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Mandatory Reporting in Texas for Domestic Violence against Vulnerable Adults: The Need for Changes in Statutory Enforcement.

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ARTICLE

MANDATORY REPORTING IN TEXAS FOR DOMESTIC VIOLENCE AGAINST VULNERABLE ADULTS: THE NEED FOR CHANGES IN STATUTORY ENFORCEMENT

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ABSTRACT

States authorize health care agencies to maintain the safety of disabled and other vulnerable adults. One reason for this authorization is to combat the nationwide problem of domestic abuse against these individuals.

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However, domestic abuse is a problem that exists nationwide, and no federal regulatory scheme for reporting such abuse to these agencies exists. Consequently, each state is free to determine its own statutory mandate and language on who should report, what should be reported, penalties for any failure to report, or whether mandatory reporting should exist at all. Specifically in Texas, statutes require mandatory reporting for certain qualified professionals who have “cause to believe that an elderly or disabled person is in the state of abuse, neglect, or exploitation.” Despite the threat of penalties in Texas for failure to report, the muddled terminology and phrasing of these statutes make them difficult to enforce. In fact, the overall lack of case law, statistical data, and other relevant information on the subject, strongly suggest these statutes are not being enforced at all.

This Article examines how the statutes’ permissive language diminishes the potential enforcement value when subject to court and agency interpretation. Additionally, when viewed in the context of the Americans with Disabilities Act, subsequent amendments to the provisions of the statutes reveal inconsistencies between outdated and newer concepts in the relevant terminology. This Article therefore recommends changing the language and terms of these statutes to promote their enforcement.

I. INTRODUCTION

A 1999 journal article written by Clarence J. Sundram documents the actions of two anonymous institutions when very disturbing incidents that occurred, each involving a disabled resident¹. In the first example, a mentally retarded, non-verbal, female residing at an institution was impregnated; three years later, in a separate incident, she was diagnosed with having syphilis as a result of sexual activity.² While the institution could not establish whether the perpetrator in either instance was another resident, it did not perform any further investigation as to the perpetrator’s identity, nor did it develop a specific plan of protection to prevent further victimization of this type.³

In the second example, an institution twice failed to report the sexual misconduct of one of its male residents. First, staff members did not file an incident report, nor did they launch an investigation after responding to the sound of a screaming female and subsequently finding the male

1. Clarence J. Sundram, *Sex and Mental Disability*, VICTIMIZATION OF THE ELDERLY & DISABLED, July/Aug. 1999 at 19 (describing various cases of sexual abuse of individuals with mental disabilities).

2. *Id.*

3. *Id.* (stating that “[n]one of the other residents . . . tested positive for syphilis”).

resident lying naked with a female resident while other residents looked on.⁴ The female lacked the capacity to consent.⁵

Six months later, staff found two of the male residents involved in the previous incident, together with several other residents, in the act of shaving the pubic hair off the same woman from the first incident and another female resident.⁶ The other female stated that an individual involved in the incident had hit her the previous day, and that she cooperated only for fear of being battered.⁷ Nevertheless, the institution deemed the incident “consensual” and did not classify it as sexual abuse or assault.⁸

These examples demonstrate the potentially severe consequences when qualified personnel—agency caseworkers, nurses, physicians, or personnel otherwise designated by state statutes—fail to report the abuse of vulnerable adults. In both examples, the failure of qualified personnel to act when the initial problem arose allowed the abuse to continue.⁹ There is no doubt that reducing the abuse of vulnerable adults will require qualified personnel in state-funded care facilities to improve their reporting of abuse.¹⁰

Moreover, home health care agencies deserve equal scrutiny. Presently, the prevalence of abuse of vulnerable adults by caretakers or family members in their own homes is unknown. A national survey conducted in 2000 reveals that all fifty states, as well as the District of Columbia and Guam,¹¹ filed 472,813 reports of elder/adult abuse for 2000.¹² However, certain critical information is conspicuously absent from the survey. For example, one question left open is whether the abuse occurs in the facility or at home. Ironically, in the age demographic of “sixty and over” alone, an estimated 449,924 Americans were victims of domestic abuse in 1996, with a mere sixteen percent reporting rate.¹³

4. *Id.*

5. *Id.*

6. Clarence J. Sundram, *Sex and Mental Disability*, VICTIMIZATION OF THE ELDERLY & DISABLED, July/Aug. 1999 at 19.

7. *Id.* (“The other woman said she cooperated out of fear of physical attack by one of the men who had hit her in the eye the day before.”).

8. *Id.*

9. *See id.* at 19, 31.

10. *See generally id.*

11. PAMELA B. TEASTER, NAT’L CTR. ON ELDER ABUSE, A RESPONSE TO THE ABUSE OF VULNERABLE ADULTS: THE 2000 SURVEY OF STATE ADULT PROTECTIVE SERVICES 11 (2000), <http://www.elderabusecenter.org/pdf/research/apsreport030703.pdf>.

12. *Id.* at viii (stating that forty-nine out of fifty-four respondents gave information that Adult Protection Service workers investigated a total of 396,398 elder/adult abuse reports in that year for which data were available).

13. NAT’L CTR. ON ELDER ABUSE, *The National Elder Abuse Incidence Study* 3–4 (1998), http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf.

