

The Current State of U.S. Regulation of Electronic Monitoring to Combat Elder Abuse and Its Future

Expanding Perspectives

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Keywords: Elder Abuse, Technology, Long-Term Care, Regulation, Public Health

Abstract: The incidence of elder abuse has led to a growing trend of states taking various methods to regulate the use of electronic monitoring in institutional settings through programs, guidelines, regulations, and laws. This article attempts to evaluate how the regulation of electronic monitoring has evolved and may be advanced in the future with the anticipated increase of elder abuse.

Elder abuse has been recognized by the World Health Organization (WHO) as “an important public health problem.”¹ The Covid-19 pandemic has increased the incidence of elder abuse in both the community (possibly 84%) as well as institutions.² Further, as the aging population grows globally, so will the incidence of elder abuse which is projected to be “some 320 million victims by 2050.”³ Elder abuse may have different definitions to various individuals in roles of identifying its occurrence and within the law itself.⁴ For ease of understanding, the definition used by the WHO will be used in this article: “Elder abuse” means “a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which cause harm or distress to an older person.”⁵ There are a number of forms of abuse under the elder abuse umbrella including: physical,

psychological, sexual, and financial exploitation with neglect being potentially a distinct category.⁶

Perhaps given these alarming global statistics, it should not be surprising that innovative solutions have begun to emerge in order to tackle elder abuse involving the use of technology, particularly, in institutional care settings with a handful of U.S. states passing laws to regulate the ability of families to use video surveillance to conduct electronic monitoring of a loved one in a long-term care facility.⁷ However, that is not the only method of regulation as some states have also developed specific programs and others have utilized guidelines.⁸ This article explores these different approaches of regulation of electronic monitoring for elder abuse focusing largely on the long-term care context and how currently existing gaps in these approaches may benefit from policy changes and program development at the federal level to help combat elder abuse.

I. By the Numbers: Understanding the Prevalence of Elder Abuse

Generally, while it is understood, and to some extent assumed, that the incidence of elder abuse is both severe and prevalent, there is less concrete, specific data to actually substantiate the extensiveness of the occurrence.⁹ The WHO references a 2017 report examining elder abuse to suggest its results of 1 out of 6 aging adults experiencing elder abuse as an indicator of the prevalence of the problem highlighting a number of different types of abuse.¹⁰ In the U.S., there has been a slow movement of examining elder abuse: “The study of elder mistreatment is a fairly recent area of scholarship in the United

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States. First discussed in the 1970's, abuse of older adults was for many years a largely hidden, private matter rather than an issue of social, health, or criminal concern.[1].¹¹ The Centers for Disease Control and Prevention (CDC) has acknowledged that the incidence of elder abuse in the private home is 1 in 10 aging adults 60 years of age or older.¹²

In focusing on institutional environments, numbers of the extent of elder abuse occurring in nursing homes are much more inconclusive.¹³ The WHO has attempted to illuminate this area indicating that nearly any country that provides care

man for long-term care received 201,460 complaints — however, there is no indication as to the extent these complaints were purely specific to instances of abuse per se and the five most common categories in terms of complaints were: “improper eviction or inadequate discharge/planning, unanswered requests for assistance, lack of respect for residents, poor staff attitudes, administration and organization of medications; and, quality of life, specifically resident/roommate conflict.”¹⁸ The minimal recent data that does exist on the U.S. as far as the incidence of elder abuse/neglect in nursing homes indicates

cially given the monumental nursing shortages that are occurring.²³ “Due to this, they also might refrain from reporting committed or observed abuse in order to protect others or themselves [65].”²⁴ Other residents are simply unable to communicate to others that they are being abused due to living with certain impairments: “For residents with cognitive impairment, reporting abuse is particularly difficult [81, 82].”²⁵

There are also other relationships besides staff-to-resident that can result in abuse even in the long-term care setting.²⁶ This includes resident-on-resident abuse or aggression.²⁷

Perhaps given these alarming global statistics, it should not be surprising that innovative solutions have begun to emerge in order to tackle elder abuse involving the use of technology, particularly, in institutional care settings with a handful of U.S. states passing laws to regulate the ability of families to use video surveillance to conduct electronic monitoring of a loved one in a long-term care facility. However, that is not the only method of regulation as some states have also developed specific programs and others have utilized guidelines. This article explores these different approaches of regulation of electronic monitoring for elder abuse focusing largely on the long-term care context and how currently existing gaps in these approaches may benefit from policy changes and program development at the federal level to help combat elder abuse.

in an institutionalized environment is experiencing incidents of elder abuse.¹⁴ It has also acknowledged that any precise data regarding the incidence of abuse in institutional settings is “scarce.”¹⁵ However, research conducted in this area highlighted that a staggering 64.2% of staff in institutional care settings admitted to committing elder abuse over the period of a year.¹⁶

