

“BIG BROTHER” AND GRANDMA: AN ARGUMENT FOR VIDEO SURVEILLANCE IN NURSING HOMES

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The proposed use of video surveillance in nursing homes, as a tool to ensure proper care of residents, has spurred controversy. Selket Nicole Cottle explores the positive and negative aspects of using so-called granny cams, both in a permissive and mandatory capacity. She concludes that states that mandate the provision of cameras provide maximum benefit to nursing home residents and their families, and, thus, she suggests that all states enact this type of legislation. While recommending such action, Ms. Cottle cautions that the use of cameras should not be made compulsory. Rather, she proposes that nursing homes should be obligated to provide the technology, but residents should retain the freedom to choose whether they will use it.

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I. Introduction

It is 11:00 p.m. Do you know where your grandmother is? She could be lying awake in bed awaiting a change of diaper¹ or being beaten for soiling it.² Or she could be properly cared for and sleeping peacefully. The emergence of video surveillance systems in nursing homes provides family members who have an elderly loved one in a nursing home with the peace of mind to get a good night's sleep, knowing that their grandmother is doing the same. Family members may choose to install a granny cam,³ as they are commonly known, in a nursing home resident's room, allowing the family to check on their loved one at any time via the Internet.⁴ Although this may sound like an idyllic solution to those families concerned about the care that their loved ones are receiving at the hands of nursing home staff, granny cams have not been greeted with universal enthusiasm.⁵ The nursing home industry has generally been defensive and unreceptive to the idea.⁶ Nursing home owners are hesitant to embrace the concept; fearing that granny cam footage is an invasion of their residents' privacy,⁷ will provide ammunition for lawsuits,⁸ and will increase staff turnover.⁹

1. Tom Zucco, *The Sleepless Eye*, ST. PETERSBURG TIMES, Apr. 18 2002, at 1D, available at 2002 WL 18541511.

2. Patrick Kampert, *Video Watchdog; Some Nursing Homes Welcome Cameras, but Many Fear Unleashing a Monster*, CHI. TRIB., Mar. 24, 2002, § 13, at 1, available at 2002 WL 2637369.

3. E.g., David Crary, *Cameras Mull'd for Nursing Homes*, AP ONLINE, Mar. 20, 2001, available at 2001 WL 16545785 (referring to "so-called 'granny cams'"); Kelly Greene, *Support Grows for Cameras in Care Facilities*, WALL ST. J., Mar. 7, 2002, at B1, available at 2002 WL-WSJ 3388000 (referring to "granny cams").

4. Douglas J. Edwards, *All Eyes Are on Granny Cams*, 49 NURSING HOMES 2630 (2000), available at 2000 WL 12150853.

5. Patrice Sawyer, *'Granny Cam' Called Lawsuit Shield: Bill Would Allow Video Monitoring in Nursing Homes*, CLARION-LEDGER (Jackson, Miss.), Jan. 30, 2002, at B1, available at 2002 WL 7614140.

6. Greene, *supra* note 3 (noting that many nursing home owners and employees discourage the use of granny cams).

7. *Id.* Many nursing home owners and employees discourage the use of granny cams "on the grounds that they are an invasion of privacy." *Id.*

8. 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, available at 2001 WL 9418702 (reporting the opinion of Morris Kutner, M.D., medical director for four Florida nursing homes, who stated that "[e]veryone believes [installing cameras] has to do with generating more lawsuits and giving ammunition to trial lawyers").

9. *Id.* (reporting the fears of Debora Cloud, Vice President of Communications at the American Association of Homes and Services for the Aging, that "the kind of suspicious environment that [cameras] suggest is not a healthy workplace

The real issue for both families of nursing home residents and for the nursing home industry is: Whose side is the law on? No law on the books of any state expressly prohibits granny cams;¹⁰ however, in all states except one, no law specifically prevents nursing homes from banning their use.¹¹ Because this matter has not been litigated,¹² a great deal of confusion remains. Many nursing homes claim that families do not have the right to install electronic monitoring devices in their private facilities; in fact, some homes include language in their admissions forms restricting or completely banning the use of cameras.¹³ Furthermore, many homes claim the right to retaliate.¹⁴ This retaliation may take the form of eviction, higher room rates, or refusal to admit residents who choose the option of installing cameras. Families of nursing home residents, on the other hand, point out that the rooms are the residences of their loved ones and they should therefore have the freedom to make this decision without institutional interference or the fear of reprisal.¹⁵ Both sides can agree that a solution must be reached.

This note analyzes the pros and cons of the possible resolutions to this uncertainty. Part II provides relevant background information on the unsettling increase of elder abuse and outlines the most frequently cited arguments both for and against the use of cameras. Part III analyzes the available legislative alternatives. This includes legislation permitting the voluntary use of granny cams, in which individual residents or their families may choose to install a granny cam and nursing homes must tolerate their presence. There is also the possibil-

environment,” making it more difficult to recruit and retain quality staff that nursing homes “so desperately need”).

10. Suzanne E. Messenger, *Granny-Cams—The Wave of the Future?*, WVSLA NEWSL. (Morgantown, W. Va.), Winter 2001, http://www.seniorlegalaid.com/newsletter_detail.cfm?H=121&E=10 (last visited Jan. 28, 2004).

11. Christopher T. Hurley, *Nursing Home Ills: Better Background Checks, Monitoring Are Needed*, FULTON COUNTY DAILY REP., May 23, 2002, at 6. Texas is the only state to have passed legislation authorizing families to install cameras in nursing homes. *Id.*

12. Galloro, *supra* note 8, at 24 (reporting the hope of Violette King, Executive Director of Nursing Home Monitors, “of generating a test court case that would clearly uphold the right to install cameras”).

13. Zucco, *supra* note 1.

14. *Id.*

15. Diane C. Lade, *Nursing Home ‘Granny Cams’ Face Scrutiny; State Study Group Seeks Public’s View on Whether Such Cameras Are an Invasion of Residents’ Privacy*, S. FLA. SUN-SENTINEL, Nov. 14, 2001, at 10B, available at 2001 WL 29954851 (reporting the belief of Violette King, Executive Director of Nursing Home Monitors, that, “[i]t’s the resident’s right to monitor their own care”).

ity of prohibiting granny cams, as many in the nursing home industry endorse, or, conversely, that they are made mandatory. Furthermore, this note raises a fourth alternative—that granny cams be made compulsory as both a remedial tool and preventative measure in nursing homes that have been the target of a certain number of elder abuse allegations within a given time period. Drawing on the experiences of states that have contemplated one or more of these options, and giving due consideration to the public policy ramifications of implementing any one of these alternatives, Part IV of this note proposes that all states should adopt legislation mandating granny cams.

II. Background

A. The Statistics

Approximately half of all Americans who are now sixty-five years of age or older will be admitted to a nursing home at least once;¹⁶ and as the baby boom generation approaches their sexagenarian years, these numbers are expected to rise, until, in the year 2040, the number of nursing home patients will have reached an unprecedented six million.¹⁷ At the same time, about thirty percent of America's 17,000 nursing homes have been sanctioned for "deficiencies" that put their residents at risk of life-threatening injury or death,¹⁸ and, according to reports from a March 2002, Senate hearing, this number rose as much as twenty percent from 1999 to 2000.¹⁹ Additionally, it is estimated that one in every twenty elderly persons suffers from abuse;²⁰ while a new federal government study suggests that this figure represents only a portion of the actual abuse, as many instances of both physical and sexual abuse go unreported.²¹ In fact, the Admini-

16. FLA. AGENCY OF HEALTH CARE ADMIN., CAMERAS IN NURSING HOMES 4 (2002), http://www.fdhc.state.fl.us/cinh/docs/cinhreport1_2002.pdf [hereinafter FLA. AHCA] (report compiled by Florida's Agency for Health Care Administration, recommending the voluntary use of cameras in nursing homes and resident rooms in Florida).

17. Deborah Sharp, *On the Watch in Nursing Homes: Coalition Wants 'Granny Cams' to Protect Elderly from Neglect*, USA TODAY, Sept. 14, 1999 at 2A.

