LEGAL ISSUES RELATED TO VIDEO SURVEILLANCE

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Stetson University College of Law:

20th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 11-13, 1999
Legal Issues Related To Silent Video Surveillance

A Brief Discussion of Constitutional Law & Policy Issues, and Tort Liability Issues Related to the Use of Silent Video Surveillance To Enhance Campus Security

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to Accompany a Panel Discussion of the Subject at The National Conference on Law & Higher Education Clearwater Beach, Florida February 12, 1999

Introduction to Constitutional Law and Privacy Issues

Legal dialogue among scholars in the fields of constitutional law and the common law of privacy has been ongoing for more than a decade. Early articles on the constitutionality of video surveillance documented the first series of projects, and raised constitutional issues that have been the subject of real outcomes described in the most recent legal commentary. Thus, in ten short years, the legal literature has drawn some fairly solid conclusions, based upon both theory and experience. Similarly, tort law, particularly negligence law, has begun to examine the use of video security systems in the context of a landowner's duty — as landlord, school, commercial business, etc. — to take reasonable measures to deter criminal

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1 This memorandum is not intended to provide specific legal advice as to situations in which video surveillance is challenged. Rather, the memorandum is an attempt to summarize selected legal commentary and judicial decisions on the subject.

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activity on the landowner's premises. This outline attempts to summarize the
dialogue and identify the most critical legal and policy issues arising from the use
of video surveillance.

History

Quentin Burrows notes that video surveillance technology was introduced in
certain cities as early as 1956, to assist police in reducing crime on public streets.
Early projects included the use of video technology in 1966 in Hoboken, N.J., and 1971, in Mt. Vernon, N.Y.5 Both Borrow and Jennifer Granholm have described
these early projects as generally unsuccessful,6 and Burrows paints a similar
picture of the later 1982 project in Dade County, Florida.7 Granholm adds that,
while many citizens may have been willing to trade privacy for safety 8 and thus did
not mind "being watched", some officers were concerned that cameras would be
used to monitor the police officer, and that criminals would quickly learn to simply
avoid areas within camera range.9

However, Burrows describes subsequent projects in Anchorage, Baltimore,
Camden, N.J. (street surveillance of Westfield Acres Housing Projects); Dover

Vernon, N.Y. and in Times Square. He indicates that all of these first systems were dismantled when found
to be ineffective, or when they failed to produce significant numbers of convictions, citing G. Robb, "Police Use
(1980). Granholm's article was inspired by the introduction of a significant video surveillance program in
Detroit in 1986, and also describes the alleged failure of the early Hoboken and Mt. Vernon projects.

6 Granholm notes that the Mt. Vernon project produced no convictions, and the Hoboken project led to only
one arrest in five years. See Granholm, supra., at 688. Burrows reports that the Dade County, Florida
project, which was monitored by local volunteers on a 24-hour basis, was discontinued in 1984, with no
convictions. Q. Burrows, supra., at 1082.

7 Burrows notes that although the Dade County project planned to use police employees, community
employees, mostly elderly, were used instead, and that the project also experienced significant equipment
failure. Burrows, supra., at 1082.

8 Burrows, supra., at 1103, citing Robb, supra., at 574.

(cameras installed in 1993 to monitor the downtown area); South Orange, N.J. (seven cameras monitored by police station personnel); Heightstown, N.J. (cameras installed to monitor trouble spots in housing project); Los Angeles (privately funded program using cameras mounted on apartment buildings to monitor adjacent streets, and using volunteers); Virginia Beach (ten low light sensitive cameras on street light poles at busy beach areas); Tacoma, Boston, Kinston, N.C., Memphis, San Diego's Balboa Park, Ft. Lauderdale, and the Ybor City district of Tampa, Florida.\(^\text{10}\) He reports that many of these projects can be described as successful in producing arrests and convictions, reducing criminal activity, and that they can be managed in such a way as to minimize the risk of intrusive surveillance or tapping.\(^\text{11}\)

According to several legal writers, the criticism of these projects is not that they cannot be implemented so as to withstand constitutional challenge, but that they are costly and ineffective in bringing about arrests and convictions, and that they add to the negative image of policing by creating a "big brother is watching you" environment on city streets, and places of public accommodation and employment. Privacy concerns are supported by the citation of cases, as well as newspaper accounts of the abusive use of surveillance technology by police and private security.\(^\text{12}\) Finally, commentators cite the recent exploitation of police video


\(^{11}\) Burrows, supra., at 1122-24. Among cited examples of widely publicized successes are the use of video in the apprehension of the suspects involved in the bombing of the Oklahoma City Federal Building; the Bugler case, in which video surveillance helped police apprehend two boys who murdered a two year old child; the thirty percent drop in crime in Boston housing projects, and significant arrests in Camden, N.J., Memphis, Tennessee, and Tacoma, Washington, as a result of the installation of video surveillance technology. He notes that cities may discourage the unauthorized or abusive use of video by simply avoiding the use of tapes, or recycling them after a certain number of hours.

\(^{12}\) Burrows at 1110, citing, e.g., Doe v. B.P.S. Guard Serv., Inc., 945 F.2d 1422 (8th Cir. 1991)[Security guards filming of fashion models undressing back stage at convention center]; cf. Oregon v. Owczarski, 766 F.2d 399 (8th Cir. 1985); Michigan v. Depue, 908 N.W.2d 652 (Mich. App. 1985); and Michigan v. Hunt, 259 N.W.2d 147 (Mich. App. 1977)[Police video surveillance of public restrooms]; and newspaper accounts of police abuses of surveillance video. In 1972, Justice Douglas dissented from the Supreme Court's decision not to grant a writ of certiorari in Williamson v. United States, 405 U.S. 1026, a case in which the federal appellate court had approved the electronic interception of communications between a police informant and the suspected
for profit as reason for limiting the use of video surveillance and the video-taping of police activity.\textsuperscript{13}

It may be that the interest in video surveillance has persisted because of its growing use in foreign countries. Burrows reports that England has installed more than 150,000 cameras, in more than 75 cities, in response to rising street crime. However, he also reports that many video clips are sold as “bootleg films” on the pornography market. Similar accounts are described in France, where police are given broad powers to install street video surveillance, and in Australia, Ireland and Scotland.\textsuperscript{14}