Such a low reporting figure suggests an impermissibly heightened risk of abuse against vulnerable adults who are physically and/or mentally disabled, who live at home, and who lack the capacity to defend themselves, or to report abuse.¹⁴

Caregivers, whether they are family relatives, experienced attendants, or novices in the human service field, often choose to target a highly vulnerable person. After all, assault is a punishable act. Society condemns these behaviors even more strongly when the victim is a vulnerable adult. Despite society's ostensible attitudes, eighty-five percent of disabled women are still victims of domestic abuse.¹⁵ In fact, disabled women rate caregiver abuse and domestic violence as the number one priority when they list topics that desperately require further research and policy advances.¹⁶ More research is required on the topic of disabled males as domestic violence victims. These individuals are unquestionably not immune from caregiver abuse.¹⁷ There have been some signs of progress on these issues in the context of state agencies, which are now often required by law to report caregiver misconduct. In terms of domestic violence, however, there are fewer grounds for optimism. Currently there is little evidence that incidents of this sort of violence against vulnerable individuals stand a chance of being reported.

II. STATE PROVISIONS MANDATING THE REPORTING OF ABUSE OF VULNERABLE ADULTS

Despite the fact that numerous statutory provisions in Texas law mandate the reporting of abuse of vulnerable adults,¹⁸ such statutes have achieved little in the context of domestic violence. Disturbingly, Texas seems symptomatic of a much larger problem. Texas, like most states, has

14. *See generally* Clarence J. Sundram, *Sex and Mental Disability*, VICTIMIZATION OF THE ELDERLY & DISABLED, July/Aug. 1999 at 19 (displaying an example of how some mentally or physically disabled individuals may, because of the fragility of their situation, even consent to certain forms of abusive conduct on the part of those employed by a state agency to assist them).

15. *See generally* CHERYL GUIDRY TYISKA, NAT'L ORG. FOR VICTIM ASSISTANCE, WORKING WITH VICTIMS OF CRIME WITH DISABILITIES, <http://www.ojp.usdoj.gov/ovc/publications/factshts/disable.htm> (last visited July 31, 2007).

16. ALL WALKS OF LIFE, WOMEN WITH DISABILITIES: DELPHI SURVEY SUMMARY—DISABLED WOMEN RATE CAREGIVER ABUSE AND DOMESTIC VIOLENCE AS NUMBER ONE ISSUE (1997) <http://www.awol-texas.org/articles/article4.html>.

17. NAT'L CTR. ON ELDER ABUSE, The Nat'l Elder Abuse Incidence Study 9 (1998), http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf (demonstrating that although a majority of the victims are women, men are still also victims of abuse).

18. *See* TEX. HEALTH & SAFETY CODE ANN. § 242.122 (Vernon 2006); *see also* TEX. HUM. RES. CODE ANN. §§ 48.051-48.052 (Vernon 2007).

been lacking in the promulgation and the enforcement of statutory reporting requirements.

However tempting it may be to rail against the particular individuals providing care in Texas and elsewhere, much of the difficulty combating these problems arises directly from the legal and political structures governing the protection of vulnerable adults. For example, there is little consistency among states in their general approaches towards mandatory reporting and associated issues. Each state allocates responsibility as it sees fit. Some bind anyone witnessing abuse to report it,¹⁹ while others only require qualified professionals do so.²⁰ Others lay out no requirements whatsoever, merely setting forth a framework by which one may volunteer a report if he or she chooses to do so. Indiana, for example, mandates that an “individual,” notwithstanding any professional obligations,²¹ report abuse.²² Meanwhile, California only requires professionals in legal, medical, law enforcement, health care, and social service fields to report.²³ North Dakota does not require anyone to report abuse, but instead specifies the particular information an individual must submit to authorities in the event that an individual chooses to report abuse.²⁴

States are no more consistent in their approach to penalizing failures to report than they are in establishing requirements for reporting in the first place. Some states impose various misdemeanors, small fines, and/or in-

19. See IND. CODE § 12-10-3-9 (2006); see also N.C. GEN. STAT. ANN. § 108A-102 (West 2006); see also R.I. GEN. LAWS § 42-66-8 (2006) (providing examples of states binding anyone to report).

20. See OHIO REV. CODE ANN. § 5101.61 (West 2006) (showing how the state of Ohio provides an extensive list of qualified professions who are required to report).

Any attorney, physician, osteopath, podiatrist, chiropractor, dentist, psychologist, any employee of a hospital as defined in section 3701.01 of the Revised Code, any nurse licensed under Chapter 4723 of the Revised Code, any employee of an ambulatory health facility, any employee of a home health agency, any employee of an adult care facility as defined in section 3722.01 of the Revised Code, any employee of a community alternative home as defined in section 3724.01 of the Revised Code, any employee of a nursing home, residential care facility, or home for the aging, as defined in section 3721.01 of the Revised Code, any senior service provider, any peace officer, coroner, clergyman, any employee of a community mental health facility, and any person engaged in social work or counseling having reasonable cause to believe that an adult is being abused, neglected, or exploited, or is in a condition which is the result of abuse, neglect, or exploitation shall immediately report such belief to the county department of job and family services. This section does not apply to employees of any hospital or public hospital as defined in section 5122.01 of the Revised Code. *Id.*

21. IND. CODE. § 12-10-3-9(b) (2006).

22. *Id.* at § 12-10-3-9(a).