18. Zucco, *supra* note 1.

19. NPR: *Talk of the Nation* (National Public Radio, Inc. radio broadcast, Mar. 5, 2002), available at 2002 WL 3296837.

20. FLA. AHCA, *supra* note 16, at 4.

21. Editorial, *Granny Cams: A Protective Eye Against Nursing Home Abuse*, DAYTONA BEACH NEWS-J., Mar. 16, 2002, http://www.protectelders.org/inthe/press/03_16_02.htm.

stration on Aging estimates that for each demonstrable report of elder abuse or neglect, at least five more instances have passed unreported.²²

These statistics are alarming, but they are no surprise to many families with loved ones in a nursing home. An elderly woman fell and spent hours stranded on the floor of her room;²³ a woman, left alone to eat dinner in a nursing home hallway, choked on a pear, lost consciousness, and suffered brain damage before she was revived;²⁴ a nursing home resident went five days without eating before anyone noticed;²⁵ an eighty-eight-year-old woman's caregiver threw her into a chair, while verbally abusing her;²⁶ a nursing home resident was forced to take sedatives to keep him quiet.²⁷ All too many families who have a loved one in a nursing home have had similar experiences. Granny cams are the newest weapon in an arsenal that concerned families can wield to put an end to this trend; and, if they are not prohibited, they will likely pervade the industry as families become aware of their potential benefits.²⁸

B. The Cameras

The cameras come in two basic forms—either a closed-circuit video camera or a Web camera.²⁹ Video cameras are frequently equipped with motion detectors, which are activated only when there is activity within the resident's room,³⁰ and infrared sensors to record

22. NAT'L CTR. ON ELDER ABUSE, NATIONAL ELDER ABUSE INCIDENCE STUDY (Sept. 1998), http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/Abuse_Report_Full.pdf.

23. Greene, *supra* note 3.

24. Kathy Slobogin, *Government Ponders Nursing Home Reform*, CNN.COM, Mar. 19, 2002, at <http://www.cnn.com/2002/HEALTH/03/15/nursing.home.help/>.

25. Mark Hollis, *Nursing Homes, Unions Blocked Plan to Monitor Patients*, S. FLA. SUN-SENTINEL, May 10, 2001, at 10B, available at 2001 WL 2676760.

26. Henry L. Davis & Dan Herbeck, *Camera Use Is Urged at Homes for the Elderly*, BUFFALO NEWS, Jan. 7, 2002, at B1, available at 2002 WL 7415299.

27. Mary M. De Shaw, *A Nursing Home Odyssey*, at <http://Socrates.Berkeley.edu/~aging/odyssey.html> (last visited Feb. 27, 2004).

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

29. Lloyd Dunkelberger, *Bill Would Allow 'Granny Cams': Under the Legislation, a Surveillance Device Could Be Installed in a Nursing Home Resident's Room*, SARASOTA HERALD-TRIB., Mar. 25, 2001, at A16, available at 2001 WL 16272206.

30. Jim Killackey, *Cameras Urged for Surveillance in Nursing Homes: 'Granny-cams' Can Promote Better Care, DHS Official Agrees*, DAILY OKLAHOMAN, May 11, 2001, at 4A, available at 2001 WL 21401971.

images in the dark.³¹ They then record to a VCR, containing tape that may be accessed at any time only by the resident or the resident's family.³² Web cameras maintain a continuous connection to the Internet, uploading images that constantly replace the previous image.³³ Residents' family members may then dial in on a secure server, accessed by a password,³⁴ to view their loved ones in real time.³⁵ Families can also achieve historical viewing through Web cams, by storing footage of the previous twenty-four hours' activity.³⁶ The equipment allows families to choose between video access, audio access, or both.³⁷ Whether—not how—granny cams work to reduce elder abuse, however, is the oft-debated issue that has arisen in conjunction with their use.

C. The Arguments

Granny cam proponents maintain that the introduction of granny cam technology is essential in restoring public confidence in an industry that has frequently been cited for abuse and neglect.³⁸ They argue that the constant surveillance that granny cams provide empowers families by bringing to light any abuse or neglect that their loved ones may be suffering.³⁹ Additionally, granny cams ensure that abuse does not continue by discouraging those potentially abusive caregivers who do not want to work under constant observation from working in nursing homes.⁴⁰ Cameras also discourage current staff members who know they are being watched from acting in an abusive or neglectful manner,⁴¹ making them more likely to perform to the best of their abilities.⁴²

31. Edwards, *supra* note 4.

32. Killackey, *supra* note 30.

33. EYES ON ELDERS, PRODUCT LINE OVERVIEW, at <http://www.eyesonelders.com/remote/overview.html> (last visited Nov. 14, 2002).

34. Editorial, *Cameras in the Sickrooms*, ORLANDO SENTINEL, June 4, 2002, available at http://www.protectedelders.org/cameras/cams/06_04_02.htm.

35. EYES ON ELDERS, PRODUCT LINE OVERVIEW, *supra* note 33.

36. *Id.*

37. Messenger, *supra* note 10.

38. John Davidson, *Eyes Wired Open: The Benefits and Costs of Technology*, AUSTRALIAN FIN. REV. Oct. 5, 2002, at 46, available at 2002 WL 26285956.

39. Lade, *supra* note 15.

40. NPR: *Talk of the Nation*, *supra* note 19.

41. Thomas Peele, *Nursing Facilities Under the Camera: Online and Videotape Surveillance Could Reduce Abuse, Elderly Advocates Say; Industry Officials Disagree*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Aug. 20, 2001, available at 2001 WL

Furthermore, the cameras provide families with ammunition, in the form of hard evidence, which they can use in meetings with nursing home staff⁴³ or in proceedings against abusers. Currently, few allegations of elder abuse result in prosecution because not all complaints are referred to local law enforcement; and even when they are properly submitted, time has passed since the occurrence of the incident.⁴⁴ Therefore, what little evidence there may have been of the event frequently has been compromised or destroyed by the time the incident is reported, and there are generally few witnesses to any alleged instances of abuse.⁴⁵ Even if witnesses can be identified, their testimony is often limited by senility, other mental infirmity, or the inability to effectively communicate.⁴⁶

Granny cams can exonerate staff from suspicion just as certainly as they can indict them, proponents argue. For instance, reviewing granny cam footage can substantiate staff claims that suspicious bruises on an elderly resident's body are actually the result of the resident hitting his or her bedrails as he or she slept fitfully,⁴⁷ or it can provide vindicating evidence against a senile or delusional resident's claim that staff abused or stole from him or her.⁴⁸ Moreover, granny cams can shield nursing home staff that may be injured by confrontational or belligerent residents.⁴⁹ In this way, granny cams protect both residents and staff.⁵⁰

27274638 (reporting that "unscrupulous caregivers might curtail [abuse] if they knew—or even suspected—that someone might be watching").

42. Sue Hecht, *We Perform Better When We're Watched*, FREDERICK NEWS-POST (Frederick County, Md.), Mar. 19, 2002, <https://www.fredericknewspost.com/sections/archives/confirm.htm?StoryID=29053> (arguing in favor of her bill, allowing permissive use of granny cams, Maryland Delegate Sue Hecht stated: "When we know our actions are being watched, we take care to perform to our better abilities. Let these cameras encourage those better actions.").

43. Lade, *supra* note 15 (noting the concerns of Eileen Nevin regarding the treatment her father was receiving at the hands of nursing home staff and her belief that she could have intervened on his behalf if only she had proof to substantiate her claim).

44. U.S. GEN. ACCOUNTING OFFICE, NURSING HOMES: MORE CAN BE DONE TO PROTECT RESIDENTS FROM ABUSE 14 (Mar. 2002).

45. *Id.*

46. *Id.* at 16.

47. See Rebecca Goldsmith, 'Eye Spies' in Nursing Homes Stir Up Debate—Video Cameras Used to Monitor Caretakers, STAR-LEDGER (Newark, N.J.), Feb. 19, 2002, at 013, available at 2/19/02 STLGRN 013 (Westlaw).

48. Kampert, *supra* note 2.

49. Killackey, *supra* note 30.

50. Kampert, *supra* note 2 (reporting that Jackie DuPont, a nursing home owner, has employees who "feel protected" by the presence of granny cams).

Granny cam opponents, on the other hand, see these situations in a different light. Some nursing home officials feel that rather than exonerating staff, granny cam footage will place them under suspicion unnecessarily.⁵¹ They believe that granny cams cannot accurately convey what actually occurs in many instances.⁵² One such antagonist to the granny cam cause cites the example of a staff member helpfully retrieving a nursing home resident's glasses from his or her room, but having the staff's actions appear as a theft on camera.⁵³ Another granny cam adversary suggests that the footage can be misinterpreted.⁵⁴ For instance, a camera recorded a nursing home resident moaning while he was being transferred from his bed.⁵⁵ A reporter viewing footage of this incident interpreted the resident's moaning as his reaction to being abused, but officials with the Association of Homes and Services for the Aging (AAHSA) note that many nursing home residents who are cognitively impaired—as was the resident in question—do moan, and it is not indicative of the resident being in any discomfort.⁵⁶ Thus, in this case, the granny cam footage cast doubt on a caregiver who acted appropriately.