In sum, the history of video surveillance has reaffirmed the common sense notions that all law-abiding citizens are vitally interested in efforts to reduce street crime, crimes in places of public accommodation and other vulnerable places (e.g., ATM machines). However, these same citizens are worried about the unethical use (viewing, sale, etc.) of surveillance video by police and private security, its inherently indiscriminate and invasive character,\textsuperscript{15} and whether, in any event, the

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\textsuperscript{13} Examples include television shows that feature police chases and graphic conduct by suspects, and 911 rescues that feature graphic video of serious injury or death. Such graphic video, it is argued, may cause emotional or physical injury to suspects, victims, and their families. \textit{But cf. Vega-Rodriguez v. Puerto Rico Telephone Company}, 110 F.3d 174 (1st Cir. 1997), holding that fear of employees that employer’s silent video surveillance of open work areas might be expanded to “restrooms,” creating potential privacy invasion, is not ripe for judicial review until there is a factual basis for such concerns.

\textsuperscript{14} Burrows cites numerous press accounts of the sale of videotapes of criminal activities, and footage from hidden cameras on streets and in shopping malls and public toilets. See Burrows, \textit{supra}, footnotes 156-176, also describing similar concerns in Australia about cameras in public toilets, and in Scotland about private surveillance of couples making love and people undressing in changing rooms.

\textsuperscript{15} \textit{See} opinion of Judge Richard Posner in \textit{United States V. Torres}, 751 F.2d 875 (7th Cir. 1984), permitting the use of “targeted” surveillance video only when the need for surveillance of criminal activity outweighs concerns for privacy; in accord, \textit{United States v. Biasucci}, 780 F.2d 504 (2d Cir. 1986) [Affidavit supported use of video surveillance]. Granholm notes, however, that these cases involved surveillance of private premises, not public streets. \textit{See} Granholm, \textit{supra}, at footnote 25.
cost of broad-scale video surveillance projects will be justified by meaningful increases in arrests and convictions, and a generally significant decrease in criminal activity.\(^\text{18}\)

**Federal Law**

The right of privacy is based in both constitutional law and common law.\(^\text{17}\) As a constitutional right, it derives from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, and from specific provisions of state constitutions.\(^\text{18}\) In *Katz v. United States*,\(^\text{19}\) the Supreme Court held that the government's electronic interception of the defendant's conversation in a telephone booth violates his right of privacy, if the defendant had an actual (subjective) expectation of privacy, and that expectation is one that society would recognize as reasonable.\(^\text{20}\) This *subjective*

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\(^{15}\) See L. Linden, "City of Oakland Will Not Use Street Surveillance Cameras," 110 Los Angeles Daily Journal, No. 182, p.3, September 19, 1997, noting a 3-1 vote of the Oakland City Council Public Safety Committee not to proceed with a plan for 50 video cameras to scan streets with zoom lenses. Noting the Council's opinion that such surveillance was legal, the article emphasizes that the ACLU, merchants, and local media had described the plan as Orwellian and a violation of the California Constitution's explicit right of privacy. The article also noted one committee member's opinion that the cost of the cameras could be used to pay for more police officers.


\(^{18}\) See, e.g., *Vega-Rodriguez v. Puerto Rico Telephone Company*, 110 F.3d 174, 183 (1st Cir. 1997), holding that while employee surveillance by public employers raises Fourth Amendment concerns, the Ninth Amendment and Fourteenth Amendment cases do not support a cause of action precluding video surveillance of work areas. The court held that the Fourteenth Amendment privacy rights cases generally protect the autonomy of the individual in making significant personal decisions relating to marriage, contraception, family relationships, and the like.

\(^{19}\) 389 U.S. 347 (1967)

\(^{20}\) Both Granholm and Burrows note that *Katz* refused to limit search and seizure protections to cases of physical intrusion, holding instead that the Fourth Amendment protects people, not places. See Granholm, *supra*, footnote 24. Canada has recognized *Katz* in its interpretation of its own constitutional search and seizure law, holding that, where an individual has a reasonable expectation of privacy, the Charter of Rights and Freedoms would prohibit an unrestricted, warrantless use of surveillance video. See *Santiago Wong v. Her Majesty the Queen*, 3 S.C.R. 36 (1990).
and objective test has continued to be the theoretical benchmark in video surveillance cases,\(^ {21}\) but post-Katz cases substantially weaken the expectation of privacy outside the home.\(^ {22}\) Indeed, Burrows and Granholm conclude that the Fourth Amendment is generally not supportive of a constitutional challenge to silent video surveillance of public streets, sidewalks, and parks, because persons do not have a reasonable expectation that they will be free of observation in such public settings.\(^ {23}\)

Granholm argues however that a citizen has some reasonable expectation regarding the extensiveness of technology used to observe her even in public places. Thus, she might have a reasonable expectation that the technology used to observe her in public places would not be so intrusive as to focus upon the letter she is reading, or the movement of her lips, or the recording of her words as she walks with a companion.\(^ {24}\) Granholm’s argument is based upon her reading of the “plain view” doctrine search and seizure cases.\(^ {25}\) She argues that – although courts have

\(^ {21}\) See People v. Smith, 360 N.W.2d 841 (1984) (defendant’s reasonable expectation of privacy will be determined by totality of circumstances), cited in Granholm, supra., at footnote 26.

\(^ {22}\) Burrows, supra., citing Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (aerial photography by EPA of company’s complex); Texas v. Brown, 460 U.S. 730 (1983) (police officer’s use of flashlight to illuminate inside of motorist’s car during routine driver’s license checkpoint); Florida v. Riley, 488 U.S. 445 (1989) (aerial surveillance of greenhouse); California v. Ciraolo, 476 U.S. 207 (1986). In Ciraolo, a 5-4 majority of the Supreme Court held that, although defendant had erected a ten foot fence around his back yard with the intent to obstruct a view of his marijuana growing activity, officers who observed his plants while flying in a private plane at an altitude of 1000 feet did not violate defendant’s reasonable expectations of privacy. The court held that the Fourth Amendment protection of the home was never meant to preclude observations that may be made by law enforcement officers from public thoroughfares. Thus, a homeowner’s steps to restrict some views does not preclude an officer’s observations from a “public vantage point where he has a right to be and which renders [defendant’s] activities clearly visible.” Defendant’s subjective expectation of privacy was therefore not objectively reasonable. 476 U.S., at 213-14.

