAUSE, <http://www.aperfectcause.org/whatwedo.html> (last visited Oct. 2, 2013, 4:11 PM).

address the larger problem more effectively and better protect the undoubtedly vulnerable residents who live in these facilities.

Part I describes long-term care facilities and their residents. Part II explores the presence of sex offenders in these facilities. It discusses who they are, how many there are, how they got there, and their likelihood of recidivism. Part III examines the problem of resident-to-resident abuse in long-term care. It addresses the prevalence of such abuse, identifies the victims, and discusses its potential causes, focusing on sex offender abuse and abuse related to the effects of dementia. In the latter regard, Part III defines dementia and discusses the inappropriate sexual behavior and aggressive behaviors which accompany it and contribute to resident-to-resident abuse. Part IV describes the registration requirements and residency restriction which ex-sex offenders currently face and that will be the foundation upon which restrictions of their access to long-term care will lie. Part V explores the merits of the actions, which have been proposed or enacted, to address the presence of sex offenders in long-term care facilities. In conclusion, Part VI advances alternative proposals that address the problem of resident-to-resident abuse more globally and provide greater protection to the residents of long-term care.

## I. LONG-TERM CARE FACILITIES

### *WHAT ARE LONG-TERM CARE FACILITIES?*

Long-term care facilities, which occupy a middle ground between a formal hospital setting and the family home, serve people who cannot care for themselves.<sup>7</sup> They fall into different categories, distinguished by the kinds of services, degree of supervision, and level of medical care provided.<sup>8</sup> Long-term care facilities may be government- or privately-operated and

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7. Thomas Day, *Guide to Long Term Care Planning: About Long Term Care*, NAT'L CARE PLAN. COUNCIL (last visited Oct. 2, 2013, 4:15 PM), [http://www.longtermcarelink.net/eldercare/long\\_term\\_care.htm](http://www.longtermcarelink.net/eldercare/long_term_care.htm).

8. *Id.*

managed for profit or non-profit.<sup>9</sup> Although the elderly comprise the largest population in long-term care facilities, many facilities serve adults of any age who require the care they provide.<sup>10</sup>

Three basic categories of long-term care facilities provide care for people outside the family home for extended periods of time. Nursing homes provide the greatest level of supervision and medical care and, consequently, are the most highly regulated of these facilities.<sup>11</sup> They have the info-structure, equipment, and personnel to provide skilled nursing care under medical direction and to perform basic medical treatments and dietary control for residents convalescing from or living with acute illness or injury.<sup>12</sup> Next down the line are rest homes with nursing supervision. They provide personal care and round-the-clock nursing care under a doctor's supervision, but do not perform the specialized medical services that nursing homes offer.<sup>13</sup> Finally, in distinction to the foregoing, residential care homes lack a nursing component. They simply furnish a place to live, along with meals, laundry service, assistance with dressing, personal hygiene, and taking daily medications.<sup>14</sup> Residential care homes represent the fastest-growing type of

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9. *Facts About Nursing Homes*, PBS.ORG (last visited Oct. 2, 2013, 4:17 PM), <http://www.pbs.org/newshour/health/nursinghomes/facts.html>.

10. *Selected Long-Term Care Statistics, Who Needs Long-Term Care?*, FAMILY CAREGIVER ALLIANCE (last visited Oct. 2, 2013, 4:24 PM), [http://www.caregiver.org/caregiver/jsp/content\\_node.jsp?nodeid=440](http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=440); Day, *supra* note 7.

11. *A Guide to Nursing Homes*, HELPGUIDE.COM (last visited November 16, 2013), [http://www.helpguide.org/elder/nursing\\_homes\\_skilled\\_nursing\\_facilities.htm](http://www.helpguide.org/elder/nursing_homes_skilled_nursing_facilities.htm); *State Regulation of Care Quality is Costly to Nursing Homes*, AGENCY FOR HEALTHCARE RES. & QUALITY PUB. NO. 12-RA004 8 (2012), <http://www.ahrq.gov/news/newsletters/research-activities/jan12/0112RA.pdf>.

12. Conn. Dep't. of Pub. Health, *Nursing Home Facilities: Licensed by the State of Connecticut 2011-2012* (Sept. 8, 2011), [http://www.ct.gov/dph/lib/dph/facility\\_licensing\\_and\\_investigations/pdf/nursing\\_home\\_book.pdf](http://www.ct.gov/dph/lib/dph/facility_licensing_and_investigations/pdf/nursing_home_book.pdf); *What Caregivers Should Know About Nursing Homes*, WEDMD.COM (last visited November 16, 2013), <http://www.webmd.com/health-insurance/nursing-home-care>

13. Conn. Dep't. of Pub. Health, *supra* note 12.

14. *Id.*; *What are Residential Homes?*, APLACEFORMOM.COM (last visited November 16, 2013), <http://www.aplaceformom.com/care-homes>.

elder housing, although some also house the non-elderly.<sup>15</sup> They vary widely in character. The category encompasses converted private homes, with a single caretaker serving a few adults, as well as large, dedicated facilities, having numerous specialized caregivers and many residents.<sup>16</sup> Residential care homes also have the least stringent regulations in terms of the physical standards, quality of care, and staff training required.<sup>17</sup>

#### **WHO, GENERALLY, RESIDES IN LONG-TERM CARE FACILITIES?**

By their nature, long-term care facilities house vulnerable people who generally cannot care for themselves or require assistance in doing so.<sup>18</sup> Approximately two-thirds of long-term care residents are aged 65 or older.<sup>19</sup> Almost half are aged 85 or older.<sup>20</sup> Women represent approximately 80 percent of the long-term care population.<sup>21</sup> Residents in nursing homes tend to be more greatly disabled than residents of residential care homes.<sup>22</sup> Indeed, studies have indicated that 80 to 90 percent of nursing home residents have a cognitive impairment and that, of those, over 50 percent suffer from some kind of dementia.<sup>23</sup> Twenty-

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15. CATHERINE HAWES & ANNE-MARIE KIMBELL, DETECTING ABUSE IN RESIDENTIAL CARE FACILITIES 5 (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229299.pdf>.

16. The Scan Found., *Residential Care Facilities for the Elderly*, 7 LONG-TERM CARE FUNDAMENTALS: TECH. BRIEF SERIES (Mar. 2011); *What is Assisted Living?*, PAYING-FOR-ELDERARE.COM (last visited November 16, 2013), <http://www.paying-for-elderare.com>; *Medicaid and Long-Term Care Services for Adults*, DSHS 22-619(X) (REV. 2012), <http://www1.dshs.wa.gov/pdf/Publications/22-619.pdf>.

17. Hawes & Kimbell, *supra* note 15, at 51-52; See also Tracy Sandlands, *How to Open a Residential Care Facility for the Elderly*, HOUS. CHRON. Oct. 2, 2013, <http://smallbusiness.chron.com/open-residential-care-facility-elderly-17393.html> (noting that regulations vary from state to state but generally require only an initial 40 hours of training for operators).

18. Day, *supra* note 7.

19. FAMILY CAREGIVER ALLIANCE, *supra* note 10.

20. *Ageing & Health A to Z*, HEALTHINAGING.ORG (last visited Oct. 2, 2013, 5:34 PM), <http://www.healthinaging.org/aging-and-health-a-to-z/topic:nursing-homes/>.

21. *The Characteristics of Long-term Care Users*, AGENCY FOR HEALTHCARE RES. & QUALITY (last visited October 23, 2013), <http://www.ahrq.gov/professionals/systems/long-term-care/resources/facilities/lcusers/lcuse1.html>.

22. *Id.*

23. Tony Rosen et al., *Resident-to-Resident Aggression in Long-Term Care Facilities: Insights from Focus Groups of Nursing Home Residents and Staff*, 56 J. AM.

five percent require assistance with two daily functions and 75 percent require assistance with three or more.<sup>24</sup> Even though residential care homes usually discharge persons whose needs become too great for them to handle, many of their residents also suffer from cognitive impairments, mental and behavioral disorders, and other disabilities.<sup>25</sup>

Social isolation further diminishes the quality of life of many residents in long-term care facilities. In one study, 87 percent of the persons living in residential care homes were not married and 27 percent had no living family members.<sup>26</sup> Nearly 70 percent of the female residents in nursing homes are widowed, divorced, or never-married.<sup>27</sup> The absence of family members to monitor the condition of many of those living in long-term care, combined with the prevalence of cognitive impairment and physical disability, creates an environment that is ripe for physical and sexual abuse.<sup>28</sup>

## II. SEX OFFENDERS IN LONG-TERM CARE FACILITIES

### *WHO ARE SEX OFFENDERS?*

Although most people probably envision a pedophile when they think of a "sex-offender," the term encompasses a wide range of misbehaviors of varying degrees of culpability and potential threat to the public at large. At the least serious end of the scale, sex offenders may include those convicted of public urination or streaking.<sup>29</sup> Teenagers convicted of engaging in

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GERIATRIC SOC'Y 1398 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2755096/pdf/nihms136079.pdf> (noting that cognitive impairment affects 80-90% of nursing home residents); Tony Rosen et al., *Sexual Aggression between Residents in Nursing Homes: Literature Synthesis for an Underrecognized Issue*, 58 J. AM. GERIATRIC SOC'Y 1970 (2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3625650/> (noting that over 50% have dementing illness).

24. *Aging & Health A to Z*, *supra* note 20.

25. Hawes & Kimbell, *supra* note 15 at v.

26. *Id.*

27. *Aging & Health A to Z*, *supra* note 20.

28. Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23 at 4.

29. Kelsie Tregilgas, Comment, *Sex Offender Treatment in the United States: The*

under-age sexual activity with other teenagers, or of texting sexually-explicit photographs over their cell phones (i.e. sexting), could also be officially branded sex offenders.<sup>30</sup> The term is equally applied to those convicted of extremely serious infractions, such as “sex trafficking,” “abusive sexual conduct,” the “solicitation of a minor to practice prostitution,” and the “production or distribution of child pornography,” in addition to “abusive sexual contact. . .against a minor.”<sup>31</sup> Moreover, in some jurisdictions, the non-parental kidnapping of a minor is deemed a sex offense, even though it does not necessarily presuppose any sex-related contact or activity.<sup>32</sup>

### **HOW FREQUENTLY DO SEX OFFENDERS RECIDIVATE?**

Although advocates for greater regulation of released sex offenders in long-term care facilities frequently refer to these prior offenders as “predators,”<sup>33</sup> evidence does not support the use of this characterization so broadly. Recidivism rates vary among the different classes of sex offenders.<sup>34</sup> Moreover, a majority of released sex offenders do not recidivate.<sup>35</sup> Recidivism rates, generally, as reported by sixteen government or academic studies conducted in the United States between 2001 and 2012 ranged between 1.8 percent and 10 percent with the majority in the 3.38 percent to 5.7 percent range.<sup>36</sup> Another

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*Current Climate and an Unexpected Opportunity for Change*, 84 TUL. L. REV. 729, 732 (2010).

30. *Id.* at 751; Robert Mummer, *Sexting and the Law: How Lack of Reform in California Puts Teenagers in Jeopardy of Prosecution under Child Pornography Laws Enacted to Protect Them*, 38 W. ST. U. L. REV. 72, 72-74, 79-83 (2010).

