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WHO'S REALLY TAKING CARE OF HER: HOW THE ADOPTION OF ABUSE REGISTRIES DIFFERENTLY AFFECTS THE CARE OF OLDER ADULTS AND CHILDREN

Sara E. Planthaber*

INTRODUCTION

Imagine a woman diagnosed with vascular dementia¹ living in a memory care facility.² She has developed a friendly relationship with a nurse, who recently started working at the facility. One morning, when called to help her get to the cafeteria, he sexually assaults her in her room. Immediately after the attack, the woman tells her daughter, another nurse, and an administrator at the facility the same story of the abuse, hours apart. Because of her diagnosis, investigators from the state and facility do not believe her and, as a result, do not investigate until several days later. At that point, the woman has forgotten about the attack, and, therefore, the investigations find no wrongdoing. After filing a civil suit against the nurse and the facility, the woman's daughter learns that the nurse who assaulted her mother was new to the facility because he was fired from his previous job for abusing patients. The facility claims they were unaware of this previous history because he did not list the previous

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¹ Vascular dementia is typically caused by a sudden event that diminishes blood flow and oxygen to the brain, such as a stroke. *Vascular Dementia*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/vascular-dementia/symptoms-causes/syc-20378793> (last visited Aug. 2, 2021). Its symptoms manifest very similarly to those of more gradual types of dementia and vascular dementia often co-occurs with Alzheimer's disease, enhancing the effects on memory recall. *Id.*

² The facts of this hypothetical are loosely based on the facts from *Keller v. Deerfield Episcopal Ret. Cmty., Inc.*, 845 S.E.2d 156 (N.C. Ct. App. 2020), which served as the inspiration for this Note. This Note is dedicated to Mrs. Keller and to all of the survivors of abuse in nursing facilities whose voices are not heard.

employer as a reference, and, because the state does not have a database of prior perpetrators of abuse, the facility had no way to check the man's prior employment history. In addition, even if the facility had prior knowledge of his previous workplace violations, the nurse could have been hired for the same job and could have had the same access to potential victims. The court sides with the nurse and facility, choosing to believe a repeat sexual offender over a woman who told the same story to three people the morning of the incident.

Now imagine a child in a daycare facility. A prospective employee applies to be a childcare worker at the facility. She was previously found to be a substantiated perpetrator of child abuse at a daycare, but she does not disclose any previous work history when applying for her current position. The facility runs numerous background checks, including searching through criminal records and the state-maintained child abuse registry, and the previous incident appears in the results report. Due to the state law prohibiting individuals with adverse child abuse records from working in a childcare facility, the woman is not hired, protecting children at the facility from harm.

In both of these hypotheticals, repeat abuse is preventable. But, because the law does not equally protect vulnerable adults and children, the victim in the first story remains unprotected. That story is an unfortunate, common reality for older adults living in any long-term care facility in the country.³ However, depending on the state—even if there were an elder abuse registry and the facility was mandated to check it—the facility still could have employed the individual. Even if the facility were required to run background checks on new employees, it would likely only reflect criminal convictions, which would miss all substantiated findings of abuse arising from Adult Protective Services (APS) investigations. APS records reflect an important repository of information because they can assist district attorneys in prosecuting individuals for committing elder abuse, which has historically been difficult given that elder abuse cases often present evidentiary difficulties, among other concerns.⁴

³ See Jennifer Marciano, *Mandatory Criminal Background Checks of Those Caring for Elders: Preventing and Eliminating Abuse in Nursing Homes*, 9 ELDER L.J. 203 (2001), for details on elder abuse in nursing facilities and arguing that all nursing facility employees should be subject to a background check prior to employment.

⁴ BRENDA K. UEKERT, SUSAN KEILITZ, DEBORAH SAUNDERS, CANDANCE HEISLER, PAGE ULREY & ERIN G. BALDWIN, NAT'L CTR. FOR STATE COURTS, PROSECUTING ELDER ABUSE CASES: BASIC TOOLS AND STRATEGIES 2 (2012).

Elder abuse is not about isolated incidents in single facilities, counties, or states. It is a public health issue, and significant resources should be devoted to preventing abuse and, as in the cases outlined above, repeat offenses. There are about five million victims of elder abuse in the United States every year,⁵ which is over seven times more than the number of substantiated cases of child abuse every year.⁶ These disparities are striking, but the real number of elder abuse cases is likely much higher given that only an estimated one in fourteen cases of elder abuse and one in forty-four cases of financial exploitation against older adults are referred to authorities.⁷ However, states invest significantly fewer resources into initiatives aimed at protecting vulnerable adults from abuse and neglect than those meant to investigate and prevent child abuse,⁸ and every state in the country must improve its efforts. States have developed significant infrastructure through their child protection programs and can use these systems to improve protections for vulnerable adults.

The idea of paralleling child abuse and elder abuse efforts is not new. For example, in 1981 the Prevention, Identification, and Treatment of Elder Abuse Act, based on the 1974 Child Abuse Prevention and Treatment Act, was introduced in the House of Representatives,⁹ but it was never passed into law.¹⁰ This Note will take a novel approach to analyzing the efficacy of abuse registries by investigating major provisions of statutes aimed at protecting children and older adults through case studies. The Note will begin by exploring elder abuse and child abuse registries generally, breaking down the differences between federal and state efforts in this area. Then, it will specifically analyze three different approaches states have taken to maintain abuse registries by looking at the case studies of Tennessee (combined elder and child abuse registries), Colorado (completely separate registries), and Nebraska (hybrid registry system). Finally, this Note will compare the employment restrictions on individuals with adverse findings on the child abuse registry and elder abuse registry, evaluate the potential impacts on the safety of older adults in

⁵ ELDER JUSTICE COORDINATING COUNCIL, DEP'T OF HEALTH & HUMAN SERVS., 2014–2016 REPORT TO CONGRESS 1, <https://acl.gov/sites/default/files/programs/2017-11/2017%20EJCC%20Report.pdf>.

⁶ *Child Maltreatment*, CHILD TRENDS (May 7, 2019), <https://www.childtrends.org/indicators/child-maltreatment>.

⁷ ELDER JUSTICE COORDINATING COUNCIL, *supra* note 5, at 1.

⁸ *See, e.g., infra* Sections II.A, B, and C.

⁹ John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207, 213 (2003).

¹⁰ *Id.* at 213–14.

applicable facilities, and provide recommendations for improvement based on the strengths and weaknesses of current state programs.

I. REGISTRIES

A. Registries Generally

Central registries are state-run databases of abuse reports, with the database also including information about subsequent investigations and outcomes, accessible only by statutorily authorized individuals or groups.¹¹ Central registries receive and maintain information about abuse reports to ensure that state agencies can rapidly access the information, initiate follow-up investigations based on the reports, and access other relevant information that may be helpful for other purposes, like research.¹² States also use these registries to protect the most vulnerable populations by having a single source of information for identifying potential victims and perpetrators of abuse.¹³ For example, one purpose of maintaining state registries is to prevent future harm to vulnerable populations.¹⁴ Central registries have many other benefits, including providing investigators with a single source of information from which to look for patterns, whether by victim or perpetrator, which can be particularly beneficial when a state has multiple agencies investigating abuse.¹⁵ This single, streamlined source of information can also support the creation of preventative and educational programs by state agencies by providing a single, consolidated database from which to design programs.¹⁶ Therefore, not only does a

¹¹ Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 885–86 (1991); Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 139 (1993) (describing child abuse registries as “comprehensive indexes of their received child abuse reports”).

¹² Garfield, *supra* note 11, at 886; see CHILDREN’S BUREAU, ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE OR NEGLECT REPORTS 2, <https://www.childwelfare.gov/pubPDFs/centreg.pdf> (last updated May 2018) [hereinafter CHILD ABUSE CENTRAL REGISTRIES]; see, e.g., *Mauk v. Dep’t of Hum. Servs.*, 617 N.W.2d 909, 911–13 (Iowa 2000) (explaining that the purpose of the Iowa central child abuse registry is to consolidate the State’s collection and dissemination of child abuse information).

¹³ See, e.g., IOWA CODE § 235A.12 (2020).

¹⁴ Walter E. Forehand, *Are New Procedures Correction Enough for Florida’s Child Abuse Registry Statute?*, 18 FLA. ST. U. L. REV. 371, 372–73 (1991).

¹⁵ Garfield, *supra* note 11, at 886.

¹⁶ *Id.* at 887.

single information source help facilitate bringing perpetrators of abuse to justice—especially in difficult cases where the patterns of abuse may be more difficult to track—but it also streamlines information necessary for state agencies to educate the public on how to spot and prevent abuse.

Central registries are not without flaws and their use has raised concerns. For example, federal cases have found that a protected liberty interest is at issue when these registries are accessible to employers because a person's future employment opportunities may be limited by their inclusion on the registry.¹⁷ In addition, individuals who work as certified nursing assistants, home health aides, and licensed practical nurses often earn close to minimum wage, so their ability to obtain legal counsel to oppose their addition to a registry may be cost-prohibitive.¹⁸ In many states, the decision to add a person's name to a registry is at the discretion of the individual who completes an intake or investigates the call.¹⁹ Thus, determining whether abuse occurred can be a subjective interpretation made by people with different levels of experience and training.²⁰ Finally, some academics and practitioners have argued that central registries may discourage reporting abuse by victims due to fear that people in the community will learn of the abuse.²¹ This may be an embarrassing or dangerous outcome especially if the perpetrator is a close family member, like an adult child or spouse.²²

Perhaps because of the need to balance these competing interests, the development of child and elder abuse registries have had very different historical trajectories. The next sections will outline the history of child and elder abuse registries in the United States, which will show that while every state has adopted a

¹⁷ See, e.g., *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N.D. Ill. 2001). But see *L.C. v. Tex. Dep't of Family & Protective Servs.*, No. 03-07-00055-CV, 2009 WL 3806158, at *3–5 (Tex. App., Nov. 13, 2009) (ruling that a mother's placement on a child abuse registry did not "in itself" implicate a constitutionally protected liberty or property interest, even though she was a licensed physician and placement on the registry could have affected her career opportunities).

¹⁸ John Sherman, Note, *Procedural Fairness for State Abuse Registries: The Case for the Clear and Convincing Evidence Standard*, 14 J. GENDER RACE & JUST. 867, 896–97 (2011).

¹⁹ Forehand, *supra* note 14, at 375.

²⁰ *Id.*

²¹ Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 766 (2013).

²² *Id.*

child abuse registry, states have not studied elder abuse and, as a result, have not been as quick to adopt any systematic measure, including registries, to combat it.

