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## Scowl Because You're on Candid Camera: Privacy and Video Surveillance

Quentin Burrows

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# SCOWL BECAUSE YOU'RE ON CANDID CAMERA: PRIVACY AND VIDEO SURVEILLANCE

## I. INTRODUCTION

"It looks like we're getting out of the surveillance business . . . . The risk in terms of privacy is too high."<sup>1</sup> This declaration came from Commissioner Randy Morris who spearheaded a move to get rid of a street surveillance system in Orlando, Florida, in 1996. Morris warned that the video surveillance system could be used to spy on people in their cars, on the streets and in nearby homes because no guidelines or restrictions existed for its use.<sup>2</sup> Orlando's deviation is the start of a counter-revolution in the street surveillance movement. However, while that city rejected street video surveillance as an invasion of privacy, fifteen other cities are currently using the systems to watch citizens.

Across America and around the world, individuals are constantly subjected to covert video surveillance.<sup>3</sup> This surreptitious surveillance manifests itself in the form of crime prevention, safety systems, productivity monitoring and outright voyeurism.<sup>4</sup> The most difficult problem facing governments which use modern video surveillance technology involves two competing values: safety and privacy. However, privacy seems to be fighting a losing campaign as more towns turn to video surveillance to protect their streets from crime.<sup>5</sup>

Indeed, the video camera has been compared with the six-shooter of the West as being the "great equalizer."<sup>6</sup> Some of the more famous examples of video camera usage include George Holiday's videotape of Los Angeles police

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1. Robert Perez, *County to Turn off Roadside Cameras Because of Concerns About Privacy*, ORLANDO SENTINEL, June 19, 1996, at A1.

2. *Id.*

3. Ken Gornley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1345; Jennifer Mulhern Granholm, *Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches*, 64 U. DET. L. REV. 687 (1987); Kent Greenfield, Comment, *Cameras in Teddy Bears: Electronic Visual Surveillance and the Fourth Amendment*, 58 U. CHI. L. REV. 1045 (1991); Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1021 (1995); Nancy J. Montroy, *United States v. Torres: The Need for Statutory Regulation of Video Surveillance*, 12 NOTRE DAME J. LEGIS. 264 (1985); Gary C. Robb, *Police Use of CCTV Surveillance: Constitutional Implications and Proposed Regulations*, 13 U. MICH. J.L. REFORM 571 (1980); Denise Troy, *Video Surveillance - Big Brother May Be Watching You*, 21 ARIZ. ST. L.J. 445 (1989).

4. See *infra* notes 180-338 and accompanying text.

5. See *infra* notes 180-227 and accompanying text.

6. McClurg, *supra* note 3, at 1022.

officers beating Rodney King, and rock legend Chuck Berry, who was sued for installing a video camera in the bathroom of a friend's restaurant.<sup>7</sup> In 1963, Abraham Zapruder preserved the assassination footage of President Kennedy on eight millimeter film, but if that assassination occurred today, twenty different angles would likely be filmed.<sup>8</sup> Moreover, technological advances are revolutionizing the surveillance systems of the future. Today the technology exists for people to receive instantaneous images of activity in their homes through their mobile phones and laptop computers.<sup>9</sup> The system can be set up so that movement within the video camera range sends a signal to the homeowner, who can then use her computer to see what is happening and determine if the police need to be summoned.<sup>10</sup> Furthermore, technicians with computers can use sound wave and microwave technology to transform the data from computer imaging systems into realistic visual images of the inside of a home.<sup>11</sup> Today, a pinhole camera lens can be the diameter of less than one-eighth of an inch.<sup>12</sup>

Video surveillance technology was first introduced in 1956,<sup>13</sup> but never has the intrusion been so pervasive as today.<sup>14</sup> Citizens certainly realize the possibility that in a shopping mall, in a bank, at an ATM machine, or in a convenience store, authorities or security guards may be monitoring their activities.<sup>15</sup> Specific site deterrence programs, such as those in department stores, have been in existence for a number of years.<sup>16</sup> Americans begrudgingly accept these surveillance devices, but few citizens expect the same surveillance on the public streets or in every private activity outside the home.

A limited amount of information exists about video surveillance intrusions because street camera facilities are so new to the United States. One particular surveillance program was instituted in Dade County, Florida in 1982.<sup>17</sup> The

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7. *Id.* Berry taped more than 250 women using the rest room, and some were only six year old girls. *Id.*

8. Howard Kleinberg, *Video Cameras Turn the Tables on Big Brother*, L.A. DAILY J., Mar. 22, 1991, at 6 (claiming that we are a society that has become accustomed to instant replay).

9. Matthew May, *Stills that Show Movement*, THE TIMES, Aug. 5, 1995, at 2.

10. *Id.*

11. Greenfield, *supra* note 3, at 1048.

12. *Id.*

13. THE CAMBRIDGE FACT FINDER 526 (David Crystal ed., 1994).

14. McClurg, *supra* note 3, at 1021. The video camcorder was introduced in 1985, and over fourteen million camcorders have been sold in the United States. *Id.* The camcorder has the potential to become the "greatest leveler of human privacy ever known." *Id.*

15. Granholm, *supra* note 3, at 687; Robb, *supra* note 3, at 572; Maureen O'Donnell, *Cameras Around Every Corner*, SUN-TIMES (Chi.), Feb. 18, 1996, at 2.

16. Raymond Surette, *Video Street Patrol: Media Technology and Street Crime*, 13 J. POLICE SCI. & ADMIN. 78, 78 n.1 (1985).

17. *Id.* at 78.

video surveillance program was designed to make a small city police department more efficient in its prime retail shopping district without the addition of more police personnel.<sup>18</sup> In this particular Miami Beach location, video cameras were placed on traffic lights in order to blanket the area with video surveillance.<sup>19</sup> The specific project included placing 100 video camera compartments along the two retail shopping areas of the city.<sup>20</sup> However, the system designers planned that only twenty-one video cameras would actually be placed in the 100 compartments at any given time.<sup>21</sup> The video cameras were to be moved from one compartment to another by the police so that criminals could not determine which compartments contained a camera.<sup>22</sup>

The Dade County cameras were monitored by local volunteers on a twenty-four hour basis.<sup>23</sup> The camera operation consisted of portable wireless cameras that were controlled from a distant point source.<sup>24</sup> The unit had a self-contained power source that collected video images which were then transferred by microwave to a television monitor.<sup>25</sup> The video receiver then conveyed the microwave to a monitoring screen located in a central command center.<sup>26</sup> The cameras even had pan and tilt capabilities and telescopic zoom lenses.<sup>27</sup>

18. *Id.* at 79. The police department indicated that to provide the same level of police coverage to the retail area would have required doubling the amount of police assigned to this area. *Id.*

19. *Id.* The two stated goals of the program were "(1) to accomplish a reduction in elderly fear of street crime and (2) to create anxiety and a sense of paranoia among the criminal element in that they [will] fear that their activities may be televised and recorded by police . . . ." *Id.*

20. *Id.* A sign was mounted on each video housing that stated "Police Television." *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 79 n.2. Different cities use different types of transfer technology. For instance, the Saint Louis, Missouri Police Department broadcasts on the 2.5 GHz educational TV band. A PRACTICAL GUIDE TO MATV/CCTV SYSTEM DESIGN AND SERVICE 42-43 (1974). The police disseminate internal police subjects like on-the-spot accident documentation to the city's eight police stations. *Id.* at 43.

25. Surette, *supra* note 16, at 79 n.2.

26. *Id.* In contrast to CCTV, broadcast television is limited to a single form of standardized signal. 4 MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 30 (7th ed. 1992) [hereinafter MCGRAW-HILL]. A television receiver uses the National Television Systems Committee (NTSC) standards. *Id.* Closed-circuit television systems are not required to use NTSC signals, but many do for economic reasons. *Id.*

27. Surette, *supra* note 16, at 79 n.2. The usual closed-circuit television picture display device is a television receiver that uses a cathode-ray tube to produce a visible image. MCGRAW-HILL, *supra* note 26, at 29. In recent years, other devices such as liquid-crystal displays have become more common. *Id.*

The impetus for the city adopting the surveillance plan denotes a few of the disturbing problems present with utilizing street surveillance systems. The City of Miami Beach had traditionally been a low-income, elderly, retirement community.<sup>28</sup> However, long-term residents became concerned when lower-income black and hispanic refugees became attracted to the inexpensive housing and then came to reside in the city.<sup>29</sup> The elderly residents began to continually demand additional police services because of an increased fear of crime.<sup>30</sup> "The business people told the research team that they were leary of young black and hispanic citizens who lived and worked in the area. They stated that they felt that each was a potential criminal and that they greatly feared that they would be victims."<sup>31</sup>

Based upon these fears, the surveillance project targeted the highest crime areas in the city.<sup>32</sup> However, the project operations were not entirely successful, and several modifications were needed. The project was originally supposed to utilize in-house police employees, but community employees, mostly elderly, were used instead.<sup>33</sup> The prototype project called for the camera locations to be switched every ninety days to confuse criminals, but the cameras remained in the target area permanently.<sup>34</sup> Equipment failures resulted in a period of time when only three of the cameras were operational.<sup>35</sup> In interviews, some local residents indicated that they felt that the cameras had no deterrent effect.<sup>36</sup> Another problem was that the project designers had hoped to make a profit off of the footage produced from the video surveillance cameras. However, the developers later identified the idea of selling video "action footage" for newscasts as a large error.<sup>37</sup> As a result of these problems, the Dade County video surveillance project was discontinued in May of 1984, after failing to catch a single criminal.<sup>38</sup>

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28. Surette, *supra* note 16, at 81.

29. *Id.*

30. *Id.*

31. *Id.*

32. This area experienced the majority of the homicides, aggravated assaults, rapes, and robberies. *Id.*

33. *Id.* at 82 tbl.1. This change was based in part upon the federal government funding that required direct community involvement. *Id.*

34. *Id.*

35. *Id.* at 82.

36. *Id.* at 82 n.3.

37. *Id.* at 83.

38. *Id.* at 84 n.7.

Unsettling as it may seem, several American cities in recent years have begun instituting video surveillance systems on public streets. The exact same types of street camera facilities that were used in Dade County now operate in Anchorage, Baltimore, Boston, Camden, Ft. Lauderdale,<sup>39</sup> Los Angeles, Memphis, Tacoma,<sup>40</sup> and Virginia Beach.<sup>41</sup> Furthermore, many cities are turning to "photo-cop systems" to deter speeders, traffic light offenders and toll evaders.<sup>42</sup> Unfortunately, the United States Supreme Court has, on numerous occasions, refused to extend the "right of privacy"<sup>43</sup> to public streets.<sup>44</sup> Moreover, Congress has never directly addressed the use of video surveillance on public streets.<sup>45</sup> The general conception of lower courts has been that no right of privacy exists in places accessible to the public or open to public view.<sup>46</sup> However, this Note seeks to explore an expanded right of privacy so that citizens will be protected from constant surreptitious video surveillance intrusions by police departments and local governments on public streets.<sup>47</sup>

39. Nicole Sterghos, *Keeping an Eye on You, Use of Video Surveillance Cameras Is on the Rise*, SUN SENTINEL (Fla.), Jan. 29, 1996, at 1A.

40. David R. Anderson, *Police May Aim Cameras at Crime*, THE OREGONIAN, Feb. 2, 1996, at B1.

41. *20/20: The Eyes of the Law* (ABC television broadcast, Sept. 8, 1995, transcript 1536) at 6. In 1993, Virginia Beach set up surveillance cameras along the boardwalk to reduce crime. *Id.* at 9. *CCTV For Public Safety 52* (Security Industry Association Report 1996) [hereinafter *1996 Report*].

42. See Eric Zorn, *Just Scowl, You're on Tollway Camera*, CHI. TRIB., Sept. 15, 1991, at 1; *Photo-Cop Is an Expensive Monster*, SALT LAKE TRIB., Aug. 29, 1995, at A8. *But see* Joe Mooney, *Federal Way Says No to Photo Cop*, SEATTLE POST-INTELLIGENCER, Jan. 5, 1995, at B2. For a comprehensive discussion of photo radar, consult Lisa S. Morris, Note, *Photo Radar: Friend or Foe?*, 61 UMKC L. REV. 805, 805 (1993) (explaining that photo radar uses a beam to determine the speed of the vehicle and simultaneously photographs the vehicle, its license plate, and its driver). Cities are beginning to realize that several problems exist with photo radar including who the ticket is mailed to, the shifting of the burden of proof, and the question of proper speed detector settings. *Id.*

43. Privacy is a relatively recent development in the evolution of civilization. Clifford S. Fishman, *Technology Enhanced Visual Surveillance and the Fourth Amendment: Sophistication, Availability and the Expectation of Privacy*, 26 AM. CRIM. L. REV. 315 (1988). Our ancestors lived in small tribal groupings where anything one did or possessed was visible to the entire community. *Id.* at 316. Today, technology has made our original conceptions of privacy obsolete. Lisa Ann Wintersheimer, Comment, *Privacy Versus Law Enforcement-Can the Two be Reconciled?*, 57 U. CIN. L. REV. 315, 315 (1988). Privacy law was originally rooted in the belief that an invasion could only occur through actual physical intrusion by the police or a criminal element. *Id.* However, technology has proven that privacy invasions stem from tort law, constitutional law, criminal procedure, civil procedure, family law, and contracts. ROBERT ELLIS SMITH, *THE LAW OF PRIVACY EXPLAINED* 4 (1993).

44. See *infra* notes 77-95 and accompanying text.

45. See *infra* section II.D.

46. Gormley, *supra* note 3, at 694; McClurg, *supra* note 3, at 991-92. *But see* *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (finding a limited privacy interest for persons on public streets). See *infra* section IV.A.

47. See *infra* notes 374-460 and accompanying text.

This Note will analyze the competing privacy and crime prevention interests as they relate to video surveillance technology utilized by the police and local governments.<sup>48</sup> Section II of this Note will provide a historical background of the diminishing right of privacy by surveying Supreme Court decisions, lower federal court cases and Congressional statutes.<sup>49</sup> Section III will examine several foreign approaches to video surveillance to determine which approach individual states should embrace when confronted with video surveillance proposals.<sup>50</sup> Section III will also discuss the specific operations of numerous cities that have begun using video surveillance cameras on public streets.<sup>51</sup> This Section will analyze exploitative video camera usage by individuals as compared with video camera usage by police officers, thereby exploring the potential for abuse by police departments when video surveillance is used continuously on public streets.<sup>52</sup> Section IV will appraise several state approaches to privacy rights in public spaces in an age of "new federalism" that promises an expansion of rights through state constitutions.<sup>53</sup> This Section also examines the potentially favorable and negative consequences inherent when towns establish video surveillance systems.<sup>54</sup> Finally, Section V of this Note proposes a model state statute that extends the right of privacy. This extension will thwart perpetual street video surveillance systems based upon the fundamental privacy right to be free from constant video surveillance intrusions.<sup>55</sup> This model state statute contains public disclosure requirements, a compelling governmental interest balancing test, specificity and duration requirements, an exclusionary rule to suppress improperly obtained information, and criminal and civil penalties for any violations of the model statute.<sup>56</sup>

## II. A HISTORY OF THE RIGHT TO PRIVACY

The existence of the right to privacy has been debated by American scholars as far back as the 1800s.<sup>57</sup> Samuel Warren and Louis Brandeis were pioneers in authoring *The Right to Privacy*,<sup>58</sup> which became the seminal article

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48. See *infra* notes 340-425 and accompanying text.

49. See *infra* notes 57-154 and accompanying text.

50. See *infra* notes 155-79 and accompanying text.

51. See *infra* notes 180-227 and accompanying text.

52. See *infra* notes 180-251 and accompanying text.

53. See *infra* notes 252-338 and accompanying text.

54. See *infra* notes 339-425 and accompanying text.

55. See *infra* notes 426-55 and accompanying text.

56. See *infra* Section V.

57. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Future Justice Brandeis called the right to privacy, "the right to be let alone." *Id.* at 195. He also indicated that what is whispered in closets should not be proclaimed from house-tops. *Id.*

58. *Id.* Warren and Brandeis were law partners and scholars who stood first and second in the Harvard Law School class of 1877. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3(B), at 1-12 (1987).

recognizing a right of privacy that had not previously existed.<sup>59</sup> Warren and Brandeis were concerned with the new technological invasions of the camera, the printing press, tabloid papers, and the telephone.<sup>60</sup> Subsequently, President Woodrow Wilson appointed Brandeis to the United States Supreme Court in 1916, where he endeavored to lay a foundation for future privacy law.<sup>61</sup> The traditional view, espoused by Professor William Prosser, has been that *The Right to Privacy* article was a direct response by Samuel Warren to unfair and prying treatment of the press into his daughter's wedding.<sup>62</sup> Thus, following a series of state law decisions in the early 1900s, Professor Prosser also became a significant figure in the privacy metamorphosis by advocating a four category approach to privacy that the Restatement of Torts subsequently adopted.<sup>63</sup> However, several critics disliked Prosser's "pigeon-holing" of privacy into only four areas,<sup>64</sup> and as a result, numerous scholars have undertaken the task of rebuilding privacy law.<sup>65</sup> Thus, the legal community is split on the definitional

59. Gormley, *supra* note 3, at 1335, 1345. Warren and Brandeis mainly used English and Irish court cases. *Id.* The two scholars presented the law as they believed it should be and became catalysts for the evolution of privacy law in America. *Id.* at 1345-48. Significantly, Warren and Brandeis were writing in the late nineteenth century during a period of the worst "yellow journalism" ever in the United States. *Id.* at 1350. *See also*, SMITH, *supra* note 43, at 4. The term "yellow journalism" derived from a cartoon character called "The Yellow Kid" created by Morrill Goddard. MCCARTHY, *supra* note 58, §1.3 (B) n.15. After the "Yellow Kid" appeared in Joseph Pulitzer's *World* and William Randolph Hearst's *Journal*, the term "yellow journalism" was born. *Id.*

60. SMITH, *supra* note 43, at 8. "The individual is entitled to decide whether that which is his shall be given to the public." Warren & Brandeis, *supra* note 57, at 199.

