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VIDEO SURVEILLANCE IN NURSING HOMES

*Elizabeth Adelman**

I. INTRODUCTION

As technological innovation invades every facet of life and particularly as unobtrusive monitoring devices become more easily available, the tension between safety and privacy will become an important issue.¹ This tension is already problematic in the nursing home industry because of tiny, hidden cameras referred to as "granny-cams."² The availability and affordability of this technology³ will likely lead to its pervasive use in the long-term care arena, as families become aware of the potential protective function these devices can serve.⁴ However, because this technology is new, and for the most part unaddressed by law, this paper explores the rights of patients, their families, employees, and nursing homes in private, long-term care facilities.⁵ In doing so,

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¹ See Quentin Burrows, Note, *Scowl because you're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1079 (1997) (discussing video surveillance in various situations; such as, public streets, automobiles, homes, and other public areas).

² See Douglas J. Edwards, *All Eyes are on Granny Cams*, NURSING HOMES, Nov. 1, 2000, 26-30 (discussing the benefits and problems associated with the use of video surveillance equipment in nursing homes).

³ See CLAY CALVERT, VOYEUR NATION 121, 125-28 (2000) (describing hidden camera companies, which package low-cost products in unsuspecting forms such as alarm clocks, smoke detectors, and other household fixtures).

⁴ Edwards, *supra* note 2, at 28 (citing safety and security for loved ones in nursing homes as a reason why families choose to install video surveillance equipment in residents' rooms). The reasoning discussed by the author is to ensure the safety and security of the residents. *Id.*

⁵ See *Jones v. Capital Cities/ABC Inc.*, 874 F. Supp. 626, 629 (S.D.N.Y. 1995) (dismissing federal civil rights claims brought under 42 U.S.C. § 1983 for violation of the wiretap statute because the private employer was not a state actor). State and federal government employees, and possibly residents of public nursing homes, are entitled to Fourth Amendment protections that employees and residents in a private setting are not entitled. *Id.* Searches and seizures by

this paper focuses on the law in California, Florida, New York, Pennsylvania, and Texas – the five states with the largest population of residents sixty-five years of age and older.⁶

Part II of this paper explores existing federal and applicable state wiretapping statutes.⁷ Part III attempts to define “zones of privacy” within the nursing home, while exploring the privacy rights of nursing home residents and employees, as well as the responsibilities of nursing home administrators.⁸ Finally, Part IV addresses state initiatives and a Texas statute involving granny-cams.⁹

II. WIRETAP STATUTES

Wiretap statutes exist on both the federal and state levels. In general, the statutes aim to protect the privacy of unsuspecting parties whose conversation and/or likeness are captured by a recording device. However, invasions of privacy with new technology often fall outside the protection of wiretapping statutes.¹⁰

A. Federal

The Omnibus Crime Control and Safe Streets Act of 1968, also known as the Federal Wiretap Act, governs the use of surveillance devices that record voices.¹¹ The Act does not attempt to prohibit or regulate the use of silent video recording.¹² Under this Act, consent to surveillance by one party to the communication is the minimum requirement to evade prosecution for voice recording: “It shall not be unlawful . . . to intercept a wire, oral, or electronic communication where such person is a party to the communica-

state actors (government employers) may trigger a Fourth Amendment violation. *See id.* Private employers, however, are not considered state actors. *Id.*

⁶ *Population 65 Years and Over and 85 Years and Over, Region, and State: 1998*, U.S. CENSUS BUREAU (showing the sixty-five and over population of listed states), at <http://www.census.gov/population/estimates/state/st98elderly.txt> (last visited on Apr. 19, 2002).

⁷ *See supra* notes 5-6 and accompanying text; *see also infra* notes 10-29 and accompanying text.

⁸ *See infra* notes 30-106 and accompanying text.

⁹ *See infra* notes 107-31 and accompanying text.

¹⁰ *See infra* notes 11-14 and accompanying text (discussing various Federal wiretapping statutes); *see also infra* notes 15-29 and accompanying text.

¹¹ 18 U.S.C. §§ 2510-2522 (1994), *amended by* 18 U.S.C. §§ 2510(12), (16), 2511(1)(e), 2512(3), 2516(1)(a), (c), (j)-(p), 2518(11)(b)(ii), (12) (Supp. V 2000).

¹² *See, e.g.,* United States v. Koyomejian, 970 F.2d 536, 538 (9th Cir. 1992) (explaining that the Wiretap Act “does not include silent video surveillance”).

tion or where one of the parties to the communication has given prior consent to such interception”¹³

The Act also makes the manufacture, distribution, or possession of a device that is designed for the secret interception of electronic communications unlawful.¹⁴

B. State

At the present time, Texas is the only state that has enacted a law addressing the use of granny-cams.¹⁵ The Texas statute allows electronic surveillance in nursing homes with consent of the resident or their guardian and any roommates affected.¹⁶ The statute provides a defense to nursing home residents, or their guardians, who would otherwise be in violation of the state’s wiretapping statute by installing such devices.¹⁷

Similar to the Federal Wiretap Act, New York State Law does not prohibit silent video surveillance.¹⁸ The statutory definition of electronic communication includes images and sounds, however

¹³ 18 U.S.C. § 2511(2)(d) (noting that this chapter applies to persons who are not acting under the “color of law”).