23. CAL. WELF. & INST. CODE § 15630(a) (West 2006).

24. N.D. CENT. CODE § 50-25.2-03 (2006).

carceration periods.²⁵ Others impose no statutory penalties at all for failure to report.²⁶

Texas has two separate statutes that impose mandatory reporting requirements with respect to the abuse of vulnerable adults. Each of these statutes has a corollary that penalizes failure to report. However, these statutes have limited applicability in the context of domestic violence. In fact, one of them cannot be used at all in this context. Specifically, § 242.122 of the Texas Health and Safety Code requires that:

A person, including an owner or employee of an institution, who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse or neglect caused by another person shall report the abuse or neglect in accordance with this subchapter.²⁷

The language of this statute is misleading. Although it might appear to apply to a Texas state agency serving vulnerable adults in a domestic setting, this provision falls under Title IV of the Health and Safety Code, Health Facilities, which regulates convalescent and health facilities and related institutions.²⁸ In actuality, § 242.122 offers little protection to those residing outside its covered institutions.

The Texas Human Resources Code offers more in the context of domestic violence. Section 48.051 of the Code requires:

(a) Except as prescribed by Subsection (b), a person having cause to believe that an elderly or disabled person is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department.

(b) If a person has cause to believe that an elderly or disabled person has been abused, neglected, or exploited in a facility operated, licensed, certified, or registered by a state agency other than the Texas Department of Mental Health and Mental Retardation, the person shall report the information to the state agency that operates, licenses, certifies, or registers the facility for investigation by that agency.

25. See, e.g., WYO. STAT. ANN. § 35-20-111(b) (2006) (stating that where any reasonable individual who is found guilty of violating this statute incurs “a misdemeanor punishable by imprisonment for not more than one year, a fine of not more than one thousand dollars, or both”).

26. See COLO. REV. STAT. § 26-3.1-102 (2006) (showing that Colorado does not have mandatory reporting requirements); see also S.D. CODIFIED LAWS § 22-46-6 (2006) (showing that South Dakota does not have mandatory reporting requirements).

27. TEX. HEALTH & SAFETY CODE ANN. § 242.122(a) (Vernon 2006).

28. *Id.*

(c) The duty imposed by Subsections (a) and (b) applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional.

(d) The report may be made orally or in writing. It shall include:

- (1) the name, age, and address of the elderly or disabled person;
- (2) the name and address of any person responsible for the elderly or disabled person's care;
- (3) the nature and extent of the elderly or disabled person's condition.²⁹

Unlike § 242.122, this statutory provision explicitly covers all individuals acting within the scope of their employment or whose professional communications are generally confidential.³⁰ It expressly names medical practitioners, social workers, and mental health professionals, attorneys, and clergy as falling within its scope.³¹ Section 48.051 also distinguishes itself from § 242.122 by indicating that a person employed by an agency not affiliated with the Texas Department of Mental Health and Mental Retardation must report incidents of domestic violence against a vulnerable adult to the organization authorized to regulate the agency. For example, an employee of the Texas Department of Transportation who, in his or her official capacity, witnesses an incident of possible abuse against a vulnerable adult is obligated to report the incident within the organization. The employee need not have any affiliation with the Texas Department of Mental Health and Mental Retardation to be obligated to report the incident under this statute. The statute also specifies the minimum amount of information the person shall report.

The Texas Human Resources Code adds more enforcement bite. Section 48.052 of the Texas Human Resources Code prescribes a Class A misdemeanor to a person who "has cause to believe that an elderly or disabled person has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with [§ 48.051]."³² Where § 242.131 penalizes only employees of state-funded health facilities or related institutions for failure to report abuse,³³ § 48.052 explicitly defers to Chapter 242 of the Texas Health and

29. TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2007).

30. *Id.* § 48.051(d).

31. *Id.*

32. *Id.* § 48.052(a).

33. TEX. HEALTH & SAFETY CODE ANN. § 242.131 (Vernon 2007).

Safety Code for all facilities that fall within its zone of application.³⁴ However, like § 48.052, § 242.131 prescribes a Class A misdemeanor penalty as well.³⁵

It might appear that the explicit distinctions drawn between the Texas Human Resources Code and Chapter 242 of the Health and Safety Code signify that the Texas Legislature was paying careful attention to the issue of mandatory reporting. Nevertheless, whether intentionally or not, the Texas Legislature left both a linguistic and practical morass. As a result, it is unclear whether law enforcement agencies are enforcing the mandatory reporting requirements of these statutory provisions.

The relative absence of relevant cases attests to the paltriness of this law enforcement effort. In fact, only one case appears to have been decided in relation to these issues. In *Moore v. State*,³⁶ a bedridden elderly woman was allegedly sexually assaulted.³⁷ Even here, however, the case makes only cursory reference to the mandatory reporting requirements. In general, the *Moore* case addresses the sufficiency of the evidence adult protective services obtained at the scene after the alleged incident was reported.³⁸ The holding in *Moore* leaves merely implicit the suggestion that agency employees actually followed reporting procedures promptly.³⁹ This sort of unspoken suggestion offers little comfort that state agencies are complying with the relevant regulations. The absence of any other cases, taken together with the dismally low percentage rate noted above of reported domestic violence against individuals “sixty and over,” tends to confirm that they are not.