61. Gormley, *supra* note 3, at 1357. *See* *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). Brandeis believed that technology's impact on privacy would become very profound, and interestingly, his working file on *Olmstead* included an Associated Press clipping from 1928 which described the new invention of television. Gormley, *supra* note 3, at 1361.

62. MCCARTHY, *supra* note 58, § 1.3(B), at 1-11. Prosser observed that the wedding of Samuel Warren's daughter was the face that launched a thousand lawsuits. *Id.* However, this has no basis in fact, because Warren's daughter was only seven years old at the time, and she was not married until fifteen years after the article was written. *See id.* § 1.3(C), at 1-13.

63. SMITH, *supra* note 43, at 14. The four torts were described by Dean Prosser as the public disclosure of private facts, false light, intrusion, and appropriation. *Id.* at 14-24. *See* RESTATEMENT (SECOND) OF TORTS § 652b-652e (1977). The acceptance of Dean Prosser's views by the Restatements is not surprising because Prosser served as Reporter for the project and prepared all of the drafts pertaining to the subject. McClurg, *supra* note 3, at 998 n.40. Most states recognize the four torts but do not receive them favorably. *Id.* at 999.

64. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); SMITH, *supra* note 43, at 46-47; McClurg, *supra* note 3, at 1036-57. Prosser's premises are flawed because they do not draw a distinction between observing a person in a public place and taking her photograph. *Id.* at 1036.

65. The foremost scholars of the twentieth century, including Roscoe Pound, Paul Freund, Erwin Griswold, Carl J. Friedrich, Alan Westin, Laurence Tribe, and Melville Nimmer, all have attempted to tackle the right to privacy concept. Gormley, *supra* note 3, at 1336-37. The paradigm method has been for an author to examine a previously-favored definition of privacy, expose its fallacies and create a new contender for the privacy crown. *Id.* at 1338.

approach to privacy, and only by pulling apart privacy to acknowledge the many threads that bind it can one explore how privacy relates to video surveillance.<sup>66</sup>

Privacy law is confusing because its sources stem from tort law, constitutional law, criminal procedure, civil procedure, family law, and contracts.<sup>67</sup> Moreover, privacy is difficult to define because it means strikingly different things to different people.<sup>68</sup> Privacy in a constitutional sense is defined from the conception that the Bill of Rights is applicable to the states as incorporated through the Fourteenth Amendment.<sup>69</sup> The United States Supreme Court has found a limited "right to privacy" stemming from a combination of the First,<sup>70</sup> Third,<sup>71</sup> Fourth,<sup>72</sup> Fifth,<sup>73</sup> Ninth,<sup>74</sup> and Fourteenth

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66. *Id.* at 1339. The "tiger has chased its tail" with respect to a definition of privacy only because privacy is inherently not a static concept. *Id.* at 1342.

67. SMITH, *supra* note 43, at 4. There are more than 800 state and federal laws that affect confidentiality and privacy. *Id.* at 5.

68. *Id.* at 45. Privacy has taken on so many connotations that it has ceased to convey any single coherent concept. MCCARTHY, *supra* note 58, § 1.1(B)(1), at 1-3. Most people agree that they should have a right of privacy, but the rights that people attach to the definition of privacy vary from secrecy in credit bureau computerized records, to unreasonably intrusive searches by the police, to snooping by neighbors and the press. *Id.*

69. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (holding that the right of privacy protected in the fourth amendment also applied to the states through the due process clause). *See also Aguilar v. Texas*, 378 U.S. 108 (1964). "We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992).

70. The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

71. The Third Amendment provides: "No soldier shall, in time of peace be quartered in any house, without consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. This right to privacy in the home evolved from the founding fathers' rebellion against King George III's requirement that British soldiers be given lodging in colonists' homes. Gormley, *supra* note 3, at 1358. Video surveillance cameras can perhaps be seen as providing a type of permanent lodging in the home without consent. Justice Douglas stated that a statute authorizing electronic surveillance "in effect, places an invisible policeman in the home." *Berger v. New York*, 388 U.S. 41, 65 (1967) (Douglas, J., concurring).

72. The Fourth Amendment provides that:

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, 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. The Fourth Amendment developed in response to the use of general warrants and writs of assistance by British officials and soldiers who conducted broad searches of colonists' homes and private affairs. Gormley, *supra* note 3, at 1359.

Amendments.<sup>75</sup> However, in recent years certain members of the Court have sought to restrict privacy expansions.<sup>76</sup> Therefore, the Supreme Court's privacy jurisprudence must be examined to determine what precedents the Supreme Court would rely upon in deciding a video surveillance case. Through detailed examination of these decisions, it can be determined whether a video surveillance privacy argument is likely to be successful before the United States Supreme Court.

#### A. Fourth Amendment Privacy

Present day conceptions of privacy frequently stem from criminal procedure cases that interpret the Fourth Amendment.<sup>77</sup> One of the first times the Supreme Court examined privacy in an electronic surveillance case, the Court stated that the Fourth Amendment "protects people not places."<sup>78</sup> In *Katz v. United States*,<sup>79</sup> the Court held that the government's activities in electronically listening to and recording the defendant's words spoken in a telephone booth

73. The Fifth Amendment provides in relevant part that: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fifth Amendment alone would not provide protection against video surveillance because it typically only applies when the government forces a defendant to utter incriminating words or to perform incriminating acts. Granholm, *supra* note 3, at 689 n.18.

74. The Ninth Amendment "retained rights clause" provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

75. The Fourteenth Amendment provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). In *Paul v. Davis*, 424 U.S. 693 (1976), the Court found that no privacy right existed when the police disclosed that the respondent was arrested on a shoplifting charge. *Id.* at 713. The Court declined to enlarge its substantive privacy decisions because the personal right must be a guarantee that is "fundamental" or "implicit in the concept of ordered liberty." *Id.* The Court found that the activities detailed were very different from ordered liberty matters relating to marriage, procreation, contraception, family relationships, child rearing and education. *Id.*

76. See *infra* notes 82-124 and accompanying text.

77. Gormley, *supra* note 3, at 1358.

78. *Katz v. United States*, 389 U.S. 347, 351 (1967). The Court held that a warrant should have been obtained before the FBI placed an electronic bug in a telephone booth which they knew Katz was about to use. *Id.* at 353. "What he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351. See also *Berger v. New York*, 388 U.S. 41 (1967).

79. 389 U.S. 347 (1967).

violated the privacy upon which he justifiably relied.<sup>80</sup> Justice John M. Harlan's concurrence in *Katz* subsequently became the Supreme Court's two-prong test for determining when a reasonable expectation of privacy exists: "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.'"<sup>81</sup>

Unfortunately, this early formulation of privacy under the Fourth Amendment was weakened by later Court decisions which seemed to indicate that when an individual leaves home, he or she only has an extremely limited expectation of privacy in the public view.<sup>82</sup> For example, the Court has held that taking aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.<sup>83</sup> The Court also concluded that the use of artificial illumination by police officers does not

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80. *Id.* at 353. *Katz* may have resulted from J. Edgar Hoover's excessive use of wiretaps as the high profile director of the Federal Bureau of Investigation. Gormley, *supra* note 3, at 1362. Moreover, President Lyndon B. Johnson in his 1967 State of the Union Address stated that:

We should protect what Justice Brandeis called the "right most valued by civilized men"—the right to privacy. We should outlaw all wiretapping—public and private—wherever and whenever it occurs, except when the security of the nation is at stake—and only then with the strictest governmental safeguards. And we should exercise the full reach of our Constitutional powers to outlaw electronic "bugging" and "snooping."

*Id.* at 1364 (citing *Text of Message by President Johnson to Congress on State of the Union*, N.Y. TIMES, Jan. 11, 1967, at A16).

81. *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring). Electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment, because any limitation on such protection would be both bad physics and bad law. *Id.* at 360, 362. See *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (accepting the two part test as the touchstone of Fourth Amendment analysis). Professor Bruce Berner and most commentators agree that the Supreme Court is answering the question wrong, but Professor Berner also believes that the Court is answering the wrong question. Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 384 (1991). Furthermore, Berner believes that the focus should not be on reasonable "expectations" because if the police announced every night on the radio that they intended to break into your house once a month and search your belongings, the expectation portion of the test clearly breaks down. *Id.* at 394-96.

82. McClurg, *supra* note 3, at 991-92. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (indicating a limited privacy interest of persons on the public streets). The Court seemed to revert to an earlier philosophy that in an "open field" the government is not searching. *Hester v. United States*, 265 U.S. 57 (1924).

83. *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986). Dow Chemical became aware of the aerial photography because it maintained elaborate security around the complex and investigated any low-level flights by aircraft over the facility. *Id.* at 229-30. The Court found that the Environmental Protection Agency's aerial observation of Dow's plant complex did not exceed the EPA's investigative authority. *Id.* at 229.

constitute a search under the Fourth Amendment.<sup>84</sup> Furthermore, the Court determined that the reasonableness of a particular government activity does not turn on the existence of alternate, less intrusive means.<sup>85</sup>

Indeed, the Court has examined a long list of privacy cases outside of the home and found no expectation of privacy when the police examine bags of garbage placed outside the curtilage.<sup>86</sup> The Court has held that no privacy could be anticipated from state agents in an open field,<sup>87</sup> and that citizens have a reduced privacy interest in a car on a public highway.<sup>88</sup> Moreover, no reasonable expectation of privacy exists when police retrieve phone numbers recorded by a pen register,<sup>89</sup> and no privacy exists when conversations are recorded by wired informants.<sup>90</sup> The Court has been particularly harsh in curtailing a citizen's reasonable expectation of privacy in drug cultivating and drug possession cases.<sup>91</sup> For instance, the Court held that no privacy exists in

84. *Texas v. Brown*, 460 U.S. 730, 740 (1983). In *Brown*, the Fort Worth police force set up a routine driver's license checkpoint and stopped Brown's car. *Id.* at 733. A police officer shined his flashlight into the car and saw Brown drop a green balloon onto the floor of the car. *Id.* Since narcotics are frequently packed in balloons, the police officer asked Brown to step out of the car and the officer seized the balloon which contained heroin. *Id.* at 734-35. The Court upheld the conviction and the use of the flashlight, because it was not necessary that the officer possess near certainty as to the seizable nature of the items. *Id.* at 742.

85. *Illinois v. LaFayette*, 462 U.S. 640, 647 (1983).

86. *California v. Greenwood*, 486 U.S. 35, 37 (1988). The "curtilage" originally referred to the land and outbuildings immediately adjacent to the castle that were in turn surrounded by high stone walls; today, its meaning has been extended to include any land or building immediately adjacent to a dwelling, and usually it is enclosed some way by a fence or shrubs. BLACK'S LAW DICTIONARY 384 (6th ed. 1990). The protection afforded the "curtilage" is "a protection of families and personal privacy in the area intimately linked to the home, both physically and psychologically. . . ." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

87. *Oliver v. United States*, 466 U.S. 170, 176-77 (1984). When the police are in an open field, it does not matter how unreasonable their actions become; so long as they remain in an unprotected place, they remain invisible to the Fourth Amendment. *Berner*, *supra* note 81, at 390.

88. *United States v. Knotts*, 460 U.S. 276, 281-85 (1983). In this case, the police placed a beeper in a container of chemicals that the defendant placed in his car. *Id.* at 278. A beeper is a radio transmitter which emits periodic signals that can be picked up by a radio receiver. *Id.* at 277. The court held that a person travelling in an automobile on public streets has no reasonable expectation of privacy in his movements from one place to another. *Id.* at 281. Justice Rehnquist reasoned that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancements as science and technology afforded them in this case." *Id.* at 282.

89. *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979). A pen register chronicles all calls made to and from a certain number. *Id.* at 736 n.1. The Court held that this was not a search and the police did not need a warrant because many people have access to the information. *Id.* at 742-43.

90. *United States v. White*, 401 U.S. 745, 751 (1971).

91. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995) (finding that a "special need" existed for the drug testing of public school athletes). *Florida v. Riley*, 488 U.S. 445, 451-52 (1989) (permitting aerial surveillance of a greenhouse through missing panels in the roof from a helicopter hovering at 400 feet); *United States v. Dunn*, 480 U.S. 294, 305 (1987) (finding that drug

one's backyard.<sup>92</sup> In the backyard case, the Court upheld police use of a private plane to engage in a warrantless aerial observation of marijuana cultivation from 1000 feet.<sup>93</sup>

Therefore, based upon prior cases, it seems unlikely that the Court would characterize police video surveillance on the street as a "search," because the Court has stated that no reasonable expectation of privacy exists on public streets.<sup>94</sup> Thus, the Fourth Amendment alone will not provide a basis for germane protection against video surveillance intrusions on the streets. Although privacy in a police context tends to rely on fourth amendment jurisprudence, privacy concerns also stem from fundamental rights privacy decisions.<sup>95</sup>

### B. Fundamental Rights Privacy

In *Griswold v. Connecticut*,<sup>96</sup> the Court changed the field of privacy, holding that a Connecticut law forbidding the distribution of contraceptives

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enforcement agents' actions were reasonable in crossing several fences in order to use a flashlight to look into a barn); *New Jersey v. T.L.O.*, 469 U.S. 325, 346-47 (1985) (holding that a student's purse could be searched for marijuana and cigarettes); *Oliver v. United States*, 466 U.S. 170, 173, 179-81 (1984) (reasoning that narcotics agents could walk around a gate marked with a "No Trespassing" sign to locate a field of marijuana); *United States v. Place*, 462 U.S. 696, 707, 710 (1983) (holding that a sniffing test by a dog to discover cocaine was not unreasonable, but that holding the luggage for ninety minutes was unreasonable).

92. *California v. Ciraolo*, 476 U.S. 207, 215 (1986). In this case the defendant had a six foot outer fence and a ten foot inner fence, and the Court held that since a police man could have perched himself on the top of a truck or a two-level bus, the defendant had no expectation of privacy. *Id.* at 211. The Court reasoned that simply because an individual took measures to restrict some views of his activities, it did not preclude an officer's observations from a public vantage point. *Id.* at 213.

93. *Id.* at 213-14. In the same vein, the Supreme Court recently decided that police departments may use sobriety checkpoints to detect drunk drivers and help eliminate alcohol-related deaths. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990). In *Sitz*, the Michigan Department of State Police established checkpoints at selected sites along state roads and examined all drivers that passed through the checkpoints for signs of intoxication. *Id.* at 447. During the 75 minute operation, 126 vehicles passed through the checkpoint and two drivers were detained for field sobriety tests. *Id.* at 448. One other driver did not stop, and he was pulled over and arrested for driving under the influence. *Id.* The Court held that "where a Fourth Amendment intrusion serves special government needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 449-50 (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66 (1989)).

94. *Gormley*, *supra* note 3, at 1370; *Granholt*, *supra* note 3, at 694; *Robb*, *supra* note 3, at 582.

95. See *infra* notes 96-124 and accompanying text.

96. 381 U.S. 479 (1965).

violated the right of marital privacy.<sup>97</sup> Justice William O. Douglas wrote the opinion for the Court, describing the right of privacy as being imputed from the "zones of privacy" or "penumbras"<sup>98</sup> of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>99</sup> Although other Justices disagreed with the source of this "right to privacy," a majority protected the privacy of the marital bedroom.<sup>100</sup> The *Griswold* decision sparked a new type of privacy that resulted from a combination of technological advancements in birth control and the personal choice to exercise privacy rights in this area.<sup>101</sup>

However, critics of Justice Douglas' theory of penumbral rights, like Chief Justice William H. Rehnquist and Judge Robert Bork, have attempted to re-mold the constitutional privacy field.<sup>102</sup> Examining the critics' approaches to the right to privacy demonstrates why a video surveillance privacy argument is unlikely to succeed before the Supreme Court in a fundamental rights context. For example, Chief Justice Rehnquist has stated that if the constitutional balance is struck in favor of privacy, other societal values will suffer.<sup>103</sup> Moreover, Rehnquist seemed to squarely reject the right to privacy in a public place when tipped against an interest in law enforcement.<sup>104</sup> In the end, Rehnquist advocated the use of a rational basis test when appraising privacy issues in order to achieve limited interference with law enforcement.<sup>105</sup>

97. *Id.* at 485-86.