31. See 42 U.S.C.A. §16911 (2012).

32. See *Id.* at (4)(B).

33. See generally *Impact of Predators in Long-Term Care Facilities*, *supra* note 4; *What We Do*, *supra* note 6.

34. TX. Dep’t of DHS, *Council on Sex Offender Treatment Treatment of Sex Offenders – Recidivism* (last updated Apr. 30, 2012), [http://www.dshs.state.tx.us/csot/csot\\_recidivism.shtm](http://www.dshs.state.tx.us/csot/csot_recidivism.shtm) (last updated Apr. 30, 2012).

35. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-326, *LONG-TERM CARE FACILITIES: INFORMATION ON RESIDENTS WHO ARE REGISTERED SEX OFFENDERS OR ARE PAROLED FOR OTHER CRIMES*, 10 (2006).

36. *Recidivism Studies*, USA FAIR INC. (last visited Oct. 2, 2013, 7:23 PM), [http://www.usafair.org/recidivism\\_studies](http://www.usafair.org/recidivism_studies).

study reported a 13 percent rate of re-offense.<sup>37</sup> All of the reported rates, however, are considerably lower than the recidivism rate of persons convicted of non-sexual offenses, which has been reported as high as 41 percent.<sup>38</sup>

Predictors of sex-offender recidivism are psychopathic characteristics, a history of criminal behavior, and youth.<sup>39</sup> Offenders attracted principally or exclusively to children, especially boys, present enhanced risk.<sup>40</sup> Notably, older offenders are less likely to recidivate than younger ones.<sup>41</sup> Recidivism rates decline significantly and directly with age, although some offenders may exhibit violent tendencies throughout their lives.<sup>42</sup> The likelihood of recidivism also declines the longer released offenders refrain from illegal sexual conduct.<sup>43</sup> Compliance with state-ordered supervision and treatment programs creates a lower risk as well.<sup>44</sup>

#### ***HOW MANY SEX OFFENDERS RESIDE IN LONG-TERM CARE?***

Notwithstanding the many sex offender registration and public notification statutes that have been enacted over the past twenty years, the number of prior sex offenders living in long-term care facilities remains largely a matter of speculation. A number of factors impede an accurate count. Elderly offenders residing in nursing homes may have committed their crimes before registration requirements came into effect.<sup>45</sup> Some

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37. KRISTIN M. ZGOBA ET AL, MULTI- STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT, 10 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf>.

38. TX. Dep't of DHS, *supra* note 34.

39. *Id.*

40. Zgoba et al., *supra* note 37, at 10.

41. *Id.* at 11.

42. *Id.* at 29.

43. *Id.* at 11.

44. *Id.* at 10.

45. Joanne R. Lax & Nicholas J. Lynn, *Treating Sex Offenders in Nursing Homes: The Problem, Possible Solutions and Pitfalls* in AMERICAN HEALTH LAWYERS ASSOCIATION SEMINAR MATERIALS (Feb. 15, 2006), available at Westlaw AHLA-Papers PO2150622.

offenders flout the law and do not register.<sup>46</sup> Because nursing homes are not required to conduct criminal background checks of prospective residents, they simply do not know whether residents are sex offenders unless the information comes from another source.<sup>47</sup> That some public registries exclude certain types of sex offenders altogether or drop some classes of offenders from the lists if they have not reoffended after a certain period of years further hampers the attainment of an accurate count.<sup>48</sup> Indeed, the level of under-reporting has been estimated at 200 percent.<sup>49</sup> However, notwithstanding the factors contributing to under-reporting, the available statistics indicate that the percentage of sex offenders living in long-term care facilities compared to the total long-term care population is still very small.

Using the National Sex Offender Registry, an FBI database, which compiles information about registered sex offenders from all of the states and the District of Columbia, the U.S. Government Accountability Office reported 683 sex offenders residing in long-term care facilities in 2005.<sup>50</sup> These offenders represented .05 percent of the total population of 1.5 million persons living in such facilities at that time.<sup>51</sup> Males accounted for 99 percent of the offender population.<sup>52</sup> Whereas 63 percent of the general population in the long-term care facilities were age 65 or older<sup>53</sup>, 57 percent of the sex offenders were younger than 65 and 30 percent were under 50.<sup>54</sup> Rape and the sexual assault of adults and minors accounted predominantly for their

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46. *Id.*

47. *See generally id.*; Jonathan McFadden, *DHEC Records Show Violations That Could Endanger Residents at Catawba Community Care Home*, ROCK HILL HERALD, October 26, 2013, <http://www.heraldonline.com/2013/10/26/5342690/dhec-records-show-violations-that.html>.

48. *Id.*; U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 35, at preface.

49. Brown & Straker, *supra* note 1.

50. U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 35, at 11.

51. *Id.*

52. *Id.*

53. FAMILY CAREGIVER ALLIANCE, *supra* note 10.

54. U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 35, at 11.

convictions.<sup>55</sup>

In 2005, A Perfect Cause, an elder-care advocacy group, also reported findings of a similar magnitude after correlating the addresses of sex offenders in public registries with the addresses of long-term care facilities. It found 637 offenders currently living in long-term care facilities in 36 states.<sup>56</sup> Approximately 45 percent of these resident offenders were under age 60.<sup>57</sup> More recent figures from individual states also indicate a relatively small percentage of sex offenders in the total long-term care population. In 2011, 19 registered sex offenders in Kansas lived among the state's 20,000 nursing home residents.<sup>58</sup> Their offenses ranged from indecent exposure to rape.<sup>59</sup> In 2012, 50 to 55 registered sex offenders lived in Iowa nursing homes<sup>60</sup> where approximately 25,000 persons receive care.<sup>61</sup> A search of Wisconsin's sex offender registry in 2011 revealed that the addresses of 45 offenders corresponded to those of the state's nursing homes,<sup>62</sup> which care for around 30,000 people.<sup>63</sup> Thus, notwithstanding their failings, the statistics demonstrate that while sex offenders do indeed live in long-term care facilities in the United States, their presence, as a percentage of total residents, remains quite low.

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55. *Id.* at 12.

56. *Predators in America's Nursing Homes, Registered Sex Offenders Residing in Nursing Homes, 2005 Report*, A PERFECT CAUSE, 6 (last visited Oct. 2, 2013, 7:52 PM), <http://www.aperfectcause.org/APerfectCause-PredatorsinAmericasNursingHomes-2005Report.pdf>.

57. *Id.* at 16.

58. Hurst Laviana, *supra* note 3.

59. *Id.*

60. Mike Wiser, *Branstad Calls for Sex Offender Notices at Long-Term Care Facilities*, QUAD-CITY TIMES, Jan. 9, 2012, [http://qctimes.com/news/local/government-and-politics/branstad-calls-for-sex-offender-notices-at-long-term-care/article\\_def1f874-3afe-11e1-9593-0019bb2963f4.html](http://qctimes.com/news/local/government-and-politics/branstad-calls-for-sex-offender-notices-at-long-term-care/article_def1f874-3afe-11e1-9593-0019bb2963f4.html).

61. Kaiser Family Found., *Total Number of Residents in State Certified Nursing Facilities* (last visited September 21, 2013), <http://kff.org/other/state-indicator/number-of-nursing-facility-residents/>.

62. Penzenstadler & Golden, *supra* note 3.

63. Kaiser Family Found., *supra* note 61.

### HOW DO SEX OFFENDERS GAIN ACCESS TO LONG-TERM CARE FACILITIES?

Although the exact number of sex offenders living in long-term care facilities remains speculative, how sex offenders gain admission to these facilities is well-documented. Long-term care facilities accept many through general admission channels.<sup>64</sup> Due to the widespread lack of criminal background checks of applicants, the failure to consult sex offender registries as part of the intake process, and even the omission of a requirement on some application questionnaires for disclosure of an applicant's criminal history, the sex-offender status of applicants may not be considered in admissions determinations.<sup>65</sup>

Placements by state agencies represent the other major channel through which sex offenders become admitted to long-term care facilities. The closure of state hospitals for the mentally ill and the incapacity of prison facilities to treat chronically ill, older inmates have forced some state and local governments to seek alternative venues for the care of individuals under their charge. Some of the sex offenders involved may have medical or mental issues that require treatment as a condition of their probation or parole. Others still may be serving out their prison sentences but suffer from medical conditions beyond the scope of the care that prison infirmaries provide.<sup>66</sup> Another category are offenders who, subsequent to the fulfillment of their prison terms, have been placed in involuntary civil commitment as sexually violent predators and now need treatment that their places of detention do not offer.<sup>67</sup> Because prison authorities arrange for the

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64. Lax & Lynn, *supra* note 45, at \*4 (noting that channels consist of hospitals, physicians, or social work staff at assisted living facilities).

65. *Id.*; Brown & Straker, *supra* note 1.

66. Lax & Lynn, *supra* note 45, at \*4-5.

67. *Id.* at \*4; See also Ann Carothers-Kay, *Law Won't Keep Predators from Nursing Homes* – Zaun, URBANDALE.PATCH.COM (Apr. 27, 2012 1:28 AM), <http://urbandale.patch.com/groups/opinion/p/keeping-sex-offenders-out-of-nursing-homes-zaun-report-4-26> (commenting upon the release of a committed sexually violent predator to an Iowa nursing home).

placement in long-term care facilities of individuals who otherwise would remain incarcerated, the intake personnel of such facilities presumably should be cognizant of these individuals' criminal status. However, they do not always pass that information down to the staff providing the actual care.<sup>68</sup> Concern also has been raised that a parole officer of a paroled sex offender on supervised release may not routinely notify health care providers of the parolee's sex offender status.<sup>69</sup>

### III. RESIDENT-TO-RESIDENT PHYSICAL AND SEXUAL ABUSE IN LONG-TERM CARE

#### *HOW PREVALENT IS RESIDENT-TO-RESIDENT ABUSE GENERALLY?*

Resident-to-resident physical and sexual abuse is the dirty secret of residential long-term care. Studies indicate that such abuse occurs more frequently than the general public probably imagines. A national survey disclosed that resident-to-resident abuse accounted for 78 percent of the reported instances of resident abuse in long-term care facilities.<sup>70</sup> Similarly, from July 1996 to June 2001, 69 percent of the reported cases of resident abuse in Virginia long-term care facilities had been instigated by other residents.<sup>71</sup> A third study revealed that other residents bore responsibility for 67 percent of the cases involving the abuse of male residents in long-term care facilities.<sup>72</sup>

Sadly, these statistics probably do not represent the full extent of the resident-to-resident abuse that actually occurs since many incidents of abuse go unreported.<sup>73</sup> Under-reporting results, in part, from the failure of facilities to observe signs of

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68. Brown & Straker, *supra* note 1.

