

Privacy, Security, and Choice: Cameras in Assisted Living Settings

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Abstract

The use of video cameras in assisted living settings has increased considerably in recent years, raising questions about how to provide a secure environment while protecting residents' right to privacy. This article explores the concept of "privacy" as it applies to assisted living, details how state regulatory agencies have addressed the use of cameras in assisted living settings, reports how cameras are used in assisted living facilities, proposes a case-specific evaluation of potential privacy violations through use of a weighted matrix, and provides best practices for camera use in assisted living.

Introduction

While there are no quantifiable estimates for the combined number of public and private sector cameras in use in the United States, we are more likely as not to be on camera whenever we are outside of our private homes. The ubiquity of personal electronic devices with video capability has offered the people as much opportunity to surveil as closed-circuit television has offered the state and private businesses. It is no surprise that camera use in assisted living settings by both facilities and residents is also increasing.

In most states, individual rights for persons who receive services in congregate care settings such as child care centers, child residential programs, or programs for persons with severely impaired cognitive functioning are protected by regulation. The most basic example of such protections includes the right to be free from abuse and restraint use or the right to be treated in a dignified manner. The same is true for assisted living settings. However, unlike other congregate care settings, the people served in assisted living generally have the legal right and cognitive ability to exercise and enjoy the same degree of rights, responsibilities, and independence as adults who do not require congregate care services. As a result, assisted living regulations tend to include more abstract rights, such as the right to make decisions about one's healthcare or the right to leave and return to the facility at will, making balancing the need to protect resident safety against the responsibility to protect residents' rights one of the foremost challenges in regulating and operating an assisted living facility. This is especially so given the emphasis on self-direction and individual choice that exists in most assisted living philosophies.

One such abstract right that is unique to assisted living residents is the right to privacy in all areas of life. In most states, the right to privacy is included among the resident rights protected by regulation. However, very few states address privacy in the context of how it is impacted by camera use; most regulations focus on "traditional" privacy protections such as privacy in bathing, dressing, sending mail, using the telephone, and meeting with others. These protections essentially define privacy in assisted living as "the right to do things alone or with others of their own choosing." What is missing from the conversation is whether one is truly alone in the presence of an electronic intermediary – a camera – between the resident and an "uninvited" third party or parties who may or may not be identified and who may or may not actually be viewing the resident.

Defining Assisted Living

Before proceeding further, it is necessary to clarify what is meant by the term "assisted living." The federal government does not have an official definition of the term, and the definition varies across each state regulatory agency. In a 2012 report, the National Center for Health Statistics defined assisted living settings (under the term "residential care facilities") as facilities that "provide housing and supportive services to persons who cannot live independently but generally do not require the

skilled level of care provided by nursing homes.” The Assisted Living Federation of America reports that “more than half of all [assisted living] residents are age 85 or older, and nearly 40 percent of residents require assistance with three or more activities of daily living.” For the purposes of this article, the term “assisted living facility” means “a congregate care setting that provides housing, food, and personal assistance to older adults who require physical assistance with self-care but who do not require skilled medical services on a continuous basis and who are generally able to manage and direct their own affairs.”

It is important to understand that a facility’s size does not determine whether or not it qualifies as assisted living, and cannot be used as the single factor in determining whether camera use violates resident privacy. The National Center for Assisted Living’s 2010 *Assisted Living Community Profile* found that

About 50 percent of all the communities were considered small with four to 10 beds. Sixteen percent of the communities had 11 to 25 beds, and 28 percent were categorized as large communities with 26 to 100 beds. The smallest percentage (7%) are extra-large communities with more than 100 beds. (2010 National Survey of Residential Care Facilities is based on communities with four or more beds.) Only 10 percent of all residents live in small communities.

Facility size is important when exploring the concept of “private space” in assisted living. This article considers “private space” to be any area where a person would reasonably expect not to be subject to video surveillance. In a private residence, we generally assume that whatever is “inside” is private and “outside” is public: one would reasonably expect not to be videotaped in his living room, but cannot hold the same expectation on the sidewalk in front of the house. These dichotomous classifications cannot be applied as easily in assisted living facilities, which serve as both residents’ private homes and as public spaces in that they are accessible to other residents, staff, visitors, and other persons conducting business in the facility (such as a building contractor or postal employee). The challenge of establishing private space is compounded by the myriad physical and social structures of assisted living facilities and the absence of widely-recognized distinctions between them, but acknowledging these distinctions is necessary in any examination of privacy expectations. In general, assisted living facilities can be grouped into three similar socio-physical types:

Home-Based Residence – An assisted living facility located in the operator’s private home that generally includes the owner and a small number of residents (generally between 4 and 6). All bedrooms, bathrooms, common areas, and dining areas are shared by all residents and by the owner. There are very few areas inaccessible to residents.

Small-Scale Residence – An assisted living facility located outside of the owner’s private residence that is generally occupied by 7-30 residents, includes multiple direct-support staff, and is administered by the owner. Most bedrooms and bathrooms are shared by all residents, with a small number of private rooms and bathrooms. Common areas and dining areas are shared by residents. There are more inaccessible areas than in home-based residences, but fewer than in large-scale residences.

Large-Scale Residence -- An assisted living facility located outside of the owner’s private residence that is generally occupied by more than 30 residents (although capacity usually ranges from 70-100 residents), includes a large hierarchy of administrative, management, and direct-support staff, and where the owner has very little direct involvement. Most residents have a private bedroom and private bathroom; some facilities may offer “living units” that include kitchen and dining areas. Common areas and dining areas are shared by residents. At least 1/3 of the physical site is inaccessible to residents.

