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TO: Roger Johnson
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FROM: Joseph Storch
RE: Updated Analysis and Model Policy for Campus Video Surveillance
DATE: November 10, 2008
CC: Nicholas Rostow
Campus Counsel

Continuing questions directed to the University Counsel's Office about the proper use of video surveillance on campuses have suggested it would be helpful to provide campus policymakers with a legal analysis of the issue and a model video surveillance policy. To that end, here is an update of an analysis and model policy first issued in 2005. Some campuses have used this model to construct their policies. You may wish to forward this memo to appropriate campus officials.

State University campuses may conduct video-only surveillance of public areas to prevent crime or to prove that a crime was committed. Such surveillance does not violate the United States Constitution or any federal or state laws.

Video surveillance cameras should ideally be placed in such a way that they only view public areas and are conspicuous, so that passersby realize they are under surveillance. Video surveillance cameras placed in certain areas of campuses do not constitute an unreasonable search or seizure, prohibited by the United States Constitution.¹ With a proper policy governing their use, video surveillance cameras can be a useful tool in the University Police arsenal to fight crime on campus and protect members of the university community.

¹ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

I- A Reasonable Expectation of Privacy:

In the landmark case of Katz v. United States, the Supreme Court, through a majority opinion and a concurrence, set the standard for surveillance. The Fourth Amendment to the Constitution protects individuals, not places. Justice Harlan in concurrence wrote that surveillance violates an individual's Fourth Amendment rights if it passes a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"² The Court adopted Harlan's concurrence in Smith v. Maryland, clarifying that application of the Fourth Amendment depends on whether the person "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' has been invaded by government action."³

The main questions are whether members of the university community have a subjective expectation of privacy in the public spaces of a campus environment and, if they do, whether that subjective expectation is objectively reasonable. The answer is that campus community members do not have a reasonable subjective expectation of privacy in the public spaces of the campus. Those that do have such an expectation do not pass the second test, since their expectations are not objectively reasonable.

The Ninth Circuit wrote that, "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

² Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

³ Smith v. Maryland, 442 U.S. 735, 739 (1979).

normally may view with the naked eye.”⁴ Similarly, the Eighth Circuit reasoned that as long as a police agency stays within the confines of the Fourth Amendment, silent video surveillance can be authorized.⁵

The Southern District of New York favors the objective beliefs of a reasonable person over the mistaken subjective belief of privacy.⁶ Additionally, the court ruled that since the monitoring activity in question “occurred entirely within a public place,” the defendant “had no reasonable expectation of privacy on the public street.”⁷

A Maryland court, in ruling that a person walking on a sidewalk or in a public park cannot reasonably expect that his actions are private, reasoned that the police could have lawfully observed him by eye, and so videotaping that observation “is not more invasive or unreasonable than personal observation and is just as lawful. Consequently, neither a court order nor a search warrant was required.”⁸

⁴ United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991). The Supreme Court comes to a similar conclusion in United States v. Knotts. In discussing video surveillance of a person in a car, the Court wrote that, “One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels *public thoroughfares* where *both its occupants and its contents are in plain view*.” United States v. Knotts, 460 U.S. 276, 281 (1983) (emphasis added).

⁵ United States v. Falls, 34 F.3d 674, 678-679 (8th Cir. 1994).

⁶ Rodriguez v. United States, 878 F. Supp. 20, 24 (S.D.N.Y. 1995), *citing*, Hoffa v. United States, 385 U.S. 293, 302 (1966); United States v. White, 401 U.S. 745, 749 (1971); Lopez v. United States, 373 U.S. 427, 438-40 (1963).

⁷ Id., *citing*, United States v. Caputo, 808 F.2d 963, 967 (2d Cir. 1987); United States v. Cruz, 981 F.2d 613, 615-16 (1st Cir. 1992). *See Also*, Thompson v. Johnson County Community College, 930 F. Supp. 501, 507 (D.Kan. 1996) (ruling that in a case of video surveillance, a plaintiff can only prove a Fourth Amendment violation if they prove they have a “subjective expectation of privacy in that area and that this expectation was objectively reasonable”).