B. *Child Abuse Registries*

State child abuse statutes vary greatly on their definitions of abuse,²³ the level of proof needed to substantiate a case of child abuse, and how much discretion is given to child welfare workers in making their determinations of whether a claim is substantiated.²⁴ In general, child abuse registries are systems that house intake information for child protective services cases and maintain records of past cases.²⁵ Child abuse registries were initially developed at the local level without comprehensive federal guidance.²⁶ As such, the development of these registries varied historically by jurisdiction.²⁷ Specifically, they differ in large part because of the way each state agency maintains and utilizes its registry.²⁸

Child abuse has short- and long-term consequences on a child's physical, emotional, and psychological health.²⁹ For example, childhood maltreatment has

²³ See, e.g., CHILDREN'S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT 6–98, <https://www.childwelfare.gov/pubPDFs/define.pdf> (last updated Mar. 2019) (listing each state's definitions of abuse and neglect and whether it is found in the civil or criminal code).

²⁴ Elizabeth Tippet, *Child Abuse as an Employment Dispute*, 17 QUINNIPIAC HEALTH L.J. 139, 150–51 (2014). For example, twenty-seven states require a preponderance of the evidence standard to substantiate a claim of child abuse, while twenty-two states only require “some credible evidence,” a comparatively lower evidentiary standard. See FLA. SENATE, COMM. ON CHILDREN, FAMILIES, & ELDER AFFAIRS, at 2 (Oct. 2010), <http://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-205cf.pdf>.

²⁵ Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 4 (2001).

²⁶ Sherman, *supra* note 18, at 869–70. For example, Los Angeles established a central child abuse registry in 1964, and the state of California followed suit in 1965. Douglas J. Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 689 (1978); see also Hollenbeck, *supra* note 25, at 6 (identifying the State of New York as creating the first statutory child protective services system in the United States in 1875, which was carried out separately and independently by agencies such as the New York Society for the Prevention of Cruelty to Children).

²⁷ See *id.*

²⁸ Phillips, *supra* note 11, at 142.

²⁹ CHILDREN'S BUREAU, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 1 (Apr. 2019), https://www.childwelfare.gov/pubpdfs/long_term_consequences.pdf.

been linked to higher rates of chronic conditions such as diabetes and lung disease.³⁰ In addition, adults with mental illnesses who were abused as children have worse mental health treatment outcomes than those who did not experience abuse,³¹ meaning they do not respond as well to treatment. Nationally, most cases of child abuse occur outside of regulated settings like childcare facilities, with the majority of cases stemming from incidents occurring at the child's home.³² Child abuse was first recognized as a public health problem when Dr. Henry Kempe wrote a groundbreaking article titled *The Battered Child Syndrome*, which detailed the effects of physical abuse on children.³³ Many child abuse registries were created during the 1970s as a result of advocacy from child abuse experts³⁴ and Dr. Kempe's article.³⁵ Within a couple of years, researchers avidly studied child abuse and all fifty states had enacted mandatory reporting laws,³⁶ which require certain individuals, especially those with significant contact with children, to report known or suspected acts of child abuse.³⁷

Most sweepingly, Congress enacted the Child Abuse Prevention and Treatment Act, which provides states with federal funds to operate their child welfare programs.³⁸ The purpose of the Act was to attempt to create a "focused Federal effort to deal with the problem [of child abuse]."³⁹ It created the Office on Child Abuse and

³⁰ *Id.* at 2.

³¹ *Id.* at 3.

³² See Julia Wrigley & Joanna Dreby, *Fatalities and the Organization of Child Care in the United States, 1985–2003*, 70 AM. SOC. REV. 729, 729–30, 743–45 (2005); see also CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 2018: SUMMARY OF KEY FINDINGS 3 (2012), <https://www.childwelfare.gov/pubs/factsheets/canstats.pdf> (finding that parents commit more than 80% of substantiated cases of abuse).

³³ C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller & Henry K. Silver, *The Battered-Child Syndrome*, 181 JAMA 17 (1962).

³⁴ Phillips, *supra* note 11, at 139–40.

³⁵ Hollenbeck, *supra* note 25, at 7 (citing Kempe et al., *supra* note 33).

³⁶ Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 82 (1998).

³⁷ 42 U.S.C. § 5106a(b)(2)(B)(i) (2018).

³⁸ 42 U.S.C. § 5106(a) (2018).

³⁹ Susan Vivian Mangold, *Reforming Child Protection in Response to the Catholic Church Child Sexual Abuse Scandal*, 14 U. FLA. J.L. & PUB. POL'Y 155, 158 (2003) (citing *Child Abuse Prevention Act, 1973: Hearings on S. 1191 Before the Subcomm. on Children & Youth of the Comm. on Lab. & Pub. Welfare*, 93d Cong. 2 (1973) (letter to Hon. Walter Mondale from Hon. Harrison A. Williams)).

Neglect, housed in the United States Department of Health and Human Services (HHS), the purpose of which was to provide funding for state initiatives aimed at complying with the new federal mandates under the Act.⁴⁰ The Act makes federal funding contingent on states' compliance with a number of restrictions, including mandatory reporting laws⁴¹ and confidentiality of the information contained in the registry.⁴² The Act adopted tools like registries to assist doctors and social workers in detecting child abuse and provided researchers with data with which to study child abuse trends.⁴³ While the Act does not *require* child abuse registries, its creation of the Model Child Protection Act, which included a central registry, provided states with a template to build their own systems and comply with new statutory requirements.⁴⁴

Beginning with this template, states developed a range of different systems for meeting the Act's mandates. In general, reports of child abuse must remain confidential, but there are a number of exceptions, including for employment screenings.⁴⁵ In addition, states differ on who is permitted to access the records, and some states have broad statutory language on the issue of confidentiality, giving discretion to courts and child welfare officials to determine whether a requesting individual should have access to the records.⁴⁶ Every state requires a background check through a child abuse registry before approving foster or adoptive parents or child or youth care providers, but, beyond that, states vary on who is subject to an employment check.⁴⁷

⁴⁰ Courtney Barclay, *When the Need to Know Outweighs Privacy: Granting Access to Child Welfare Records in the Fifty States*, 34 CHILD. LEGAL RTS. J. 175, 178 (2014).

⁴¹ Tippet, *supra* note 24, at 154.

⁴² 45 C.F.R. § 1340.14(i)(2) (2020) (setting confidentiality standards states must meet to receive federal funding).

⁴³ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, REPORT OF THE U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES ON THE IMPLEMENTATION OF PUBLIC LAW 93-247, THE CHILD ABUSE PREVENTION AND TREATMENT ACT 13-14 (1975).

⁴⁴ Hollenbeck, *supra* note 25, at 9-10.

⁴⁵ Courtney Barclay, *When the Need to Know Outweighs Privacy: Granting Access to Child Welfare Records in Fifty States*, 34 CHILD. LEGAL RTS. J. 175, 179 (2014).

⁴⁶ *Id.*

⁴⁷ CHILD ABUSE CENTRAL REGISTRIES, *supra* note 12, at 2.

The utility of a national registry for child abuse has long been recognized by legislators and government agencies. In the Adam Walsh Child Safety and Protection Act of 2006, the Secretary of HHS was required to create a national registry of substantiated cases of child abuse and neglect.⁴⁸ However, that registry was never created because it became clear, then as now, that there are logistical and legal concerns in creating a centralized, federal child abuse registry.⁴⁹ States vary on what information they maintain in their registries (some maintain only substantiated reports and others include all investigated reports),⁵⁰ the length of time a name appears on the registry, and the conditions necessary to have a name removed from the registry.⁵¹ In contrast to elder abuse initiatives, federal efforts to address child abuse and domestic violence have received federal funding to research and combat these problems, as well as recognition that addressing these problems “require[s] a multifaceted solution, including public health, social service, and law enforcement approaches.”⁵²

C. Elder Abuse Registries (Generally)

Elder abuse is a broad term that encompasses many different types of older adult mistreatment, including physical abuse, emotional abuse, neglect, abandonment, sexual abuse, and financial exploitation.⁵³ Approximately one in ten adults over the age of sixty have experienced some form of elder abuse.⁵⁴ Similar to incidences of child abuse, most cases of reported elder abuse occur in the older

⁴⁸ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, § 633, 120 Stat. 587, 642.

⁴⁹ *Why America Needs an Interstate Child Abuse and Neglect Registry*, CHILD WELFARE MONITOR (Nov. 27, 2018), <https://childwelfaremonitor.org/2018/11/27/why-america-needs-an-interstate-child-abuse-and-neglect-registry/>.

⁵⁰ It is worth noting that a majority of states list all reports of abuse, substantiated and unsubstantiated, on their registries. Tippet, *supra* note 24, at 159.

⁵¹ *State Child Abuse Registries*, ADOPT US KIDS, <https://www.adoptuskids.org/for-professionals/interstate-adoptions/state-child-abuse-registries> (last visited Aug. 2, 2021); Laura Radel, *Interim Report to the Congress on the Feasibility of a National Child Abuse Registry*, OFF. ASSISTANT SECRETARY FOR PLAN. & EVALUATION (May 15, 2009), <https://aspe.hhs.gov/basic-report/interim-report-congress-feasibility-national-child-abuse-registry>.

⁵² Breau & Hatch, *supra* note 9, at 208.

⁵³ *Elder Abuse*, NAT'L INST. ON AGING, <https://www.nia.nih.gov/health/elder-abuse> (last updated July 29, 2020).

⁵⁴ *Elder Abuse Facts*, NAT'L COUNCIL ON AGING, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/> (last visited Aug. 2, 2021).

adult's home or other community settings.⁵⁵ Unlike child abuse—which is more likely to be noticed because children interact with others, such as teachers, outside their home—many older adults are immobile, isolated, or both, meaning that the likelihood of someone noticing signs of abuse is much lower.⁵⁶ Researchers believe elder abuse is systematically underreported, with only one in fourteen cases believed to be reported to law enforcement or other authorities by some estimates.⁵⁷ Other estimates put that figure at one in every twenty-four.⁵⁸

Older adults do not report abuse on their own for a number of reasons, including shame, social isolation, fear of losing their independence, and love for the perpetrator,⁵⁹ the last being a particularly strong factor given that about sixty percent of perpetrators are believed to be family members.⁶⁰ Victims of elder abuse suffer many different adverse health effects, including increased hospitalizations, lower life expectancy, and increased rates of depression and anxiety.⁶¹ Nursing facility residents are protected by a federal Resident Bill of Rights,⁶² but the rampant problem of elder abuse in long-term care facilities shows that the federal policies in place are not enough to effectively deter abusive conduct. Therefore, more concrete action needs to be implemented to protect vulnerable older adults in community and institutional settings. Notably, the rights granted to nursing facility residents do not extend to older adults living in settings outside of regulated skilled nursing facilities. So, the protections under the law are only coextensive with generic criminal and tort laws that protect the general population and which provide no special protections or considerations for the challenges of different populations like older adults.

