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Cover Page Footnote
J.D. Candidate 2004, Fordham University School of Law; B.A. Human Biology, Stanford University 1999; Writing and Research Editor, Fordham Urban Law Journal, 2003-2004. I would like to thank Manuel Del Valle for his guidance and patience.
WATCHING OUT FOR GRANDMA: VIDEO CAMERAS IN NURSING HOMES MAY HELP TO ELIMINATE ABUSE

Tracey Kohl*

INTRODUCTION

Advocates for the elderly have proposed that video surveillance could provide the necessary solution to a growing epidemic of abuse violations in nursing homes throughout the country.1 Although there would appear to be few legal obstacles to the use of "granny cams," groups such as the Coalition to Protect America's Elders are lobbying for a federal law that would give residents the affirmative right to install cameras.2 Traditionally, the nursing home industry has strongly opposed the use of video cameras in facilities, most often citing privacy concerns.3 They argue that the cameras degrade residents by recording intimate moments of exposure during bathing, medical examinations, or diaper changes.4 Nursing home operators also fear that the cameras will exacerbate the ongoing problem of finding qualified help for this minimal pay job because employees would resent the constant supervision.5

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1. According to a study by the U.S. General Accounting Office, thirty percent of the nation's 17,000 nursing homes have been cited in recent years for abuse violations. Nursing Homes: Many Shortcomings Exist in Efforts to Protect Residents from Abuse: Hearing Before the U.S. S. Special Comm. on the Aging, 107th Cong. 1 (2002) [hereinafter Hearings on the Aging] (statement of Leslie G. Aronovotz, Director, Health Care—Program Administration and Integrity Issues, United States General Accounting Office). This figure had almost doubled since the previous study in 1996. Id. Furthermore, the National Elder Abuse Incidence Study conducted by the Administration on Aging estimated that for every report of elder abuse and neglect substantiated by adult protective services, more than five additional cases of abused and neglected elders go unreported. Nat'l Ctr. on Elder Abuse & Westat, National Elder Abuse Incidence Study 4 (1998).


5. Id.
In 2001, Texas became the first and only state\(^6\) to enact a law directly addressing the use of granny cams.\(^7\) Under this statute, a nursing home or related institution "shall permit a resident or the resident's guardian . . . to monitor the room of the resident through the use of electronic monitoring devices."\(^8\) Residents are allowed to choose where in the room the cameras are mounted as well as when they are turned on and off.\(^9\) The statute requires express written consent of the resident or her guardian as well as the consent of any roommates.\(^10\) Included in these consent forms must be a provision releasing the institution from any civil liability with regard to invasion of privacy resulting from the electronic surveillance.\(^11\) Additionally, notice of surveillance must be provided at both the entrance to the institution and the entrance to the resident's room.\(^12\)

This Comment examines the arguments for and against the proposal to grant nursing home residents and their guardians a legal right to install video cameras for protection. Part I discusses the current state of federal nursing home regulation. It focuses on the problems impeding effective enforcement of these regulations that have led to the current crisis in nursing home quality of care. Part II examines how the proposed video surveillance might affect various privacy interests within a nursing home setting. Part III addresses the economic concerns of granny cam opponents. Part IV concludes that with careful drafting, federal legislation requiring

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\(^6\) The movement to place cameras in the rooms of nursing home residents began in Illinois in 1996 with the Nursing Home Monitors, an advocacy group for the elderly. *Agency for Health Care Admin., Cameras in Nursing Homes* 2 (2002) [hereinafter AHCA]. Although the Illinois Legislature and Department of Public Health were quick to reject the group's proposal for a state-sponsored program implementing granny cams, the message reached various other groups across the country. *Id.* at 2-3. Since then, pilot projects designed to examine the benefits and detriments of cameras in nursing homes have been initiated in several states including California, Florida, and Maryland. *Id.* Several state legislatures have also proposed bills that would require nursing homes to allow cameras at the request of a resident or guardian. Henry L. Davis & Dan Herbeck, *Camera Use is Urged at Homes for the Elderly, Buffalo News*, Jan. 7, 2001, at B1. Although officially these specific bills have met with little success so far, granny cams have remained an important issue on many state agendas. See *id.* (stating that these bills have been greatly debated within 11 states).


\(^8\) *Id.* § 242.847(a).

\(^9\) See *id.* § 242.846(b)(2) (allowing for the obstruction of the camera during intimate moments).

\(^10\) *Id.* §§ 242.846(a), (b)(3).

\(^11\) *Id.* § 242.846(b)(1).

\(^12\) *Id.* §§ 242.847(b), 242.850.
nursing homes to allow cameras could provide a necessary protective tool against abuse for residents and their families, while at the same time minimizing intrusions upon privacy.

I. BACKGROUND

A. Nursing Home Regulation

In 1987, Congress enacted the Omnibus Budget Reconciliation Act ("OBRA") in an attempt to address growing concerns of deficient care in nursing home facilities. Also known as the Nursing Home Reform Act, OBRA revised the regulation of long-term care facilities participating in the Medicare and Medicaid Programs. Among other things, this sweeping legislation shifted the focus of the standards for participation in the programs from the nursing home facilities to the patients themselves. Previously, the participation requirements concentrated on whether a facility was physically capable of providing the necessary care and services. The new survey procedure instead observed patient outcomes to determine whether these facilities were actually providing the requisite care.

OBRA specifies that a nursing home "must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of quality of life of each resident." The statute further requires that nursing homes "provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." These broad directives are given life through more specific regulations disseminated by the Centers for Medicare and Medicaid Services ("CMS"), for-
merly the Health Care Financing Administration ("HCFA").

Both OBRA and the Code of Federal Regulations set forth a Bill of Rights for residents of nursing homes participating in the Medicare and Medicaid programs.

Under these statutes, residents are guaranteed the right to privacy and confidentiality, the right to receive reasonable accommodation of individual needs, and the right to voice grievances with respect to treatment or care. A nursing home facility must also promote a resident’s rights to dignity, self-determination and participation by, for example, allowing the resident to "make choices about aspects of his or her life in the facility that are significant to the resident." The federal regulations further require nursing home facilities to meet other, more specific quality care standards relating to a resident’s ability to perform activities of daily living, the prevention of pressure sores, and the maintenance of a resident’s range of motion, mental and psychosocial functioning, and nutrition and hydration. As a comprehensive measure, the Federal Code of Regulations contains an additional provision directly granting residents the "right to be free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion."