\(^ {23}\) Granholm, supra., at 694-95; Burrows, supra., at 1090.

\(^ {24}\) Granholm, supra., at 695. Granholm argues that this limitation of video and audio surveillance is the essence of a reasonable application of the Supreme Court’s decision in Katz.

\(^ {25}\) Citing Coolidge v. New Hampshire, 403 U.S. 443 (1971), limiting the doctrine to situations where police seize an object pursuant to a prior, valid search, i.e., pursuant to a warrant, or a judicially recognized exception to the warrant requirement. Granholm, supra., at 697 and footnotes 42 and 43.
recognized that a view open to outsiders mitigates the suspect’s reasonable expectation of privacy – reliance on the plain view doctrine is misplaced where video surveillance includes enhancement features such as telescopic lenses, or film recording devices.\textsuperscript{26} Granholm insists that the plain view doctrine is based upon the premise that the discovery of the evidence in question is inadvertent. She then reasons that, where an enhanced video device is deployed to observe activity, the observation is “intrinsically advertent, adverse, and intrusive.”\textsuperscript{27} This aspect of Granholm’s argument however, predates Supreme Court decisions approving aerial searches in drug cultivation cases.

Granholm’s second argument is that mass citizen surveillance should be unconstitutional because it lacks the precondition of reasonable suspicion found in drug testing, and sobriety checkpoint cases, or the justification for mass searches at airports and government buildings. Granholm argues that the cases which allow governmental mass searches at airports and government buildings are based upon the presence of proven present risk of violence in these settings,\textsuperscript{28} not present in general surveillance scenarios.\textsuperscript{29} She concludes that the undifferentiated threat

\textsuperscript{26} Granholm’s distinction has merit. In Vega-Rodriguez v. Puerto Rico Telephone Company, 110 F.3d 174 (1st Cir. 1997), the court observed that arguments justifying video surveillance of streets emphasize the constitutional parity between observations made with the naked eye (by an officer who could be assigned to the street) and observations recorded by an openly displayed video camera having no greater range than the officer’s naked eye.

\textsuperscript{27} Granholm, supra., at 697. She explains that, if a video camera can zoom in to focus on facial expressions, a license plate, etc., the camera’s capability exceeds the senses of the policeman on the beat, and any argument that the camera is simply an extension of the policeman is a flawed argument. She cites People v. Fly, 110 Cal. Rptr. 158 (Cal. App. 1973) holding that officer’s observation of marijuana growing in defendant’s enclosed yard through a telescope was a search because the officer had “wedged” himself between two buildings and thus had assumed an unusual vantage point. In accord, see United States v. Cuenas-Sanchez, 821 F.2d 248 (5th Cir. 1987).

\textsuperscript{28} Citing Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972); U.S. v. Lopez, 328 F.Supp. 1077 (E.D.N.Y. 1971); U.S. v. Bell, 335 F.Supp. 797 (S.D.N.Y.), aff’d 464 F.2d 667 (2d Cir. 1971), cert. denied, 409 U.S. 991 (1972); and federal regulations at 14 C.F.R. 121.638, and 14 C.F.R. 107.123 (1987) requiring air carriers to use screening devices designed to deter passengers from carrying explosives or weapons aboard an aircraft, or to allow unauthorized vehicles access to air operations areas.

\textsuperscript{29} Citing Jacobsen v. Seattle, 658 P.2d 653 (Wash. 1983)[danger posed by patrons at rock concert far less than that posed by terrorist bombings of courtrooms and attempts to hijack airplanes]; Collier v. Miller, 414 F.Supp. 1387 (S.D.Tex. 1976)[searching university sports arena patrons did not fall under the courthouse or
presented by general crime statistics does not justify the use of highly enhanced surveillance technology. Indeed, she explains, the actual settings in which video surveillance is frequently used are not inner-city high crime areas where the safety of poor people is threatened, but rather areas such as shopping malls, and upscale entertainment districts (e.g., Bricktown, Detroit, and Ybor City, Tampa) where the intent is to protect suburban shoppers, and the economic well-being of store and club owners.\textsuperscript{30}

Burrows' suggests that attempts to prevent the reasonable use of video surveillance of public places on the ground that such surveillance violates federal privacy concepts are also likely to be unsuccessful. Although he reminds us of the importance of the Supreme Court's decision in \textit{Griswold v. Connecticut},\textsuperscript{31} and its progeny, he suggests that members of the current court have rejected the right of privacy in public places when balanced against the state's interest in deterring criminal activity.\textsuperscript{32} The limited precedent dealing with the expectation of privacy is in the context of the video surveillance of suspected criminal activity.

\textsuperscript{30} Granholm, \textit{supra.}, at 706.

\textsuperscript{31} 381 U.S. 479 (1965).

\textsuperscript{32} Citing W. Rehnquist, \textit{"Is An Expanded Right of Privacy Consistent with Effective Law Enforcement,"} 23 Kan. L. Rev. 1 (1974). And see \textit{Laird v. Tatum}, 408 U.S. 1 (1972)[affirming refusal of an injunction preventing army officials from engaging in covert surveillance of civilian political activities where meetings were public]. Burrows, \textit{supra.}, at 1094.
In these cases, federal courts have found some expectation of privacy in business premises, or within buildings, but have upheld video surveillance orders. See, e.g., United States v. Mesa-Rincon. These cases deal with the intrusive nature of video surveillance in situations where there is some legitimate expectation of privacy, and where, therefore, the need for surveillance must be justified. Such surveillance intrusions, Burrows notes, are also the concern of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

911 F.2d 1433 (10th Cir. 1990) [authorizing Secret Service installation of television camera to film defendants’ counterfeiting operation]; Cf. U.S. v. Pui Kan Lam, 483 F.2d 1292 (2d Cir. 1973), cert. denied, 415 U.S. 984 [Defendants had no justifiable expectation of privacy while in the house of complete strangers to which they had gained entry by false representations].