¹⁴ See *id.* § 2512, amended by 18 U.S.C. § 2512(3) (Supp. V 2000).

¹⁵ TEX. HEALTH & SAFETY CODE ANN. §§ 242.841-.852 (Vernon 2002) (discussing the logistics surrounding legal installation of video surveillance in nursing homes); see also *supra* notes 123-31 and accompanying text (describing the Texas Law allowing video surveillance in nursing homes).

¹⁶ See TEX. HEALTH & SAFETY CODE ANN. § 242.846(b)-(c) (describing a consent form’s requirements authorizing video surveillance in a multi-person nursing home). The main requirement in Texas is to obtain consent of the parties involved and providing notice to those who may be subjected to the surveillance. See *id.* § 242.846(b)(3), (c).

¹⁷ See *id.* § 242.842(a).

¹⁸ N.Y. PENAL LAW § 250.05 (McKinney 2000) (“A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.”); *Id.* § 250.10 (“A person is guilty of possession of eavesdropping devices when, under circumstances evincing an intent to use or to permit the same to be used in violation of section 250.05, he possesses any instrument, device or equipment designed for, adapted to or commonly used in wiretapping or mechanical overhearing of a conversation.”); *Id.* § 250.00 (defining the mechanical overhearing of a conversation as “the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment”).

only interception is illegal.¹⁹ The statute stops short of making it a crime for those who create the images.²⁰

Unlike New York, California's Invasion of Privacy statutes provide more privacy protections.²¹ The legislative intent of these statutes acknowledges the rapid change in technology that creates a "threat to the free exercise of personal liberties."²² The California wiretapping and eavesdropping statutes reflect this policy. The wiretapping statute prohibits "intercepting communications by an unauthorized *connection* to the transmission line,"²³ and the eavesdropping statute prohibits "the interception of communications by the use of equipment which is not connected to any transmission line."²⁴ In addition, the manufacture, sale, or possession of devices used to eavesdrop are prohibited by statute in California.²⁵

Consent of all parties to the communication, however, is a requirement in California,²⁶ Florida,²⁷ and Pennsylvania²⁸ in order to avoid a violation of their eavesdropping statutes. In addition, California law stipulates that the conversation in question must be a confidential communication, meaning that the conver-

¹⁹ See *id.* § 250.00. The statutory definition of electronic communication is: [A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system, but does not include: . . . any communication made through a tracking device consisting of an electronic or mechanical device which permits the tracking of the movement of a person or object. . . .

Id. § 250.00; see also §250.05.

²⁰ See Joel Cohen & Claude Szyfer, *Private Taping of Conversations: What the Law Says*, N.Y.L.J., May 31, 2000, at 8 (stating that taping telephone conversations, in which the taper is part of the conversation, is legal in New York). However, the article also says that if the taper is not a party to the conversation, as would possibly be a video taper in a granny-cam situation, that taper under New York law, has engaged in illegal eavesdropping. *Id.*

²¹ Compare CAL. PENAL CODE §§ 630-37.9 (West 1999) with N.Y. PENAL CODE §§ 250.00-.35 (McKinney 2000) (comparing the broadness of California's privacy statute to the narrower New York statute).

²² CAL. PENAL CODE § 630.

²³ *People v. Ratekin*, 261 Cal. Rptr. 143, 145 (Ct. App. 1989) (distinguishing wiretapping from eavesdropping); see also CAL. PENAL CODE § 631.

²⁴ *Ratekin*, 261 Cal. Rptr. at 145; see also CAL. PENAL CODE § 632.

²⁵ CAL. PENAL CODE § 635.

²⁶ *Cf. id.* § 632(a).

²⁷ See FLA. STAT. ANN. § 934.03(3)(d) (West 2001).

²⁸ See 18 PA. CONS. STAT. ANN. § 5704(4) (West 2001).

sation must take place under circumstances which the parties to the conversation do not want others to hear.²⁹

III. PRIVACY

Although there is a reasonable expectation of privacy within a home, "New York courts have consistently held that there is no reasonable expectation of privacy in the common areas of a residential building, such as the lobby, common hallways and stairwells."³⁰ In addition, a New York court held that there is both no expectation of privacy in a hospital and no Fourth Amendment violation when the allegedly private activity has already been seen publicly and is later viewed in a similar fashion.³¹ In this case, after the police arrested and subsequently acquired defendant's blood-stained clothing from hospital staff, the defendant "abandoned any privacy interest he had in [his clothing's] outward appearance by displaying them to the public at large when he wore them to the hospital."³² On the other hand, the court in *Cherry v. Koch*³³ stated that "some conduct is protected under the zone of privacy even when it occurs in semipublic places."³⁴ The court listed a hospital as one such semi-private place.³⁵

California courts have also held that the public hallway of a hospital is a public place.³⁶ However, one California court pointed out that there are private areas within hospitals as well. Hospital rooms, for example, have "joint dominion."³⁷ In other words, even if a patient implicitly waives his or her rights to privacy when in the company of hospital employees, his or her hospital room is

²⁹ See CAL. PENAL CODE § 632(c); compare 18 PA. CONS. STAT. ANN. § 5702 (defining oral communication as "any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.").