98. *Id.* at 484-85. A "penumbra" is a body of rights held to be guaranteed by implication in a civil constitution. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 860 (10th ed. 1994). Penumbra is an umbrella term that encompasses a broad range of rights that are explicit and implicit in the Constitution. Justice Holmes first spoke of penumbras in relation to privacy in *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting). But the original use of the term was by Justice Field in *Montgomery v. Bevans*, 17 F. Cas. 628 (C.C.D. Cal. 1871) (No. 9735). For a detailed history of penumbra, see Henry T. Greely, *A Footnote to "Penumbra" in Griswold v. Connecticut*, 6 CONST. COMMENTARY 251 (1989).

99. See *supra* notes 70-75 for the text of these amendments.

100. Gormley, *supra* note 3, at 1392.

101. *Id.* at 1396.

102. *Paul v. Davis*, 424 U.S. 693, 713-14 (1976). See also SMITH, *supra* note 43, at 40-42 (citing examples where Justice Rehnquist attempted to curb the right to privacy during his tenure on the Court).

103. William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 KAN. L. REV. 1 (1974). *Id.* at 2. With an almost eerie foreshadowing for how his Court would later attempt to change privacy, Rehnquist declared that the Supreme Court had "not spoken the last word on this subject," but he would not "predict the contours of future developments." *Id.* at 5. "To my mind there can be no question that driving an automobile down a public street and into a parking lot of a bar, which is itself open to the general public, is not in any normal sense of the word a 'private' act." *Id.* at 9.

104. *Id.* at 13. "Since those attending the rally realized that they were going to be in a public place, their interest in 'dictionary' privacy is, it seems to me, nil." *Id.*

105. *Id.* at 20. Justice Rehnquist also believes that the privacy battle should be fought in Congress rather than in the courts. *Id.* at 22.

Turning to the next major fundamental privacy case, Justice Harry A. Blackmun helped usher in twenty-four years of abortion debate with the Court's perpetually-controversial decision in *Roe v. Wade*.<sup>106</sup> *Roe* established that the constitutional right of privacy protects a woman's decision to have an abortion.<sup>107</sup> In establishing this branch of privacy, *Roe* seemed to rely more on the concept of ordered liberty in the Fourteenth Amendment than upon the penumbral spheres of privacy.<sup>108</sup> *Roe* has been dramatically altered by *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>109</sup> but the Court clings to *Roe* as being good law.<sup>110</sup> The Court held that *Casey* fits comfortably into the framework of prior Court decisions, including *Skinner v. Oklahoma*,<sup>111</sup> *Griswold v. Connecticut*,<sup>112</sup> *Loving v. Virginia*,<sup>113</sup> and *Eisenstad v. Baird*,<sup>114</sup> "which are 'not a series of isolated points'" but rather a "rational continuum."<sup>115</sup> In dissent, Justice Rehnquist attempted to halt the expansion of this new right of privacy by describing privacy as a cluster under the Fourteenth Amendment of matters related to family, child rearing, education, marriage, procreation, and contraception.<sup>116</sup>

106. 410 U.S. 113 (1973).

107. *Id.* at 154.

108. *Id.* at 152. Ordered liberty is limitation of the area where the states have power to substantively regulate conduct. Paul v. Davis, 424 U.S. 693, 713 (1976). Ordered liberty was first described in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

109. 505 U.S. 833 (1992).

110. "It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts." *Id.* at 846. The Court probably did not want to directly overrule *Roe* because of the negative connotations the news media would attach to such a decision. Justice Antonin Scalia sarcastically called this "keep-what-you-want-and-throw-away-the-rest" stare decisis. *Id.* at 993 (Scalia, J., concurring and dissenting).

111. 316 U.S. 535 (1942). In this case the Court found that a criminal sterilization act violated equal protection when a person convicted three times of petty larceny could be sterilized, but an embezzler could not. *Id.* at 537-43. *But see* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a sterilization law applicable only to mental defectives in state institutions).

112. 381 U.S. 479 (1965). See discussion *supra* notes 96-101 and accompanying text.

113. 388 U.S. 1, 12 (1967) (finding that a state statute that prevented marriages between persons solely on the basis of racial classifications violated the Fourteenth Amendment).

114. 405 U.S. 438, 454-55 (1972) (overturning a conviction based upon a Massachusetts law making it a felony to distribute contraceptive materials, except in the case of registered physicians and pharmacists furnishing the materials to married persons). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

115. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 858 (1992).

116. *Id.* at 964 (Rehnquist, J., concurring and dissenting) (stating that the fundamental right standard of *Roe* must be rejected, and that the new undue burden test is created largely out of whole cloth). See also Paul v. Davis, 424 U.S. 693, 712-13 (1975) (refusing to find a right to privacy under the Fourteenth Amendment when flyers listing the plaintiff as an active shoplifter were erroneously circulated by a police department). Some commentators believe that *Roe* and *Griswold* were used to "plug gaps" in the existing social contract. Gormley, *supra* note 3, at 1399. The

Along the lines of Rehnquist's dissent, the Supreme Court refused to expand personal privacy doctrines on two inauspicious occasions. First, in *Bowers v. Hardwick*,<sup>117</sup> the Court decided that sexual activity in the home, in violation of sodomy laws, was not protected by privacy rights.<sup>118</sup> Ironically, former Justice Lewis Powell Jr., who cast the deciding vote in the case, later

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social contract is an actual or hypothetical agreement among individuals forming an organized society or between the community and the ruler that defines and limits the rights and duties of each. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1114 (10th ed. 1994). The "gap plugging" theory establishes that fundamental privacy is necessary when broad constitutional language clashes with unexpected inventions or altered societal conditions. Gormley, *supra* note 3, at 1399. Thus, this same reasoning could apply to video surveillance technology which was previously unheard of and seldom used. However, with the current make-up of the Court, such a forthcoming opinion seems unlikely. Justice Scalia indicated in a recent lecture that the Constitution should not simply be considered to contain every ingredient that a person desires as in the television commercial for "Prego Spaghetti Sauce." Chelsea Morse, *Justice Argues Constitutional Interpretation, THE TORCH* (Valparaiso University, Ind. student newspaper), Jan. 26, 1996, at 1. Justice Scalia believes that merely because a person feels strongly that a particular fundamental right should be in the Constitution does not mean "it's in there." *Id.* Justice Scalia said jokingly: "You want the right to die? It's in there. You want the right to an abortion? It's in there." *Id.* Seemingly, Scalia would feel the same about the right to be free from video surveillance. However, Justice Scalia and Justice Rehnquist are not alone, and several critics believe that the Supreme Court would not decide a video surveillance case based upon a fundamental right to privacy on public streets. Mark Silverstein, Note, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 225. The Court has forcefully halted the right to privacy expansion by exercising judicial restraint. *Id.* The two principle obstacles in using the right to privacy are the lack of a justiciable controversy and the narrow scope of the constitutional right to privacy. Granholm, *supra* note 3, at 689-90 n.18; DARIEN A. MCWHIRTER & JON D. BIBLE, *PRIVACY AS A CONSTITUTIONAL RIGHT* 12, 181 (1992). With the appointments to the Supreme Court by Presidents Bush and Reagan, the Supreme Court is considerably more conservative than the average citizen. *Id.* at 181. Critics of the Court specifically look to the appointment of Justice Clarence Thomas to fill the seat vacated by Justice Thurgood Marshall as the turning point in the privacy balance. *Id.* at 12. Justice Harry A. Blackmun, a moderate, has since been replaced by Justice Stephen G. Breyer, and Justice Byron White, appointed by President Kennedy, was replaced by Justice Ruth Bader Ginsburg. See WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 329 (7th ed. 1991 & Supp. 1995). Therefore, the balance seems to have remained the same with seven republican appointments and two democrat appointments. CRAIG R. DUCAT & HAROLD W. CHASE, *CONSTITUTIONAL INTERPRETATION* A17-A19 (5th ed. 1992).

117. 478 U.S. 186 (1986).

118. *Hardwick* was charged under Georgia's sodomy statute for engaging in homosexual activity with another male in his bedroom. Although the District Attorney decided not to present the matter to a grand jury, *Hardwick* brought suit in Federal District Court because he asserted that he was in imminent danger of arrest as a practicing homosexual. LOCKHART ET AL., *supra* note 116, at 528 n.2. John and Mary Doe were also plaintiffs in the action, and they alleged that they wished to engage in oral sex which was also prohibited by the sodomy statute. *Id.* However, the Court of Appeals affirmed that the Doe's did not have standing to bring a claim because they had not sustained a direct injury, and they were not in immediate danger of sustaining a direct injury from the enforcement of the statute. *Id.*

told law students that "I think I probably made a mistake in that one."<sup>119</sup> However, this type of privacy decision, which allows police and local governments to determine what conduct may occur in the home, clearly seems to have negative implications for an expansion of the privacy doctrine to encompass video surveillance. Furthermore, the Court in *Laird v. Tatum*<sup>120</sup> held that an alleged "chilling effect" to free speech resulting from surveillance was insufficient alone to enable political activists to maintain judicial standing.<sup>121</sup> The *Laird* Court refused to enjoin military surveillance of a political group because the group was unable to show specific present harm or a threat of specific future harm.<sup>122</sup>

Thus, in two personal privacy instances, the Court permitted police and the military to trump the privacy rights of the individual. Under the current privacy philosophy, it seems unlikely that an individual could successfully bring a video surveillance privacy argument before the United States Supreme Court.<sup>123</sup> The penumbral right of privacy doctrine would be of little use to a plaintiff seeking to enjoin police video surveillance in public areas.<sup>124</sup> Therefore, other sources of federal and state privacy doctrines must be examined to help fill a video surveillance privacy void left by the United States Supreme Court.

### C. Other Federal Courts

Although the lower federal courts generally attempt to follow the privacy pattern set by the Supreme Court, many surveillance decisions have resulted in perplexing court divisions. For example, the federal district court of Hawaii held that FBI agents invaded an individual's privacy when they used a telescope to detect the material that the individual was reading, without obtaining a

119. Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3; Linda Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at 14.

120. 408 U.S. 1 (1972). In *Laird*, a group of political activists wanted an injunction to prohibit the Army from further covert surveillance of their lawful and peaceful civilian activities. The Court noted that the information gathered was nothing more than a good newspaper reporter would be able to gather by attending public meetings. *Id.* at 7.

121. To invoke judicial power the individual must show that he has sustained or is in immediate danger of sustaining direct injury as a result of action that was not common to all members of the public. *Ex Parte Levitt*, 302 U.S. 633, 634 (1937).

122. *Laird*, 408 U.S. at 13-14. No current case or statute prevents law enforcement officers from photographing people in public places. Robb, *supra* note 3, at 597 n.103.

123. Gormley, *supra* note 3, at 1406; McClurg, *supra* note 3, at 990-92.

124. Granholm, *supra* note 3, at 689-90 n.18; Robb, *supra* note 3, at 593-96; MCWHIRTER & BIBLE, *supra* note 116, at 12, 181.

warrant.<sup>125</sup> The court reasoned that the government may not use surveillance simply because peeping toms abound in society.<sup>126</sup> In *United States v. Torres*,<sup>127</sup> the Seventh Circuit Court of Appeals recognized that television surveillance is exceedingly intrusive and could be grossly abused to eliminate personal privacy, as understood by modern western nations.<sup>128</sup> In *Torres*, the United States District Court for the Northern District of Illinois had authorized the FBI to make surreptitious entries into apartments to install electronic bugs and television cameras in every room.<sup>129</sup> Judge Posner, speaking for the Seventh Circuit, indicated that this area cries out for congressional attention, but the federal appellate court held that television surveillance of suspected criminals is not unconstitutional per se.<sup>130</sup>

Other similar federal court decisions have upheld the use of surreptitious video surveillance by law enforcement agencies.<sup>131</sup> In *United States v. Mesa-Rincon*,<sup>132</sup> the Tenth Circuit Court of Appeals upheld a video surveillance order that authorized the secret filming of a counterfeiting operation in a Kansas building.<sup>133</sup> The court held that the interception of oral communication was substantially similar to video surveillance, even though video surveillance can be vastly more intrusive.<sup>134</sup> The court found that the government had an elevated burden to meet because there was a "medium" expectation of privacy

125. *United States v. Kim*, 415 F. Supp. 1252 (D. Haw. 1976). "It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search." *Id.* at 1256. See *United States v. Taketa*, 923 F.2d 665, 668 (9th Cir. 1991) (reversing convictions based upon the admission of videotaped evidence that violated the Fourth Amendment). See also *Doe v. B.P.S. Guard Serv. Inc.*, 945 F.2d 1422, 1427 (8th Cir. 1991) (upholding damages against guards who filmed models changing clothes with surveillance cameras).

126. *Kim*, 415 F. Supp. at 1256. The court held that as the technological capabilities of law enforcement increase, the Fourth Amendment protections must grow in response. *Id.* at 1257. Government intrusions of this sort violate basic foundations of privacy, security and decency which distinguish free societies from controlled societies. *Id.*

127. 751 F.2d 875 (7th Cir. 1984).

128. *Id.* at 882. Judge Posner described electronic visual surveillance as "inherently indiscriminate." *Id.* Posner employed a reasonableness balancing test that imposed a heavy burden on the use of video surveillance, but in this instance because the surveillance was used to investigate terrorist organizations who were building bombs, the court upheld its use. *Id.* at 883.

129. *Id.* at 877. The court made reference to the irony of the Seventh Circuit making such a decision in the year 1984. *Id.*

130. *Id.* at 883, 886.

131. *United States v. Ianniello*, 808 F.2d 184, 186 n.1, 195 (2d Cir. 1986) (affirming convictions without addressing the use of electronic audio and video surveillance).

132. 911 F.2d 1433 (10th Cir. 1990).

133. *Id.* at 1435-36. In this case the Secret Service installed television cameras at the authorized location and observed and recorded the defendants counterfeiting United States currency. *Id.*

134. *Id.* at 1437.

in the building.<sup>135</sup> The court upheld the use of the video surveillance evidence even though in the process of filming, the Secret Service observed an unknown male masturbating.<sup>136</sup> The court found that the expectation of privacy in this business premises was low enough as to be outweighed by the government's specific showing of a need for video surveillance.<sup>137</sup>

These cases delineate an important distinction between the government targeting a specific subject and the government targeting the entire public at large. Most cases seem to wrestle with the concept of video surveillance and its intrusive nature, but the police and the agents in these cases listed specific targets or operations and specific reasons for filming.<sup>138</sup> Therefore, a large differentiation must be seen between narrow surveillance activities with specific targets and general public surveillance.<sup>139</sup> In order to properly understand how the federal courts are interpreting specific video surveillance requirements, an analysis of congressional statutes which authorize surveillance activities is required.

#### D. Congress and Video Surveillance

Congress has refused to pass a statute protecting citizens from constant video surveillance intrusions. In reaction to the *Katz* oral surveillance decision, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which regulates the interception of electronic, wire, and oral communication, but not video surveillance.<sup>140</sup> Under Title III, law enforcement officials must apply for a court order to intercept communications

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135. *Id.* at 1443.

136. *Id.* at 1435. The use of a video camera is an extraordinarily intrusive method of searching because no other technique would have recorded, in graphic detail, an innocent individual engaging in this very personal and private behavior. *Id.* at 1442. However, the court held that the pressing need for video surveillance outweighed the expectation of privacy in this business premises. *Id.* at 1445.

137. *Id.* The court found that at least two of the government's goals could not be achieved through the use of audio surveillance or standard visual surveillance. *Id.* at 1444.

138. *United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986) (holding that the specific facts in the affidavit supported the necessity of video surveillance). *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984) (finding that video surveillance was necessary to investigate terrorist organizations who were building bombs). *In re Order Authorizing Interception of Oral Communications & Videotape Surveillance*, 513 F. Supp. 421, 422 (D. Mass. 1980) (holding that the supporting affidavits presented compelling evidence of probable cause to believe that ongoing violations of Title 21 were occurring within the dwelling).

139. See *infra* section V for a proposal of how to eliminate general surveillance and still permit targeted surveillance, if specific guidelines are followed.

140. 18 U.S.C. §§ 2510-2521 (1994). See Andrew Miller, *Electronic Surveillance*, 80 GEO. L.J. 1037 (1992); Wintersheimer, *supra* note 43, at 330.

in connection with the investigation of certain enumerated crimes.<sup>141</sup> A Title III search warrant must contain four requirements to be valid: (1) probable cause, (2) particularity, (3) necessity, and (4) minimization.<sup>142</sup> However, the federal appellate courts differ in applying Title III to video surveillance, and Congress has never clarified the issue.<sup>143</sup> Some federal courts apply portions of the four requirements of Title III in the use of silent video surveillance,<sup>144</sup> while other courts do not find Title III applicable to video surveillance.<sup>145</sup> Therefore, an inconsistency exists because video surveillance is unregulated by Title III, even though video is arguably more intrusive than aural (audio) surveillance.<sup>146</sup> As federal courts have stated,<sup>147</sup> "video surveillance is more invasive of privacy than audio surveillance, 'just as a strip search is more invasive than a pat-down search'"; but Congress has not made this distinction.<sup>148</sup>

Congress has continued to expand other surveillance statutes, but it has not addressed police use of video surveillance in specific target operations or in general street camera surveillance operations. Paradoxically, Congress established a Federal Intelligence Surveillance Act (FISA) which provides

141. 18 U.S.C. §§ 2516-2518 (1994). Suspicion of virtually any felony will provide adequate grounds for an application for surveillance. *Id.* §2516(3). See Troy, *supra* note 3, at 445.

