



# An Overview on the Guidelines for Closed Circuit Television (CCTV) For Public Safety and Community Policing

*Promulgating the Responsible Use of CCTV Technology in  
Security and Public Safety Applications*

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## **Forward**

The CCTV for Public Safety and Community Policing Guideline has taken three years to complete and would not have been possible without the commitment and support of the International Association of Chiefs of Police's (IACP) leadership, staff and Private Sector Liaison Committee. The IACP has been outstanding and uncompromising in their quest to positively effect how technology can be most appropriately and responsibly used in furthering the causes of law enforcement. The Security Industry Association (SIA) feels fortunate to have made such an historic partnership with this prestigious organization, which responsibly addresses the issues associated with the use of closed circuit television (CCTV).

The achievements of the Private Sector Liaison Committee (PSLC), under the steady leadership and direction of Chief Michael Shanahan, have been truly outstanding and beyond reproach. The members of the PSLC unselfishly give of their valuable time and knowledge to work on programs designed to improve law enforcement's interaction with the private sector. In similar character, the members of the PSLC's CCTV Subcommittee, under the strong and careful leadership of Chief Steven R. Harris (also a former president of IACP), have rallied to draft and shepherd the many revisions of the CCTV for Public Safety and Community Policing Guideline to completion and widespread dissemination.

Specifically, the guideline would not be in existence today if it were not for the dedication and expertise of the following people: Chief Michael Shanahan (Ret'd); Chief Steven R. Harris, Redmond, Washington; Thomas M. Seamon, CPP former Vice President of Public Safety University of Pennsylvania and the CCTV guideline's primary architect; Robert Bickel, Professor of Law at Stetson University and the CCTV Subcommittee's primary legal advisor and author of the CCTV Legal Memo; Richard Chace, Executive Director of the Security Industry Association and coordinator of the 1999 CCTV Summit and author of *CCTV for Public Safety* compendium; Richard Moe; Vice President of the Interpro Group; Ira Sommerson, President, Loss Management

Consultants; Marene Allison, Vice President Loss Prevention at Great Atlantic & Pacific Tea Co.; Chief Joseph Dunne, New York City, New York; Chief Michael Brassfield, Fort Lauderdale, Florida; James Harris, President, Regent International Solutions; Ronald Schwartz, CEO Universal Atlantic Systems; Ronald Spiller, Executive Director, Security Industry Association; Lessing Gold, Esquire, Mitchell, Silberberg & Knupp, LLP; Jeffrey Blum, Vice President of Strategic Planning, Ultrak; Chief Bruce Glasscock, Plano, Texas; Daniel Rosenblatt, Executive Director, International Association of Chiefs of Police; Eugene R. Cromartie, Deputy Executive Director, International Association of Chiefs of Police; Charlie Higginbotham, Director of Information and Services Division, International Association of Chiefs of Police; John Firman, Research Coordinator, International Association of Chiefs of Police; Jeffrey Higginbotham, Chief Legal Counsel, International Association of Chiefs of Police; and the many participants in the 1999 CCTV for Public Safety and Community Policing Summit.

## **Overview of Guideline Development**

The manufacturers and distributors of closed circuit television (CCTV) security products, represented by the Security Industry Association (SIA), and members of the law enforcement and public safety communities, represented by the International Association of Chiefs of Police (IACP) and the National Sheriffs Association (NSA), are committed to enhancing the quality of life of the local community by integrating the best practices of public and private policing with state-of-the-art security technology.

Several United States and European public safety models have demonstrated that closed circuit television (CCTV) is a critical component of a comprehensive public safety and security plan. Although, in the U.S., the constitutionality of CCTV use in public areas is well established, there are nonetheless concerns within the public arena with regards to the implications of CCTV use on privacy and civil rights. To consider these issues and develop a guideline regarding the appropriate use of CCTV technology within the public sector of the local community, SIA and the IACP Private Sector Liaison Committee conceived a CCTV Summit. The Summit involved CCTV manufacturers, law enforcement organizations, civil liberty organizations, tort and constitutional lawyers, state and federal regulators, state and federal legislators, and local citizens groups.

At present (January 2001), there are an estimated 2 million + video cameras in use around the country for the purpose of promoting public safety and security. Many of these cameras have been in use for years in applications such as Automatic Teller Machines (ATM's) and traffic regulation. Despite the prevalence of CCTV use on the national and local levels, there have been (prior to the Spring 1999 CCTV Summit) no consistent policies or procedures guiding the use of this equipment. Given the ethical, legal and other important issues implicated in the use of CCTV technology in the public sector, the members of SIA, IACP, and NSA recommend that public safety officials and law enforcement agencies adopt some or all of the following written guideline to assist and facilitate in the use of CCTV technology within the local community.

## **Background of Closed Circuit Television (CCTV) Use**

CCTV has been widely used in public areas by law enforcement and private security organizations in the United States. Currently, CCTV technology is being used by city police departments, such as New York and Baltimore, and on University campuses, such as the University of Maryland at College Park and the University of Pennsylvania. Much of the existing CCTV use at the local level is currently being used to monitor traffic; especially traffic signal-controlled intersections and to observe and sanction aggressive driving.

Critics of CCTV uses in the public sector have raised two constitutional issues: 1.) the Fourth Amendment guarantee against unreasonable searches and seizures, and 2.) the right of personal privacy, a generic term encompassing various rights recognized to be inherent in the concept of ordered liberty under the Fourteenth Amendment. The clearly established constitutionality of CCTV use in public areas rests on the concepts of “public area” and “reasonable expectation of privacy,” as defined extensively in case law. Generally, public areas are those areas open for public use, including unenclosed areas (public streets, sidewalks, and parks, etc.) and enclosed areas (building lobbies, corridors and elevators, etc.) To qualify as a constitutionally protected “reasonable expectation of privacy,” the individual must have an actual expectation of privacy and that expectation must be one which society recognizes as reasonable.

The courts have consistently found that an individual does not have a reasonable expectation of privacy when he or she is in a public place. Behavior and activity exhibited in a public area is obviously available for observation by others. Police observation of activities conducted in plain view in a public place, therefore, does not violate the Fourth Amendment guarantee against unreasonable search and seizure, regardless of whether the observation occurs through the physical presence of a person at the scene or through the assistance of CCTV technology. Similarly, there is no violation of personal privacy rights under the Fourteenth Amendment when an individual’s public behavior is observed by a video camera.

However, it is important to re-iterate, regardless of the green-light given by current law, responsible and ethical use CCTV technology as a public safety and security tool is critical to the success of current and future public safety applications of CCTV and other technologies. SIA, IACP and the NSA are firmly committed to promoting such use and strongly urge all law enforcement agencies actively using or contemplating the use of CCTV technology to use the CCTV for Public Safety and Community Policing guideline.