Cf. Vega-Rodriguez v. Puerto-Rico Telephone Company, 110 F.3d 174 (1st Cir. 1997), defining the scope of a public employer’s right to conduct disclosed silent video surveillance of open employee work areas. In Vega-Rodriguez, a quasi-public employer installed, over employee objection, a silent video surveillance system to record all employee activity in open work areas. The videotapes were stored and could be viewed with the permission of a designated company official. Citing Oliver v. United States, 466 U.S. 170 (1984), and O’Connor v. Ortega, 480 U.S. 709 (1987), the court recognized that public employees may be protected against unreasonable search and seizure if the challenged conduct infringes a reasonable expectation of privacy. That protection must, however, be both subjectively demonstrable and objectively reasonable under the circumstances. Generally, the employee’s expectation of privacy is objectively reasonable as to his exclusive private office, desk and file cabinets containing personal matters not shared with other workers. In contrast, there is no reasonable expectation of privacy against video surveillance of open work areas, unenclosed locker areas, or desks, files, and the like subject to shared access among employees, especially where the employer discloses its use of surveillance. Citing State v. Takata, 923 F.2d 665 (9th Cir. 1991); Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991); Sheppard v. Beerman, 18 F.3d 147 (2d Cir. 1994); American Postal Workers Union v. United States Postal Service, 871 F.2d 556 (6th Cir. 1989); Thompson v. Johnson County Community College, 930 F.Supp. 501 (D. Kan. 1996); and Gross v. Taylor, 1997 WL 535872 (No. Civ. A. 96-6514, 1997) [holding that public police officers did not have an objectively reasonable expectation of privacy or non-interception while on duty in a patrol car, and thus interception of their conversation by employer’s open and visible rear seat microphone would not violate 18 U.S.C. §2510, or Fourth Amendment protections].


It is noteworthy that, while §8 of Canada’s Charter of Rights and Freedoms (protecting against unreasonable search and seizure), is similarly silent as to video surveillance, the Supreme Court of Canada has interpreted §8 to cover both audio and video surveillance. See Santiago Wong v. Her Majesty the Queen, 3 S.C.R. 36 (1990), citing R. v. Duarte, 1 S.C.R. 30 (1990) [The court observed: “In Duarte, this court held that unauthorized electronic audio surveillance violates §8 of the Charter. It would be wrong to limit the
Courts appear divided on the application of the Act’s requirements to targeted silent video surveillance, where justifiable expectations of privacy might exist.\(^{36}\)

**State Law**

Concepts of privacy have been fashioned by the states in constitutional provisions and judicial pronouncements. Several states, including Oregon, Pennsylvania, Hawaii, Montana, Illinois, California, Alaska, Florida, New Hampshire, and Michigan have explicit constitutional protections of privacy, some of which limit search and seizure, including wire and electronic communications

\(^{36}\) Compare United States v. Mesa-Rincón, supra.; United States v. Cueva-Sanchez, supra., 821 F.2d 248, 250-52 (5th Cir. 1987); defendant had reasonable expectation of privacy, under California v. Ciraolo, 476 U.S. 207 (1986), against government’s video surveillance of his fenced-in back yard through use of camera installed to indiscriminately record all of his activity; held however, that government complied with Title III of OCCSSA in obtaining surveillance order; United States v. Bissaucci, 765 F.2d 504 (2d Cir. 1985); and United States v. Torres, 751 F.2d 875 (7th Cir. 1984); with United States v. Taketa, 923 F.2d 665 (9th Cir. 1991); silent video taping does not come within provisions of Title III; In Re Order Authorizing Interception of Oral Communication & Video Surveillance, 513 F.Supp. 421 (D. Mass. 1980); (Title III not applicable to silent video surveillance); U.S. v. Foster, 985 F.2d 466 (9th Cir. 1993), on rehearing, 17 F.3d 1256 [videotaping of defendant did not violate Electronic Privacy Act where a number of persons were present and with the consent of the owner of the premises]; State v. Diaz, 706 A.2d 264 (1998), emphasizes the Seventh Circuit’s comment in United States v. Torres, supra., that “[O]f course, it is anomalous to have detailed statutory regulation of bugging and wiretapping, but not of television surveillance, in Title III, and detailed statutory regulation of television surveillance of foreign agents, but not of domestic criminal suspects, in the Foreign Intelligence Act,... But judges are not authorized to amend statutes, or bring them up to date”; Cf. United States v. Andonian, 735 F.Supp. 1467 (C.D.Cal. 1990);[legislative history of 1986 amendments to Title III suggests that statute would apply to audio but not video portion of a surveillance]; aff’d and remanded, 29 F.3d 634 (9th Cir. 1994); cert. denied, Andonian v. United States, 513 U.S. 1128 (1996). See also Vega-Rodriguez v. Puerto Rico Telephone Company, 110 F.3d 174 (1st Cir. 1997), observing that announced, silent video surveillance of work areas open to all employees is less intrusive than a physical search that intrudes into employee desks, drawers, filing cabinets, or other enclosed spaces, and does not intercept private conversations between employees.  

Canada appears to follow Bissaucci, and holds that video surveillance of a hotel room would normally be held to be a search, and thus would require a warrant. Santiago Wong v. Her Majesty the Queen, 3 S.C.R. 36 (1990), also citing Stoner v. California, 376 U.S. 483 (1964) regarding the reasonable expectation of privacy of one occupying a hotel room (A majority of the Court in Wong held, on the facts presented, that the search in question, although including video surveillance not authorized by a court, was reasonable based upon legal advice received by police, and where it was arguable that defendant had no reasonable expectation of privacy during “floating” gaming operation. The court held however, that unauthorized, surreptitious electronic surveillance violates §§ of the Charter of Rights and Freedoms where the target of the surveillance has a reasonable expectation of privacy).
surveillance which might be permitted by U.S. Supreme Court precedent. However, several states have permitted video surveillance supported by legitimate public interest in newsworthy information. Indeed, Burrows notes, the public interest in crime can overcome personal concerns for privacy even in situations where publication of videotaped accounts cause emotional upset.