⁵⁵ *11 Facts About Elder Abuse*, DOSOMETHING.ORG, <https://www.dosomething.org/us/facts/11-facts-about-elder-abuse#fn1> (last visited Aug. 2, 2021).

⁵⁶ Moskowitz, *supra* note 36, at 81.

⁵⁷ NAT'L RESEARCH COUNCIL, *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AGING AMERICA* 266 (2003).

⁵⁸ *Elder Abuse*, WORLD HEALTH ORG. (June 15, 2020), <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

⁵⁹ *Id.*

⁶⁰ *Elder Abuse Facts*, *supra* note 54.

⁶¹ See Xinqi Dong, Ruijia Chen, E-Shien Chang & Melissa Simon, *Elder Abuse and Psychological Well-Being: A Systematic Review and Implications for Research and Policy—A Mini Review*, 59 GERONTOLOGY 132 (2012).

⁶² 42 C.F.R. § 483.10 (2020).

Despite the many calls for protecting children⁶³ and survivors of domestic abuse, reforms aimed at addressing these problems failed to generate parallel reforms to combat elder abuse.⁶⁴ Nevertheless, the issue of elder abuse did not get significant attention until the late 1970s.⁶⁵ In fact, no state had a statute specifically aimed at protecting older adults until 1977.⁶⁶ In 1981, the House Special Committee on Aging issued a report titled, "Elder Abuse: An Examination of a Hidden Problem." The first of its kind, the report estimated that about four percent of older adults (or one million people at that time) were victims of mistreatment per year, but that the problem was mostly hidden in the shadows.⁶⁷ Elder abuse is at least as prevalent as child abuse but much less likely to be reported; only one in eight cases of elder abuse is reported, whereas one of every three cases of child abuse is reported.⁶⁸ Although the federal government mandated that states maintain APS programs in 1974, federal funding to operate such programs decreased significantly in the 1980s.⁶⁹ The decrease in funding left states to create their own strategies for combatting elder abuse.⁷⁰ In 1980, the Elder Abuse Treatment and Prevention Act was introduced in the House.⁷¹ It was modeled after the Child Abuse Prevention and Treatment Act but was never enacted, leaving no federal funding or policy directives to guide states in protecting older adults.⁷²

⁶³ See discussion *supra* Section II.B.

⁶⁴ In particular, survivors of elder abuse and domestic abuse share many similarities, including that both involve power dynamics which render the victim unable or unwilling to report the abuse for fear of retribution. See generally Bridget Penhale, *Older Women, Domestic Violence, and Elder Abuse: A Review of Commonalities, Differences, and Shared Approaches*, 15 J. ELDER ABUSE & NEGLECT 163 (2003) (detailing how academic researchers have typically conceptualized elder abuse and domestic violence and how the conditions for survivors are very similar).

⁶⁵ Moskowitz, *supra* note 36, at 83.

⁶⁶ See Miller & Dodder, *The Abused: Abuser Dyad, Elder Abuse in the State of Florida*, in ELDER ABUSE: PRACTICE & POLICY 167 (R. Filinson & S. Ingman eds., 1989).

⁶⁷ H.R. REP. NO. 97-277, at xv (1981), <https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1137&context=govdocs>.

⁶⁸ *Id.* at xiv.

⁶⁹ Moskowitz, *supra* note 36, at 84.

⁷⁰ *Id.*

⁷¹ Prevention, Identification, and Treatment of Adult Abuse Act, H.R. 7551, 96th Cong. (1980).

⁷² Moskowitz, *supra* note 36, at 84.

Further, in 1987, Congress amended the Older Americans Act to require Area Agencies on Aging (AAAs) to evaluate their elder abuse prevention practices, but the \$5 million authorized to be appropriated to states was never distributed.⁷³ As will be discussed later, there is a significant disparity in funding between child protective services and APS, which is not new. A 1990 House follow-up report found that, on average, states spent \$43.03 per child on protective services, while only \$3.80 was spent per older adult resident on APS.⁷⁴ This history shows that the study of elder abuse and states' willingness to invest time and resources into protecting their older adult citizens are lagging behind the comparable efforts to prevent child abuse.

In the 1990s, the Senate Aging Committee proposed establishing a website where the public could check the findings of random nursing facility inspections, specifically about which employees working in the facility have committed a crime,⁷⁵ essentially proposing to create a national abuse registry. In 2015, the Administration for Community Living (ACL), using the data from nine state APS programs, piloted the National Adult Maltreatment Reporting System (NAMRS).⁷⁶ NAMRS collects data on APS agencies' policies and procedures, as well as de-identified case information, including client characteristics and outcomes.⁷⁷ Beginning in 2016, the ACL began publishing reports from the data provided to NAMRS.⁷⁸ The reports are meant to inform government interventions aimed at prevention and early detection with the hope of having a robust system that can accurately measure national trends on elder abuse.⁷⁹

However, logistical hurdles stand in the way of introducing such a program. States vary widely on a number of important distinctions that could make a national study of elder abuse trends and the establishment of an elder abuse registry more

⁷³ *Id.*

⁷⁴ *Elder Abuse: A Decade of Shame and Inaction: A Report by the Chairman of the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 101st Cong., xii (1990).

⁷⁵ Monica A. Preboth & Shyla Wright, *Quantum Sufficit Just Enough*, 58 AM. FAM. PHYS. 1951, 1951 (1998).

⁷⁶ *National Adult Maltreatment Reporting System (NAMRS) Background*, ADMIN. FOR COMMUNITY LIVING, <https://acl.gov/programs/elder-justice/national-adult-maltreatment-reporting-system-namrs-background> (last updated Mar. 2, 2017).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

difficult.⁸⁰ For example, while the federal government has its own definition of what constitutes abuse,⁸¹ states do not agree on whether to define neglect as a violation of their elder abuse statutes.⁸² These differences in the definition of elder abuse among states can cause the same case to be substantiated or prosecuted in one state and not another,⁸³ making it difficult to compare state data. The lack of a uniform definition of elder abuse and the lack of central reporting makes it nearly impossible to gauge the status of national trends and statistics of elder abuse.⁸⁴ This lack of consensus on the meaning of even basic terms is inhibiting the implementation of a uniform data reporting system. Thus, the possibility of a nationally integrated registry system is even less likely. However, these logistical concerns do not impede states from establishing their own, independent registries.

While the move to a nationally calibrated APS system seems far off, other federal efforts seek to create both a centralized data collection system and parallel enforcement mechanisms aimed at elder justice. The Elder Justice Act⁸⁵ was enacted as part of the Affordable Care Act, and it contains provisions addressing certain public health and social services approaches to prevention, detection, and treatment of elder abuse primarily under HHS authorities and administration.⁸⁶ It requires the Social Security Administration and HHS to provide funding to APS agencies beginning in 2011.⁸⁷ However, this funding did not reach state APS agencies until 2015.⁸⁸ The responsibility of establishing measures to help protect vulnerable citizens has largely fallen on the states with little to no assistance—financial or otherwise—from the federal government. In addition, the federal government's failure to require states to aggregate APS data creates a challenge for researchers

⁸⁰ Meagan Pagels, Comment, *You Cannot Protect Elders Unless you Protect the Institutions that Care for Them: How Streamlining the Definition of Elder Abuse Will Positively Impact the Long-Term Care Industry*, 65 DEPAUL L. REV. 793, 795 (2016).

⁸¹ See 42 C.F.R. § 488.301 (2020).

⁸² Pagels, *supra* note 80, at 809–10; see also Moskowitz, *supra* note 36, at 89–97.

⁸³ Pagels, *supra* note 80, at 795.

⁸⁴ *Id.* at 817.

⁸⁵ 42 U.S.C. §§ 1397–1397n-13 (2018).

⁸⁶ KIRSTEN J. COLELLO, CONG. RESEARCH SERV., R43707, THE ELDER JUSTICE ACT: BACKGROUND AND ISSUES FOR CONGRESS 4 (June 15, 2020).

⁸⁷ *Id.* at 7.

⁸⁸ *Id.* at 8.

studying the issue of elder abuse in their attempt to create a multi-faceted approach to the problem.

As mentioned previously, states vary significantly on how they choose to protect their older adult citizens. One way in which some states have chosen to do so is through the use of elder abuse registries. Unlike child abuse registries, which have federal legislation setting minimum standards for administration, the legal landscape of elder abuse registries lacks directives and remains a patchwork approach to combatting elder abuse. And this patchwork leaves significant gaps. Of particular concern is that some workers in long-term care facilities not otherwise subject to background checks, like nurse's aides, are able to simply move to a new facility with impunity if found to be a substantiated perpetrator of abuse,⁸⁹ assuming their offense was not documented in a nurse's aide registry.

Twenty-six states have systems known as registries that catalog the identities of individuals who are found to have abused, neglected, or exploited seniors or adults (eighteen and older) with disabilities living in the community or in a facility.⁹⁰ The purpose of having such a registry is to make this information available to individuals, agencies, or employers who are authorized to receive such information.⁹¹ Some states make a distinction between APS and Older Adult Protective Services, while others operate them as one agency.⁹² As of the writing of this Note, there are no inter-state collaborations or information-sharing agreements for APS abuse registry information across state lines.⁹³ A study on state APS registries found that there was an average of 2,754 names on state registries, with a median of 947, and a range of 0 to 15,249.⁹⁴ However, there is inconsistency even within states because states often give their APS workers discretion to decide which cases are referred to the registry, so changes in staff may affect which names get referred to the registry.⁹⁵ This Note

⁸⁹ See Marciano, *supra* note 3, at 206 (arguing for mandatory background checks and drug testing for all nursing facility employees).

⁹⁰ NAT'L ADULT PROTECTIVE SERVS. ASS'N, ADULT PROTECTIVE SERVICES ABUSE REGISTRY NATIONAL REPORT 9 (2018) [hereinafter NAPSA REPORT].

⁹¹ *Id.*

⁹² See *id.* at 23.

⁹³ *Id.* at 21.

⁹⁴ *Id.* at 16.

⁹⁵ *Id.* at 17.

will continue by spotlighting case studies of elder abuse and child abuse registries in three states: Tennessee, Colorado, and Nebraska.

