

REMOVING THE MENACING SPECTER OF ELDER ABUSE IN NURSING HOMES THROUGH VIDEO SURVEILLANCE

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I. INTRODUCTION

A specter holds American nursing homes in its grasp - the specter of elder abuse in nursing homes. By the year 2030, seventy million people will be at least sixty-five years old.¹ Forty percent of that population will live in a

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1. Bob Ogle, *ESA Continues Focus on Video Monitoring Legislation at State, National Levels*, ELECTRONIC SECURITY ASS’N (Dec. 6, 2013), <http://www.esaweb.org/blogpost/703019/175013/ESA-Continues-Focus-on-Video-Monitoring-Legislation-at-State-National-Levels>.

nursing home before they die.² Simply put, at some point in every person's life, they will walk through the doors of a nursing home either as a resident or guest. Unfortunately, nursing homes continually breed perfect places for elder abuse because of the inability of the victim to report the crime and the government's inability to enforce federal regulations consistently against nursing homes.³ Facing these difficulties, relatives of loved ones in nursing homes have resolved the problem themselves through the use of hidden video surveillance.

In order to continue the battle against abuse in nursing homes, the government must actively allow, not mandate, the use of video cameras in nursing homes. A federal law promulgating the permissive use of video surveillance in nursing homes will increase prosecution against offenders and reduce incidents of elder abuse, revealing the untold number of elder abuse victims in the United States, without running afoul of the constitutionally protected right to privacy.

II. ABUSE IN NURSING HOMES

The Federal Government became involved in the nursing home industry with the "passage of the Social Security Act of 1935."⁴ However, it was not until 1986 that the Federal Government became increasingly more concerned with the welfare of the elderly in nursing homes.⁵ In 1986, the Committee on Nursing Home Regulation of the Institute of Medicine (IOM) published a report stating that, "many nursing homes provided substandard care," including "neglect and abuse leading to premature death, permanent injury, increased disability, and unnecessary fear and suffering on the part of residents."⁶ Following that report, the U.S. General Accounting Office (GAO) issued a report in 1987 concluding that among nursing homes:

[N]oncompliance with federal regulations were widespread; nursing homes with serious compliance deficiencies were able to avoid penalties, such as decertification from the Medicare and Medicaid programs; nursing homes with less serious deficiencies were not penalized; state and federal agencies did not adequately comply with

2. *Id.*

3. *See* discussion *infra* Part II.

4. Bradley J.B. Toben & Matthew C. Cordon, *Legislative Stasis: The Failures of Legislation and Legislative Proposals Permitting the Use of Electronic Monitoring Devices in Nursing Homes*, 59 BAYLOR L. REV. 675, 682 (2007).

5. *Id.* at 684.

6. *Id.* at 684-85.

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federal regulations regarding the recertification of nursing homes with repeated noncompliance; and that the alternative penalties in the federal regulations were needed. As of November 1985, according to the GAO's report, more than one-third of federally certified nursing homes failed to meet one or more standards set forth in federal regulations. . .⁷

Shortly after the GAO's reports were published, the Omnibus Reconciliation Act of 1987 (OBRA) was passed.⁸ The Act, known as the Nursing Home Reform Act,⁹ completely revised the "regulation of long-term care facilities participating in Medicare and Medicaid Programs."¹⁰ OBRA, combined with the Code of Federal Regulations, created a Bill of Rights for members of nursing homes.¹¹ Included in these rights is "the right to privacy and confidentiality" including the promotion of "a resident's right to dignity, self-determination, and participation by, for example, allowing the resident to 'make choices about aspects of his or her life in the facility that are significant to the resident.'"¹² Furthermore, federal regulations also grant residents the "right to be free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion."¹³ Though the federal laws on nursing homes were significantly revamped to protect elderly members of the nursing home, elderly residents continue to face abuse at the hands of nursing home employees.

One harrowing example is the story of Willie Mae Ryan, an eighty-one year old woman, residing in a nursing home in Arkansas.¹⁴ She was beaten and killed with brass knuckles by two nursing home employees.¹⁵ Other examples of abuse suffered by the elderly include: an elderly woman stranded on the floor of her room for hours, a woman choking and losing consciousness resulting in brain damage, another woman verbally abused by her caretaker, and a man forced to take sedatives to keep him quiet.¹⁶ These incidents, which

7. *Id.* at 685-86.