⁸ McCray v. State, 84 Md. App. 513, 521 (Md. Ct. Spec. App. 1990). *See Also*, State v. Abislaiman, 437 So.2d 181 (Fl. Ct. of Appeals 3d Cir. 1983), *cert. denied*, 469 U.S. 833 (1984) (hospital may use a video camera with a zoom lens in its parking lot and such use does not constitute an illegal search).

The Supreme Court of Alaska ruled for the state in a case involving cameras on a campus used to catch a pilfering student union worker.⁹ The state did not contest the student's subjective claim of privacy and belief that she was not monitored, but the court focused and emphasized the second part of the test, "namely whether [the student's] expectation of privacy was, from a societal perspective, a reasonable one."¹⁰ Since passersby could see the student's activities through the ticket window and an open door, and her fellow employees could watch her work, she was essentially involved in an activity that was open to the public.¹¹ That public activity, the court ruled, is not protected by the Fourth Amendment.¹²

II- The Reasonableness Standard for the Current College Generation:

Current college and university students, and younger members of the faculty and staff, are likely to have less expectation of privacy than their predecessors. Even if those earlier generations would have had an objective expectation of privacy, millennial students often do not harbor such an expectation, making cameras on campus a more reasonable method of securing the campus.¹³ Current students have grown up with video cameras surveilling many activities. ATM transaction and store purchase, the exterior of city buildings, and even school parking lots are captured on camera. Students have come to expect cameras in public and some private places. Some may even feel safer when they see a video camera's red light.

⁹ Cowles v. State, 23 P.3d 1168 (Alaska 2001).

¹⁰ Id. at 1171.

¹¹ Id.

¹² Id.

¹³ See e.g. Lirtzman, Michelle. "Surveillance Cameras Win Broad Support: Majority of Americans Favor Extra Safety Factor of Cameras." ABC NEWS. <http://abcnews.go.com/US/story?id=3422372&page=1> (July 29, 2007).

Some individual students may have a subjective expectation of privacy on campus. Yet a court will likely give more weight to the objective privacy expectations of that student's contemporaries. If a campus thoroughly educates students, faculty, and staff about the use of cameras on campus, and/or places signs and warnings that premises are under surveillance, few students could claim even a subjective expectation of privacy.

III- Applicable Federal and State Law:

Silent video surveillance (no audio) of a public place does not violate federal or state law. Title I of the Electronic Communications Privacy Act,¹⁴ regulates audio recording and surveillance but is silent on video recording and surveillance.¹⁵ Since the statute defines "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device,"¹⁶ "a visual observation is in no possible sense an 'aural acquisition,' or an acquisition, of any kind, of a 'wire or oral communication.' ... The Senate committee report, after repeating the statutory definition of 'aural acquisition,' remarks: 'Other forms of surveillance are not within the proposed legislation.'"¹⁷ Judge Posner, writing for the Seventh Circuit majority in United States v. Torres, emphasized that the absence of

¹⁴ 18 U.S.C. § 2510 (2005).

¹⁵ Id.

¹⁶ 18 U.S.C. § 2510(4) (2005).

¹⁷ United States v. Torres, 751 F.2d 875, 880 (7th Cir. 1984), *cert. denied*, 407 U.S. 1087 (1985), *citing*, S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968), *Accord*, United States v. Falls, 34 F.3d 674, 679 (8th Cir. 1994); United States v. Biasucci, 786 F.2d 504, 508-09 (2d Cir. 1986), *cert. denied*, 479 U.S. 827 (1986); Thompson v. Johnson County Community College, 930 F. Supp. 501, 507 (D.Kan. 1996); Sponick v. Detroit Police Dep't, 49 Mich. App. 162, 198-199 (Mich. Ct. App. 1973), *overruled on other grounds by*, Rinaldi v. Civil Service Commission, 69 Mich. App. 58, 244 NW2d 609 (1976). *See Also* Spinner, Cheryl. "Let's Go to the Videotape: The Second Circuit Sanctions Covert Video Surveillance of Domestic Criminals." 53 BROOKLYN L. REV. 469, 471 N.11 (1987) (explaining that the legislative history agrees with judicial decisions that visual surveillance is not covered by the statute).