States may also establish their own criteria for licensing nursing home operation so long as such standards do not conflict with the federal mandates. The federal standards represent a benchmark floor for nursing home care, but states are free to impose more stringent requirements. As a result, many states have passed their own legislation aimed at providing increased protection for the elderly.

Nursing home compliance with these standards is monitored through a mandatory survey process. CMS evaluates nursing

21. 42 U.S.C. § 1395i-3(c); 42 C.F.R. § 483.10.
22. 42 U.S.C. § 1395i-3(c)(1)(A)(iii), (iv), (vi); 42 C.F.R. § 483.10 (e)-(f).
23. 42 C.F.R. § 483.15(a).
24. 42 C.F.R. § 483.15(b).
25. Id. § 483.25(a), (c), (e), (f), (i), (j).
26. Id. § 483.13(b).
28. Id. at 13.
homes through contractual relationships with one agency in each state. In addition to licensing nursing homes in accordance with state regulations, these state survey agencies certify that nursing homes participating in the Medicare and Medicaid programs are continually meeting their federal requirements by conducting three types of surveys. The first, a "standard survey," must be conducted every twelve months on average, with no more than fifteen months between standard surveys. During this evaluation, the surveyors observe a "case-mix stratified sample of residents" and evaluate "medical, nursing, and rehabilitative care, dietary and nutrition services, activities and social participation," as well as characteristics of the facility's physical environment.

Facilities found to have provided substandard care are also subjected to an extended survey. This secondary inspection includes a larger sample of residents and further examines the staffing and in-service training. The focus of an extended survey is to "identify the policies and procedures that caused the facility to furnish substandard quality of care" so that the problem may be quickly and efficiently remedied.

Finally, state survey agencies must conduct complaint surveys to investigate any specific reports of nursing home violations. Such grievances are usually claimed by family members, patient advocates, and long-term care ombudsmen. Complaint surveys are generally targeted to the alleged incident, however, once on site, the surveyors are free to pursue other quality of care violations that may become evident.

Nursing homes found to be providing deficient care may be subject to a variety of sanctions. These include: termination of the facility's participation in the state funding program; denial of pay-

31. CMS is responsible for enforcing standards in nursing homes with Medicare certification which constitute over eighty-six percent of all homes in the United States. ENFORCEMENT REPORT, supra note 14, at 4.
32. Brady, supra note 27, at 13; Grassley, supra note 14, at 271.
33. Grassley, supra note 14, at 272. Although states may also set their own guidelines for licensing nursing homes, this Comment focuses on the shortcomings of the federal survey procedure.
34. 42 U.S.C. §§ 1395i-3(g)(2)(A)(i), (iii)(I); 42 C.F.R. §§ 488.308(a), (b) (2002).
35. 42 U.S.C. § 1395i-3(g)(2)(A)(ii); 42 C.F.R. § 488.305(a)(1)-(2).
37. Id. § 1395i-3(g)(2)(B)(iii).
38. 42 C.F.R. § 488.310(a).
40. Grassley, supra note 14, at 272.
41. Id.
ment for services rendered; civil monetary penalties; appointment of a temporary manager to oversee the facility's operation; or closure of the facility entirely. Based on their findings, the state survey agencies are authorized to select and impose appropriate sanctions, according to the seriousness of the violation.

B. Nursing Home Abuse: A Problem of Inadequate Enforcement

Despite the stringent federal regulation of long-term care facilities, nursing home abuse remains rampant throughout the United States. One of the most cited reasons for this trend has been inefficiency in the enforcement of the federal quality care standards. Studies by the United States General Accounting Office ("GAO") and other government entities, have identified several problems, including the frequency with which state inspectors miss important violations during annual surveys. To address this concern, federal inspectors conduct random follow-up inspections of nursing homes after state inspections have been completed. According to a GAO study, federal inspectors report more serious violations than the state inspectors in sixty-nine percent of these circumstances. Although federal law requires that facilities not be given notice prior to their standard survey, the GAO has observed that homes can often predict when their annual on-site surveys will occur and can, therefore, take steps to mask problems otherwise observable during normal operations.

43. Id.; see also 42 U.S.C. § 1396(h) (1994).
44. Grassley, supra note 14, at 273. Sanctions for violations of federal requirements must be sent to CMS for approval. Id.
45. 42 C.F.R. § 488.408(a). The federal regulations categorize the remedies according to whether the violations caused any actual harm to the residents as well as whether they pose any immediate jeopardy to resident health or safety. Id. §§ 488.408(c)(2), (d)(2)(i)-(ii), (3)(ii).
46. See SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REPRESENTATIVES, ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES 4-7 (2001) [hereinafter ABUSE REPORT]. This study showed that the percentage of nursing homes cited for abuse violations has steadily increased in recent years, almost tripling in the period from 1996 to the year 2000. Id. at 6-7.
47. See ENFORCEMENT REPORT, supra note 14, at 2-4 (discussing HFCA's ineffective oversight and enforcement process); Grassley, supra note 14, at 274-75.
48. ABUSE REPORT, supra note 46, at 8.
49. Id. at 8 n.17.
Additionally, where nursing homes are sanctioned for noncompliance, the GAO has noted that nursing homes are only temporarily induced to take action toward correcting the deficiencies.\textsuperscript{53} Most homes do conform to regulation at least briefly, to avoid fines or other sanctions, but many do not maintain this status of compliance.\textsuperscript{54} In fact, violations often reoccur before the facility’s next survey or follow-up inspection.\textsuperscript{55} This “yo-yo pattern” of compliance and noncompliance persists even among homes facing the most severe sanctions, such as termination from the Medicare program.\textsuperscript{56}