142. Troy, *supra* note 3, at 456-61.

143. *Id.* at 445.

144. *United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990); *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987); *United States v. Biasucci*, 768 F.2d 504 (2d Cir. 1986); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984).

145. *United States v. Taketa*, 923 F.2d 665, 675 (9th Cir. 1991) (stating that silent video taping does not fall under Title III because no aural (audio) communications were intercepted). *Mesa-Rincon*, 911 F.2d at 1436-38 (using the general Title III warrant requirements but resolving that the two defendants could be convicted by visual surveillance evidence). *In re Order Authorizing Interception of Oral Communications & Videotape Surveillance*, 513 F. Supp. 421, 423 (D. Mass. 1980) (stating that Title III is not "formally applicable to video surveillance"). At the state level, see *People v. Teicher*, 422 N.E.2d 506 (N.Y. 1981), and *Sponick v. City of Detroit Police Dept.*, 211 N.W.2d 674 (Mich. Ct. App. 1973).

146. People who are afraid of audio surveillance may mute or mask their conversations, move their conversations or communicate in non-verbal ways, but this is not possible with video surveillance. Greenfield, *supra* note 3, at 1047.

147. *Torres*, 751 F.2d at 885; *Mesa-Rincon*, 911 F.2d at 1442-43.

148. Thomas M. Messana, *Ricks v. State: Big Brother Has Arrived in Maryland*, 48 MD. L. REV. 435, 452 (1989) (quoting *Torres*, 751 F.2d at 885). Equally complex issues surface when the government attempts to obtain a warrant to conduct roving surveillance operations. See Lyle D. Larson, Note, *An End-Run Around the Fourth Amendment: Why Roving Surveillance Is Unconstitutional*, 28 AM. CRIM. L. REV. 143 (1990). Larson finds that roving surveillance orders are unconstitutional because the orders are too broad and the orders require the officials conducting the search to determine if probable cause exists, rather than a neutral magistrate. *Id.* at 150. Furthermore, the orders fail to deter overzealous government conduct, and the need for the roving surveillance orders is illusory. *Id.* Many of the same problems may be attributed to use of street surveillance cameras which furnish no judicial check.

standards for video surveillance of foreign agents, but not for surveillance of American citizens.<sup>149</sup> FISA also provides for suppression proceedings, *in-camera* review of video tapes, and the destruction of unintentionally acquired information.<sup>150</sup> In interpreting FISA, Title Nine of the United States Attorney's Manual states that when justifiable expectations of privacy exist, judicial authorization is needed to conduct video surveillance of foreign agents.<sup>151</sup> However, police and federal agents do not need to follow the safeguards of Title III or the FISA when conducting video surveillance activities because the statutes do not list any requirements for video surveillance of American citizens on public streets.<sup>152</sup>

Thus, legislation at the state and federal level is needed because the current law is inconsistent, ineffective, and it creates divergent court opinions in the absence of congressional clarification.<sup>153</sup> As more video surveillance problems surface, the need for comprehensive policies becomes clear, but the Supreme Court and Congress have simply sidestepped the problem.<sup>154</sup> Therefore, an examination of how foreign nations have managed the surveillance explosion may provide insight as to what polices the United States could develop in this field. If the privacy violations inherent in video surveillance are not addressed, America may soon resemble these foreign nations.

### III. ANALYSIS OF FOREIGN COUNTERPARTS AND THE AMERICAN EXPERIENCE

#### A. Foreign Counterparts

You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized. . . . He tried to squeeze out

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149. 50 U.S.C. § 1801 (1994).

150. *Id.* § 1806.

151. UNITED STATES DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, Title 9 at 9-7.1010 (1984). UNITED STATES DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, Title 9 at 9-60.401 et seq. (1992).

152. Montroy, *supra* note 3, at 271.

153. 138 CONG. REC. E81-02 (extension of remarks Jan. 24, 1992) (statement of Rep. Lee H. Hamilton). "The Congress and the President must devise a better framework for safeguarding privacy rights in an era of rapid technological innovation." *Id.* at E82. Covert video surveillance is not covered by federal wiretapping statutes and bills that have been introduced to amend Title III have been rejected. 136 CONG. REC. E2297-01, E2298 (July 11, 1990) (statement of Rep. Don Edwards). Although Representative Kastenmier introduced a bill in 1984 to extend Title III protection to video surveillance, it did not pass by the end of the 98th Congress, and it has never been resubmitted. H.R. 6343, 98th Cong. (1984). Representative Kastenmier declared that this bill would apply to both private and public sources in closing the video loopholes of Title III. 130 CONG. REC. E4107-08 (daily ed. Oct. 1, 1984) (statement of Rep. Kastenmier).

154. Montroy, *supra* note 3, at 264-74.

some childhood memory that should tell him whether London had always been quite like this.<sup>155</sup>

The irony of this George Orwell quote is not lost on present day England, which currently boasts upwards of 150,000 professionally installed cameras that operate in British cities to "prevent crime."<sup>156</sup> These cameras are incredibly powerful, and most have the capacity to pan 360 degrees as well as zoom in from one-half mile away.<sup>157</sup> The surveillance revolution is rapidly flourishing, and at the present rate, England will have 10,000 more "spy cameras" over the next three years.<sup>158</sup> Moreover, most people in Britain are simply unaware of the presence and magnitude of video surveillance in their society.<sup>159</sup> About ninety-five percent of local governments in Britain are considering establishing closed circuit television (CCTV)<sup>160</sup> systems, and over seventy-five English cities have already installed the systems.<sup>161</sup> The British began relying on video surveillance in response to rising street crime; however, without a written constitution or a common law right to privacy, nothing protects average citizens from being observed twenty-four hours a day, seven days a week.<sup>162</sup>

155. GEORGE ORWELL, 1984, at 6-7 (Signet Classic ed., Penguin Books 1992) (1949). The Orwellian nightmare of the "Thought Police" and "Big Brother," written 48 years ago, has several disturbing similarities to the current widespread use of video surveillance in London.

156. Simon Davies, *True Stories: Last Post Sounds for Americans, An Infringement of Civil Liberties or a Necessary Weapon to Fight Crime?*, THE INDEPENDENT, Nov. 2, 1994, at 2. The number of cameras in British cities is increasing by 500 per week. *Id.*

157. 20/20, *supra* note 41, at 8. If it rains, each camera even has a windshield wiper that allows for uninterrupted filming. *Id.*

158. John Deane, *CCTV Boost Follows Crime-Fighting Success*, Press Association Newsfile, Oct. 13, 1995, available in LEXIS, World Library, ARCNWS File.

159. John Naughton, *Video Eyes Are Everywhere: "Big Brother" in Britain*, THE OBSERVER, Nov. 13, 1994, at 13.

160. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 71 (1970). CCTV is the most useful device in visual surveillance because it provides a continuous picture and allows for an instant response to any activity. *Id.* The cameras send a picture of a room or a street to a remote receiver located several blocks away. *Id.* The cameras can even take photographs of completely dark areas by utilizing infrared technology. *Id.* at 72.

161. Davies, *supra* note 156, at 2. For example, the city of Bournemouth has 103 cameras, some of which overlook a local beach and have infrared nighttime surveillance capabilities. *Id.* These cameras have incredible clarity, and they have the resolution to read a pack of cigarettes from 100 meters (328 feet) away. *Id.*

162. Steve Coll, *Crime Busters: In England Video Cop on Patrol*, INT'L HERALD TRIB., Aug. 10, 1994, available in LEXIS, World Library, ARCNWS File. The accountability of the camera operators, who are mostly private security guards, is a concern for citizens of England. *Id.* Although a majority of the society supports the use of the cameras to stop crime, four out of ten people believe that the cameras will be used to spy on people. *Id.*

The European crime problem resulted in a warm reception for innovative methods to combat crime.<sup>163</sup> Thus, by using video surveillance technology, residents in Europe have simply traded privacy for protection.<sup>164</sup> The harshest realization of the lack of privacy protection occurred recently in England when Barrie Goulding released a film entitled "Caught in the Act," which compiled the "juicy bits" from street video surveillance cameras.<sup>165</sup> The spy camera footage shows sexual acts taking place in doorways, as well as harassments, muggings, car crimes, burglaries, and street fights.<sup>166</sup> The video portrays innocent victims, as well as the lawbreakers, whose images are captured and then exploited for profit. Even more disturbing is the supposition that every surveillance video operator has their personal top twenty clips which are then sold as bootleg films on the pornography market.<sup>167</sup> Barrie Goulding's "Caught in the Act" video exists because England does not require any regulation of camera use or the collection of images.<sup>168</sup> Europeans simply go about daily routines being watched and recorded by an unknown audience in distant control rooms.<sup>169</sup>

163. Davies, *supra* note 156, at 2; John Arlidge, *Welcome, Big Brother*, THE INDEPENDENT, Nov. 2, 1994, at 2.

164. Oliver Bennett, *Here's Looking at You; Closed-Circuit TV Is Now a Part of the Street Furniture. The Police (and the Pornographers) Are Watching Your Every Move. In Our Surveillance Culture, Is Nothing Private?*, THE INDEPENDENT, Dec. 3, 1995, at 3; Nuala Haughey, *Should Electronic Eyes Be Watching Over Us?*, THE IRISH TIMES, Apr. 18, 1995, at 7. As more autonomy slips away, city inhabitants in Europe must constantly update address changes with the police. TONY LESCE, THE PRIVACY POACHERS 19 (1992).

165. *Blackmail Concern as CCTV Video Sex Footage Goes on Sale*, THE HERALD (Glasgow), Nov. 27, 1995, at 5 [hereinafter *Blackmail Concern*]. Mr. Goulding claims that he wanted to fuel public debate and was quoted as saying: "It's voyeuristic, I wouldn't deny that. It is a commercial film and I will make money from it. But there is a message—who watches the watcher?" *Id.*

166. Nicholas Hellen, *Councils Sell Camera Monitor Footage for Sex and Crime Video*, SUNDAY TIMES (London), Oct. 8, 1995, at 1. The clips were sold by local councils and security firms and include footage from hidden street cameras, shopping mall cameras and cameras in public toilets. *Id.* Barrie Goulding is a millionaire video maker who in 1995 also released a film entitled "Executions" which portrayed twenty-one execution style deaths. *Id.*

167. Bennett, *supra* note 164, at 3. This bootleg footage includes a prostitute providing oral sex to a businessman and a man in a Santa hat stripping and then masturbating. *Id.*

168. Patrick Matthews, *Somebody's Watching You*, THE INDEPENDENT, Aug. 29, 1994, at 21. No law currently forbids the selling of videotapes from CCTV in England, and Barrie Goulding plans on releasing thousands more hours of street camera footage. *Blackmail Concern*, *supra* note 165, at 5.

169. Bennett, *supra* note 164, at 3. The effect on British society has been to consider public spaces as unacceptable places to be. *Id.* The English government is trying to introduce a barn closing code of practices to cover the use of material from closed circuit television cameras; unfortunately the proverbial horses are long gone. Rowan Dore, *Minister Promises Curbs on Sale of CCTV Videotapes*, Press Association Newsfile, Nov. 30, 1995, available in LEXIS, World Library, ARCNEWS File.

European video surveillance received world-wide attention through the infamous Jamie Bulger case. In this case, a video surveillance camera captured two boys leading a two-year-old child from a Liverpool, England shopping mall.<sup>170</sup> However, this case demonstrates that one of the largest problems in confronting video surveillance evidence is the conflicting views on its success.<sup>171</sup>

Although England may well be considered the surveillance capital of the world,<sup>172</sup> many other countries have incorporated surveillance into their societies. For instance, France gives police broad power to install cameras for street video surveillance, including installations in building entrances.<sup>173</sup> In Australia, video surveillance system use is on the rise, and one particular downtown business district contains at least 200 cameras.<sup>174</sup> In Ireland, video

170. CNN: *Loss of Innocence* (CNN television broadcast, Nov. 27, 1993). Jamie's body was found beaten to death with bricks, rocks and an iron rod. *Id.* The child was discovered on a railroad track cut in half by a train. *Id.* See also Arlidge, *supra* note 163, at 2 (indicating that people assume that because cameras helped to convict the guilty in the Bulger case, they must be a good thing).

171. Research in Newcastle showed that video surveillance improved police response times and resulted in more than 700 arrests. Deane, *supra* note 158. Another benefit is that most people caught on camera plead guilty, which results in fewer expensive trials. Davies, *supra* note 156, at 2. Although the public tends to support video surveillance, civil liberty groups urge that blind faith in video surveillance will lead to an Orwellian society. *Id.* Moreover, the converse side to most people pleading guilty is that a person who merely looks like the perpetrator is quickly arrested and assumed to be guilty because of the video tape evidence. See Tim Moynihan, *Police Apology 'Would Not Be Enough'*, Press Association Newsfile, Sept. 19, 1994, available in LEXIS, World Library, ARCNWS File (indicating that because of the surveillance footage, Colin Stagg was wrongly held in prison for thirteen months as a murderer). The British civil rights group, Liberty, disputes the deterrent value of video surveillance because most of the CCTV schemes are accompanied by a package of security initiatives. Haughey, *supra* note 164, at 7.

172. Matthews, *supra* note 168, at 21. Ray Hilton, a marketing manager for Philips Security Systems, acknowledges that "in other countries, you just don't see the number of installations, the number of cameras" as in England. *Id.*

173. *French Deputies Agree Tough New Police Powers*, Reuters World Service, Oct. 11, 1994, available in LEXIS, World Library, ARCNWS File. Similar systems are planned throughout France as part of the Interior Minister's plan to curb the growing crime rate. Adam Sage, *French Unease Grows Over Spread of Secret Surveillance*, THE TIMES (London), Aug. 11, 1994, available in WESTLAW, 1994 WL 9156259.

174. Robert Wainwright, *Australia: Candid Cameras Already Watching Us*, SYDNEY MORNING HERALD, Apr. 15, 1995, at 2. As in England, privacy laws do not cover the use of the camera footage in Australia, and reporters have discovered surveillance video tape footage that included segments where the camera zooms in on underwear and cleavage. Julie Delvecchio, *Australia: Big Brother's Eyes See All*, SYDNEY MORNING HERALD, July 8, 1994, at 9. Australia has its share of privacy concerns and problems because virtually no controls exist with respect to the filmed material. Jake Niall, *Australia: Smile, Someone Is Always Watching*, REUTER TEXTLINE SUNDAY AGE (Melbourne), June 18, 1995, at 6. The Victorian Council for Civil Liberties stepped in to halt a local council's plans to install surveillance cameras in public toilets. *Id.* Australian television recently broadcast secretly filmed footage of police officers engaged in sex with prostitutes, cocaine

surveillance has occurred since the mid-1980s without public consent, and several new government plans include expanded street surveillance.<sup>175</sup> Scotland also faces many video surveillance privacy problems.<sup>176</sup> In contrast to these European Countries, Canada has taken the lead in protecting privacy rights for its citizens under Section Eight of its Charter.<sup>177</sup> The Canadian Supreme Court used a reasonable expectation of privacy test in determining that police who installed audio-visual recording equipment in an apartment violated the Canadian Charter.<sup>178</sup> Examining other countries' problems and solutions to video surveillance provides valuable insight into America's growing surveillance propensity. The United States should learn a precious lesson from the voyeurism and exploitation that necessarily occurs when privacy is not properly protected.<sup>179</sup>

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consumption, and the delivery of child pornography. Peter Lynch, *Revelations of Police Graft Shock Nation*, BUSINESS TIMES, Dec. 19, 1995, at 12.

175. Haughey, *supra* note 164, at 7.

176. Severin Carrell, *Split Over 'Spy' Camera Controls*, THE SCOTSMAN, Dec. 14, 1995, at 4. Protests recently erupted in Scotland over the sale of footage from private surveillance cameras that captured couples making love, people making faces in shop windows, and people undressing in changing rooms. *Id.* However, this public outcry has not deterred the Scottish government, which plans on installing 1000 new CCTV cameras in the next three years. *Id.* In fact, the Minister of Home Affairs was quoted as saying: "At the moment we've no immediate proposals for statutory controls." *Id.*

177. Monique Rabideau, *Duarte v. R.: In Fear of Big Brother*, 49 U. TORONTO FAC. L. REV. 171 (1991). On January 25, 1990, the Supreme Court of Canada rendered an important surveillance decision in *Mario Duarte v. The Queen* [1990] D.L.R. 4th 240 [hereinafter *Duarte*]. *Id.* at 171. Justice LaForest, who wrote the opinion of the Court, described the right to privacy as: "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself." *Id.* at 177. The interpretations by the Court of Canada's Charter is analogous to when the United States Supreme Court interprets the Constitution.