Targeted video surveillance may be permitted under state law adopting the Katz standard. In Ricks v. Maryland, the Baltimore police department employed surreptitious, nonconsensual video surveillance, pursuant to court order, as part of an extensive narcotics investigation of premises allegedly being used by defendants as a "processing house" or "cut house" where controlled dangerous substances were diluted and packaged for street sale. Following the arrest of defendants based upon a search warrant, the appellate court upheld the court-ordered surveillance. The court noted defendants' admission that video

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37 Burrows, supra., at 1113-1114. Florida's concern for inappropriate private use of silent video has led to the proposal of HB 3709, Chapter 98-415, creating Section 810.14, F.S., prohibiting a person from secretly observing, photographing, or videotaping another person with lewd...or indecent intent, when the victim is in a dwelling, structure, or conveyance that provides a reasonable expectation of privacy. Interest in the passage of the statute was apparently fueled by reports of a case involving female workers at the Apalachicola Times who disclosed that a manager was observing them via a palm-sized video camera installed behind an air conditioning vent in an employee rest room, with live video feed to a monitor in the manager's office. See M. Lassell, "We're Being Watched", Allure (August, 1998), p.135. Lassell notes the expanding video-voyeur subgenre on the Internet under the title "Upskirt," that has dozens of sites devoted to the display of pictures of unsuspecting women taken in malls, parks, stores, etc., taken by concealed cameras.


39 Id., at 1116-1119, citing Waters v. Fleetwood, 91 S.E.2d 344 (Ga. 1956) [newspaper publication of photographs of murdered fourteen year old girl held newsworthy]; Cape Publications, Inc. v. Bridges, 423 So.2d 426 (Fla. 1982) [newspaper publication of photograph taken of rape victim at scene of crime shortly after she was raped by former husband].

40 520 A.2d 1136 (Md. App. 1987); aff'd, 537 A.2d 612 (Md. 1988).

41 Police were allowed to install a small video camera into the ceiling of the apartment to record the illegal activities, after a showing that alternate investigative methods had been tried and failed, or were too dangerous to undertake. 537 A.2d at 613, 615. (The court reviewed in detail the showing required under Section 2516-18 of the Federal Act).

42 Defendants argued that the surveillance violated both the Maryland Wiretap and Electronic Surveillance Law, and the Fourth Amendment to the U.S. Constitution. 520 A.2d 1136, 1138.
surveillance was not regulated by the federal Omnibus Crime Control and Safe Streets Act of 1968, after which the Maryland wiretap statute was modeled,\textsuperscript{43} and that the Maryland statute did not expressly contemplate video surveillance.

The court held, therefore, that video surveillance of suspected criminal activity was not proscribed by the Maryland Wiretap and Electronic Surveillance Act.\textsuperscript{44} As to defendants’ Fourth Amendment argument, the court reasoned that the proponent of a motion to suppress has the burden of proving that the video surveillance in question violates a legitimate expectation of privacy in the invaded place.\textsuperscript{45} Citing \textbf{Smith v. Maryland},\textsuperscript{46} the court held that defendant must demonstrate, by his conduct, that he has exhibited a subjective expectation of privacy (that he seeks to preserve something as private), and that his expectation is one that society is prepared to recognize as reasonable (that is, whether the defendant’s expectation, viewed objectively, is justifiable under the circumstances).\textsuperscript{47}

\textsuperscript{43} 537 A.2d at 613-14.


\textsuperscript{46} 442 U.S. 735 (1979).

\textsuperscript{47} 537 A.2d at 619. Finding that defendants may have had a reasonable expectation of privacy under the facts of the case, the court of appeals held that the video surveillance was conducted in accordance with Fourth Amendment requirements and consistent with the required showings under Title III of the OCCSSA. 537 A.2d at 613, 620-21. The Ricks standard is explained in McCravy v. State of Maryland, 581 A.2d 45 (Md. App. 1990). In McCravy, the defendant was suspected of procuring false driver’s licenses for persons whose licenses had been suspended or revoked. As a part of their investigation, police conducted a warrantless video surveillance of defendant, videotaping him crossing the street to a state motor vehicle administration office. The court held that such surveillance did not implicate the privacy concerns evident in Ricks, because the video surveillance of defendant took place only when he was crossing the street and entering the MVA office in full public view. Citing Katz, and Notz, “Police Use of CCTV Surveillance: Constitutional Implications and
Some states have constitutional provisions which arguably prohibit general police use of powerful video street surveillance cameras with zoom lens capability. Burrows cites *Hawaii v. Bonnell,* holding that the video surveillance of an employee break room by police without a warrant (to investigate alleged gambling operations) violated the Hawaii Constitution. Burrows also emphasizes Montana's requirement of a compelling governmental interest to justify excessively intrusive surveillance. However, where video street surveillance is limited in its intrusiveness, some legislatures have proposed that its use in reducing traffic violations or crime is justified.

Canada has defined this intrusiveness facet of the constitutionality of video surveillance in precise terms. The Supreme Court has rejected a "risk analysis" which would permit surveillance if an assessment of the person's

Proposed Regulations," 13 U. Mich. J.L. Ref. 571 (1980), the court held that a person does not have a reasonable expectation of privacy when he is walking along public sidewalks, streets, or parking lots, or in a similar location in full public view. 581 A.2d, at 47-48. See also *State v. Diaz,* 706 A.2d 264 (N.J.Sup. 1998) [New Jersey's Wiretap Act, which is modeled after Title III of federal Omnibus Crime Control Act and Safe Streets Act, does not subsume silent television surveillance, and the legislative history of the federal legislation indicates that the exclusion was deliberate. The admissibility of a videotape with sound recording in a criminal proceeding is, however governed by the warrant provisions of the New Jersey statute].