8. *Id.*

9. Tracey Kohl, *Watching Out for Grandma: Video Cameras in Nursing Homes May Help to Eliminate Abuse*, 30 FORDHAM URB. L.J. 2083, 2085 (2003).

10. *Id.*

11. *Id.* at 2086.

12. *Id.* (citation omitted)

13. *Id.*

14. See Toben & Cordon, *supra* note 4, at 677.

15. *Id.*

16. Selket Nicole Cottle, "Big Brother" and Grandma: An Argument for Video Surveillance in Nursing Homes, 12 ELDER L.J. 119, 123 (2004).

are actually reported, are the ones that result in employee punishment. For each reported incident there are many more that remain unreported, leaving the abuser free to harm other members of the nursing home community.¹⁷

Failures to report abuse exist for a number of reasons. The victim may decline to report abuse out of fear,¹⁸ or the victim may simply be unable to report the incident “due to physical or mental impairments affecting the victim’s “ability to communicate’.”¹⁹ Even if a victim was able to testify about the attack, the credibility of the witness may steadily decline because over time the victim may be unable to recall details of the attack.²⁰ Another reporting problem is the sheer lack of evidence regarding the incident. If a victim will not testify or is unable to testify, the victim’s family members are often unable to substantiate the claim of abuse against the nursing home.²¹ In fact, only one-third of nursing homes in the United States have been cited for an abuse violation during a two-year period.²²

Even knowing these facts, the government has been slow to act, referencing the difficulty in fighting elder abuse and that “state efforts to address these situations are often ineffective; [t]he perpetrators are seldom prosecuted and front-line responders often lack the training needed to adequately address the problem.”²³ Therefore, it comes as no surprise that family members have taken matters into their own hands and begun the use of private video surveillance to catch the perpetrators harming their loved ones.²⁴

III. “GRANNY CAMS” CATCH ABUSE

The video surveillance used by family members in nursing homes is called a “granny cam,” endearingly spoofing the well-known “nanny cam.”²⁵ These cameras typically come in two forms, “either a closed-circuit video camera or a [w]eb camera.”²⁶ Both record on video the daily activities of the loved one for the family to watch later.²⁷ Some family members put the cameras in discrete

17. See discussion *infra* Part III.

18. Kohl, *supra* note 9, at 2089.

19. *Id.*

20. *Id.* at 2090.

21. Cottle, *supra* note 16, at 132-33.

22. Toben, *supra* note 4, at 680.

23. *Id.* at 690-91.

24. See discussion *infra* Part III.

25. Cottle, *supra* note 16, at 120.

26. *Id.* at 123.

27. *Id.* at 123-24.

locations, such as potted plants, radios, or webcams; some even use iPhones.²⁸ These relatives claim they have resorted to monitoring measures as a “last-ditch step”²⁹ because they suspect abuse “but feel that the authorities dismiss[ed] their complaints.”³⁰ Plus, it is a “cheap, quick way to verify” that the abuse they suspect is occurring.³¹ These “granny cams” have been largely successful in catching the culprits of abuse.³² For example, in 2011, a relative in Ohio placed a “granny cam” in a desk fan and caught “two nursing home workers abusing and hitting his 78-year old mother who suffers from Alzheimer’s disease,” which had rendered her incapable of informing him of her abuse.³³ In New Jersey, employees were caught on camera “abusing an 87-year-old woman, prompting a wrongful-death lawsuit,” and in New York “authorities arrested 22 workers” when the hidden “granny cams” revealed abuse.³⁴ Another poignant example was the story of a daughter in Oklahoma City who used a hidden camera to try to catch the thief she suspected of stealing her mother’s things.³⁵ Upon reviewing the footage, she witnessed an employee stuffing latex gloves into her mother’s mouth, while another employee “taunted her, tapping her on the head laughing.”³⁶ Without the hidden video camera, her daughter would never have known about the abuse.³⁷ Families have thus discovered that the presence of video surveillance in a loved one’s room reduces the government’s inability to enforce the federal standards for nursing homes.³⁸

Cameras are one solution to the government’s own self-proclaimed inability to effectively enforce federal regulations against nursing homes

28. Jan Hoffman, *Watchful Eye in Nursing Homes*, N.Y. TIMES (Nov. 18, 2013, 4:31PM), <http://well.blogs.nytimes.com/2013/11/18/watchful-eye-in-nursing-homes/>.