Looking specifically to the U.S. and statistics on elder abuse in long-term care settings: “Few studies have investigated the prevalence of mistreatment within institutions. Those that have been conducted have provided wide-ranging, sometimes disparate estimates.”¹⁷ In 2017, states’ ombuds-

that 15,000 complaints were made in 2020 to state ombudsmen who oversee the regulation of nursing homes at the state level.¹⁹ Regardless of these reported numbers, it is known that elder abuse in nursing homes is underreported.²⁰ One factor that has a significant influence here is the fear factor — both on the side of the residents themselves as well as staff of nursing homes that reporting abuse will result in them facing serious consequences.²¹ For a resident, reporting abuse when the individual depends on the care of nursing staff could result in minimal or poor treatment for daily needs and assistance.²² On the other hand, nursing staff rely on their colleagues and employers, espe-

According to a 2018 breakdown of elder abuse complaints in nursing homes by the National Center for Victims, 22% was the result of resident-on-resident abuse (physical or sexual).²⁸ This form of abuse has been described as “commonplace” and essentially so normalized that it is just a natural occurrence in the institutional setting.²⁹ Finally, there can be family-to-resident abuse, however, there is a lack of research on the extent of this abuse in the long-term care facility which can occur behind closed doors as staff may give families privacy during visits.²⁹

“Although abusive behavior is considered ‘unthinkable’ [56], it is often tolerated and underreported [65].”³⁰

Research has shown that as there is substantial evidence of elder abuse that does not easily fit into any one category, elder abuse has to be closely examined in the long-term care context.³¹ “The overall high prevalence rates of abuse of unspecified type (51–79%) [52, 77] indicate that abuse is not an uncommon phenomenon in nursing homes and should receive more attention.”³²

II. Factors Influencing Elder Abuse and the Impact of Its Occurrence

A. Factors Influencing Abuse

Another important consideration is recognizing what are the factors that contribute to the incidence of elder abuse in the long-term care environment. This is of particular importance given that in determining opportunities and options in tackling elder abuse in long-term care, an understanding of this environment and its unique characteristics is necessary to better inform approaches to combatting elder abuse. “Staff-to-resident abuse is a multifactorial problem [35, 76, 86] determined by characteristics of the institution and the individuals involved (residents, staff members).”³³ However, other relationships in which elder abuse may occur in the institutional setting that must be considered are resident-on-resident as well as potentially family-on-resident.³⁴

First, the long-term care facility, especially a nursing home, serves dual purposes in that it is technically first a resident’s “home.”³⁵ But second, it is also an institutional care setting with a community of residents receiving care.³⁶ Because of this, it is arguably far more restrictive than what one does experience in a private residence with many daily living experiences being structured at a certain time.³⁷ This creates what some authors have described as an “institutional abuse” given that the restrictiveness of the environment perpetuates a climate that invites the potential for abuse to occur.³⁸

“Staff-to-resident abuse is of particular interest since institutions should protect residents’ rights and prevent harm [6].”³⁹ However, a 2022

review demonstrated a wide range of abuse in the nursing home setting varying by type and complicated by different definitions of abuse used and difficulty gathering data.⁴⁰ Further in 2022, the American Health Care Association (AHCA)’s report indicated that the staffing shortage across the U.S. had further become so severe that 61% of long-term care facilities were limiting the admission of aging adults further complicating matters.⁴¹

Additionally, the entire culture of the long-term care facility likewise can lead to influencing the extent of elder abuse when it comes to safety.⁴² This also begs a greater question of what leadership looks like in the long-term care setting and what instruction is given to staff regarding what constitutes abuse.⁴³ Research is lacking as to the role leadership plays in promoting safety in these settings regarding the identification of abuse.⁴⁴

B. Impact of Elder Abuse

The impact on aging adults who become victims of abuse can be extraordinary and necessitates remedying this problem.⁴⁵ “For the residents, however, abuse results in major consequences. Residents experience distress, long-term psychological consequences and physical injuries as well as lower quality of life and higher mortality [4].”⁴⁶ There has also been very little research to this point on interventions to assist staff in nursing homes to prevent the prevalence of abuse of residents, “Therefore, effective interventions aiming to prevent abuse in nursing homes are needed. Our results, however, reveal that research on preventive interventions is sparse. Only one interventional study [74] examined an intervention with components of education and mutual support in a quasi-experimental design. Four qualitative studies described the need for interventions addressing staff education and organizational conditions [46, 47, 50, 64]. Strategies promoting a critical reflection of situations and of one’s own behaviour should be embedded at the institutional level [46].”⁴⁷

III. The Aging Population and Disability

While the aging population is generally considered a vulnerable population, there are also certain disabilities that make individuals even more susceptible to experiencing elder abuse: “Multimorbid individuals with cognitive and/or functional limitations are frequent victims of abuse, regardless of the setting [83].”⁴⁸ Therefore, it is crucial to consider what is known as far as the growing aging population and its intersection with disability.