Nursing home administrators largely feel that factors such as these outweigh any advantages of granny cams; and, even those advantages may be overstated. They are concerned that while granny cams will undoubtedly raise previously concealed issues, they cannot actually improve nursing home living conditions because cameras can only watch and catch someone after the fact.⁵⁷ One granny cam disbeliever analogizes to convenience stores, all of which have video surveillance systems; yet are still robbed regularly.⁵⁸

Granny cams' effect on family involvement in the life of a nursing home resident is also a subject of debate. No one questions that close family involvement in the nursing home resident's daily care and routine is of the utmost importance, but some argue whether

51. See Goldsmith, *supra* note 47.

52. Zucco, *supra* note 1.

53. Dunkelberger, *supra* note 29.

54. Zucco, *supra* note 1.

55. Edwards, *supra* note 4.

56. *Id.*

57. Zucco, *supra* note 1.

58. *Id.* (quoting Ed Towey, a spokesman for the Florida Health Care Association, who observed that “[e]very 7-Eleven has surveillance cameras, and they’re robbed quite frequently”).

granny cams aid or hinder this involvement.⁵⁹ Some people view the technology as a valuable asset for contributing to resident quality of life in terms of family involvement.⁶⁰ They believe that the presence of granny cams decreases the isolation between a nursing home resident and his or her loved ones⁶¹ by allowing them, in effect, to share experiences. Family members can access, through granny cam technology, footage of their loved ones eating dinner, playing cards, or participating in nursing home programs, and then discuss the activities with them later.⁶² In stark contrast to this position, opponents feel that having granny cams installed will reduce family involvement and resident-family interaction⁶³ by allowing families to stay home and check on their loved ones online in lieu of personal visits.

This divergence of opinion extends to our elected officials. Despite proposals by many state legislators,⁶⁴ Texas remains the only state to enact legislation specifically authorizing the presence of granny cams.⁶⁵ Even the emotional vigor and vigilance of Maryland Delegate C. Sue Hecht, fueled by her personal experience with nursing home abuse,⁶⁶ was not enough to keep the nursing home industry from quashing her granny cam proposal, Vera's Law,⁶⁷ in three con-

59. FLA. MED. DIR. ASS'N, FMDA ISSUES STATEMENT AGAINST ATTORNEY GENERAL AHCA REPORT ON ELECTRONIC SURVEILLANCE IN FLORIDA NURSING HOMES, at <http://www.fmda.org/attorney1-31-02.html> (Jan. 31, 2002).

60. See NPR: *Morning Edition* (National Public Radio, Inc. radio broadcast, Feb. 22, 2001), available at 2001 WL 9326604.

61. *Id.*

62. ABC News: *Good Morning America* (ABC television broadcast, Mar. 19, 2002), available at 2002 WL 2969563 (broadcasting a conversation between Jimmy Lyons and his mother, Netty, a nursing home resident, about the strawberries that she had been served).

63. FLA. MED. DIR. ASS'N, *supra* note 59.

64. See, e.g., *Briefing Book; News and Views from the Louisiana Capitol*, TIMES-PICAYUNE (New Orleans), May 7, 2003, at 03, available at 2003 WL 4007764 (reporting that, in response to objections from the Louisiana Nursing Home Association, a Louisiana bill that would have allowed cameras in nursing home rooms was derailed in favor of a resolution to study the granny cam issue for a year); *Granny-Cam Legislation Is Paused*, SNFINFO CONNECTION (HCPro, Inc., Marblehead, Mass.), Aug. 7, 2001, at http://www.protectelders.org/cameras/cams/08_07_01.htm (noting that the Maryland legislature twice failed to pass granny cam bills, and that Massachusetts and Florida have recommended a study on the effect of cameras in nursing homes, but have taken no action on granny cam bills); Encarnacion Pyle, *Families Pushing for Video Cameras in Nursing Homes*, COLUMBUS DISPATCH, Apr. 7, 2002, at 01B, available at 2002 WL 17815213 (reporting on a failed Ohio bill pushing for the right to install cameras).

65. Hurley, *supra* note 11.

66. Greene, *supra* note 3.

67. See Maria Tsigas, *Md. Lawmakers Consider Nursing Home Cameras*, FOX-NEWS.COM, Feb. 14, 2003, at <http://www.foxnews.com/story/0,2933,78553,00>.

secutive years.⁶⁸ Proposed bills in Arkansas, Louisiana, Massachusetts, and Ohio have met comparable fates.⁶⁹

Even those likely to benefit most from the availability of granny cams—nursing home residents themselves—are divided in their opinions as to the cameras' utility and propriety.⁷⁰ As part of a study concerning whether granny cams should be allowed in Florida nursing home rooms, the Agency for Health Care Administration (AHCA) held a public hearing at which nursing home residents were invited to testify.⁷¹ Those residents who testified appeared to be evenly split between both sides of the issue.⁷²

Some residents and nursing home administrators also harbor concern about privacy issues implicated by the presence of granny cams.⁷³ This includes concern for the resident's privacy, his or her roommates' and visitors' privacy, and nursing home staff members' privacy.⁷⁴ Frequently, this is the reason nursing homes deny their residents the right to install a camera.⁷⁵ Anti-cam nursing home officials also note that the nature of nursing home care often involves situations—such as dressing, having diapers changed, and having wounds cared for—in which residents' bodies are necessarily exposed.⁷⁶ To have such activity caught on camera would be both humiliating and unnecessary, they argue.⁷⁷

Other officials in the nursing home industry point out that many nursing home residents already share a room; thus, they are already frequently exposed in front of another resident.⁷⁸ In effect, privacy is

html. Vera's Law is named for Hecht's mother, who was verbally abused in a Frederick, Maryland, nursing home. *Id.*

68. *Id.*

69. Galloro, *supra* note 8, at 26.

70. See generally Lade, *supra* note 15.

71. *Id.*

72. FLA. AHCA, *supra* note 16, at 12–16 (summarizing the comments of those who participated in a public forum on the issues of electronic surveillance in nursing homes at the Stetson University Law School on October 25, 2001). Included in the summary were the feelings of Isabella Maxwell, a ninety-three-year-old nursing home resident, who believes cameras “would be an invasion of privacy and is just a money-making idea,” as well as those of Doris Ahler, an eighty-six-year-old citizen who supports the use of cameras in nursing homes, and claims she would “commit suicide” before going into a nursing home without one, because she believes her husband was beaten to death by his nursing home caregiver. *Id.*

73. See generally Lade, *supra* note 15.

74. Galloro, *supra* note 8, at 26.

75. *Id.*

76. Greene, *supra* note 3.

77. *Id.*

78. *Id.*

compromised in nursing homes as a matter of course, regardless of the presence of cameras.⁷⁹ They submit that having such activity monitored by camera, therefore, is no less dignified than having it occur in front of other residents.⁸⁰ This is especially true given that monitoring of granny cam footage would be limited to the resident's immediate family⁸¹ or nursing home staff.⁸²

Granny cam proponents believe that they can easily address these and other privacy concerns raised by the availability of granny cam technology. For example, regarding the privacy of residents and roommates of residents, states' proposed legislation—which would allow individual residents to choose to install granny cams—strives to protect individual privacy rights “to the extent reasonably possible.”⁸³ These proposals include provisions requiring that families obtain roommate consent before they may install a camera in their loved ones' rooms;⁸⁴ and providing that a family must also post signs alerting any potential visitors to the resident's room that cameras are in use in that room.⁸⁵ Alternatively, residents who opt for the installation of a granny cam could request a private room in order to avoid any issues concerning a roommate's privacy.⁸⁶ Once installed, granny cams can be positioned in a way that will allow full viewing of the resident's bed, but will keep the roommate out of view.⁸⁷ Additionally, many video surveillance systems can be programmed to give the resident or his or her legal guardian the power to turn the camera off and on as needed.⁸⁸ Thus, they may choose to turn the cameras off during particularly private moments.⁸⁹ Staff privacy, many agree, is less of a concern because they are already subject to a great degree of monitoring and supervision by their superiors,⁹⁰ and their privacy

