

Privacy and Surveillance in Nursing Homes

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Karen Levy, Lauren Kilgour, & Clara Berridge, *Regulating Privacy in Public/Private Space: The Case of Nursing Home Monitoring Laws*, 26 **Elder Law J.** __ (forthcoming 2018) available at [SSRN](#).

A nursing home can be a dangerous place. Undetected abuse and neglect are common. Frustrated with the inadequacy of government oversight, some families have taken matters into their own hands and installed in-room video monitoring devices. In this way, privatized abuse prevention efforts can identify and rectify that which the camera records. The increasing use of so-called “granny cams” has led to legislative responses in at least six states—Illinois, New Mexico, Oklahoma, Texas, Washington, and Utah. These statutory frameworks are thoughtfully examined by [Karen Levy](#), [Lauren Kilgour](#), and [Clara Berridge](#) in their forthcoming article, *Regulating Privacy in Public/Private Space: The Case of Nursing Home Monitoring Laws*.

The covert use of technology such as web-enabled video cameras to “peek in” and also preserve evidence of inadequate care, abuse, or exploitation may be well-intentioned. The overt placement of cameras might help to deter abuse from occurring in the first place. Privacy and autonomy concerns, however, might be overlooked. As these three co-authors explain, the interests of the resident, their roommates, their visitors, and their care workers—even, to some degree, the institutions themselves—merit scrutiny: “These multivalent privacy dynamics create a complicated space for law.” (P. 3.) Indeed, this complex relational space has given rise to strikingly varied legislative fixes. Levy, Kilgour, and Berridge study a relatively unstudied problem with sensitivity and thoroughness.

Initially, this article enters the nursing home setting and explores the relational, interdependent nature of privacy in that space. A nursing-home room is an intimate, personal space for the often vulnerable individuals who live in them. In that space, residents (as well as their roommates) may receive personal care. They may share intimacy with their partners. They may be examined by their doctors. They may change clothes. They may masturbate. A nursing home room can also be a private space for parties visiting those individuals, such as their spouses, their children, or even their attorneys. At the same time, a nursing home room is a closely regulated space where states monitor and structure conduct, especially that of staff. “Electronic monitoring in nursing homes, and the rules which regulate it, thus enter a particularly fraught context, in which the aims and targets of privacy protection, and the perceived threats thereto, are multivalent and interact in complex ways.” (P. 6.)

Having detailed the unique privacy intersections within a nursing-home room, the authors next assess how the law has entered that fraught space. Here, the authors deploy a comparative analysis and identify the salient aspects of the varied approaches that six states have taken. While each statutory paradigm permits in-room monitoring devices by a resident or their representative, the authors highlight significant variation in the ways in which competing privacy interests are balanced. Some states delineate notification and consent forms. Some attempt to police against institutional retaliation. Some require signage or ban covert cameras. Some permit roommates to switch rooms when a camera is introduced. Some constrain the positioning (e.g., allowing only fixed-position cameras) and precision (e.g., focus, volume, etc.) of data collection. New Mexico requires data encryption when a monitoring

device is web-enabled. Utah simply bans any device which can transmit recordings. State approaches lack uniformity in addressing the admissibility of recordings in judicial or administrative proceedings. Abuse-reporting requirements and liability limitations vary as well.

Finally, the authors map privacy relationships within these legislative approaches. A significant number of nursing home residents may lack the capacity to consent to in-room monitoring or to condition consent upon limitations. The majority of the statutes analyzed by the authors confirm that a resident's fiduciary (such as an agent or a guardian) can consent to recording on the resident's behalf. Washington, interestingly, permits residents' representatives to authorize visual video monitoring, but not audio, absent a court order.

Sadly, the most common perpetrators of elder abuse are adult children and spouses. These are the individuals typically acting as elderly individuals' representatives. As a result, the most likely perpetrators are the ones collecting recordings. For the most part, states have failed to account for potential abuse by a representative. Mistreatment by a representative is unlikely to be captured by a monitoring device, and if it is, the representative controls the captured data. Indeed, a representative might use embarrassing footage to intimidate or extort. This potential for misuse must be carefully balanced against gains in documenting abuse by nursing home staff or others, but so far it hasn't been adequately considered.

Regulating Privacy in Public/Private Space: The Case of Nursing Home Monitoring Laws is an important and elucidating discussion of these kinds of important policy issues. Its comparative mapping could serve as an effective guide to future legislative efforts. And its explication of competing privacy interests demonstrates a mature sorting of recurring intersections of human interests in the nursing home space. I recommend it.

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