Another reality that contributes significantly to the incidence of elder mistreatment is the intersection of age and disability.⁴⁹ “Approximately 43.6% (2 in 5) of adults aged 65 and older in the U.S. have some type of disability.”⁵⁰ Within this group, the highest prevalence of disability involves mobility at 27.7%.⁵¹ Research has supported that there is greater risk of elder mistreatment for those aging adults with both physical decline combined with other impairments.⁵²

Cognitive impairments specifically can have a major impact on the potential for elder abuse.⁵³ As reported by the Alzheimer’s Association in 2023, “About 1 in 9 people (10.8%) age 65 and older has Alzheimer’s dementia.”⁵⁴ The incidence of Alzheimer’s dementia by percentage also increases with aging.⁵⁵ However, there are likely significantly more individuals who have Alzheimer’s dementia but have not been diagnosed.⁵⁶ Although over a quarter of a century, the incidence of Alzheimer’s and related dementias may have declined, there is anticipated continued growth due to the pace of the aging population’s overall increase in the U.S.⁵⁷ A 2022 study by Columbia University indicated that approximately 10% of the U.S. aging population age 65 and older has dementia.⁵⁸ This study further suggested that an additional approximately 22% has cognitive impairment.⁵⁹

One sub-group of aging adults represents the fastest growing segment — those with intellectual and developmental disabilities (IDD).⁶⁰ Research is lacking as far as the extent of abuse experienced by this group and possible avenues for prevention.⁶¹ One study has indicated the

extensiveness of challenges for aging adults with intellectual disability as communication which can limit one's ability to report abuse, "finding that 57.9% experienced communication difficulties and, in 23.5% of cases, the difficulties were of a severe nature."⁶² Types of communication challenges for those with IDD include: "intelligibility, fluency of speech, understanding and comprehension of spoken, written, or sign language, transmission of messages or the pragmatic use of language."⁶³

IV. What is Elder Abuse?: A Complicated Definitional Web Involving the Law

While at first blush, it may seem like an understanding of "elder abuse" and how it is used in the law might be simple. "Definitions are not only needed for 'academic' purposes, definitions are needed in legislation and policy where they can compel certain action and direct resources. Cultural diversities complicate the debate on defining abuse even further."⁶⁴ The term "elder mistreatment" can be defined to include "elder abuse" as follows: "Elder mistreatment is a complex phenomenon that includes physical, psychological, and sexual abuse, as well as financial exploitation, of older adults."⁶⁵ However, there is no universal definition of "elder mistreatment" utilized.⁶⁶

First, there has been debate whether "elder abuse" is deserving of its own specific definitional treatment or if it falls into the more general umbrella of the terms "elder mistreatment."⁶⁷ When a more narrowly tailored definition is given instead to "elder abuse," there are likely commonalities seen in these definitions which are primarily: 1) there is a relationship of trust/care identified between the aging adult and the individual, or 2) the harm that is perpetuated is one committed against an aging adult.⁶⁸ These potential components are captured in the WHO's definition of "elder abuse."⁶⁹ Similarly, the CDC also embraces these principles in the definition it uses but specifies a particular age, "Elder abuse is an intentional act or failure to act that causes or creates a risk of

harm to an older adult. An older adult is someone age 60 or older. The abuse occurs at the hands of a caregiver or a person the elder trusts."⁷⁰ Despite these possible similarities, it has been pointed out that these definitions will vary both in terms of organizations and jurisdictions making a complicated web for understanding what can and should be identified as instances of "elder abuse."⁷¹ Additionally, abuse itself can take many forms.⁷² In conclusion, there are different definitions of "elder abuse" at the federal and state level involving the law in the U.S..⁷³

The Government of Canada has actually done substantial work in evaluating the legal definition of "elder abuse" from a global perspective in trying to determine the definition it would use.⁷⁴ In this evaluation, it emphasized the interdisciplinary nature of those involved as far as elder abuse further contributes to a lack of consistency in a definition.⁷⁵ Further, it pointed out that the definition used by the WHO in the Toronto Declaration was the result of a multidisciplinary group involving WHO, the University of Toronto, and the International Network for the Prevention of Elder Abuse (INPEA).⁷⁶ It also explains that while this was not a purely legal definition, it has been used by various legal resources.⁷⁷ One critical observation of the Government of Canada was that law cannot and should not ultimately exist separately to the reality of what actually happens in the world — that it must be informed by other groups and contexts.⁷⁸

It might be surprising to learn that despite the definition of "elder abuse" by WHO, countries other than the U.S. have actually not incorporated "elder abuse" separately into legislation instead choosing to resort to the traditional criminal law offenses (i.e. assault, battery, sexual assault, etc.).⁷⁹ Despite this, U.S. federal law defines "elder abuse" in the Older Americans Act but does not criminalize it federally instead listing "...protection against abuse, neglect, and exploitation" as an objective and provides some additional definitions in section 3002 for "abuse," "elder abuse,"

and "older adult."⁸⁰ The Older Americans Act provides a definition for "older individual" as someone aged 60 or older.⁸¹ However, this is another area of potential difference in laws when considering elder abuse as far as what specific age an aging adult is protected.⁸² Some states in the U.S., rather than determining this by age, instead refer to "vulnerable individuals" as seen in Arizona.⁸³

One important point as a reminder is that much of the abuse of aging adults that occurs in institutional settings occurs involving resident-on-resident harm. "One of the central questions is whether elder abuse is conceptually limited to relationships of trust."⁸⁴ Research has suggested that at the minimum, the definition of "abuse" in the nursing home context should be expanded to include not simply staff members but also other residents.⁸⁵ There are other instances of defining "elder abuse" that go as far as to include strangers as well.⁸⁶