The problem of ineffective enforcement is further evidenced by the fact that relatively few allegations of physical and sexual abuse of nursing home residents are successfully prosecuted.\textsuperscript{57} The GAO attributes this to two major factors.\textsuperscript{58} First, allegations of abuse are seldom reported to local law enforcement, and when law enforcement is notified, it is often so long after the incident that the integrity of any available evidence has been severely compromised.\textsuperscript{59} Second, a lack of credible witnesses further weakens prosecutions and makes convictions unlikely.\textsuperscript{60}

Potential abuse violations may not be reported promptly for several reasons, including reluctance on the part of residents, family members, nursing home employees, and administrators.\textsuperscript{61} Residents may not report abuse because of fear of retribution or due to physical or mental impairments affecting the resident’s ability to communicate.\textsuperscript{62} Family members may entertain similar retaliation concerns, including the possibility that the resident will be evicted from the nursing home and that finding a replacement home will prove difficult with a whistle-blower reputation.\textsuperscript{63}

Although nursing home officials are generally required to notify state survey agencies of abuse allegations immediately after the incident occurs, such notices are often delayed until several days or
weeks after the abuse has taken place.\textsuperscript{64} Nursing home staff may hesitate to report suspected abuse out of concern that they may lose their jobs or face other repercussions from their employer or co-workers.\textsuperscript{65} Additionally, studies show that nursing home staff are often skeptical that an abusive act did, in fact occur.\textsuperscript{66} Nursing home administrators may be further deterred by the potential for adverse publicity.\textsuperscript{67}

Delayed reports inhibit the prevention of further abuse by hindering investigations and postponing corrective action.\textsuperscript{68} If contacted at all, law enforcement officers frequently find themselves trailing another investigation by the state survey agency or other entity.\textsuperscript{69} By this time, much of the evidence has been lost or compromised, limiting the effectiveness of prosecutions.\textsuperscript{70}

One important piece of evidence that is particularly affected by delayed reports of abuse is witness testimony.\textsuperscript{71} Many potential witnesses have a short span of credibility.\textsuperscript{72} As time passes from the date of the incident to the day of trial, a witness's ability to remember important details about the incident often diminishes.\textsuperscript{73} Although impaired recall is a common concern in criminal cases, it is even more prevalent among nursing home residents.\textsuperscript{74} In addition, given the age and medical condition of many residents, a witness may not survive long enough to testify at trial.\textsuperscript{75} As a result, even in cases where residents sustained visible injuries such as black eyes, lacerations, and fractures, a court may be unable to positively identify the perpetrator or rule out the possibility of an

\begin{footnotes}
\item[64] Id. at 7, 10.
\item[65] Id. at 12.
\item[66] Id. at 11.
\item[67] Id. at 12.
\item[68] Hearings on the Aging, supra note 1, at 11 (statement of Leslie G. Aronovitz, Director, Health Care—Program Administration and Integrity Issues, U. S. General Accounting Office).
\item[69] More Can Be Done, supra note 57, at 9.
\item[70] Id.
\item[71] Id. at 16-17.
\item[72] Id.
\item[73] Id. at 16.
\item[74] Id. at 16-17. As an example, the GAO report cites one case where a victim's roommate witnessed an abusive act and could positively identify the perpetrator during investigation. Id. at 17. Five months later, however, on the day of the trial, the witness was unable to recognize the suspect in the courtroom. Id. Consequently, the court was forced to dismiss the charges. Id.
\item[75] Id. at 17.
\end{footnotes}
accident beyond a reasonable doubt, leading to the dismissal of the case.\textsuperscript{76}

Advocates of granny cams believe the presence of video cameras in nursing homes will improve government enforcement of the federal standards for quality care.\textsuperscript{77} They contend that cameras can protect our elderly, who are often too frail or incapacitated to protect themselves, by providing constant documentation of resident care.\textsuperscript{78} With their ever-watchful eyes, cameras could fill the gaps in federal government supervision of nursing homes.\textsuperscript{79} Video or audio tapes can also provide compelling evidence necessary to increase the efficiency with which abuse and neglect cases are reported and prosecuted.\textsuperscript{80} Finally, with widespread use, supporters believe cameras may shift the system of enforcement from the futile mode of prosecuting violations \textit{after} they occur to preventing the violations beforehand.\textsuperscript{81}

Supporters also note that since nursing homes have already begun to implement electronic surveillance, the proposed legislation is necessary for regulation.\textsuperscript{82} They argue that “[t]he current lack of guidelines can result in . . . residents’ privacy being compromised” and that a “comprehensive and cohesive set of regulations” is needed to “ensure that electronic monitoring in nursing homes is conducted in an appropriate manner.”\textsuperscript{83} Additionally, a law could protect the rights of nursing homes, their employees, and visitors to the facility by, for example, requiring that notice of electronic surveillance be provided.\textsuperscript{84}

\textsuperscript{76} See id. at 16-17.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.; see also H.B. 457, 2001 Leg., Reg. Sess. (La. 2001) (allowing video surveillance tapes to be admissible as evidence in both civil and criminal actions).
\textsuperscript{81} VIOLETTE KING, NURSING HOME MONITORS, FAMILY-CONTROLLED SURVEILLANCE CAMERA PROJECT: OUR PROJECT IS CRUCIAL, available at http://www.nursinghomemonitors.org/why_our_project_is_crucial.htm (last visited May 16, 2003).
\textsuperscript{82} BILL ANALYSIS, supra note 77, at 4.
\textsuperscript{83} Id. Specifically, advocates want to ensure that residents have control over when and how the cameras will record. Id.; see also TEX. HEALTH & SAFETY CODE ANN. § 242.846(b)(2) (Vernon 2001) (requiring residents to choose whether their video cameras will be obstructed in specified circumstances).
\textsuperscript{84} See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 242.847(b), (h) (Vernon 2001) (requiring a resident who conducts electronic surveillance to post a notice on the resident’s door and allowing the institution to require that the camera be placed in plain view).
II. THE RIGHT TO PRIVACY AND ITS IMPACT ON THOSE SUBJECT TO VIDEO SURVEILLANCE

A. Origins of the Right to Privacy

Although the concept of privacy is not explicitly mentioned in the United States Constitution, it has long been embedded in our country’s common law. In one of the earliest and most influential commentaries on the concept of privacy law, Samuel D. Warren and Louis Brandeis noted that the protection of person and property is a pervasive theme in our legal system. Tracing the evolution of this principle in law, Warren and Brandeis argued that a right of privacy was the natural progression of protection afforded American citizens, particularly in an increasingly technological society. The protection of personal dignity required that people be granted the “right to be let alone,” which included allowing a person to decide how much access to a person’s private thoughts and affairs the public should have.