A facility's socio-physical classification is directly related to the number of private spaces present in a given facility. Home-based residences tend to function in a communal fashion. It is not uncommon for owners and residents to eat meals together, engage in the same pastimes, and participate in the same social functions. The residence functions very much like a private home, and as a result is almost entirely private space. All of the spaces within the home except those inaccessible to residents "belong" to the community of individuals who share the living environment. This is usually not the case with small- and large-scale residences, which include interior corridors, lounge areas, dining rooms, and courtyards that are accessible to residents, visitors, staff, and anyone else present in the facility. These spaces are the ones most difficult to clearly classify as public or private. A resident who wishes to eat must traverse the corridor to reach the dining room just as a person in a private home must walk from her bedroom to the dining area. Unlike a private home, the corridor "belongs" to one resident just as much as it "belongs" to another resident and, to a lesser extent, to staff. Most people would object to being recorded while watching television in their living rooms, but the "living room" in small- and large-scale residences is usually a common lounge area in a conspicuous place. Because these types of spaces are both public and private, other factors must be considered when determining the appropriateness of camera use.

What is Privacy?

The vast majority of literature addressing privacy exists in a legal context; there is little if any published research addressing privacy in assisted living settings (or any other type of congregate care environment). Nevertheless, the law's view of the concept of privacy can in some ways be applied to privacy in such environments. Prosser (1960) identified "four distinct kinds of invasion [of privacy] of four different interests," which included:

1. "Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs." In describing intrusion, Prosser noted that "the intrusion must be something which would be offensive or objectionable to a reasonable man," and that "the thing into which there is prying or intrusion must be, and be entitled to be, private."
2. "Public disclosure of embarrassing private facts about the plaintiff." In his examination of the concept of public disclosure, Prosser set forth three criteria that must be present for a privacy violation to occur: disclosure of the private facts must be public, not private; the facts disclosed to the public must be private facts, and not public ones; and that whatever is made public must be one which would be offensive and objectionable to a reasonable person.
3. "Publicity which places the plaintiff in a false light in the public eye." Prosser described invasion of privacy via placement in a false light as one where "the interest protected is clearly that of reputation," noting that the primary difference between this type of invasion of privacy and public disclosure being that "one involves truth and the other lies, one private or secret facts and the other invention."
4. "Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Prosser noted that appropriation of one's likeness "is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."

From Prosser we deduce that camera use in assisted living would be a violation of resident privacy in the following circumstances:

- The filming or monitoring of a resident in an area where privacy is clearly expected, such as bedrooms and bathrooms.
- The use of camera footage to disclose embarrassing facts about a resident, such as a group of direct-support staff watching a recording of a resident's incontinence episode for amusement.
- The use of camera footage to make false accusations or assumptions about a resident, such as use of recordings showing residents entering one another's bedrooms to "conclude" that they are engaged in sexual activity.
- The use of camera footage in promotional or advertising materials without resident consent.

Like Prosser, Solove's *A Taxonomy of Privacy* (2006) attempts to classify privacy, but in contemporary American life. Solove's taxonomy goes on to establish four types of "harmful activities" that relate to privacy. The first harmful activity identified relates to surveillance as information collection, where surveillance is defined as "the watching, listening to, or recording of an individual's activities," which of course is the very essence of camera use. Solove acknowledges that "we all watch and listen, even when others do not want us to, and we often do not view this as problematic," but goes on to note that surveillance can be problematic when "done in a certain manner – such as continuous monitoring." Solove notes that "not only can direct awareness of surveillance make a person feel extremely uncomfortable, but it can also cause a person to alter her behavior," and furthermore, "there can be an even greater chilling effect when people are generally aware of the *possibility* of surveillance, but are never sure if they are being watched at any particular moment" (emphasis in original).

The second harmful activity identified is secondary use of information processing. Solove defines "information processing" as "the use, storage, and manipulation of data that has been collected," and classifies "secondary use" as "the use of data for purposes unrelated to the purposes for which the data was initially collected without the data subject's consent." From Solove's perspective, storing the information captured by a camera and using it for the disclosed purpose (such as resident security) would not constitute a harmful activity; however, if the video was used for any other purpose than the one disclosed, the act would indeed be harmful. For example, if an assisted living facility records the hallway that leads to the entrances of residents' living units for the disclosed purpose of security, but also uses the recordings to monitor residents' behavior patterns, the act would be considered harmful. Solove writes that secondary use "creates a dignitary harm, as it involves using information in ways to which a person does not consent and might not find desirable." A resident may not object to, or in fact may desire, camera use to prevent theft, but would likely object to use of cameras to profile her behavior.

The third harmful activity identified is exposure through information dissemination. This is the type of privacy violation most readily envisioned when contemplating privacy in assisted living. Solove explains exposure as "the exposing to others of certain physical attributes of a person...that people view as deeply primordial, and their exposure often creates embarrassment and humiliation." It is readily apparent how easily the concept of exposure manifests in assisted living environments: residents not only engage in all manners of activities of daily living in these environments – bathing, dressing, eating, defecating, etc. – but usually do so in the presence of a staff person due to the need for physical assistance in these areas. The necessity of exposing one's most private activities to a stranger is surely difficult enough; for any of these activities to be captured on camera would be automatically dismissed by any reasonable person.