V. Legal Responsibility and Regulation of Electronic Monitoring in Long-Term Care

A. Federal Resident Rights in Nursing Homes

Long-term care facilities are expected to be places that aging adults can live safely and receive the care needed as exemplified by federal legal requirements in the nursing home context specifically by The Nursing Home Reform Act of 1987 (Nursing Home Act) which applies to all nursing homes in the U.S. receiving Medicare or Medicaid payment.⁸⁷ It includes a provision among the rights of residents to be free from "abuse, neglect, misappropriation of resident property, and exploitation."⁸⁸ A resident is also entitled to be treated with respect and dignity.⁸⁹ While the Nursing Home Act provides protection to residents to be free from abuse, it also includes privacy protections, "personal privacy" concerning "accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups[.]"⁹⁰ However, there is no federal law in the U.S. regulating the use of electronic monitoring leading

states to take both a number of different approaches to regulation and balancing of privacy interests given the groups involved: residents, roommates, families, staff, and visitors.⁹¹

B. Examining the Regulation of Electronic Monitoring in Long-Term Care

1. Types of Regulation

In the absence of federal legislation, the issue of regulating electronic monitoring in long-term care has emerged on the state level through different mechanisms of regulation: 1) state programs, 2) guidelines, and 3) actual legislation/regulations in a handful of states.⁹² It is known that there are vast differences in how these are carried out: “The rules differ in terms of how they provide notice of data collection, and to whom such notice is provided; what processes for consent are contemplated; what safeguards are required for data security and access; and many other features.”⁹³ The following is by no means an exhaustive exploration of all of these issues but attempts to highlight some examples of these approaches and their differences.

C. State Programs

Some states have chosen to regulate electronic monitoring through the use of state programs beginning with the State of New Jersey.⁹⁴ The Safe Care Cam Program through the New Jersey Division of Consumer Affairs in 2016 was created to allow the use of electronic monitoring in the private homes of individuals to monitor potential abuse of aging adults involving home health care through video surveillance.⁹⁵ The program was expanded in 2019 to nursing homes and other long-term care facilities.⁹⁶ Rather than require families to have to bear the financial burden of equipment which would ultimately create inequity in being able to monitor for potential abuse, the NJ program involves the Division loaning out the equipment without charge to the families who are NJ residents including video surveillance cameras and memory cards.⁹⁷ It is then up to the families to actually review the surveillance and report any instances

of abuse.⁹⁸ The State of New Jersey does not publicly disclose how many requests for cameras have been made.⁹⁹ The loan period for a camera is initially 30 days.¹⁰⁰ However, this can be renewed with approval.¹⁰¹ An individual making a request to be loaned the equipment must demonstrate legal guardianship over a loved one.¹⁰² Further, there is an agreement that is entered into between the State of New Jersey and the family member.¹⁰³ Training is also provided to the family member in order to learn how to use the camera, review the surveillance, and store the data.¹⁰⁴

Following the example of New Jersey, Wisconsin has similarly created the Senior Safe Camera Program.¹⁰⁵ Through its Wisconsin Department of Justice, the State of Wisconsin announced this pilot program in February 2018.¹⁰⁶ Wisconsin also began by limiting its program to the in-home healthcare setting.¹⁰⁷ Similarly structured to NJ’s program, the Wisconsin program also provides the cameras and memory cards to family members by loan and gives an initial 30-day window for surveillance.¹⁰⁸ Finally, in another similarity to New Jersey, Wisconsin requires a contract between the government and the party engaging in the monitoring.¹⁰⁹

D. Guidelines

Another approach taken to regulate electronic monitoring for elder abuse is the use of guidelines.¹¹⁰ In 2003, Maryland passed “Vera’s Law”, HB 149, which required the development of guidelines for electronic monitoring by the Maryland Department of Health and Mental Hygiene in nursing homes, however, this is limited in the fact that this electronic monitoring is only allowed if a resident’s roommate consents and the nursing home agrees to it.¹¹¹ Thus, the nursing home may voluntarily agree to the use of electronic monitoring but is not required to offer it. The guidelines were made available on December 1, 2003.¹¹²

It is clear from the outset of the actual guidelines that they are not binding and are designed to provide insight after consultation with various constituencies in their creation:

“It is a general resource tool and is not intended to be all-inclusive, but is designed to assist in the facilitation and implementation of electronic monitoring requests. Facilities are encouraged to use this document to develop policies and procedures that suit their individual facility needs.”¹¹³ However, the guidelines do mandate particular aspects of electronic monitoring when it comes to issues of privacy and consent.¹¹⁴

Audio-only or use of audio recording is prohibited under the definition of electronic monitoring.¹¹⁵ One of the mandatory provisions of the guidelines involves consent requiring that consent must be obtained from any and all roommates.¹¹⁶ Further, there can be consent of a roommate(s) with limitations that must be respected and observed.¹¹⁷ Another area of the guidelines that is mandatory has to do with the installation of the electronic monitoring devices: “A camera or any other electronic monitoring device must be installed in a fixed position and not able to rotate.”¹¹⁸ The actual cost associated with the electronic monitoring such as the camera and any installation is a determination of the nursing home and those costs can be required of the resident or a legal representative.¹¹⁹