³⁰ *People v. Farrow*, 642 N.Y.S.2d 473, 475 (Crim. Ct. 1996).

³¹ See *People v. Hayes*, 584 N.Y.S.2d 1001, 1003 (Sup. Ct. 1992).

³² See *id.*

³³ 129 Misc. 2d 346 (N. Y. Sup Ct. 1985), *aff'd as modified*, 514 N.Y.S.2d 30 (App. Div. 1987).

³⁴ *Id.* at 354.

³⁵ *Id.* (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973)).

³⁶ See, e.g., *People v. Brown*, 151 Cal. Rptr. 749, 753 (Ct App. 1979) ("Many areas of a hospital are public places and as such are not areas subject to constitutional protection from entry without [a] warrant The public hallway . . . [is] clearly such an area."). This is so because the hallway is open to all members of the public, including state actors. See *id.*

³⁷ See *id.* at 754.

considered a private area to all others.³⁸ In addition, protection of privacy in the home of a California resident is afforded where there is a legitimate expectation of privacy.³⁹

Florida statutes, on the other hand, explicitly protect the privacy of nursing home residents by providing:

The right to have privacy in treatment and in caring for personal needs; to close room doors and to have facility personnel knock before entering the room, except in the case of an emergency or unless medically contraindicated Privacy of the resident's body shall be maintained during, but not limited to, toileting, bathing, and other activities of personal hygiene, except as needed for resident safety or assistance.⁴⁰

Florida statutes also afford "[t]he right to be treated courteously, fairly, and with the fullest measure of dignity,"⁴¹ as well as "[t]he right to be free from mental and physical abuse."⁴²

Additionally, Florida courts have acknowledged privacy rights afforded to dwellers of semi-permanent residences, such as nursing homes and motels, compared to the privacy of those in public places, such as emergency rooms.⁴³ Pennsylvania courts mirror this sentiment.⁴⁴

The holding in *Huskey v. National Broadcasting Company*⁴⁵ is also illustrative of privacy rights in an institutional setting. Although *Huskey* involves the privacy rights of an inmate in a public institution, the case helps define areas of institutions in

³⁸ See *id.* (noting that a hospital room is not traditionally known as a public area).

³⁹ See *infra* notes 94-97 and accompanying text (noting that an intrusion tort is recognized in California).

⁴⁰ FLA. STAT. ANN. § 400.022(1)(m) (West 1998).

⁴¹ *Id.* § 400.022(1)(n).

⁴² *Id.* § 400.022(1)(o).

⁴³ See *Beverly Enterprises-Florida Inc. v. Deutsch*, 765 So. 2d 778, 782, 784 (Fla. Dist. Ct. App. 2000) (stating that the broad privacy rights granted by Florida statutes extend over the "pronounced concern for the privacy of nursing home patients."); see also *Buchanan v. State*, 432 So. 2d 147, 148 (Fla. Dist. Ct. App. 1983) (disregarding defendant's assertion of a reasonable expectation of privacy in a "busy hospital emergency room where medical personnel were constantly walking in and out and where he could have expected to remain only a few hours at most").

⁴⁴ See *United States v. Franklin*, 64 F. Supp. 2d 435, 439 (E.D. Pa. 1999) (denying the notion that an expectation of privacy exists in a hospital emergency room); see also *Commonwealth v. Brundidge*, 620 A.2d 1115, 1118 (Pa. 1993) (recognizing a legitimate expectation of privacy in a motel room during the rental period).

⁴⁵ 632 F. Supp. 1282 (N.D. Ill. 1986).

which a resident has a legitimate expectation of privacy.⁴⁶ As an inmate in the Marion Illinois Penitentiary, NBC video crews filmed Arnold B. Huskey without his permission while exercising in a gym, dressed only in gym shorts.⁴⁷ The inmate filed suit alleging, among other claims, a common law invasion of privacy for an unreasonable intrusion upon the seclusion of another.⁴⁸ The plaintiff claimed he was engaged in private activities, in a place designated for those activities, and expected only to be seen by other security guards or inmates.⁴⁹ The court noted, "Huskey's visibility to some people does not strip him of the right to remain secluded from others."⁵⁰ The opinion went on to state that although prisons are closed systems where prisoners are supervised by prison guards and in plain view of other prisoners, there remains an expectation of privacy in areas not normally open to outsiders.⁵¹

Defining the zone of privacy in nursing homes also requires an exploration of the nature of the facility. A nursing home is "a quasi-private facility."⁵² The "public license," or the ability for people to come and go on the premises of a private nursing home, is limited by the very nature of the facility and the responsibilities of the administration.⁵³ For example, the resident of a nursing home can restrict unwanted visitors while people without business on the premises are restricted by the administration for health and safety reasons.⁵⁴

Like the prison setting, the nursing home setting has an established zone of privacy, but with expected intrusions inherent in the proper functioning of the institution. In fact, there are areas of the facility that are designated "open," and others that are restricted to outsiders. Also, residents often share rooms with other residents and doors are left open for staff monitoring and for residents to welcome visitors. In addition, health care workers enter rooms to assist with aspects of everyday living that are pri-

⁴⁶ See generally *id.* at 1287-89.