### **Common Questions and Answers**

- 1.) **Will there be security cameras in public bathrooms or other areas designated as “public,” where an individual may expect privacy?**

No. Despite the name “public restroom” or “public bathroom,” the proposed guideline recognizes these spaces in which one has a reasonable expectation of privacy. The proposed guideline prohibits CCTV use in areas where there is a “reasonable” expectation of privacy, as defined by existing law. This guideline would, however, permit CCTV use in the hallway or area outside a public restroom or similar use facility.

- 2.) **How will CCTV use change the way law enforcement patrols and interacts with my community; will such use supersede law enforcement’s current means of street patrol?**

The proposed guideline advocates that each law enforcement agency coordinates the intended purpose and focus of its CCTV program with the community in which the CCTV program will reside. This exchange of information and knowledge should clearly define and outline what problems the CCTV program was designed to address. This should then become part of a public document distributed to the community. It is recommended that these programs subscribe to existing laws and accepted procedures of evidentiary gathering.

However, if an individual(s) is/are perpetrating a crime in a public area they may still be stopped or addressed by law enforcement, but not necessarily due to the operation of CCTV equipment. The use of CCTV technology in public areas is intended to be a force-multiplier designed to assist law enforcement in the execution of their duties.

3.) **How do I know law enforcement is not using CCTV technology to track my normal daily activities and movements?**

The proposed guideline places a great deal of emphasis on individual privacy and rights. Subsequently, the vehicles/tools used to store image data are subject to specific handling protocols. In order to gain public support of CCTV use, law enforcement agencies should adhere to a specific operational guideline, specifically the CCTV for Public Safety and Community Policing guideline. This guideline, among other specifics, clearly states that normal CCTV-obtained images should be purged on a regular basis and retained in accordance with applicable public record laws. This affords law enforcement a fail-safe in case an image obtained through CCTV technology becomes a piece of evidence. Law enforcement, as a general rule, can only use its time and resources to identify instances that require action based upon “just cause.”

4.) **Who wrote this draft guideline?**

The proposed guideline has been developed over the last two years through numerous discussions and meetings by the International Association of Police Chief’s (IACP) Private Sector Liaison Committee whose members include representatives of the law enforcement, public/private security professional, CCTV manufacturer, legal and regulatory communities. This committee considered the ethical, social, legal and practical implications of CCTV use for safety and security purposes. A draft guideline was constructed based on the

committee's discussions, the University of Pennsylvania's CCTV Monitoring and Recording of Public Areas for Safety and Security draft policy, and the United Kingdom's Metropolitan Police Service Public Place CCTV Systems Guidance Guideline.

The resulting draft was prepared for discussion and debate at a CCTV Summit in the Spring of 1999 in Washington, DC. There, over a two-day period, members of the law enforcement, public/private security professional, CCTV manufacturer, legal and regulatory communities edited the guideline and offered revision suggestions to key elements of the document. The IACP's PSLC CCTV Sub-committee reviewed the recommended edits over a two-day period, incorporating suggested edits into the draft guideline document. The resulting 5<sup>th</sup> Revision was presented to the PSLC with the recommendation that the draft be moved into the three-month Review and Comment Period, starting in June 1999 and ending in September 1999. The responses from this three-month comment period were then reviewed by the PSLC CCTV Sub-committee and incorporated as necessary. The resulting 6<sup>th</sup> revision was then reviewed for continuity and substance. The final 7<sup>th</sup> revision was presented to the full PSLC with recommendation that it be approved and disseminated to all interested constituencies.

**5.) What was the CCTV Summit and who participated?**

The two-day CCTV Summit, held April 8-9, 1999, Washington, DC, at the Capital Hilton, hosted representatives of the CCTV manufacturer, public/private security, law enforcement, legislative, regulatory, civil-libertarian, and legal communities who came together to develop a consensus CCTV for Public Safety Operational Guideline document.

The goal was to create a document that discusses the privacy and legal issues associated with the public safety and community policing applications of CCTV technology.



*Security Industry Association*  
*And*  
*International Association of Chiefs of Police*  
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**GUIDELINE:** Closed Circuit Television (CCTV) for  
Public Safety and Community Policing

**PURPOSE:** The purpose of this document is to provide  
guidance to law enforcement in the  
responsible use of overt closed circuit  
television (CCTV) cameras in public areas,  
without a court order, for the purpose of  
safety and security.

**GENERAL PRINCIPLES:**

- A. In promulgating these guidelines, the security industry and law enforcement agencies seek to establish voluntary parameters restricting the non-court-ordered use of CCTV to public places, to enhance public safety and security in a manner consistent with accepted rights of privacy.
- B. Except in situations of the investigation of a crime committed by a person(s) whose description is known, CCTV programs must not be based on individual characteristics, or classifications, including race, gender, sexual orientation, national origin, or disability.
- C. These guidelines are intended to demonstrate that the security industry and law enforcement communities are committed to enhancing the public's quality of life by integrating the best practices of public and private policing with the responsible use of technology.

- D. The principle objectives of any CCTV program should include:
- 1.) Enhancing public safety;
  - 2.) Preventing/ deterring crime and public disorder;
  - 3.) Reducing and removing the fear of crime;
  - 4.) Identifying criminal activity;
  - 5.) Identifying suspects;
  - 6.) Gathering evidence;
  - 7.) Documenting police actions to safeguard citizen and police officer rights;
  - 8.) Reducing the cost and impact of crime to the community; and
  - 9.) Improving the allocation and deployment of law enforcement assets.
- E. CCTV use for safety and security purposes should be conducted in accord with accepted legal concepts regarding privacy, and in a professional, and ethical manner. Personnel involved in CCTV use should be appropriately trained and closely supervised in the responsible use of this technology. Violations or breaches of any program protocols should result in appropriate discipline and may subject those involved to civil or criminal liability under applicable state and federal laws governing CCTV video monitoring.
- F. Initial and ongoing needs assessments should be conducted as a part of any CCTV for safety and security program or protocol. Such needs assessments should consider that CCTV is only one of many tools available in protecting the public's safety-and that other alternatives may be more appropriate or cost effective.
- G. Information obtained from CCTV use should be used exclusively for safety and law enforcement purposes.

Information in any form obtained through the use of a CCTV program, or CCTV technology should be handled according to accepted law enforcement procedures and legal rules governing the handling of evidence. Dissemination of such information should be conducted in accordance with applicable State and Federal laws. Unusable or non-case specific video or digital image data should not be retained, and should be purged from data storage within an appropriate time, and in conformance with governing State and federal legal and public policy requirements.

- H. Law enforcement agencies should actively seek consultation and input from their community prior to implementing any CCTV program, or any significant expansion or alteration of such a program.