29. *Id.*

30. *Id.*

31. *Id.*; see also Edwards Douglas, *All Eyes are on Granny Cams*, NURSING HOMES (Nov. 1, 2000), available at <http://www.thefreelibrary.com/ALL+EYES+ARE+ON+GRANNY+CAMS.-a067643006> (“You can walk into any Office Depot and buy a Web cam to sit on top of your computer for \$49 and the software to run it for \$99”).

32. Brad Schrade, *Families Turn to Cameras in Nursing Homes*, THE SEATTLE TIMES (Sept. 20, 2011, 10:31PM), http://seattletimes.com/html/health/2016266696_webelder_camabuse21.html.

33. *Id.*

34. *Id.*

35. Hoffman, *supra* note 28.

36. *Id.*

37. See *id.* Following this incident, Oklahoma became the third state to allow video surveillance cameras in residents’ rooms.

38. Kohl, *supra* note 9, at 2091.

because these cameras can “provide compelling evidence necessary to increase the efficiency with which abuse and neglect cases are reported and prosecuted.”³⁹ The government even followed the trend of utilizing hidden cameras in nursing homes to document neglect and abuse—resulting in thirty arrests.⁴⁰ But perhaps most importantly, these “granny cams” give hope to the families who formerly faced an upward battle against the nursing homes in an attempt to protect their loved ones.⁴¹ These cameras can restore “confidence in an industry that has frequently been cited for abuse and neglect” and “empower families by bringing to light any abuse or neglect loved ones may be suffering.”⁴² Lastly, by placing disclosed cameras in rooms, the current nursing staff are less likely to become abusers, since they know they are now under surveillance.⁴³

IV. “GRANNY CAMS” AND THE RIGHT TO PRIVACY

Despite the seemingly perfect solution to the abuse occurring in nursing homes, state legislation allowing the permissive use of “granny cams” has largely been unsuccessful.⁴⁴ Some commentators hint that the lobbying efforts of nursing homes and insurance industries have created a legislative landmine, causing proposals to allow the permissive use of video cameras in nursing homes to die in committee in Alabama, Arkansas, Louisiana, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia.⁴⁵ However, the only legal argument against these “granny cams” that the nursing homes have raised is that the cameras violate the right to privacy of the residents, employees, and visitors.⁴⁶ It is true that video surveillance in a nursing home records very private activities; for instance, “[w]ould *you* consent to be recorded continuously while being bathed, toileted, and more? If you were recorded, would *you* trust that these videos would remain private?”⁴⁷ Privacy, after all, is “viewed as a prerequisite for the

39. *Id.*; see also H.B. 457, 2001 Leg., Reg. Sess. (La. 2001).

40. Thompson/West, *NY Hidden-Camera Probe Nets Another Neglect Guilty Plea*, 13 No. 1 Andrews Health Care Fraud Litig. Rep. 11 (2007).

41. See Cottle, *supra* note 16, at 124.

42. *Id.*

43. *Id.*

44. Toben & Cordon, *supra* note 4, at 724.

45. See *id.* at 718-24.

46. See discussion *infra* Parts IV.B-C.

47. Mark Lachs, *The Utility and Ethics of “Granny Cams*, HUFFINGTON POST (Apr. 22, 2014, 5:59AM), http://www.huffingtonpost.com/mark-lachs-md/granny-cams_b_4790576.html (emphasis added).

pursuit of personhood, freedom, and responsibility.”⁴⁸ To invoke the constitutional right to privacy, there must be a state action.⁴⁹ Here, the state action would be in the form of a permissible statute allowing the use of “granny cams.”⁵⁰ The question is whether such a statute would violate the right to privacy.⁵¹