In 1965, the United States Supreme Court held for the first time, in Griswold v. Connecticut that the right to privacy could be found within the “penumbras” of the Bill of Rights, “the emanations from those guarantees that help give them life and substance.” Specifically, the Court found the right of privacy to be a necessary corollary to the freedoms granted in the First, Third, Fourth, and Fifth Amendments. The language of the Ninth Amendment further bolstered this argument, stating “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Numerous Supreme Court cases have since both expanded and limited the right of privacy established in Griswold.

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86. Id.
87. Id. at 195-97.
88. Id. at 193, 198; see also E.L. Godkin, The Rights Of The Citizen to his Own Reputation, Scribner’s Magazine, July 1890, at 65-66.
89. 381 U.S. 479, 484 (1965) (holding that the right to privacy does protect the use of birth control by married couples).
90. Id.; see also U.S. Const. amend. I (granting the freedom of association); U.S. Const. amend. III (prohibiting the quartering of soldiers in times of peace without consent of the homeowner); U.S. Const. amend. IV (prohibiting unreasonable searches and seizures by the government); U.S. Const. amend. V (granting citizens the right to refrain from giving self-incriminating testimony).
91. Griswold, 381 U.S. at 484 (quoting the Ninth Amendment).
Much of the case law regarding privacy has been based in the Fourth Amendment protection against unreasonable searches and seizures by the Government. Although "searches" were originally limited to physical trespasses upon personal property, the Supreme Court eventually came to protect informational privacy by holding that electronic surveillance could also constitute a sufficiently "unreasonable" intrusion.93 Regarding electronic surveillance, the Court has determined that citizens maintain a privacy interest under the Fourth Amendment where they have an actual expectation of privacy that society recognizes as reasonable.94

To comply with the Fourth Amendment standard within these zones of privacy, the Government’s interest in maintaining public order must outweigh the degree of intrusion caused by the Government action.95 This utilitarian balancing test has become the dominant tool used by courts in cases where the justification for governmental searches of persons is to further interests other than law enforcement.96 Since the proposed granny cam law would mandate video surveillance in nursing homes where requested by a resident or resident’s family, this Fourth Amendment analysis will be an important consideration in adopting any such legislation.

**B. Applying Privacy Law in the Nursing Home Context**

The first step in this process is to establish the protected zones of privacy within a nursing home. Applying the "reasonable expectation of privacy" test to a nursing home setting, however, proves more complicated than it appears. Since a nursing home possesses the characteristics of both a public and private place, it is unclear where a court will draw the line regarding what is reasonable.

Although there is generally a reasonable expectation of privacy within a home, courts have held that this does not extend to the common areas of a residential building, such as lobbies, which are considered public places.97 Common areas of hospitals have simi-
larly been considered public places, and, therefore, outside the zone of privacy. 98 This would imply a limited amount of privacy within the common areas of the nursing home.

Courts have found, however, that other "semi-private" places within a healthcare facility, such as a patient's room, can constitute a sufficient zone of privacy. 99 Even though a patient may implicitly waive certain rights to privacy when in the company of hospital employees, the patient can expect her room to remain private to all others. 100 Analogously, a nursing home resident's room should be considered a "semi-private" area.

Further, a nursing home could be considered "semi-private" throughout the facility by the very nature of the institution and its responsibilities. Although some courts have found that hospital common areas are "public places," 101 others have found that a greater degree of privacy exists within a medical facility. 102 A nursing home, for example, has broad discretion to limit the license of the public to enter its premises for health and safety reasons. 103 At the same time, nursing home facilities inherently require that residents waive certain privacy rights so that they may be monitored by staff. 104 Accordingly, common areas may not be considered public places, but rather "semi-private" zones where residents waive certain rights to privacy from staff surveillance while maintaining some privacy from visitor intrusion.

This rationale has been applied to other institutional residence settings. For example, in *Huskey v. National Broadcasting Company*, an inmate in the Marion Illinois Penitentiary filed suit against NBC for invasion of privacy when the crew filmed him exercising in his gym shorts. 105 In its opinion, the court noted, "Huskey's visibility to some people [such as security guards or other inmates] does not strip him of the right to remain secluded from

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98. *E.g.*, People v. Brown, 151 Cal. Rptr. 749, 753-54 (Ct. App. 1979) (noting that many areas of a hospital, such as the hallway, are public places and therefore not subject to the constitutional protection of privacy).
99. *Id.* at 754.
100. *See id.*
101. *Id.*
102. *See People v. Marino*, 515 N.Y.S.2d 162, 166 (J. Ct. 1986) (finding that the public license to enter a medical facility is not as broad as that of an airport terminal or welfare office).
103. *Id.*
Similarly, a nursing home must monitor its residents to a certain extent. Applying the reasoning of Huskey to nursing homes, residents may retain some privacy interests throughout the facility, including in common areas, despite being under constant staff supervision and within the plain view of other residents.

The "zone of privacy" analysis will be further affected by the party involved. Residents, compared to employees or visitors, for example, may reasonably expect different degrees of privacy within the same nursing home context. Accordingly, this Comment addresses each group separately.

1. Privacy Rights of Residents

Federal laws requiring that healthcare facilities maintain a minimum standard of care may apply for the use of granny cams. For example, under OBRA, skilled nursing facilities must promote and protect patient rights, including, "[t]he right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups."107 As a camera could record any of these situations, this patient right would inevitably be implicated by the surveillance.

Residents may, however, choose to waive their own privacy rights in return for the protection offered by the cameras.108 A written consent form could allow for this through a provision releasing the nursing home of liability for invasion of privacy stemming from the surveillance.109 If a nursing home resident is incapacitated, however, as is often the case, obtaining consent may not be an easy task.