It is clear from the referenced age group that abuse has occurred in the broad-based demographic of the elderly as early as 1996, and that domestic violence was and continues to be a top concern of disabled women who have been surveyed. Notwithstanding the possibility that certain disabled domestic violence victims might obtain access to attorneys, the lack of cases confronting these issues points out the lack of enforcement and lack of recognition of the problems underlying our reporting framework.

The problem of domestic violence itself might also play a role in the statutes’ lack of enforcement. Domestic violence is an inherently elusive

34. TEX. HUM. RES. CODE ANN. § 48.052(b) (Vernon 2007).

35. TEX. HEALTH & SAFETY CODE ANN. § 242.131(b) (Vernon 2007).

36. *Moore v. State*, No. 07-95-0279-CR, 1996 Tex. App. LEXIS 1987 (Tex.App.—Amarillo May 14, 1996, no writ) (not designated for publication).

37. *Id.* at 1–2.

38. *Id.* at 1.

39. *Id.* at 2–3 (noting that a supervisor with Adult Protective Services of the Texas Department of Protective and Regulatory Services received a call concerning the suspected victim on the same day the agency employees initially found evidence of the possible assault).

problem. Many domestic violence perpetrators know their victims well, and take complete advantage of the intimate trust and dependency that the vulnerable victim may have in them. If the victim lacks the capacity to communicate, the perpetrator can commit these acts with impunity unless a third party reports the situation. Because of these tendencies, domestic violence often lurks under the surface without ever coming to the light. He or she can commit the abusive acts when the chances of getting caught are minute.

Even if a victim does not lack the capacity to communicate and report the abuse, his or her vulnerable situation may allow perpetrators to exert coercive force and to keep the victim silent. For example, a victim may fear permanent abandonment with no further assistance and that the agency in question will not aid the victim after the incident is reported. Furthermore, the perpetrator may retaliate against a victim who reports abuse. The perpetrator is probably more familiar with the victim's daily activities, environment, and habits than others and may have greater knowledge of the victim's vulnerabilities. These attributes give the perpetrator extended control beyond the time frame of the initial abuse.

The placement of these statutes may play a role in the relative absence of mandatory reporting cases. The Texas system of interwoven statutes does not readily lend itself to ease of adjudication. Courts may not even consider looking at Chapter 48 of the Human Resources Code where domestic violence against a vulnerable adult occurs. Assuming that the health care statutes would be the ones to apply, courts might rely entirely on Chapter 242 of the "Health Facilities" Title of the Health and Safety Code. If the health care statutes do apply, courts will have difficulty applying the statutory provisions that, as noted above, expressly target institutions.

III. SUFFICIENCY OF THE TERMINOLOGY AND PHRASING OF THESE STATUTES

Although most states mandate the reporting of domestic violence against vulnerable adults, the terminology used in some state statutes is suspect. States need not use specific terms such as "domestic violence" or "vulnerable adult." In fact, only eleven states actually define and use the term "vulnerable adult" in the context of abuse.⁴⁰ However, these eleven

40. States that use the term "vulnerable adult" in this context include: Alaska, *see* ALASKA STAT. § 47.24.900 (2007); Arizona, *see* ARIZ. REV. STAT. § 13-3623(6) (LexisNexis 2007); Florida, *see* FLA. STAT. ANN. § 415.102(26) (LexisNexis 2007); Maryland, *see* MD. CODE ANN., CRIM. LAW § 3-604(10) (LexisNexis 2007); *see also* MD. CODE ANN., FAM. LAW § 14-101(q) (LexisNexis 2007); Minnesota, *see* MINN. STAT. § 626.5572(sub. 21) (2007); Mississippi, *see* MISS. CODE ANN. § 43-475(m) (2007); Oklahoma, *see* OKLA. STAT.

states do not employ the same definition for the term “vulnerable adult” in this context.⁴¹ These variances make it particularly difficult for courts or other interpreters of these statutes to derive concrete direction from them.

Texas statutes make no reference to the terms “vulnerable adult” or “domestic violence.” Instead, Texas defines the scope of its reporting requirements against “elderly or disabled persons,” among others.⁴² The statutes’ repetitive and interchangeable use of the terms “elderly” and “disabled” throughout § 48.051 blurs their distinctive definitions. It is not that the definitions themselves are unavailable or unclear.

Section 48.002 of the Texas Human Resources Code defines “elderly person” simply as “a person 65 years of age or older.”⁴³ The same section separately defines “disabled person” as:

[A] person with a mental, physical, or developmental disability that substantially impairs the person’s ability to provide adequately for the person’s care or protection and who is:
(A) 18 years of age or older; or

tit. 30, § 3-106.1(A)(3) (2007); Utah, *see* UTAH CODE ANN. § 62A-3-301(26) (2007); *see also* UTAH CODE ANN. § 76-5-111(1)(t) (2007); Vermont, *see* VT. STAT. ANN. tit. 33, § 6901(14) (2007); Washington, *see* WASH. REV. CODE ANN. § 74.34.020(13) (2007); and Wisconsin, *see* WIS. STAT. ANN. § 940.285(3)(e) (2007).