79. FLA. AHCA, *supra* note 16, at 13.

80. Greene, *supra* note 3.

81. Killackey, *supra* note 30; EYES ON ELDERS, PRODUCT LINE OVERVIEW, *supra* note 33.

82. See generally FLA. AHCA, *supra* note 16, at 2.

83. See, e.g., H.D. 433, 2001 Leg., Reg. Sess. (Md. 2001); H.R. 3344, 77th Leg., Reg. Sess. (Tex. 2001).

84. See, e.g., H.R. 5786, 2001–02 Leg., Reg. Sess. (Mich. 2002); S. 1120, 2001–02 Leg., Reg. Sess. (Mich. 2002).

85. See, e.g., Tex. H.R. 3344.

86. Edwards, *supra* note 4.

87. Killackey, *supra* note 30.

88. Edwards, *supra* note 4.

89. *Id.*

90. See Galloro, *supra* note 8, at 26. Professor Gerard Magill, Director of the Center for Health Care Ethics at St. Louis University, believes that the privacy is-

concerns can be easily resolved by requiring staff members to sign a waiver.⁹¹

III. Analysis

A. Prohibiting Any Use of Granny Cams Eliminates What Is Often Families' Only Option to Prevent Abuse

If states pass legislation prohibiting the use of granny cams, concerned families must opt for a different technique to combat elder abuse. Unfortunately, many families find themselves in a situation in which other techniques are ineffective. Families whose loved ones have received unsatisfactory nursing home care should first bring their concerns to the attention of nursing home staff to ensure that the staff is receptive to the families' expectations.⁹² If problems persist, families should schedule a conference with a staff supervisor, followed by the local ombudsman, and then file a complaint with the state licensing agency, if their previous contacts have been unresponsive.⁹³ Finally, if families have exhausted these outlets with no recourse, they should contact an attorney or move their loved ones to a different nursing home.⁹⁴ This can be an emotionally exhausting, time-consuming, and ultimately expensive process, with no guarantee of success;⁹⁵ and the most extreme measure—removing their loved ones to a different nursing home—is not always a viable option.

Most families are limited geographically. They wish to situate their loved ones in nursing facilities near their own residences, near their spouses, or in the town in which their loved ones resided before they required placement in long-term care, so that there are individu-

sue for nonprofessional staff (i.e., other than doctors and registered nurses) is really a nonissue. *Id.* Magill said that, in regards to nonprofessional staff, "their [privacy] claim is so small that it's virtually nonexistent." *Id.*

91. *Id.*

92. NAT'L CITIZENS' COALITION FOR NURSING HOME REFORM, FACT SHEETS: RESOLVING PROBLEMS IN NURSING HOMES, at http://www.nccnhr.org/public/50_156_454.cfm (last visited Feb. 27, 2004).

93. NAT'L SENIOR CITIZENS LAW CTR., HOW TO RESOLVE PROBLEMS INVOLVING NURSING HOMES, http://www.nslc.org/news/03/06/CAnhcomp_problems.pdf (last visited Feb. 27, 2004).

94. *See id.*

95. *See generally* A PERFECT CAUSE, RESOURCE DIRECTORY: NURSING HOME LITIGATORS, at <http://www.aperfectcause.org/directory/attorney/litigator/apc-dir-litigators-index.shtml> (last visited Feb. 27, 2004).

als available to visit the nursing home residents.⁹⁶ The result of this geographical perimeter is that there are a finite number of facilities to which families may even give consideration when attempting to place their loved ones in a nursing home.⁹⁷

In addition to geographical concerns, there are financial barriers that most families must also consider. Families whose loved ones qualify for Medicaid, for example, are restricted in that they must choose among only those nursing homes in the area that are certified by Medicare or Medicaid.⁹⁸ Although a sufficient number of homes are qualified to accept “Medicaid direct” residents, those residents and their families have fewer options available to them.⁹⁹ Thus, families may look exhaustively at nursing homes in their environs without ever finding one that is both financially and geographically appropriate.¹⁰⁰ If and when families finally overcome these limitations, they may be either hesitant or powerless to move their loved ones to another nursing home that fits the requisite criteria.

Under prohibitive legislation, if families feel that their loved ones are receiving inadequate care, and they have gone through the proscribed steps with no resolution of their concerns,¹⁰¹ they may have no choice but to relocate them. Families who find themselves in this situation will have been legislatively estopped from installing surveillance with which they can check on their loved ones; and leaving their loved ones in an abusive environment is obviously no option. The only alternative left, short of moving their loved ones, is to visit more frequently. Residents who have families and friends who visit or call often usually get the best care because it sends the message to the nursing home that someone is monitoring that resident’s care.¹⁰² Additionally, frequent visits provide the opportunity for residents to

96. See OFFICE OF N.Y. STATE ATTORNEY GEN., HOW TO CHOOSE A NURSING HOME, at <http://www.oag.state.ny.us/seniors/nursing.html> (last visited Jan. 29, 2004).

97. See generally *id.*

98. Deborah Peterson, *Planning and a Grasp of Options Can Ease the Stress of Up-rooting a Life (Neglected to Death: A Family’s Decision, Part Seven of a Special Report)*, ST. LOUIS POST-DISPATCH, Oct. 20, 2002, at A22, available at 2002 WL 2592075.

99. *Id.*

100. *Id.*

101. See generally NAT’L SENIOR CITIZENS LAW CTR., *supra* note 93.

102. ILLINOISPROBONO.ORG, A FAMILY CAREGIVER’S GUIDE TO LONG TERM CARE: CHAPTER 10: HOW TO HAVE A GOOD VISIT, at http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_content&contentid=928 (last visited Feb. 9, 2004).

communicate any problems or for families to detect instances of abuse.¹⁰³ Some nursing home administrators recommend that if they are able to make personal visits, concerned family members should stop by the nursing home at different times of the day and different days of the week to ensure that their loved ones are being properly cared for.¹⁰⁴ This is more effective than regularly scheduled visits because caregivers will not know when to expect a call. These administrators also suggest taking time to speak to various nursing home staff members, ensuring that the caregivers are aware of a family member's personality, any special needs, and his or her likes and dislikes.¹⁰⁵

This tactic of visiting the nursing home unexpectedly may be successful for some families of nursing home residents; but what about family members who do not live within driving distance of their loved one's nursing home? Granny cams would allow families to check on their loved ones at any time, from anywhere in the world;¹⁰⁶ however, legislation prohibiting granny cam installation robs them of that option.

Moreover, even the efforts of those families who are able to visit their loved ones in the nursing home frequently—or even daily—may nonetheless fail to guarantee nursing home residents' welfare and comfort.¹⁰⁷ For instance, a Florida resident who lived only ten minutes from her father's nursing home visited him there every day.¹⁰⁸ Despite her daily visits, she felt certain that her father was receiving deficient care in his nursing home.¹⁰⁹ He suffered from several ailments frequently associated with inadequate care and neglect,¹¹⁰ and he was usually highly sedated when she visited.¹¹¹ When she complained to state investigators, she learned that she could not file abuse charges against her father's caregivers because she had no proof to substanti-

103. *Id.*

104. Peterson, *supra* note 98; *ABC News: Good Morning America*, *supra* note 62 (broadcasting the opinion of experts that another way, besides cameras, to ensure that loved ones are being properly cared for is to show up and "show up often").

105. Peterson, *supra* note 98.

106. Davidson, *supra* note 38.

107. Lade, *supra* note 15.

108. *Id.*

109. *Id.*

110. *Id.* (reporting that the resident in question "fell twice and was bruised . . . developed infections and ultimately a massive bedsore, and was so sedated that he usually couldn't speak").

111. *Id.*

ate her claim.¹¹² If she had the option of installing a granny cam in her father's room, she would have had the requisite proof to file a claim against her father's nursing home.¹¹³ She visited her father every day and was unable to ensure his care.¹¹⁴ What hope, then, do families who live farther from their loved ones and who are not able to visit the nursing home on a daily basis have of guaranteeing the adequate care and safety of their loved ones without the ability to install a granny cam?

Although frequent visits are the optimal means of discovering instances of inadequate care,¹¹⁵ the aforementioned example illustrates that they are not always enough. Granny cams would provide families with access to the same information when they cannot be there,¹¹⁶ and allow them to substantiate their claims of abuse and neglect when they observe a problem, but cannot observe the actual abusive or neglectful acts.¹¹⁷ Legislation prohibiting the use of granny cams would deprive families of this means, and often leave them feeling powerless to help those they love.

B. Permitting Granny Cams Will Disproportionately Benefit Only a Select Class of Nursing Home Residents

If all that is keeping a family from installing a granny cam is the legislative prohibition, that family may fare better under state proposals allowing the voluntary use of granny cams. Unfortunately, they may be the only people who do. The permissive scheme of granny cam use introduced by many states is inherently exclusionary.