Under federal law, "in the case of a resident [adjudicated] incompetent under the laws of a State, the rights of the resident . . . shall devolve upon, and . . . be exercised by, the person appointed under State law to act on the resident's behalf."110 While this language would appear to allow legal guardians to assert a claim on behalf of their ward for invasion of privacy rights,111 it does not specify that they may waive the privacy rights of the incompetent person.

106. Id. at 1288.
108. AHCA, supra note 6, at 6-7.
110. 42 U.S.C. § 1395i-3(c)(1)(C).
111. In Re Guardianship of Browning, 568 So. 2d 4, 13 (Fla. 1990).
State law governs the scope of a legal guardian's decision-making power and, thus, a federal granny cam law could have varied application across the country with regard to incompetent residents. This issue often remains uncertain within state law as well. For example, under Florida law, the right to privacy is considered to be retained by a person who has been adjudicated as incompetent. At the same time, however, the statute also authorizes a guardian to make decisions regarding the person's residential environment, along with other aspects of social life. As the decision to impose video surveillance implicates both of these rules, the courts might ultimately be left with the decision as to whether a legal guardian may waive the privacy rights of her charge in this context.

Many advocates of granny cams argue that video surveillance is most necessary for and beneficial to the incapacitated. Since these residents are unable to speak for themselves, the camera can speak for them in reporting abuse. Opponents find it a gross intrusion upon dignity to monitor a person's most intimate moments without their explicit consent. With important concerns supporting both policies, it is unclear how this issue should be resolved.

In adopting its own granny cam law, the Texas Legislature has chosen a more flexible approach regarding incapacitated residents. Not only does the statute authorize a legal guardian to waive the privacy rights of a resident who has been judicially declared incompetent, but the "legal representative" of a resident who has not been judicially declared incompetent may also consent to video surveillance, so long as the resident lacks the capacity to request electronic monitoring herself. Other states considering granny cam legislation have similarly proposed granting a resi-

113. Id. ch. 744.3215(3)(e)-(g).
115. Id.
117. Id. § 242.845(b).
118. Id. § 242.845(c). "Legal guardians" for the purpose of this statute may be appointed by the resident while the resident has full capacity or may qualify within separate guidelines promulgated by the Texas Department of Human Services. Id. § 242.845(c)(2)
dent’s representative the power to consent to electronic monitoring on behalf of the resident.\textsuperscript{119}

In addition to a resident’s right to personal privacy, federal law also guarantees residents “the right to confidentiality of personal and clinical records.”\textsuperscript{120} Because cameras would likely record certain patient medical information, during treatment and physician visits for example, nursing home administrators would be obligated to ensure that the content of the tapes remained out of the hands of third parties, including possibly the resident’s own family.\textsuperscript{121} Guidelines for minimal standards of procedure in this respect would be an imperative part of any law allowing the use of cameras in nursing homes.

2. \textit{Privacy Rights of Roommates}

Although a roommate implicitly consents to a slightly lower expectation of privacy by sharing a room, residents cannot implicitly consent to surveillance.\textsuperscript{122} The same privacy rights analysis as above would apply to these residents as well. A resident or legal representative seeking to monitor the entire room would, therefore, be required to obtain written consent from a roommate before proceeding with the installation of the cameras.\textsuperscript{123} If surveillance were limited to the consenting resident’s area, a roommate would have less right to object. Federal and state wiretapping statutes, however, would still apply to the recording of any voices or conversations.\textsuperscript{124}

3. \textit{Employee Privacy Rights}

Wiretapping statutes such as the Electronic Communications Privacy Act\textsuperscript{125} provide little tangible privacy protection for employees, particularly when they are monitored through silent video surveillance and when a consenting resident is party to the conversa-

\textsuperscript{119} E.g., H.B. 996, 2001 Gen. Assemb. (N.C. 2001) (defining the term “resident” to include the resident’s legal representative for the purpose of interpreting the statute language requiring nursing homes to permit a “resident” to use electronically monitoring devices); see also H.B. 216, 124th Gen. Assemb., Reg. Sess. (Ohio 2001) (allowing a resident or “resident’s sponsor” to install electronic monitoring devices).
\textsuperscript{120} 42 U.S.C. § 1395i-3(c)(1)(A)(iv) (1994); see also 42 C.F.R. § 460.112(f) (2002).
\textsuperscript{121} Galloro, \textit{supra} note 114, at 24.
\textsuperscript{122} Adelman, \textit{supra} note 104, at 829.
\textsuperscript{123} AHCA, \textit{supra} note 6, at 7.
\textsuperscript{124} See id. (finding fewer privacy concerns if no sound is recorded); see also infra notes 157-161 and accompanying text.
Employers also enjoy an express exception to the Act which sanctions surveillance for the purpose of supervision or evaluation of employees. Monitoring nursing home staff for abuse and neglect violations would appear to fit directly into this exception, severely limiting the protective value of the statute regarding employee privacy.

Because the protection offered by criminal wiretapping statutes is so narrow, employees must often turn to state tort law for privacy protection. Most commonly, they invoke the invasion of privacy tort known as unreasonable intrusion upon seclusion. Unfortunately, not all states recognize this tort. Furthermore, in those states that acknowledge this claim, courts have generally limited recovery to areas of a highly intimate nature, such as bathrooms. Thus, while staff break rooms or locker rooms may be considered sufficiently private areas, a resident’s room and the facility common areas most likely would not.

Some commentators make a distinction between professional and nonprofessional staff in assessing their respective rights to privacy. In their view, trained professionals such as physicians may enjoy a greater privacy interest as a result of their extensive training, which implies an expectation of being able to work without supervision. Also, such professionals often have an ethical duty to maintain confidentiality regarding communications with patients and may therefore insist on treating patients beyond the gaze of the camera.