A. *A Nursing Home’s Right to Privacy*

Beginning with the basic question of whether the nursing home *itself* has the right to privacy, courts have held that a corporation does not have a recognized right to privacy.⁵² Therefore, if a nursing home is incorporated, it cannot claim that the home itself has a right to privacy. If a nursing home functioned as an unincorporated entity, perhaps the nursing home may have a claim to a right to privacy. Furthermore, the Second Circuit determined that the “government interest in the regulation of nursing homes [is] to be of the ‘highest order’ . . . ‘nursing homes’ right of privacy with regard to matters related to their compliance with patient care rules and regulations. . . is virtually non-existent.”⁵³ As a result, it is unlikely that a nursing home could prevail on the argument that the nursing home itself has a right to privacy, especially when concern for the patients’ care is at issue.

48. Ashok J. Bharucha, Alex John London, David Barnard, Howard Wactlar, Mary Amanda Dew & Charles F. Reynolds III, *Ethical Considerations in the Conduct of Electronic Surveillance Research*, 34 J.L. MED. & ETHICS 611, 615 (2006) (“[M]odernity places the highest moral value on the private sphere while accommodating public impingements for the sake of the collective welfare.”).

49. Op. S.C. Att’y Gen. at n.1 (July 16, 2003).

50. *Id.*; see also *Bray v. Alexandra Women’s Health Clinic*, 506 U.S. 263, 278 (1993); *Hill v. National Collegiate Athletic Ass’n*, 865 P.2d 633, 644 (Cal. 1994).

51. See, e.g., *Bray*, 506 U.S. at 278; *Hill*, 865 P. 2d at 641-42.

52. Kohl, *supra* note 9, at 2101. See, e.g., *In re Med. Lab. Mgmt. Consultants*, 931 F. Supp. 1487, 1493 (D. Ariz. 1996); *Fleck & Assocs., Inc., v. City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)) (holding that a corporation “can claim no equality with individuals in the enjoyment of a right to privacy”); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O’Connor, J., concurring in part, dissenting in part) (“A corporation has no . . . right to privacy.”). See also *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1183 (2011) (Corporations are not entitled to personal privacy.).

53. *Blue v. Koren*, 72 F.3d 1075, 1081 (2d Cir. 1995); see also Kohl, *supra* note 9, at 2101.

B. A Resident's Right to Privacy

The individual right to privacy developed as the idea that people should be allowed the “right to be let alone,” which now encompasses the rights to physical privacy, informational privacy, and decisional privacy.⁵⁴ In the seminal case *Griswold v. Connecticut*, the Court held for the very first time that the right to privacy comes from the “penumbras” of the Bill of Rights, stemming specifically from the freedoms granted in the First, Third, Fourth, and Fifth Amendments.⁵⁵ And the Ninth Amendment stated specifically that “[t]he enumeration in the Constitution, of certain, rights shall not be construed to deny or disparage others retained by the people,” leaving the door open to the idea that rights existed that were not specifically laid out in the Bill of Rights.⁵⁶ Such expanded privacy rights may be harmed by electronic surveillance.

The Court “has determined citizens maintain a privacy interest under the Fourth Amendment where they have an actual expectation of privacy that society recognizes as reasonable.”⁵⁷ These privacy rights can be implicated when people are being electronically surveyed.⁵⁸ Since a nursing home is both public and private, the application of the “reasonable expectation of privacy” test is complex, as a reasonable expectation of privacy does not exist in a public space.⁵⁹ Nursing home hallways and community rooms are definitively public areas.⁶⁰ Since the courts have not addressed the issue of privacy in a nursing home, commentators have analogized nursing homes to other regulated institutions such as prisons.⁶¹ This analogy is effective because, like a prison, a nursing home has an established zone of privacy in the resident’s room with expected intrusions caused by the relationship between the resident and the employees.⁶² Drawing from the analysis in *Huskey v. National Broadcasting Company*, though the presence or appearance of a nursing home employee in a resident’s room may destroy the usual expectation of privacy, these employees “like prison guards, are a continuous and expected presence, and residents may

54. Bharucha et al., *supra* note 48, at 614.

55. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

56. U.S. CONST. amend. IX.

57. Kohl, *supra* note 9, at 2093.

58. *Id.*

59. *Id.*

60. Elizabeth Adelman, *Video Surveillance in Nursing Homes*, 12 ALB. L.J. SCI. & TECH. 821, 828 (2002).

61. *See, e.g., id.* at 827-28.