⁴⁷ *Id.* at 1285.

⁴⁸ *Id.*

⁴⁹ See *id.* at 1285, 1286.

⁵⁰ *Id.* at 1288.

⁵¹ *Huskey*, 632 F. Supp. at 1287-88.

⁵² *People v. Marino*, 515 N.Y.S.2d 162, 166 (J. Ct. 1986).

⁵³ See *id.* (stating that a medical facility is not maintained for public use and "[t]he public license to use is not as broad as in the case of an airport terminal, a state university campus or a welfare office").

⁵⁴ See *id.*

vate by their very nature. Although it could be argued that the presence or appearance of health care workers in a resident's room at any time removes any expectation of privacy, *Huskey* shows that healthcare workers, like prison guards, are a continuous and expected presence, and residents may become "understandably inured to the gaze of staff" and other residents.⁵⁵

Accordingly, privacy in a nursing home is multi-layered. Nursing home employees and residents, as compared to visitors, may be afforded a larger zone of acceptable invasion of privacy. Residents have a reasonable expectation of privacy in certain areas of the institution. Although there is some ambiguity in the distinction between public and private areas of such an institution, we can safely assign community rooms and hallways as public areas and bathrooms as private areas. All other areas arguably fall on a continuum somewhere in between.

Although, for some purposes, nursing homes and hospitals are treated the same,⁵⁶ nursing home life appears to fall somewhere between a residential building where there is a greater expectation of privacy, and a hospital where there is a diminished expectation of privacy. Thus the question of whether employees and residents of a private nursing home have an expectation of privacy from video surveillance is raised.

A. *Privacy Rights of Residents*

Although the law protecting nursing home residents' right to privacy is well settled in Florida,⁵⁷ the law is less clear in the other four states.⁵⁸ These states generally extend the protection of privacy in the home.⁵⁹ Pennsylvania's Wiretap Act explicitly acknowledges privacy in the home, as long as the home is not usually open to the public.⁶⁰ Texas recognizes an expectation of privacy within the home as long as the private act was "out of view of passers-by."⁶¹

⁵⁵ *Huskey*, 632 F. Supp. at 1288.

⁵⁶ See, e.g., Margaret M. Flint, *Nursing Homes*, in BASIC ELDER LAW 2000 § 10:2, at 452 (Practicing Law Institute, 2000) (explaining that a nursing home and hospital are treated as one in the same for purposes of the New York State Department of Health regulations).

⁵⁷ See *supra* notes 40-43 and accompanying text.

⁵⁸ See *infra* notes 60-63 and accompanying text.

⁵⁹ See *infra* notes 60-61 and accompanying text.

⁶⁰ 18 PA. CONS. STAT. ANN. § 5702 (West 2001).

⁶¹ *Mayberry v. State*, 532 S.W.2d 80, 82 (Tex. Crim. App. 1975).

Conversely, there are no New York statutes that “protect individuals from being observed in what should be considered their private residence.”⁶² New York nursing home residents’ “zone of privacy” within the facility they call home must be established in order to define the boundaries of privacy. New York State Regulations provide each patient with the minimum amount of “privacy consistent with the provision of appropriate care.”⁶³

As a general rule, consent of a nursing home resident is necessary prior to covert surveillance.⁶⁴ Thus, even a family member does not necessarily have inherent authority over the resident.⁶⁵ For example, New York and Florida cases hold that one spouse cannot record telephone conversations between the other spouse and a third party,⁶⁶ suggesting that even the intimate marital relationship provides protection from monitoring. Any family member or guardian, including the spouse, cannot consent to the monitoring of a competent resident. Applying the “zone of privacy” rationale of *Huskey* to a private nursing home, consent is necessary to videotape nursing home residents in the privacy of their room because there is a reasonable expectation of privacy in the area they call “home.” Additionally, roommates of the resident in question have privacy rights as well.⁶⁷ Although a roommate implicitly consents to invasions of some aspects of his or her privacy by sharing a room, residents do not implicitly give consent to be monitored.⁶⁸

⁶² SENATE MAJORITY TASK FORCE ON THE INVASION OF PRIVACY, N.Y.S.S. 2000 LEG. SESSION, March 2000 Report, at 19.

⁶³ N.Y. COMP. CODES R. & REGS., tit. 10 § 405.7(b)(12) (2001).

⁶⁴ Interception of Communications Act, 18 U.S.C. § 2511(2)(d) (1994).

⁶⁵ *Cf. id.* (stating that the interception of communication must be between parties or with the consent of one of the parties).