See L. Linden, supra., footnote 16, citing the concern of Oakland City Officials that such surveillance would violate the California Constitution.

856 P.2d 1265 (Hawaii, 1993).

The Court noted that fifty video tapes with 1200 hours of footage disclosed only one minute of conduct which might reflect gambling activity. More important, the court held that the Hawaii constitution protects legitimate expectations of privacy wherever the individual may go. Thus, even in a public park, an individual may have an expectation of privacy that should not be invaded by warrantless video surveillance absent exigent circumstances. Indeed, the court held that the justification required for video surveillance should be higher than that required for audio surveillance. Id., at 1273.

*State v. Brown,* 755 P.2d 1364 (Mont. 1988), approving consensual warrantless monitoring of face-to-face conversation, but observing that privacy might preclude such interception where none of the participants has consented to the surveillance.

See Maryland House Bill 391, SIA Second Annual Report on CCTV for Public Safety, Appendix 8, p. 153 [proposed legislation for use of video cameras to capture image of automobile and license plate entering intersection after traffic signal has turned red]; Illinois House Resolution 62, SIA Report, Appendix 12, p. 211 [enhancing video surveillance technology used by merchants by installing measurement device within picture to better show criminal's height and size].
reasonable expectation of privacy were made to rest on a consideration whether he “courted the risk of electronic surveillance.” Rather, in R. v. Duarte,\(^{53}\) the court approached the determination whether a person has a reasonable expectation of privacy in given circumstances by attempting to assess whether, by the standards of privacy that persons can expect to enjoy in a free society, the state should not be allowed to engage in the surveillance questioned without prior judicial authorization. This interpretation subsumes the notion, advanced by the court, that constitutional protections against unreasonable search and seizure must be held to embrace an awareness of advances in the science and technology available to government. The court speculates, given the advanced state of surveillance technology, a “risk analysis” would set a meaningless standard for privacy.\(^{54}\)

In sum, Burrows suggests that serious consideration must be given to the argument that the extension of expectations of privacy to public places so as to preclude video surveillance will, in fact, impede law enforcement efforts to protect the public from crime. He observes that many citizens support public surveillance programs, so long as they comply with the need to prevent abusive use of the technology, or videotapes. He advises however, that the warrantless use of video surveillance by police should be limited to public streets where the Supreme Court has held that citizens have no reasonable expectation of privacy.\(^{55}\) Against these arguments, Burrows emphasizes that the right of privacy is a fundamental right in our society, and that the more than 600,000 state and federal law enforcement personnel and 1.5 million private security personnel, with resources in excess of

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\(^{53}\) 1 S.C.R. 30 (1990).

\(^{54}\) Santiago Wong v. Her Majesty the Queen, 3 S.C.R. 36 (1990), citing also Amsterdam, “Perspectives on the Fourth Amendment”, 58 Minn. L. Rev. 349, 402 (1974). It may be said that the U.S. Supreme Court agrees with the Canadian court’s general concerns, but would apply those concerns only to restrict surveillance which violates a truly reasonable expectation of privacy. In California v. Ciraolo, supra., [approving warrantless surveillance by police of defendant’s back yard by private plane, on tip about defendant’s marijuana growing activities], the majority recognized Justice Harlan’s concern in Katz v. United States, that future electronic developments would extend the potential for electronic interference with private communications. However, the majority held, such concerns are not aimed at simple observations from a public place. 476 U.S., at 214.

\(^{55}\) Burrows, supra., at 1124.
thirty billion dollars, present a force that has already eroded notions of privacy once taken for granted. And, both legal writers and journalists express concern that video surveillance may be used by police to “target” minorities who are stereotyped as more likely to commit crimes, as well as members of unpopular political action groups in the community. Burrows cautions that, in our efforts to reduce crime, we must not trade individual liberties for rigid notions of order. Technology should be used to support arrests only where it is reliable, and aspects of its unreliability or potential abuse must be understood.\footnote{Burrows, supra, at 1125-26. He notes, for example, that digital imaging allows a criminal to be removed from a scene or placed at a scene, and that an expert could not distinguish a copy from the original master tape. He also expresses concern that citizens could access surveillance footage through the Internet on their personal computers. Some jurisdictions are already establishing a structure for bringing together groups having competing concerns about the parameters of the use of video surveillance in targeted retail/commercial areas of the City. See, e.g., Agenda Report, City of Oakland, SIA Second Annual Report on CCTV for Public Safety, Appendix 9, p. 179-80 [but noting decision not to seek opinion of City Attorney unless there is a governmental role in the surveillance program].}

**Tort Claims Related to the Use of Silent Video: Private Civil Liability and Governmental Immunity**

**Introduction:** Modern tort law has been increasingly concerned with the security of premises, but modern rules both expand and limit duty. In most, if not all jurisdictions, modern duty rules were originally announced by courts or legislatures to limit the ‘old’ common law’s imposition of strict liability on innkeepers for loss or damage to a guest’s personal property. *McIntosh v. Schops*, 180 P. 593 (Ore. 1919), cited in *Kutbi v. Thunderlion Enterprises, Inc.*, 698

\footnote{Burrows, supra, at 1125-26. He notes, for example, that digital imaging allows a criminal to be removed from a scene or placed at a scene, and that an expert could not distinguish a copy from the original master tape. He also expresses concern that citizens could access surveillance footage through the Internet on their personal computers. Some jurisdictions are already establishing a structure for bringing together groups having competing concerns about the parameters of the use of video surveillance in targeted retail/commercial areas of the City. See, e.g., Agenda Report, City of Oakland, SIA Second Annual Report on CCTV for Public Safety, Appendix 9, p. 179-80 [but noting decision not to seek opinion of City Attorney unless there is a governmental role in the surveillance program].}

Burrows proposes a model statute defining the permissible scope of video surveillance. His statute would provide, inter alia, that: All surveillance operators must be trained, professional, certified police or federal agents; Operators should make specific disclosure to targets of surveillance, along with a general public disclosure of the video surveillance activities of police departments to citizens who must then be allowed to submit comments and objections at public hearings; Operators must prove, by a showing of probable cause and compelling governmental interest that video surveillance is necessary and that the least restrictive [sic] method of surveillance will be employed; Targeted surveillance should be permitted only on showings and according to procedures presently required under statutes like Title III, as amended; That under no circumstances shall the contents of any captured video images be exploited for purposes of profit, publication or distribution; and that violations of the statute would lead to the suppression of evidence, criminal penalties, and/or civil remedies. 31 Val. U.L. Rev. 1079, 1133-1138.