The suggested legislation in other states has generally followed the guidelines currently in place in Texas.¹¹⁸ Texas's choice of legisla-

112. *Id.*

113. *Id.* (reporting Eileen Nevin's reaction to her inability to file abuse charges: "[The nursing home] should have a camera in [her father's room] . . . That would be proof.").

114. *Id.*

115. Pyle, *supra* note 64 (reporting that, according to the American Health Care Association (AHCA), one of "the most effective ways to assure high-quality care is through family involvement in patient care").

116. Hollis, *supra* note 25.

117. See Lade, *supra* note 15.

118. See H.R. 5786, 2001-02 Leg., Reg. Sess. (Mich. 2002) (proposed bill requiring nursing homes to permit residents or their legal representative to monitor the residents through the use of an electronic monitoring device if certain requirements regarding costs, privacy, consent, and access to the device are met); see also COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION: NURSING FACILITIES:

tion—neither making granny cams compulsory nor allowing a nursing home to refuse to admit someone because their family has requested a camera¹¹⁹—seems to appeal to legislators' sense of personal autonomy. It is merely allowing technology that the resident wants, the resident requests, the resident will pay for, and only the resident will see.¹²⁰ Additionally, permissive legislation is often introduced because it can best address granny cam opponents' concerns.¹²¹ When granny cams are installed only at the request of a resident, many concerns about the resident's privacy and the expense to the nursing home are alleviated.¹²² Therefore, legislators introduce versions of granny cam legislation as a compromise that they believe to be the most likely to pass.¹²³

Every state sponsor of a proposed granny cam bill, then, has advocated the permissive use of granny cams, allowing video monitoring only by request of the resident or the resident's family, and only so long as the resident incurs the cost.¹²⁴ Such measures also prohibit the nursing home from failing to admit a resident or removing a resident from the nursing home based on his or her request to install a granny cam.¹²⁵ In addition, they instruct the nursing home to provide space to mount the granny cam and to provide families with reasonable access to a power source.¹²⁶ Many state bills also specify that the nursing home must provide notice to all residents of their right to install a granny cam if they choose.¹²⁷

If states adopt this type of legislation, the benefit will, at best, be disproportionate. The disparate improvements to resident quality of life as a result of the permissive use of granny cams are few in comparison to the variety of factors excluding nursing home residents

ELECTRONIC MONITORING (2002), <http://stars.csg.org/ssl/2002/2002ssl80.pdf> (examining the legislative efforts in Maryland, New Jersey, North Carolina, and Ohio to pass bills legalizing the voluntary use of video cameras in nursing homes, without threat of nursing home retaliation).

119. H.R. 3344, 77th Leg., Reg. Sess. (Tex. 2001).

120. Goldsmith, *supra* note 47.

121. Tsigas, *supra* note 67.

122. *See id.*

123. *Id.* (noting that former Maryland Delegate, Sue Hecht, who has introduced three versions of granny cam legislation, modified this year's version to address opponents' questions).

124. *See* H.R. 5786, 2001–02 Leg., Reg. Sess. (Mich. 2002); COUNCIL OF STATE GOV'TS, *supra* note 118.

125. COUNCIL OF STATE GOV'TS, *supra* note 118.

126. *Id.*

127. *Id.*

from reaping the benefits from this type of legislation. The prohibitive cost of the cameras, the unavailability of family to monitor the footage that their granny cam has captured, and the lack of mental capacity to request their installation are just a few examples of the factors which create a two-tiered system in which some residents would benefit from granny cam technology while others are unable to do so.¹²⁸

The addition of a granny cam in a resident's room augments the already punishing cost of nursing homes, making it an unaffordable luxury for many residents. Currently, nursing homes cost anywhere from \$60,000 to \$100,000 a year for each resident,¹²⁹ while granny cams run anywhere from a few hundred to several thousand dollars, just for the purchase of the equipment.¹³⁰ Eyes on Elders, a technology company that markets a product line catering to video monitoring of the elderly,¹³¹ sells their Web cameras for \$629 to \$1584, depending on the system specifications of each camera,¹³² plus a \$20 per month fee to access Eyes on Elders's secure server,¹³³ and a \$10 per month cost for a data-only line to continuously upload images.¹³⁴ For this price, families are given a password and the ability to log on and view footage of their nursing home residents any time and as frequently as they want, twenty-four hours a day,¹³⁵ as well as access to technical support, should any problems arise.¹³⁶

Certainly some families have the financial security to provide their loved ones with this quality of technological protection; however, the majority of them do not have the means.¹³⁷ Even less expensive, less intricate technology is still too expensive for many families, resulting in a system in which only those residents who can afford it

128. See Edwards, *supra* note 4; Goldsmith, *supra* note 47; Zucco, *supra* note 1 (reporting the observation of Barbara Hengstebeck, Director of the Coalition to Protect America's Elders, that "[i]f a resident has no family, there's nobody to look at [granny cam footage] anyway").

129. Stephen Smith, *Survey Details Disparities in Nursing Homes*, BOSTON GLOBE, Nov. 13, 2002, at A1.

130. FLA. AHCA, *supra* note 16, at 10.

131. See generally EYES ON ELDERS, at <http://www.eyesonelders.com> (last visited Nov. 14, 2002).

132. EYES ON ELDERS, PRODUCT LINE OVERVIEW, *supra* note 33.

133. EYES ON ELDERS, EONE-SD, at <http://www.eyesonelders.com/remote/sd.html> (last visited Nov. 14, 2002).

134. *Id.*

135. *Id.*

136. EYES ON ELDERS, PRODUCT LINE OVERVIEW, *supra* note 33.

137. Zucco, *supra* note 1.

will benefit from video monitoring.¹³⁸ In fact, about seventy-six percent of nursing home residents rely exclusively on Medicare or Medicaid to finance their nursing home care¹³⁹ and will therefore not reap the benefits of legislation permitting the installation of granny cams.

Medicaid, on which two out of every three nursing home residents rely,¹⁴⁰ will not pay for the installation of granny cams. Medicaid will pay only for “medically necessary”¹⁴¹ expenses, including “most nursing home costs” for individuals sixty-five years of age or older and on a limited income.¹⁴² Although specific services covered by Medicaid vary by state, granny cams are not among those services enumerated by several states that have contemplated their use.¹⁴³ For example, neither Maryland nor Texas allows Medicaid to foot the bill for the cost of a granny cam.¹⁴⁴ The same is true in Florida, where, unless required by law, it is unlikely that Medicaid will reimburse nursing home residents for the cost of video cameras in their rooms.¹⁴⁵ Drawing on the rationale of these states, granny cams likely do not fall within the purview of “most nursing home costs”¹⁴⁶ in any state.

An additional granny cam-related cost arises for some nursing home residents who share a room. These residents who wish to install a camera must get permission from their roommates before doing

138. Edwards, *supra* note 4.

139. Celia S. Gabrel, Ctrs. for Disease Control & Prevention, *Characteristics of Elderly Nursing Home Current Residents and Discharges: Data from the 1997 National Nursing Home Survey*, 312 ADVANCE DATA (Apr. 25, 2000), <http://www.cdc.gov/nchs/data/ad/ad312.pdf>.

140. NURSING HOME ABUSE RES. CTR., NURSING HOME FACTS, at <http://www.nursinghomeabuseresourcecenter.com/facts/index.html> (last visited Feb. 27, 2004) [hereinafter NURSING HOME FACTS].

141. ILL. DEP'T OF PUB. AID, MEDICAID, at <http://www.dpailinios.com/medical/medicaid.html> (last visited Feb. 27, 2004).

142. CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., NURSING HOMES: PAYING FOR CARE, at <http://www.medicare.gov/Nursing/Payment.asp> (last visited Feb. 27, 2004) [hereinafter MEDICARE PAYING FOR CARE].

143. FLA. AHCA, *supra* note 16; MD. DEP'T OF HEALTH & MENTAL HYGIENE, SERVICES COVERED BY MARYLAND MEDICAL ASSISTANCE, at <http://www.dhnh.state.md.us/mma/Eligibility/medcareprog/pdf/MASERVIC42202.pdf> (last revised Apr. 2002); TEX. DEP'T OF HUMAN SERVS., IN-HOME AND FAMILY SUPPORT PROGRAM HANDBOOK, APPENDIX X: EXAMPLES OF ITEMS COVERED BY MEDICAID, at <http://www.dhs.state.tx.us/handbooks/ihsfp/appendix/X/> (last visited Feb. 27, 2004).