62. *Id.*

become ‘understandably inured to the gaze of staff’ and other residents,” thereby preserving their zone of privacy in their room in a nursing home.⁶³

An individual does possess a reasonable expectation of privacy in a hospital room, which increases the longer the stay.⁶⁴ However, not all courts agree. For example, the Ninth Circuit held that there is no expectation of privacy for a defendant in the search of his hospital room.⁶⁵ That being said, as a nursing home falls between a residential building and a hospital, it may reasonably grant residents a greater expectation of privacy in their room than they would receive in a hospital room.⁶⁶ On the other hand, if the Court applies the rationale of *Huskey* to a private nursing home, then the resident’s room would be most akin to “home,” in which the resident has a reasonable expectation of privacy; therefore, the resident would need to consent before the surveillance began.

Due to this expectation of privacy, it is a general rule that the consent of a nursing home resident is necessary before instigating covert surveillance.⁶⁷ In order to avoid running afoul of the resident’s right to privacy, the resident must waive his or her own privacy rights before a nursing home may begin covert surveillance.⁶⁸ This can easily be done through a standard written consent form.⁶⁹ However, this prompts the question of whether the resident is competent to sign the form. Competency is a legal determination.⁷⁰ The most effective way to maneuver this issue would be to follow the Texas Legislature, which in 2001 became the first to enact a permissive “granny cam” law,⁷¹ authorizing a legal guardian to waive the privacy rights of a “resident who has

63. *Id.* at 828 (citing *Huskey v. Nat’l Broad. Co.*, 632 F. Supp. 1282, 1288 (1986)). See also Op. S.C. Att’y Gen. at 4 (July 16, 2003) (“[A]pplying some modified form of the Hudson balancing test, a court might well hold that the use of video surveillance without the resident’s express consent or the consent of the resident’s legal representative is an unreasonable invasion of personal privacy.”).

64. Op. S.C. Att’y Gen. at 3 (July 16, 2003) (citing *Jones v. State*, 648 So. 2d 669, 676-77 (Fla. 1994); *Morris v. Commonwealth*, 157 S.E.2d 191, 194 (Va. 1967)).

65. *United States v. George*, 987 F.2d 1428, 1432 (9th Cir. 1993).

66. Op. S.C. Att’y Gen. at 3 (July 16, 2003).

67. *Adelman*, *supra* note 60, at 829.

68. *Kohl*, *supra* note 9, at 2095.

69. *Id.*

70. 42 U.S.C. § 1395i-3(c)(1)(C) (2012) (“resident adjudged incompetent”). For the process used to declare a person judicially incompetent, see 18 U.S.C. § 4242 (2012). See also Phillip J. Resnick and Renee Sorrentino, *Competence vs. capacity: an analysis for medical professionals*, ELDER LAW PROF BLOG (Jan. 12, 2006), http://lawprofessors.typepad.com/elder_law/2006/01/competence_vs_c.html (“Only a court can make a determination of incompetence.”).

71. *Id.* at 2084.

been judicially declared incompetent.”⁷² This guardian could consent to the video surveillance “so long as the resident lacks the capacity to request electronic monitoring herself.”⁷³

The law allowing the use of private video surveillance must be permissive and not compulsory to avoid clashing with the resident’s constitutionally granted right to privacy.⁷⁴ In this way, the legal guardian can knowingly consent to private electronic monitoring of the resident and not violate the right to privacy. However, the use of “granny cams” in a nursing home may implicate the privacy rights of, not only the resident, but also the roommate, other residents, employees and even visitors.