41. *Compare* MD. CODE, CRIM. LAW § 3-604(10) *and* MD. CODE (LexisNexis 2007), FAM. LAW § 14-101(q) (LexisNexis 2007) (defining “vulnerable adult” as “an adult who lacks the physical or mental capacity to provide for the adult’s daily needs”), *with* MINN. STAT. § 626.5572(sub. 21) (2007) (defining “vulnerable adult” differently):

- (1) a resident or inpatient of a facility;
- (2) receives services at or from a facility required to be licensed to serve adults under sections 245A.01 to 245A.15, except that a person receiving outpatient services for treatment of chemical dependency or mental illness, or one who is committed as a sexual psychopathic personality or as a sexually dangerous person under chapter 253B, is not considered a vulnerable adult unless the person meets the requirements of clause (4);
- (3) receives services from a home care provider required to be licensed under section 144A.46; or from a person or organization that exclusively offers, provides, or arranges for personal care assistant services under the medical assistance program as authorized under sections 256B.04, subdivision 16, 256B.0625, subdivision 19a, and 256B.0627; or
- (4) regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction:
 - (i) that impairs the individual’s ability to provide adequately for the individual’s own care without assistance, including the provision of food, shelter, clothing, health care, or supervision; and
 - (ii) because of the dysfunction or infirmity and the need for assistance, the individual has an impaired ability to protect the individual from maltreatment. *Id.*

42. *See* TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2007).

43. *See id.* § 48.002(a)(1).

(B) under 18 years of age and who has had the disabilities of minority removed.⁴⁴

Yet Chapter 48 of the Code makes nothing of the distinctions offered in the definitions, using the terms as if they meant the same thing.⁴⁵ Because they do not mean the same thing, this treatment clearly poses difficulties.

As that term is defined, a significant part of the overall population qualifies as elderly. Consequently, anyone falling into the category of elderly is eligible for assistance under Texas law, even though not everyone that falls into this category requires such assistance. On the other hand, a “disabled person” is defined much more narrowly in § 48.002. Based on that definition, one who falls into that category would almost certainly require the services regulated and provided by the state. Any conflation of the two definitions consequently muddles the boundaries between very different subsets of the population.

Texas may be using the terms “elderly” and “disabled” interchangeably because of the overlap between the two groups. An estimated 12.5% of the nation is said to be over sixty-five,⁴⁶ while twenty percent of the American population is disabled.⁴⁷ Many people fit into both categories, and there is sometimes what might be described as a causal link between membership in both groups. Becoming elderly itself is a risk factor for becoming disabled. Thus, the number of individuals with disabilities increases partially as a result of the aging of our population and the resulting entrance of more and more people into the category of “elderly.”⁴⁸

It may be that the demographic similarity coupled with this causal link has prompted the Texas Legislature to promulgate statutes that treat protective services for the elderly and disabled persons as if they were one. It is equally possible that courts reading these statutes, however they may be intended, ultimately interpret them as treating elderly and disabled persons the same way. Nevertheless, the groups are not the same and their needs are not equivalent. Courts may not help themselves to the fallacious assumption that they are the same. The fact that legislatures, law enforcement agencies, and courts apparently have helped themselves to this assumption offers a possible explanation for the lack of enforcement for these statutory provisions for the disabled population under the

44. *See id.* § 48.002(a)(8).

45. *See, e.g., id.* § 48.001.

46. Health Policy Monitor, Country Fact Sheet: USA, http://www.hpm.org/en/Country_Facts/Country_Selection/North_America/USA.html (last visited July 31, 2007).

47. *See* Daniel D. Sorensen, *TASH Connections: Invisible Victims 2003*, VICTIMIZATION OF THE ELDERLY & DISABLED, July/Aug. 2004 at 17.

48. *See id.*

age of sixty-five, who, by the nature of the case, would not fall under the category of the “elderly.”

The statute describes abuse in broad terms, referencing the neglectful or willful infliction, unreasonable confinement, intimidation, and harm or pain due to cruel punishment.⁴⁹ These are hardly types of abuse that are best left unreported due to difficulties in the interpretation of the statute. In fact, the statute specifies sexual abuse as within its scope,⁵⁰ including indecent exposure⁵¹ and assaultive offenses.⁵²

Surely, crimes so vilified by society should not be allowed to continue against society’s most vulnerable members simply because of apathetic enforcement efforts. By identifying abuse committed by those with an ongoing relationship to the victim, the statute warns of the above discussed dangers inherent in a relationship where one party is vulnerable and another party has the capacity to elude detection.⁵³ By so warning, the statute, by the nature of the case, urges those responsible for preventing such abuse to take the appropriate measures. It is ironic then that apparent ambiguities in the statutory language itself, and in society’s views of what “disability” may mean, should prevent such adequate enforcement.