⁶⁶ See *Pica v. Pica*, 417 N.Y.S.2d 528, 529-30 (App. Div. 1979) (stating that defendant husband could not record the telephone conversation between his wife and a third party); see also *Connin v. Connin*, 392 N.Y.S.2d 530, 531 (Sup.Ct. 1976) (involving evidence sought in matrimonial actions); *Markham v. Markham*, 265 So. 2d 59, 62 (Fla. Dist. Ct. App. 1972) (“A husband has no more right to tap a telephone located in the marital home than has a wife to tap a telephone situated in the husband’s office.”).

⁶⁷ See Patrick Kampert, *Video Watchdog; Some Nursing Homes Welcome Cameras, but Many Fear Unleashing a Monster*, CHI. TRIB., Mar. 24, 2002, at 1 (stating that when one family member installs a camera in a room, privacy issues immediately pop up with regard to the roommate), available at 2002 WL 2637369.

⁶⁸ See Vince Galloro, *Watching out for Nursing Home Residents: Cameras could Help Curb Abuse but Others Argue they Invade Patient Privacy*, MOD. HEALTHCARE, May 14, 2001, at 24, 26.

State statutes aside, the Federal Wiretap Act criminalizes the use of any device that is used primarily for secret surveillance.⁶⁹ Devices used primarily for covert surveillance of parties in communication violates the Federal Wiretap Act, regardless of consent.⁷⁰ In contrast, the surveillance of common areas in nursing homes is a common practice for security reasons,⁷¹ and would fall outside this federal statute as long as their equipment is not designed for covert surveillance and notice of monitoring is posted.

B. Privacy Rights of Employees

Although surveillance in the workplace is believed to foster low employee morale,⁷² companies commonly monitor for quality assurance, protection of property, or investigation of employees' behaviors.⁷³ American workers in private employment settings

⁶⁹ See 18 U.S.C. § 2511(2)(d).

⁷⁰ See Jay Goldberg, *A Little Known Hidden Problem within the Federal Wiretap Statute*, 14 WHITE COLLAR CRIME REP., Oct. 2000, at 1, 5, 7.

⁷¹ See Lindsay Peterson, *Patients' Advocates, State's Nursing Homes at Odds Over Video Cameras*, TAMPA TRIB., Oct. 30, 2001, at 1 ("The cameras are only in the common areas - kitchen, porch, living room - and were installed originally to give out-of-town relatives a way to observe their loved ones . . ."), available at 2001 WL 26696068; see also David Crary, *Video Systems Worry Nursing Homes*, MILWAUKEE J. SENT., Apr. 1, 2001, at 20A (quoting a Lake City, Florida owner of an assisted living facility who has installed cameras in the common areas of the facility: "I want to keep an eye on my people and see what's going on. . . . I'll put cameras anywhere it won't invade the privacy of residents."), available at 2001 WL 9347662; Jane Adler, *Home Safe Home Seniors-Only Villages have a Lock on Security*, CHI. TRIB., Oct. 22, 2000, at 5 (noting that surveillance cameras are used in the common areas of assisted-living facilities for security purposes), available at 2000 WL 3723894; Galloro, *supra* note 68, at 25 (noting that cameras are used by the owner of several Irvine, California long-term-care facilities in the common areas of her facilities, as well as in the rooms of patients with moderate or severe dementia, based on the consent of the resident's guardians); see also Greg Gittrich, *Granny Cams Help Kin Watch Over Elderly*, N.Y. DAILY NEWS, July 9, 2001, at 1, available at 2001 WL 23585557. Some nursing homes have taken this one step further by allowing "virtual visitation" with residents over the Internet. See *id.* The Hebrew Home for the Aged in Riverdale, New York, recently installed six cameras in the recreational areas of the home. *Id.* Out of seventy-five residents, only four refused to give consent to the surveillance. *Id.* When one of the four enters a room under surveillance, the camera is turned off. *Id.* Also, family members are given a password to log on via the Internet. *Id.* However, this program is experimental and is being monitored by the New York State Department of Health. See *id.*

⁷² See Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379, 381 (2000).

⁷³ See Richard A. West, Jr., *Workplace Privacy: A Reasonable Expectation or an Illusory Idea?*, N.J. LAW., Apr. 1999, at 14 (noting that the "[m]onitoring and surveillance of employees has become commonplace in the modern business workplace").

are generally not protected from surveillance because the premises, equipment, and supplies are the property of the employer.⁷⁴ Furthermore, Fourth Amendment protections against unreasonable searches and seizures do not apply to employees in private employment settings.⁷⁵ Finally, an at-will employment situation gives rise to implicit consent to monitoring because an at-will employee can be discharged without cause.⁷⁶ Therefore, at-will employees have less power over the conditions of their employment because complaints can lead to discharge. While this unstable employment situation subjects the employee to working conditions that they may dislike, implicit consent to the working conditions is maintained by continued employment.⁷⁷

Generally, employees in private settings have little right to privacy, and these rights are further diminished by statute. Although the Electronic Communications Privacy Act of 1986 (ECPA)⁷⁸ was enacted to update the Wiretap Act to account for new forms of electronic communication, it prohibits the interception of data by any electronic means, even though it does provide for exceptions with regard to employees.⁷⁹ One such relevant exception is monitoring for supervision or evaluation of employees.⁸⁰ Another exception allows for monitoring when the employer has made the employees aware of the monitoring or where there is an established monitoring policy.⁸¹ Under this exception, continued employment implies that the employee consented to monitoring.⁸² Further, "[i]f a party to the communication other than the employee under surveillance agrees to the monitoring, there need