144. MD. DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 143; TEX. DEP'T OF HUMAN SERVS., *supra* note 143.

145. FLA. AHCA, *supra* note 16, at 19.

146. MEDICARE PAYING FOR CARE, *supra* note 142.

so.¹⁴⁷ If a roommate refuses to consent to the installation, and the nursing home is willing, the resident can be moved to another room where the subsequent roommate does not object.¹⁴⁸ This may not always be an option, however, as many nursing homes that are opposed to the cameras are not willing to go so far in accommodating a resident who wishes to install one.¹⁴⁹ In such cases, the resident must then choose between requesting a private room¹⁵⁰ at a higher room rate or continuing to live with his or her roommate, but without the benefit of a granny cam. An informal survey of nursing home rates suggests that private rooms are, on average, \$35 per day more expensive than semiprivate rooms with one roommate,¹⁵¹ amounting to approximately \$12,775 a year. Therefore, it is possible that even the one resident in three who does not depend on Medicaid for his or her care,¹⁵² and who may be able to afford to the technology of a granny cam, will still be excluded from its benefit if he or she cannot afford a private room.

Permissive legislation is also exclusive in that someone must actually inspect the footage. Granny cams will be of little benefit to the nursing home resident who has no family to log on to view the recording, thus ensuring that the loved one is receiving proper care.¹⁵³ Under the Texas law, the nursing home must make “reasonable physical accommodation”¹⁵⁴ for families who wish to install granny cams; however, no mention is made of monitoring the surveillance footage.¹⁵⁵ Similar language appears in the proposed granny cam legislation in Maryland,¹⁵⁶ Michigan,¹⁵⁷ and other states, again with no

147. See, e.g., H.R. 5786, 2001–02 Leg., Reg. Sess. (Mich. 2002).

148. Zucco, *supra* note 1.

149. See *id.*

150. *Id.*

151. See, e.g., AUGSBURG LUTHERAN HOME & VILLAGE, NURSING HOME ROOM RATES AND FEES, at <http://www.augsburg.org/rates.htm> (last visited Jan. 21, 2004); CHRISTIAN HEALTH CARE CTR., HERITAGE MANNER NURSING HOME, DAILY ROOM RATES, at http://www.christianhealthcare.org/elder_heritage.shtml (last visited Jan. 21, 2004); ORANGE BLOSSOM MANOR, MONTHLY ROOM RATES, at <http://www.l-and-m.com/orangeblossommanor.html> (last visited Jan. 21, 2004); TOWERS NURSING HOME, RATES, <http://www.towersnursinghome.citysearch.com/> (last visited Feb. 27, 2004).

152. NURSING HOME FACTS, *supra* note 140.

153. Zucco, *supra* note 1.

154. H.R. 3344, 77th Leg., Reg. Sess. (Tex. 2001).

155. *Id.*

156. H.D. 433, 2001 Leg., Reg. Sess. (Md. 2001).

157. H.R. 5786, 2001–02 Leg., Reg. Sess. (Mich. 2002).

suggestion that the nursing home must also monitor the footage.¹⁵⁸ Because the use of the granny cams under this legislation is permissive, and therefore voluntary, all costs and responsibilities for installing, maintaining, and monitoring fall to the family.¹⁵⁹

Nursing home residents without family lose out in another aspect as well. Many of the elderly residents in nursing homes will be unable to take advantage of permissive legislation because they are too infirm to express their wishes.¹⁶⁰ If they have no family who will speak for them, they are left without any recourse. It is these patients who need the cameras most, because they cannot assert their rights if a problem exists.¹⁶¹ Alzheimer's patients, for example, are often delusional and unable to inform nursing home administrators if their caregivers have in some way abused or neglected them.¹⁶² These people are incapable of articulating their pain, are powerless to request the technology that could "speak" for them,¹⁶³ and have no family to ensure that they are being properly cared for. Permissive legislation, therefore, is unresponsive to the needs of those who are most in need of its aid.

A final concern of the permissive use doctrine is the element of distrust that the presence of a video camera connotes to nursing home caregivers.¹⁶⁴ If an abusive relationship exists in a resident-caregiver relationship, there is likely very little trust to be lost, and a granny cam will only be beneficial. When residents elect to install granny cams as a preventative measure, however, the presence of constant surveillance could lead to hostility on the part of the caregiver because it implies that the resident does not trust the caregiver.¹⁶⁵ Nursing home officials have noted that a particular resident choosing to install a granny cam, while other residents apparently did not feel the need for this particular safeguard, would create an atmosphere of distrust

158. See, e.g., Tex. H.R. 3344.

159. See generally Md. H.D. 433; Mich. H.R. 5786; Tex. H.R. 3344.

160. Goldsmith, *supra* note 47.

161. See Kampert, *supra* note 2.

162. *Id.*

163. See *id.*

164. See Galloro, *supra* note 8, at 24.

165. Cathy Ates, Letter, *Regarding "Behind Closed Doors,"* TAMPA TRIB., Mar. 22, 2002, at 18, available at 2002 WL 6544224 (claiming that "[o]mnipresent surveillance treats [caregivers] like criminals and threatens to rip the fabric of trust that has to exist among the patient, the family and . . . staff"); see also Peele, *supra* note 41 (reporting that some people believe that the use of video surveillance "says 'we don't trust you' to even the best caregivers").

that would be both degrading and demoralizing to nursing home staff.¹⁶⁶ Should granny cams be mandated in all nursing home residents' rooms, this element of distrust is eliminated because the caregiver cannot fault a particular resident for the camera's presence.

C. Mandating Granny Cams Will Ensure That All Nursing Home Residents Are Equally Protected

Mandating the use of granny cams—either for all nursing homes, or only for those contravening the *Code of Federal Regulations* for nursing home quality of life¹⁶⁷—is advantageous because it is wholly inclusive. If nursing homes are instructed to install video surveillance systems, every resident who could benefit from the aid of granny cams will receive it, regardless of any existing socio-economic, familial, or mental health impairments.¹⁶⁸ Additionally, any possibility of only those individuals with cameras in their rooms receiving the proper care is eliminated, as is the element of distrust that develops when only particular residents elect to install a granny cam.¹⁶⁹ The difficulties that accompany both permissive legislation and legislation prohibiting the use of granny cams are not present under this mandate. There are logistical considerations—namely, cost of compliance and questions regarding who will monitor the footage—but they may largely be reconciled.

One camera is expensive in its own right, but the nursing home must multiply this cost by the number of residents' rooms in their facility, in addition to installing a camera system that monitors public areas—hallways, recreation rooms, cafeterias, and even the exterior of the building—at a cost of approximately \$20,000,¹⁷⁰ depending on the size of a particular facility. Although this expense is daunting, the

166. David Royse, *Review of 'Granny Cam' Idea Is Delayed: A Task Force Wants More Time for Its Report on Whether to Let Cameras in Nursing Homes*, ORLANDO SENTINEL, Jan. 1, 2002, at D3, available at 2002 WL 3022130.

167. See generally 42 C.F.R. § 483.15 (2002).

168. See Zucco, *supra* note 1 (suggesting that private, individual cameras would not affect most people, only those who can afford them).

169. See Dunkelberger, *supra* note 29 (suggesting that constant monitoring will damage the personal bonds between residents and caregivers); Zucco, *supra* note 1 (suggesting that cameras could create a climate of suspicion and mistrust between residents and caregivers).

170. Kampert, *supra* note 2 (reporting that a Lake City, Florida, nursing home installed an \$18,000 camera system in their common areas).

tapes themselves or the cost of Internet access are inexpensive.¹⁷¹ Consequently, after the initial sticker shock of the installation, the recurring cost is negligible.¹⁷² Furthermore, if cameras were made mandatory by law, nursing homes would have to pay the added expense of the granny cams as an ordinary cost of doing business.¹⁷³ Nursing homes would eventually accept granny cams as a business expense and pay for them just as they pay the costs of complying with other existing mandates, such as providing adequate housekeeping and maintenance and complying with standards for the safe storage and preparation of food.¹⁷⁴ Blank tapes would become a standard shopping list item, just like toilet paper or light bulbs.

Some concern exists, however, that in order to comply with such a mandate, the homes will be forced to cut costs elsewhere, by reducing staffing and programs offered, to raise prices, or both.¹⁷⁵ Although this result is sure to be the response to the legislation in some facilities, this does not always have to be the case. For example, a Florida couple who operates a for-profit nursing home installed a camera system, and, although the granny cams were expensive for the facility, the owners were able to finance their installment without significantly increasing prices and without cutting any programs.¹⁷⁶ The majority of the costs were defrayed when their liability insurance premiums dropped significantly after the cameras were installed.¹⁷⁷ Furthermore, the couple suggested that private nursing homes that would not otherwise be able to finance granny cam installations without significantly raising prices or cutting costs might approach local law en-

171. See, e.g., EYES ON ELDERS, EONE-SD, *supra* note 133 (listing the cost of an ISP to acquire Internet connection at \$21.95 per month).