Also noteworthy in summary is the suggestion that we continue to give some consideration to the
P.2d 1044 (Ore. App. 1985). However, in modifying the 'old' common law rule, modern courts imposed a duty on landowners to exercise reasonable care for the safety of business or public invitees.

The modern rule, summarized in the Restatement 2d, Torts, provides that a landowner that holds land open to the public is subject to liability for physical harm to public invitees caused by the accidental, negligent, or intentionally harmful acts of third persons, if the landowner fails to use reasonable care to (a) discover that such acts are occurring or are likely to occur, or (b) adequately warn visitors to avoid such harm or otherwise protect them from it.57 Because the rule is derived from negligence (fault) principles, and not strict liability theory, liability is 'pegged' to foreseeability of harm. And, because the landowner is not generally required to anticipate that third parties will commit criminal acts, the landowner is subject to liability only where criminal intrusion is reasonably foreseeable.

The rule is usually stated to provide that the landowner — e.g., landlord — may be negligent, even though the harm to a visitor/invitee — e.g., tenant — is caused by the criminal act of a third person, if the situation is one in which a reasonable landowner would have foreseen the likelihood of criminal intrusion.58 The landowner/proprietor is not the insurer of the invitee’s — e.g., tenant’s — safety59, but is required to exercise reasonable care to protect the invitee from unreasonable risks of which the landowner has superior knowledge. What constitutes reasonable care in a given situation varies with the circumstances, but generally evidence of substantially similar prior criminal acts may be used to demonstrate that the landowner had actual or constructive knowledge of risk of harm to the invitee. The term 'substantially similar' does not mean identical — as, for example, whether a weapon was used — but whether the prior crimes would put a reasonable landowner

57 Restatement 2d, Torts, Sec. 344 (1965).

58 See Restatement, 2d, Torts, Sec. 302, and Comment e.

on notice that visitors, residents, etc. were subject to increased risk of harm. The question is whether the prior activity would have attracted the attention of a reasonably prudent landowner, and caused him to be concerned about the safety of visitors, tenants, etc. *Shoney's Inc. v. Hudson*, 460 S.E.2d 809 (Ga. App. 1995); *Cohen v. Southland Corporation*, 203 Cal. Rptr. 572 (Cal. App. 1984). [Citing cases from Pennsylvania, New York, North Carolina, Oregon, Texas, Massachusetts, and New Jersey]. What is required to be foreseeable is the general character of the event or harm, not the precise nature of the activity or the precise manner of its occurrence.60

Balanced against this consideration of the likelihood and severity of harm to visitors, tenants, etc. is the burden to the landowner if he is required to eliminate or reduce the risk. Where reasonable efforts to reduce risk would not place an onerous burden on the landowner, it is more likely that he will be asked to take affirmative steps to reduce the risk of criminal activity that threatens visitors, tenants, etc.61

To summarize, until recently courts have been reluctant to impose liability on the landowner/operator of premises for injuries to the landowner's invitees/tenants/customers/students, etc., caused by the criminal act(s) of third parties. However, recently many courts have extended negligence rules to hold supermarkets, restaurants, libraries, schools, summer camps, and other entities liable for crime-related injuries. Even though the criminal act is, in fact, an intervening act, the landowner's antecedent negligence subjects him to liability if the criminal act was itself reasonably foreseeable. See *Nebel v. Avichal Enterprises, Inc.*, 704 F.Supp. 570 (D.N.J. 1989).62

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60 Cohen v. Southland Corp., 203 Cal. Rptr. 572, 576. Contra., see Boren v. Worthen National Bank of Arkansas, 921 S.W.2d 934 (Ark. 1996). (Holding that bank is not required to provide security at ATM's and that the fact that apartments, or businesses are in high crime areas does not in itself establish a duty to provide security. The dissent argues that the court should adopt the foreseeable risk rule, and observes that it should be a question of fact whether installation of cameras, or other measures, would have deterred criminal acts that caused plaintiffs' injuries).

61 Id., at 576.

62 There is an important limit to this liability. Because the allegation of negligent security in such situations
Application of the Rule in the Context of Video Surveillance: (1)

Failure to utilize a video security system: A natural aspect of a modern claim of negligent security is that a landowner's security system does not include available, cost-effective, and popularly utilized video surveillance equipment. In tort law cases, a plaintiff may actually introduce evidence of the 'industry standard' to show negligence. Although departure from the 'industry standard' does not establish negligence per se, the benchmark is relevant and admissible. In Nebel v. Avichal Enterprises, Inc., 704 F.Supp. 570 (D.N.J. 1989), a motel patron alleged that Defendant's employees were negligent in failing to provide 'functional and operational closed circuit surveillance cameras and monitors,' in a motel located in a well-known high crime area of Atlantic City, New Jersey. The court held that the obligation of plaintiffs in cases alleging inadequate security is to prove that defendant's negligence was a substantial factor in causing the harm. Keeping in mind the basic rule of law (that, while the criminal act is, in fact, an intervening act, the defendant remains liable if such a criminal act was foreseeable, and the defendant did not exercise reasonable care to reduce the risk of its occurrence), the plaintiff needs to prove, essentially, that a video surveillance system — or other security measures — would likely have deterred the criminal activity that caused plaintiff's injury. See also Morris v. Krauszer's Food Stores, Inc., 693 A.2d 510 (N.J.App. 1997)(Jury award of damages affirmed where plaintiff's estate introduced expert testimony that, considering foreseeability of robbery, Defendant should have increased security measures, including the installation of video

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is based upon the invitee's status and relationship with the landowner, the landowner's liability does not extend beyond his premises, and even on premises extends only to those areas within the landowner's control. Thus, for example, a landlord's duty to provide reasonable security to his tenants extends to those areas of the landlord's premises over which the landlord retains control during the lease (common entrances, stairwells, laundry rooms, recreation facilities, etc.).