In contrast, nonprofessional staff appear to have very limited privacy rights in a resident’s room, and certainly in the common areas of the facility. Due to the nature of their duties—to perform more menial tasks during which they may be interrupted at

126. This discussion is elaborated, infra notes 161-167 and accompanying text.
128. Adelman, supra note 104, at 831.
129. Id. at 832-33.
130. Id.; see also RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining intrusion upon seclusion as “when one intentionally intrudes, physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns if the intrusion would be highly offensive to the reasonable person.”).
133. Galloro, supra note 114, at 24.
134. Id.
135. Id.
136. Id.
any time—nonprofessional employees should have a minimal expectation of privacy.\textsuperscript{137}

Another impediment to protecting employee privacy exists in the doctrine of implied consent.\textsuperscript{138} Under this theory, when an employer notifies the employees of the electronic surveillance or when there is an established monitoring policy, an employee is considered to have implied consent to the surveillance through her continued employment.\textsuperscript{139} This view is considered appropriate even within at-will employment situations, where employees have inherently less power over their working conditions because of the fear that complaints may lead to discharge without cause.\textsuperscript{140}

4. Visitor Privacy Rights

Nursing home visitors may be entitled to an even lesser degree of privacy than employees. Although courts have generally held that a social guest is entitled to a reasonable expectation of privacy within the host’s residence,\textsuperscript{141} a guest on commercial premises is afforded less privacy.\textsuperscript{142} A “casual, transient visitor” has no recognized expectation of privacy.\textsuperscript{143} The rationale behind these distinctions is that the privacy of person’s home should extend to a guest only where the guest exhibits a similar connection to the premises as a temporary “home.”\textsuperscript{144}

In making this assessment, courts generally rely on factors such as whether the person has keys to the residence, the length of time on the premises, and the nature of the relationship with the host.\textsuperscript{145} In a nursing home setting, visitors are never given keys or unlim-

\textsuperscript{137} Id.
\textsuperscript{138} Adelman, supra note 104, at 831.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} See, e.g., Minnesota v. Olsen, 495 U.S. 91, 99 (1990) (holding that an overnight guest has a legitimate expectation of privacy); United States v. Heath, 259 F.3d 522, 533 (6th Cir. 2001) (noting that a familial relationship may be sufficient to establish a legitimate expectation of privacy for a social guest); United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997) (noting that a social guest need not be an overnight guest in order to maintain a reasonable expectation of privacy on the premises of their host).
\textsuperscript{142} See, e.g., Minnesota v. Carter, 525 U.S. 83, 90 (1998) (failing to find a legitimate expectation of privacy for a guest during a business transaction); New York v. Burger, 482 U.S. 691, 700 (1987) (noting that an expectation of privacy on commerical premises is less than that the expectation created in one’s home).
\textsuperscript{143} United States v. McNeal, 955 F.2d 1067, 1070 (6th Cir. 1992); see also United States v. Harris, 255 F.3d 288, 295 (6th Cir. 2001).
\textsuperscript{144} See Carter, 525 U.S. at 89 (noting that the text of the Fourth Amendment suggests that its privacy protections extend only to people in their own houses).
ited access to the facility.\textsuperscript{146} Visitation periods are generally con-
strained to certain hours as opposed to overnight. Additionally, the visitor’s relationship is with the individual resident, not with the nursing home and its administration, who would most likely be considered the visitor’s “host.” These factors further make the re-
relationship between the nursing home administrators and the visitor appear more commercial, more like an industry merely providing a service.

Based solely on the objective standard of reasonableness, if the common areas of a nursing home are deemed “public places” similar to those in a hospital,\textsuperscript{147} a visitor would not have a reasonable expectation of privacy in those areas. With regard to a resident’s room, the resident, rather than the nursing home itself, may be considered the host, because the resident has charge over who may enter her room.\textsuperscript{148} Such a finding may change the above analysis regarding visitor privacy interests since a guest will ordinarily have a clear social relationship with a resident. Visitation periods will still be restricted by nursing home policy, however, and courts may therefore conclude that visitors do not have an expectation of pri-
vacy within a resident’s room either.

Providing visitors with notice that the facility is monitored by video cameras may further negate any reasonable expectation of privacy.\textsuperscript{149} In cases involving video surveillance of public places, courts have repeatedly held that where notice of the surveillance is clearly displayed, a person cannot expect privacy.\textsuperscript{150} In \textit{Gillett}, the court stated that a fitting room in a clothing store “was for use by the public on conditions established by the business.”\textsuperscript{151} If [a per-
son] did not want to use the fitting room under the posted condi-

\begin{footnotesize}
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\item[146.] \textit{See supra} note 102-04 and accompanying text.
\item[148.] \textit{Id.} at 754.
\item[149.] \textit{See Lewis v. Dayton Hudson Corp.}, 339 N.W.2d 857, 860-61 (Mich. Ct. App. 1983) (finding that signs warning of video surveillance removed what reasonable expectation of privacy a person may have had); \textit{c.f.}, \text{Brazinski v. Amoco Petroleum Additives Co.}, 6 F.3d 1176, 1183 (7th Cir. 1993) (noting that where the least intrusive means of surveillance is used to achieve an important objective, a stranger whose privacy is incidentally compromised should not have standing to complain).
\item[150.] \textit{E.g., Lewis}, 339 N.W.2d at 860-61; \textit{Gillett v. State}, 588 S.W.2d 361, 363 (Tex. Crim. App. 1979); \textit{see also United States v. Edwards}, 498 F.2d 496, 501 (2d Cir. 1974) (holding that a person has a limited expectation of privacy from baggage searches in an airport where notice and warning of such surveillance is posted, giving the person the option of choosing not to fly if she would prefer not to be subjected to a baggage search).
\item[151.] \textit{Gillett}, 588 S.W.2d at 363.
\end{itemize}
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tions, she was not compelled to do so."

Similarly, a nursing home is entitled to place conditions on visitor entry to the facility, perhaps including video surveillance. Thus, a visitor who is aware of the surveillance and yet chooses to enter the facility, most likely has no reasonable expectation of privacy from such monitoring.

5. Privacy of the Nursing Home Institution

Several jurisdictions have held that a corporation does not have a recognized right to privacy. The Supreme Court has further noted that any expectation of privacy is "particularly attenuated" in industries that are "closely regulated." Applying this principle to a nursing home setting, the Second Circuit found the government interest in the regulation of nursing homes to be of the "highest order." As a result, the court stated, "nursing homes' right of privacy with regard to matters related to their compliance with patient care rules and regulations is even less than 'attenuated.' It is virtually non-existent."