69. Minnesota, Governor's Commission on Sex Offender Policy, *Final Report*, at 18-19 (2005), available at <http://www.doc.state.mn.us/commissionsexoffenderpolicy/commissionfinalreport.pdf>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 3.

abuse.<sup>74</sup> Under-reporting also results due to residents being ashamed to report their abuse for fear that reporting it will affect their living situations adversely.<sup>75</sup> Even when administrators suspect abuse, they often cannot confirm it or identify its source when the victim suffers cognitive impairment and cannot credibly relate what happened.<sup>76</sup>

#### ***WHO ARE THE VICTIMS OF RESIDENT-TO-RESIDENT ABUSE?***

Female residents of long-term care facilities are the primary victims of resident-to-resident abuse, accounting for over 90 percent of the reported cases.<sup>77</sup> Male residents, however, are not immune, although they are targeted at a significantly lower rate.<sup>78</sup> A majority of victims exhibited cognitive impairment. Disorientation in regard to time and place was common and substantially so in the female victims. Victims in general also experienced one or more physical disabilities and at least a third could not walk unassisted.<sup>79</sup>

#### ***WHAT ARE THE CAUSES OF RESIDENT-TO-RESIDENT ABUSE?***

Perpetrators of resident-to-resident abuse are largely male, although sexual and physical abuse by women has been reported.<sup>80</sup> Even though resident sex offenders have engaged in the most highly reported cases, aggression attributable to dementia probably accounts for the greater number of incidents.<sup>81</sup>

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74. Rosen et al, *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23, at 3.

75. *Id.* at 3-4.

76. *Id.* at 3.

77. *Id.* at 5.

78. *Id.*

79. *Id.*

80. *Id.* at 4-5.

81. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 5, 26 (reporting that "[f]acility officials we interviewed more frequently express concerns about the behavior and potential for abuse by cognitively impaired and mentally ill residents than by offenders who may have no behavioral issues").

*Sex Offender Abuse*

Violent acts by sex offenders against fellow residents in long-term care facilities have received the lion's share of media attention. Indeed, to the extent that public attention is drawn to the issue of resident-to-resident abuse in long-term care, it has occurred almost exclusively within the context of sex offenders residing in these facilities.<sup>82</sup> Thus, in the public's mind at least, the abuse of residents in long-term care seems to have become synonymous with the sex offender. Many of the reported cases of sex offender abuse of long-term care residents have, indeed, been horrific.<sup>83</sup> Yet, however much they stick in the mind, it should not be forgotten that they also have occurred relatively infrequently.<sup>84</sup>

In actuality, sex offender abuse of fellow nursing home residents apparently occurs relatively infrequently.<sup>85</sup> A lack of solid statistical data, however, inhibits a full understanding of the impact of sex offenders in long-term care settings.<sup>86</sup> Some instances of sex offender abuse probably go unreported for the same reasons that resident-to-resident abuse, generally, is under-reported.<sup>87</sup> Abuses that are reported often do not indicate whether the abuser had a prior conviction for a sex or other offense.<sup>88</sup> Consequently, under-reporting and the insufficient description of the perpetrators of reported abuses have created a situation where, insofar as policies related to the sex offender are

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82. See *id.* at 1 (noting news reports of sex offenders in nursing homes abusing other residents).

83. See, e.g., A Perfect Cause, *Criminal Acts Committed by Predators While Residing in America's Long-Term Care Facilities*, available at [http://www.aperfectcause.org/APC-US\\_CongressReport-CriminalOffendersOffensesInLTC-April2006.pdf](http://www.aperfectcause.org/APC-US_CongressReport-CriminalOffendersOffensesInLTC-April2006.pdf) (noting instances of murder and rape among other abuses).

84. Brown & Straker, *supra* note 1.

85. *Id.*

86. *Id.*

87. See Kimberly Essex, *Senior Sex Offenders*, WAFF 48 NEWS, Sept. 9, 2011, <http://www.waff.com/story/15430737/sex-offenders-in-nursing-homes-a-waff-48-news-special-report> (noting that many attacks on seniors in nursing homes goes unreported).

88. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 34, at 17.

concerned, instinct often prevails over actual knowledge of how different kinds of abuse correlate with the characteristics of both the abusers and the abused.<sup>89</sup>

*Resident-to-Resident Abuse Associated with Dementia*

The prevalence of dementia in long-term care facilities and the inappropriate sexual behavior and/or violent behavior that sometimes accompanies it is, perhaps, as disregarded in public discussions of elder abuse in long-term care facilities as the presence of sex offenders in such facilities is over-emphasized. However, if the vulnerable populations in long-term care are to be fully protected from resident-to-resident abuse, both issues must be addressed in tandem as joint contributors to the ongoing problem.<sup>90</sup>

Dementia, which occurs in various forms, is a neurodegenerative disease that negatively affects memory and cognition.<sup>91</sup> Dementia occurs more frequently, but not exclusively, in older people<sup>92</sup> and typically leads to progressive emotional and behavior changes.<sup>93</sup> Although common types include vascular dementia and Lewy body dementia, Alzheimer disease is the most common form of dementia.<sup>94</sup> Alzheimer's disease generally appears after age 60 and results in the impairment of "memory, language skills, judgment, and spatial abilities."<sup>95</sup>

Many nursing home residents suffer from dementia.<sup>96</sup> Its

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89. See generally Brown & Straker, *supra* note 1, at 1-2.

90. Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23 at 5.

91. Tsatali et al., *The Complex Nature of Inappropriate Sexual Behaviors in Patients with Dementia: Can We Put it into a Frame?* 29 SEX. DISABIL. 143, 145 (2010).

92. *Dementia: Causes*, MAYOCLINIC.COM (last visited August 30, 2013), <http://www.mayoclinic.com/health/dementia/DS01131/DSECTION=causes>.

93. Tsatali et al., *supra* note 90, at 145.

94. *Dementia: Causes*, *supra* note 92.

95. *Id.*

96. Tsatali et al., *supra* note 91, at 145; Rosen et al., *Resident-to-Resident Aggression in Long-Term Care Facilities*, *supra* note 23, at 2 (noting that "cognitive impairment afflicts 80-90% of nursing home residents"); Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23, at 4 (noting that "over

onset, however, does not necessarily extinguish their sexual feelings and needs for intimacy and love.<sup>97</sup> Although changes in sexuality occur as a result of aging, many nursing home residents remain sexually active or, at least, continue to experience sexual desires.<sup>98</sup> As their cognitive processes deteriorate, some persons may become sexually disinhibited, resulting in Inappropriate Sexual Behavior.<sup>99</sup> Inappropriate Sexual Behavior is a clinical term, which describes "any vigorous sexual drive after the onset of dementia that interferes with normal activities of living or is pursued at inconvenient times and with unwilling partners."<sup>100</sup> The condition manifests itself in various ways. Some persons touch or fondle themselves or others.<sup>101</sup> Sufferers may masturbate or disrobe in public.<sup>102</sup> In extreme instances, the demented person climbs into bed with another resident and attempts sexual intercourse.<sup>103</sup> Inappropriate Sexual Behavior occurs more frequently, but not exclusively, in males, while the targets of such behavior are most often, but not exclusively, females with cognitive impairment.<sup>104</sup>

Some inappropriate conduct that outwardly appears sexually-motivated actually may result from non-sexual needs.<sup>105</sup> These might include the desire for intimacy, to be freed from uncomfortable clothing, or even to scratch an itch.<sup>106</sup> Disinhibited persons suffering from Alzheimer dementia are more likely to be sexually motivated than persons with other forms of dementia.<sup>107</sup>

The effect of dementia-related Inappropriate Sexual

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50% have dementing illness").

97. Tsatali et al., *supra* note 91, at 144.

98. *Id.*

99. *Id.* at 145.

100. *Id.*

101. *Id.*

102. Tsatali et al., *supra* note 91, at 145.

103. *Id.*

104. Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23, at 5.

105. *Id.* at 3.

106. *Id.*

107. *Id.* at 5

Behavior on sex offenders has received little, if any, attention. Yet, studies do not appear to link dementia-related Inappropriate Sexual Behavior in the population, generally, to pre-dementia sexual behavior. One study notes that “[s]pecifically, the previous history does not impact on such abnormalities. . .”<sup>108</sup> Moreover, no studies have shown that sex offenders are predisposed to commit resident-to-resident abuse in long-term care environments.<sup>109</sup> It must be noted, however, that some sex offenders residing in long-term care facilities may be younger than the other residents and, in certain cases, considerably so.<sup>110</sup> Dementia in these younger sex offenders could be expected to be less prevalent<sup>111</sup> and, consequently, a less likely cause of aggressive sexual behavior they exhibit toward fellow residents.

Anger, accompanied by aggressive behavior, commonly accompanies the progression of dementia and also causes patient-to-patient abuse. Indeed, aggression and violence have been called “the most serious behavioral disturbances associated with dementia.”<sup>112</sup> Aggressive behavior occurs in approximately 20 percent of patients with Alzheimer disease.<sup>113</sup> Verbal aggression gives way to physical aggression as dementia becomes more severe.<sup>114</sup> Although aggressive behavior appears in patients of both genders, one study indicates that male patients are three times more likely to become violent than

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108. Tsatali et al., *supra* note 91, at 146.

109. Brown & Straker, *supra* note 1; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 26 (noting that sex offenders appear no more likely to commit abuses than other residents).

110. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 11.

111. *Dementia: Causes*, *supra* note 82 (noting that dementia more frequently afflicts older adults).

112. Jaya Joy & Joe John Vattakatucher, *Aggression and Violence in Patients with Dementia*, GERIATRIC MED. (2013), [http://www.gmjournals.co.uk/aggression\\_and\\_violence\\_in\\_patients\\_with\\_dementia\\_78559.aspx](http://www.gmjournals.co.uk/aggression_and_violence_in_patients_with_dementia_78559.aspx).

113. Rebecca Eastley & Ihsan Mian, *Physical Assaults by Psychogeriatric Patients: Patient Characteristics & Implications for Placement*, 8 INT'L J. GERIATRIC PSYCHIATRY 515, 515 (1993).

114. Roger Almvik et al., *Challenging Behaviour in the Elderly – Monitoring Violent Incidents*, 21 J. GERIATRIC PSYCHIATRY 368, 368 (2006).

female patients.<sup>115</sup>

Aggression by demented residents is particularly common in long-term care settings. The placement of an individual with dementia in a nursing home frequently occurs when his or her increasingly challenging behavior can no longer be handled by caregivers at home.<sup>116</sup> Thus, a higher concentration of persons with this disorder could be expected in long-term care facilities. However, the nursing home environment, in and of itself, may contribute to the behavior as the individual comes into contact with displeasing aspects of communal living. For example, resident-to-resident assaults commonly arise out of conflicts with roommates, over competition for shared resources, and as a result of impatience with more impaired residents.<sup>117</sup> In some instances, however, the abuse may be unprovoked by the victim.<sup>118</sup>

While long-term care staff appear to bear the brunt of demented patients' aggressive behavior, an observed 9 percent incident rate of patient-to-patient abuse remains significant.<sup>119</sup> Disturbingly, nursing home staffs tend not to report incidents of violence directed by patients toward themselves, either because they discount its severity or consider it just part of the job.<sup>120</sup> Nor do caregivers share a common understanding of what constitutes violence or aggression in the patient behaviors they observe.<sup>121</sup>

Although no studies definitively indicate the extent to which dementia-related, resident-to-resident aggression occurs

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115. *Id.* at 370.

116. *Transition of Patients with Dementia into Aged Care Home*, VIRTUAL MEDICAL CENTRE (last visited November 17, 2013), <http://www.virtualmedicalcentre.com/healthandlifestyle/transition-of-patients-with-dementia-into-an-aged-care-home/190>.

117. Mark Lachs et al., *Resident-to-Resident Elder Mistreatment and Police Contact in Nursing Homes: Findings from a Population-Based Cohort*, 55 J. AMER. GERIATRIC SOC'Y. 840, 840-41, 843 (2007).