172. See FLA. AHCA, *supra* note 16, at 17.

173. *Id.* at 10.

174. See CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., NURSING HOMES: ABOUT NURSING HOME INSPECTIONS, at <http://www.medicare.gov/Nursing/AboutInspections.asp> (last visited Jan. 21, 2004) [hereinafter MEDICARE, NURSING HOMES].

175. See generally Jennifer Gimler Brady, *Long-Term Care Under Fire: A Case for Rational Enforcement*, 18 J. CONTEMP. HEALTH L. & POL'Y 1, 46-48 (2001) (noting that nursing homes already devote significant resources to regulatory compliance efforts, but that the successes of many regulations have been limited by the lack of funding necessary to implement the recommendations). It follows that if nursing homes already lack adequate funding to comply with existing mandates, then there is legitimate concern they will be forced to cut costs or raise their own funds (through higher prices) if they are going to attempt to comply with a new granny cam mandate.

176. Kampert, *supra* note 2.

177. *Id.*

forcement for help.¹⁷⁸ Police departments in their area already had access to technology similar to that of the granny cams that the nursing home needed, and they were willing to share it in exchange for the nursing home's cooperation in reporting and prosecuting allegations of abuse.¹⁷⁹

Despite possible budgetary difficulties, some legislators believe it inherently correct for nursing homes, not families, to incur the cost of granny cams.¹⁸⁰ In their view, a nursing home accepting the price of maintaining a video surveillance system is analogous to accepting the responsibility for maintaining certain residential living conditions, as required by federal law.¹⁸¹ These legislators point to the fact that nursing homes accept federal funds in exchange for performing the function of their job.¹⁸² Their job entails doing whatever is necessary to provide their residents with a certain quality of life.¹⁸³ This quality of life includes a level of care free of abuse and neglect.¹⁸⁴ Therefore, if installing a granny cam is the necessary means for achieving this requisite lifestyle, then it follows that by accepting the federal funds, nursing homes have, in effect, agreed to provide granny cams.¹⁸⁵ This is all the more true if state legislatures specifically mandate that granny cams are a necessary part of maintaining residents' quality of life. To require families to assume this financial obligation is therefore wholly inappropriate because it shifts the responsibility of providing quality care from the nursing home, where it belongs, to the resident's family members.¹⁸⁶

In some cases, nursing homes, not families, are the only entities that may install the cameras.¹⁸⁷ Granny cams mounted in a resident's room are a valuable tool in documenting what goes on in that room; however, it does not capture what occurs in the bathrooms, in the hallways, or in the nursing home common areas, including outdoors.¹⁸⁸ Even if families are granted permission to install a camera in

178. *Id.*

179. *Id.*

180. *Id.* (reporting the opinion of Iowa Senator Chuck Grassley).

181. *See id.*

182. *Id.*

183. *Id.*

184. *See id.*

185. *See id.*

186. *Id.*

187. *See Edwards, supra note 4.*

188. *Id.*

their resident's room, they cannot be completely assured of their loved one's well-being, because abuse and neglect can occur in other places, outside of their authority to electronically monitor.¹⁸⁹ Legislation permitting families to install a granny cam in their loved one's room limits that right to the room of the resident in question; therefore, families could not, even if they had the means, install cameras in nursing home common areas.¹⁹⁰ Only legislation mandating that nursing homes install granny cams will sufficiently fill this gap left by permissive legislation.

Like the expense of granny cams, if they are compelled to do so, nursing homes will eventually accept as commonplace the added burden of monitoring granny cam footage. This may be less of a burden than it appears because nursing homes do not necessarily have to inspect every second of tape.¹⁹¹ Instead, they can keep the tapes on file for a specified period and review the appropriate tape only if an allegation of abuse or neglect were reported during that time.¹⁹² If no such allegation occurs during the specified period, the tapes can simply be reused.¹⁹³ A live feed could also be made available at the nurses' station, so that caregivers may readily check on the welfare of their charges;¹⁹⁴ however no one need monitor continuously.

Although this newly acquired administrative duty might initially pose some difficulty for nursing home administrators, they could capitalize on the value of video surveillance as a management tool. In fact, Eagle Eye Technologies, Inc., a granny cam provider, markets its own "virtual visitation" to caregivers as precisely this type of tool.¹⁹⁵ The company advertises that its cameras will provide for the routine observation of nursing home employee capabilities, documentation for administrative functions such as insurance hearings, and a selling point for potential residents.¹⁹⁶

Others in the industry have discovered the potential use of granny cams for administrative purposes. One nursing home owner,

189. *Id.*

190. *See, e.g.*, H.D. 433, 2001 Leg., Reg. Sess. (Md. 2001); H.R. 5786, 2001-02 Leg., Reg. Sess. (Mich. 2002); H.R. 3344, 77th Leg., Reg. Sess. (Tex. 2001).

191. *See* FLA. AHCA, *supra* note 16, at 2.

192. *Id.*

193. *Id.*

194. *Id.*

195. EAGLE EYE TECHS., INC., *GRANNY CAM—VIRTUAL VISITATION—KINDER CAM*, at <http://www.goagleeye.com/virtual.html> (last visited Nov. 20, 2002).

196. *Id.*

for example, utilized granny cam footage in decisions regarding her home's budget.¹⁹⁷ She made the decision to retain her music and art therapy program when she saw on the video footage how well her residents reacted to it.¹⁹⁸ Other nursing home administrators use granny cam technology as a means for training their staff.¹⁹⁹ Much of the reported conduct is not so much abusive as it is neglectful—it is the result of poorly trained staff who are delivering inadequate care, often without intending to do so.²⁰⁰ Granny cams could be utilized in training staff on proper procedure²⁰¹ and ensuring that workers remain on task,²⁰² thus successfully eliminating many cases of abuse and neglect that might otherwise go unnoticed.

Some opponents are concerned, however, that granny cams will actually lead nursing home caregivers to be more neglectful, through the exploitation of granny cam technology.²⁰³ A nursing home reform specialist voiced her fear that the presence of granny cams will lead to “virtual care”²⁰⁴ in which caregivers will monitor a resident's room, rather than attending to the resident personally.²⁰⁵ Instead of answering a resident's call bell, for example, a caregiver could first check the monitor at the nursing station before deciding whether to actually go to the resident's room,²⁰⁶ whereas before the advent of granny cam technology, caregivers would have no other option than to check on the resident directly. Some legislators are also concerned that staff will rely too much on video displays, thus visiting the resident's room less often.²⁰⁷ Currently, nursing home residents only receive approximately three and a half hours of direct, personal care within a

197. Galloro, *supra* note 8, at 25.

198. *Id.*

199. See FLA. AHCA, *supra* note 16, at 3.

200. Kampert, *supra* note 2.

201. NPR: *Talk of the Nation*, *supra* note 19 (broadcasting the opinion of Cindy O'Steen, owner of Southland Suites assisted living facility in Lake City, Florida, that granny cam footage is valuable to play back to staff in order to “show them better ways to approach a resident or to do things to improve the quality of care”).

202. Galloro, *supra* note 8, at 25 (reporting that Jacqueline DuPont, owner of six long-term care facilities uses video surveillance mainly “as a way to ensure workers aren't being lazy”).

203. Edwards, *supra* note 4.

204. *Id.*

205. *Id.*

206. *Id.*

207. Jack Elliott, Jr., ‘Granny Cam’ Proposal Rejected in Mississippi Senate, ASSOCIATED PRESS NEWSWIREs, Mar. 5, 2003.

twenty-four-hour period,²⁰⁸ and nursing home officials fear that granny cams will ultimately further reduce this greatly needed personal care.²⁰⁹

Some in the nursing home industry fear that the presence of video surveillance may also lead to less personalized care in that caregivers under surveillance would feel pressured to do everything by the book.²¹⁰ Caregivers who would normally be inclined to hug a resident with whom they have built a relationship, or kiss them on the cheek, for example, may refrain from doing so for fear that their affection would be misconstrued on camera.²¹¹ The personal contact, touted by nursing home staff to be “more important than almost everything else”²¹² in nursing home care, would be lost.