discussion of video surveillance in the statute should be interpreted as congressional intent *not* to regulate, rather than intent *to* regulate. “It does not follow [that because the statute] does not authorize warrants for television surveillance, it forbids them. The motto of the Prussian state -- that everything which is not permitted is forbidden -- is not a helpful guide to statutory interpretation. Television surveillance (with no soundtrack) just is not within the statute’s domain.”¹⁸

The New York Court of Appeals interpreted New York Penal Law §700, which deals similarly with surveillance warrants,¹⁹ as inapplicable to video surveillance.²⁰ The court reasoned that as the “language and legislative history of that statute makes clear, it was never intended to address the use of video surveillance equipment”²¹

Thus neither federal²² nor state law prevent SUNY campuses from operating video-only surveillance cameras in public areas of campuses.

¹⁸ *Id.* Judge Posner continued, “The legislative history does not refer to it, probably because television cameras in 1968 were too bulky and noisy to be installed and operated surreptitiously. It would be illogical to infer from Congress’s quite natural omission to deal with a nonproblem that it means to tie the federal courts’ hands when and if the problem arose.” *Id.* at 880-881.

¹⁹ The statute was “drafted to conform to the provisions of the federal act.” *People v. Teicher*, 52 N.Y.2d 638, 653 (1981), *citing*, Denzer, “Practice Commentary,” MCKINNEY’S CONS. LAWS OF N.Y., Book 11A, C.P.L. art. 700, p 243.

²⁰ *Id.* at 650.

²¹ *Id.* at 653.

²² To the contrary, it should be noted that Congressional intent is in favor of video cameras in public elementary and secondary schools. Congress funds the “Safe Schools Act of 1994.” 20 U.S.C. § 5961 (2005). Grant money from that act can be used to pay for video surveillance, among other school safety measures. Braggs, Dominique. “Chalk Talk: Webcams in Classrooms: How Far is Too Far?” 33 J.L. & EDUC. 275, 276-277 (2004). Colleges and universities are not funded by this act. These cannot be compared perfectly since students have a lower expectation of privacy in elementary and secondary schools than in college and society. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (allowing a warrantless search of a student’s handbag in school since that student has a smaller expectation of privacy). At the least, however, this act shows that Congress can be comfortable with video surveillance in a school setting and does not feel that such surveillance harms important educational interests.

IV- New York's Video Voyeurism Law:

New York Penal Law forbids citizens from taking and distributing surreptitious video.²³ This statute is intended to punish those who videotape people in compromising positions for the purpose of amusement or entertainment, degrading another person, or sexual arousal.²⁴ This section of the Penal Law does not apply, however, with “respect to any: (a) law enforcement personnel engaged in the conduct of their authorized duties; (b) security system wherein a written notice is conspicuously posted on the premises stating that a video surveillance system has been installed for the purpose of security; or (c) video surveillance devices installed in such a manner that their presence is clearly and immediately obvious.”²⁵ In this case, law enforcement personnel would utilize the cameras to maintain public safety, part of their authorized duties.²⁶

Since SUNY Police satisfy clause “a” of the exception, it would seem that campuses have the option of fulfilling clauses “b” and “c.” The legislative intent would seem to dictate fulfilling as many of the clauses as possible, and campuses should consider that notion in deciding whether to make the cameras conspicuous and to post information about the cameras. Making the cameras conspicuous and posting information about the cameras may serve as a deterrent to actions in the area of the cameras. One downside would be that individuals with bad intentions will know where the cameras are located and commit their actions elsewhere.