118. *Id.*

119. Almvik et al., *supra* note 114, at 371 (comprised 19 cases of resident-to-resident violence in a study).

120. Eastley & Mian, *supra* note 113, at 519.

121. Joy & Vattakatucher, *supra* note 112.

in long-term care, dementia-related, resident-to-resident aggression represents perhaps an even greater danger to those living in these facilities than a resident sex offender. While the public largely remains unaware of the relationship between dementia and elder abuse, long-term care professionals have recognized the threat it poses. Indeed, as early as 2005, the U.S. Government Accountability Office's report on sex offenders in long-term care facilities noted that "[s]everal long-term care ombudsmen, industry association officials, and facility officials in the states we reviewed indicated that the residents they are most concerned about in terms of behavioral problems are those with mental illness, particularly dementia, for which behaviors are apt to change as the disease progresses."<sup>122</sup>

#### **REPORTING AND INVESTIGATION OF RESIDENT-TO-RESIDENT ABUSE IN LONG-TERM CARE**

The mechanisms for the reporting and investigation of resident-to-resident abuse in long-term care facilities vary widely from one state to another.<sup>123</sup> In many jurisdictions, no centralized office exists to receive complaints of abuse, resulting in a diffusion of reporting between licensing agencies, adult protective services, ombudsmen programs, and other state and local agencies.<sup>124</sup> Because these different agencies often have separate agendas, different complaint screening standards, and variable levels of communication between each other, a comprehensive understanding of the magnitude and nature of the resident-to-resident abuse, which occurs, is difficult, if not impossible, to obtain.<sup>125</sup> Indeed, some state agencies screen out many reports of abuse at the initial intake and, thus, never

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122. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 5.

123. Hawes & Kimbell, *supra* note 14, at 63.

124. *See generally Id.* at 62 (noting multi-level intake sites with different standards of screening).

125. *Id.* at 69-70 (noting the different roles of and approaches taken to reports of abuse by licensing agencies, adult protective services, and ombudsmen); *Id.* at 68 (noting "turf wars" between agencies and the failure to cross-report complaints of abuse).

report or investigate them at all.<sup>126</sup> These factors have contributed to a widespread under-reporting of resident-to-resident abuse, and, more specifically, to a failure to develop best practices on a state-wide level to combat it.<sup>127</sup>

#### IV. CURRENT REGISTRATION REQUIREMENTS AND LIVING RESTRICTIONS PLACED UPON SEX OFFENDERS

Sex offenders are subject to a variety of federal and state reporting requirements and may also face residency restrictions imposed by state or municipal authorities. These requirements and regulations provide the baseline to which any additional regulation of sex offenders in long-term care facilities will be applied. Moreover, many of the concerns raised by these existing laws should be considered as well when assessing the appropriateness of any further regulation of sex offenders in the context of long-term care.

##### *SEX OFFENDER REGISTRATION REQUIREMENTS*

In 2006, the United States Congress enacted the Adam Walsh Child Protection and Safety Act.<sup>128</sup> The Act, which incorporated several earlier sex offender registration and public notification mandates, seeks to establish a unified system of registration and public notice provisions throughout the states.<sup>129</sup> It ranks sex offenders in three tiers, depending upon the severity of their offenses.<sup>130</sup> Each state is required to maintain a state-wide sex offender registry to which offenders, upon release from prison or completion of an alternative

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126. *Id.* at 64-65 (noting reports of the screening out of complaints due to a shortage of agency staff to investigate them).

127. *Id.* at 66 (under-reporting); *Id.* at 107-108 (noting need for research to identify and examine the causes of elder abuse and determine how to prevent abuses more effectively).

128. 42 U.S.C.A. § 16901 (2012).

129. Rebecca L. Visgaitis, Note, *Retroactive Application of the Sex Offender Registration and Notification Act: A Modern Encroachment on Judicial Power*, 45 COLUM. J.L. & SOC. PROBS. 273, 274 (2011).

130. 42 U.S.C.A. § 16911 (2012).

sentence, must register.<sup>131</sup> Registration involves the provision of a current photograph, DNA sample, fingerprints, and social security number.<sup>132</sup> Offenders must also disclose the location of their current residences, the names and addresses of their employers, any schools they attend, and the make and color of their motor vehicles and license plate numbers.<sup>133</sup> Tier I, II, and III offenders must register for periods of 15 years, 25 years, and life, respectively, unless granted a reduction in their registration period upon demonstration of a variety of ameliorative factors.<sup>134</sup> The Act further requires states to provide public access to their sex offender registries through the Internet and to facilitate online searches by zip code and geographic area.<sup>135</sup> The act requires the establishment of a National Sex Offender Registry to which the states must forward their sex offender registrations.<sup>136</sup>

The Adam Walsh Act required states to comply substantially with its provisions by July 27, 2011 or face a reduction in federal justice assistance funding.<sup>137</sup> As of January 2013, sixteen states had complied.<sup>138</sup> Some non-compliant states object to the Act's tiered, offense-oriented classification system, which ranks sex offenders based on the severity of their convicted offense. These states argue that their existing offender classification systems, which rank offenders according to their risk of re-offending, better facilitate the reintegration of sex offenders into the community.<sup>139</sup> Even these non-compliant

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131. 42 U.S.C.A. §§ 16912(a); 16913(b) (2012).

132. 42 U.S.C.A. §16914(a).

133. *Id.*; Stephanie Buntan, Note, *The High Price of Misguided Legislation: Nevada's Need for Practical Sex Offender Laws*, 11 NEV. L.J. 770, 773 (2011).

134. 42 U.S.C.A. §§ 16915(a)-(c) (2012).

135. 42 U.S.C.A. § 16918.

136. 42 U.S.C.A. § 16919.

137. Emanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN.COM (July 28, 2011 11:51 AM), <http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/index.html>.

138. *Adam Walsh Child Protection and Safety Act: Compliance News*, NAT'L CONF. OF ST. LEGIS (last updated Aug. 1, 2013), <http://www.ncsl.org/issues-research/justice/adam-walsh-child-protection-and-safety-act.aspx>.

139. *Id.*; See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, REPORT TO THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY, COMMITTEE ON

states, however, are required to register offenders and provide online public access to their registries.<sup>140</sup>

It remains unclear whether the imposition of registration requirements and public notification laws has impacted the recidivism rates of sex offenders. A 2005 study of Washington sex offenders showed a 70 percent drop in recidivism following the introduction of notice requirements.<sup>141</sup> A 2008 study in Minnesota also reported lower recidivism rates since community notification.<sup>142</sup> However, studies in Wisconsin,<sup>143</sup> Iowa,<sup>144</sup> New Jersey,<sup>145</sup> South Carolina,<sup>146</sup> and New York<sup>147</sup> reported no significant statistical changes in recidivism rates as a result of the implementation of registration and/or notification requirements.<sup>148</sup> An analysis in 2011 of fifteen states found that registration reduced recidivism rates but public notification did not.<sup>149</sup> Thus, there is no firm indication that registration and public notification policies effectively reduce recidivism rates of sex offenders across the board.

Although sex offender registries have been enacted to protect the public,<sup>150</sup> not to reduce recidivism per se, their efficacy as a safety measure is questionable. In the majority of sex offenses, the victim already knows the perpetrator.<sup>151</sup> Moreover, most of the offenders who must now register under

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THE JUDICIARY, HOUSE OF REPRESENTATIVES, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS, 29 (2013), <http://www.gao.gov/assets/660/652032.pdf> (noting similar concerns of states, which have implemented the Act's tiered system, that it does not take into account the risk assessment of individual offenders).

140. Zgoba et al., *supra* note 37, at 6.

141. *Id.* at 8.

142. *Id.* at 9.

143. *Id.* at 8.

144. *Id.* at 8-9.

145. Zgoba et al., *supra* note 36, at 9.

146. *Id.*

147. *Id.* at 9-10.

148. *Id.* at 8-10.

149. *Id.* at 9.

150. Grinberg, *supra* note 137 (noting supporters "tout their public safety benefits").

151. *Id.*

the Adam Walsh Act pose low risk to others.<sup>152</sup> Added to this, because registration pursuant to the Adam Walsh Act is triggered by the offense committed and not the risk posed, it does not distinguish offenders who truly present a danger from the rest.<sup>153</sup> Law enforcement agencies have expressed the concern that loading the registries with low-risk offenders makes the tracking of high-risk offenders more difficult.<sup>154</sup> In light of many of these caveats, and the stigma which registration places upon ex-offenders and their families, the Criminal Justice Committee of the Texas Senate concluded that “it is clear registries do not provide the public safety, definitely not the way it is now.”<sup>155</sup>

### SEX OFFENDER RESIDENCY RESTRICTIONS

Along with registration requirements and public notification of the names and addresses of convicted sex offenders, a number of states and municipalities have enacted legislation that restricts where sex offenders may live.<sup>156</sup> In substance, these residency requirements appear motivated to protect children from contact with convicted pedophiles. They typically prevent registered sex offenders from living a prescribed distance from the places where children usually congregate, including schools, day-care facilities, playgrounds, churches, and, in some instances, public libraries.<sup>157</sup>

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152. TEX. SEN. CRIMINAL J. COMM., INTERIM REP.18 (2010) (noting the testimony of Philip D. Taylor, a sex offender treatment provider, that “75 to 80 percent of sex offenders are low risk”).

153. *Id.* at 17 (testimony of Lieutenant Gregory Moss of the Austin, Texas Police Department, stating that “the public assumes all registered sex offenders are predators”).

154. *Id.* at 16.

155. *Id.* at 19; *See also* Grinberg, *supra* note 137 (quoting the California Sex Offender Management Board’s criticism of the Adam Walsh Act’s registration requirements: “California state law and practice related to offender risk assessment, juvenile registration and sex offender monitoring is more consistent with evidence-based practice that can demonstrate real public safety outcomes.”).

156. Jill S. Levenson, *Sex Offender Residence Restrictions, Part II*, 7 SEX OFFENDER L. REP. 49, 49-51 (2006).

157. *Id.*; Caleb Durling, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J.

Notwithstanding their focus, many residency restrictions do not distinguish between types of sex offenders and so apply equally to people convicted of relatively minor sexual offenses as well as to pedophiles.<sup>158</sup> Moreover, in recent years, states and municipalities have embarked upon what one commentator has called a “race to the bottom” to enact stricter residency limitations upon sex offenders in terms of both the types of areas and distances from which offenders are excluded.<sup>159</sup> As a result, some municipalities have effectively zoned convicted sex offenders outside of their boundaries.<sup>160</sup>

Although residency restrictions appeal greatly to politicians and the general public, they do not effectively prevent sexual violence or enhance child safety.<sup>161</sup> Indeed, misinformation, not research-based evidence, primarily motivates their adoption. Several myths lie at the heart of residency restrictions: 1) that sex offenders generally recidivate; 2) that treatment of sex offenders is always futile; and 3) that most sexual abuse is perpetrated by strangers.<sup>162</sup> In fact, recidivism is low, treatment often works, and victims of sex abuse typically know their abusers.<sup>163</sup> Moreover, critics of residency restrictions contend the restrictions actually aggravate the danger of sexual abuse, insofar as they foster recidivism by distancing offenders from the sources of family and community support needed for rehabilitation, impede the efficacy of sex offender notice

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Crim. L. & Criminology 317, 321-325 (2006); G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 42 (2008).