Similarly, California has taken the approach of using guidelines to regulate electronic monitoring in assisted living facilities since 2015 through the California Department of Social Services (CDSS).¹²⁰ The guidelines come under 2-5800 Guidelines for Use of Video Surveillance which are specific to “adult community care facilities and residential facilities for the elderly.”¹²¹ While video surveillance is permitted, audio surveillance is not just like Maryland.¹²² There is a waiver process in which residents who are agreeing to video surveillance are essentially agreeing to waive their right to privacy.¹²³ One distinguishing portion of the CA guidelines compared to Maryland is the incorporation of standards related to the maintenance of recordings both in terms of if the facility maintains them and they become part of the “resident record” or if they are maintained elsewhere.¹²⁴ Video surveillance also does

not in any way replace or minimize the required staffing needs for care.¹²⁵

E. Laws

The majority of regulation of electronic monitoring at the state level is through actual legislation.¹²⁶ Texas was the first state to pass legislation for electronic monitoring in the nursing home environment.¹²⁷ States that have passed laws to regulate electronic monitoring in the nursing home setting include: Connecticut, Illinois, Kansas, Louisiana, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Texas, Utah, and Washington.¹²⁸ While the follow-

order to permit the technology's use in this different way.¹³¹

Ohio is also one of the most recent states to adopt this legislative approach of regulation passed in 2021 and implemented in March 2022 known as "Esther's Law."¹³² An interesting provision of Ohio's law includes an anti-discrimination or retaliation provision against anyone choosing to use electronic monitoring.¹³³ ORC §3721.66(A) also provides that no one "shall intentionally obstruct, tamper with, or destroy the device or a recording made by the device". Under ORC §3721.99(D), a violation of this section will be pun-

ther inform regulation in electronic monitoring:

A. More Extensive Research

"While a research base has been steadily growing, the subject matter is still largely understudied and there remains a critical deficit in the development of robust studies."¹³⁴ More research is needed on elder abuse generally, but especially in the nursing home and/or long-term care context. It would be particularly beneficial to have research now on the various state approaches to the use of regulation and their impact on the incidence of elder abuse in

More research is needed on elder abuse generally, but especially in the nursing home and/or long-term care context. It would be particularly beneficial to have research now on the various state approaches to the use of regulation and their impact on the incidence of elder abuse in the various long-term settings. Further, unless and until there are any attempts at interventions to assist staff in long-term care facilities, there is research lacking to determine whether such interventions could prove effective. Finally, even less is known about elder abuse committed by family members themselves when a loved one is in long-term care that must be explored.

ing is not intended to fully examine the laws in all of these states, it will attempt to highlight some distinguishing features by states that have recently decided to regulate through legislation.

In 2021, Connecticut passed legislation in this area and adopted a unique approach going beyond simply electronic monitoring in the nursing home environment but more broadly to regulation of technology involving virtual visits.¹²⁹ While similar to other state laws in this area, Connecticut requires the resident to supply the equipment for the monitoring, internet access is provided by the facility.¹³⁰ Another aspect of Connecticut's law is that technology used for virtual visits can then be utilized for virtual monitoring, however, consent then must be obtained from any roommates or roommates' legal representatives in

ishable as a misdemeanor of the first degree as guilty of tampering with an electronic monitoring device. Additionally, there is a provision under the code which provides a list of specific individuals who may review the recording in ORC §3721.66(B). Exceptions are provided in ORC §3721.66(C) for the following individuals: "A resident or resident's guardian or attorney in fact may authorize a person to view or listen to the images displayed or sounds recorded by an electronic monitoring device installed in a resident's room."

VII. Recommendations/Policy Considerations

Given these developments and expansion of regulation of electronic monitoring in long-term care, the following recommendations/policy considerations are provided to combat elder abuse moving forward to fur-

the various long-term settings. Further, unless and until there are any attempts at interventions to assist staff in long-term care facilities, there is research lacking to determine whether such interventions could prove effective. Finally, even less is known about elder abuse committed by family members themselves when a loved one is in long-term care that must be explored.

B. Consideration of a Universal

Definition of Elder Abuse

The definition of "elder abuse" is inconsistent despite its known prevalence. There is still vast confusion between different stakeholders about what that means and ultimately, what needs to be reported, particularly, among the long-term care staff themselves. Further, as definitions have generally been limited to involving those of a "relationship of trust", con-

sideration must be made of whether this should be expanded to include others who may inflict abuse on aging adults such as other residents of long-term care facilities (a known contribution to elder abuse), visitors, or even strangers.

C. Staffing Shortage-But Lacking Interventions?

While the Biden Administration has placed significant focus on the staffing shortage in federal nursing home regulation reform which is critical to elder abuse,¹³⁵ it is known from research that interventions have not been sought to assist staff in understanding elder abuse and receiving practical education which is needed. This could further help prevent instances of elder abuse in the institutional setting.