The final harmful activity to be addressed in this article is invasion by intrusion, which Solove defines as "invasions or incursions into one's life [that disturb] the victim's daily activities, alters her routines, destroys her solitude, and often makes her feel uncomfortable or uneasy." Solove distinguishes

intrusion from other types of harmful activities in that it “interrupts one’s activities through the through the unwanted presence or activities of another person.” Intrusion is an unwanted infringement on a person’s solitude.

Solove’s work shows that assisted living facilities using cameras must:

- Ensure that camera use does not force residents to alter their behavior.
- Adhere to the established and disclosed purpose of camera use.
- Limit the ability of the information captured by a camera to be disseminated to persons or entities that have no reasonable need to access the information.
- Restrict camera use to areas where residents do not have a reasonable expectation of solitude.

As will be shown below, cameras in assisted living settings are used primarily for the security of residents, especially from theft of personal property by facility staff. In light of the need to balance security with privacy rights, it is necessary to explore how camera surveillance for public safety impacts the privacy rights of citizens in public places. After outlining the widespread scope of camera use in the United States and the United Kingdom, Slobogin (2002) examines the reasons why cameras may not be effective in crime reduction, which include the camera operators’ inability to clearly discern what is happening on camera, operator distraction (in the case of live-feed cameras), poor recording quality, poor lighting or similar environmental limitations, misinterpretation of what has been captured on video, and cameras’ failure to serve as a deterrent to crime if the presence of the crime is not known. All of these limitations can be (and typically are) mitigated in assisted living. The quality of surveillance equipment available for private use has certainly become more sophisticated since Slobogin published his analysis, reducing concerns about video quality. Moreover, assisted living facilities tend to be well-lit and free from other environmental contaminants. The nature of the “crimes” observed nearly always involve direct support staff entering a resident’s living unit at a time when (s)he would have no work-related reason to do so, reducing misinterpretation of what has occurred. The greatest mitigating factor is that assisted living is a “closed system.” There are generally a finite number of “suspects” and “victims,” making identification of parties involved much easier than monitoring a public street with a practically-infinite number of persons who may be involved.

Slobogin goes on to provide extensive references that, like Prosser and Solove, show that humans change their behavior when being watched, and that behavioral changes are “even more likely when the surveillance involves not just observation but recording of one’s activities.” He goes on to write that “surveillance can chill conduct, even though it takes place in public and is meant to be seen by others.” When addressing the difference between recorded material and observation by a person in public-sector camera use, Slobogin writes

People who engage in expressive conduct in public know that they will be observed. But they may choose, like the pamphleteer or the petitioner, not to reveal their identity, for all sorts of reasons. Camera surveillance virtually nullifies that effort. Because the camera’s recorded images are far better than an informer’s memory, it vastly improves government efforts to link visages with names.

Slobogin then examines what he calls the “two versions of the right to privacy, one focusing on protection-of-personhood and the second on freedom-from-normalization” stemming from a person’s modifying his behavior as a result of surveillance. The former addresses an individual’s right to define themselves, of which privacy, he writes, is a necessary component. If a camera captures everything all of the time, even in public, it “prevents us from retaining control over how we present

ourselves.” The latter addresses how monitoring not only modifies an individual’s behavior, but shapes behavior into social norms. When the state takes actions that limit or curtail unacceptable behavior, it also limits the range of “permissible” behaviors, leading to normalization of the subject population.

Slobogin’s work suggests that the limitations of camera use by law enforcement would not apply in assisted living (making camera use a viable option for security), provided that the use of cameras does not lead residents to change their behaviors.

McClurg’s exploration of the right to privacy in public places (1995) offers a “redefinition of the tort of intrusion [that] strikes a workable balance between legitimate privacy interests in public places and the competing interests of free social interaction and freedom of speech.” McClurg identifies an actor of intrusion as “one who intentionally intrudes, physically or otherwise, upon the private affairs or concerns of another, whether in a private physical area or one open to public inspection...if the intrusion would be highly offensive to a reasonable person.” He goes on to provide a matrix for identifying whether a given intrusive act would be “highly offensive to a reasonable person.” Because the article is related to tort law, the matrix uses the terms “plaintiff” and “defendant.” For the purposes of this article, the matrix, which appears below, has been modified to use appropriate jargon: “plaintiff” has been replaced with “subject,” and “defendant” has been replaced with “offender”¹:

1. The offender’s motive.
2. The magnitude of the intrusion, including the duration, extent, and means of the intrusion.
3. Whether the subject could reasonably expect to be free from such conduct under the habits and customs of the location where the intrusion occurred.
4. Whether the offender sought the subject’s consent.
5. Whether the actions of the subject would lead a reasonable person to believe that the subject did not wish the intrusion to occur.
6. Whether the offender disseminated images of or information about the subject that was acquired during the intrusive act.
7. Whether the images or information gathered during the intrusive act have a legitimate public interest.

Ku (2005) builds on McClurg’s concept in his analysis of privacy rights relating to camera phones. Ku draws on the concept of “zones of privacy” to propose “a solution to address the privacy concerns surrounding the use of camera phones and technologies with similar capabilities.” Ku provides an extensive history of case law to demonstrate what is meant by a zone of privacy, which is essentially a constitutionally-protected right to be secure and expect privacy in a certain space, such as one’s person, home, and possessions. Ku’s proposed solution is twofold. First, he proposes that municipalities create “Safe Places” by statute where the public could expect freedom from “any form of electronic device that enhances an individual’s natural senses.” Ku writes

¹ McClurg includes a footnote that supports this modification, explaining that the terms “plaintiff” and “defendant...denote, respectively, the victim of the intrusive conduct and the perpetrator of the intrusive conduct.”