#### **RESPONSIBILITIES**

- A. Law enforcement agencies implementing a CCTV program shall be responsible to oversee and coordinate the use of CCTV for public safety and security purposes, and shall establish a liaison with their community regarding the program's policies and procedures.
- ~~B.~~ Each law enforcement agency implementing or using a CCTV program should identify a responsible party for the implementation and oversight of the CCTV program. The designated CCTV oversight officer shall be charged with facilitating input from and conducting consultations with the community. Such consultations should identify the positive aspects of CCTV use, and should work toward securing community support for CCTV use in public places to enhance public safety and security.
- C. Any local law enforcement agency implementing a CCTV program should monitor relevant law and security industry

practices to ensure that their CCTV program is consistent with appropriate industry standards and legal protections.

- E. Each local law enforcement agency implementing or using CCTV in public places should conduct ongoing program needs assessments and periodic review of CCTV camera locations, perimeter view, monitoring, training, and administration.
  
- D. All local law enforcement agency personnel involved in the application, use or monitoring of CCTV installations, collection of video or digital data, or other aspects of CCTV use shall receive appropriate training, including but not limited to the ethical limits of CCTV use, and instruction in applicable civil and criminal law. Law enforcement agencies and the security industry shall assist in the establishment of standards or criteria for such training programs.
  
- H. All operators and supervisors involved in use of CCTV in public places will be responsible to perform their duties in accordance with applicable law, department or agency policy, and this guideline.

**LOCAL LAW ENFORCEMENT IMPLEMENTATION  
GUIDELINES:**

- A. All existing public safety and security uses of CCTV technology should be brought into compliance with this guideline.
  
- B. Local law enforcement agencies implementing or conducting a CCTV program shall establish and enforce operating procedures that implement this guideline.
  
- C. Any local law enforcement agency implementing a CCTV program should consider posting signage at appropriate locations notifying citizens that the location may be using

- CCTV technology. The posting and content of signage should be reviewed with agency legal counsel.
- D. Any use of CCTV to observe locations consisting of residential or commercial housing should limit the view available to that which is only available to the unaided vision of an officer that may be on sight. Furthermore, any view of any residential or commercial housing area must not violate reasonable expectations of privacy, as current case law or statute defines that term or concept.
  - E. Any monitoring center of a local law enforcement agency implementing a CCTV program must be configured to prevent camera operators from tampering with or duplicating recorded information. Law enforcement agency policies must provide for discipline where this guideline is violated, and must notify all agency personnel that the unauthorized or illegal use, viewing, dissemination, or duplication of video recordings, images, or data, may subject the offending officer to civil or criminal liability.
  - F. Recorded analog videotape and collected digital video images should be stored for an appropriate time period, consistent with established policy and public records laws, and then should be erased or deleted, unless retained as part of a criminal investigation or civil or criminal court proceedings.
  - G. Videotapes and digital video images should be stored in a secure location with access, controlled and logged, limited to authorized personnel as defined and designated by the agency.
  - H. Law enforcement agencies using CCTV must establish and implement programs for the training of personnel involved in the use of CCTV, including camera control operators. Such training shall include technical training related to all equipment and technology used in the program, and shall include all aspects of this guideline.

- I. Camera control operators must not use CCTV to track/observe individuals based on characteristics of race, gender, ethnicity, sexual orientation, disability or other classifications protected by law.

**TECHNICAL PROCEEDURAL GUIDANCE:**

- A. In constructing a CCTV program it is necessary to establish each individual program's **Operational Requirements**. These requirements should include:
  - 1.) Identification of areas requiring CCTV use;
  - 2.) Assessment of the number of cameras, their locations and optimum required positions;
  - 3.) Evaluation of existing light levels and positioning of artificial and natural lighting sources in both day and nighttime conditions; and
  - 4.) Choice and identification of the most appropriate camera technology and equipment in relation to the proposed operating environment.
- B. A system review or audit should be undertaken periodically by accredited and/or qualified personnel, and measured against the specifications developed by each CCTV program's respective **Operational Requirements**. Any such audit must also include an assessment of the CCTV program's compliance with this guideline, including an ongoing assessment of the involvement and support of the community.
- C. Any CCTV program must include a system management plan that provides for:

- 1.) Formulation of control room location, configuration, and staffing;
- 2.) Development of the CCTV program's functional mission and operational protocols;
- 3.) Assignment of a supervisor to oversee the operation of control rooms, system equipment, monitors and data collection/storage procedures;
- 4.) Formulation of security protocols for control rooms, related personnel, equipment and any other component of the CCTV program's system;
- 5.) In cases of real-time monitoring, formulation of incident response protocols;
- 6.) Assessment of power supply and backup requirements; and
- 7.) Formulation and establishment of a routine system maintenance/upgrade program.

**POTENTIAL APPLICATIONS OF CCTV IN PUBLIC AREAS:**

Legitimate public safety and security purposes may include, but are not limited to, the following:

<b>Purpose</b>	<b>Example Uses:</b>
Protection of Persons and Property	Patrol of building perimeters, entrances and exits, public lobbies/corridors/elevators, public docks, public storage areas;
Monitoring of Access Control Systems	Monitoring of restricted access transactions at

	entrances to public buildings and other public areas;
Verification of Security Alarms	Confirming, prior to deployment of resources, public building intrusion alarms, trips on exit-door controls, hold-up alarms;
Video Patrol of Public Areas	Remotely observe or document activity at transit stops, parking lots, public streets, shopping areas, public parks, school playgrounds, and vehicle intersections;
Criminal Activity	Remotely observe or document instances of robbery, burglary, prostitution, vandalism, street crimes, or loitering;
Traffic Regulation or Control	Remotely observe and/or document red light running, aggressive driving, and pedestrian/vehicle traffic at intersections and on major Highways.

## **Building Productive Public – Private Security Partnerships**

For the past ten years the Security Industry Association (SIA) has been working with the International Association of Chiefs of Police (IACP) as a member of their Private Sector Liaison Committee (PSLC). This sixty member super-committee has been the breeding ground for such industry initiatives as the Model States Program, CCTV for Public Safety and Community Policing Summit, Standards for Mobile Security devices and most recently the Guide for Preventing and Responding to School Violence. In short the PSLC has been a bridge by which the private sector can interact with law enforcement and it's a bridge that has been used to successfully increase the security industry's stature and value within that community.

In the Spring of 1999, in an unprecedented move, the IACP agreed to partner with SIA to co-host a Summit designed to address the issues associated with the use of CCTV in public safety applications. Through prior meetings with key members of the PSLC, SIA was able to deduce that law enforcement was hesitant to institute widespread CCTV programs due to perceived liability and operational issues.

Concomitantly, SIA was aware of outside attempts to limit law enforcement's use of CCTV technology through the courts and certain state legislatures and was concerned that these actions would severely limit this industry's accessibility to a viable CCTV market.