D. Monitoring Request Cannot be Limited to Just Family/Legal Representative

The states that have chosen to regulate electronic monitoring in nursing homes have premised this on residents all having family members or legal representatives being actively involved and attentive to instances of potential abuse. Some family members might not be in close geographic proximity to their loved ones to be able to discover the potential abuse. Other residents simply may not have family who is invested or just doesn't have family period. Even if there is a legal representative such as a court-appointed guardian when there is no family, that is not a guarantee of potential abuse being identified. Another problem is what if the family members themselves are the ones engaging in the abuse? One recommendation would be that anyone who suspects or has a reasonable belief abuse of an individual in these settings is occurring can request electronic monitoring for a period of time such as 30 days initially. There could then be independent reviewers to review the video surveillance.

E. Who Bears the Cost?

The states that have enacted actual laws to regulate electronic monitoring in nursing homes have required

the family members or legal representatives seeking to monitor a loved one to bear the cost of the equipment required for surveillance. It must be pointed out that most residents in nursing homes are dependent on Medicaid as the largest public provider for the cost of long-term care.¹³⁶ Others will rely primarily on private pay,¹³⁷ but given the vast majority of the population relies on Medicaid, this is already a group that is technically financially strapped and shouldn't be further burdened financially. To either have state governments bear the cost or the federal government, should this become a part of a national program, would be the better option to eliminate the possible inequity.

F. Recognizing Other Long-Term Care Settings & Potential for Abuse

Other long-term care environments are also deserving of this focus on electronic monitoring for example, assisted living facilities. Assisted living was contemplated in Ohio in passing its electronic monitoring legislation but it was believed to be at too late of a time in the legislative process to push it forward.¹³⁸ Federal regulation has already been lacking overall for assisted living facilities leaving this area largely to the states.¹³⁹ While there is some attention to this in regulation of electronic monitoring (the example of Maryland), it's not nearly enough.

G. Federal Program to Provide Electronic Monitoring Automatically When Aging Adult Has Certain Disabilities Exist

A mandatory requirement could be implemented that when an individual has a cognitive impairment or communication difficulty, electronic monitoring is installed. This would ensure that individuals in these groups have greater protection from the outset given challenges in reporting.

H. Increasing Home and Community-Based Options

Creating additional options in more traditional community settings rather than institutionalized

care like nursing homes also has the potential to better protect individuals, at least to some degree. Many people with disabilities who could be in such placements are on incredibly long state waitlists but have to instead be in institutionalized care because the options are currently non-existent which is also dictated by U.S. Supreme Court precedent in the *Olmsted*¹⁴⁰ decision mandating community placement where possible.¹⁴¹

I. Adequately Addressing Privacy Concerns

As indicated, states that have taken on regulation of electronic monitoring in long-term care settings have taken different approaches that ultimately impact privacy. There are privacy concerns for all stakeholders involved: the residents, staff, family, and visitors. It must be assessed what is the best approach to responding to these diverse needs.¹⁴²

VII. Conclusion

Elder abuse will continue to be an issue plaguing the aging population as it continues to rise. Defining "elder abuse" is complex and lacks uniformity that further contributes to this problem. The long-term care environment is complicated given both the private "home" nature while being a place designed to provide for significant healthcare needs in some settings. In the absence of any federal regulation in the U.S., several states have taken on a number of approaches to regulate electronic monitoring in long-term care facilities mostly involving nursing homes with a few exceptions. There is a pressing need for elder abuse research and policy development to be a top priority among policymakers to ensure the next pandemic is not created by the perfect storm of a rising aging population, lack of uniformity about what constitutes abuse, and a national staffing shortage.

Note

The author notes that Cleveland State University provided travel expenses to attend the Health Law Professors Conference where the author presented on this topic in June 2023. Registration fee for the conference was paid by ASLME as part of the

2022-23 Expanding Perspectives Fellowship Program.