How a "safe area" would be determined would be left to the discretion of local communities which have already begun this process, designating areas in which individuals have a de facto "safe area" created by statute. Presumably, a residence, a changing room, and public bathrooms would be such "safe areas." Thus, citizens do not have to guess whether it is reasonable to be secure in a public restroom.

Second, Ku proposes a "multi-factor test" to "balance the legitimacy of the intrusion against any mitigating facts" when determining the right to privacy in public places. He directs the reader to McClurg's matrix, adding that

The test is particularly resilient with respect to current technologies, such as normal cameras and camera phones, as well as any future sort of device that might be able to record even more data in even less obtrusive means. The test also affords protection to legitimate uses of the camera phone. If the images captured have a legitimate public interest, such as the commission of a crime, the responsible party would be immune from any civil action for his conduct. In addition, acceptance of this revised tort would ensure the legitimacy of the various existing state statutes regarding voyeurism.

McClurg's and Ku's concept of the development of a means to evaluate the degree to which a given event constitutes a privacy violation is the foundation for the matrix to evaluate privacy violations through camera use proposed below.

Regulatory Protection of Resident Privacy

Every state in the United States has regulations governing assisted living facility operation, and nearly every set of regulations addresses resident privacy in some way. As has been noted, the federal government does not have a formal definition of "assisted living," no federal statutes or regulations exist for assisted living facilities, and the terminology used in state regulations differs from state to state. However, privacy protections granted by regulation generally fall into the following categories: general right to privacy, privacy in communications, privacy of person, and privacy in room or living unit². General right to privacy means that the regulations include a statement that guarantees privacy without specifying a particular context³. Privacy in communications means that one or more regulations specifically protect the right to privacy in mail, telephone, and association with others. Privacy in possessions means that the regulations include privacy in personal items such as clothing or decorative items. Privacy of person means protection of privacy when performing self-care activities such as bathing or dressing, and may also include regulatory protection from unreasonable searches. The table below shows the privacy protections granted through each state's assisted living regulations:

Table 1: Privacy Protections in State Regulations

State	Privacy Type				
	General	Communications	Person	Room	Other
Alabama	●	●		●	
Alaska	●	●	●	●	
Arizona	●	●			
Arkansas		●	●		
California		●			
Colorado	●	●			
Connecticut					

² Many states' regulations require "privacy of records" in the form of confidentiality requirements; these regulations are not addressed here.

³ This includes regulations that address constitutionally-protected civil rights.

State	Privacy Type				
	General	Communications	Person	Room	Other
Delaware	●	●		●	
Florida	●	●			●
Georgia	●	●	●		
Hawaii	●				●
Idaho		●	●		
Illinois	●	●	●		●
Indiana	●	●	●		
Iowa		●	●		
Kansas	●	●	●		
Kentucky		●			●
Louisiana	●	●			
Maine		●	●		
Maryland	●	●		●	
Massachusetts	●	●	●		●
Michigan	●	●	●		
Minnesota	●	●		●	
Mississippi		●			
Missouri			●		
Montana	●				
Nebraska	●	●			
Nevada		●			
New Hampshire	●	●			
New Jersey	●	●			
New Mexico	●		●		
New York	●	●	●		
North Carolina	●	●			
North Dakota	●	●	●		
Ohio	●	●	●		
Oklahoma	●	●	●		
Oregon		●			
Pennsylvania	●	●	●		
Rhode Island	●	●	●		
South Carolina	●	●	●		

State	Privacy Type				
	General	Communications	Person	Room	Other
South Dakota	●	●	●	●	
Tennessee		●			
Texas	●	●	●		
Utah	●	●	●		
Vermont	●	●	●		
Virginia	●	●	●		
Washington	●	●	●		
West Virginia	●	●	●		
Wisconsin	●	●	●		
Wyoming	●	●			
United States	37	45	28	6	5

Florida regulations specify that residents using “portable bedside commodes” be provided privacy when using the commodes. Hawaii is the only state that defines privacy in its assisted living regulations; that state defines “privacy” as “a specific area or time over which the resident maintains a large degree of control. Privacy is supported with services that are delivered with respect for the resident’s civil rights.” The right to live in privacy is also included in Hawaii’s definition of “assisted living.” Illinois specifies that residents have “the right to privacy in financial and personal affairs,” and as such is the only state to specifically protect fiscal privacy. Kentucky assisted living regulations specify that residents must have “at least visual privacy” in multi-bed rooms. Massachusetts specifies that privacy rights within a living unit are “subject to the rules of the Assisted Living Residence reasonably designed to promote the health, safety, and welfare of residents.”

States with Regulations and Policy Statements Governing Electronic Monitoring

As of this writing, three states have regulatory requirements that specifically address “electronic monitoring,” which generally means the use of visual and audio monitoring devices. Two states have developed policy interpretations that clarify the licensing agency’s expectations for facilities that use monitoring devices.

West Virginia’s list of regulatory-protected resident rights includes a provision that “the use of visual and auditory devices to monitor areas of the assisted living residence is restricted to common areas only. The licensee shall provide written notice to the resident or his or her legal representative of the use of these devices at the time of admission and also post a notice about their use in a private place in the residence”⁴. In this instance, providers may only monitor “common areas,” which could reasonably be interpreted as any area that is not space exclusive to a resident’s use (i.e. a living unit or bathroom).

Conversely, Washington State has very strict prohibitions on electronic monitoring in assisted living⁵, including:

⁴ See §64-14-6.2.k.