In response to their respective and mutual concerns, SIA and the IACP drafted the CCTV for Public Safety and Community Policing Guideline. This guideline has evolved through 8 revisions, with the 9<sup>th</sup> approved in early 2000 by the full PSLC and referred to the Board of Directors of the IACP with the recommendation that it be disseminated to police agencies across the country. This guideline has been reviewed by law enforcement, CCTV manufacturers, Department of Justice officials, Congressional leaders, Municipal leaders, Civil Libertarian groups, members of the general public, and Constitutional and tort lawyers. The guideline builds upon a vast reservoir of public safety and legal knowledge and experience and serves as a "How To..." document for those law

enforcement and private sector entities seeking to implement a CCTV for Public Safety program.

This three-year effort and comprehensive guideline document has worked to preserve the threatened public safety CCTV market. Perhaps it is not clear to CCTV manufacturers and dealers how dangerously close the CCTV industry has come to losing the public safety market due to the litigation efforts of civil libertarian groups over privacy and security issues. One of the ways to counter such efforts is to promulgate the use of the CCTV for Public Safety guideline as an educational and management tool.

The guideline clearly spells out the intent to responsibly promote the use and instruct in the application of CCTV technology while partnering with law enforcement. Additionally, the document recommends ways to institute a CCTV program and how to build one from the ground up.

It has been vital that the CCTV industry understand it must develop and cultivate working relationships with law enforcement and public safety entities prior to any sales pitches. Six years worth of research, data and personal interaction demonstrating this fact should be respected. Law enforcement agencies are traditionally strapped for funding and information; such agencies are wary of the security industry and the promises made about products and services. The industry may dangle the CCTV carrot in front of public safety officials' noses extolling the force-multiplying virtues of the technologies, but it often fails to outline the need to invest in public outreach and education prior to installing or even purchasing the equipment. Perhaps, even worse the industry over-sells and convinces municipalities and agencies that they need more technology rather than more attention to responsible use of less technology.

Industry data reveals that law enforcement agencies place a higher value on practical information such as to validate or instruct that posting an officer at that intersection during peak traffic hours may solve their red light-running problem.

However, if such resources do not exist, then a less high tech and an inexpensive B/W fixed camera may be the first step in addressing the problem.

Is this a simplistic approach? Of course. But the point is clear: *To responsibly sell to law enforcement at partnership must be established.* Just because manufacturers build a product and sell it, does not mean law enforcement agencies can use it or will buy it. Dealers and manufacturers must demonstrate they are committed to responsibly addressing public safety issues for the long term and can be relied on to provide the right information; even if means offering a lower-tech version of a high-tech product.

The manufacturers and dealers of CCTV technology and equipment can demonstrate their commitment to, and gain trust with law enforcement by participating with groups such as the Virginia Police & Private Security Alliance (VAPPSA) or the Area Police/Private Security Liaison (APPL) in New York. There are such public/private groups in all states whose sole purpose is to develop better working relationships between law enforcement and the security industry.

The Security Industry Association has worked hard to cultivate the trust and respect of the law enforcement community by funding and spearheading such initiatives as the CCTV for Public Safety Guideline program. Now it is up to the manufacturers and dealers of CCTV equipment to avail themselves of this foundational work and provide the services and equipment law enforcement wants, rather than what we think they want.

## **Supplemental Legal Information on CCTV**

### **Legal Issues Related To Silent Video Surveillance**<sup>1</sup>

**A Brief Paper on the Subject of  
Constitutional Law & Policy Issues, and Tort Liability Issues  
Related to the Use of Silent Video Surveillance  
To Enhance Policing, and Premises or Employer Security**

Prepared by **Robert D. Bickel**<sup>2</sup>  
to Facilitate a Discussion of the Subject at a Special Conference  
Arranged by  
The Security Industry Association and  
The Private Sector Liaison Committee  
Washington, D.C., April 8, 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<sup>3</sup> 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.<sup>4</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> B.A., Univ. of South Florida, J.D., Florida State University. Professor of Law, Stetson University.

<sup>3</sup> J. Granholm, "Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches," 64 *U. Det. L. Rev.* 687 (1987).

<sup>4</sup> Q. Burrows, "Scowl Because You're On Candid Camera: Privacy and Video Surveillance," 31 *Val. Univ. L. Rev.* 1079 (1997).

context of a landowner's duty – as landlord, school, commercial business, etc. – to take reasonable measures to deter criminal 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.<sup>5</sup> Both Burrows and Jennifer Granholm have described these early projects as generally unsuccessful,<sup>6</sup> and Burrows paints a similar picture of the later 1982 project in Dade County, Florida.<sup>7</sup> Granholm adds that, while many citizens may have been willing to trade privacy for safety<sup>8</sup> 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.<sup>9</sup>

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<sup>5</sup> See Q. Burrows, footnote 4, *supra.*, p. 1103. Burrows describes projects in Hoboken, N.J., Orlean, N.Y., Mt. 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 of CCTV Surveillance: Constitutional Implications and Proposed Regulations,” 13 U. Mich. J.L. Reform 571 (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.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> Burrows, *supra.*, at 1103, citing Robb, *supra.*, at 574.

<sup>9</sup> Granholm, *supra.*, at 689. See e.g., Gross v. Taylor, 1997 WL 535872 (E.D.Pa. 1997).

However, Burrows describes subsequent projects in Anchorage, Baltimore, Camden, N.J. (street surveillance of Westfield Acres Housing Projects); Dover (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.<sup>10</sup> 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 ways that minimize the risk of intrusive surveillance or taping.<sup>11</sup>

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

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<sup>10</sup> Burrows, *supra.*, at 1106-1108. For descriptions of the Ybor City project, see R. Danielson, "Police Cameras May Soon Scan Ybor," St. Petersburg Times, May 24, 1996, 1996 WL 7117611; I. Hathaway, "Decision Delayed on Video Surveillance in Ybor," Tampa Tribune, May 24, 1996, 1996 WL 10228767; and R. Danielson, "Smile, Ybor: You're on Crime Camera," St. Petersburg Times, June 7, 1996, 1996 WL 7119969.

<sup>11</sup> 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.

surveillance technology by police and private security.<sup>12</sup> Finally, commentators cite the recent exploitation of police video for profit as a reason for limiting the use of video surveillance and the video-taping of police activity.<sup>13</sup>

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.<sup>14</sup>

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).<sup>15</sup> However, these same citizens are

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<sup>12</sup> 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. Owczarzak, 766 P.2d 399 (Ore. App. 1988), Michigan v. Dezek, 308 N.W.2d 652 (Mich. App. 1988), 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 operator of a whiskey still. Justice Douglas observed that, although electronic eavesdropping had been justified as a necessary means of combating organized crime, it was actually used by government agencies, including the Army, to conduct surveillance of United States Senators and Representatives, the ACLU, the NAACP, the Urban League, and college black studies programs and anti-war groups. See e.g., Chicago Lawyers Committee for Civil Rights Under Law, Inc. v. City of Chicago, No. 76 C 1982, 1985 WL 3450 (N.D.Ill. 1985).

<sup>13</sup> 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. *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.