C. *Privacy Rights of Roommates, Employees, and Visitors*

Residents’ roommates have the same privacy rights as the residents themselves, which means that the same privacy right analysis applies.⁷⁵ In order to use a “granny cam” in a room containing two people, the resident would need to gain consent (preferably in written form) from the roommate before the camera could be used.⁷⁶ Without the consent of the roommate, the resident would implicate the roommates’ privacy rights by filming the roommate.

The privacy right of visitors to the nursing home further complicates the matter. Practically speaking, a resident could not gain the consent of every person ever to visit him or her, nor would everyone visiting likely consent to be filmed. Courts are divided on the implicit privacy rights of these “casual, transient visitors,” usually construing their analysis by the relationship between the “nursing home host and the visitor, and the area of the facility within which the privacy right is asserted.”⁷⁷ For instance, “generally . . . a social guest is entitled to a reasonable expectation of privacy within the host’s residence.”⁷⁸ However, the “casual, transient visitor” has been found to have no recognized

72. *Id.* at 2096-97.

73. *Id.* at 2095. *See also* Tex. Health & Safety Code Ann. §§ 242.841-.852 (2013).

74. Op. S.C. Att’y Gen. at 3 (July 16, 2003).

75. Kohl, *supra* note 9, at 2097; *see* discussion *supra* Part IV.B-C.

76. Kohl, *supra* note 9, at 2097.

77. Bharucha et al., *supra* note 48, at 615.

78. *E.g.*, Minnesota v. Olsen, 495 U.S. 91, 99 (1990); United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997) (recognizing that a social guest maintains a reasonable expectation of privacy even though they are not staying overnight). *See also* Kohl, *supra* note 9, at 2099.

expectation of privacy.⁷⁹ A visitor to a nursing home is not a social guest at a residence where the resident has complete control of the premises; rather, the visitor is subject to hours of visitation. The common areas of the nursing home are public; therefore the visitor could have no reasonable expectation of privacy.⁸⁰ It is unclear whether the courts will determine that the visitor of a resident in the resident's room qualifies as a "casual, transient visitor." It seems likely a court would rule that the visitors are casual, given the lack of control the resident has over the area in that the nursing home room is more akin to a hotel room. If the court analogizes the nursing home room to a hotel room, certainly the Ninth Circuit would find that the visitor had no "reasonable expectation of privacy."⁸¹ However, an easy solution would be for a notice to be placed on the resident's door informing every visitor that they would be under surveillance.⁸² Under these circumstances, the visitor would be placed on notice that they have no reasonable expectation of privacy, and would forgo such expectations upon entering the facility.⁸³ After all, a nursing home is "entitled to place conditions on visitor entry to the facility."⁸⁴

The last privacy interest that would be implicated by the use of "granny cams" is that of the employees of the nursing homes. Generally, courts have found that an employee gives implied consent to being electronically surveyed by their continued employment so long as the monitoring is for legitimate reasons.⁸⁵ Most importantly, workers in the *private* employment sphere are "generally not protected from surveillance because the premises, equipment, and supplies are the property of the employer."⁸⁶ However, this does not mean that the workers do not have rights against surveillance. For example, in some states private employees can bring a tort action for unreasonable intrusion upon

79. See, e.g., *United States v. McNeal*, 955 F.2d 1067, 1070 (6th Cir. 1992); *United States v. Berryhill*, 352 F.3d 315, 317 (6th Cir. 2003) ("[A] casual transient visitor does not have a reasonable expectation of privacy."). See also *United States v. Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987) (holding that "mere presence in the hotel room of another is not enough" to establish a legitimate expectation of privacy in one's surroundings).

80. Kohl, *supra* note 9, at 2093.

81. See *United States v. Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987) (holding that "mere presence in the hotel room of another is not enough" to establish a legitimate expectation of privacy in one's surroundings).

82. Kohl, *supra* note 9, at 2100.

83. *Id.* at 2100-01.

84. *Id.*

85. Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L. & COMP. L. 379, 402 (2000). See also Op. S.C. Att'y Gen. at 5 (July 16, 2003).