⁵ See 388-778A-2680 - 2690

- Blanket prohibitions on use of audio monitoring and video monitoring equipment with an audio component.
- Restricting video monitoring to:
 - Entrances and exits as long as the cameras focus only on doorways and not on “areas where residents regularly congregate.”
 - Areas not used by residents, such as medication storage and food preparation areas.
 - Designated smoking areas, provided that residents who smoke have been assessed to need supervision while smoking, a staff person watches the video monitor at all times the area is used by residents, the video monitor cannot be seen by the general public, the camera is clearly visible, and the facility notifies all residents in writing of the use of video monitoring equipment.

Washington does permit audio or video monitoring when requested by the resident and is limited to the sleeping room occupied by the resident. The regulations go on to require extensive documentation from the resident relating to the basis for the request and the period of time the camera will be used; regular reassessments of the need for the monitoring; and the requirement to immediately cease monitoring at the resident’s request.

Texas levies even more restrictions on the use of “Authorized Electronic Monitoring”⁶ in that the use of such monitoring must be resident-specific and applied only with the resident’s consent. While the regulations do not expressly prohibit the practice of general monitoring of facilities, the context of the regulations constitute such a prohibition. Notable requirements include, but are not limited to:

- The requirement to permit a resident to monitor his or her room, and a prohibition on refusing to admit or discharging a resident because of a request to monitor the room.
- Extensive requirements for documented consent to engage in monitoring.
- The requirement to obtain consent to monitor from other residents occupying the room, if applicable.
- A requirement to “post and maintain a conspicuous notice” of monitoring use at the entrance to the resident’s room.
- A requirement that the facility “meet residents’ requests to have a video camera obstructed to protect their dignity.”
- Requiring all facilities to post a notice at the main entrance to the facility reading “the rooms of some residents may be monitored electronically by or on behalf of the residents. Monitoring may not be open and obvious in all cases.” Facilities must post this notice even if monitoring is not currently being conducted at the facility.
- Restrictions on how information collected via video monitoring may be used to report suspected resident abuse.

A 2008 clarification memorandum issued by the Wisconsin Bureau of Assisted Living provides clear direction to adult congregate care facilities relating to video monitoring and filming in regulated facilities. Following an analysis of relevant state statutes and regulations, the Wisconsin memo provides the following guidelines relating to the use of video monitoring:

- Electronic video monitoring and filming may be allowed in cooperation with law enforcement on a case-by-case basis, specific to an investigation. Law enforcement may need permissions, waivers, warrants and other authorization to proceed.

⁶ See §92.129 (Relating to Authorized Electronic Monitoring)

- Electronic video monitoring and filming are allowed in the following locations, provided the facility posts signs indicating that monitoring or filming is taking place:
 - Parking areas;
 - Locations where individuals may enter or exit the building;
 - Areas that are marked for employees only;
 - Storage areas;
 - Hallways or corridors that do not lead to resident rooms or activity areas; and
 - Personnel offices that are not accessible to residents.
- The Department interprets the provision of privacy as a resident and tenant right and prohibits the use of electronic video monitoring or filming in locations other than in those areas identified above. Consequently, electronic video monitoring and filming are not allowed in the following locations:
 - Resident bedrooms;
 - Facility or resident bathrooms or shower rooms;
 - Dining rooms;
 - Therapy rooms;
 - Visiting areas, lounges, multipurpose rooms, or activity rooms; or
 - Any other space where a resident may be seen meeting with visitors, engaging in an activity (including eating), sleeping, discussing their current condition, or receiving personal care, medical treatment or therapy.
- Mandatory consent to the use of electronic video monitoring or filming equipment is not an acceptable condition of admission to a facility. Facilities cannot prohibit admissions or require residents to give up their rights as part of any admission, service, or risk agreement:

The memorandum goes on to clearly state that

electronic video monitoring or filming in resident areas violates residents and tenants' right to privacy. If your facility currently uses electronic video monitoring or filming equipment in areas included in the list of locations in which use is not allowed, please discontinue use to comply with state statutes and administrative rules.

However, there is an acknowledgment that there are some circumstances where video monitoring may be used, including:

- Cases in which an individual resident may benefit from, or request the use of electronic video monitoring or filming equipment, e.g., cases where the use is indicated by a therapeutic treatment plan or where a competent resident initiates a request;
- Client groups whose rights are restricted by the Department of Corrections; or
- Religious services, recognition ceremonies, or public speeches that are broadcast to a wider audience than is present in the room.

Pennsylvania produces an interpretive guide for assisted living providers that offers a “discussion” section for each regulatory requirement. Pursuant to 55 Pa.Code § 2800.42(s), “A resident has the right to privacy of self and possessions. Privacy shall be provided to the resident during bathing, dressing, changing and medical procedures.” The interpretive guide offers the following relating to the use of audio and video monitoring:

- Audio monitoring in any location on the grounds of the residence is prohibited.
- Video monitoring and recording of the residence’s exterior is permitted.
- Video monitoring of the residence’s interior common areas is permitted.

- Video recording is permitted in interior areas completely inaccessible to residents, such as medication and supply storage areas.
- Video recording of the residence's entrances and exits and the interior corridors leading to entrances and exits is permitted, provided that:
 - Residents are informed at admission that these areas are subject to video recording
 - Signs indicating that images are being recorded are posted in the areas that are being recorded.
- All other recording of interior areas by the residence is a violation of resident privacy and therefore prohibited.
- Staff may not photograph or video record residents with private cell phones or other electronic devices.
- Residents may video record in their private rooms or with the written permission of all roommates in shared rooms.
- Residents may install "hidden cameras" in private rooms without the residence's knowledge.