178. *Id.* at 175-82. The *Duarte* case was an investigation into drug trafficking where the police rented an apartment for an informer who was working with an undercover police officer. *Id.* at 175. The apartment was equipped with audio-visual recording equipment, and the accused was charged with conspiracy to import a narcotic. *Id.* The Court found the evidence to be admissible because the police acted in good faith, but the police in Canada are now put on notice that subsequent violations will not be tolerated. *Id.* at 182. The Canadian Supreme Court's decision represents a significant shift in the balance between individual privacy and the state's need to pursue the administration of justice. *Id.* at 185. Canada is now "less susceptible to the watchful eye of Big Brother." *Id.*

179. "It was terribly dangerous to let your thoughts wander when you were in any public place or within range of a telescreen." ORWELL, *supra* note 155, at 54. This note advocates a privacy shift similar to that of the Canadian government before public street surveillance cameras and private video surveillance cameras become as prevalent and as intrusive in the United States as they are in Britain.

### B. *The American Experience*

Police first used video surveillance to monitor the public streets in Hoboken, New Jersey,<sup>180</sup> and Olean, New York. Both systems, however, were dismantled because they were ineffective.<sup>181</sup> In 1971, New York installed a video surveillance system in the City of Mt. Vernon, which was also dismantled after it produced no convictions.<sup>182</sup> In 1973, the New York Times and several local businesses installed a \$15,000 video surveillance system in Times Square.<sup>183</sup> After the system resulted in fewer than ten arrests in twenty-two months, it was dismantled and dubbed one of the biggest flops the city had ever seen.<sup>184</sup> In 1982, Miami Beach, Florida, set up its surveillance program based upon the fears of the elderly citizens that low income blacks and hispanics were invading the city.<sup>185</sup> As previously indicated in the Introduction, the Miami Beach video surveillance project was discontinued in May of 1984 after police were unable to apprehend a single criminal using the system.<sup>186</sup> However, as technology improved and memories began to lapse, the United States moved into the 1990s and a video revolution.

In Anchorage, Alaska, video images from street surveillance cameras are not transferred to a police department; instead, they are sent to private residents' home computers.<sup>187</sup> The Alaska program has been in operation since 1990, and the funding for the program comes from private and public grants.<sup>188</sup> The impetus for the Alaska program came when the Alaskan pipeline project brought after-hours gambling, drug dealers, drinking establishments and prostitutes to the city of Anchorage.<sup>189</sup> The video patrol operates every night with the cameras being controlled by residents who can videotape close-ups of suspects. The residents then produce hard copies of the photos which are circulated in paper form to business owners and police in the neighborhood.<sup>190</sup> The video

180. Granholm, *supra* note 3, at 687. In Hoboken, the camera system was dismantled because it only produced one arrest during the five years it was in place. *Id.* at 688.

181. Robb, *supra* note 3, at 572 n.5. Police began surveillance in 1968, but Olean dismantled its system after only one year because of the high costs of maintenance. *Id.* at 574 n.11.

182. *Id.* at 573 n.7; Granholm, *supra* note 3, at 688.

183. Robb, *supra* note 3, at 574. Newspapers at the time stated that most people did not mind the cameras, and the cameras even made them feel a little safer. *Id.* at 575 n.15.

184. O'Donnell, *supra* note 15, at 16.

185. Surette, *supra* note 16, at 81.

186. *Id.* at 84.

187. 1996 Report, *supra* note 41, at 15.

188. *Id.* at 14. The community patrol is based upon grants from both the Anchorage business community and the state of Alaska. *Id.* at 15.

189. *Id.* at 14.

190. *Id.* at 15. By digitizing images on home computers and editing the video frame by frame, residents are able to produce high quality close-ups of suspects. John F. Kirch, *Northern Exposure*, SECURITY MGMT., Mar. 1995, at 15.

watchers even put together a newsletter with photos of lawbreakers "to be on the look-out for."<sup>191</sup>

In January 1996, a Baltimore, Maryland, community group petitioned a non-profit organization to run a surveillance experiment.<sup>192</sup> The city installed sixteen cameras in the downtown area that watch and record sixteen downtown blocks.<sup>193</sup> The video screens are monitored by a cooperative effort of police and private civilians.<sup>194</sup> The program carried a bill of \$58,000 that was funded by private grants and the department of transportation.<sup>195</sup> This is just the first stage of the Baltimore program which will eventually have over 200 cameras that cover 200 blocks from fifteen separate monitoring sites.<sup>196</sup> The city of Baltimore also hopes to enlist private security guards and private civilians to monitor the cameras.<sup>197</sup>

The state of New Jersey has five separate cities that have instituted video monitoring programs. In Camden, New Jersey, the police use street surveillance cameras to monitor the Westfield Acres Housing Projects.<sup>198</sup> The cameras are housed in bullet proof domes because individuals have tried taking shots at the cameras to bring them down.<sup>199</sup> The city plans to reduce the burden on police monitoring by allowing residents to operate the cameras.<sup>200</sup> In Dover, four cameras were installed in 1993 to watch the downtown area on a twenty-four hour basis.<sup>201</sup> The Dover cameras have a 360 degree rotation

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191. 1996 Report, *supra* note 41, at 15. In addition, license plates of suspected criminals were also recorded and stored in computer databases. Kirch, *supra* note 190, at 15.

192. 1996 Report, *supra* note 41, at 17.

193. *Id.* at 18. The downtown area has signs indicating that the city is under surveillance. *Id.* See Bill Glauber, *T.V. Keeps Eye on British Streets*, BALTIMORE SUN, Jan. 29, 1996, at 1A.

194. 1996 Report, *supra* note 41, at 18. One police officer claimed that he can get as much done from his cozy outpost as eight police officers out walking the beat. Bill Straub, *TV Cameras Taking Place of Policemen in Baltimore*, ROCKY MOUNTAIN NEWS, March 10, 1996, available in LEXIS, News Library, CURNWS File. The mini-police station contains four video monitors stacked on top of each other, displaying a panoramic view of eight busy downtown streets in Baltimore. *Id.*

195. 1996 Report, *supra* note 41, at 19. Peter Hermann, *Safety vs. Big Brother*, MILWAUKEE J. SENTINEL, Jan. 28, 1996, at 11. The rhetoric is already flying that: "If you are not doing anything wrong, what do you have to worry about?" *Id.*

196. 1996 Report, *supra* note 41, at 19.

197. Michael Schneider, *Cameras Being Set up in Baltimore to Keep Eye out for Crime*, ATLANTA J.-CONST., Jan. 20, 1996, at E1.

198. 1996 Report, *supra* note 41, at 23. Officials claim that the cameras are designed not to see inside homes or private areas. *Id.*

199. *Id.* at 23-24. The criminals actually fought back and disabled the cameras by shooting at them, which forced the city to move to ballistic (bulletproof) domes that are impervious to most gunfire. *Id.* at 71.

200. *Id.* at 24.

201. *Id.* at 25.

and 180 degree vertical motion along with zoom capabilities.<sup>202</sup> In Garfield, thirty-three cameras are videotaping housing complexes around the clock.<sup>203</sup> The program was instituted by the Garfield Housing Authority. The Garfield project is unique in that the cameras are not monitored, they are only taped and then reviewed for suspicious behavior.<sup>204</sup> The video tapes are then forwarded to the police and the FBI.<sup>205</sup> However, the city plans to allow resident volunteers to monitor the cameras in the near future.<sup>206</sup> In South Orange, the municipality installed seven video surveillance cameras.<sup>207</sup> The cameras are located in bubble-like housings twenty-five to thirty feet off the ground and they allow police station personnel to "monitor a bank of screens and to zoom in and videotape almost anybody and anything in the camera's view."<sup>208</sup> Finally, in Heightstown, New Jersey, ten cameras monitor trouble spots within housing projects.<sup>209</sup>

In Los Angeles, California, an entirely privately funded video surveillance program is in operation.<sup>210</sup> Landlords have mounted video cameras on their apartment buildings to conduct surveillance of the streets, after which certain footage is turned over to police.<sup>211</sup> The Los Angeles Police support the community program which uses volunteers to monitor the cameras.<sup>212</sup> One

202. *Id.* at 72. The Dover system is viable because of the compactness of the downtown business area coupled with the close proximity of the police station. *Id.*

203. *Id.* at 27.

204. *Id.* at 28.

205. *Id.* The police in Bridgewater Township recently installed a \$4000 video camera in one of its patrol cars to aid officers in prosecuting drunk drivers. Angela Stewart, *Video Cameras Stir Privacy Concern*, STAR-LEDGER, Aug. 19, 1996, available in 1996 WL 7961910. However, the police conceded that the camera will also be used to film routine motor vehicle stops. *Id.*

206. 1996 Report, *supra* note 41, at 28.

207. *Id.* at 42.

208. *Id.* at 43.

209. *Id.* at 62. The town of Boonton is also trying to calm safety concerns by installing three cameras which will operate on a twenty-four hour basis at the cost of \$38,000. Stewart, *supra* note 205.

210. 1996 Report, *supra* note 41, at 31. The police in Redwood City, California have also begun using sophisticated hidden listening devices to patrol high-crime areas. Claude Lewis, *Police Will Eye Crime with Hidden Surveillance*, CALGARY HERALD, Feb. 18, 1996, at A7, available in 1996 WL 5068489. The devices are so sensitive that gunfire can be traced to within ten yards of its origin. *Id.* In addition, authorities are also installing cameras that can monitor a sixteen block area on a twenty-four hour basis. *Id.*

211. 1996 Report, *supra* note 41, at 31.

212. *Id.* at 32. Deputies in California have also begun to wear "CopCam." Kelly Thornton, *Deputies Will Wear Tiny Video Cameras*, SAN DIEGO UNION-TRIB., Dec. 13, 1996, available in 1996 WL 12581755. This tiny video camera attaches inconspicuously to the shirt so that officers may record interactions with the public. *Id.* The device sends pictures and sound through a wireless belt transmitter to an antenna mounted on a police cruiser. *Id.* The signal is broadcast on a small television screen inside the police car and recorded by a VCR in the trunk. *Id.* Once the tape is inserted, it can be removed only by a supervisor's key. *Id.*

property owner who was a catalyst in implementing the system proclaimed: "[y]ou can't commit crimes if you know Big Brother is watching you."<sup>213</sup>

In Virginia Beach, Virginia, the city has installed ten video cameras on the busiest beach front area.<sup>214</sup> The cameras are mounted on existing signal devices and street light poles, and they are enclosed in weather-proof spheres with tinted domes.<sup>215</sup> The cameras can be rotated 360 degrees, and they are equipped with motorized pan and tilt devices and zoom lenses.<sup>216</sup> The color cameras are low light sensitive so they can produce high quality video images in darkness.<sup>217</sup> The \$240,000 project was funded through local business contributions, a drug asset forfeiture fund and the city's reserve fund.<sup>218</sup> The city plans to add seven more cameras with the backing provided by local businesses.<sup>219</sup>

Similar surveillance camera systems are also in use in Orange County, California; Tacoma, Washington; and Boston, Massachusetts.<sup>220</sup> Kinston, North Carolina has installed twenty video cameras on utility poles that will be monitored on a twenty-four hour basis.<sup>221</sup> The City of Memphis, Tennessee currently has ten cameras operating, but the surveillance plan includes an expansion to seventy-two cameras.<sup>222</sup> In San Diego, California, five cameras operate in Balboa Park.<sup>223</sup> Across the country in Tampa, Florida, the city installed eight cameras in the Ybor City District which allows the police to monitor the tens of thousands of people who come to the city every weekend.<sup>224</sup> Despite camera abuses and surveillance failures, many towns are

213. 1996 Report, *supra* note 41, at 33.

214. *Id.* at 50. In 1993, Virginia Beach set up surveillance cameras along the boardwalk to help reduce crime. 20/20, *supra* note 41, at 10.

215. 1996 Report, *supra* note 41, at 50.

216. *Id.* at 50. A fiber optic cable sends a picture to a police station, where a single officer can watch the 10 television monitors that survey 27 blocks. Tom Curley, *Police Video Cams Hook up*, USA TODAY, Dec. 27, 1995.

217. 1996 Report, *supra* note 41, at 90.

218. *Id.* at 50.

219. *Id.* at 51.

220. *Id.* at 21, 44; Sterghos, *supra* note 39, at 1A.

221. 1996 Report, *supra* note 41, at 29. The New Bern Police Department also plans to use a \$40,000 federal grant to place four cameras in the downtown area. Jerry Allegood, *New Bern Debates Use of Street Cameras*, NEWS & OBSERVER, Aug. 28, 1996, at A3, available in 1996 WL 2894263. The cameras would be attached to utility poles and they will transmit video images to dispatchers. *Id.*

222. 1996 Report, *supra* note 41, at 35-36.

223. *Id.* at 37-38.

224. *Id.* at 46-47. The city plans to install eight additional cameras in 1997. *Id.* at 48. The Tampa City Council was originally unsure about approving the \$62,000 budget for the surveillance cameras on east seventh avenue. Ivan J. Hathaway, *Decision Delayed on Video Surveillance in Ybor*, YBOR TRIB., May 24, 1996, at 1.

still using video surveillance or considering video surveillance technology.<sup>225</sup> For instance, Portland, Oregon police are currently in the process of appraising the use of cameras to rid the downtown area of street crime.<sup>226</sup> Seemingly destined to repeat the British Government's errors, Portland plans to hire private security firms and security guards to watch the cameras.<sup>227</sup>

Although limited information exists about the use of video surveillance tapes from American street surveillance systems, a helpful analogy may be to examine similar operations where private actors use and abuse video cameras. America is fascinated with the potential of video cameras to invade privacy, as evidenced by the abundance of "reality" television shows that appeared in the 1990s such as *COPS*, *I-Witness Video*, *Firefighters*, *Real Stories of the Highway Patrol*, *Emergency Response*, and *Rescue 911*.<sup>228</sup> However, in the United States, camera crews follow police and emergency personnel as well as use video surveillance cameras mounted on poles and buildings.<sup>229</sup> The effect is

225. The City of Chicago has also tried smaller versions of video surveillance systems in the past. Robb, *supra* note 3, at 571 n.2. See also, Robert Davis, *City Graffiti Vandals Snared By Cops with Hidden Cameras*, CHI. TRIB., Aug. 19, 1994, at 4. Under the direction of Mayor Richard Daley, the Chicago Police set up a graffiti sting operation where a building was chosen and cleaned of all graffiti, and then police used cameras to catch spray paint vandals in the act. *Id.* Daley indicated that the sting operation was so successful, it was likely to be repeated throughout the city. *Id.* Moreover, officials from Illinois recently visited King's Lynn, England to inspect the British video surveillance operations. Coll, *supra* note 162.

226. Anderson, *supra* note 40, at B1; *1996 Report*, *supra* note 41, at 60-61.

227. Anderson, *supra* note 40, at B1. See *supra* notes 165-69 and accompanying text discussing Barrie Goulding's "Caught in the Act" video. To Portland's credit, the city claims to be sensitive to the issue of privacy, and it advocates "a comprehensive system of procedures and guidelines to ensure that privacy rights of citizens are respected and inappropriate use of the video system will not occur." *1996 Report*, *supra* note 41, at 95.

228. McClurg, *supra* note 3, at 1013. McClurg believes that the aspiration of these programs is to compact as much human suffering and embarrassment as possible into a 30 or 60 minute telecast. *Id.*

229. Another growing trend is the mounting of cameras on police cars and in police cars. C. Ron Allen, *Boca Police Put Motorists on Candid Camera*, SUN-SENTINEL (Ft. Lauderdale), May 15, 1995, at 3B. In Florida, these mounted cameras are used in conjunction with microphones worn by the police officers when they pull over a car. *Id.* The cameras are typically used to help document drunk driving arrests. *Id.* Although the police do not need to let the people know that they are being filmed, the officers inform the motorists that they are being filmed and audiotaped. *Id.* This seems slightly different than street surveillance cameras because the person already knows the officer is observing them, and they are also informed that a video and audio tape is being made. The police in California have also installed cameras in 36 patrol cars as a result of the Rodney King beating in 1991. Patrick McGreevy, *Chief Wants Squad-Car Cameras Kept on During Specific Operations*, L.A. DAILY NEWS, July 15, 1995, at N3. The video cameras are to be turned on during pursuits, traffic stops, and traffic-related investigations for evidence purposes and to help reduce conflicts between officers and citizens. *Id.* See also *Haymond v. Dep't of Licensing*, 872 P.2d 61, 63 (Wash. Ct. App. 1994) (upholding the use of a video camera during a traffic stop without the driver's consent).

frequently the same when individuals are filmed suffering a heart attack, being subjected to a search warrant in the middle of the night, or humiliating themselves during sobriety tests.<sup>230</sup> Reminiscent of "*Caught in the Act*," produced by Barrie Goulding, the executive producer of *COPS*, John Langley, recently began selling a "too hot" for television version of *COPS* that the "censors would not let you see."<sup>231</sup> The most graphic portions of the video show a man who hung himself in his garage, a drive-by shooting victim dying in a car, a man running from his house on fire and the slaughtered bodies of an entire family including a baby in a crib.<sup>232</sup>

Another "reality" show placed a hidden microphone on a paramedic who aided a critically injured woman.<sup>233</sup> The woman can clearly be heard moaning and begging to be allowed to die.<sup>234</sup> Currently, the woman, who is permanently paralyzed, is suing because she does not believe her family's tragedy is suitable viewing for public entertainment.<sup>235</sup> These "reality" videos are frighteningly similar to the CCTV films from England which display the most gruesome and titillating aspects of a person's life for the pleasure of the viewing audience. Moreover, news tabloid shows and other news programs constantly use hidden cameras and microphones to expose individuals and businesses.<sup>236</sup> The use of hidden cameras has dramatically increased from the already staggering statistics taken ten years ago indicating that sixty-four percent of television stations were using hidden investigation techniques.<sup>237</sup> However, a simple supply and demand concept dictates that if these shocking and

230. McClurg, *supra* note 3, at 1014.

231. *COPS: Too Hot For TV*, Volume I, (Barbour/Langley Productions 1995). This video includes footage of drunk drivers humiliating themselves, women and men engaged in prostitution, women offering police sexual favors, and full frontal nudity of men and women. The video also includes at least five requests by different individuals to "get the camera out of here," which the camera-operators totally ignore. Moreover, many people are shown without the face distortion technique often used on the television show.