II. STATE CASE STUDIES

A. Tennessee—Combined Registry

Tennessee's registry, unlike the other two discussed below, includes substantiated elder and child abuse reports in one list. In 2016, Tennessee allocated about \$6.67 per resident over the age of sixty to Adult Protective Services.⁹⁶ In stark contrast, in 2016, the Department of Child Services spent over \$513 per child resident under the age of nineteen.⁹⁷ The Department of Child Services provides a number of services requiring funding, including the investigation of child abuse, foster care, and adoption, providing care management services for children in the juvenile justice system, and other services.⁹⁸ However, Tennessee APS also provides many services to adults over the age of sixty and all adults with mental or physical disabilities regardless of age.⁹⁹ APS staff investigate all referrals, which include those where there is no allegation of abuse but there is a need for some other safety planning.¹⁰⁰ They also help with referral services to legal counsel, transportation, and identifying sources of food and medical care, if needed.¹⁰¹ In 2018, Tennessee APS

⁹⁶ This number was calculated by taking the APS budget estimate of about \$8 million and dividing it by 1.2 million, which is the number of people over 60 in Tennessee. See Marisa Kwiatkowski, *How the State Failed to Protect Shirley Jarrett*, INDYSTAR (Jan. 10, 2016), <https://www.indystar.com/story/news/investigations/2016/01/10/state-underfunded-adult-protective-services-agency-day-away-exploding/78526046/>; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., POLICY ACADEMY STATE PROFILE: TENNESSEE (2012), <https://acl.gov/sites/default/files/programs/2016-11/Tennessee%20Epi%20Profile%20Final.pdf> [hereinafter TENN. PROFILE].

⁹⁷ This number was calculated by taking the budget of the Department of Child Services (\$801.3 million) and dividing it by the number of children under the age of 19 (1.561 million). See ANNUAL REPORT, TENN. DEP'T OF CHILDREN'S SERVS., https://www.tn.gov/content/dam/tn/dcs/documents/quality_improvement/annual-reports/Annual%20Report%2011-2018.pdf [hereinafter CHILDREN'S SERVICES ANNUAL REPORT]; TENN. PROFILE, *supra* note 96.

⁹⁸ *About Us*, TENN. DEP'T OF CHILDREN'S SERVS., <https://www.tn.gov/dcs/about-us.html> (last visited Aug. 2, 2021).

⁹⁹ TENN. DEP'T OF HUMAN SERVS., ADULT PROTECTIVE SERVICES POLICY MANUAL 3 (2015), https://www.tn.gov/content/dam/tn/human-services/documents/APS_Policy_Manual_11.1.15.pdf.

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.*

received 28,471 reports of abuse or neglect and conducted 10,345 investigations.¹⁰² In contrast, in its 2017–18 annual report, the Office of Child Safety (a part of the Department of Child Services) received 134,757 Child Abuse Hotline calls and conducted 24,303 investigations.¹⁰³ Given that elder abuse is reported at significantly lower rates than child abuse, the lack of funding means not only that APS is at risk for being unable to keep up with its current caseload, but also that there is no available budget for researching the impact of elder abuse on the state and what ways the state could improve its response.

1. Structure of the Registry

Tennessee does not have separate registries for perpetrators of child and elder abuse. Instead, the state has one registry named the Vulnerable Persons Registry (VPR).¹⁰⁴ The statute defines “vulnerable person” as children under the age of eighteen or adults over the age of eighteen who “by reason of advanced age or other physical or mental condition, is vulnerable to or has been determined to have suffered from abuse, neglect or misappropriation or exploitation of property.”¹⁰⁵ The VPR mandates that all names and information in the registry be publicly available.¹⁰⁶ The VPR is available through a public, online portal where users can search by name or social security number.¹⁰⁷

When a report is made by a mandatory or voluntary reporter alleging abuse or neglect, it is entered into an internal system that is not initially publicly available.¹⁰⁸ However, if the reported incident took place in a long-term care or other facility, the appropriate licensing authority is notified.¹⁰⁹ The Tennessee Department of Health adds an individual’s name to the VPR when it receives notification that the individual has been found to have abused, neglected, exploited, or misappropriated the property

¹⁰² TENN. DEP’T OF HUMAN SERVS., ANNUAL REPORT 26 (2019), https://www.tn.gov/content/dam/tn/human-services/documents/DHS_19_ANNUAL_REPORT_FINAL_SCREEN.pdf.

¹⁰³ CHILDREN’S SERVICES ANNUAL REPORT, *supra* note 97.

¹⁰⁴ This registry is authorized by TENN. CODE ANN. §§ 68-11-1001–68-11-1006 (2020).

¹⁰⁵ TENN. CODE ANN. § 68-11-1002(8); TENN. COMP. R. & REGS. § 1240-07-03-.02(17) (2020). See TENN. CODE ANN. §§ 68-11-1002(8)(B)(i)–(v), for definitions of “vulnerable.”

¹⁰⁶ TENN. CODE ANN. § 68-11-1001(b).

¹⁰⁷ *Abuse Registry*, TENN. DEP’T OF HEALTH, <https://apps.health.tn.gov/AbuseRegistry/default.aspx> (last visited Aug. 2, 2021).

¹⁰⁸ TENN. COMP. R. & REGS. § 1240-07-03-.03(4).

¹⁰⁹ *Id.*

of a vulnerable person.¹¹⁰ An individual's name can also be added as a consequence of a federal, state, or local criminal disposition ordering that the individual's name be added to the VPR¹¹¹ as long as the crime was against a vulnerable person.¹¹² If the individual's name is added as a result of a criminal disposition, the individual's name will remain on the VPR even if the criminal offense is subject to expungement.¹¹³ However, the Tennessee Department of Health has the discretion to remove someone's name at any time.¹¹⁴

Before the individual's name is added to the VPR, that person is notified.¹¹⁵ In that notification, the individual is informed of the right to an appeal hearing and other due process rights.¹¹⁶ The notification must also include the definition of the relevant violated provision.¹¹⁷ An individual has sixty days from the date of notification to request an appeal hearing, but if it is not requested before that time, the individual's name will be added.¹¹⁸ This administrative due process is only available to paid caregivers of vulnerable people,¹¹⁹ meaning that volunteers and other non-paid caregivers cannot appeal a decision to add them to the registry.

2. Role of Registry in Hiring and Licensing

Certain agencies and entities, including state licensing agencies, state entities that provide care for vulnerable persons, and any entity with a state contract to provide care for vulnerable individuals, must check the VPR before hiring or agreeing to allow someone to be a volunteer.¹²⁰ No employee or volunteer on the

¹¹⁰ TENN. CODE ANN. § 68-11-1003(a)(1).

¹¹¹ It is notable that an individual's name is not automatically added to the registry upon conviction of a crime against a vulnerable person. *Id.*

¹¹² *Id.* § 68-11-1003(b).

¹¹³ *Id.* § 68-11-1003(c). All information about the expunged crime will be removed from the registry, but the individual will still be identified as a perpetrator of abuse, neglect, exploitation, or misappropriation of property against a vulnerable person.

¹¹⁴ *See id.* § 68-11-1003(g).

¹¹⁵ *Id.* § 68-11-1003(a)(1).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 68-11-1003(a)(3).

¹¹⁸ *Id.* § 68-11-1003(d).

¹¹⁹ TENN. COMP. R. & REGS. § 1240-07-03-.01(2) (2020).

¹²⁰ TENN. CODE ANN. § 68-11-1004(a); TENN. COMP. R. & REGS. § 0940-05-38-.07(1)(d).

VPR can be hired to directly work with vulnerable populations or provide regulatory oversight or services.¹²¹ In addition, licensing authorities who refuse to license someone who is listed on the VPR are immune from a civil suit or liability.¹²²

The restrictions on access to vulnerable populations differ depending on the place of employment and nature of the position. For example, neither licensed assisted living facilities¹²³ nor adult care homes¹²⁴ can employ someone whose name appears on the VPR. Similarly, no one can be employed by an operator or licensee, or have any access to children in a drop-in childcare center, if they are listed on the VPR.¹²⁵ School-administered childcare programs must run VPR checks on anyone, including staff and volunteers, who will work at the program.¹²⁶ If the applicant is on the VPR, that applicant must either be excluded from working there or from interacting with children enrolled in the program.¹²⁷ In contrast, if an individual is found to be a perpetrator of abuse or neglect against a vulnerable adult, the employer is not required to fire the perpetrator, but rather must only demonstrate that the individual will not pose a threat to vulnerable persons.¹²⁸ This means that if an individual currently employed as a paid caregiver is found to be a perpetrator of abuse against an adult, they may continue to be employed at that facility. But, the facility must regularly document that any known perpetrators are not a threat to vulnerable persons in their care.

3. Implications for Workers

The public nature of the registry provides a unique option to states that have decided to adopt a central registry to help address the issue of elder abuse in their state. It provides more power to consumers, who can search for employees' names on the registry. In addition, if a facility or agency's hiring restrictions are not as strict as a resident or family member would prefer, they still have a way to see whether an employee or volunteer is a perpetrator of abuse by looking at the public portal. While

¹²¹ TENN. CODE ANN. § 68-11-1004(b).

¹²² *Id.* § 68-11-1005(b).

¹²³ TENN. COMP. R. & REGS. § 1200-08-25-.06(1)(a)(6).

¹²⁴ *Id.* § 1200-08-36-.05(1)(h).

¹²⁵ *Id.* § 1240-04-02-.05(4).

¹²⁶ *Id.* § 0520-12-01-.07(17).

¹²⁷ *Id.*

¹²⁸ *Id.* § 1240-07-03-.07(1)(b)(1).

no data is available about how often private consumers look up individuals on the registry, the option is available for consumers who may be interested in searching for home health aides or long-term care facility employees.

The state's maintenance of a single registry to protect all "vulnerable persons" makes inclusion of abusers on the registry—and the resulting restrictions on access to employment opportunities—accordingly parallel. However, there is one significant difference; childcare facilities cannot employ anyone on the registry regardless of when the abuse occurred.¹²⁹ Facilities that care for adults can continue to employ an employee whose name is added to the list during their term of employment.¹³⁰ This means that it is much more difficult for those listed on the registry to remain employed in the childcare industry because they must be fired from their current job and cannot be employed by other childcare facilities. That outcome for childcare workers is likely intended by the statute, as its purpose is to protect vulnerable populations from dangerous individuals. However, the more lenient treatment of adult abusers—that is, allowing those on the registry to continue working in facilities that care for vulnerable adults—undermines any goal of protecting vulnerable populations.

In addition, Tennessee has an exception to allow individuals to receive direct care in their homes by hiring workers on the registry.¹³¹ This can be problematic because even though consumers can check the names before hiring a home healthcare worker, they may not have the required information to do so or may not know about the registry at all. Also, because of the employment restrictions put on hiring workers on the registry in facilities, more people on the registry may choose this employment path.¹³² This "loophole" will likely affect more vulnerable adults than children because substantiated abusers have more access to older adults, putting the adults at greater risk of mistreatment.

While there are positives to publicly available registry information, some jurisdictions have addressed the issue of whether the benefits of such a system may

¹²⁹ *Id.* § 0520-12-01-.07(17).