References

1. World Health Organization, Abuse of Older People, available at <<https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>> (last visited September 14, 2023).
2. *Id.*
3. *Id.*
4. N. Kohn, *Elder Law: Practice, Policy and Problems Second Edition* (Boston, Aspen Publishing, 2020): at 492.
5. World Health Organization et al., *The Toronto Declaration on the Global Prevention of Elder Abuse*, (2021), available at <https://eapon.ca/wp-content/uploads/2021/09/toronto_declaration_en.pdf> (last visited July 6, 2023).
6. See Kohn, *supra* note 4 at 492.
7. K. Levy, et al., “Regulating Privacy in Public/Private Space: The Case of Nursing Home Monitoring Laws,” *The Elder Law Journal* 26 (2019); 323-363, at 328-29.
8. *Id.*
9. See Kohn, *supra* note 4, at 491.
10. See World Health Organization, *supra* note 1.
11. National Center on Elder Abuse, Research, Statistics, and Data, available at <<https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx>> (last visited September 14, 2023).
12. Centers for Disease Control and Prevention, Fast Facts: Preventing Elder Abuse, available at <<https://www.cdc.gov/violenceprevention/elderabuse/fastfact.html>> (last visited September 14, 2023).
13. J. Myhre et al., “Elder Abuse and Neglect: An Overlooked Patient Safety Issue. A Focus Group Study of Nursing Home Leaders’ Perceptions of Elder Abuse and Neglect,” *BMC Health Services Research* 20, no. 199 (2020): 1-14, at 2.
14. *Id.*
15. See World Health Organization, *supra* note 1.
16. *Id.*
17. See National Center on Elder Abuse, *supra* note 11.
18. Administration for Community Living, Long-Term Care Ombudsman Program, available at <<https://acl.gov/programs/Protecting-Rights-and-Preventing-Abuse/Long-term-Care-Ombudsman-Program>> (last visited September 14, 2023).
19. Nursing Home Abuse Justice, Nursing Home Abuse Statistics, available at <<https://www.nursinghomeabuse.org/nursing-home-abuse/statistics/>> (last accessed September 14, 2023).
20. J. Hirt et al., “Staff-to-Resident Abuse in Nursing Homes: A Scoping Review,” *BMC Geriatrics* 22, no. 563 (2022): 1-14 at 8.
21. *Id.*, at 9.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. See J. Myhre et al., *supra* note 13, at 2.
27. *Id.*
28. See Nurse Home Abuse Justice, *supra* note 19.
29. See J. Myhre et al., *supra* note 13, at 2.
30. See J. Hirt et al., *supra* note 20, at 10.
31. *Id.*, at 9.
32. *Id.*
33. *Id.*
34. See J. Myhre et al., *supra* note 13, at 2.
35. *Id.* at 2-3.
36. *Id.* at 2.
37. *Id.* at 3.
38. *Id.*
39. See J. Hirt et al., *supra* note 20, at 2.
40. *Id.* at 9.
41. American Health Care Association, *State of the Nursing Home Industry: Survey of 759 Nursing Home -Providers Show Industry Still Facing Major Staffing and Economic Crisis*, (June 2022), available at <<https://www.ahcancal.org/News-and-Communications/Fact-Sheets/FactSheets/SNF-Survey-June2022.pdf>> (last visited September 14, 2023).
42. See J. Myhre et al., *supra* note 13, at 3.
43. *Id.*
44. *Id.*
45. See J. Hirt et al., *supra* note 20, at 10.
46. *Id.*
47. *Id.*
48. *Id.*, at 9.
49. National Center on Elder Abuse, *Mistreatment of Adults with Disabilities*, Research Brief, (March 2022), available at <https://ncea.acl.gov/NCEA/media/Publication-4.0/NCEA_RB_Disabilities.pdf> (last visited September 14, 2023).
50. *Id.*, at 1.
51. *Id.*
52. *Id.*, at 5.
53. See J. Hirt et al., *supra* note 20, at 9.
54. Alzheimer’s Association, *2023 Alzheimer’s Disease Facts and Figures*, (April 2023), available at <<https://www.alz.org/media/Documents/alzheimers-facts-and-figures.pdf>> (last visited September 14, 2023), at 20.
55. *Id.*
56. *Id.*
57. *Id.*, at 27.
58. J.J. Manly, et al., “Estimating the Prevalence of Dementia and Mild Cognitive Impairment in the US: The 2016 Health and Retirement Study Harmonized Cognitive Assessment Protocol Project”, *JAMA Neurology* 79 no.12 (2022):1242-1249.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. J.C. Garcia et al., “Communication Support Needs in Adults with Intellectual Disabilities and Its Relation to Quality of Life,” *International Journal of Environmental Research and Public Health* 17, no. 20 (2020): 7370.
64. Government of Canada, *LEGAL DEFINITIONS OF ABUSE AND NEGLECT*, (Dec. 8, 2021), available at <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/elder-aines/def/p1.html>> (last visited September 14, 2023).
65. See Kohn, *supra* note 4, at 491.
66. *Id.*, at 492.
67. *Id.*
68. *Id.*
69. See World Health Organization, *supra* note 1.
70. See Centers for Disease Control and Prevention, *supra* note 12.
71. See Kohn, *supra* note 4, at 492.
72. See J. Hirt et al., *supra* note 20.
73. See Government of Canada, *supra* note 64, at 7.0.
74. *Id.*, at 1.1.1.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*, at 1.2.
80. 42 U.S.C. § 3002 et seq. (2009).
81. *Id.*
82. See Government of Canada, *supra* note 64, at 7.1.2.1.
83. Ariz. Rev. Stat. §13-3623(F)(6) (1991).
84. See Government of Canada, *supra* note 64, at 1.1.2.
85. See J. Myhre et al., *supra* note 13, at 2.
86. See Government of Canada, *supra* note 64, at 1.1.2.
87. 42 U.S.C. § 1396r (2012).
88. 42 C.F.R. §483.12 (2018).
89. 42 C.F.R. §483.10(e) (2018).
90. 42 C.F.R. §483.10 (2018).
91. See K. Levy, *supra* note 7, at 328-329.
92. National Center on Elder Abuse, Balancing Privacy & Protection: Surveillance Cameras in Nursing Home Residents’ Rooms, Fact Sheet, (2020), available at <<https://ltcombudsman.org/uploads/files/issues/cv-ncea-surveillance-factsheet-web.pdf>> (last visited September 14, 2023).
93. *Id.*, at 329.
94. See National Center on Elder Abuse, *supra* note 92.
95. New Jersey Department of Law and Public Safety, Office of the Attorney General, New Jersey’s “Safe Care Cam” Program Leads to Abuse Charges Against Private Caretaker Allegedly Caught on Hidden Camera Assaulting 90-Year-Old Woman Residing in Bergen County Assisted Living Facility, Press Release, (Jan. 16, 2019), available at <<https://www.nj.gov/oag/newsreleases19/pr20190116c.html#:~:text=Individuals%20who%20wish%20to%20participate,day%20operation%20of%20the%20program>> (last visited September 14, 2023).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