The Texas Legislature needs to improve the language of the statute. Such improvements may depend upon rejecting outdated concepts of “elderly” and “disabled person” in favor of standards more relevant to the current day and more informed by modern sociological research. The tension between these outdated and newer concepts may be reflected in structure of the statutory provision itself. The term “elderly,” for example, is the very first term defined in § 48.002 of the Code,⁵⁴ but “disabled person” is not defined until much later.⁵⁵ One may speculate that the term “elderly” was used exclusively or coupled with “disabled person” for a long time prior to legislators narrowly redefining the later term. Such redefinitions, possibly in response to political pressures or congressional changes on the national level, may have taken the form simply of gradual linguistic accretions to the statute as opposed to systematic reformulation of the concepts basic to that statute. It may be, in other words,

49. TEX. HUM. RES. CODE ANN. § 48.002(a)(2)(A) (Vernon 2007).

50. *Id.*

51. TEX. PEN. CODE ANN. § 21.08 (Vernon 2007).

52. *See id.* §21.01.

53. TEX. HUM. RES. CODE ANN. § 48.002(a)(2) (Vernon 2007).

54. *Id.* § 48.002(a)(2) (“‘elderly person’ means a person 65 years of age or older”).

55. *Id.* § 48.002(a)(8) (“‘disabled person’ means a person with a mental, physical, or developmental disability that substantially impairs the person’s ability to provide adequately for the person’s care or protection and who is: (A) 18 years of age or older; or (B) under 18 years of age and who has had the disabilities of minority removed.”).

that legislators simply added on new language in deference to the requests of various constituents, but did not examine the extent to which a new outlook on the entire question of mandatory reporting of abuse might have become necessary in virtue of the ideas reflected in those new linguistic additions.

Sections 48.051-48.052 of the Texas Human Resources Code may suffer from the same difficulties. These statutory provisions on their face appear to require reporting when a person “has cause to believe that an elderly or disabled person has been abused, neglected, or exploited . . . or is in the state of abuse, neglect, or exploitation[.]”⁵⁶ While the provisions give the appearance of laying out mandatory requirements, they ultimately have a relatively permissive effect because of the phrase “has cause to believe.” This phrase leaves questions of recording domestic violence or abuse against a vulnerable adult within the hazy boundaries of an individual’s personal subjective perceptions.

Such a subjective approach has considerable dangers. It is possible, for example, that a caseworker or a nurse visiting clients at their place of residence may overlook—whether through negligence or through indifference—signs of domestic violence against that client that are not easily spotted or not particularly extreme. Although the statute might suggest reporting such instances, these caseworkers or nurses, perhaps overburdened with their caseload, trusting of particular individuals associated with the client, or simply interested in meeting their quota of client visits for a given day, may simply ignore or even find reasons to avoid the extra paperwork involved with reporting them. If the client then suffers an extremely traumatic episode of domestic violence thereafter, these persons could easily avoid liability under the statute by claiming simply that they had no cause to believe, at the time, that their client was being abused.

IV. SUFFICIENCY OF THESE STATUTES IN TERMS OF THE AMERICANS WITH DISABILITIES ACT

With the enactment of the Americans with Disabilities Act (“ADA”) in 1990, millions of individuals with disabilities became protected from discrimination with respect to the provision of public accommodations, transportation, state and local government services, telecommunication relay services and employment.⁵⁷ The ADA itself estimated that “43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing

56. *Id.* §§ 48.051(a), 48.052(a).

57. *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000).

older.”⁵⁸ The ADA was intended to provide a mandate on a national level for the elimination of discrimination against individuals with disabilities.⁵⁹ The ADA’s main flaw is that it does not apply to private facilities.

Family law and human resource law are generally governed by state law as opposed to federal law. Consequently, Texas need not defer to the federal mandate in the ADA when designing its own language and procedures regarding the reporting of domestic abuse against the elderly and the disabled. The ADA can help inform interpretations of Texas law and can assist in exposing possible deficiencies in the relevant Texas statutes. To this effect, the ADA can play a role in examining the sufficiency of Texas’s statutes on reporting abuse at least in terms of its use of language.

The ADA defines “disability” with respect to an individual as:

“(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁶⁰

The definition does not require courts to construct narrowly defined categories for particular individual’s impairments. Instead, it outlines its components in broad strokes, allowing courts to determine an individual’s disability either by a record or community acknowledgement of the individual’s impairment, or by the extent to which the impairment prevents her from performing essential daily tasks—i.e., major life activities.⁶¹

Regardless of how Texas applies the ADA’s definition of disability when determining its approach to public accommodations, the state still approaches human resource law with an entirely independent definition of disabled persons.⁶² Nevertheless, the definition within the statute has evolved with the onset of the ADA era.

In 1988, § 48.002(a)(8) defined “disabled person” only as:

“[A] person with a mental, physical, or developmental disability who is:
(A) 18 years of age or older; or (B) under 18 years of age and who has had the disabilities of minority removed.”⁶³ Prior to the ADA, therefore, the statutory language relied on other authorities to adequately define disability within three distinct categories, the mental, physical, and developmental.

58. *Id.* § 12101(a)(1).

59. *Id.* § 12101(b)(1).

60. *Id.* § 12102(2).

61. See 29 C.F.R. § 1630.2(i) (2007) (defining “major life activities” as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working”).