<sup>14</sup> 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, *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.

<sup>15</sup> See, e.g., Dunnigan v. Keane, 137 F.3d 117 (2d Cir. 1998)[State court may admit videotape from bank ATM CCTV to identify assailant who robbed plaintiff and then attempted to use her ATM card, so

worried about the unethical use (viewing, sale, etc.) of surveillance video by police and private security, its inherently indiscriminate and invasive character,<sup>16</sup> and whether, in any event, the 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.<sup>17</sup>

#### Federal Law

The right of privacy is based in both constitutional law and common law.<sup>18</sup> As a constitutional right, it derives from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, and from specific provisions of state constitutions.<sup>19</sup> In **Katz v. United States**,<sup>20</sup> the Supreme Court held that the

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long as identification is reliable].

<sup>16</sup> See opinion of Judge Richard Posner in 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*, 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. See Granholm, *supra.*, at footnote 25.

<sup>17</sup> 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.

<sup>18</sup> Electronic surveillance is not unconstitutional *per se*. See U.S. v. Martinez, 498 F.2d 464 (6th Cir. 1974), *cert. denied*, 419 U.S. 1056. See 18 U.S.C.A. §2510. See also State v. Diaz, 706 A.2d 264 (N.J.Sup. 1998)[Neither federal or state constitutions are implicated by parents’ arrangement with private firm to install a videotape surveillance system in their home to record the conduct of a “nanny” hired to care for their children, citing United States v. Jacobsen, 466 U.S. 109 (1984)].

<sup>19</sup> 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.

<sup>20</sup> 389 U.S. 347 (1967).

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.<sup>21</sup> This *subjective and objective* test has continued to be the theoretical benchmark in video surveillance cases,<sup>22</sup> but *post-Katz* cases substantially weaken the expectation of privacy outside the home.<sup>23</sup> 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.<sup>24</sup>

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

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<sup>21</sup> 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).

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> Granholm, *supra.*, at 694-95; Burrows, *supra.*, at 1090.

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.<sup>25</sup> Granholm's argument is based upon her reading of the "plain view" doctrine search and seizure cases.<sup>26</sup> She argues that – although courts have held 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.<sup>27</sup> 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."<sup>28</sup> However, this aspect of Granholm's argument predates Supreme Court decisions approving aerial searches in drug cultivation cases.

**L. R. Willson and Sons v. Occupational Safety & Health Review Commission**,<sup>29</sup> considers both the issue of expectation of privacy and Granholm's concern for 'enhancements' such as zoom lenses. In **Willson**, the Secretary of Labor cited the company for OSHA violations after discovering

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<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> 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. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987).

<sup>29</sup> 134 F.3d 1235 (4th Cir. 1998).

that employees were working on structural steel more than 80 feet above the ground, without the benefit of ‘fall protective devices’ mandated by 29 C.F.R. § 1926.750(b)(1)(ii). The violation was documented by an OSHA compliance officer who observed Willson workers from the window of a room at a hotel across the street from the worksite, using a “16” power camera lens.<sup>30</sup> Upholding an Administrative Law Judge’s admission of the videotape at an evidentiary hearing, the Court of Appeals observed that: “Although surveillance is a type of search that can violate Fourth Amendment protections if performed unreasonably, [the compliance officer’s enhanced] observations were not unreasonable.” The court held that, since the video disclosed only that which was easily observable by anyone on one of the hotel’s upper stories, the employer had no reasonable expectation of privacy. Citing Secretary of Labor v. Concrete Constr. Co.,<sup>31</sup> the Court explained the ‘reasonable expectation of privacy rule’ in context by observing that there is no constitutional violation when an OSHA inspector makes observations of areas on commercial premises “...that are out of doors and not closed off to the public.”<sup>32</sup>

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,<sup>33</sup> or the justification for

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<sup>30</sup> The discovery was initially made by an Assistant Secretary of Labor for Occupational Safety and Health, from his room at the hotel. After observing the workers, the Assistant Secretary telephoned the local OSHA compliance officer who received permission from the hotel to videotape the worksite from the window of the Assistant Secretary’s room. The compliance officer then visited the worksite, presented his credentials and interviewed the two employees. 134 F.3d 1235, 1237.

<sup>31</sup> 15 O.S.H.C. 1614 (1992).

<sup>32</sup> 134 F.3d 1235, 1238. The court noted the use of a high powered lens in shooting the videotape, but found that the employer had left the worksite open to observations from vantages outside its control, and thus concluded that a sustained view from a hotel across the street from the construction site was not an unreasonable intrusion into the employer’s ‘private’ space. The court also held that the use of the video camera did not violate Section 8(a) of the Act requiring that an inspector present his credentials before ‘inspecting’ a site, or the employer’s ‘walkaround’ rights under Section 8(e) of the Act.

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 risks of violence in these settings,<sup>34</sup> not present in general surveillance scenarios.<sup>35</sup> She concludes that the undifferentiated threat 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.<sup>36</sup>

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<sup>33</sup> Regarding the constitutionality of government checkpoints set up to detect drunk drivers, *see Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>34</sup> 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. 121.538, 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.

<sup>35</sup> Citing *Jacobsen v. Seattle*, 658 P.2d 653 (Wash. 1983)[The danger posed by patrons at a rock concert is far less than that posed by the threat of terrorist bombings of courtrooms and attempts to hijack airplanes]; *Collier v. Miller*, 414 F.Supp. 1357 (S.D.Tex. 1976)[Searching university sports arena patrons did not fall under the courthouse or airport exceptions to a warrant requirement]. Granholm acknowledges cases to the contrary, citing *Jensen v. City of Pontiac*, 317 N.W.2d 619 (Mich. 1982)[Search of patrons entering a stadium is justified by threat of harm by unknown assailants throwing container-type objects]. *And see Norwood v. Bain*, 143 F.3d 843 (4<sup>th</sup> Cir. 1998)[Approving videotaping of license check of motorcycle riders seeking to enter fairgrounds for motorcycle rally, based upon reliable reports of potential violence involving rival clubs].

The distinction is explained in *Wheaton v. Hagan*, 435 F.Supp. 1134 (N.D.N.C. 1977). Citing *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974), and *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973), in addition to the cases cited by Granholm, the court observed that the factors advanced in the airport and courthouse search cases are: the public necessity for warrantless searches, the efficacy of the search, and the nature of the intrusion involved. The public safety factor was met in the seminal cases by the documentation of bombings and other acts of violence in the late 1960's and early 1970's. In contrast, the court explained, as unruly as patrons of arenas and coliseums might be, the dangers posed by these actors are substantially less than the dangers which justified suspending the warrant requirement in courthouse and airport cases. The court was also concerned that in the arena cases, searches tended to be random, singling out certain individuals and thereby exposing them to a stigma or embarrassment. The court held that, unless alternatives to random searches were adopted, a search of an arena patron should comply with the standard announced in *Terry v. Ohio*, 392 U.S. 1, 21 (1968)[The searching officer must be able to point to specific and articulable facts which...together with rational inferences...(would) reasonably warrant intrusion]. 435 F.Supp. 1134, 1145-46.