232. *Id.*

233. Gail Diane Cox, *Privacy Frontiers At Issue: Unwilling Subjects of Tabloid TV Are Suing*, 16 NAT'L L.J. 1 (1993).

234. *Id.*

235. *Id.*

236. McClurg, *supra* note 3, at 1014. Don Hewitt, the executive producer of *60 Minutes*, recently stated that: "It's a small crime versus the greater good. . . . If you can catch someone violating 'thou shall not steal' by violating 'thou shall not lie,' that's a pretty good trade-off." *Id.* at 1015 n.129 (citing Howard Kurtz, *Hidden Network Cameras: A Troubling Trend? Critics Complain of Deception as Dramatic Footage Yields High Ratings*, WASH. POST, Nov. 30, 1992, at A1).

237. McClurg, *supra* note 3, at 1015. Several recent law suits may curtail some future hidden camera news segments. Barry Meier & Bill Carter, *Juries Slap Down TV Journalists' Methods*, PITTSBURGH POST-GAZETTE, Dec. 24, 1996, at D1, available in 1996 WL 12105658.

voyeuristic shows did not sell, they would cease to exist.<sup>238</sup> The voyeurism revolution endures because we have the means and the market for taping ordinary people living their lives.<sup>239</sup>

If more American cities do turn to video surveillance, it probably will not take long before some entrepreneur, like John Langley or Barrie Goulding, tries to use the footage from the cameras for a new television show. As indicated earlier, Alaska permits its private citizens to view the street surveillance footage in the comfort of their own homes on their personal computers.<sup>240</sup> The developers of the failed Dade County, Florida, video surveillance project openly admitted their intent to sell video "action footage" for newscasts.<sup>241</sup> Furthermore, several cities allow private citizens to decide what to watch and who gets filmed. In other circumstances the tapes are reviewed after filming to decide what gets sent to the police.<sup>242</sup> As Orlando, Florida, discovered recently when it shut down its surveillance operation, no guidelines or restrictions exist for the use of the street surveillance cameras.<sup>243</sup> To realize the inherent danger created, Americans only need to turn to newspaper headlines replete with tales of voyeurism and video camera abuses.<sup>244</sup>

238. McClurg, *supra* note 3, at 1017 (placing the responsibility squarely on the willing American consumers).

239. Cox, *supra* note 233, at 1. Lawsuits that are filed by individuals are long shots because the victims usually did not suffer great injuries. McClurg, *supra* note 3, at 1080. *See also* Mark Levy, *Of Laws and Lenses*, VIDEOMAKER (Magazine), Dec. 1995, at 76. A person does not have the absolute right to include even true statements about another in a video without permission. *Id.* at 78. Videotaping a person's private conversations or his family and business activities without permission constitutes an invasion of privacy. *Id.* Public interest should not be the standard by which the courts judge the acceptability of privacy intrusions. McClurg, *supra* note 3, at 1080.

240. 1996 Report, *supra* note 41, at 15.

241. Surette, *supra* note 16, at 83.

242. The program instituted by the Garfield Housing Authority provides that the tapes are forwarded to the police and the FBI after viewing. 1996 Report, *supra* note 41, at 28.

243. *See supra* notes 1-3 and accompanying text.

244. In Missouri, several fashion models were shocked to learn that security guards filmed them while dressing and undressing back stage in a convention center. *Doe v. B.P.S. Guard Serv. Inc.*, 945 F.2d 1422 (8th Cir. 1991). In Washington, male pool staff taped and flaunted footage to friends of female lifeguards and pool patrons changing clothes in a locker room. *Karl Vick, Videotaped Lifeguard Wins Lawsuit*, WASH. POST, Dec. 12, 1995, at E3. In Milwaukee, a public school teacher was arrested after he video taped girls changing clothes for a school play the teacher directed. *Alleged Taping Leads to Teacher's Arrest*, MILWAUKEE J. SENTINEL, May 4, 1995, at 3B. In one particular case, a physician made secret video tapes of his patients as they undressed. *Kimberly D. Kleman, Insurance Fund Sues to Cancel Dubin's Policies*, ST. PETERSBURG TIMES, Nov. 3, 1987, at 2. A recurring scenario is fashion models filmed back stage or in dressing areas by hidden video cameras. *See Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 4 (S.C. Ct. App. 1989); USA TODAY, Nov. 25, 1991, at 8A (discussing a law suit by three models against a photographer who secretly video taped them changing in his studio). In one disturbing case, a sixteen year old model was filmed changing clothes. *South Bay: Arrest Warrant Issued in Nude Photo Case*, S.F. CHRON., Dec. 9, 1992, at A24. In yet another case, the defendant was accused

Even towns that only employ police officers to monitor the cameras still face the dangers of unauthorized use. To facilitate an understanding of the potential for police and security firm abuses, an overview of voyeurism cases involving police officers proves valuable. One particular defendant, who happened to be a police officer, was charged after filming two women during sexual intercourse and then showing the surreptitiously taped sex act to fellow officers.<sup>245</sup> In another suit against police officers, a woman claimed that police investigators installed a camera in her daughter's hospital room and recorded her sleeping and changing clothes.<sup>246</sup>

In Michigan and Oregon, police officers placed cameras above the stalls in public restrooms to catch males engaging in homosexual relations.<sup>247</sup> In several cases men were arrested for masturbating or engaging in consensual sex with other men.<sup>248</sup> The acts were caught on videotape by police who were spying on the innocent and the guilty alike.<sup>249</sup> When police officers freely film these extremely private activities, it becomes clear that many other potentially embarrassing situations could be filmed by street surveillance cameras. In comparison, a recent interview with a security guard video monitor in Glasgow produced the following conversation:

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of taping his fifteen-year-old godson having sex with the nineteen-year-old nanny. Zachary R. Dowdy, *McNeil, Pleading Guilty Receives 7 1/2 to 9 Year Term For Bribery*, BOSTON GLOBE, Mar. 5, 1993, at 80.

245. Patricia Nealon, *Weymouth Officer Charged with Secretly Taping Sex*, BOSTON GLOBE, Sept. 25, 1992, at 21.

246. *Check with Judge Should Have Come First*, OMAHA WORLD-HERALD, Feb. 3, 1996, at 8.

247. Jeanette R. Scharrer, Comment, *Covert Electronic Surveillance of Public Restrooms: Privacy in the Common Area?*, 6 COOLEY L. REV. 495 (1989). See also *Oregon v. Owczarzak*, 766 P.2d 399 (Or. Ct. App. 1988). In reaction to these decisions, some commentators have expressed a belief that a public restroom occupant should be shielded from public eyes the same way that a telephone booth occupant in *Katz* was shielded from public ears. William O'Callaghan, *Cameras in the Restroom: Police Surveillance and the Fourth Amendment*, 22 HASTINGS CONST. L.Q. 867, 881 (1995); Scharrer, *supra*, at 510. *Michigan v. Dezek*, 308 N.W.2d 652 (Mich. Ct. App. 1988), held that a bathroom stall is like a temporary private place. But see *Michigan v. Hunt*, 259 N.W.2d 147 (Mich. Ct. App. 1977), where a man and a woman were charged for having sex in a men's restroom, and the court found that they did not have a reasonable expectation of privacy when the restroom was not locked and the pair occupied the men's room for 30 minutes making audible moans. *Id.* at 148-49.

248. O'Callaghan, *supra* note 247, at 869.

249. *Id.* at 878. In one case the wrong man was charged after his brother-in-law borrowed his car and visited a rest area to engage in homosexual relations. Scharrer, *supra* note 247, at 495. Police officers set up video cameras at a highway rest stop and, under a gross indecency statute, arrested 42 homosexual males for engaging in a variety of sexual acts. *Id.* at 503. Initially, the police placed one camera above the entrance to the bathroom and another camera below the sinks. *Id.* at 502. Tapes from these cameras were then used to show the probable cause necessary to install two additional cameras in the ceiling above the toilet stalls. *Id.* at 502-03.

Lynn Sherr: Do you ever see women that you're interested in and follow them and try to get their number?

Video Monitor: It's hard not to pick up on things. I mean you might see this beautiful woman walking down the street and I will think boy, she's not bad. But I wouldn't abuse the system like that.

Lynn Sherr: You sure?

Video Monitor: Yeah, well, no.<sup>250</sup>

Thus, the United States has not yet learned the lessons of voyeurism inherent in the use of street video surveillance systems. Voyeuristic television shows have succeeded in America and England based on video camera footage from cameras on public streets, and there is no reason to think that "America's Funniest Street Surveillance Videos" would not be a hit.<sup>251</sup> Regardless, several video surveillance systems have been set up, and more will be set up in American cities unless regulation takes place. Therefore, since Congress and the Supreme Court have not addressed the video surveillance problem, the states must.

#### IV. THE STATE LABORATORIES

Justice Brandeis coined the term "state laboratories" by proclaiming that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>252</sup> Justice Brandeis meant that because of the sovereign power that states enjoy from federal law, the states may expand upon rights guaranteed by the Federal Constitution, or a particular state can create new rights for its own citizens. Therefore, a proposal to stop video surveillance may stem from state constitutional privacy rights expressed in a model state statute.<sup>253</sup> This type of solution has been validated by several instances where the Supreme Court has limited a particular constitutional expansion, and the states have reacted by

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250. 20/20, *supra* note 41, at 9-10.

251. McClurg believes that if a television network began broadcasting secretly filmed footage of a couple having sex in their bedroom, the ratings would probably be extraordinary. However, public interest should not be the standard by which the courts judge the acceptability of privacy intrusions. McClurg, *supra* note 3, at 1080. In fact, there currently exists a show called "America's Dumbest Criminals," which displays footage from surveillance cameras with narration and comedy music.

252. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

253. *See infra* section V.

expanding rights guaranteed under the state's own constitution.<sup>254</sup> Since 1970, over 300 published opinions of state supreme courts have restricted government actions more severely than parallel provisions in the United States Constitution, thereby expanding the rights of the citizens of the state.<sup>255</sup> The state constitutional law movement began in response to the perceived conservative decisions of the Burger and Rehnquist Courts, as compared with the perceived liberal approach of the Warren Court.<sup>256</sup> Indeed, some Supreme Court Justices have encouraged state courts to take a broader approach to privacy rights under their own constitutions.<sup>257</sup> The state constitutional law movement has been dubbed "new federalism,"<sup>258</sup> and the states may eventually become the "privacy laboratories" that Justice Brandeis envisioned.<sup>259</sup>

Although state constitutions may provide greater protection than the United States Constitution, a state must have adequate and independent state grounds for its decision based upon state constitutional law.<sup>260</sup> A state may examine federal cases for guidance, but the state must make a plain statement in its

254. For example, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the Court held that the closure of an adult book store did not require First Amendment analysis because the enforcement of the public health regulation was one of general application. *Id.* at 705. On remand, the New York Court of Appeals held that in the absence of showing a no broader than necessary application of the health regulation, the forced closure would unduly impair the bookseller's right of free expression under the New York State Constitution. *People ex rel Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 494-95 (N.Y. 1986). See also *Burrows v. Superior Court of San Bernardino County*, 529 P.2d 590 (Cal. 1974). The California Supreme Court found that the state constitution provided greater coverage of the right of privacy than the Fourth Amendment. *Id.* at 594-95.

255. Silverstein, *supra* note 116, at 215 n.3. For an expansive discussion of the development of privacy doctrines in Alaska, Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, and Washington, see *id.* at 228-58.

256. Gormley, *supra* note 3, at 1420. Many articles address the replacement of federal rights with expanding state constitutional law. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Developments in the Law-The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Symposium, *The New Judicial Federalism: A New Generation*, 30 VAL. U. L. REV. 421 (1996).

257. *Christ v. Bretz*, 437 U.S. 28, 39-40 (1978) (Burger, C.J., dissenting); *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting); Brennan, *supra* note 256, at 491.

258. Silverstein, *supra* note 116, at 217. The term "federalism" was originally used to describe the ratification philosophy of the Constitution's proponents. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 133 (3d ed. 1995) The Federalists wanted a strong central government that preserved individual liberty and confirmed state sovereignty. *Id.*

259. Gormley, *supra* note 3, at 1422.

260. *Michigan v. Long*, 463 U.S. 1032 (1983). If jurisdiction rests upon two grounds, one which is federal and one which is non-federal in character, the Supreme Court's jurisdiction fails if the non-federal grounds are independent of the federal grounds and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

judgment that state law was used to decide the case.<sup>261</sup> Thus, if a state follows a supplemental approach to its constitution, it can effectively build an unreviewable body of state constitutional jurisprudence.<sup>262</sup> Although a state may grant broader powers to its citizens than the United States Constitution grants, the state interpretation may not limit federal laws, because such an expansion would violate the Supremacy Clause of the Constitution.<sup>263</sup>

In the age of new federalism, the states have become the defenders of the right to privacy, and several state constitutions explicitly articulate a right to privacy.<sup>264</sup> For instance, Oregon rejected the *Katz* reasonable expectation of privacy formula under its own constitution and asserted that the Oregon Constitution protects "privacy to which one has a right."<sup>265</sup> Furthermore, Pennsylvania found that its constitution mandated a greater need for protection from illegal government conduct that was offensive to the right of privacy.<sup>266</sup>

261. *Long*, 463 U.S. at 1040-41. The Supreme Court will refuse to decide cases if there exists an adequate and independent state ground, out of respect for the state courts and to avoid issuing advisory opinions. *Id.* In *Long*, the officers performed a "Terry search" and discovered marijuana protruding from under the armrest of the front seat, and the police found 75 pounds of marijuana in the trunk. *Id.* at 1036. The Court remanded the case back to the Michigan Supreme Court to determine whether the trunk search was permissible. *Id.* at 1053. A "Terry search" comes from the landmark case of *Terry v. Ohio*, 392 U.S. 1 (1968), which provides the parameters of stop and frisk requirements based upon reasonable suspicion.

262. Silverstein, *supra* note 116, at 217. In contrast to the supplemental approach, states that follow a dual approach analyze state and federal constitutional claims together, but these states may be eventually reversed by the Supreme Court. *Id.*

263. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. State court rulings may only effectively serve to expand individual rights, because if a ruling under the state constitution affords less protection than the United States Supreme Court precedents, the rulings are subject to being voided and should be essentially considered meaningless. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 2.10(b), at 96 (2d ed. 1992).

264. See *infra* notes 265-73.

265. *Oregon v. Campbell*, 759 P.2d 1040, 1044 (Or. 1988).

No Law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

OR. CONST. art. I, § 9. *But see* *Pennsylvania v. Hernley*, 263 A.2d 904, 907 (Pa. Super. Ct. 1970) (refusing to apply the Fourth Amendment when a shop owner failed to place curtains on the windows).

266. *Pennsylvania v. Sell*, 470 A.2d 457 (Pa. 1983). A Pennsylvania court plurality also found that a defendant who spent a certain portion of time at his fiancée's home had a reasonable expectation of privacy at that dwelling. *Pennsylvania v. Wagner*, 406 A.2d 1026 (Pa. 1979). Moreover, in *Pennsylvania v. Schaeffer*, 536 A.2d 354 (Pa. Super Ct. 1987), the court held that a reasonable expectation of privacy exists in what one speaks in the confines of his home, and such conversation should be protected by the Pennsylvania constitution regardless of what the United States Supreme Court protected under the Fourth Amendment. *Id.* at 371.