63 704 F.Supp. 570, 580. The court's opinion contains a detailed discussion of the law of proximate causation that need not be detailed here, but that is instructive to the attorney or administrator who desires an in depth discussion of the principle of 'significant factor' analysis that underlies proximate cause theory in cases involving two or more alleged causes of harm.
(2) Use of video to replace security guards or officers: Although the cases are few in number, some observations may be made about the ‘reasonableness’ of using silent video surveillance to replace or enhance security personnel/guards/officers. In *Shoney’s, Inc. v. Hudson*, supra., a patron was robbed and injured by an assailant in the parking lot of Defendant’s restaurant. She alleged that Defendant knew of at least four acts of violence at this location within the prior two years, including one shooting of a cashier. Plaintiff alleged that Defendant had initially responded by hiring security personnel during all evening hours, but later discontinued the use of guards and installed silent video cameras near the cash register of its new restaurants. Later, Defendant apparently hired guards to observe the premises and escort employees with payrolls on Friday and Saturday nights. Noting that the restaurant was located in the highest crime area of any of Defendant’s outlets in Savannah, and that Defendants had acknowledged the potential for criminal attacks, the court held that an issue of material fact was raised whether Defendant provided reasonable security for patrons.65

The opinion may be read to state that a business or public invitee may allege that a landowner/landlord/store owner/school, etc., is negligent in discontinuing the use of security personnel – and replacing them with silent video – where the video is ineffectively deployed or located, or where reasonable care calls for the use of security guards or officers. Certainly the court’s opinion cautions – if indirectly – against the undifferentiated use of video to replace security personnel, merely to save money, etc.

(3) Policies and procedures, and employee training: Where devices are installed as the only security measure, or to enhance security, the landowner must also be careful to follow its own policies regarding installation and use of the

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64 Specifically, plaintiff's expert testified that a clearly visible closed circuit television focused on the area of the cash register, and a barrier to protect employees should have been installed. 693 A.2d 510, 513.

65 460 S.E.2d 809, 812.
technology. **Cohen v. Southland Corporation**, 203 Cal. Rptr. 572 (Cal. App. 1984) is illustrative. The Defendant corporation had commissioned a study of its store security, and had embarked on a program of employee training, balancing of lighting (inside and outside stores), etc. When a patron was shot by a robber — while the store clerk hid in the back room of the store — the patron alleged that the installation of a security camera at the cash register did not represent adequate security, unless store employees were also adequately trained, store interiors and parking lots were properly illuminated, etc.\(^{66}\)

(4) **False sense of security:** Victims of robbery or assault might also allege negligence where there is evidence that a video security system is improperly designed or maintained, or not monitored. The latter allegation may actually include a claim that a video security system that is represented as monitored, but is in fact not monitored, may create a false sense of security, thereby encouraging visitors/tenants/customers/students, etc. to take risks they would not take if they knew the video security system was not monitored. See, e.g., **Kutbi v. Thunderlion Enterprises, Inc.**, 698 P.2d 1044 (Ore. 1985). In **Kutbi**, the patron of a motor inn alleged that defendant's employees were negligent — with respect to guest security — when they: (1) duplicated excessive keys; (2) maintained a video security system that was not in working order, and that did not offer a view of patrons' rooms; and (3) 'lulled' patrons into a 'false sense of security' by not disclosing that the video security system was not regularly monitored. While the court's opinion does not comment in detail on plaintiff's third allegation, it implies that Defendant prevailed on this issue only because it introduced evidence that the security system was in good working order, and was properly monitored on the night when plaintiff's room was burglarized.\(^{67}\)

\(^{66}\) Thus, where plaintiff introduced evidence that the store manager had received no security training — despite the corporation's assertion that it had an extensive program of employee security training — and evidence of inadequate lighting on the night of the incident, summary judgement for the corporation was properly denied. The inference is, of course, that use of a video camera is not per se reasonable care where the situation demands additional forms of/or approaches to security.

\(^{67}\) 698 P.2d 1044, 1048. The court denied Defendant's motion for summary judgement, finding that Plaintiff
(5) **Governmental immunity:** The 'public duty doctrine' discussed earlier in this memorandum limits the liability of governmental landowners, including universities, by generally precluding - under constitutional 'separation of powers' analysis - a judicial imposition of executive branch policy. In other words, a private plaintiff - who is a crime victim - could probably not obtain a private monetary award based upon the allegation that a public university had generally devoted too few resources (too little budget) to campus security. The university should however be cautious not to play 'fast and loose' with this qualified immunity. Where a student/visitor/tenant/etc. enjoys a legal relationship with the university, the university’s duty as landlord, premises operator, etc., makes it vulnerable to allegations of negligent security to the same extent that a private landlord/premises operator/etc. would be subject to liability. Indeed, in reality, except as to 'undifferentiated' allegations of negligent security, the public institution, under most Tort Claims Acts, is subject to liability to the extent it would be liable if it were a private entity.

**Conclusion**

The decision whether to use silent video surveillance technology in certain environments/situations, or decisions regarding the extent of its use raise serious constitutional law, privacy and negligence law questions. The wide array of technology that is available certainly encourages the use of video security systems. However, the design and implementation of any such system, and its periodic enhancement, must recognize legal parameters that both limit and expand liability. Evaluation of policy, staffing, training, and budget issues are essential, and should involve all divisions having responsibility for campus security. The absence of much case law does deprive us of the administrative efficiency we seek in the law, but the case law that does exist gives guidance that is quite rich in common sense and

had introduced evidence sufficient to create a genuine issue of material fact on the questions whether
applicable constitutional and tort law principles that can be analogized with minimal intellectual uncertainty. The challenge is whether the college or university is willing to devote serious planning, and budget (for training, staffing, maintenance, enhancement, etc.) to this aspect of campus security, and whether students, faculty and staff will accept a shared commitment to the system selected.

Defendant's employees had made excessive keys and had not changed locks.