158. Lauren FitzPatrick, *Sex Offenders: A Flawed Law*, METROWEST DAILY NEWS, Aug. 26, 2007,

<http://www.metrowestdailynews.com/news/x997379032#axzz2VGtb0BbE> (noting that “[m]ost state laws don't distinguish between serial rapists and repentant mooners”).

159. Corey Rayburn Yung, Comment, *Banishment By a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U.L. REV. 101, 104 (2007).

160. *No Easy Answers: Sex Offender Laws in the U.S.*, 19 HUM. RTS. WATCH 1, 3 (2007), <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

161. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 412-18 (2010).

162. Levenson, *supra* note 156, at 3-4.

163. *Id.* at 3-4.

provisions by making many offenders homeless, and create an undue concentration of sex offenders in unrestricted areas.<sup>164</sup> Thus, residency restrictions, for the most part, pose harsh and unnecessary strictures upon prior sex offenders while leaving the public with a false sense of security from abuse.<sup>165</sup>

#### CIVIL COMMITMENT OF SEX OFFENDERS UNDER SEXUALLY VIOLENT PREDATOR STATUTES

Sexually violent predator (SVP) statutes represent the ultimate restriction on the lives of convicted sex offenders. Twenty states and the federal government have enacted these statutes,<sup>166</sup> which provide generally for the civil commitment of sexually violent offenders who are scheduled for release but deemed likely to reoffend if allowed to reenter the community.<sup>167</sup> In *Kansas v. Hendricks*, the United States Supreme Court dismissed due process objections that an SVP created double jeopardy and violated the ex post facto clause.<sup>168</sup> Equating SVP statutes to statutes for the civil confinement of mentally ill persons who present a danger to themselves or others, the Court held that SVP statutes comport with due process so long as the

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164. Jill S. Levenson, *Sex Offender Residency Restrictions Impede Safety Goals*, JURIST.ORG (Feb. 2, 2012), <http://jurist.org/hotline/2012/02/jill-levenson-sexoffenders-residency.php>.

165. *Id.*

166. *Civil Commitment of Sexually Violent Predators*, ATSA.COM (Aug. 17, 2010), <http://www.atsa.com/civil-commitment-sexually-violent-predators> (last visited Oct. 7, 2013); *See also* ARIZ. REV. STAT. ANN. §§ 36-3701-3717 (2012) (West); CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 2013); FLA. STAT. ANN. §§ 394.910-394.932 (West 2013); 725 ILL. COMP. STAT. ANN. §§ 207/1-99 (West 2013); IOWA CODE ANN. §§ 229A.1-16 (West 2013); KAN. STAT. ANN. §§ 59-29a01-23 (2012); MASS. GEN. LAWS CH. 123A, §§ 1-16 (West 2013); MINN. STAT. ANN. §§ 253B.001-24 (West 2012); MO. ANN. STAT. §§ 632.480-513 (West 2006); N.H. REV. STAT. ANN. §§ 135-E:1-24 (2012); N.J. STAT. ANN. §§ 30:4-27.24-31 (West 2013); N.Y. MENTAL HYG. LAW §§ 10.01-17 (Consol. 2013); N.D. CENT. CODE §§ 25-03.3-01-24 (2013); S.C. CODE ANN. §§ 44-48-10-170 (2012); TENN. CODE ANN. §§ 33-6-804 (2012); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-151 (West 2012); VA. CODE ANN. §§ 37.2-900-921 (2012); WASH. REV. CODE ANN. §§ 71.09.010-903 (West 2013); WISC. STAT. ANN. §§ 980.01-980.14 (West 2013); 18 U.S.C. § 4248 (2006).

167. *Id.*; Rudolph Alexander, *Employing the Mental Health System to Control Sex Offenders after Penal Incarceration*, 19 Law and Pol'y 111, 112 (1995).

168. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1996).

commitment of the offender requires both a finding of a past history of sexually violent behavior and of a present “mental abnormality” or “personality disorder” that prevents the offender from controlling his or her dangerousness.<sup>169</sup> Most SVP statutes, as a consequence, include four requirements for detention past the prisoner’s release date: “(1) past sexually harmful conduct, (2) a current clinical condition, (3) a substantial risk of future sexual violence, and (4) a causal relationship between the mental abnormality and the potential sexual harm.”<sup>170</sup>

Notably, the American Psychiatric Association has condemned SVP statutes for subverting psychiatry to achieve greater periods of confinement than the prevailing sentencing regulations allow.<sup>171</sup> In 1999, an Association task force reported:

In the opinion of the Task Force, the sexual predatory commitment laws establish a nonmedical definition of what purports to be a clinical condition without regard to scientific and clinical knowledge. In so doing, legislators have used psychiatric commitment to effect nonmedical societal ends that cannot be openly avowed. In the opinion of the Task Force, this represents an unacceptable misuse of psychiatry.<sup>172</sup>

A disparity between medical and legal assessments of the parameters of mental abnormality in relation to sex offenders, therefore, has plagued SVP statutes from their inception.<sup>173</sup>

Others have raised concerns about the fundamental tools used for the assessment of sex offenders’ risk of re-offending.

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169. *Id.* at 358.

170. Kasee Sparks, Note, *Differences in Legal and Medical Standards in Determining Sexually Violent Predator Status*, 32 LAW & PSYCHOL. REV. 175, 175 (2008) (quoting Richard Rogers & Rebecca L. Jackson, *Sexually Violent Predators: The Risky Enterprise of Risk Assessment*, 33 J. AM. ACAD. PSYCHIATRY L. 523, 524 (2005)).

171. Shoba Sreenivasan et al., *Normative Versus Consequential Ethics in Sexually Violent Predator Laws: An Ethics Conundrum for Psychiatry*, 38 J. AM. ACAD. PSYCHIATRY L. 386, 386 (2010).

172. *Id.* at 388 (quoting H. ZONANA et al., DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION, 1999).

173. See Alexander, *supra* note 167, at 115 (noting criticism by medical professionals that “sexual psychopathy and sexually violent predator were not clinical terms but strictly legal terms”).

For example, in 2011, a commission of the Virginia legislature faulted the methodology used by the state's SVP program for evaluating the likelihood of recidivism.<sup>174</sup> It noted that its inaccuracy as a predictor had led to the release of inmates posing a greater risk of harm and the commitment of some who presented less danger.<sup>175</sup> The committee also criticized the commitment review process as too greatly influenced by the reports of individual evaluators who "[found] offenders to be SVPs at differing rates."<sup>176</sup>

In a similar vein, a 2012 report submitted to the National Institute of Justice strongly criticized the reliability of the offense-based tiers established by the Adam Walsh Act as predictors of offender risk.<sup>177</sup> It concluded that "[a]ssessment tools that are not empirically driven [like the tiers of the Adam Walsh Act] may offer misinformation to the public and lead to an inefficient distribution of resources, perhaps ultimately undermining the very objectives of registration and notification."<sup>178</sup>

Accordingly, apart from the legal concerns raised about the constitutionality of SVP statutes by a large chorus of commentators,<sup>179</sup> their implementation, in practice, has proved problematic in a number of key respects.

## V. THE RESPONSES TO SEX OFFENDERS IN LONG-TERM CARE

Legislators and advocates for the elderly have responded to the presence of sex offenders in long-term care facilities as much as government and the public have responded to sex offenders in the community generally: In short, keep them out or lock them

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174. [VA] Joint Legislative Audit and Review Commission, *Review of the Civil Commitment of Sexually Violent Predators* 76 (Nov. 29, 2011), <http://jlarc.virginia.gov/meetings/November11/SVP.pdf>.

175. *Id.* at 34-45.

176. *Id.* at 47.

177. Zgoba et al., *supra* note 37, at 25.

178. *Id.* at 29.

179. *Legal Update: Constitutional Challenges to Sexually Violent Predator Laws Post Kansas v. Henricks*, AP-LS UPDATE (Am. Psychol. L. Society, Bronx, NY) Spring 2001.

up. Concern has led to proposed and/or enacted legislation that, in whole or in part; 1) requires long-term care facilities to perform criminal background checks of prospective residents;<sup>180</sup> 2) requires authorities to notify long-term care facilities of the identity of any sex offender living in them;<sup>181</sup> 3) requires long-term care facilities, which house sex offenders, to post a public notice that sex offenders reside therein;<sup>182</sup> and 4) authorizes the establishment of a long-term care facility dedicated solely for sex offenders.<sup>183</sup> In a step further, the Commonwealth of Massachusetts bans its highest risk sex offenders from long-term care facilities altogether.<sup>184</sup> Like notice requirements, residency restrictions and SVP confinement statutes, these responses reflect public disgust and fear more than evidence-based policy-making. They ignore altogether dementia-associated resident-to-resident abuse. As a consequence, they provide scant assurance to the elderly long-term care residents they purport to protect.

This section examines these proposals in terms of their likely effect on sex offenders themselves, efficacy in preventing

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180. *Proposed Action Steps*, A PERFECT CAUSE (last visited November 20, 2013), <http://www.aperfectcause.org/actionsteps.html>; See 210 ILL. COMP. STAT. ANN. § 45/2-201.5 (West 2013) (requiring long-term care facilities to perform a criminal background check within 24 hours after admission).

181. See MINN. STAT. ANN. § 244.052 (4c) (requiring notice of registration of a predatory offender); OKLA. STAT. ANN. 57. § 584 (K) (West 2013); OR. REV. STAT. § 441.373 (2011) (requiring notification by the Department of Human Services or an area agency when it knows a sex offender on probation, parole, or post-prison supervision is applying for admission); VA. CODE ANN. § 9.1-914 (2012) (providing for facilities to receive, upon request, electronic notification when a sex offender registers therein);

182. *Proposed Action Steps*, *supra* note 179; See also 210 ILL. COMP. STAT. ANN. 45/2-216 (West 2008) (providing for notice to current and prospective residents or their guardians of their right to ask whether any residents of the facility are identified offenders); LA. REV. STAT. ANN. § 40:2116(I) (2013) (providing for notification to new residents and their families and guardians).

183. See OKLA. STAT. ANN. 63 § 1-849(A) (West 2013) (requiring the State Department of Health to initiate a request for proposal of a stand-alone long-term care facility with heightened security for Level II and III sex offenders); *Nursing Home Eyed for Elderly Sex Offenders*, NEWS TRIBUNE, Jan. 17, 2012, <http://www.newstribune.com/news/2012/jan/17/iowa-nursing-home-eyed-elderly-sex-offenders/>; *Proposed Action Steps*, *supra* note 179;

184. MASS. GEN. LAWS ANN. ch. 6. § 178k(1)(e) (West 2013).

abuse of other residents by sex offenders, responsiveness to resident-to-resident abuse generally, and legality. As background, the section assumes several points, which were established in the foregoing sections: that most sex offenders do not reoffend;<sup>185</sup> that sex offenders are not the exclusive cause of resident-to-resident abuse in long-term care;<sup>186</sup> that sex offenders do not routinely abuse fellow residents in long-term care;<sup>187</sup> and that dementia lies at the heart of an equal, and probably greater, number of cases of resident-to-resident abuse.<sup>188</sup>

### **CRIMINAL BACKGROUND CHECKS OF PROSPECTIVE RESIDENTS**

Requiring criminal background checks of prospective long-term care residents would be a sensible and non-intrusive measure whether concern about sex offenders living in long-term care facilities existed or not. Given that potential landlords and employers routinely conduct such checks<sup>189</sup>, most people would not deem as unreasonable or unduly invasive of privacy the requirement that consent to a check be a condition of admission to the facility. Best practices of long-term care require, in any case, a detailed evaluation of the physical, mental, and social history of the individual directly upon his or her admission to the facility.<sup>190</sup> Within that context, the background check simply constitutes another assessment tool

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185. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 10.

186. Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23, at 5.

187. Brown & Straker, *supra* note 1.

188. Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23, at 5.

189. *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC ENFORCEMENT GUIDANCE (April 25, 2010), [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) ("In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks,"); *Fact Sheet 16: Employment Background Checks: A Jobseeker's Guide*, PRIVACY RIGHTS CLEARINGHOUSE (last visited October 23, 2013), <https://www.privacyrights.org/fs/fs16-bck.htm> (noting the increasing reliance on background checks in hiring decisions).

190. See BARBARA ACELLO, *THE LONG-TERM CARE NURSING DESK REFERENCE* 38-41 (2005) (summarizing the components of a patient assessment upon entry to long-term care).

the facility could use to facilitate the integration of the patient into the facility in a way that promotes his or her well-being and that of the other residents.

Nor does the background check unduly stigmatize prior sex offenders to the extent it applies to and informs long-term care facilities of all types of criminal convictions. A prospective resident with a string of convictions for burglary or theft, for example, could prove potentially problematic in light of the heightened opportunities that exist in long-term care settings for the misappropriation of residents' belongings.<sup>191</sup> Although the theft of personal property does not, in itself, constitute physical abuse, it might well serve as the catalyst for resident-to-resident violence when discovered.<sup>192</sup> Thus, it can be argued that criminal background checks serve a useful function as a preemptive tool for the avoidance of potential causes of resident-to-resident abuse generally.

On the other hand, improper stigmatization of prior sex offenders would result if long-term care facilities used the background check as a filter targeted solely at sex offenders and barred the admission of anyone with any type of prior sex offense. Such a practice could, in many instances, deprive the large percentage of offenders, who pose little to no risk to others, of their moral, if not legal, right to quality long-term care if no alternative facilities existed.<sup>193</sup>

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191. Lachs et al., *supra* note 117, at 843 (noting that "[it] was hypothesized that higher functional status created more opportunities for community-dwelling older adults to interact in the community and experience crime.").

192. *See id.* (noting that resident-to-resident assaults occur in conflict situations).

193. *See generally* EJI, *Alabama's Community Notification Act: Creating Homelessness and Permanent Punishment*, (last visited October 23, 2013) <http://www.eji.org/eji/files/CNA%20Fact%20Sheet3reduced.pdf> (noting that Alabama's harsh residency restrictions have kept elderly and mentally ill individuals out of facilities that could provide care, leaving them homeless); Brittany Bacon, *Sex Offender Faces Life in Prison for Being Homeless*, ABC NEWS, Aug. 8, 2007, <http://www.waff.com/story/15430737/sex-offenders-in-nursing-homes-a-waff-48-news-special-report> (reporting that a Georgia residency restriction would force ex-sex offenders with Alzheimer disease out of their nursing homes and a terminally ill offender out of hospice care); Lavianna, *supra* note 3 (noting that the alternative to the nursing home could be "put[ing] them out on the street or under a bridge.").

Some sex offenders, of course, do pose a risk of dangerousness with which many facilities are not equipped to deal.<sup>194</sup> Nevertheless, facilities, which might hesitate to admit a sex offender of any type, routinely accept patients with dementia who have the potential for aggressive or sexually inappropriate behaviors.<sup>195</sup> In many instances, the risk to others the sex offender presents is likely no greater than the risk posed by some of these patients with dementia.<sup>196</sup> Although prior sex offenses should never be disregarded totally in intake decisions, each offender ought to be evaluated on an individual basis for the risk of danger he or she presents.<sup>197</sup> To the extent that a long-term care facility successfully manages patients with dementia who pose a risk of abusive behavior while protecting its other residents from harm, that facility has no rational basis to exclude many sex offenders, particularly those who have served their punishment and never reoffended.<sup>198</sup>

However, knowing that a resident has a criminal background of any nature is only useful insofar as long-term care facilities understand how to interpret it. Unfortunately, the degree to which a prior sexual offense or any other offense is a predictor of resident-to-resident abuse remains unstudied.<sup>199</sup>

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194. Stephanie Bouchard, *Sex Offenders Living in Nursing Homes*, HEALTHCARE FINANCE NEWS, March 5, 2012, <http://www.healthcarefinancenews.com/news/sex-offenders-living-nursing-homes>.

195. Rosen et al., *Resident-to-Resident Aggression in Long-Term Care Facilities*, *supra* note 23; *Facts About Nursing Homes*, *supra* note 9.

196. *Id.* (reiterating long-term care professionals' greater concern about the potential for abuse caused by cognitively impaired residents); See generally Jeffrey Nichols, *Offenders in Long-Term Care Facilities*, CARING FOR THE AGES (Dec. 8 2011) <http://www.caringfortheages.com/views/dear-dr-jeff/blog/offenders-in-long-term-care-facilities/cb4e8ea2a100cedb5cf0f7ab17faca67.html> (noting that the teacher who engaged in sexual relations many years ago and even pedophiles probably pose little danger to fellow residents in long-term care).

197. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 26 (asserting "it may be more appropriate to focus on residents' behaviors versus their prior convictions when assessing the potential for committing abuse").

198. *Id.* at 180 (noting that long-term care facilities already deal with problematic behaviors and the residents of most concern are those with mental illnesses such as dementia).

199. See *Brown & Straker*, *supra* note 1 ("[R]esearch has not documented the danger that residents with criminal backgrounds pose while living in community long-term care facilities and a link has not been shown between reports of resident-

Lacking a research-based guide for assessment of the risks posed by different kinds of prior criminal activity, long-term care facilities must rely on intuition and guesswork. Until this situation changes, the effectiveness of criminal background checks as a deterrent to resident-to-resident abuse remains seriously diluted.

**OFFICIAL NOTICE TO LONG-TERM CARE FACILITIES OF A  
RESIDENT'S SEX OFFENDER STATUS**

To those who view resident-to-resident abuse in long-term care facilities as primarily a sex offender problem, official notification to such facilities of a resident's sex offender status holds great appeal.<sup>200</sup> It seems a quick fix, particularly if the (largely unspoken) assumption comes to pass and the facility refuses to accept or discharges the resident.<sup>201</sup> The problem with official notification lies not with the notification per se – long-term care facilities should know as much as possible about every resident's personal history – but with the underlying rationale behind it;<sup>202</sup> The fear and loathing that largely motivates sex offender residency restrictions also drives the call for official notification.<sup>203</sup> Proponents of official notification make a simple argument: sex offenders are predators who molest those with whom they reside.<sup>204</sup> As proof, they cite a string of incidents where sex offenders in long-term care have violently abused

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to-resident abuse and those who have a criminal record or who are registered sex offenders.”).

200. Sex offenders are equated with and classified as “predators.” See, e.g., *Impact of Predators in Long-Term Care Facilities on Small Business Operators*, *supra* note 4 (equating sex offenders, generally, with “predators”); *Predators in America's Nursing Homes, Registered Sex Offenders Residing in Nursing Homes*, *supra* note 50 (classifying all registered sex offenders as “predators”).

201. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 25 (noting Minnesota state officials' belief that “some long-term care facilities may be hesitant to accept sex offenders as residents in the future.”).

202. See ACELLO, *supra* note 189, at 48-51 (discussing the elements of an incoming patient assessment).

203. See, e.g., Bouchard, *supra* note 193 (quoting Wes Bledsoe, a leading advocate for notification: “When you put predators in with the prey, somebody's going to be bit. It's not a question. It is going to happen.”).

204. *Id.*

other residents.<sup>205</sup> In so doing, they tar every person who has ever committed a sex offense of any kind with the same brush, notwithstanding the number of studies, which indicate most sex offenders do not, in fact, reoffend.<sup>206</sup>

One might argue, however, that the motivation behind official notification is irrelevant if, ultimately, notification protects the elderly in long-term care from resident-to-resident abuse. It is undoubtedly a politically popular move that can be enacted with minimal cost. However, although notification may dissuade facilities from accepting sex offenders, eliminating one potential cause of resident-to-resident abuse, it still leaves residents unprotected from abuse associated with dementia. And it threatens to deprive many sex offenders, who pose low risk to others, of long-term care they need, exposing them, in turn, to abuse in substandard care settings.<sup>207</sup> By creating the false impression that the problem of elder abuse in long-term care has been resolved, dementia-related abuse is also less likely to receive meaningful governmental or public attention. In sum, while offender notification may prevent a small number of cases of resident-to-resident abuse in long-term care, it ultimately does a better job of stigmatizing sex offenders than providing the comprehensive protection from resident-to-resident abuse, which the inhabitants of long-term care so greatly need.

#### *POSTING NOTICE OF THE PRESENCE OF A SEX OFFENDER IN THE FACILITY*

Advocates for the elderly also urge that long-term care facilities be required to post a notice informing the public of the

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205. *Predators in America's Nursing Homes, Ongoing Investigations and Reports 2004 - 2006*, A PERFECT CAUSE (2006), [http://www.aperfectcause.org/APC-US\\_CongressReport-CriminalOffendersOffensesInLTC-April2006.pdf](http://www.aperfectcause.org/APC-US_CongressReport-CriminalOffendersOffensesInLTC-April2006.pdf).

206. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 10; DEP'T OF JUSTICE, BUREAU OF JUSTICE STATICS, *Recidivism of Sex Offenders Released from Prison in 1994* (2003) <http://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.

207. See Bouchard, *supra* note 194 (noting the disincentives for nursing homes to take registered sex offenders); Laviana, *supra* note 3 (noting the probable lack of alternatives for sex offenders requiring long-term care).

presence of a resident sex offender on site.<sup>208</sup> Several states have enacted such a provision.<sup>209</sup> Two primary rationales have been advanced for the requirement. On the one hand, the notice is likely to provoke such an unfavorable public reaction that facilities will be discouraged from housing sex offenders in the first place.<sup>210</sup> On the other hand, the residents of the facility and their loved ones have a right to know so they are better prepared to deflect the offender's advance.<sup>211</sup>

Because the first rationale rests on the unfounded proposition that all sex offenders are predators and appeals purely to public prejudice, it should be rejected for many of the reasons discussed in relation to official notice requirements. In one respect, a measure like this, which effectively may bar anyone who ever committed a sex offense from long-term care, sweeps too broadly – encompassing people who pose a low threat to their fellow residents. And, in another respect, a measure of this kind sweeps not far enough, because it ignores entirely a major component of the problem of resident-to-resident abuse, namely sexual and physical abuse related to dementia.

The second rationale for a posted notice warrants greater consideration. Without question, consumers of long-term care should be made aware that resident-to-resident abuse occurs. As conceived, however, the notice tells just one portion of the story and, perhaps, not the most important portion at that. The

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208. *Proposed Action Steps*, *supra* note 180; *Essex*, *supra* note 87 (noting a member of the Silver Haired Legislature has sponsored a resolution requiring all nursing homes to disclose the presence of a registered sex offender).