Alaska<sup>267</sup> and Hawaii<sup>268</sup> also decided to include a right to privacy in their respective constitutions. Moreover, Montana adopted a separate clause that guarantees its citizens the right to individual privacy by subscribing to a strict scrutiny approach to privacy.<sup>269</sup> Illinois secures the rights of citizens to be free from warrantless searches and seizures and invasions of privacy,<sup>270</sup> while the California Constitution provides that privacy ranks among the inalienable rights.<sup>271</sup> Moreover, the highest courts of Alaska, Florida, New Hampshire, Michigan, and Montana have all rejected the Supreme Court's analysis in *United States v. White*,<sup>272</sup> which upheld police use of wired informants without the knowledge of the police targets.<sup>273</sup>

Unfortunately, not every state has a clear constitutional right to privacy. Indeed, states without constitutional privacy jurisprudence typically permit more intrusions into the zone of privacy.<sup>274</sup> However, other states endeavor to protect privacy when police desire to use video cameras.<sup>275</sup> Thus, by examining states that protect privacy and states that do not recognize a right to privacy, a proper model state statute can be crafted to manage street camera surveillance.<sup>276</sup>

#### A. States That Allow Privacy Intrusions

Several important state cases have permitted invasions of privacy through the use of video surveillance technology and cameras. One famous privacy case arose from a photograph taken of a couple sitting together at their ice cream

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267. ALASKA CONST. art. I, § 22. "The right of the people to privacy is recognized and shall not be infringed." *Id.*

268. HAW. CONST. art. I, § 7. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches seizures, and invasions of privacy shall not be violated" *Id.*

269. MONT. CONST. art. II, § 10. "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." *Id.*

270. ILL. CONST. art I, § 6. "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." *Id.*

271. CAL. CONST. art. I, § 1. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.*

272. 401 U.S. 745 (1971).

273. *White* provided that a government agent may wear a concealed wire that transmits and records conversations about illegal activity or proposed drug deals. *Id.* at 754. Gormley, *supra* note 3, at 1426.

274. See *infra* notes 277-316 and accompanying text.

275. See *infra* notes 317-38 and accompanying text.

276. See *infra* notes 426-55 and accompanying text.

stand in Los Angeles.<sup>277</sup> The picture portrayed the couple pressed romantically close together with the man's arm around the woman, but the article related to a discussion of divorce and love at first sight.<sup>278</sup> The Supreme Court of California found that the mere publication of the photograph alone did not invade the couple's privacy because of the public interest in the dissemination of the news.<sup>279</sup> The court found it significant that the photograph was not surreptitiously taken on private grounds, but rather the photograph was taken in public.<sup>280</sup> Some critics have disputed the logic of the California Supreme Court's decision.<sup>281</sup> The Restatement (Second) of Torts essentially provides that a plaintiff who fully understands a risk of harm to himself, and who nevertheless voluntarily remains there, cannot recover for harm within that risk.<sup>282</sup> However, the wisdom of the California Supreme Court breaks down if the romantic couple did not have any knowledge of the risk in a meaningful sense.<sup>283</sup> To assume the risk, the couple must have appreciated the danger itself of the particular photograph being taken, not merely that the event was possible.<sup>284</sup> This same analysis applies to the use of video surveillance footage, because subsistence in society requires that people spend a considerable amount of time in places accessible to the public.<sup>285</sup> Therefore, at least one critic believes that the California Supreme Court applies an all-or-nothing approach to privacy that is simply unworkable.<sup>286</sup>

277. *Gill v. Hearst Publ'g Co.*, 239 P.2d 636 (Cal. 1952), *reh'g after remand*, 253 P.2d 441 (Cal. 1953); *Gill v. The Curtis Publ'g Co.*, 239 P.2d 630 (Cal. 1952). Under the picture of the couple appeared the caption: "love at first sight is a bad risk." *Id.* at 632. *See also*, *De Gregorio v. CBS*, 473 N.Y.S.2d 922 (N.Y. Sup. Ct. 1984). In the *De Gregorio* case, a male and female construction worker were holding hands while walking on Madison Avenue. *Id.* at 923. A camera crew doing a story on romance filmed the couple and broadcast the footage over protests of the male worker that he was married and his companion was engaged. *Id.* The male worker sued CBS and lost because romance was a matter of public interest. *Id.* at 926.

278. *Hearst Publ'g*, 253 P.2d at 442-43. The plaintiffs alleged that the photograph had been taken by a Hearst employee and the plaintiffs had not consented to its publication. *Id.* at 442.

279. *Id.* at 443. The court stated that the right of privacy is determined by the norm of the ordinary man with ordinary sensibilities. *Id.* at 444.

280. *Id.* The court held that by their own voluntary actions, the plaintiffs waived their right of privacy and the particular pose became part of the public domain. *Id.* However, the court held that if the publication of the picture had been shocking, revolting or indecent, the case may have been different. *Id.* at 445.

281. McClurg, *supra* note 3, at 1038-41.

282. RESTATEMENT (SECOND) OF TORTS § 496A (1977).

283. McClurg, *supra* note 3, at 1039.

284. *Id.*

285. *Id.* Therefore, the *Gill* rationale provides that the only way to avoid voluntary actions becoming part of the public domain is to remain inside with the blinds tightly closed. *Id.* at 1040. This would require individuals to not hold a job, go to the store, go to school, or participate in any "public" relationships. *Id.*

286. *Id.* at 1040-41.

In one particular Alabama case, a plaintiff was able to recover for a photograph taken of her at a "Fun House" when an air jet blew her skirt over her head.<sup>287</sup> The photographer sold the picture of the woman in her underwear to a newspaper which published the photograph on the front page of its paper.<sup>288</sup> An important distinction is that the intrusion occurred the moment the photograph was taken, not when the photograph was published.<sup>289</sup> In contrast, a couple tried to sue the publisher of *World Guide to Nude Beaches and Recreation* after he published a photograph of them on a nude beach.<sup>290</sup> The Appellate Court in New York held that the matter was of some public interest, and the couple's picture was reasonably related to the subject; therefore, the couple was not allowed to recover.<sup>291</sup> A summary of these cases seems to imply that simply because people understand the risk that they may always be photographed does not confer the right to take a photograph of every potentially embarrassing situation, especially when the embarrassing display was unintentional.

However, different courts address these types of photographs in different manners, depending especially on the status of the person photographed. A Georgia newspaper published photographs of a murdered fourteen-year-old girl whose body was partially decomposed and wrapped in chains.<sup>292</sup> A Georgia court held that the dead body was newsworthy and the girl's family could not maintain a cause of action.<sup>293</sup> In another case, a woman's former husband kidnapped her, took her to an apartment, and stripped and raped her.<sup>294</sup> To add to the horrifying experience, the police arrived with camera crews, and although the woman attempted to cover herself with a dish towel, her photograph was published the next day in a newspaper.<sup>295</sup> A Florida

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287. *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964).

288. *Id.* at 476. The court called the photograph a "wrongful intrusion into one's private activities." *Id.*

289. McClurg, *supra* note 3, at 1073. However, McClurg argues that to discount the publication aspect of the privacy tort would be like focusing on the pin prick in a person's arm when they are infected with HIV through a blood transfusion instead of focusing on the offensiveness and intrusiveness of infecting the person. *Id.* at 1075.

290. *Creel v. Crown Publishers*, 496 N.Y.S.2d 219 (N.Y. App. Div. 1985). The book contained 200 close-up photographs of nudes. *Id.* at 220.

291. *Id.*

292. *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956).

293. *Id.*

294. *Cape Publications, Inc. v. Bridges*, 423 So.2d 426 (Fla. 1982). Hilda Bridges was abducted by her estranged husband who came to her workplace and forced her at gunpoint to go with him to their former apartment. *Id.* at 427.

295. *Id.* The police heard a gunshot, stormed the apartment and rushed Bridges outside to safety. *Id.*

court denied the woman damages and held that the event was a newsworthy, emotion-packed drama to which others are attracted.<sup>296</sup>

A relatively new invasion of privacy tort area has been "ride-along" cases or "reality show" cases where criminals and victims are exposed to public scrutiny by camera crews following police and paramedics.<sup>297</sup> In one particular case, camera crews from NBC rushed into a house with paramedics who were attempting to save a heart attack victim's life.<sup>298</sup> To the outrage of the family, the death of fifty-nine-year-old Dave Miller was broadcast on television several different times.<sup>299</sup> Unfortunately, the family soon learned that the right to privacy is a personal right, and only the person whose privacy is actually invaded may sue.<sup>300</sup> In contrast, another court held that CBS did not have the right to follow police on a search and seizure mission into a man's apartment.<sup>301</sup> The New York Court held that the only reason CBS was present at the search was to "titillate and entertain others."<sup>302</sup>

Certain state courts have allowed the use of surreptitious video surveillance by police departments in homes and in public. In *Ricks v. Maryland*,<sup>303</sup> the Baltimore City Police received an order authorizing the use of audio and video

296. *Id.* "At some point the public's interest in obtaining information becomes dominant over the individual's right of privacy." *Id.* at 427. A hypersensitive individual will not be protected under an invasion of privacy. *Id.*

297. See *supra* notes 228-39 and accompanying text.

298. *Miller v. National Broad. Co.*, 187 Cal. App. 3d 1463 (Cal. Ct. App. 1986).

299. Case reprinted in part by ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 176-88 (1995). Author/attorney, Caroline Kennedy, the daughter of President John F. Kennedy, was involved in a privacy suit of her own when she was a child. McClurg, *supra* note 3, at 1047. In *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), Donald Galella filed suit against Jacqueline Onassis and three Secret Service agents for false arrest, and Onassis counterclaimed for several actions including invasion of privacy. McClurg, *supra* note 3, at 1047. The suits arose from Galella constantly following and photographing Onassis, John Kennedy Jr. and Caroline Kennedy. *Id.* Onassis eventually dropped her claim for damages, but the court enjoined Galella from further harassment of Onassis and her family. *Id.* at 1048.

300. ALDERMAN & KENNEDY, *supra* note 299, at 183. Thus, the relatives of Dave Miller could not file the claim for invasion of privacy and could only sue for the physical invasion into their home. *Id.* at 183-85. After six years in the pre-trial stage, the family finally settled with NBC for an undisclosed amount. *Id.* at 187-88. The right to privacy expires at death, unless a state statute or state common law extends the right of publicity after death. SMITH, *supra* note 43, at 35. However the image of a famous individual such as Elvis Presley or Bela Lugosi (as Count Dracula) may be protected by statute. *Id.*

301. *Ayeni v. CBS, Inc*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The case stated that "CBS had no greater right than that of a thief to be in the home." *Id.*

302. ALDERMAN & KENNEDY, *supra* note 299, at 190.

303. 537 A.2d 612 (Md. 1988).

surveillance of a drug processing house.<sup>304</sup> The police entered the air ducts of the apartment through the roof, shaved away part of the dry wall, and placed a miniature camera in the wall.<sup>305</sup> The police recorded twenty-five hours of video tape and then arrested the occupants of the house on drug charges.<sup>306</sup> The Court of Appeals noted the Orwellian overtones of Big Brother watching, but the court upheld the convictions.<sup>307</sup> In *McCray v. Maryland*,<sup>308</sup> the police conducted their video surveillance of a false driver's license operation without a court order or search warrant.<sup>309</sup> In *McCray*, the police videotaped the defendant walking from his home across the street to the Department of Motor Vehicles, and the prosecutor subsequently used the video evidence in a jury trial.<sup>310</sup> The court held that no justified expectation of privacy exists when walking along a public sidewalk or standing in a public park.<sup>311</sup>

The use of video surveillance technology has resulted in some suppression of criminal activity. For instance, in *New York v. Teicher*,<sup>312</sup> the court convicted a dentist of sexual abuse through the use of video surveillance. In *Avery v. Maryland*,<sup>313</sup> a doctor was convicted of assault and battery when he was observed on closed circuit television touching the breasts of his patients. In another case, a security guard filmed an employee's son in the act of

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304. The court held that sufficient probable cause existed to target these members of the drug organization, because other methods of searches and surveillance would not be successful. *Id.* at 615.

305. *Id.* The court held that simply because Title III does not authorize warrants for television surveillance, that does not mean it forbids them. *Id.* at 617. See *supra* notes 140-48 (discussing Title III).

306. *Ricks*, 537 A.2d at 615.

307. *Id.* at 616. Under the present state of the law, video surveillance can only be conducted in Maryland under a search warrant. *Id.* at 621.

308. 581 A.2d 45 (Md. Ct. Spec. App. 1990).

309. *Id.* at 47. An undercover police officer made deliberate errors on his written law test which the defendant corrected. *Id.* at 46. The officer was not required to take an eye examination or provide any proof of identification. *Id.* The police officer then paid five hundred dollars in exchange for a permanent driver's license. *Id.*

310. *Id.* at 47.

311. *Id.* at 48. "[A]ny justified expectation of privacy is not violated by the videotaping of activity occurring in full public view." *Id.* See *South Carolina v. Brown*, 451 S.E.2d 888, 890 (S.C. 1994) (permitting police to conduct video surveillance of Brown's apartment in order to obtain a search warrant for the apartment); *Sponick v. City of Detroit Police Dep't*, 211 N.W.2d 674, 690 (Mich. Ct. App. 1973) (upholding the use of video surveillance in a public tavern because it merely made a permanent record of what any member of the general public would see).

312. 422 N.E.2d 506 (N.Y. 1981). Two female patients complained that a male dentist made sexual advances toward them while they were under the influence of anesthesia, and the police placed a video camera in the dentist's office. *Id.* at 507-09.

313. 292 A.2d 728 (Md. Ct. Spec. App. 1972). In this case a 21 year old woman claimed that her doctor offered to stop by her apartment because she was having trouble sleeping. *Id.* at 734-35. Police watched on CCTV as the doctor gave her an injection that rendered her unconscious. *Id.* The court held that video surveillance was no more intrusive than audio surveillance. *Id.* at 743.

masturbating in the company parking lot and showed the video tape to other employees.<sup>314</sup> The father became the target of harassment and insults for several months and attempted to sue the company for negligent infliction of emotional distress.<sup>315</sup> The court held that although the acts of the security officers and plant personnel were reprehensible in filming the plaintiff's son, he was unable to recover for the publication of the tape contents.<sup>316</sup> In contrast to the gritty reality of surveillance intrusions in particular states, there are several states that have expanded their state constitutions to protect citizens from varying degrees of privacy encroachments.

### B. States That Protect Citizens

Several states have explicitly protected their citizens' rights to privacy from electronic surveillance.<sup>317</sup> The Hawaii Supreme Court has determined that Hawaii's constitutional provisions prohibit undue government inquiry and regulation of a person's life, so that individuality and human dignity can be insured.<sup>318</sup> The court specifically held that the privacy provisions were added to the state constitution in order to protect against extensive governmental use of electronic surveillance techniques.<sup>319</sup> The Hawaii Supreme Court found that Hawaii's constitution affords much greater protection of privacy rights than the United States Constitution.<sup>320</sup>

Additionally, in a recent landmark decision, the Hawaii Supreme Court held that video surveillance of an employee break room without a warrant must be suppressed as "fruits of a poisonous tree."<sup>321</sup> In this case, the Maui Police Department placed four video surveillance cameras in the employees' break

314. *Turner v. General Motors*, 750 S.W.2d 76 (Mo. Ct. App. 1988).

315. *Id.* at 78.

316. *Id.* at 79-80. The court attached great significance to a sign in the parking lot premises that stated that the grounds were subject to video surveillance. *Id.* at 79 n.1.

317. Louis A. Smith II, Comment, *Pennsylvania's Constitutional Right to Privacy: A Survey of Its Interpretation in the Context of Search and Seizure and Electronic Surveillance*, 31 DUQ. L. REV. 557 (1993).

318. *Hawaii v. Lester*, 649 P.2d 346, 352 (Haw. 1982).

319. *Hawaii v. Roy*, 510 P.2d 1066, 1069 (Haw. 1973). In *Roy*, a police officer, without a search warrant, misrepresented himself and purchased marijuana from the defendant, but the court held that the evidence should not be suppressed. *Id.* at 1067. The court specifically looked to the Hawaii constitution to determine that privacy was added to the constitution to protect citizens from the use of electronic surveillance, not the misrepresentation of government agents. *Id.* at 1069.

320. *Hawaii v. Kam*, 748 P.2d 372, 377 (Haw. 1988).

321. *Hawaii v. Bonnell*, 856 P.2d 1265, 1273 (Haw. 1993). Fruit of the poisonous tree means that evidence which is spawned by or directly derived from an illegal search is generally inadmissible against the defendant because of its original taint. BLACK'S LAW DICTIONARY 670 (6th ed. 1990). *Nardone v. United States*, 308 U.S. 338, 341 (1939), first used the phrase "fruit of a poisonous tree." YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 806 (8th ed. 1994).

room for a full year before they tried to charge six defendants with gambling violations.<sup>322</sup> The police officers accumulated fifty videotapes with twelve hundred hours of footage of normal work activities and one minute of conduct that might reflect gambling activity.<sup>323</sup> Significantly, the court held that the Hawaii Constitution protects the “‘halo’ of privacy” wherever a person goes, and she can invoke a protectable right to privacy wherever she may legitimately be, whether it be a public park or a private place.<sup>324</sup> The court found that no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.<sup>325</sup> Importantly, the court emphasized that the showing needed to justify video surveillance was higher than other search and seizure methods, including audio surveillance.<sup>326</sup> Overall, the court stated that “[p]rivacy does not require solitude”<sup>327</sup> and any video surveillance may provoke an immediate visceral reaction because it is an exceedingly intrusive medium.<sup>328</sup>

The places where courts find privacy interests may also vary. However, some state courts are recognizing a legitimate privacy interest outside of the home. For example, a federal court of appeals applying state law found a publishing company liable for a tortious invasion of privacy after they published a photograph of an auto accident victim.<sup>329</sup> In one particularly unusual Connecticut case, the Connecticut Supreme Court found some legitimate expectation of privacy in a homeless person’s boxes under a bridge.<sup>330</sup> In another case, ABC’s “America’s Funniest Home Videos” showed an unauthorized video of professional musicians accidentally falling off stage during one of their public performances. A Louisiana Appellate Court held that the allegations were sufficient to state a cause of action for false light invasion of privacy.<sup>331</sup> Also, some cases have found that a man masturbating in a public restroom stall may have a reasonable expectation of privacy.<sup>332</sup> Therefore, an

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322. *Bonnell*, 856 P.2d at 1270.