What is particularly fascinating about these states' positions is how closely they focus on the concept of "public and private space" as described above. West Virginia limits recording to common areas, Washington, Texas, and Wisconsin forbid any monitoring of common areas, and Pennsylvania permits monitoring in common areas but prohibits recording in these areas.

It is important to stress that the absence of a regulation specific to monitoring or privacy in general does not mean that state licensing agencies are not concerned with protecting resident privacy or that blatant privacy violations involving electronic monitoring would be ignored; a state licensing agency could certainly elect to consider a gross violation of individual privacy as a form of abuse or undignified treatment, as prohibitions against such activities are present in some form in each state's adult care regulations.

Facility Use of Electronic Monitoring

In their analyses of privacy violations, Solove, McClurg, and Ku all contemplate the importance of how the information collected through potential violations will be used (what McClurg succinctly identifies as "motive"). Given this, we must examine how and why assisted living facilities are using electronic monitoring.

Method

To collect information about how facilities use cameras, a 14-question survey relating to camera use in assisted living was distributed to assisted living providers. The survey, which was produced and managed using an online survey tool, was open to any assisted living provider in the United States between the period April 9, 2014 and August 4, 2014. The survey was announced via requests for distribution to assisted living providers made to the following entities:

- Adult care licensing contacts identified via the National Center for Assisted Living's *2013 Assisted Living State Regulatory Review*.
- State affiliates of the Assisted Living Federation of American.
- State liaisons for the National Association for Regulatory Administration.

Fifty-seven providers completed the online survey.

Results

Sixty percent of all respondents reported using video cameras in the operation of their facilities; of the facilities that use cameras, 62% post signs announcing that cameras are in use. The tables below show where the cameras are located, what information is captured by the cameras, and how the cameras are used:

Table 2: Location of Cameras in Assisted Living Facilities

Location	Percent
At entrances and exits	79.4%
In hallways or corridors leading to resident living units	55.9%
In common areas (lounges, activity areas, etc.)	50.0%
Outside the community	47.1%
In areas inside the community that are inaccessible to residents (medication rooms, business offices, etc)	29.4%
Inside resident living units	2.9%

Table 3: Camera Capabilities

Do the cameras record footage, or offer “live feed” only?	Percent
Both live feed and recording	70.6%
Live feed	11.8%
Record footage	20.6%

Do the cameras capture audio feed?	Percent
No	91.2%
Some do, and some do not ⁷	8.8%

Table 4: Reason for Camera Use

Reason for Camera Use	Percent
Security	88.2%
Supervision of residents	35.3%
Other	17.6%

Respondents were asked whether their facilities had developed policies and procedures relating to camera use; 62% report that such policies are in place. The table below shows the contents of the policies and procedures among facilities that have developed them:

Table 5: Policy Elements Related to Camera Use

Policy Contents	Percent
Disclosure of camera use at admission	85.7%
Limited access to recorded footage	52.4%
Need for police involvement / role of law enforcement	38.1%
Other	23.8%

⁷ Of the three respondents whose cameras capture audio feed, one records the audio, and two offer both live feed and recording.

In addition to questions about camera use in facility operation, respondents were also asked a series of questions relating to the use of hidden cameras by residents. Only 21% of respondents reported that such cameras were permitted⁸. Three respondents (43%) reported events where residents' hidden cameras captured inappropriate or criminal behavior by staff.

Finally, respondents were provided the opportunity to provide comments they felt were relevant to the topic of camera use in assisted living. Many comments provided examples of how cameras use benefited residents. One respondent wrote

The use of cameras has provided extremely valuable information. It has established several times that an injury to a resident was not caused by staff (i.e. falling versus being pushed etc.). [It] has curbed staff behavior (excessive breaks, or other behaviors that are detrimental to being there for the residents). Many families have expressed their appreciation for the extra effort with watching over the care of their family member. It also has potential value from protection or capturing an outside source potentially creating a theft or other type concern.

Another respondent replied that

Camera use is a vital part of ensuring the safety and well-being of our residents as well as business operations. The intent is not to spy on the residents or violate their rights in any manner, but to provide a secure environment, provide video evidence of crimes to law enforcement (including abuse or neglect of residents and theft from the facility) and to protect our business interests. The state's stance against video cameras is archaic and misguided, and puts residents in jeopardy rather than protecting them. As a side note, it is my understanding that the use of audio recording is prohibited, however you cannot prove verbal abuse without it, so it should be strongly considered as a viable resource from a protection standpoint.

Several respondents provided specific examples of how camera use provided evidence of theft of resident property by staff. Two respondents indicated that the use of hidden cameras by residents was a violation of the rights of staff employed by their facilities.

Analysis and Recommendations

Comparing state regulatory agencies' position on camera use with the reasons assisted living facilities use cameras reveals a curious – and not uncommon – relationship between the regulators and the regulated. Both “sides” are clearly focused on a common goal: protecting the rights of residents in care, but each has a very different perspective on how to provide that protection. In general, state regulatory agencies view camera use as a threat to residents' right to privacy of self and the freedom to communicate with others in private. Facilities, on the other hand, generally view camera use as a means to protect the residents' right to a safe and secure environment, and, one could argue, the right to privacy of possessions (since cameras frequently capture theft of resident property by staff).

Who is right, and how does this impact what areas can and should be recorded? We propose that these questions should not be answered in a dichotomous manner, and that decisions about camera use should not be approached as a universal policy. State agencies are correct in acting to protect resident privacy, and facilities are right to take steps to ensure resident safety; neither concern outweighs the other in every single case. Therefore, the solution to appropriate camera use is the application of a matrix to establish when cameras are used in a manner that violates residents' privacy.