62. TEX. HUM. RES. CODE § 48.002(a)(8) (Vernon 1990).

63. *Id.*

However, in 1995, the Texas Legislature amended its language in §48.002(a)(8) to include language that appears to reflect the thought processes behind the ADA. A disabled person was now defined as “a person with a mental, physical, or developmental disability that substantially impairs the person’s ability to provide adequately for the person’s care or protection”⁶⁴ The statute’s language thus retained its division of disabled persons into three distinct categories, but gave those categories a common base relating to the severity of the given individual’s impairment.

In adding this language the legislature may have simply recognized the need for public entities to comply with the ADA’s Title II “program accessibility,”⁶⁵ or it may have intended a more extensive effort to stay current with new federal regulations in general. Whatever the intent, the added language appears so closely tied to that of the federal statute that it seems to reflect almost an aspiration towards kinship with that statute.

Unfortunately, the existing similarities between the federal and state statutes do not resolve the question of how to interpret the state statute on the proper reporting of domestic violence. The legislators have retained the problematic terminology “elderly” or “disabled persons” in the relevant regulations. Such structural continuity is likely to undermine the effect that the recent definitional changes might otherwise have had. Because courts and law enforcement agencies have traditionally conflated the elderly and the disabled person when determining how to enforce the statute, any change to that definition is unlikely to dramatically alter the approaches taken by these entities.

V. RECOMMENDATIONS ON ENFORCING MANDATORY REPORTING FOR DOMESTIC VIOLENCE

The absence of case law reflecting efforts to enforce and apply the statutes concerning the reporting of abuse against vulnerable adults does not mean these statutes are not enforced at all. Despite reports of abuse, domestic violence remains a hidden crime for the general population today. Currently there are approximately fifty-four million Americans with disabilities.⁶⁶ This is a substantial increase in the population when compared to Congress’s initial estimate of forty-three million in 1990 when the ADA was enacted. Given this increase, more of these individuals will

64. *Id.*

65. Americans with Disabilities Act of 1990, 42 U.S.C. § 12134(b) (2000).

66. THE WHITE HOUSE DOMESTIC POL’Y COUNCIL, THE PRESIDENT’S NEW FREEDOM INITIATIVE FOR PEOPLE WITH DISABILITIES: THE 2004 PROGRESS REPORT 7 (2004), *available at* <http://www.whitehouse.gov/infocus/newfreedom/newfreedom-report-2004.pdf>.

likely suffer some form of abuse during their lifetime. The amount of incidents that go unreported will likely increase as well.

Texas legislators may have made some progress by adopting language similar to that in the ADA, although it is still unclear what effect this has had or will have. Whatever the case, there is still an unquestionable need to for more regulation to prompt better enforcement through state action. Just as the ADA mandates protection for individuals with disabilities against discrimination with respect to public accommodations, so can the states provide the same protection with respect to private residences.

Other states have started providing such protection by changing the terminology and requirements of their respective statutes, and by establishing advocacy programs to better assist vulnerable adults who are victims of domestic violence.⁶⁷ For example, the Washington State Coalition Against Domestic Violence offers a model practice through its Disability Advocacy Project.⁶⁸ The coalition offers a manual providing a very extensive background on the state's disabled population and resources an individual can utilize when assessing or reporting abuse against a vulnerable adult.⁶⁹ Another manual offers detailed recommendations on safety planning for victims with disabilities.⁷⁰

The Texas Legislature has made tentative moves in this direction and perhaps should pursue this process of amendments even further. Such legislative action may have the added bonus of increasing awareness in the general population of the need to protect vulnerable adults from domestic violence while still offering them the means to preserve their independence.

67. See, e.g., SafePlace: Disability Services, http://www.austin-safeplace.org/site/PageServer?pagename=program_disability (last visited July 31, 2007) (serving as an example for advocacy programs existing in Texas that provide assistance to vulnerable adults who are victims of domestic violence). SafePlace, an organization located in Austin, Texas, is committed to providing shelter to victims of domestic violence and launching programs to promote awareness of domestic violence issues, provides advocates for vulnerable adults in need of such assistance. *Id.*

68. See WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, DISABILITY ADVOCACY PROJECT, available at http://www.wscadv.org/projects/disability_protocols.htm.

69. See CATHY HOGG, ENOUGH AND YET NOT ENOUGH: AN EDUCATIONAL RESOURCE MANUAL ON DOMESTIC VIOLENCE ADVOCACY FOR PERSONS WITH DISABILITIES IN WASHINGTON STATE (2001), available at <http://www.mincava.umn.edu/documents/wscdv/wscdv.pdf>.

70. See CATHY HOGG, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, MODEL PROTOCOL ON SAFETY PLANNING FOR DOMESTIC VIOLENCE VICTIMS WITH DISABILITIES: RECOMMENDED PROCEDURES (2004), available at http://www.wscadv.org/projects/safety_protocol.pdf.

A. *One Term for “Elderly or Disabled Person”*

“Elderly” does not mean “disabled.” Consequently, a state court should not conflate the two terms by interpreting the terms as meaning “elderly or disabled person.” The court must draw the requisite distinctions so as to better understand the requirements of the statute under consideration. Each victim’s individual characteristics impact the circumstances surrounding the abusive situation in which he or she is trapped. Because Chapter 48 of the Texas Human Resources Code provides protective services for such individuals, both the Code itself and any interpretation of the Code should reflect the nuances in an individual’s circumstances. A category of “elderly or disabled person” taken together cannot accomplish this. Instead, the requirements of each type and level of vulnerability must be addressed independently.