⁷⁴ See Rothstein, *supra* note 72, at 382-83. Employees in private settings, however, have some legal rights against surveillance. They can bring a tort action for intrusion into seclusion, in states where this tort is recognized, where an intrusion occurs, either physically or through electronic surveillance, in an area that a reasonable person would find offensive or highly objectionable. See *id.* at 382. Areas that are considered offensive or highly objectionable include, but are not limited to, employee locker rooms and bathrooms. *Id.* at 382-83. Thus, surveillance of a room of a nursing home resident would not fall under the offensive or highly objectionable category for an employee.

⁷⁵ *Id.* at 400.

⁷⁶ See *id.* at 402.

⁷⁷ *Id.* at 402.

⁷⁸ 18 U.S.C. § 2510 (1994).

⁷⁹ See Rothstein, *supra* note 72, at 401-02 (noting that Congress enacted the ECPA to update the Wiretap Act to account for new forms of electronic communication).

⁸⁰ *Id.* at 402.

⁸¹ *Id.*

⁸² *Id.*

be no knowledge or consent of the employee."⁸³ Additionally, silent video surveillance falls outside the ECPA because the ECPA only protects wire, oral, and electronic communications.⁸⁴ Electronic communication is defined as any "transfer of signs, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system."⁸⁵

Besides protecting oral communications that the employee reasonably expects to be private, the ECPA also protects oral communications that employees expect not to be intercepted.⁸⁶ This subtle distinction can best be explained by distinguishing between situations where employees are in a public setting but have an expectation of non-interception (e.g., sales clerk at cash register) as compared to situations where employees have an expectation of privacy (e.g., co-workers chatting in break room).

State privacy laws also provide some protections for private sector employees. Some states recognize the common law invasion of privacy of unreasonable intrusion upon the seclusion of another as applied to workplace settings.⁸⁷ When balancing the interests of the parties involved within the workplace environment, courts tend to evaluate: 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 legitimate business justifications for the alleged intrusion.⁸⁸

⁸³ *Id.* at 402-03; *see also* 18 U.S.C. § 2511(2)(d).

⁸⁴ 18 U.S.C. § 2510(4).

⁸⁵ *Id.* § 2510(12).

⁸⁶ *Cf. id.* § 2510(2).

⁸⁷ *See Rothstein, supra* note 72, at 405.

⁸⁸ *See id.* (listing two independent considerations for privacy outside of the employment setting). "(1) Did the individual intruded upon have a legitimate expectation of privacy ?; (2) Did the legally protected interests of the intruder outweigh the legitimate expectation of privacy?" *Id.*

Although New York does not recognize this tort,⁸⁹ California,⁹⁰ Florida,⁹¹ Pennsylvania,⁹² and Texas⁹³ do recognize it. California's tort, for example, has two elements: "(1) the intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person."⁹⁴ Under the intrusion theory, a plaintiff is likely to succeed if she can "show that the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff."⁹⁵ The plaintiff must have also had an objectively reasonable expectation of privacy in the place where the intrusion occurred.⁹⁶

Video and audio monitoring of employees is common, however, silent video surveillance of public areas of the workplace, where employees have little expectation of privacy, will not usually be considered a tortious invasion of privacy.⁹⁷ Conversely, rest rooms, locker rooms, and private offices are areas clothed with a reasonable expectation of privacy and are areas where silent video surveillance should never occur. Potential liability can be avoided by simply giving notice of the surveillance to the employee. Also pertinent to privacy rights of employees are the federal and state wiretapping statutes previously discussed.⁹⁸

⁸⁹ See Tonianne Florentino, *Workplace Privacy in the Technology Revolution*, in *FIRST ANN. INST. ON PRIVACY L.: STRATEGIES FOR LEGAL COMPLIANCE IN A HIGH TECH & CHANGING REG. ENV'T* 281, 283 (Practicing Law Institute 2000) (explaining that private employees in New York have no reasonable expectation of privacy within the workplace).

⁹⁰ See, e.g., *Miller v. NBC*, 232 Cal. Rptr. 668, 678 (Ct. App. 1986) (recognizing the intrusion upon seclusion tort as adopted by the Restatement Second of Torts).

⁹¹ See, e.g., *Goosen v. Walker*, 714 So. 2d 1149, 1150 (Fla. Dist. Ct. App. 1998) (finding a neighbor's repeated videotaping of other neighbors while in their own backyard an activity that is not constitutionally protected).

⁹² See, e.g., *Vogel v. W.T. Grant Co.*, 327 A.2d 133, 135-36 (Pa. 1974) (noting that "[t]he Restatement (Second) of Torts has . . . arrived at an accurate formulation of the tort of invasion of privacy." *Id.*

⁹³ See, e.g., *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219, 221 (Tex. Civ. App. 1977) (analogizing the invasion of privacy tort to an intentional tort such as trespass or battery).