6. Wiretap Statutes

Wiretapping statutes are designed to protect the privacy of an individual's communication with another party. These statutes, however, have generally not been updated to address modern technology, so current invasions of privacy often fall outside their protection. Further, broad exceptions remove much of the force of these laws. As a result, this body of law offers little guidance or regulation regarding the use of video surveillance in nursing homes.

152. Id.
153. See supra notes 46-48 and accompanying text.
154. See, e.g., In Re Med. Lab. Mgmt. Consultants, 931 F. Supp. 1487, 1493 (D. Ariz. 1996) (holding that a corporation has no privacy rights); CAN Fin. Corp. v. Local 743, 515 F. Supp. 942, 946-47 (D.C. III. 1981) (holding that the right of privacy is a personal right designed to protect individuals from unwarranted disclosure of personal information and does not extend to corporations); Bear Foot Inc. v. Chandler, 965 S.W. 2d 386, 389 (Mo. Ct. App. 1998) (noting that while some states have recognized a right of publicity in individuals or the deceased, a corporation does not have such a right). But see H & M Assoc. v. City of El Centro, 167 Cal. Rptr. 392, 410 (Ct. App. 4th Dist. 1980) (holding that a partnership may assert action based on a right to privacy).
156. Blue v. Koren, 72 F.3d 1075, 1080 (2d Cir. 1995).
157. Id. at 1081.
158. Adelman, supra note 104, at 822.
159. Id.
160. See infra notes 161-170 and accompanying text.
The Omnibus Crime Control and Safe Streets Act of 1968, also known as the Federal Wiretap Act, governs the use of surveillance that "intercepts wire, oral, or electronic communications." Courts have interpreted this language to mean that the statute prohibits the recording of conversations but does not apply to silent video surveillance. Accordingly, granny cams equipped only to record images without sound would appear to be lawful under this statute.

Under this act, it is also lawful to record a communication with consent of one of the parties. Because many communications in a resident's room would in some way involve the resident as a party, these could also be lawfully recorded by a camera to which the resident has consented. The federal wiretap statute further contains an exception for "communication[s] in the normal course of business" that may allow facilities to lawfully monitor their employees.

State wiretapping statutes may be more or less extensive in their protection of privacy relating to video surveillance. In general, however, they similarly fall short of outlawing the use of cameras in the nursing home context. In New York, for example, recording a conversation is legal as long as the person recording is a party to the conversation. In comparison, California, Florida, and Pennsylvania require consent of all parties to a conversation to avoid a violation of their eavesdropping statutes.

The Texas Legislature has addressed the concern of possible criminal eavesdropping liability by expressly providing a defense to the criminal statute for electronic surveillance authorized by the granny cam law. Such a provision was necessary to avoid a direct conflict with the state eavesdropping statute, which prohibits the interception of conversations resulting from audio surveillance. Although the Texas Legislature chose to create such an exception to the criminal statute, a federal law protecting elec-

162. See, e.g., United States v. Koyomejian, 970 F.2d 536, 538 (9th Cir. 1992) (holding that silent video surveillance is neither prohibited nor regulated by the Wiretap Act).
164. Id. § 2511.
166. Id. at 824, 824 n.20.
167. Id. at 824-25.
tronic monitoring in nursing homes could simply limit the acceptable devices to exclude audio surveillance to avoid a conflict with the Federal Wiretap Act.\textsuperscript{170}

\section*{III. Economic Concerns}

A. Equipment Costs

The cost of installing a video surveillance system can range from under one hundred to several thousand dollars.\textsuperscript{171} If the legislature mandated the implementation of cameras in nursing homes, the facilities would be responsible for paying for the required technology.\textsuperscript{172} Ultimately, however, the cost would fall on the residents and their families in the form of higher monthly rates.\textsuperscript{173} Since many nursing home residents receive healthcare through Medicare or Medicaid,\textsuperscript{174} the cost of compliance with a mandatory surveillance provision would further be passed to the taxpayers. More likely, however, the federal or state legislatures would follow the lead of Texas, where the use of video surveillance is a choice made by the resident or resident’s family that must simply be obliged by the nursing home.\textsuperscript{175} Under this model, the resident making the request would be responsible for bearing the costs of equipment purchase and installation.\textsuperscript{176}

Some commentators, such as Senator Charles Grassley\textsuperscript{177} have argued that even the least expensive surveillance technology may be difficult for many families to afford.\textsuperscript{178} He believes that since nursing homes are better equipped to bear this cost, they should be required to do so even under a bill that makes camera use a voluntary choice of the resident or resident’s family.\textsuperscript{179} Senator Grassley

\textsuperscript{170} See \textit{Tex. Health \& Safety Code Ann.} \S 242.841(2) (defining “electronic monitoring device” to include audio devices designed to acquire communications or other sounds occurring in the room).
\textsuperscript{171} AHCA, \textit{supra} note 6, at 10.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} See \textit{supra} note 31.
\textsuperscript{175} Id.
\textsuperscript{176} See \textit{id.} (stating that the nursing home would be responsible for providing space).
\textsuperscript{177} Senator Grassley was the chairman of the Special Committee on Aging in 2000 when the General Accounting Office was commissioned to study nursing home abuse in the United States. Patrick Kampert, \textit{Video Watchdog; Some Nursing Homes Welcome Cameras, But Many Fear Unleashing a Monster}, \textit{Chi. Trib.}, Mar. 24, 2002, Health \& Family, at 1(c).
\textsuperscript{178} Id.
\textsuperscript{179} Id.
Further contends that placing the burden on families would shift too much responsibility for resident care away from nursing home owners and administrators. He points out that nursing homes are federally and state funded for the purpose of maintaining their residents' quality of life. So, when the nursing home industry has failed its residents in this endeavor, the burden of rectification should remain with the industry.

B. Staffing Shortages

Nursing home industry representatives have stated that video surveillance would aggravate one of the biggest difficulties they face in providing quality care to elders—the hiring of quality staff. They argue that the constant monitoring, with the concomitant increased risk of lawsuits, would increase employee stress and deter qualified applicants. They further contend that cameras could harm the relationship of trust that is vital between patients and caregivers. Nursing home staff believe the video images could be misinterpreted, turning innocent situations into fuel for false accusations.