²³ NY PENAL LAW §§ 250.40-250.60 (2005).

²⁴ Id.

²⁵ NY PENAL LAW § 250.65 (2005).

²⁶ It is clear that all State University Police would qualify for this exception. Less clear is whether hired security personnel at community college campuses would qualify for this exception. Those campuses would be advised to be extra careful to ensure that conspicuous notices accompany video cameras placed in public areas, and that it is obvious to passersby that such cameras are in use.

V- Cameras in Private Areas:

Video Surveillance Cameras may only be used in the private areas of colleges when a proper law enforcement agency has attained a warrant and followed all laws and policies regarding search and seizure. Students use residence halls as their homes. Other areas (for instance clinic exam rooms) are also widely believed to be private. For those areas, an individual expectation of privacy coupled with an objectively valid expectation of privacy is sufficient, under the Katz v. United States standard, to prevent the campus from installing surveillance cameras. The individual expectation of privacy may only be overcome through the proper judicial channels.

VI- Ensuring that Video is Not Misused:

SUNY campuses should take pains to ensure that video is only watched and/or reviewed by certain employees. SUNY policy should dictate which employees may monitor and review video. Stored video is also subject to warrants properly obtained by other agencies. In addition to claims of invasion of privacy if an employee misuses the video cameras for voyeuristic purposes,²⁷ there is also the public relations hit that an individual campus would take when the community learned of such use.

²⁷ School employees have been dismissed for misusing video equipment in schools for voyeuristic purposes. Clinch County Board of Education v. Hinson, 247 Ga. App. 33, 543 S.E.2d 91 (Court of Appeals of Georgia, 2000). The Georgia court upheld the school's dismissal as proper, when the school submitted evidence of several improper video surveillance tapes of students made by the school media coordinator.

Model SUNY Video Surveillance Policy

Preamble:

The State University of New York reserves the right to place cameras on its campuses where necessary and appropriate.

The State University of New York respects the privacy of university community members and takes pains to balance that privacy against safety needs on campus. Cameras extend the protection of University Police, even when officers are not in an immediate area. Cameras are not a guarantee of safety, but are a tool that assists University Police. Cameras protect campus community members from dangers by serving as deterrents and alerting police to dangers. Cameras are never used to monitor or track campus community members.

This policy does not apply to legitimate academic use of video cameras for educational purposes, to cameras used for journalism, or to private video cameras owned and operated by members of the campus community.

CAMERA PLACEMENT:

Campuses shall develop policies on use of video surveillance cameras in public areas subject to or in accordance with the following guidelines:

- I- University Police may establish temporary or permanent video surveillance cameras in public areas of State University of New York campuses. These cameras may not make audio recordings.
- II- This policy does not apply to covert cameras used by University Police or another law enforcement agency for criminal surveillance as governed by New York Penal Law.

- III- Cameras may not be established in private areas of the campus without obtaining a warrant and only subject to Section II above. Campuses should identify private areas including residence hall rooms, bathrooms, shower areas, locker and changing rooms, areas where a reasonable person might change clothing, or private offices. Additionally, rooms used for medical, physical, or mental therapy or treatment are private. Private areas also include the entrances, exits, lobbies, exam rooms or hallways of on-campus medical centers, counseling centers, or health facilities. The only exceptions are cameras used narrowly to secure money, documents, supplies or pharmaceuticals from theft, destruction, or tampering.
- IV- Video Surveillance Cameras shall not be directed or zoomed into the windows of any private residential building including residence halls. To the maximum extent possible, electronic shielding should be utilized so that the camera does not have the capability to look into or through windows.
- V- Video Surveillance Cameras shall not be directed or zoomed into the windows of any private building not on University property.
- VI- Campus policies shall strongly discourage use of empty dummy or placebo cameras due to liability concerns and the harm to the deterrence function of the system.

NOTIFICATION OF THE CAMPUS COMMUNITY:

- VII- The campus community should be notified that cameras may be utilized. Postings may accompany cameras, or simply be posted at the campus entrances. This policy should be made available to all students, faculty, staff, and visitors and be printed in appropriate publications.