The proposed matrix considers five distinct components: The physical layout of the facility; the locations of the cameras throughout the facility; the primary purpose for use of the cameras and the

⁸ Of the seven respondents who reported permitting hidden cameras, only two had policies relating to their use. Each reported that their policies included disclosure of camera use at admission and the facility's rules for camera use.

information collected by them; the function, storage and accessibility of the information captured; and the resident's awareness of camera use and their desire for the cameras to be used. Each component is then mapped on a spectrum from "low risk of rights violation" to "high risk of rights violation" if cameras are used. Each risk level is assigned a weighted score; the sum of the scores based on the level of risk is then calculated to determine whether sufficient balance of privacy and security has been achieved. Based on the sum of scores for each component, the facility's "Camera Use Privacy Score" (CUPS) is established; the minimum score is five, the maximum score is 50. In general, any facility with a score of 25 or lower is likely using cameras in a manner that does not unreasonably infringe on residents' right to privacy, whereas a score of 26 or higher means that camera use is likely infringing privacy rights to some degree. The matrix appears on the following page.

There are several important factors to keep in mind when applying the matrix. First, the CUPS is meant to be used for an overall evaluation of privacy protections in a given facility relating to camera use, and as a tool for facilities and regulators to take steps to change a facility's operations to minimize privacy violations when using cameras. For example, a facility with an elevated CUPS as a result of the absence of policies relating to camera use and by using cameras that record audio feed may elect to lower its score by developing policies and disabling the cameras' audio feature.

Second, a CUPS should not be used to constitute evidence of a regulatory violation, especially in cases where the CUPS is very low. As with any regulation, the circumstances specific to a given case must be considered when determining regulatory compliance or noncompliance. For example, a facility with a very low CUPS that is equipped with live-feed functionality only but monitors bathing and dressing areas would clearly be engaging in a noncompliant practice under any set of state regulations. Similarly, a facility with a very high CUPS where the entire population of residents served actively desires camera monitoring in the manner employed by the facility would not necessarily be noncompliant, in that the residents have collectively determined that the facility's practices do not violate their right to privacy.

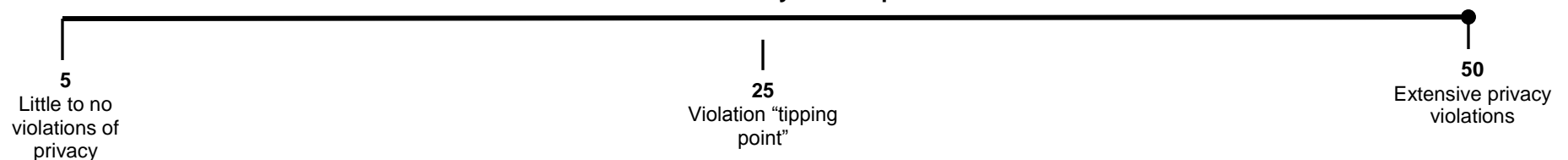
Third, the matrix applies only to camera use initiated by the facility. The matrix cannot be successfully applied to a case where an individual resident elects to equip his room with a hidden camera⁹. Finally, the matrix only evaluates facilities' degree of privacy protection as it relates to camera use. A facility with a CUPS of 5 that regularly opens and reads residents' mail or forbids residents from meeting in with others in the residents' rooms is effectively protecting residents' privacy when using cameras, but is grossly violating the residents' right to privacy in communication and free assembly.

⁹ This is not to say that use of cameras by residents is automatically acceptable. A resident who uses his camera to surreptitiously monitor his roommate would be violating his roommate's right to privacy. A facility with knowledge of this practice but who took no action to remediate the resident's actions would potentially be noncompliant with any number of regulatory requirements.

Table 6: Proposed Matrix to Evaluate Privacy Violations in Camera Use

Risk of Rights Violation	Privacy Components				
	Physical Layout	Camera Location	Primary Purpose	Function, Storage, and Accessibility	Resident Awareness and Desire
Low Risk score = 1	Large-scale residence	<ul style="list-style-type: none"> • Areas inaccessible to residents • Outside facility • At entrances and exits 	<ul style="list-style-type: none"> • Staff supervision • Crime prevention 	<ul style="list-style-type: none"> • Cameras have live-feed capability only • Cameras do not have audio monitoring capability. • For cameras with recording capability only: <ul style="list-style-type: none"> ○ A limited number of staff persons have access to the recordings ○ The recordings may only be used at the request of a resident or law enforcement ○ Recorded information is retained for a limited period of time and is stored in a secure location • The facility has a disciplinary process in place for staff who misuse information collected by camera 	<ul style="list-style-type: none"> • There is conspicuous and public notice that cameras are in use • Policies on camera use have been developed and provided to residents • All residents have consented to camera use and most residents have expressed a desire to have cameras in place. Consent is not required for admission
Moderate Risk score = 5	Small-scale residence	<ul style="list-style-type: none"> • Common areas • Hallways leading to living units 	<ul style="list-style-type: none"> • Resident supervision, meaning observation to promptly respond to emerging events such as falls or behavioral outbursts that is not initiated for a specific reason 	<ul style="list-style-type: none"> • Cameras have audio monitoring capability, but do not record audio • Multiple staff persons can access the camera monitor and recorded information • Camera use is ad-hoc, but does not require a request from a resident or law enforcement involvement • Recorded information is stored indefinitely and is stored in an area accessible to multiple persons • Staff persons receive general instruction in appropriate camera use, but there is no specific disciplinary process in place for staff who misuse information collected by camera 	<ul style="list-style-type: none"> • Camera use is not announced, but is disclosed at admission • Policies on camera use have been developed, but are not provided to residents • All residents have consented to camera use, but have not necessarily expressed a desire for cameras to be used. Consent is required as a criterion for admission
High Risk score = 10	Home-based residence	<ul style="list-style-type: none"> • Resident rooms / living units • Bathing and dressing areas 	<ul style="list-style-type: none"> • Resident monitoring, meaning observation of a specific resident or residents to profile day-to-day activities or associations with others that is initiated for a specific reason 	<ul style="list-style-type: none"> • Cameras record audio • Any staff person can access the camera monitor and recorded information • Camera use is a standard practice • There are no internal controls for information storage and accessibility • Staff persons are provided no direction or instruction regarding appropriate camera use 	<ul style="list-style-type: none"> • Camera use is not disclosed at any time • Policies on camera use have not been developed. • Residents are not asked to consent to camera use