¹³⁰ *Id.* § 1240-07-03-.07(1)(b)(1).

¹³¹ NAPSA REPORT, *supra* note 90, at 36.

¹³² *But see Elder Abuse: Spotting the Signs and Getting Help*, TAKACS MCGINNIS ELDER CARE LAW, <https://www.tn-elderlaw.com/free-resources/blog/the-continuum-summer-2017/elder-abuse-spotting-the-signs-and-getting-help> (last visited Aug. 2, 2021) (citing a study where only about 15% of perpetrators of abuse were home care aides).

come at a cost to those on the registry. In *Valmonte v. Bane*,¹³³ the Second Circuit ruled on whether New York's maintenance of a child abuse central registry implicates a protected liberty interest under the Fourteenth Amendment. The Second Circuit ruled that, because the Central Register releases information to prospective childcare employers and inclusion on the list is "defamatory," a liberty interest is implicated.¹³⁴ Notably, the Central Register records in this case were only accessible to law enforcement agencies, judicial officers, and, of relevance here, employers.¹³⁵ In Tennessee, the records are publicly available, making the risk of misuse of the information on the list, particularly for defamatory purposes, likely much higher. Though *Valmonte* is not controlling in Tennessee, states considering adopting a public registry like Tennessee's should consider whether the positives of giving the public access to this information are outweighed by the potential for violating a liberty interest.

B. Colorado—Separate Registries

In 2018–19, Colorado spent about \$24.28 per resident over the age of sixty-five on APS services.¹³⁶ In the same year, Colorado spent over \$316 per resident under the age of eighteen for Child Welfare Services.¹³⁷ As in Tennessee, these disparate figures can easily be taken out of context. Child Welfare Services provides protective services for at-risk children, implements intervention services for at-risk children, and oversees twenty-four-hour licensed childcare facilities, among other services.¹³⁸

¹³³ 18 F.3d 992, 994 (2d Cir. 1994).

¹³⁴ *Id.*

¹³⁵ *Id.* at 995.

¹³⁶ This number was calculated by dividing the \$19.3 million APS budget for FY 2018–19 by the population of people over the age of 65, which was 794,800 in 2018. ROSE GREEN, COLO. ADULT PROTECTIVE SERVS., COLORADO ADULT PROTECTIVE SERVICES (APS) ANNUAL REPORT—FISCAL YEAR 2018–19, at 5 (2019), https://www.coloradoaps.com/uploads/5/0/9/7/50975653/aps_annual_report_-_fy_2019.pdf; *Population Distribution by Age*, KAISER FAMILY FOUND., <https://www.kff.org/other/state-indicator/distribution-by-age/?dataView=1¤tTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Aug. 2, 2021) [hereinafter STATE POPULATION ESTIMATE].

¹³⁷ This number was calculated by dividing the \$418,000,000 budget for FY 2018–19 of the Child Welfare Services by the number of Colorado residents under the age of 18 (1,321,800). COLO. DEP'T OF HUMAN SERVS., FY 2019–20 JOINT BUDGET COMMITTEE HEARING AGENDA 117 (2018), https://leg.colorado.gov/sites/default/files/fy2019-20_humhrg1.pdf [hereinafter CHILD WELFARE BUDGET]; STATE POPULATION ESTIMATE, *supra* note 136.

¹³⁸ *Child Welfare*, COLO. DEP'T OF HUMAN SERVS., <https://www.colorado.gov/pacific/cdhs/child-welfare-0> (last visited Aug. 2, 2021).

APS is responsible for investigating all allegations of abuse, neglect, or exploitation and, if necessary, working with the adult victim to implement a safety plan to mitigate any safety risk as well as law enforcement and the district attorney's office to prosecute cases where such action is warranted.¹³⁹ In 2017, the most recent date for which information is available, the Child Abuse Reporting Hotline received 220,213 calls.¹⁴⁰

1. Structure of the Registries

a. Elder Abuse

Colorado Adult Protective Services (CAPS) is available to provide services to "at-risk adults," which is defined as individuals eighteen or older who are susceptible to mistreatment or self-neglect because they are unable to perform or obtain services necessary for their health, safety, or welfare, or because they lack sufficient understanding or capacity to make or communicate responsible decisions.¹⁴¹ An individual is not at-risk just because of age or disability.¹⁴²

Seventy-three percent of reporting parties were professionals of some kind.¹⁴³ CAPS does not investigate emotional or verbal abuse.¹⁴⁴ In 2019, fifty-five percent of substantiated reports of elder abuse occurred in the community, meaning that the remaining forty-five percent of substantiated reports of elder abuse occur in facilities.¹⁴⁵ The most common substantiated finding was of "self-neglect," followed by exploitation and caregiver neglect.¹⁴⁶ Therefore, professionals in these facilities are likely also finding and reporting this abuse, which is important and necessary to identify the problem of abuse in facilities.

¹³⁹ GREEN, *supra* note 136, at 2–3.

¹⁴⁰ CHILD WELFARE BUDGET, *supra* note 137, at 126.

¹⁴¹ COLO. REV. STAT. § 26-3.1-101 (2020); 12 COLO. CODE REGS. § 2518-1 (LexisNexis 2020).

¹⁴² 12 COLO. CODE REGS. § 2518-1.

¹⁴³ GREEN, *supra* note 136, at 13.

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.* at 9.

¹⁴⁶ *Id.* at 17.

When a case is referred, an investigation is performed, and the timeline of that investigation is dependent on the severity of the case.¹⁴⁷ Investigations include, to the extent possible, interviews with the alleged victim, alleged perpetrator, and collateral witnesses who may have seen the abuse or mistreatment taking place.¹⁴⁸ While investigations must be completed within sixty days of CAPS receiving the report, all interviews must be completed within fourteen days of receiving the report.¹⁴⁹ This timeline is important when dealing with older adults who are more likely to have problems with memory recall. In order for a case to be substantiated, the investigator must be satisfied, by a preponderance of the evidence standard, that the mistreatment or self-neglect occurred.¹⁵⁰

The notice to the alleged perpetrators of a substantiated abuse finding must include: the type and severity of mistreatment, the date of the report, the name of the county department, and information about individuals or agencies that have access to the report information.¹⁵¹ An alleged perpetrator has ninety days to appeal,¹⁵² but the substantiated finding remains in the system during the appeals process.¹⁵³ Colorado has the newest elder abuse registry in the country; it went into effect in 2017, but it was not fully implemented until January 2019.¹⁵⁴ The information listed in the registry only reflects cases where mistreatment reports were substantiated.¹⁵⁵ The information contained in CAPS is not available to the general public. Instead, it can only be shared with certain entities, such as an employer completing an employment screening¹⁵⁶ or child protection officials, if a child welfare official

¹⁴⁷ See 12 COLO. CODE REGS. § 2518-1 (describing the necessary response timeline depending on the perceived severity of the abuse and safety concerns to the at-risk adult, with timelines ranging from immediate response to no more than three days after receiving the referral).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *New Law to Help Prevent Mistreatment of At-Risk Coloradans*, COLO. DEP'T OF HUMAN SERVS. (May 31, 2017), <https://www.colorado.gov/pacific/cdhs/news/new-law-help-prevent-mistreatment-risk-coloradans>.

¹⁵⁵ COLO. REV. STAT. § 26-3.1-111(4) (2020). When a report is substantiated, that means that the mistreatment was established to a preponderance of the evidence standard. GREEN, *supra* note 136, at 16.

¹⁵⁶ 12 COLO. CODE REGS. § 2518-1.

believes information from CAPS would help in a child welfare investigation.¹⁵⁷ This policy to protect children evidently reflects the concern that an individual who poses a risk to vulnerable adults may also pose a risk to children. Unfortunately, that general concern does not seem to be reciprocated when looking at policy to protect older adults.

b. Child Abuse

The child abuse registry evolved into its current form as a result of inaccuracies found in the child welfare reporting system. The state has a longstanding registry, but a 1990 report found that the central registry contained inaccurate information, which was both under-inclusive (it did not contain all confirmed cases of child abuse or neglect, including those resulting in the child's death) and over-inclusive (it included unsubstantiated cases of child abuse or neglect).¹⁵⁸ A follow-up 2001 report found that over forty-two percent of the records in the central registry did not have the perpetrator's birth date, which made identification difficult when investigators or employers tried to use the system.¹⁵⁹ Further, there was no statewide definition of a "confirmed incident of child abuse or neglect," which often led to inconsistency in the types of cases reported to the registry.¹⁶⁰

Now, any time a case is referred¹⁶¹ to Child Welfare Services, intake workers enter it into Colorado's automated case management system, known as Trails.¹⁶² First, the intake worker is responsible for referring a case to child protective services if appropriate.¹⁶³ Then, child protective services workers complete an initial assessment by, among other tasks, checking Trails to see whether the child or alleged perpetrator has previously been the subject of a referral.¹⁶⁴ This step is part of the assessment process because if there has been prior involvement with child protective

¹⁵⁷ *Id.* Note that the converse is also allowable, meaning that the department in charge of adult protection can access child protective services information to assess the risk to an older adult. *Id.*

¹⁵⁸ 2003 Colo. Sess. Laws 1395.

¹⁵⁹ *Id.* at 1396.

¹⁶⁰ *Id.* at 1397.

¹⁶¹ A referral is a report made to a county department involving a child and suspicion of abuse, risk to the child because of his or her own behavior, or any information which may indicate a child in need of Child Welfare Services. 12 COLO. CODE REGS. § 2509-1.

¹⁶² *Id.* § 2509-8.

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 2509-2.

services, it may increase the likelihood that the child is at risk.¹⁶⁵ Reports must be completed within thirty days and reported in Trails,¹⁶⁶ notably shorter than the sixty days under the elder abuse statute.¹⁶⁷ A report is considered substantiated if there is a preponderance of the evidence to support the conclusion that the abuse or neglect occurred or is occurring.¹⁶⁸ An alleged perpetrator must be notified of a substantiated finding, and the notice must include, among other information, the type of abuse, the date of the report, and notice of appeal rights and timelines to do so.¹⁶⁹ The alleged perpetrator has ninety days to appeal the finding to the agency.¹⁷⁰

Notably, there is a separate evaluation process for child abuse or neglect when that abuse or neglect is alleged to have occurred in an institutional setting.¹⁷¹ Investigations must be initiated within twenty-four hours of receiving the report and the facility and appropriate licensing agency must also be notified of the alleged mistreatment during that initial twenty-four-hour window.¹⁷² In addition, the parents of other children at the facility must also be notified within seventy-two hours if the investigation substantiates the claim.¹⁷³ There is no similar investigation requirement for alleged abuse occurring in facilities that care for at-risk adults. Thus, facilities may not be aware that abuse is occurring. The lack of an expedited investigation timeline means that any investigation, whether internal or by the state, may face barriers like degradation of memories or destruction of evidence. In addition, when there is institutional abuse, the law does not require that APS notify other residents of adult care facilities about abuse allegedly occurring within their facility. The lack of notice could put residents at risk—and, family members may not know their loved one is at-risk or what the facility is doing to mitigate that risk.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* § 2518-1.