100. New Jersey Division of Consumer Affairs, An Initiative to Protect Your Loved Ones Receiving Care, *available at* <<https://www.njconsumeraffairs.gov/SCC>> (last visited September 14, 2023).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Wisconsin Department of Justice, Office of the Attorney General, News for Immediate Release, (Feb. 6, 2018), *available at* <https://www.doj.state.wi.us/sites/default/files/news-media/2.6.18_Hidden_Camera_Initiative.pdf> (last visited September 14, 2023).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Maryland Department of Health and Mental Hygiene, Office of Office of Health Care Quality, Guidelines for Electronic Monitoring, (Dec. 1, 2003), *available at* <<https://health.maryland.gov/ohcq/docs/Reports/149report.pdf>> (last visited September 14, 2023).
111. *Id.*
112. *Id.*
113. *Id.*, at 3.
114. *Id.*
115. *Id.*
116. *Id.*, at 4.
117. *Id.*
118. *Id.*, at 5.
119. *Id.*
120. M. Payton, "State Approves Security Cameras in Patient Rooms at Assisted Living Homes", *NBC San Diego*, (Aug. 11, 2015), *available at* <<https://www.nbcsandiego.com/news/local/state-approves-security-cameras-in-patient-rooms-at-nursing-homes/1996492/>> (last visited September 14, 2023).
121. California Department of Social Services, 2-5800 Guidelines for Use of Video Surveillance, p. 27, (2015), *available at* <<https://www.documentcloud.org/documents/2271047-office-functions-surveillance-guidelines.html>> (last visited September 14, 2023).
122. *Id.*
123. *Id.*, at 20.
124. *Id.*, at 30.
125. *Id.*
126. See National Center on Elder Abuse, *supra* note 94.
127. Tex. Health & Safety Code Ann. § 555.025 (2017).
128. Ct. PA 55 (2021); 210 Ill. Comp. Stat. 32/1 (2011); Kan. Stat. Ann. § 39-981 (2018); La. Stat. Ann. § 40: 1193.1 (2018); Minn. Stat. Ann. § 144.6502 (LexisNexis, Lexis Advance through May 20, 2023); N. M. Stat. Ann. § 24-26-21 (2018); §198.610 R.S.Mo. (2020); Ohio Rev. Code Ann. § 3721.60 (2022); Okla. Stat. titl 63, § 1-1953.1 (2018); Tex. Health & Safety Code Ann. § 555.025 (2017); Utah Code Ann. § 26-21-301 (LexisNexis 2018); and Wash. Admin. Code § 388-97-0380 (2017).
129. Ct. PA 55 (2021).
130. *Id.* at Sec. 3(c)(1).
131. *Id.* at Sec. 3(b)(4) & (5).
132. Ohio Department of Aging Esther's Law, *available at* <<https://aging.ohio.gov/care-and-living/get-help/get-an-advocate/esthers-law>> (last visited September 14, 2023). See Ohio Rev. Code Ann. § 3721.60 (2022).
133. Ohio Rev. Code Ann. § 3721.65 (2022).
134. See National Center on Elder Abuse, *supra* note 11.
135. R. Roubain, "Biden's Nursing Home Staff Mandates Expected Soon," *The Washington Post*, May 9, 2023, *available at* <<https://www.washingtonpost.com/politics/2023/05/09/biden-nursing-home-staff-mandates-expected-soon/>> (last visited September 14, 2023).
136. B. Carlson, "Why Medicaid Shouldn't Be Your Long-Term Care Plan," *Forbes*, May 23, 2023, *available at* <<https://www.forbes.com/sites/bob-carlson/2023/05/23/why-medicaid-shouldnt-be-your-long-term-care-plan/?sh=634f682129ce>> (last visited September 14, 2023).
137. National Institute on Aging, Paying for Long-Term Care, *available at* <<https://www.nia.nih.gov/health/paying-long-term-care>> (last visited September 14, 2023).
138. K. Bonvissuto, "Advocates Push to Include Assisted Living in Legislation Allowing Cameras in Nursing Home Rooms," *McKnights Senior Living* (October 22, 2021), *available at* <<https://www.mcknightsseniorliving.com/home/news/advocates-push-to-include-assisted-living-in-legislation-allowing-cameras-in-nursing-home-rooms/>> (last visited September 14, 2023).
139. See Kohn, *supra* note 4, at 450.
140. *Olmstead v. Zimring*, 527 U.S. 581, 600-01(1999).
141. A. Burns, et al., *A Look at Waiting lists for Home and Community-Based Services from 2016 to 2021*, Kaiser Family Foundation (Nov. 28, 2022), *available at* <<https://www.kff.org/medicaid/issue-brief/a-look-at-waiting-lists-for-home-and-community-based-services-from-2016-to-2021/>> (last visited September 14, 2023).
142. See Levy, *supra* note 7, at 325-326.