86. Adelman, *supra* note 60, at 830-31.

seclusion.⁸⁷ The determining factor in this tort is whether a reasonable person would find the occurring intrusion offensive or highly objectionable.⁸⁸ Furthermore, in the employment setting, courts “balance the interests of the parties involved [to determine] whether the intrusion would have been offensive to a reasonable person; whether the employee had a subjective expectation of privacy; whether that expectation of privacy was reasonable; and if there were a legitimate business justifications for the alleged intrusion.”⁸⁹ The successful plaintiff in these cases must have “an objectively reasonable expectation of privacy.”⁹⁰ In the nursing home situation, “video and audio monitoring of employees is common”; therefore, public areas of the workplace, such as common rooms, will not constitute an invasion of privacy.⁹¹ Furthermore, the resident’s room is not private to the employee – in that it is not the employee’s home or residence, but a place of work. If notice is given to the employee, liability can be avoided entirely.⁹² Should “granny cams” be installed in employee locker rooms, bathrooms, or private offices, a claim of tortious invasion of privacy may be available.⁹³

Employees may attempt to turn to federal wiretap statutes but will find little assistance there to benefit their right to privacy.⁹⁴ For instance, the Federal Wiretap Act, through the courts’ interpretation, has come to “mean that the statute prohibits recording of conversations but does not apply to silent video surveillance.”⁹⁵ Furthermore, if the recorder has the consent of one of the parties, the recording is lawful under the act.⁹⁶ “Granny cams” do not run afoul of federal law because an actively abused resident will always be present

87. Unreasonable intrusion upon seclusion means “one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS § 652B (1977). The state of Washington, for example, recognizes this common law tort. *See Mark v. King Broad. Co.*, 618 P.2d 512 (1980).

88. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

89. Adelman, *supra* note 60, at 832.

90. *Id.* at 833. If the employee is notified of the surveillance in the workplace, the plaintiff no longer has a reasonable expectation of privacy. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See, e.g.*, 18 U.S.C. §§ 2510-2522 (2013) (failing to discuss the right to privacy with regards to video surveillance).

95. 18 U.S.C. §§ 2510-2522 (2013). *See, e.g.*, *United States v. Koyomejian*, 970 F.2d 536, 538 (9th Cir. 1992). *See also Kohl, supra* note 9, at 2102.

96. 18 U.S.C. § 2511(2)(d).

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in the recording. A permissive federal law ensuring the use of “granny cams” on site should encourage the nursing home administration to require the resident to post a sign on the door providing notice to employees that the room is being monitored.⁹⁷ Additionally, nursing homes may require staff members sign a waiver or consent form acknowledging the presence of videotape surveillance.⁹⁸ Since employees at a workplace are given to expect a lesser degree of privacy, the “granny cams” are less likely to harm their privacy rights.⁹⁹ The easiest way to avoid infringement upon employee rights is through notification. Notification also serves the dual role of both notifying and decreasing the likelihood of abuse, as the staff will know that they will be caught.¹⁰⁰

V. CONCLUSION

Video surveillance in nursing homes is an ideal solution to the specter of abuse occurring in nursing homes throughout the United States. This surveillance serves to give a voice to those abused – those either unwilling or unable to recall incidents of harm. The surveillance also serves as a solution to problems of enforcing the regulations that have stymied the United States since the 1930s by ensuring transparent care of the elderly within public and private nursing homes. However, privacy rights must be maintained in the face of the technological world. No one wants a world akin to that of the novel 1984 with “Big Brother” watching everything people do day-in and day-out. Therefore, “granny cams” should serve as a last resort for families unable to prove through any other manner that their loved one is being harmed. A permissive federal law authorizing the use of “granny cams” in nursing homes is the easiest way to ensure that these cameras will be properly used without running afoul of the right to privacy. The law should mimic the Texas state law in requiring consent from both the resident and the resident’s roommate. Notification must be placed outside the resident’s door informing visitors and employees of the surveillance. But, a permissive federal law mandating the ability to use a “granny cam” is not the end of the battle against elder abuse in nursing homes. Rather, it is a mere stop-gap measure in the face of what is now, rampant abuse with little to no oversight.

97. See, e.g., Adelman, *supra* note 60, at 835.

98. Cottle, *supra* note 16, at 129-30.

99. Adelman, *supra* note 60, at 830-31.

100. See discussion *supra* Part III.