⁹⁴ *Sanchez-Scott v. Alza Pharms.*, 103 Cal. Rptr. 2d 410, 415 (Ct. App. 2001) (quoting *Sanders v. Am. Broad. Co.*, 978 P.2d 67, 71 (Cal. 1999)).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *id.* at 416 (explaining that an intrusion need not constitute "absolute or complete privacy") (citation omitted).

⁹⁸ See *supra* notes 11-29 and accompanying text.

C. Responsibilities of Nursing Home Administrators

Federal and state regulations carry a strong inference that the administrator of a nursing home facility is ultimately responsible for the quality of care of each resident.⁹⁹ The Omnibus Reconciliation Act of 1987 (OBRA) sets forth standards for patients' rights. In addition, states have laws and regulations that must be complied with. Standing alone, however, OBRA establishes administrator liability.

OBRA states that the administrator is responsible for the overall management of the nursing home.¹⁰⁰ The NYCRR states that "[t]he facility shall: (i) not use, or permit, verbal, mental, sexual or physical abuse, including corporal punishment, or involuntary seclusion of residents. . . ."¹⁰¹ In addition, allegations of abuse or mistreatment must be reported to the administrator.¹⁰² The facility bears the burden of establishing that reported violations are investigated, that precautions are taken to safeguard allegedly abused patients during the investigation process, and that action is taken if abuse is proven.¹⁰³ "The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion. . . . The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents. . . ."¹⁰⁴ Further, New York regulations ensure that "[r]esident rooms shall be designed and equipped for adequate nursing care, comfort and privacy of residents."¹⁰⁵

OBRA holds the nursing home administrator ultimately responsible for the care and protection of each resident.¹⁰⁶ From the administrator's standpoint, nursing homes should establish policies about video surveillance by third parties and other residents

⁹⁹ See NURSING HOME LITIGATION: INVESTIGATION AND CASE PREPARATION 142 (Patricia W. Iyer ed., 1999).

¹⁰⁰ Requirements for States and Long Term Care Facilities, 42 C.F.R. § 483.75(d)(2)(ii) (2001); cf. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.4(b) (1997) ("The nursing home shall develop and implement written policies and procedures that prohibit mistreatment, neglect or abuse of residents of misappropriation of resident property.").

¹⁰¹ tit. 10, § 415.4 (b)(1)(i).

¹⁰² 42 C.F.R. § 483.13 (c)(2), (4) (2001); tit. 10, § 415.4(b)(2).

¹⁰³ See 42 C.F.R. § 483.13(c)(3).

¹⁰⁴ *Id.* § 483.13(b), (c); cf. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.4(b).

¹⁰⁵ tit. 10, § 415.29(c).

¹⁰⁶ See 42 C.F.R. §§ 483.1, 483.25 ("Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable. . . well-being").

as a good faith effort to address the safety, responsibility and sensibilities of all parties involved. A showing of this good faith effort may reduce the amount of liability assigned in future litigation for any cause of action related to monitoring. An established policy addressing this issue also makes the administration more approachable. The party that requests the monitoring will know exactly what steps must be taken and the party's role in the process. It will also serve as a reminder that cases of alleged abuse or mistreatment will be reported and taken seriously.

An established policy on video monitoring will also protect employees. Guidelines should be issued that will outline what employees should expect when monitoring occurs. These guidelines, at a minimum, should have a notice requirement. For example, the policy should establish that a room under video surveillance will be marked clearly with a visible sign. In addition, a policy reduces the chance of employer liability. An employee who maintains employment in a private nursing facility that has an established monitoring policy gives implied consent to monitoring in areas outside of the employee locker room and bathroom.

IV. THE MARYLAND MODEL

Maryland State Representative Sue Hecht walked into her mother's room in a Maryland nursing home and saw her mother being abused.¹⁰⁷ She cites this as the reason for introducing Maryland House Bill No. 433 on February 1, 2001.¹⁰⁸ The bill requires a nursing home facility to allow a resident or her legal representative to monitor the resident in the resident's room through the use of any electronic monitoring device.¹⁰⁹ However, the resident or legal representative must request and pay for the service.¹¹⁰ Further, written consent of any roommate(s) is also required.¹¹¹ Notice of the surveillance must be posted on the door of the room.¹¹² Representative Hecht believes that this is a

¹⁰⁷ See *Sue Hecht Discusses Legislation She's Introduced to Video Cameras in Nursing Homes*, NPR: MORNING EDITION, (National Public Radio Feb. 22, 2001), available at 2001 WL 9326604 [hereinafter Hecht].

¹⁰⁸ See *id.*; see also H.B. 433, 415th Gen. Assem., Reg. Sess. (Md. 2001), available at <http://mlis.state.md.us/2001rs/billfile/hb0433.htm> (last visited Apr. 22, 2002).