Granny cam advocates insist that this personal care should not be discontinued due to the presence of the cameras. While recognizing caregivers’ concerns, one such person analogized to a situation in which a day-care worker removes a child’s clothing to change the child’s diapers.²¹³ She submits that, absent some allegation or other cause for concern, most parents viewing footage of this incident would assume that the worker was trying to change the child’s diaper, not that he or she was trying to harm or abuse the child.²¹⁴ The same holds true for a nursing home caregiver who hugs or kisses a resident with whom he or she has built rapport.

In addition to an effective training device for the prevention of elder abuse, granny cams also may function as a punitive measure in nursing homes that have been the venue of an inordinate number of abuse complaints. Currently, federal law provides that in the incidence of an allegation of abuse, a nursing home must conduct an investigation and submit a report to survey and certification agencies.²¹⁵

208. NURSING HOME FACTS, *supra* note 140. Registered nurses in Medicare/Medicaid-certified nursing homes spend an average of forty-two minutes a day with each patient; licensed nurses spend the same amount of time per patient per day; while certified nursing assistants spend an average of two hours, six minutes per day with each patient; for a total of three and a half hours of direct care from all sources per resident. *Id.*

209. Edwards, *supra* note 4.

210. Zucco, *supra* note 1.

211. *Id.*

212. *Id.* (quoting Beverly Fuller, a licensed practical nurse who works in a Florida nursing home).

213. Dunkelberger, *supra* note 29.

214. *Id.*

215. NPR: *Talk of the Nation*, *supra* note 19.

If a nursing home is then found to be in violation of the minimum Medicare and Medicaid quality and performance standards enacted to promote “maintenance or enhancement of the quality of life of each resident,”²¹⁶ the Centers for Medicare and Medicaid Services (CMS) may impose any combination of prescribed penalties.²¹⁷ Such consequences include fines, denial of Medicare or Medicaid payments to the nursing home, installation of either a temporary manager or state monitor to oversee nursing home operations,²¹⁸ and for the most serious deficiencies, transfer of residents and closure of the nursing home.²¹⁹ Another possibility, not yet contemplated by the federal government,²²⁰ is requiring those nursing homes that CMS cites for deficiencies to install a granny cam system. Amending federal regulations to encompass this possibility would bring the benefits of granny cams to the residents who need it most—those who may already be in peril.²²¹ Granny cams will be helpful to these residents in the investigation stage, not just as a means of reprimand.²²² In addition, unlike the presence of a temporary manager or state monitor, who will leave the nursing home when the deficiency has been corrected, the granny cams provide permanent benefits.²²³

Even those who are quick to dismiss the potential benefits of granny cams under normal circumstances admit their utility in nursing homes that are experiencing problems.²²⁴ The uncertainty regard-

216. 42 U.S.C. § 1395i-3 (2000).

217. MEDICARE, NURSING HOMES, *supra* note 174.

218. *Id.*

219. Brady, *supra* note 175, at 17.

220. *See id.* at 15–16, 22–23 (listing all of the contemplated sanctions of the Omnibus Reconciliation Act of 1987 as civil or monetary penalties, appointment of a substitute manager, in-house training on the problematic issue, implementation of an HCFA plan for correcting the problem, placement of a state monitor in the nursing home, and transfer of residents and closure of the facility; and also listing updated penalties imposed by President Bill Clinton’s 1998 Nursing Home Quality Initiative).

221. *See id.* The regulations create a framework for evaluating the relative seriousness of nursing home deficiencies, ranging from “no actual harm with the potential for minimal harm” to the more extreme “immediate jeopardy to the resident health or safety.” *Id.* at 16. Under this framework, the sanctions are applied according to the seriousness of the identified deficiencies, so that residents who are in immediate jeopardy will receive the benefits of the most aggressive remedies. *Id.*

222. Goldsmith, *supra* note 47.

223. *Id.*

224. Lade, *supra* note 15 (reporting the belief of Toni Ricke, Coordinator of a Longterm Care Ombudsman Council, that “[cameras] might be good if a facility was having problems”).

ing the monitoring of granny cam footage, however, is a particularly sensitive situation under this variety of proposed legislation. Can a nursing home that was cited for putting its residents' health in jeopardy be trusted to oversee the implementation of its own "punishment?" If it cannot, who will review the footage in its stead? The obvious option is to allow all the residents' families access to the footage over the Internet, in the same manner as if the family itself had requested and installed the camera.²²⁵ Yet, this does not settle the problem facing those residents who are without family, as previously discussed.

The less troublesome alternative is for the nursing home to engage the services of an independent company to control the tapes and make them available online to residents' families and nursing home administration.²²⁶ In this way, families can check on their loved ones and nursing homes can check on their residents with no family, yet everyone will sleep a little better at night knowing that an independent source is regulating and reviewing the tapes, should any problems arise. This service, like the cost of the cameras or of the tapes, is an added institutional cost that the nursing home will incur;²²⁷ nevertheless, it is likely the best option to preserve the integrity of the tapes and ensure that only families and authorized officials gain access to them.²²⁸

IV. Recommendation

The presence of granny cams is, of course, a contentious issue, sharply divided along ideological lines between families whose interest is in protecting their elderly loved ones from potential abuse and nursing homes that are concerned for their staff, their residents, and their reputation. Balancing these competing interests is no easy task, as advocates on both sides of the issue feel that they are looking out for the nursing home residents' best interests.²²⁹ For this reason, sev-

225. EYES ON ELDERS, PRODUCT LINE OVERVIEW, *supra* note 33 (describing the way in which families gain access to granny cam footage over the Internet).

226. Kampert, *supra* note 2 (noting that a Lake City, Florida, nursing home hired an independent company to control the tapes).

227. FLA. AHCA, *supra* note 16, at 10.

228. See FLA. MED. DIR. ASS'N, *supra* note 59, for the proposition that the integrity of the tapes is one of the principle concerns regarding their proper use.

229. Lade, *supra* note 15 (reporting the opinion of Caralee Starnes, an AHCA supervisor, who noted that views regarding the propriety of granny cam use are extreme "with both sides claiming they have the residents' best interests at heart").

eral state legislatures that have contemplated the possibility of permitting the use of granny cams have opted instead to implement an experimental period in order to assess the effect of cameras in nursing homes.²³⁰ Massachusetts is still in the midst of its study;²³¹ however, Florida has already reached its conclusion.²³²

The Florida study collected the opinions of legal, educational, and health care professionals, and solicited comments from the general public, including nursing home residents and their families, through the mail, posting to a website, and at a public hearing.²³³ It concluded that the state should ratify legislation allowing individual Floridians to choose to use cameras in resident rooms.²³⁴ It found that both the deterrence of elder abuse and neglect, and the management benefits to the nursing home supported the proposition that voluntary use of cameras would work well in Florida.²³⁵

This note operated in a like manner to the Florida study by amassing opinions from newspapers, Internet sites, radio and television broadcasts, and proposed legislation as to which legislative response—permissive, prohibitive, or mandatory—will work best for all states' citizens. Based on widespread response to the granny cam debate, states will best serve their residents, especially their nursing home residents, by enacting legislation making granny cams a mandatory component of nursing home life.

That is not to say that residents who are opposed to having a camera in their room will have one forced upon them. Granny cams should be available to everyone, but not compulsory for anyone who is not comfortable with them. Cameras may still be installed in every resident's room, in preparation for the possibility that the resident may change his mind or that the room's occupancy changes. It is simple enough to turn off or obstruct the view of those cameras, while preserving the option of using the cameras in the future.

230. *Granny-Cam Legislation Is Paused*, *supra* note 64 (noting that Maryland, Massachusetts, and Florida have all endorsed such studies).

231. *See id.*

232. FLA. AHCA, *supra* note 16, at 1.

233. *Id.*

234. *Id.* at 19.

235. *Id.*

V. Conclusion

Parties on both sides of the granny cam debate recognize that cameras cannot replace, but can only supplement the efforts of families and nursing home staff. However, the obstacles that are inherent in the remaining legislative alternatives of either permitting or prohibiting the use of granny cams become nonexistent or easily resolved should the cameras be made compulsory. The most pressing difficulties are determining who will pay for the installation of the cameras and who will monitor the footage that they capture. Should state legislatures choose to mandate the use of granny cams, both the added expense and the task of screening the footage will be incurred by the nursing homes. When mandated, these duties, which may originally appear overwhelming, become operating costs that nursing homes will conform to and administer in the same way that they meet the requirements of any mandated standard of living. Nursing homes, rather than the families of individual residents, are in the best position to do so. In this way, families of elderly nursing home residents are allowed one of the most effective weapons in the fight against elder abuse; and no one is deprived of its benefits.