¹⁶⁸ *Id.* § 2509-1.

¹⁶⁹ *Id.* § 2509-2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* § 2509-2.

¹⁷³ *Id.*

2. Role of Registry in Hiring

a. Elder Abuse

From January 2019 to June 2019, employers made 56,041 requests through the CAPS system, with ninety-eight individuals found to be substantiated perpetrators of elder abuse.¹⁷⁴ Some employers, such as health facilities, nursing facilities, and home care agencies¹⁷⁵ must request a CAPS registry check for new employees who will be providing direct care to at-risk adults, though they do not have to do so for volunteers¹⁷⁶ or current employees.¹⁷⁷ Only those who were found to be substantiated perpetrators after July 1, 2018 can be added to the CAPS registry.¹⁷⁸ If an employee was found to have a substantiated abuse record in the CAPS registry, the employer will receive information about the date the mistreatment was reported, the type of mistreatment reported, and the county that investigated the mistreatment.¹⁷⁹ However, employers are free to hire someone whose name appears on the CAPS registry.¹⁸⁰ In addition, several entities must request information from the CAPS registry prior to hiring new employees but are not required to do so for existing employees: health facilities, adult daycare facilities, and any agency contracting with the AAA.¹⁸¹

By not requiring registry checks for current employees and limiting the registry to only those who were found to be perpetrators after July 1, 2018,¹⁸² the Colorado law guarantees that any search through the registry will be missing a large portion of incidents committed against older adults. The fact that there is no requirement for volunteers to be subject to registry checks is extremely concerning, given that

¹⁷⁴ GREEN, *supra* note 136, at 29.

¹⁷⁵ See COLO. REV. STAT. §§ 26-3.1-111(7)(a)–(i) (2020) (listing the entities that must request a background check through the CAPS system before hiring a new employee, including: all healthcare facilities (private and public), adult daycares, any facility operated for the care and treatment of people with mental health disorders or intellectual disabilities, and community healthcare service agencies).

¹⁷⁶ *Id.* § 26-3.1-111(5)(a).

¹⁷⁷ 12 COLO. CODE REGS. § 2518-1.

¹⁷⁸ *Id.*

¹⁷⁹ COLO. REV. STAT. § 26-3.1-111(6)(a)(I).

¹⁸⁰ *Id.* § 26-3.1-111(6)(c)(I).

¹⁸¹ 12 COLO. CODE REGS. § 2518-1.

¹⁸² *Id.*

volunteers may have significant contact with older adults.¹⁸³ The low percentage of adverse results from registry checks is suggestive of an underpopulated database because of the registry's recent establishment, and any claim that it ensures the actual safety of residents of these facilities is misguided. While the registry is still in its early stages of development, the large gaps in checks are a concerning oversight.

b. Child Abuse

In contrast to the elder abuse system, a licensed childcare facility must submit a background check through Trails to determine if an applicant (either for employment or volunteering) or current employee has been found "responsible for a confirmed report of child abuse or neglect."¹⁸⁴ The record check must be renewed every five years.¹⁸⁵ Similarly, to be a licensed foster home, kinship care, or non-kinship care entity, all adults over the age of eighteen must undergo, among other types of checks, a background check through the child abuse registry.¹⁸⁶ If an employee was not hired because of an adverse result from the child abuse registry, the employer is permitted, but not required, to inform the applicant of that fact.¹⁸⁷ Some facilities, like childcare facilities that do not operate twenty-four hours a day, cannot receive state funding if they employ someone who was found to be a substantiated perpetrator of child abuse.¹⁸⁸

3. Implications for Workers

Given the relative infancy of the CAPS registry, and that previous offenders' names cannot be included, there are very few names on the registry. Therefore, the registry is incomplete because it does not capture individuals who were found to be perpetrators of abuse prior to the enactment of the registry. This underinclusiveness protects previous employees who may have been found to be perpetrators. At this point, it is difficult to evaluate the extent to which the CAPS registry is affecting workers. However, even if there was more information about the CAPS registry, there is no employment restriction for those found to be perpetrators of abuse against

¹⁸³ COLO. REV. STAT. § 26-3.1-111(5)(a).

¹⁸⁴ 12 COLO. CODE REGS. § 2509-8.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* § 2509-1.

¹⁸⁷ *Id.* § 2509-8.

¹⁸⁸ 9 COLO. CODE REGS. § 2503-9.

older adults. Even for entities required to check the registry for hiring,¹⁸⁹ there is no requirement to check for current employees. Therefore, if an employee is found to be a substantiated perpetrator of abuse at another or previous job, the current employer may never know about the abuse.

Moreover, child abuse reviews must be renewed every five years, which is not required for workers in adult care facilities.¹⁹⁰ It is entirely possible that if an individual is found to be a perpetrator at a second job or in a non-employment context during the time of their employment, their employer may never know about it. This lack of regular employment checks puts older adults at risk. While there may be concerns with adding previous offenders to the registry, employers should do the next best thing and ensure employees lack adverse results from the registry at least as often as in the childcare setting (i.e., every five years). That window will give the registry time to develop its database and would make any subsequent search more accurate and valuable.

In the elder abuse context, Colorado should adopt a similar investigation mechanism for allegations of institutional abuse and neglect as they have for child abuse. Almost half of reports to CAPS originated from community settings,¹⁹¹ meaning that there should be a separate investigation method to evaluate any possible facility shortcoming. In addition, in an institutional setting, there is a greater chance that the perpetrator victimized more than one individual.¹⁹² Like in the childcare setting where investigators notify the parents of all children that abuse occurred, CAPS should consider notifying residents or family members about the occurrences of at least severe forms of abuse in facilities so they can make informed decisions about from whom they are receiving care.

C. *Nebraska–Hybrid Registry*

Nebraska's registry is somewhat unique in that the child abuse and adult abuse registries are not consolidated as in Tennessee, but are not completely separate as in Colorado. Therefore, this Note categorizes Nebraska's registries as a hybrid model

¹⁸⁹ 12 COLO. CODE REGS. § 2518-1.

¹⁹⁰ 12 COLO. CODE REGS. § 2509-8.

¹⁹¹ GREEN, *supra* note 136, at 13.

¹⁹² See generally Yongjie Yon, Maria Ramiro-Gonzalez, Christopher R. Mikton, Manfred Huber & Dinesh Sethi, *The Prevalence of Elder Abuse in Institutional Settings: A Systematic Review and Meta-Analysis*, 29 EUR. J. PUB. HEALTH 58 (2019) (detailing a meta-analysis of estimates of the prevalence of elder abuse in institutional settings).

because while the registries are technically separate, employers can search one or both when doing a background check.¹⁹³ Indeed, one of the stated purposes of Nebraska's registry is for facilities and employers to complete pre-employment checks for those who work with vulnerable adults or children.¹⁹⁴ As discussed below, a facility can decide which registry to search when performing background checks on employees.¹⁹⁵

In 2018, Nebraska spent about \$8.13 per resident over the age of 65 on APS services.¹⁹⁶ In comparison, the state spent over \$451.23 per child resident on child welfare services in that same year.¹⁹⁷ Nebraska's APS provides similar services to those in other states, such as investigating reports of abuse, neglect, exploitation, referring older adults and caregivers to services like respite care, home-delivered meals, as well as assisting the county attorney and law enforcement in investigations.¹⁹⁸ The Division of Children and Family Services, which is the agency responsible for child welfare work, also provides many services, including investigating child abuse and neglect, overseeing foster care and adoptions, and providing family addiction services.¹⁹⁹

¹⁹³ *Submitting a Central Registry Check on the Central Registry Portal*, NEB. DEP'T HEALTH & HUM. SERVS., <http://dhhs.ne.gov/Documents/Completing%20a%20Check-Portal%20Guide.pdf> (last visited Aug. 2, 2021) (encouraging anyone doing a background check for employment to check the applicant's name against both the child abuse and elder abuse registries).

¹⁹⁴ *See* 473 NEB. ADMIN. CODE § 7-011.01B (2020).

¹⁹⁵ *See infra* Section III.C.2.

¹⁹⁶ This number was calculated by dividing the state's aging care management budget (\$2,370,374) by the number of residents over the age of 65 (291,700). *See* STATE OF NEB., EXECUTIVE BUDGET, 2019–2021 BIENNium 446 (Jan. 15, 2019), <https://budget.nebraska.gov/assets/Entire%20Executive%20Budget%20Book%20-%202019-2021.pdf> [hereinafter NEB. BUDGET]; STATE POPULATION ESTIMATE, *supra* note 136.

¹⁹⁷ This number was calculated by dividing the state's child welfare budget (\$220,378,962) by the number of residents under the age of 18 (488,400). *See* NEB. BUDGET, *supra* note 196, at 431; STATE POPULATION ESTIMATE, *supra* note 136.

¹⁹⁸ *Adult Protective Services*, NEB. DEP'T HEALTH & HUM. SERVS., <http://dhhs.ne.gov/Pages/Adult-Protective-Services.aspx> (last visited Aug. 2, 2021).

¹⁹⁹ *Child Welfare and Protection*, NEB. DEP'T HEALTH & HUM. SERVS., <http://dhhs.ne.gov/Pages/Child-Welfare.aspx> (last visited Aug. 2, 2021).

In 2017, there were 35,923 reports of child abuse or neglect.²⁰⁰ Of those reports, 13,718 met the criteria for investigation, and 2,169 were substantiated (fifteen percent).²⁰¹ In 2017, the Abuse and Neglect Hotline received 14,158 calls relating to adult abuse or neglect.²⁰² Only about 2,650 of those calls met the criteria for investigation, 351 were substantiated (thirteen percent), and 151 perpetrators were added to the registry.²⁰³ However, the state does not publish an annual report for adult abuse and neglect. In 2018, the most recent date for which information is available, Nebraska had 8,610 names on its central registry, the second most of any state.²⁰⁴

1. Structure of the Registry

a. Elder Abuse

When abuse is reported, APS provides the Nebraska Adult Abuse and Neglect Central Registry (AACR) all information regarding the report of abuse, with the exception of the name of the person who made the report.²⁰⁵ Individuals—such as physicians or those in charge of adult care facilities—who make a report pursuant to the mandatory reporting statute will receive a summary of the findings and actions taken in response to the report.²⁰⁶ That report will include information such as the date of the report, the alleged victim, the alleged perpetrator, the allegations, and the finding.²⁰⁷ If the report is substantiated, as described below, then the report will also include: whether services were offered and provided by APS, a description of factors that may have contributed to the abuse or neglect, and recommendations to prevent future abuse or neglect.²⁰⁸ If a reporter requests information about their report, APS can only release the following information: whether an investigation was conducted,

²⁰⁰ NEB. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT 6 (2017), <http://dhhs.ne.gov/Reports/Child%20Abuse%20and%20Neglect%202017%20Annual%20Data%20Report.pdf>.