The Texas Legislature need not gear all of its changes towards such distinctions and differentiation. Broad categorizations do not always prove problematic, but legislatures must choose carefully when using such broad terms. The phrase “vulnerable adult” has value in the context of reporting abuse. Alaska defines “vulnerable adult” as “a person 18 years of age or older who, because of physical or mental impairment, is unable to meet the person’s own needs or to seek help without assistance.”⁷¹ Although this simple definition includes not only the elderly and individuals with a disability, but also someone totally incapacitated, for example, there are circumstances where grouping these individuals together can be useful. The legislature must be extraordinarily careful, only to use such a sweeping rubric when there is no need of drawing nuanced distinctions between various victims. It may be, for example, that with respect to sexual assault, the legislature may deem that when a crime so horrific has been committed it simply does not matter whether the victim was vulnerable due to age or disability. Such legislative decisions must be made consciously and must not be forced upon the legislature because of simple linguistic murkiness.⁷²

B. *Change Permissive Language of Mandatory Reporting Statutes*

The Texas Legislature must also consider altering the language of Texas statutes as well. For example, it may well need to eliminate the phrase “has cause to believe,” as this phrase does much to weaken any compulsive force the statute might otherwise have. The language provides too

71. ALASKA STAT. § 47.24.900 (2007).

72. See TEX. HUM. RES. CODE ANN. § 48.001 (Vernon 2007) (providing for child welfare in cases where the victim is a child, but would otherwise meet the requirement of being a “vulnerable adult”). Texas lawmakers might consider the same criteria for someone under the age of eighteen by defining such an individual as a “vulnerable minor.”

much of a loophole for an individual bearing the responsibility to report abuse under § 48.051 to evade that responsibility. Courts, for their part, must be obligated to properly determine if a given responsible individual should have reasonably known that an elderly or disabled person was or might have been the victim of domestic violence. The passive language of the existing statutes cannot guarantee adherence to these statutes. With another simple change of language, the Texas Legislature can make Chapter 48 of the Human Resources Code more enforceable. The phrase “a person *finding* that an elderly or disabled person might appear to be or have been in the state of abuse, neglect, or exploitation shall report the information” increases the burden on the reporter to fulfill his or her obligation.

C. *Expand the Scope of Who Reports*

“Domestic violence does not discriminate against race, class, gender, religious [affiliation], age, or economic status.”⁷³ Ironically, however, the responsibility of reporting crimes of this nature in Texas does not fall on the public at large. Instead, only a few whose employment or whose professional communications are generally confidential bear this responsibility: attorneys, clergy members, medical practitioners, social workers, and mental health professionals. Is this list exhaustive? With the increased likelihood that persons with disabilities will suffer from domestic violence, it becomes clear that this is not the problem of a selected few. We must expand the pool of reporters. Acquaintances, friends, or relatives of an individual with a disability must serve as an independent source to ensure the safety of that individual.

In an effort to expand this pool, the language of the provision must be extended to include “persons otherwise acquainted with the elderly or disabled person.” Someone acquainted with a victim would serve as an advocate when reporting the domestic incident accurately, while such a report from another individual could produce an outcome that does not favor the victim.⁷⁴ Examples of such outcomes are when the abuser is himself disabled and shares the same caseworker,⁷⁵ or if the abuser is the victim’s caretaker and purports to interpret for the victim during an

73. Sacramento County Dist. Att’y, *What Is Domestic Violence*, <http://www.da.sac-county.net/dv/definition.htm> (last visited July 31, 2007).

74. See CATHY HOGG, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, MODEL PROTOCOL ON SAFETY PLANNING FOR DOMESTIC VIOLENCE VICTIMS WITH DISABILITIES: RECOMMENDED PROCEDURES 4 (2004), available at http://www.wscadv.org/projects/safety_protocol.pdf.

75. See *id.* at 5.

caseworker or police investigation while controlling the content of the victim's statements.⁷⁶

The added phrase in the Code may be problematic for a person acquainted with the disabled individual who remains unaware of the mandatory reporting requirement in the wake of a domestic incident. But while acquaintances may not know that they are required to file a report, they certainly must know that anyone may file a report of domestic violence against an elderly or disabled person if he suspects that one has occurred. Public education about the newly created legal duty would reduce the problem of private citizens' being unaware of their new role in protecting vulnerable adults. Furthermore, a mandatory requirement and the surrounding publicity would serve to stimulate awareness about the problem of the abuse of vulnerable adults. For example, members of the general public might realize that they know a potential victim.

VI. CONCLUSION

The amendments that the Texas Legislature has made to the Human Resources Code represent progress in the area of domestic violence against vulnerable adults. However, there remains very little evidence as to how frequently the mandatory reporting statutes are enforced, if they are enforced at all. To improve enforcement, substantial improvements must still be made to the language of these statutes. One of the keys to defeating the problem of domestic violence against vulnerable adults is holding people accountable for what they witness. A statutory scheme that truly enforces the reporting of such abuse among the general public will substantially increase awareness.

76. *See id.* at 4.