209. 210 ILL. COMP. STAT. 45/2-216 (West 2008) (providing for notice to current and prospective residents or their guardians of their right to ask whether any residents of the facility are identified offenders); LA. REV. STAT. ANN. § 2116 (I) (2013) (providing for notification to new residents and their families and guardians).

210. Bouchard, *supra* note 193 (noting that if a notice is posted, staff may not want to work in the facility, families will pull existing residents out, and prospective residents will look elsewhere).

211. See Mike Wiser, *Branstad Calls for Sex Offender Notices at Long-Term Care Facilities*, QUAD-CITY TIMES, Jan. 9, 2012, [http://qctimes.com/news/local/government-and-politics/branstad-calls-for-sex-offender-notices-at-long-term-care/article\\_def1f874-3afe-11e1-9593-0019bb2963f4.html](http://qctimes.com/news/local/government-and-politics/branstad-calls-for-sex-offender-notices-at-long-term-care/article_def1f874-3afe-11e1-9593-0019bb2963f4.html).

notice's single-minded focus on the sex offender, therefore, misleads the public about the full nature of the threats their loved ones face in long-term care. Moreover, the notice even deflects public attention away from the issue of dementia-related, resident-to-resident abuse. As a consequence, long-term care facilities are less likely to receive the kind of public pressure, which may be necessary to effectuate policies and procedures addressing this second aspect of the problem. A failure to resolve the global problem of resident-to-resident abuse could result.

The loved ones of a long-term care resident can play an important role in detecting signs of abuse because they probably know the patient better than anyone else and, therefore, are more likely to observe changes in behavior.<sup>212</sup> The distribution to family members of frank information about all of the parameters of resident-to-resident abuse with an explanation of the signals indicative of it could serve as a positive vehicle to involve the family more closely in the patient's care. The bare notice of the presence of a sex offender on the premises, however, scares more than it informs and squanders an opportunity to create a more collaborative relationship between the family and the long-term care facility.

The protective value of such a notice also seems doubtful, given the prevalence of cognitive impairment, advanced dementia, and multiple physical disabilities observed in long-term care residents.<sup>213</sup> It must be remembered that the residents most compromised in these respects face the greatest likelihood of abuse from a fellow resident.<sup>214</sup> Assuming these highly

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212. See Ann Horgas & Lois Miller, *Pain Assessment in People with Dementia*, AM. J. OF NURSING, July 2008 62, 66 (noting that nurses should talk with family members "to ascertain behaviors, or changes in behaviors, that indicated pain when the patient was younger or more cognitively intact"); Tom Morrissey, *The Approach to Altered Mental Status*, CLERKSHIP DIRECTORS IN EMERGENCY MED. SELF-STUDY MODULES (last visited June 17, 2013), [http://www.cdemcurriculum.org/ssm/approach\\_to/ams.php](http://www.cdemcurriculum.org/ssm/approach_to/ams.php) (discussing the importance of contacting families to aid in the detection of altered mental states of cognitively impaired patients).

213. Rosen et al., *Resident-to-Resident Aggression in Long-Term Care Facilities*, *supra* note 23, at 2.

214. Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note

impaired residents fully understood the importance of the announcement of the presence of a sex offender on the premises, few could successfully resist an attack by a fellow resident should it occur.

The possibility further exists that the announcement to residents of the sex offender's presence could create an environment of fear and/or suspicion, which might exacerbate the likelihood of resident-to-resident abuse. Stress related to stigmatization may actually cause a sex offender to recidivate.<sup>215</sup> In turn, speculation about the identity of the offender, resulting in the misattribution of his identity, could spark anger in anyone, not least persons experiencing dementia-related symptoms of violent aggression. Accordingly, the offender or persons wrongly thought to be the offender could be placed at enhanced risk of physical abuse.

#### *CREATION OF A LONG-TERM CARE FACILITY SOLELY FOR SEX OFFENDERS*

Proponents for the creation of long-term care facilities solely for sex offenders make no bones about their desire to banish sex offenders altogether from community long-term care facilities.<sup>216</sup> Nevertheless, plans for dedicated sex offender facilities have not advanced beyond the proposal stage. For example, Oklahoma has enacted a provision actually enabling the creation of such a facility, but it has not yet been constructed.<sup>217</sup> Given the broad support these kinds of facilities have received from elder care advocates,<sup>218</sup> why have they failed to come to fruition? The most

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23, at 5.

215. Aleisha Orr, *Stress on Sex Offenders Increases Risk of Re-offending*, WA NEWS, Aug. 20, 2012, <http://www.watoday.com.au/wa-news/stress-on-sex-offenders-increases-risk-of-reoffending-20120816-24b0y.html> (quoting Melbourne University criminology fellow, Dr. Mayumi Purvis: "Stress and inability to cope are often a risk factor to offending.").

216. Laviana, *supra* note 3 (noting belief of Wes Bledsoe of A Perfect Cause that "every state needs to build a separate facility for aging sex offenders.").

217. *Id.* (noting that the Oklahoma facility was not built because no one submitted bids to run it).

218. *Id.* (noting Wes Bledsoe of A Perfect Cause "thinks every state needs to

probable answer is that, aside from the political unpopularity of allotting funds in a time of budgetary retrenchment for anything dealing with sex offenders,<sup>219</sup> the placement of most sex offenders in such facilities poses a significant constitutional hurdle.

Proponents must explain how restricting a prior sex offender, who needs residential long-term care, to a dedicated sex offender facility, which many envision as a quasi-prison or higher security-type environment,<sup>220</sup> differs from civil commitment under sexually violent predator statutes. As already noted, the United States Supreme Court in *Kansas v. Hendricks* stipulated that a sexually violent predator statute passes constitutional muster only insofar as it can be demonstrated that the offender has a past history of sexually violent behavior and a current condition that prevents him from controlling his dangerousness.<sup>221</sup> However, many current, registered sex offenders – streakers, sexters, and viewers of child pornography, to name a few – have no prior history of violent behavior.<sup>222</sup> The authorities, moreover, have released sex offenders who do, in fact, have such a history back into the community where, according to statistics, the majority has lived successfully without recurring violent behavior.<sup>223</sup> Forcing these people, to whom one or both of the *Hendricks* requirements do not pertain, to choose between entering a prison-like facility for the long-term care they need or foregoing that care to maintain

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build a separate facility for aging sex offenders”).

219. Kevin Kolus, *Much Ado about Sex Offenders*, E-NEWSLETTER (Long-Term Living) July 13, 2008, <http://www.ltlmagazine.com/article/much-ado-about-sex-offenders> (noting that “some people are outright disgusted with the idea of housing sex offenders in any facility”).

220. See Marc McAfee, *Proposal Calls for Sex Offender Nursing Home*, 11 ALIVE News, Jan. 24, 2012, <http://www.11alive.com/news/article/224117/3/Proposal-calls-for-sex-offender-nursing-home>; *Kansas v. Hendricks*, *supra* note 151 (discussing Georgia governor’s proposal to renovate a former prison for a long-term care facility for sex offenders and noting the comment of a resident that there would be no community opposition to it “as long as they stay inside the gates”).

221. *Kansas v. Hendricks*, *supra* note 168.

222. See generally *Mummer*, *supra* 30.

223. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 35, at 10.

their personal liberty would create a serious violation of both the due process and the ex-post facto clauses.

Conceivably, proponents might argue that the criteria outlined in *Hendricks* and, particularly, the dangerousness prong of *Hendricks* would be satisfied in a case where a previously violent sex offender suffers from dementia. That prior offender's dementia, they might assert, should be correlated with an inability to control dangerousness. One might counter that, as noted previously, Inappropriate Sexual Behavior associated with dementia has not been tied to prior sexual behavior.<sup>224</sup> And dementia-related anger or aggressiveness does not necessarily lead to dangerousness.<sup>225</sup> Thus, such a correlation lacks medical support.

Lack of solid medical support may not, however, stand in the way of proponents of dedicated facilities. Psychiatrists, after all, have condemned the subversion of sound medical judgment in the efforts of states to classify certain offenders as Sexually Violent Predators.<sup>226</sup> But distorting medical knowledge to force sex offenders into a dedicated facility would be even more insupportable. Unlike inmates considered for SVP status, many of the prior violent offenders, who would be subject to the facility restrictions, possess a demonstrated record of non-offending, often of many years standing. To attempt to shoehorn these persons into the second *Hendricks* requirement of dangerousness, because they have or are likely to have dementia, would represent not just a subversion of medical understanding, but also a subversion of the foundation upon which *Hendricks* rests.

Thus, in most cases, the forced direction of disabled sex offenders to a dedicated facility would create a grave legal injustice. It would stigmatize recidivated offenders one more

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224. Tsatali, et al., *supra* note 91, at 146.

225. Eastley & Mian, *supra* note 113, at 515 (noting that dementia-associated aggression is "occasionally dangerous").

226. See generally Alexander, *supra* note 167, at 115 (noting criticism by medical professionals that "sexual psychopathy and sexually violent predator were not clinical terms but strictly legal terms.").

time. And, because the facility most likely would be located away from population centers, it could well separate these recidivated offenders from family and friends, condemning them in their final years to a life of social isolation.<sup>227</sup>

One category of sex offenders exists, however, which would benefit from the creation of a dedicated long-term care facility and for which such a facility legally is justified: the offenders in need of specialized care who are currently incarcerated or who have been committed to civil confinement after SVP designation. Several good reasons exist for the creation of a facility for them. For one thing, the prisons where they reside may lack the staff or the facilities to provide the extended care these offenders need. There is also a reasonable basis to question the appropriateness of removing these individuals to a community facility. In respect to recidivism, they are an unknown quantity and, therefore, different from released offenders with proven track records of non-recidivism out in the community. In addition, they are more likely to have committed their offenses recently, to have sexually abused a child, and to have committed their first offense at a relatively old age, all of which create further concerns about recidivism.<sup>228</sup> Finally, the state wrongly uses community long-term care facilities as dumping grounds for people it has chosen to incarcerate but now finds an inconvenience. Placing in community facilities offenders who, but for their disability, the state would continue to imprison fuels public hysteria about sex offenders generally, makes a

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227. For example, Oklahoma envisions building only one such facility in a state that encompasses 69,956 square miles. See OKLA. STAT. ANN. § 1-849 (A) (West 2013); *Oklahoma - Location, Size and Extent*, CITY-DATA (last visited October 26, 2013), <http://www.city-data.com/states/Oklahoma-Location-size-and-extent.html>; See, e.g., McAfee, *supra* note 219 (noting proposal to establish a nursing home for sex offenders in a former prison facility in Milledgeville, Georgia, a city of approximately 17,000 people, which is 98 miles and an approximately one hour and forty five minute drive from Atlanta); see also *Driving Distance from Milledgeville, GA to Atlanta, GA*, TRAVEL MATH (last visited June 17, 2013), <http://www.travelmath.com/drive-distance/from/Milledgeville,+GA/to/Atlanta,+GA>; see also *Milledgeville, Georgia Population: Census 2010 and 2000 Interactive Map*, CENSUS VIEWER (last visited October 23, 2013), <http://censusviewer.com/city/GA/Milledgeville>.

228. Kevin E. McCarthy, *State Initiatives to Address Aging Prisoners*, OLR RESEARCH REP. (2013), <http://www.cga.ct.gov/2013/rpt/2013-R-0166.htm>.

reasoned public discussion about prior sex offenders in long-term care facilities less likely, and, ultimately, further stigmatizes those who have, indeed, recidivated and now require that long-term care.