<sup>36</sup> Granholm, *supra.*, at 706.

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 **Griswold v. Connecticut**,<sup>37</sup> 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.<sup>38</sup> The limited precedent dealing with the expectation of privacy is in the context of the video surveillance of suspected criminal activity.

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**.<sup>39</sup> 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.<sup>40</sup> Such surveillance intrusions, Burrows notes,

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<sup>37</sup> 381 U.S. 479 (1965).

<sup>38</sup> Citing W. Rehnquist, "Is An Expanded Right of Privacy Consistent with Effective Law Enforcement," 23 *Kan. L. Rev.* 1 (1974). And see *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, *supra.*, at 1094.

<sup>39</sup> 911 F.2d 1433 (10th Cir. 1990) [authorizing Secret Service installation of television camera to film defendants' counterfeiting operation]; *United States v. Wilson*, 116 F.3d 1066 (5th Cir. 1997)[Video surveillance of undercover drug purchases from gang members]; Cf. *U.S. v. Pui Kan Lam*, 483 F.2d 1202 (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].

<sup>40</sup> 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

are also the concern of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.<sup>41</sup> Unfortunately, the federal courts appear to be divided on the application of the Act's requirements to targeted silent video surveillance, where justifiable expectations of privacy might exist.<sup>42</sup> Thus, federal law in this area remains less than fully conclusive.

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use of surveillance. Citing State v. Taketa, 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].

<sup>41</sup> 18 U.S.C., §§ 2510-2521, as amended by the Electronic Communication Privacy Act of 1986, Pub.L. 99-508, P.L. 103-414, and P.L. 105-153 (1997). See United States v. Bailey, 607 F.2d 237 (9th Cir. 1979), holding that Title III is constitutional under the Fourth Amendment, citing Hackett v. United States, 429 U.S. 837 (1975). The Act requires application for a court order to intercept communications in connection with the investigation of enumerated crimes, but does not specifically subsume the use of silent video surveillance. See Ricks v. State, 537 A.2d 612, 613-14 (Md. 1988). The purpose of the Act is to protect individual privacy while permitting limited governmental surveillance in accordance with uniform standards, when necessary for effective law enforcement. See, e.g., Application of U.S. Authorizing Interception of Wire Communications, 413 F.Supp. 1321 (E.D.Pa. 1976); Dowd v. Calabrese, 101 F.R.D. 427 (D.D.C. 1984). For an excellent discussion of Title III, see K. Springer, "In God We Trust: All Others Who Enter This Store Are Subject to Surveillance," 48 Fed. Comm. L.J. 187 (1995).

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 implications of that decision to that particular technology. Rather, *what the court said in Duarte must be held to embrace all existing means by which the agencies of the state can electronically intrude on the privacy of the individual, and any means which technology places at the disposal of law enforcement authorities in the future,*" (emphasis added), citing Brandeis, J. in Olmstead v. United States, 277 U.S. 438 (1928)]; and see United States v. Cuevas-Sanchez, 821 F.2d 248, 250-52 (5th Cir. 1987).

<sup>42</sup> Compare United States v. Mesa-Rincon, *supra.*; United States v. Cuevas-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 (1985), 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. Biasucci, 768 F.2d 504 (2d Cir. 1986); 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 "[Of 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

### 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 surveillance which might be permitted by U.S. Supreme Court precedent.<sup>43</sup> However, several states have permitted video surveillance when supported by legitimate public interest in newsworthy information.<sup>44</sup> 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.<sup>45</sup>

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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 (1995). For a discussion of the use of a ‘highlighted portion’ of a videotape in criminal proceedings, see United States v. Hardwell, 80 F.3d 1471, 1492-93 (10<sup>th</sup> Cir. 1996).

Canada appears to follow Biasucci, 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 §8 of the Charter of Rights and Freedoms where the target of the surveillance has a reasonable expectation of privacy).

<sup>43</sup> 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. Lasswell, “We’re Being Watched”, Allure Magazine (August, 1998), p.135. Lasswell 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.

<sup>44</sup> *Id.*, citing Gill v. Hearst Publishing Co., 239 P.2d 636 (Cal. 1952); *reh.* 253 P.2d 441 (Cal. 1953), and DeGregorio v. CBS, 473 N.Y.S.2d 922 (N.Y.Sup. 1984).

<sup>45</sup> *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,

Targeted video surveillance may be permitted under state law adopting the **Katz** standard. In **Ricks v. Maryland**,<sup>46</sup> 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.<sup>47</sup> Following the arrest of defendants based upon a search warrant, the appellate court upheld the court-ordered surveillance.<sup>48</sup> The court noted defendants’ admission that video surveillance was not regulated by the federal Omnibus Crime Control and Safe Streets Act of 1968, after which the Maryland wiretap statute was modeled,<sup>49</sup> and that the Maryland statute did not expressly contemplate video surveillance.

The court held, therefore, that silent video surveillance of suspected criminal activity was not proscribed by the Maryland Wiretap and Electronic Surveillance Act.<sup>50</sup> As to defendants’ Fourth Amendment argument, the court

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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].

<sup>46</sup> 520 A.2d 1136 (Md. App. 1987); *aff’d*, 537 A.2d 612 (Md. 1988).

<sup>47</sup> 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).

<sup>48</sup> 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.

<sup>49</sup> 537 A.2d at 613-14.

<sup>50</sup> Citing United States v. Biasucci, 786 F.2d 504 (2d Cir. 1986), *cert. denied*, 479 U.S. 827 (1986)[video surveillance of “business” offices of loan-sharking operation]; United States v. Torres, 751 F.2d 875 (7th Cir. 1985)[video surveillance of terrorist “safe houses” used to assemble bombs permitted on showing that audio devices alone might be neutralized by defendants playing music, using code, or assembling bombs in silence]; In the Matter of an Application for an Order Authorizing Interception of Oral Communications and Video Surveillance, 513 F.Supp. 421 (D. Mass. 1980); and People v. Teicher, 422 N.E.2d 506 (N.Y. 1981)[permitting court order allowing installation of camera in office of dentist suspected of sexually assaulting female patients (see R. Hochberger, “Appellate Division Approves Video Surveillance by Police,” 37 New York Law Journal, February 25, 1980)].

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.<sup>51</sup> Citing **Smith v. Maryland**,<sup>52</sup> 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).<sup>53</sup>

Some states have constitutional provisions which arguably prohibit general police use of powerful video street surveillance cameras with zoom lens capability, or other intrusive surveillance.<sup>54</sup> Burrows cites **Hawaii v. Bonnell**,<sup>55</sup> holding that the video surveillance of an employee break room by police without a warrant (to investigate alleged gambling operations) violated

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<sup>51</sup> 537 A.2d at 619, citing Katz v. United States, *supra.*, and Rakas v. Illinois, 439 U.S. 128 (1978).