CAMERA USE AND NONUSE:

- VIII- Cameras are not to be used to monitor individual students, faculty, or staff, except as necessary for a criminal investigation and except as in accordance with the terms of a warrant. Cameras may be used to monitor a student or employee work area, such as an area with financial transactions, even if there is only one student, faculty, or staff member employed in that work area. Cameras used to monitor a work area should not be able to view the contents of computer screens. If the cameras can pan to view computer screens, electronic shielding should be utilized so that these cameras are not used to monitor employee computer use.
- IX- Video Surveillance Cameras should not be used to prosecute violations on campus, such as violations of parking rules. Video surveillance should not be used to collect data on students such as parking patterns or student activity.
- X- Video Surveillance Cameras should not be used by Human Resources to evaluate employee performance or to monitor employees during their non-working time.
- XI- Video Surveillance Cameras shall be used exclusively for campus safety purposes. The campus committee that governs human study does not have jurisdiction over video recorded by Video Surveillance Cameras and may not authorize any research arms or organization, whether faculty or student, to use these cameras, or recordings from the cameras, for research purposes.

ESTABLISHMENT OF CAMERAS ON CAMPUS:

- XII- Temporary Video Surveillance Cameras are defined as cameras that are established by the University Police to provide additional security for a campus event or

situation, and that are not in place for more than 30 days. Permanent Video

Surveillance Cameras are established as part of the campus infrastructure and require planning and approval by the appropriate authorities.

- XIII- Each campus may establish a representative committee or panel or utilize an already established committee or panel (such as Health and Safety Task Forces) to determine placement and use of Video Surveillance Cameras on each individual campus. Such committees or panels should include representatives from University Police, Facilities, Student Affairs, Information Technology, Residence Life and Housing, and representatives of students, faculty, and staff. It is advised that representatives of local law enforcement agencies be given ex officio status.

CAMERA MONITORING:

- XIV- Video may only be monitored by University Police Officers. No students may be hired to monitor video. No unapproved employees may monitor or view video for any reason except as necessary in the course of an investigation or adjudication.
- XV- If the University Police feels it is necessary to aid in an investigation or search, small video clips or image stills may be released to the media or the public. Prior to releasing the video clip or image still, the face and identifying features of all those on video but not of interest to the investigation should be blurred.
- XVI- Those Officers approved to monitor video should receive training in effective, legal and ethical use of the monitoring equipment. These officers will receive a copy of this policy and provide written acknowledgement that they have read and understand this policy. Officers will receive any and all updates or amendments to this policy.

VIDEO OR OTHER STORAGE MEDIA:

- XVII- Video tapes or other media will be stored and transported in a manner that preserves security. Current and archived tapes or media shall be kept locked and secured.
- XVIII- Current and archived video under review shall be subject to a process where the tape or media is signed in and out of a logbook.
- XIX- Recordings not related to or used for an investigation shall be kept confidential and destroyed as early as possible in accordance with a retention policy. The policy shall provide that video used for investigation or prosecution of a crime shall be retained until the end of the proceeding and appeal period unless directed otherwise by a court.
- XX- No recording shall be altered in any manner. Steps should be taken to ensure that no editing or alterations compromise recorded video. The only narrow exception allows for faces of nonparticipants in an incident to be blurred for privacy reasons in the event a video or still image is provided to the media.
- XXI- Any system that uses the internet or a network to transmit or transfer video shall use encryption technology to ensure that video is not improperly accessed. University Police will work with the Information Technology department to determine the strength and security of the system and to ensure proper password and encryption technology for video transferred or transmitted over a computer system.

DESTRUCTION OR TAMPERING WITH CAMERAS:

- XXII- Any person who tampers with or destroys a Video Surveillance Camera or any part of the Video Surveillance System may be prosecuted in the criminal justice system as well as the campus judicial system.