Camera Use Privacy Score Spectrum



Conclusion

Camera use is becoming more prevalent in assisted living facilities, raising questions about whether and how their use infringes on residents' right to privacy. Facilities that use cameras primarily do so for resident security, but the fact that few state regulatory agencies have developed regulations or policies relating to camera use by assisted living facilities offers minimal guarantee that the ways cameras are used are consistent with states' privacy requirements. Relevant literature relating to individual privacy and video monitoring suggests that camera use does not automatically violate resident privacy, but rather that privacy violations can occur absent adequate internal controls. Instead of taking a dichotomous approach when creating policy relating to camera use, the author proposes that each facility be evaluated using the matrix provided to determine whether cameras are being used in a manner that protects resident rights.

Finally, in addition to use of the matrix, there eight "best practices" that assisted living facilities who use or wish to use cameras should adopt. Based on the findings of this article, it is recommended that assisted living facilities:

1. Do not use cameras with audio components;
2. Do not use cameras in resident rooms, bathing areas, or dressing areas for any reason;
3. Do not use cameras to monitor an individual resident's behaviors or actions¹⁰;
4. Post notice that cameras are in use in conspicuous and public places in the facility;
5. Establish "safe zones" in the form of common areas that are not equipped with cameras and clearly identified as such;
6. Minimize the amount of time that internal areas are recorded such that residents and visitors are unlikely to be captured on video, e.g. during mealtimes, sleeping hours, or outings¹¹;
7. Develop robust policies and procedures relating to camera use, which include at a minimum extremely limited access to recorded information; requiring just cause to access or use the recorded information; secure storage of recorded information; a retention and disposal schedule; and stringent disciplinary actions against staff who misuse recorded information; and
8. Provide to residents, at admission, a copy of the home's policy relating to camera use, an explanation of where cameras are located in the facility, and the purpose of their use.

Limitations and Suggestions for Further Research

According to research conducted by the National Center for Assisted Living, there were 31,100 assisted living facilities in the United States as of 2010. Given the variety of adult care facilities in the United States that would meet the criteria for classification as "assisted living" as set forth in this article, there are likely many more facilities to which the contents of this article apply. As a result, the 57 responses gathered from the survey on camera use is far too small a sample to guarantee that the responses accurately represent how cameras are used nationwide.

¹⁰ One possible exception would be monitoring in conjunction with law enforcement; as McClurg notes, privacy infringement may be justified when there is a "legitimate public interest" in performing the act.

¹¹ Additionally, these are the times when theft from resident living units are most likely to occur.

While specific regulations relating to privacy were analyzed for this article, there are other contributing factors to how state regulatory agencies address privacy and the protection of resident rights as a whole. Such factors include case law in a given state, internal documents maintained by state regulatory agencies that clarify how to measure compliance with privacy requirements, the degree to which individual inspectors in a given agency may individually interpret and apply regulatory requirements, and state statutes that are not directly related to regulatory administration but do address privacy and confidentiality, e.g. laws protecting persons with mental illness that would apply in an assisted living environment. These factors were not considered in this article.

Although cameras used by residents were briefly touched upon in this article, the subject deserves much more attention than it received here. Camera use by residents raises questions of employees' right to privacy, the effectiveness of such cameras in preventing crime, the psychological impact of knowing that one might be monitored when performing difficult (and sometimes unpleasant tasks), the tendency of so-called "granny cam" stories to attract significant media attention, and many others. A deeper exploration of camera use by residents would be very useful to both regulators and facilities.

Regulating and operating an assisted living facility requires balancing the need to protect resident safety against the responsibility to protect residents' rights – an extremely challenging task. This task is further complicated by the fact that nearly all providers and many state regulatory agencies stress the role of individual choice in defining the philosophy of assisted living. There is a great demand for research that explores the connections between rights, choice, individual needs, and the needs of the entire population of an assisted living facility.

Finally, there exists very little research on the sociological and psychological dynamics of assisted living (indeed, there is not even a nationally-accepted definition of the term). The vast majority of assisted living research is conducted by provider-affiliated trade associations or by advocacy groups. To be sure, this research is very valuable and often insightful, but does not provide a comprehensive picture of assisted living's impact on residents, families, workers, and the communities in which the facilities are located, nor does it help regulatory oversight agencies understand the way that regulatory requirements are woven into the fabric of assisted living "life." More research of this type is desperately needed, especially in light of the aging United States population and the increased demand for assisted living as a long-term care option for persons who do not have complex medical needs.

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