<sup>52</sup> 442 U.S. 735 (1979).

<sup>53</sup> 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 McCray v. State of Maryland, 581 A.2d 45 (Md. App. 1990). In McCray, 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 Note, "Police Use of CCTV Surveillance: Constitutional Implications and 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].

<sup>54</sup> See L. Linden, *supra.*, footnote 16, citing the concern of Oakland City Officials that such surveillance would violate the California Constitution.

<sup>55</sup> 856 P.2d 1265 (Hawaii, 1993).

the Hawaii Constitution.<sup>56</sup> Burrows also emphasizes Montana’s requirement of a compelling governmental interest to justify excessively intrusive surveillance.<sup>57</sup> 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.<sup>58</sup>

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 reasonable expectation of privacy were made to rest on a consideration whether he “courted the risk of electronic surveillance.” Rather, in **R. v. Duarte**,<sup>59</sup> the court defined the reasonable expectation of privacy in given circumstances by asking 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 suggests that constitutional protections against unreasonable search and seizure must embrace an awareness of advances in the science and technology available to government. The court speculates that, given the

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<sup>56</sup> 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.

<sup>57</sup> **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.

<sup>58</sup> 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].

<sup>59</sup> 1 S.C.R. 30 (1990).

advanced state of surveillance technology, a “risk analysis” would set a meaningless standard for privacy.<sup>60</sup>

### **Employer Use of Video Surveillance in Work Areas**

The Seventh Circuit’s opinion in **Brazinski v. AMOCO Petroleum Additives Company**,<sup>61</sup> presents a thought-provoking discussion of employee expectations of privacy and employer concern for employee misconduct. In **Brazinski**, eight female workers (at an AMOCO chemical laboratory) challenged in state court their employer’s installation of a television camera in the ceiling of a locker room used by female employees to change from their street clothes into work clothes. The company explained that its CCTV installation was for the purpose of documenting improper (presumably sexual) activity by a certain male employee and a certain female employee in this locker room during working hours. However, seeking to avoid a determination of the merits, the company argued that the suit implicated the company’s collective bargaining agreement with plaintiffs’ union, and thus was a suit under Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. The suit was successfully removed to federal district court, and summary judgement was entered in favor of the company because plaintiffs failed to file a grievance under the bargaining agreement. Affirming summary judgement against the union plaintiffs, the Seventh Circuit nonetheless

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<sup>60</sup> 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.

<sup>61</sup> 6 F.3d 1176 (7<sup>th</sup> Cir. 1993).

rendered an opinion on the ‘supplemental’ claim of one non-union plaintiff<sup>62</sup> that the company’s use of CCTV in the female employees’ locker room subjected her to being taped in a state of undress.

The court observed that state tort law might support a claim that a ‘well-motivated but unavoidably indiscriminate effort at [video] surveillance is actionable by a person [who is] not the target of the surveillance, [but] who accidentally wanders into the scene and is photographed or recorded [in a state of undress].’<sup>63</sup> However, the court cautioned, if the method of surveillance chosen is the least indiscriminate possible for achieving a lawful and important objective, the ‘stranger’ whose privacy is incidentally and accidentally compromised might not have a cause of action.<sup>64</sup> If a cause of action were to be recognized, the court observed, plaintiff would be required to demonstrate that she was seen live by a human being – either a person monitoring the camera, or viewing a tape – or, at the very least that she was in the place under surveillance so that, if the equipment was manned, she would have been seen or heard.<sup>65</sup> See also **Vega-Rodriguez v. Puerto Rico Telephone Company**, *supra.*, footnote 40, 110 F.3d 174 (1st Cir. 1997), observing that announced, silent video surveillance of public employee 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.

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<sup>62</sup> Jones, the non-union plaintiff, was in fact an electrician employed by another company – but engaged in work on defendant’s premises.

<sup>63</sup> 6 F.3d 1176, 1183.

<sup>64</sup> Citing Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978). The court noted that this situation could arise, for example, where an innocent person visits an apartment that is under police surveillance.

<sup>65</sup> Finding that plaintiff introduced no evidence either that she was in the locker room during periods of CCTV surveillance, or that the camera was aimed inside the locker room (the employer argued that the camera was aimed at all times at the entry door to the locker room), the court affirmed dismissal of plaintiff’s complaint.

Union activity receives special protection from video surveillance under § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). Recent cases such as **California Acrylic Industries, Inc. v. National Labor Relations Board**,<sup>66</sup> hold that, in the absence of proper justification (e.g., violence or trespass), the videotaping of union pickets, or union/employee activity during organizing efforts or contested elections has a tendency to intimidate and interfere with the employees' right to engage in concerted activity. Specifically, the court held in **California Acrylic**, the employer may not videotape such activities on the basis of an undifferentiated fear that 'something might happen.'<sup>67</sup> Moreover, even where the employer's videotaping is justified as a lawful precaution against violence, it must be careful not to exceed the necessary boundaries of surveillance activities.<sup>68</sup>

#### **Summary of Constitutional and Privacy Issues**

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

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<sup>66</sup> 150 F.3d 1095 (9<sup>th</sup> Cir. 1998).

<sup>67</sup> 150 F.3d 1095, 1100; *and see* National Steel and Shipbuilding Company v. National Labor Relations Board, 156 F.3d 1268 (D.C. Cir. 1998); Clock Electric, Inc. v. National Labor Relations Board, 162 F.3d 907 (6<sup>th</sup> Cir. 1998); *Cf.* Overnight Transportation Company v. National Labor Relations Board, 140 F.3d 259 (D.C. Cir. 1998), holding that videotaping by employees who were union supporters but not union members did not violate the Act, where employer could not show that their activities should be attributed to the union under common law agency principles. Where election misconduct is attributable to one of the parties, the Board will overturn the election if the misconduct created such an environment of tension and coercion as to have a probable effect upon employee action at polls and to have materially affected the results of the election. Where misconduct is attributable to third parties, however, the Board will overturn the election only if the misconduct is so aggravated as to create a general atmosphere of fear and reprisal rendering a 'free election' impossible. 140 F.3d 259, 302-03.

<sup>68</sup> See Horsehead Resource Development Co., Inc. v. National Labor Relations Board, 154 F.3d 328 (6<sup>th</sup> Cir. 1998)[In taping beyond front gate of plant, surveillance of union members who were in no way engaged with company employees or property, but were merely talking among themselves or moving to and from picket shack and portable toilet, was unjustified].

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.<sup>69</sup> 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 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.<sup>70</sup>

## **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

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<sup>69</sup> Burrows, *supra.*, at 1124.