Without question, however, the creation of a dedicated sex offender facility utterly fails to address dementia-related resident-to-resident abuse. In other circumstances, most people would consider highly imprudent an expenditure of hundreds of thousands, if not millions, of dollars, which leaves a significant cause of the problem untouched. Moreover, to expend such capital on the basis of factually-unsupported fears and prejudices not only would be deemed imprudent, but also irrational and wasteful. Yet, as residency restrictions have demonstrated, when the public and its leaders consider sex offenders, rationality and prudence often go out the door.

***MASSACHUSETTS' APPROACH: BARRING HIGHEST RISK SEX OFFENDERS FROM LONG-TERM CARE FACILITIES***

The Massachusetts code bars level 3 sex offenders from long-term care facilities. These offenders have been judged to present high risks of re-offense and dangerousness, which create "a substantial public safety interest."<sup>229</sup>

Specifically, the code states that "[n]o sex offender classified as a level 3 offender shall knowingly and willingly establish living conditions within, move to, or transfer to any convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded"<sup>230</sup> The statute establishes prison sentences of thirty days to five years in accord with the number of prior convictions the offender has received for its violation.<sup>231</sup>

The Massachusetts Supreme Court has cast doubt, however,

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229. MASS. GEN. LAWS ch. 6, § 178 (K)(2)(C) (2013).

230. MASS. GEN. LAWS ch. 6, § 178 (K)(2)(e) (2013).

231. *Id.*

upon the restriction's constitutionality. In *Doe v. Police Commissioner of Boston*, the court held the statute unconstitutional as applied to a level 3 offender, previously convicted of child abuse, whom authorities had sought to remove from a rest home housing eleven elderly adults.<sup>232</sup> By restricting where the offender chose to live, the statute implicated a liberty interest protected by the Massachusetts constitution.<sup>233</sup> It also threatened to deprive the offender of a property interest because the offender already resided in the rest home from which the state sought his removal.<sup>234</sup> This latter interest was heightened because removal would render him homeless.<sup>235</sup>

Employing a due process analysis, the court balanced the government's interests against the offender's.<sup>236</sup> It faulted the statute's blanket assumption that every level 3 offender endangers long-term care residents, noting the state had insufficiently established the correlation between the offender's status and his risk of dangerousness.<sup>237</sup> Due process, the court held, required the government to give the offender an opportunity to prove he did not threaten the safety of his fellow residents and to establish that removal from the facility would expose him to homelessness and significant harm.<sup>238</sup>

Interestingly, the explanatory points made in the footnotes to *Doe* could pertain just as well to the previously-discussed responses to the presence of prior sex offenders in long-term care facilities. The court highlights the government's failure to cite any research or authorities in support of its central premise – in this case, that pedophiles threaten elderly adults because children and the elderly are both extremely vulnerable.<sup>239</sup> It

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232. *Doe v. Police Commissioner of Boston*, 460 Mass. 342, 344 (Mass. 2011).

233. *Id.* at 348.

234. *Id.*

235. *Id.* at 346-47.

236. *Id.* at 348.

237. *Id.* at 348-350.

238. *Id.* at 349.

239. *Id.* at 350 n. 14.

notes the state's admission that disrupting a prior offender's living situation could lead to "upsetting a mitigating factor in his risk of reoffense and level of dangerousness."<sup>240</sup> Finally, the court stresses one additional time that "[d]ue process requires that an evidentiary hearing be conducted that would include assessment of the actual, rather than theoretical, risks posed by the plaintiff to the residents of the rest home; consideration of the impact on the plaintiff of removal from the facility; and weighing of these considerations against the impact on residents of the rest home whom the Legislature sought to protect."<sup>241</sup>

#### VI. ALTERNATIVE RECOMMENDATIONS TO ADDRESS RESIDENT-TO-RESIDENT ABUSE IN LONG-TERM CARE

Treating resident-to-resident abuse in long-term care facilities as a sex offender problem fails on several levels. By framing the problem in so limited terms, advocates of the elderly disserve the very people whose interests they purport to represent. No resident in long-term care benefits if over-emphasis of the less likely threat of sex offender aggression effectively allows the more prevalent danger of dementia-associated abuse to pass under the radar of policy-makers. Abuse is abuse, whether initiated by a prior sex offender or by a pillar of the community suffering from advanced dementia. The victim suffers no less injury because the perpetrator was a "fine person," who simply "was not himself." Many victims have so much cognitive impairment that they could not draw the distinction, even if it mattered. Yet, their cognitive impairment does not diminish the effects of that "fine person's" physical or sexual abuse – the shame, fear, physical injury, and/or psychological damage – which, in the elderly, are often aggravated and life-threatening.<sup>242</sup> A "solution" that does not address this part of the problem cannot be deemed a meaningful solution at all.

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240. *Id.* at 344 n. 7.

241. *Id.* at 351 n. 15.

242. Rosen et al., *Sexual Aggression between Residents in Nursing Homes*, *supra* note 23, at 6-7.

The misguided focus on the sex offender as the primary agent of resident-to-resident abuse also disserves another group of the elderly population: aging prior sex offenders who urgently need long-term care. Although the long-term ramifications of sexual abuse should not be discounted, nor should a prior conviction close the door to the redemption of the offender and his or her re-entry into society. Against great odds, many sex offenders have served their punishment and gone on to live productive lives. Those who would banish these persons from community long-term care facilities through “reforms,” which explicitly or implicitly promote the exclusion of all sex offenders, apparently believe vengeance is an appropriate goal of public health policy. Yet, the denial of health care on such grounds is as irrational as it is inhumane. Absent a finding of present dangerousness, no prior sex offender should be foreclosed from long-term care in a community facility on the basis of prejudice and unsupported fears.

A more effective approach to the prevention of resident-to-resident abuse in long-term care facilities must take into account all facets of the problem. Because the phenomenon has been underexplored medically<sup>243</sup> and, by most accounts, has been chronically under-reported in the field,<sup>244</sup> it will not be resolved overnight by legislative fiat. Nor can it be resolved without a significant commitment of personal and financial resources from government and the long-term care industry. Resolution will require a joint effort by both. First of all, efforts must be undertaken to understand fully the nature of the problem. The establishment of best practices for confronting the problem of resident-to-resident abuse must follow. To achieve these goals, the following steps should be considered:

1. As an initial matter, the government, the long-term care industry, and elder advocacy groups should embark upon a

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243. *Id.* at 2 (noting that resident-to-resident aggression in long-term care “remains virtually unstudied”).

244. *Id.* at 3 (asserting that “[s]exual violence is the type least likely to be acknowledged, detected, or reported to Adult Protective Services”).

public education campaign to explain the problem of resident-to-resident abuse in long-term care in all of its facets. The presentation should be informative, balanced, and non-threatening. The state might require all long-term care facilities to provide an information sheet to prospective applicants. The sheet would explain the problem of resident-to-resident abuse and its warning signals and provide contact information to report suspected instances of abuse or related concerns.

2. The state and the long-term care industry should fund ongoing research of the causes and predictors of resident-to-resident abuse.<sup>245</sup>

3. Psychiatry professionals should work closely with the state to develop more accurate guidelines for the assessment of the potential dangerousness, not only of sex offenders, but also of all individuals with criminal convictions. With that in place, the requirement of universal criminal background checks for admission to long-term care facilities could be instituted, with the proviso that decisions be made on a case by case basis. There must also be an established procedure for the appeal of a denial of admission owing to a determination of dangerousness.

4. In addition, psychiatry professionals and the state should develop clear guidelines for assessing the potential dangerousness posed by various stages of dementia, predicated upon current and past behaviors.<sup>246</sup>

5. The state should establish an office, staffed by trained psychologists, to which long-term care facilities generally and residential homes particularly could seek guidance in the evaluation of applicants for admission.

6. The state should require that application forms for admission to long-term care facilities ask for the disclosure of all prior criminal offenses, as well as of prior instances of dementia-related aggression or inappropriate sexual behaviors.

7. The state should establish a commission of experts in

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245. See Lachs et al., *supra* note 117, at 55 (noting the need for future research on the causes of resident-to-resident aggression in long-term care facilities).

246. Joy & Vattakatucher, *supra* note 11.

long-term care to draft guidelines for the prevention of resident-to-resident abuse generally. Guidelines should also be drafted for the supervision, care, and treatment of individuals believed to endanger the wellbeing of themselves or those around them.<sup>247</sup>

8. The state should examine the effectiveness of its oversight of long-term care facilities and ensure that related agencies are properly staffed to facilitate the reporting and investigation of resident-to-resident abuse. Policies should be drafted to encourage rather than penalize the reporting of abuse or suspected abuse. Reporting forms should provide sufficient data to enable researchers and policy-makers to further their understanding of the causes and predictors of resident-to-resident abuse. Forms should elicit, for example, information about precursors to the abuse, descriptions of the abuser and the abused, the nature of the abuse, the after-effects of the abuse, and reports of staff prior to and after the abuse occurred. The state should establish a central, computerized database of reports of resident-to-resident abuse with the capacity for researchers to isolate or link various elements of the reports.

9. Long-term care facilities, themselves, should be required to institute policies that encourage, rather than punish, staff for reporting suspected abuse. As an initial matter, facilities must define which behaviors constitute abuse and which do not and communicate those determinations to their staffs. All personnel in long-term care facilities should be required to receive training about resident-to-resident abuse and its warning signs. Before incidents occur, facilities should have a plan in place for dealing with abusive or potentially abusive situations. They should also act proactively to prevent resident-to-resident abuse from occurring. Incidents of resident aggression or inappropriate sexual behavior should be charted whether deemed dangerous

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247. *See id.* (noting an inability “to locate specific guidelines or training materials for nursing home staff on how to interdict in cases of [resident-to-resident abuse,]” concluding that “nursing home staff simply have no framework with which to address the problem”).

or not. Charting should include incidents involving staff as well as residents. Residents' charts should be reviewed by a specially-trained staff member on a periodic basis for indicators of potentially abusive behaviors.

10. The state should provide subsidies to insure that long-term care facilities are present throughout the state with the expertise, facilities, and staff to care for individuals deemed to present enhanced levels of risk to themselves or others, whether they be prior sex offenders or not.

11. The state should also take steps for the establishment throughout the state of long-term care facilities to serve the needs of the non-elderly. The placement of a relatively young sex offender (or any younger person for that matter) in a facility that primarily houses and caters to the interests of the very elderly is less than ideal for all parties concerned. The resulting social isolation is particularly problematic for younger sex offenders. Indeed, it increases the likelihood of recidivism in persons whose relative youth and lesser distance in years from their crime already makes them somewhat more likely to reoffend.<sup>248</sup>

## CONCLUSION

None of the foregoing can be deemed "a quick fix." In that respect, they differ from most of the proposals, which place the onus of resident-to-resident abuse in long-term care solely upon the sex offender. However, those proposals, which ignore abusive behavior associated with dementia, leave the larger problem un-remedied. They endanger vulnerable long-term care residents and unwarrantedly stigmatize many recidivated prior sex offenders, potentially depriving those individuals of needed treatment. In sum, any proposal, which targets only sex offenders, should be rejected because it offends that most basic principle of medical policy: do no harm.

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248. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 10-11.