Nursing home administrators who have allowed video surveillance have told a different story, however. Jacqueline DuPont, who owns several long-term care facilities for Alzheimer's patients, has installed cameras in patient rooms as well as common areas in her homes. Dupont says that her staff is grateful for the protection that the cameras provide in cases where delusional residents make false accusations. DuPont also considers the videotapes a valuable training tool, enabling her to monitor staff performance, identify areas of weakness, and provide the necessary training for improvement.

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180. Id.
181. Id. at 4-5.
182. Id.
183. Galloro, supra note 114, at 24. The annual turnover rate for nursing assistants can approach ninety percent. Sharp, supra note 2, at 1A.
185. AHCA, supra note 6, at 11, 13; Galloro, supra note 114, at 24.
186. AHCA, supra note 6, at 11, 13; Galloro, supra note 114, at 24.
188. Kampert, supra note 177, at 1. According to Jean Yarnall, a nursing home administrator in West Chester, Pennsylvania, nursing aides are most discouraged by disorganization and feeling of underappreciation. Sharp, supra note 2, at 1A. To address these concerns, her home solicited suggestions from the staff and began offering simple rewards for good work. Id. As a result, Ms. Yarnall experienced a significant decrease in the staff turnover rates within only six months. Id.
189. Galloro, supra note 114, at 24.
Unfortunately, currently available information is insufficient to support a thorough evaluation of the effect that granny cams might have on staff hiring and turnover rates.\textsuperscript{190} In the few facilities that have taken advantage of the benefits of video surveillance, however, staff turnover appears unaffected.\textsuperscript{191}

C. Liability Insurance

Information is also conflicting as to how the liability insurance market would be affected by the presence of cameras in nursing homes.\textsuperscript{192} Representatives from the insurance underwriting industry, such as J. Sterling Shuttleworth, President and Chief Executive Officer of Uni-Ter Underwriting Management Corporation, have stated that the use of video surveillance systems would greatly increase the risk associated with insuring nursing homes against tort liability.\textsuperscript{193} This observation is based primarily on the assertion that cameras increase the potential for misinterpretation of events and therefore increase the potential for lawsuits.\textsuperscript{194}

Many underwriters, including Shuttleworth would therefore recommend that insurance carriers either: 1) exclude from coverage any claim “arising out of or involving the use or operation of video equipment, as well as claims based on information captured on or recorded by such video equipment,” or 2) decline to offer liability insurance coverage at all to facilities implementing such surveillance equipment.\textsuperscript{195} Based on these concerns, Clayton L. Deen, Vice President of Brown and Brown Insurance, commented that “[a]ny legislation that requires the use of video camera monitoring will eliminate any possibility of the return of a rational and reasonably priced insurance product for nursing homes.”\textsuperscript{196}

Again, these predictions have seemingly been proven inaccurate by the nursing homes that have installed video surveillance systems. Cindy O’Steen, owner and administrator of Southland Suites, a nursing home facility in Lake City, Florida with video sur-

\textsuperscript{190} AHCA, \textit{supra} note 6, at 11.
\textsuperscript{191} Id. at 11, 15; see Galloro, \textit{supra} note 114, at 24.
\textsuperscript{192} See Galloro, \textit{supra} note 114.
\textsuperscript{193} Id.
\textsuperscript{194} Id. According to the American Association of Homes and Services for the Aging, one example of a situation prone to misinterpretation is where residents moan during care. Douglas J. Edwards, \textit{All Eyes are on Granny Cams}, \textit{Nursing Homes}, Nov. 2000, at 28. Although these noises may appear to be evidence of abuse to a lay person or family member, in actuality, such behavior is common, especially among residents who are cognitively impaired, and may not indicate any abuse at all. Id.
\textsuperscript{195} AHCA, \textit{supra} note 6, at 11.
\textsuperscript{196} Id.
veillance throughout, reported that ten months after the cameras were installed, she had eliminated lawsuits and workmen's compensation claims.\textsuperscript{197} She maintained that, as a result, her liability insurance premiums went from $57,000 per year to $10,000, a decrease of $500 per bed.\textsuperscript{198} She has further been told that her worker's compensation insurance premiums will decline as well.\textsuperscript{199}

\section*{IV. Conclusion}

Elder abuse is a serious problem in the United States that requires more effective enforcement of standards of care if it is to improve.\textsuperscript{200} The inability of the federal survey mechanisms to successfully and consistently ensure compliance with these standards has led to a need for residents and family members to assume this responsibility.\textsuperscript{201} Empowering residents and their representatives with the ability to install cameras in nursing home facilities would strengthen the current system of accountability, ultimately providing incentives for compliance and deterrents to abuse.\textsuperscript{202}

Despite the criticism of the nursing home industry, granny cams do not legitimately affect the privacy of anyone but the residents they protect.\textsuperscript{203} Accordingly, it is appropriate that those same residents be able to choose whether to waive their rights in exchange for the benefits that cameras may provide.\textsuperscript{204} Without an affirmative right to install electronic surveillance, however, residents will remain unable to take advantage of the added protection that this technology offers because of nursing home industry control.\textsuperscript{205}

Something must change in the current system of nursing home care. Evidence confirming that cameras deter resident abuse and neglect suggests that electronic monitoring may be the next step toward enhanced resident safety. With careful drafting, a federal law implementing this technology could provide the necessary tool to improve quality of care, as well as quality of life, for our parents and grandparents in nursing homes.

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\textsuperscript{197} Id. at 15.
\textsuperscript{198} AHCA, supra note 6, at 15; Kampert, supra note 177, at 1.
\textsuperscript{199} AHCA, supra note 6, at 15.
\textsuperscript{200} See supra Part I.
\textsuperscript{201} See supra Part I.B.
\textsuperscript{202} See supra notes 77-80 and accompanying text.
\textsuperscript{203} See supra Part II.
\textsuperscript{204} See supra notes 108-109 and accompanying text.
\textsuperscript{205} See supra notes 2-3 and accompanying text.
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