²⁰¹ *Id.* at 7.

²⁰² *Gov. Ricketts, Adult Protective Services Team Highlight Elder Abuse Awareness Day*, NEBRASKA.GOV (June 15, 2018), <https://governor.nebraska.gov/press/gov-ricketts-adult-protective-services-team-highlight-elder-abuse-awareness-day>.

²⁰³ *Id.*

²⁰⁴ NAPSA REPORT, *supra* note 90, at 17.

²⁰⁵ Adult Protective Services Act, NEB. REV. STAT. § 28-378 (2020).

²⁰⁶ *Id.* § 28-379.

²⁰⁷ 463 NEB. ADMIN. CODE § 1-002.01A (2020).

²⁰⁸ *Id.* § 1-002.01B.

whether it was completed, and whether the local office is still involved in the case, which could mean APS is still investigating the report, providing services, or other outcomes.²⁰⁹

Two types of substantiated classifications may appear in the AACR: “court-substantiated” (the perpetrator was found guilty in court beyond a reasonable doubt) and “agency-substantiated” (the agency found support for the allegation by a preponderance of the evidence).²¹⁰ If a report was unfounded or if the alleged victim did not meet the definition of being a vulnerable adult, then those reports are not added to the registry.²¹¹ In addition to notifying the alleged perpetrator,²¹² APS will notify the vulnerable adult of the finding and whether the alleged perpetrator will be listed on the AACR.²¹³ If the older adult who was the subject of the report, the guardian of that older adult, or the alleged perpetrator believes the information in the AACR is not accurate, they can request the Nebraska Department of Health and Human Services (DHHS) expunge the record.²¹⁴ If DHHS refuses or fails to act within thirty days, the individual has a right to a hearing where DHHS has the burden of proving that the record is accurate.²¹⁵ If the record is expunged, the alleged victim, perpetrator, and any other individuals or entities who received a copy of the record will be informed of the expungement.²¹⁶ If the substantiated report is retained in the system, the identifying case file information is retained in the AACR permanently.²¹⁷

b. Child Abuse

The Child Abuse and Neglect Central Registry (CACR) was established by the Child Protection and Family Safety Act in 2014.²¹⁸ As with most child welfare

²⁰⁹ 473 NEB. ADMIN. CODE § 7-003.06.

²¹⁰ 463 NEB. ADMIN. CODE § 1-003.01.

²¹¹ *Id.* § 1-003.02. The list provided is not exhaustive of the situations in which a name may not be added to the registry. For example, substantiated reports of self-neglect are also not added to the registry. *Id.* § 1-003.03.

²¹² *See id.* § 1-004.01; *see also* NEB. REV. STAT. § 28-374.01 (2020).

²¹³ 463 NEB. ADMIN. CODE § 1-004.02.

²¹⁴ NEB. REV. STAT. § 28-380.

²¹⁵ *Id.*

²¹⁶ *Id.* § 28-381.

²¹⁷ 473 NEB. ADMIN. CODE § 7-010.01.

²¹⁸ Child Protection and Family Safety Act, NEB. REV. STAT. §§ 28-710–28-727.

statutes, the legislature noted that the purpose of the Act was to “promot[e] responsible child care in all settings.”²¹⁹ The Act cross-references another Nebraska statute, which emphasizes that the least restrictive means should be used to keep a child safe, and no child will be placed in a situation in which they are at continued risk of harm.²²⁰ This reference highlights that children will not be placed in a situation in which they may come into contact with or receive care from someone who has been found, through a substantiated finding of child abuse or other mechanism, to be a safety risk to children. However, the least restrictive means provision appears to bow to the emphasis on preservation of safety.

Investigators enter child abuse reports into a tracking system of child protection cases, which includes all reports of suspected child abuse or neglect.²²¹ The tracking system is used for statistical purposes and as a reference for future investigations to see if the same victim or perpetrator is involved.²²² While not all reports are entered into the CACR,²²³ if a report of child abuse is entered into the registry, the “subject of the report” (the alleged perpetrator) must be informed of the type of abuse identified and of the right to request an expungement.²²⁴ Only people who have a mandatory requirement due to a license or other status, upon request, will receive a summary of the findings and actions taken as a result of their report,²²⁵ including: the date of the report, the alleged perpetrator and victim, the allegations, whether the report was substantiated and, if so, what services were offered by DHHS.²²⁶ Similar to the AACR, the CACR contains all court-substantiated and agency-substantiated cases.²²⁷ But, the CACR also contains reports of child abuse or neglect that are pending in court.²²⁸ Again, the agency substantiation only requires a finding

²¹⁹ NEB. REV. STAT. § 28-710.01(1).

²²⁰ *Id.* § 43-532(2)–(3).

²²¹ *Id.* § 28-715.

²²² *Id.*

²²³ *See id.* § 28-713.01(3); *see also id.* § 28-720(3)(a) (stating that if the perpetrator is a minor child under the age of 12, the report is not entered in the registry).

²²⁴ *Id.* § 28-713.01(2).

²²⁵ *Id.* § 28-727.

²²⁶ 395 NEB. ADMIN. CODE § 2-003.05 (2020). For example, APS can offer services like home-delivered meals, legal representation, and other services. *See Adult Protective Services, supra* note 198.

²²⁷ NEB. REV. STAT. § 28-718(1).

²²⁸ *See id.* § 28-720(1)(b).

supported by a preponderance of the evidence, whereas court substantiation requires meeting the beyond a reasonable doubt standard, but abuse substantiated by either means is added to the registry.²²⁹

The appeals process is the same as the AACR: the subject of the report can request DHHS amend or expunge the report, and if DHHS refuses or does not act within thirty days, the subject is entitled to request a hearing where the burden is on DHHS to prove the record's accuracy.²³⁰ The expungement and amendment process is also the same as the APS process: if the record is expunged or amended, the alleged victim, perpetrator, and any other individuals or entities who received a copy of the record will be informed of the change.²³¹

2. Role of Registry in Hiring

The APS statute allows certain entities to have access to APS records, including investigating law enforcement agencies, physicians who believe a patient has been abused, and DHHS when licensing childcare providers.²³² All entities listed in the CPS statute have access to APS data,²³³ but the CPS statute does not similarly cross-reference the APS statute.²³⁴ The CPS list of entities that have access to child abuse

²²⁹ See Sherman, *supra* note 18, at 868–69 (arguing that states should establish a clear and convincing evidence standard for adding names to abuse registries as it protects the rights of the people added to registries by effectively balancing the incongruity between the low preponderance of the evidence standard and the high beyond a reasonable doubt standard for a criminal conviction). *But see* W. Todd Miller, *The Central Registry Statute for Abuse and Neglect Matters is Constitutionally Flawed*, 8 RUTGERS J.L. & PUB. POL'Y 651, 662–66 (2011) (arguing that in some states, like New Jersey, individuals convicted of a crime are permitted to show evidence of rehabilitation, allowing them to be licensed in nursing or other caretaking fields. Those listed on the Central Register do not have a similar avenue after they have exhausted their administrative options).

²³⁰ NEB. REV. STAT. § 28-723.

²³¹ *Id.* § 28-724.

²³² *Id.* § 28-377.

²³³ *Id.*

²³⁴ See *id.* § 28-726. However, it is important to note that all of the entities in the APS statute are already incorporated in the CPS statute.

records is significantly longer than that of APS.²³⁵ In the AACR²³⁶ and the CACR,²³⁷ records of all requests made for information are recorded in the registry. When a third party requests a record check, the record cannot be released to the third-party absent a signed authorization by the subject of the check.²³⁸ The following information will be released to third parties upon an authorized request: if there was a record found (and, if so, the classification of the report and date of the alleged abuse or neglect) or if no record was found.²³⁹

Employers are not required to search the registry before hiring employees to provide direct care,²⁴⁰ with some exceptions. Licensed skilled nursing facilities, licensed nursing facilities, and licensed intermediate care facilities must check the AACR and CACR before hiring new employees.²⁴¹ While some facilities have employment restrictions on the basis of an adverse finding on other types of registries,²⁴² employers are not prohibited from hiring the applicant if the applicant has an adverse record on the AACR.²⁴³ Licensed care facilities only need to make a policy for how to use the registry information and document how hiring a person with an adverse registry record will not generally threaten patient safety or property.²⁴⁴ Similarly, healthcare agencies that provide personal assistance services²⁴⁵ must make a policy for how to use the registry information, and they must document how hiring a person with an adverse registry record will not threaten client

²³⁵ *See id.* (adding additional entities and people who can access child abuse report records and the Central Registry, including: The Foster Care Review Office, juvenile probation officers, and the individual with custody of the abused or neglected child (in cases of out of home abuse)).

²³⁶ *Id.* § 28-378.

²³⁷ *Id.* § 28-719.

²³⁸ 463 NEB. ADMIN. CODE § 1-002.02(B) (2020).

²³⁹ NEB. REV. STAT. § 28-725. However, a separate part of Nebraska's Administrative Code says that a third party will only be told whether there is a record or not. *See* 473 NEB. ADMIN. CODE § 7-011.01B.

²⁴⁰ NAPS REPORT, *supra* note 90, at 35.

²⁴¹ 175 NEB. ADMIN. CODE § 12-006.04A(3)(b).

²⁴² For example, a respite care service agency cannot employ someone with an adverse finding on a Nurse Aide Registry or a sex offender registry. *See id.* § 15-006.03A(1)(a).

²⁴³ NAPS REPORT, *supra* note 90, at 35.

²⁴⁴ 175 NEB. ADMIN. CODE § 12-006.04A(3)(c).