<sup>70</sup> 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 opinion of Justices Powell, Brennan, Marshall and Blackmun in *California v. Carraolo*, 476 U.S., at 216-226.

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 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 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.<sup>71</sup> 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.<sup>72</sup> The landowner/proprietor is not the insurer of the invitee's – e.g., tenant's – safety<sup>73</sup>, 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

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<sup>71</sup> Restatement 2d, Torts, Sec. 344 (1965).

<sup>72</sup> See Restatement, 2d, Torts, Sec. 302, and Comment e.

<sup>73</sup> See Scott v. Harper Recreation, Inc., 506 N.W.2d 857 (Mich. 1993).

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 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.<sup>74</sup>

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.<sup>75</sup>

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

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<sup>74</sup> ***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].

<sup>75</sup> *Id.*, at 578.

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).<sup>76</sup>

**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.<sup>77</sup> 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 cameras<sup>78</sup>).

(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

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<sup>76</sup> There is one important limit to this liability. Because the allegation of negligent security in such situations 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.).

<sup>77</sup> 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.

<sup>78</sup> Specifically, plaintiff's expert testified that a clearly visible closed circuit television camera focused on the area of the cash register, and a barrier to protect employees should have been installed. 693 A.2d 510, 513.

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 then 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.<sup>79</sup>

The opinion may be read to state that a business or public invitee may allege that a landowner (*e.g.*, storeowner)/landlord/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 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

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<sup>79</sup> 460 S.E.2d 809, 812.

adequately trained, and store interiors and parking lots were properly illuminated, *etc.*<sup>80</sup>

(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 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.<sup>81</sup>

(5) Governmental immunity: The 'public duty doctrine' limits the liability of governmental landowners 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

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<sup>80</sup> 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.

<sup>81</sup> 698 P.2d 1044, 1048. The court denied Defendant's motion for summary judgement, finding that Plaintiff had introduced evidence sufficient to create a genuine issue of material fact on the questions whether Defendant's employees had made excessive keys and had not changed locks.

victim – could probably not obtain a private monetary award based upon the allegation that a public landowner (e.g., a university) had generally devoted too few resources (too little budget) to (campus) security. Governmental agencies/entities should however be cautious not to play ‘fast and loose’ with this qualified immunity. Where a visitor/tenant/student enjoys a legal relationship with the landowner, the landowner’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 administrators having responsibility for 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 applicable constitutional and tort law principles that can be analogized with minimal intellectual uncertainty. The challenge is whether the law enforcement unit, government agency or employer is willing to devote serious planning, and budget (for training, staffing, maintenance, enhancement, *etc.*) to this aspect of

policing/security, and whether a shared commitment to the appropriate use of technology may be obtained.

### **Sample Case Study**

The Security Industry Association has recently completed the fourth and final volume of its CCTV for Public Safety series. This series, among other items, has tracked the successes and failures of CCTV use in public safety applications throughout the United States. The following is a sample case study of a public schools systems use of CCTV technology.

#### **NEW YORK CITY, NEW YORK**

## Background

Since July of 1997, five of the most crime ridden public housing facilities have been participating in a pilot program exploring the value of closed circuit television monitoring. Around the time this project launched, New York City began a massive undertaking to rid crime throughout the city. It was hoped that the cameras would deter and reduce crime in these public housing buildings as well as enhance the overall security for residents and housing staff.

## Public Safety Surveillance Application

The New York City Police Department is responsible for monitoring the equipment 24 hours a day, 7 days a week. Over 100 cameras are deployed throughout the five buildings. Cameras are located at building entrances, exits, rooftops, elevator cabs, lobbies, common areas, parking lots and perimeter locations. Three sergeants and nine police officers are assigned to each monitoring station, however the video footage is also recorded for later review. Each building has a separate monitoring station.

As the pilot program continues, the Housing Authority is looking into ways to enhance the capabilities of the current system. Soon, according to Millie Molina of the New York City Housing Authority, “video signals will be transmitted via telephone lines using a digital system. The distribution of high-density information over local area networks will enhance the central station operator’s surveillance capabilities. In addition, a demonstration remote video monitoring system using NYCHA’s computer network as a method to carry CCTV video signals is currently being prepared for possible installation.” They are also hoping to develop a system to allow for monitoring of all buildings from one central station.

## Cost

The CCTV system is funded by the Comp. Grant Program – Capital Funds Program and the modernization programs offered by the Department of Housing and Urban Development. The police who monitor the system are financed through the NY Police Department. Maintenance is covered under NYCHA operating funds. Since the

program's inception the city has average about \$30,000 per year to maintain the program. Most of the costs going towards overhauling the time lapse video recorder after 10,000 hours of use.

### Results

During 1999, New York City reported a 13.3% decrease in crime. Impressively, four of the five public housing units, which used CCTV, reported even a greater decrease. Since its inception, over 300 arrests can be attributed to CCTV through either direct observation or identification of perpetrators after reviewing videotape.

### Program-At-A-Glance

Site:	NYC Public Housing
Date Installed:	July 1997
Previously Reported:	1998
Funding Source:	HUD Grants
Hours of Surveillance:	24 Hours
Implementation:	NYC Housing Authority & Police Department
Main Problem Addressed:	Drug Dealing & General; Crime
Results:	300 arrests attributed to CCTV

## **Resources**

The *2001 CCTV For Public Safety and Community Policing* Report is in the final stage of completion as it moves from printed version to Internet and CD-ROM version. It became evident as the report neared 800 pages that it was in the best interests of the project that the report be compiled in such a way as to facilitate Internet and CD-ROM dissemination.

The 2001 report is a compendium of all aspects of the project as specifically relates to:

- The CCTV Guideline;
- Review of the CCTV Summit;
- Review of Sample US cities currently using CCTV technology in public safety and community policing applications;
- Legal Issues related to Video Surveillance;
- Legal Briefs on CCTV Use;
- Samples of Federal and State CCTV Legislation categorized by Security Application;
- Review of Federal Grant Programs that Fund CCTV Programs; and
- Related Supplemental Program documentation listed in a detailed Appendix.

It is envisioned that this compendium will be accessible on the SIA and IACP websites as well as be available on CD-ROM in a PDF format and/or searchable format, free of charge or with a nominal postage/handling fee. By placing this compendium on the Internet SIA/IACP will be able to regularly update the project and provide up-to-date information on a more regular basis and thus extend the life and effectiveness of the project.

The next iteration of this program will be to establish the statistical effectiveness of the CCTV technology as a public safety and community-policing tool. Discussions are underway with representatives from Stetson University and The University of Tampa to conduct this research. SIA is willing to fund the project and the compilation and dissemination of the data for the PSLC. It is expected that this statistical part of the program will be completed in late 2001 mid 2002.

For more information on responsible CCTV use in public safety applications, contact Richard Chace at [chace@siaonline.org](mailto:chace@siaonline.org) or visit [www.securitygateway.com](http://www.securitygateway.com).