¹⁰⁹ Md. H.B. 433

¹¹⁰ *Id.*

¹¹¹ See *id.*

¹¹² *Id.*

residents' rights issue and that the privacy rights of employees are not invaded for those that are performing their job properly.¹¹³

Aside from addressing how the law will circumvent any wiretap laws that apply, the Maryland Model addresses many problems from the nursing home, employee, and resident perspectives.¹¹⁴ First, it protects the nursing home from liability for not protecting the privacy and well-being of the resident.¹¹⁵ An open policy shifts the liability for any subsequent secret cameras to the defendant trespasser.¹¹⁶ Second, it requires consent of any roommate(s) that would be affected by the surveillance.¹¹⁷ Third, it provides notice to anyone entering the premises while still protecting the patient.¹¹⁸ Fourth, the resident or the resident's family must pay the costs involved in the installation, maintenance, and electricity used for the surveillance.¹¹⁹ Finally, this bill provides some protection for residents who fear retaliation by abusive employees.¹²⁰

However, the Maryland Bill died when the 2001 Legislative Session ended,¹²¹ but other states have attempted to address video surveillance in nursing homes through similar legislation.¹²² However, to date, Texas is the only state that has passed a statute relating to electronic monitoring devices in nursing homes.¹²³ The Texas statute addresses all of the issues raised by Hecht's bill.¹²⁴

The Texas statute allows electronic monitoring with written consent by either a resident with capacity, or a resident who lacks capacity but provides consent through a guardian or legal repre-

¹¹³ See Hecht, *supra* note 108.

¹¹⁴ See generally Md. H.B. 433; cf. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.29(c).

¹¹⁵ See generally Md. H.B. 433

¹¹⁶ See *id.*

¹¹⁷ See *id.* (showing the requirements for each resident, which are consistent even if sharing one room); see generally Hecht, *supra* note 108 ("If there's another resident living in the room, we have to get written consent.").

¹¹⁸ Md. H.B. 433.

¹¹⁹ *Id.*

¹²⁰ See *id.*; see also Hecht, *supra* note 108 (explaining that individuals who tamper with a nursing home resident's installed video camera could face punishment).

¹²¹ See Md. H.B. 433.

¹²² See, e.g., S.B. 242, 103rd Reg. Sess. (Fla. 2001) (died in committee); H.B. 1202, 182nd Gen. Ct., Reg. Sess. (Mass. 2001), WL 2001 MA. H.B. 1202 (SN); H.B. 996, 2001 Leg., Gen. Assem. (N.C. 2001), WL 2001 NC H.B. 996 (SN); H.B. 3344, 77th Leg. (Tex. 2001), WL 2001 TX H.B. 3344 (SN).

¹²³ See TEX. HEALTH & SAFETY CODE ANN. §§ 242.841-.852 (Vernon 2001).

¹²⁴ See *supra* notes 107-20 and accompanying text.

sentative.¹²⁵ Additionally, the Texas statute's consent form provision may release the institution from civil liability arising from any privacy violation directly related to the use of surveillance.¹²⁶ Furthermore, it allows the resident or guardian to choose what areas of the room will be monitored in order to protect the dignity of the resident.¹²⁷ However, in doing so the guardian must "obtain the consent of other residents in the room."¹²⁸ The statute also requires notice to visitors and employees at both the entrance to the institution,¹²⁹ as well as the entrance to the resident's room.¹³⁰ Finally, the Texas statute also protects the resident from various forms of retaliation for requesting, or intending to request, a monitoring device.¹³¹

V. CONCLUSION: USE OF TECHNOLOGY FOR SURVEILLANCE WITHOUT CONSENT

Tension between safety and privacy already exists in nursing homes. Such tension involves circumstances where video surveillance devices are installed without the knowledge of the nursing home, without the consent of residents, and without notice to employees. More legislation is needed to balance the need for safety in nursing homes with the need to protect the privacy rights of the parties involved. Of course, in the absence of legislation, citizens must rely on the court system to protect their privacy rights. A recent Supreme Court case affirmed that privacy rights within the home—especially in the wake of rapidly changing technology—continue to be highly valued.¹³² Justice Scalia's majority opinion mirrors this sentiment: "In the home . . . *all* details are intimate details."¹³³ This quote, and the holding of the case, suggest that courts will continue to place limits on surveillance tech-

¹²⁵ See TEX. HEALTH & SAFETY CODE ANN. § 242.845(a)-(c).

¹²⁶ *Id.* § 242.846(b)(1) (stating that the resident, a resident's guardian or legal representative must "release the institution from any civil liability for a violation of the resident's privacy rights in connection with the use of the electronic monitoring device").

¹²⁷ See *id.* § 242.846(b)(2) (allowing for the obstruction of the camera while the resident may be having private moments).

¹²⁸ *Id.* § 242.846(b)(3).

¹²⁹ *Id.* § 242.850.

¹³⁰ *Id.* § 242.847(b).

¹³¹ See TEX. HEALTH & SAFETY CODE ANN. § 242.851(a)(3).

¹³² *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding the use of a thermal imaging device that detects heat emitting from the home as a warrantless search that violated the Fourth Amendment).

¹³³ *Id.* at 37.

nology used without consent in all dwellings that are considered home, including nursing homes.