²⁴⁵ These are services which help individuals who cannot independently perform activities of daily living. 471 NEB. ADMIN. CODE § 15-002.

safety.²⁴⁶ Assisted living facilities²⁴⁷ and adult day services²⁴⁸ have discretion to decide whether to employ someone with an adverse record on either of the Central Registries. Each respite care²⁴⁹ service provider may create its own policies on whether to employ or continue to employ someone with an adverse finding from the AACR or CACR.²⁵⁰ Other providers, like rehabilitative psychiatric services funded by Medical Assistance funds, are allowed to choose which registry checks are appropriate for their staff and how the results will impact hiring decisions.²⁵¹

In contrast, the restrictions are much stricter regarding hiring for child care services than for hiring employees who work with vulnerable adults. For example, to be licensed as a foster home, all members of the household must have their names searched through Nebraska's AACR and the CACR, as well as the child protection registry for any state in which the applicant has lived in the last five years.²⁵² If the individual applying to provide foster care is identified as a perpetrator on any Central Registry, they are not eligible to be a foster parent.²⁵³ These stringent requirements (i.e., an adverse registry search renders an individual ineligible for the position sought) apply to many other facilities and services dealing with children, including childcare facilities,²⁵⁴ preschools,²⁵⁵ and group homes and agencies dealing with child caring and child placing.²⁵⁶ In contrast to the rehabilitative psychiatric service providers for adults mentioned previously,²⁵⁷ agencies that provide pediatric mental

²⁴⁶ *Id.* § 15-006.03A(1)(b).

²⁴⁷ 175 NEB. ADMIN. CODE § 4-006.03A(2)(a).

²⁴⁸ *Id.* § 5-006.03A(2)(a).

²⁴⁹ Respite care is temporary relief provided to caregivers where older adults stay in an institutional setting for a short period of time, anywhere from a few hours to a week or more. *See What is Respite Care?*, NAT'L INST. OF AGING (May 1, 2017), <https://www.nia.nih.gov/health/what-respite-care>.

²⁵⁰ *Id.* § 15-006.03A(1)(b).

²⁵¹ 471 NEB. ADMIN. CODE § 35-013.02B.

²⁵² 395 NEB. ADMIN. CODE § 3-003.08(A)(iv).

²⁵³ *Id.* § 3-003.08(A)(v)(1)(b).

²⁵⁴ 391 NEB. ADMIN. CODE § 6.

²⁵⁵ *Id.* § 9.

²⁵⁶ 474 NEB. ADMIN. CODE § 6.

²⁵⁷ *See* 471 NEB. ADMIN. CODE § 35-013.02B.

health and substance use treatment services cannot employ direct care workers who have an adverse record on any Central Registry.²⁵⁸

3. Implications for Workers

The most obvious difference between how Nebraska handles hiring in cases of child abuse and elder abuse is leniency—there is significantly more leniency in the hiring of adult care workers than childcare workers. This leniency is concerning for the health and safety of vulnerable adults who may live in or receive services from care facilities. If an employer hiring for care of older adults searches both registries they may see prior substantiated reports, but there is no data on how many employers do so. In addition, there is no incentive for care facilities to search both registries. Moreover, the fact that it is difficult to staff adult care facilities²⁵⁹ coupled with the lack of a mandate to check both registries makes it unlikely that facilities will reject an applicant solely on the basis of an adverse finding on the registry. The outright restrictions on hiring individuals with adverse findings on the CACR, compared to the relatively toothless requirement of needing to have a policy for how to keep vulnerable residents safe, communicates to older adults that their safety is less of a priority. That messaging is also indirectly communicated to employers of adult care.

As in the states previously mentioned, Nebraska should at least provide the same protections to older adults as they do to children. The lack of uniformity in the way the state treats the seriousness of abuse against children and older adults is, unfortunately, consistent with a general societal tendency to not treat all vulnerable populations similarly. Older adults are more at risk of being subjected to abuse than children because facilities do not prevent previous abusers from continuing to have access to older adults. In addition, the text of the child protection statute makes clear that it is state policy to not put children in any situation in which they may be at risk.²⁶⁰ However, there is not the same level of protection for older adults because employees with adverse records may continue to be employed. Nebraska should issue a similar policy directive that makes clear that it is not enough to simply require facilities to plan for keeping older adults safe. The state should enact the same

²⁵⁸ 471 NEB. ADMIN. CODE § 32-007.03E(1)(j)(4).

²⁵⁹ See, e.g., Chris Kirkham & Benjamin Lesser, *Special Report: Pandemic Exposes Systemic Staffing Problems at U.S. Nursing Homes*, REUTERS (June 10, 2020), <https://www.reuters.com/article/us-health-coronavirus-nursinghomes-speci/special-report-pandemic-exposes-systemic-staffing-problems-at-u-s-nursing-homes-idUSKBN23H1L9>.

²⁶⁰ See *supra* text accompanying notes 220–21.

protections for older adults as it does for children in order to protect them from repeat abusers.

III. LESSONS LEARNED AND SUGGESTIONS

Child abuse is a more discussed and studied problem in the United States than is elder abuse. In the 1970s, the federal government mandated child abuse records be maintained for statistical purposes,²⁶¹ indicating their recognition that child abuse is a topic worth studying and tracking over time. No similar mandate has been created for elder abuse. In addition, while every state has the same basic classifications of child abuse, there is no such unanimity among states' elder abuse definitions. These, among other differences, make a concerted, integrated effort to combat elder abuse much more difficult than the national mobilization against child abuse. This lack of knowledge about elder abuse is also likely fueled, at least in part, by national values, which prioritize and emphasize the vulnerability of children and the corresponding imperative to protect them. This protective value is not shared in the laws relating to the treatment of older adults, particularly the most vulnerable ones living in nursing facilities and other institutionalized settings.

There is an incongruity between the protections afforded to children and older adults from the employees of facilities that serve them. For example, there are generally more restrictions on individuals with histories of child abuse than there are on individuals with histories of elder abuse who apply for and work in facilities caring for older adults.²⁶² State practices requiring facilities to have policies to protect residents from offenders are too general, subjective, and unenforceable to actually protect older adults from mistreatment. An outright ban on employing someone with an adverse finding on a registry, like the policy in some states regarding substantiated child abusers, would go a long way to protecting residents.

However, it is worth mentioning that, particularly in adult care facilities, understaffing is a serious problem.²⁶³ Some of the reasons cited for staffing shortages include low wages, unrealistic work schedules, and lack of effective training, which

²⁶¹ Tippet, *supra* note 24, at 154.

²⁶² See *infra* Sections II.A.3, II.B.3, and II.C.3 pertaining to implications for workers.

²⁶³ NAT'L CITIZENS COAL. FOR NURSING HOME REFORM, THE NURSING STAFFING CRISIS IN NURSING HOMES, https://theconsumervoice.org/uploads/files/issues/Consensus_Statement_Staffing.pdf (last updated June 26, 2001).

leads to extremely high staffing turnover rates.²⁶⁴ In order to retain higher-quality workers, states must improve their training standards, raise wages, and require a lower staff-to-resident ratio to ensure that staff members are not overworked. The decrease in stress provided by these policies will also likely have the effect of decreasing abuse committed by nursing facility staff.²⁶⁵ Any comprehensive elder justice policy must include support for the caregivers, paid and unpaid, who work tirelessly to care for older adults. In addition, any employment restrictions must give workers an opportunity to appeal findings and expunge their record, which to their credit, many states include. The abuse registry system is meant to prevent repeat offenders and catch serial behavior before it becomes rampant, not to punish someone forever for one mistake.

Second, states should create parity between rules regarding perpetrators of abuse against older adults versus those against children. Such leniency is likely a symptom of societal attitudes about each of these vulnerable groups. This sentiment is reflected in the relative control placed on employment in these two areas. This Note is not arguing that child abuse and elder abuse should be treated exactly the same. However, more research, money, and enforcement efforts have been involved in the prevention of child abuse than in the prevention of elder abuse. Therefore, to combat elder abuse, similar resources to study, understand, and address the problem are required.

Third, funding sources for protective services should be proportional. Each state discussed in this Note has a different structure to its registry, but the one constant across all of these states is that APS services are funded at significantly lower rates than their CPS counterparts. The agencies which provide child protective services also generally provide significantly more services to children than APS agencies provide to older adults. The budgets for child protective services are understandably higher because they are providing more services, but the fact that agencies that serve children are providing so many more services is exactly the problem that society needs to combat. Society emphasizes protecting children, and until we as a society place greater value on protecting vulnerable older adults, the true scope of the problem of elder abuse will continue to exist in the shadows, making it more difficult to truly address.

²⁶⁴ *Id.* at 2–3. For example, the turnover rates of Certified Nursing Assistants range from 49%–143%, registered nurses range from 28%–59%, and licensed practical or vocational nurses between 27%–61% per year. *Id.* at 2.

²⁶⁵ *What Causes Nursing Home Abuse?*, NURSING HOME ABUSE JUST., <https://www.nursinghomeabuse.org/nursing-home-abuse/causes/> (last updated Jan. 10, 2019).

Finally, states must standardize, unify, and close the gaps in the administration of these registries. The nationwide patchwork of different definitions makes a national response or ability to study the problem of elder abuse that much more difficult. Advocates should pressure lawmakers to create greater uniformity in the definitions of abuse and what kinds of abuse warrant inclusion on a registry. A coordinated effort would not only make the study of elder abuse easier, but it would also facilitate the comparison of interstate employment records, resulting in safer communities and care facilities where older adults are living.

IV. CONCLUSION

Abuse, no matter to whom it is directed, is a societal and public health problem that has dangerous and enduring consequences, sometimes ending in untimely death. Policymakers should be making every effort to protect the most vulnerable individuals from exposure to prior perpetrators of abuse. However, history shows that the trajectory toward protecting these populations is not uniform, and that is likely due in part to a lack of awareness and pressure on lawmakers to learn more about the state of elder abuse and how it affects the older adult population. To keep older adults safe, in the absence of more comprehensive study, some states have adopted registries, which mirror already-established child abuse registries in that employers can check to see if current or prospective employees were a perpetrator of abuse or neglect. However, as demonstrated by the case studies, each state treats staffing in facilities that care for children and vulnerable adults differently, and, even within the same state, the restrictions placed on employees in childcare facilities tend to be stricter than those in adult care facilities.

While this Note investigated how the structure of the registry may affect employment restrictions, the clear motif is that states place a much stronger emphasis on protecting children from harm than vulnerable adults. Beyond merely patching the problem with enhanced research and more effective laws, society must become more aware of the issues surrounding elder abuse. Efforts must be made to enhance visibility on these issues; efforts to which this Note contributes. Anyone alleging abuse should not be immediately disregarded because of their age or cognitive decline. Investigators should take them seriously, and investigate them with the same zeal that they use to investigate child abuse claims. Just because an individual has Alzheimer's, dementia, or any other condition does not mean they should be denied a fair and legitimate investigation. No one wants to imagine a situation in which a parent, grandparent, or older friend is ignored after reporting abuse, and society needs to advocate for older adults by, among other things, petitioning elected representatives to do everything in their power to treat all older adults with dignity and respect and to prevent their victimization. Age should not determine the degree of protection afforded to guard against abuse; society should emphasize protections for all vulnerable people, whether they attend a childcare facility or live in the

memory ward of a long-term care facility, and it is time for society to start living that truth.