323. *Id.* at 1271.

324. *Id.* at 1275. The court properly avoided a clash with the federal Constitution by stating: “Because we resolve the present appeal on state constitutional grounds, we need not (and do not) decide whether a federal constitutional violation has occurred.” *Id.* at 1272.

325. *Id.* at 1273.

326. *Id.* at 1273 n.5. Because of the invasive nature of video surveillance, the government must make a very high showing of necessity to justify its use. *Id.*

327. *Hawaii v. Bonnell*, 856 P.2d 1265, 1276 (Haw. 1993).

328. *Id.* at 1277.

329. *Levertov v. Curtis Publ'g Co.*, 192 F.2d 974 (3d Cir. 1951) (holding that the publication of the photo twenty months after the accident in a generic article unrelated to the news event violated the plaintiff’s right to privacy). See also *Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994).

330. *Connecticut v. Mooney*, 588 A.2d 145 (Conn. 1991).

331. *Shariff v. American Broad. Co.*, 613 So.2d 768 (La. Ct. App. 1993).

332. *State v. Limberhand*, 788 P.2d 857 (Idaho Ct. App. 1990); *State v. Owczarzak*, 766 P.2d 399 (Or. Ct. App. 1988).

expansion of privacy law to protect the public from continuous street video surveillance may be possible by looking to decisions that find a zone of privacy in public spaces.

As previously mentioned, Montana rejected the *Katz* test<sup>333</sup> and focused on a compelling government interest test to guarantee privacy when government surveillance activity is excessively intrusive.<sup>334</sup> Thus, Montana courts maintain an ideal strict scrutiny approach<sup>335</sup> when state agents attempt to infringe upon privacy.<sup>336</sup> In a similar vein, the Washington Supreme Court noted that the scope of state constitutional protection should not be diminished just because citizens know of technological developments to enhance visual surveillance.<sup>337</sup> With this type of video surveillance jurisprudence as a background, states may be able to stop street camera surveillance plans before the recommendations begin by simply adopting a model state statute.<sup>338</sup>

### C. *A Brave New World: The Pros and Cons of Video Surveillance*<sup>339</sup>

A citizen's fundamental right to privacy embraces the right to be free from constant surreptitious video surveillance, and the lack of comprehensive

333. See *supra* notes 78-81 and accompanying text for the *Katz* reasonable expectation of privacy test.

334. *State v. Brown*, 755 P.2d 1364, 1370 (Mont. 1988). In *Brown*, a conversation was monitored and recorded without a warrant by using a body wire transmitting device that was attached to a police officer. *Id.* at 1366. The court found that there was no violation of Montana's right to privacy when law enforcement officers perform warrantless consensual monitoring of face-to-face conversations. *Id.* at 1371. However, the court stressed that an individual is not left without protection from all inappropriate electronic intrusions, especially when no participants have given permission for the surveillance. *Id.*

335. JOHN E. NOWAK & RONALD D. ROTUNDA, ON CONSTITUTIONAL LAW § 14.3, at 573-78 (4th ed. 1991). Strict scrutiny is the strongest level of constitutional protection that places the burden of proof on the government to show a compelling government interest in the regulation. *Id.* at 575-76. In comparison, the intermediate standard of review only requires the government to show an important governmental interest and that a substantial relationship exists between the regulation and the government's goal. *Id.* at 576-78. The lowest level of scrutiny is a rational basis test where the burden of proof is on the plaintiff to show that no legitimate purpose exists for the regulation. *Id.* at 574-75.

336. MONT. CONST. art. II, § 10. See *supra* note 269 for the text of the constitutional provision.

337. *State v. Myrick*, 688 P.2d 151, 156 (Wash. 1984) (holding ultimately that police did not unreasonably intrude when they conducted aerial surveillance at 1500 feet without visual enhancement technology).

338. See *infra* section V for a proposed model statute.

339. ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper Perennial 1989) (1946). Huxley created a version of futuristic Central London where modern fertilization techniques created elite social classes. *Id.* at 2-6. In this "Brave New World" learning is reinforced with electric shocks so that children will learn to reject the evils of flowers and books. *Id.* at 20-21.

legislation in this area causes uncertainty among the courts.<sup>340</sup> Consequently, the potential for abuse is immense because a violation of privacy through the use of a video camera is not clearly defined.<sup>341</sup> Indeed, by its very nature, surreptitious surveillance is not intended to be discovered by those surveyed, and frequently, people are unaware of their freedom being captured somewhere on a magnetic tape.<sup>342</sup> Moreover, video surveillance is more intrusive than federally regulated wiretapping because it is continuous.<sup>343</sup> Audio surveillance is only an invasion when people are actually speaking, but video surveillance is not limited to times of criminal activity or speech.<sup>344</sup> To properly design a model state statute prohibiting street video surveillance, the benefits of a city placing cameras on the public streets must be examined. By considering the strongest benefits provided by video surveillance, street camera proposals can properly be challenged. Frequently it will be necessary to refer to United States Supreme Court cases to support a particular proposition,<sup>345</sup> but states obviously will have both similar and divergent cases and principles based upon their own state constitutions.<sup>346</sup> However, as previously indicated, states may look to Supreme Court precedents without invoking Supreme Court review, as long as the particular state has adequate and independent state grounds for the decision that do not contravene the federal Constitution.<sup>347</sup> Therefore, the pro-video surveillance position needs to be analyzed to properly consider any realistic benefits of video surveillance.<sup>348</sup> Following the positive aspects of video surveillance will be a comprehensive discussion of the potential drawbacks to video surveillance.<sup>349</sup>

### 1. Video Surveillance Benefits

Arguments made in defense of video surveillance focus on social control and protection of the public. First, placing limits on law enforcement only makes existing laws more difficult to enforce.<sup>350</sup> Those who break the laws must be detected, and society must use surveillance to properly determine guilt

340. See *supra* notes 125-54 and accompanying text.

341. See *supra* notes 153-54 and accompanying text.

342. McClurg, *supra* note 3, at 1024.

343. Montroy, *supra* note 3, at 269; Greenfield, *supra* note 3, at 1047.

344. Montroy, *supra* note 3, at 269. On video surveillance missions, every aspect of the person under surveillance is filmed, as compared to wiretapping which tunes the eavesdroppers in as to when to begin the interception. *Id.* at 269 n.53.

345. See *infra* notes 350-425.

346. See *supra* notes 252-73.

347. *Michigan v. Long*, 463 U.S. 1032 (1983). See *supra* notes 260-62 and accompanying text (discussing the *Long* decision).

348. See *infra* notes 350-73 and accompanying text. See also *State v. Bonnell*, 856 P.2d 1265, 1272 (Haw. 1993).

349. See *infra* notes 374-425 and accompanying text.

350. See *supra* notes 187-227 and accompanying text.

or innocence.<sup>351</sup> The more society protects privacy, the more society impedes law enforcement personnel striving to protect the public from crime. Therefore, surveillance is the fundamental means of social control, and extending amorphous concepts of privacy only cripples local governments and police departments.<sup>352</sup>

Secondly, video surveillance is successful in apprehending criminals.<sup>353</sup> In Norway, video surveillance helped to capture thieves who purloined Edvard Munch's painting, "The Scream."<sup>354</sup> Although perhaps an incidental use of street surveillance in Oklahoma City, film obtained from nearby building surveillance cameras proved critical in apprehending the suspects involved with the bombing of a federal building.<sup>355</sup> In the Bugler case, video surveillance helped police apprehend the two boys that murdered a two-year-old child, and without the surveillance cameras, the crime may never have been solved, or perhaps it would have been repeated.<sup>356</sup> In Europe, cities that have installed video surveillance cameras claim dramatic reductions in crime rates.<sup>357</sup> One Boston, Massachusetts, surveillance system saw an estimated thirty percent drop in crime in housing projects.<sup>358</sup> The Camden, New Jersey, system provided a half-dozen arrests in the first day alone.<sup>359</sup> Memphis, Tennessee, claims a ten percent drop in crime in the early reports.<sup>360</sup> Furthermore, Tacoma, Washington, boasts fifty-five arrests in the first four months of the video

351. WESTIN, *supra* note 160, at 57.

352. *Id.*

353. See *supra* notes 187-227 and accompanying text.

354. *Oslo Trial Held On Theft of Munch's "The Scream,"* REUTERS WORLD SERVICE, Aug. 30, 1995, available in LEXIS, World Library, ARCNWS File. Two men climbed a ladder, smashed through a window, ran into the gallery and stole the masterpiece in less than a minute. *Id.* Footage from video surveillance cameras helped to capture the criminals and two other accomplices three months later. *Id.* Agents from Scotland Yard captured the men after posing as potential buyers of the painting. *Id.*

355. *Film of Building Blast Scene Being Processed*, REUTERS WORLD SERVICE, Apr. 21, 1995, available in LEXIS, World Library, ARCNWS File; *Surveillance Video Links Timothy McVeigh with Oklahoma City Bombing as McVeigh Receives New Court-Appointed Lawyer*, (NBC News television broadcast, May 8, 1995). Law enforcement officials claim that they have a 22 second long surveillance video that shows McVeigh in a Ryder truck 500 feet from the federal building a few minutes before the explosion. *Id.* A surveillance camera in the Regency Tower apartment building clicked every other second recording the Ryder truck coming into view and stopping in front of the Alfred P. Murrah Federal Building prior to the explosion. *1996 Report, supra* note 41, at 62.

356. See *supra* notes 170-71 and accompanying text for details of the Bugler case.

357. Deane, *supra* note 159. In Newcastle, England, research showed an 11% drop in assaults, a 49% drop in burglary, and a 44% fall in criminal damage. *Id.* Moreover, insurance rates for companies within CCTV zones were reduced. *Id.*

358. *1996 Report, supra* note 41, at 21.

359. *Id.* at 24. The initial 90-day report indicates "no decrease in arrests, and a significant decrease in domestic and violent crimes." *Id.*

360. *Id.* at 35.

surveillance operation.<sup>361</sup> At the same time, video surveillance helps to disprove false accusations of crime, and it frees up police officers to patrol other areas.<sup>362</sup> The justice system will become less clogged with video evidence aiding prosecutors in speedy trials and plea bargains.<sup>363</sup> Surveillance footage proves to be a devastating weapon when a witness denies guilt on the stand and then watches her crimes revealed on surveillance tapes.<sup>364</sup>

America needs to resort to innovative methods to protect the streets when one violent crime occurs every seventeen seconds.<sup>365</sup> When totaled, this produced 13,991,675 offenses in the United States in 1994 alone.<sup>366</sup> Video surveillance transfers fear from the victim of the crime to the criminal, where it belongs. Moreover, public support is high in towns that have tried video surveillance.<sup>367</sup> For instance, a recent survey in Scotland revealed that almost ninety percent of people support public surveillance projects.<sup>368</sup> If it turns out that camera operators are peering into shops and apartments, the cameras can be programmed to simply not register those areas. Alternatively, a computer alarm could notify a supervisor of the operator's activities. To discourage unauthorized distribution of information, Baltimore, Maryland, destroys or recycles tapes after 96 hours and Tacoma, Washington, does not even use tapes.<sup>369</sup>

Nothing should prohibit the police from simply augmenting the sensory faculties bestowed upon them at birth with science and technology.<sup>370</sup> The proposed video surveillance will take place on the public streets where the Supreme Court has held time and again that citizens have no reasonable expectation of privacy.<sup>371</sup> In this way video surveillance is the best offense

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361. *Id.* at 44. Tacoma also used funds to add street lights, remove graffiti and clean vacant lots. *Id.* at 45.

362. Deane, *supra* note 158.

363. *See supra* note 171 and accompanying text.

364. Lynch, *supra* note 174, at 12.

365. CRIME IN THE UNITED STATES 1994, UNIFORM CRIME REPORTS 4-5 (1995).

366. *Id.* Offenses are defined as murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

367. Arlidge, *supra* note 163, at 2.

368. *Id.* at 2.

369. 1996 Report, *supra* note 41, at 10.

370. *United States v. Knotts*, 460 U.S. 276 (1983) (holding that the use of a beeper did not constitute a fourth amendment search). *See supra* note 88.

371. *California v. Ciraolo* 476 U.S. 207 (1986); *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. *California v. Greenwood*, 486 U.S. 35 (1988).

in attacking what has truly become a "crime war."<sup>372</sup> Video surveillance is proving to be an effective tool to assist law enforcement agencies that are stretched to their limit in trying to assure the safety and security of all Americans.<sup>373</sup> Conversely, several detriments exist in the use of video surveillance systems.

## 2. Video Surveillance Detriments

Humans have a fundamental belief in the right to personal autonomy which stems from dignity and individuality.<sup>374</sup> When the sphere of autonomy is consistently violated, the shell of humanity erodes.<sup>375</sup> If whenever an individual peers out a window, he sees a sign stating "Big Brother is Watching You," society has become what George Orwell imagined.<sup>376</sup> Perhaps the Big Brother reference has become a cliché, but citizens will undoubtedly become chilled from performing daily activities if video surveillance increases.<sup>377</sup> If the proponents of video surveillance succeed, citizens will be forced to engage in a perpetual paranoid shoulder check to consider who is watching and who is following.<sup>378</sup> Privacy is a basic human necessity, and it cannot simply be shed like some unneeded sweater on a warm day at the front door of a home.<sup>379</sup>

Before electronic surveillance, locking doors, closing curtains, and remaining quiet was sufficient to protect citizens from police intrusions.<sup>380</sup> Today, the state and federal police are 600,000 strong, with an annual budget of thirty billion dollars.<sup>381</sup> Moreover, combining the police power with an

372. Particularly in the context of felonies and crimes involving threats to public safety, the law enforcement interest outweighs an individual's interest. *United States v. Hensley*, 469 U.S. 221 (1985).

373. *1996 Report*, *supra* note 41, at 5.

374. The security of one's privacy against arbitrary intrusion by the police is basic to a free society. *Wolf v. Colorado*, 338 U.S. 25 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961).

375. WESTIN, *supra* note 160, at 59.

376. ORWELL, *supra* note 155, at 6.

377. According to a recent Associates Poll, America is more concerned about privacy than any time in the last twenty years. Aurora M. Armstrong, *Private Eyes, Private Lives*, L.A. TIMES, July 19, 1990, at J10. People will uncontrollably ponder: "What will the watcher think, if he sees me do that?" Therefore, Orwell's "thought crime" ensues, when to merely think a wrongful act was the same as committing the wrongful act itself. ORWELL, *supra* note 155, at 27.

378. Although many people surveyed support video surveillance, the attitude changes when people become aware they are being watched. Naughton, *supra* note 159, at 13. One woman was asked how she felt when a reporter commented that he had seen her, on video surveillance, drop used cigarettes on the ground and she replied: "I didn't think it would be used for that, but I suppose it's still a good thing to have." *Id.* But after looking worried for a second she added: "You didn't see me doing anything else did you? I mean, not that I was." *Id.*

379. Granholm, *supra* note 3, at 696.

380. Greenfield, *supra* note 3, at 1046.

381. LESCE, *supra* note 164, at 1.

estimated 1.5 million people employed in the security industry indicates that the right of privacy is facing extinction.<sup>382</sup> With the power of video surveillance, some police will undoubtedly target those likely to commit crimes and entrap those whom they believe are predisposed to crimes.<sup>383</sup> The failed Miami Beach surveillance town provided the ultimate example of this travesty. The elderly residents resorted to video surveillance when lower-income black and hispanic refugees came to reside in the city.<sup>384</sup> The business people were leery of young black and hispanic citizens who lived and worked in the area, and some even stated that they felt that each was a potential criminal.<sup>385</sup>

With the use of surveillance, the information collected about citizens will increase, and the police will be able to use cameras to spot and arrest persons involved in political fringe groups and "subversive" organizations.<sup>386</sup> In fact, researchers are already working on technology called "computerized face recognition" which would make the matching of faces with a list of names instantaneous.<sup>387</sup> In this fashion, surveillance suppresses the constitutional right to travel and associate, because people will no longer be able to freely move through the streets speaking with whom they wish and attending the meetings that they wish.<sup>388</sup> Clearly, the more America moves toward a high surveillance society, the closer society comes to Orwell's totalitarian state where individual liberties are traded for order. The fact that law enforcement may be made more efficient is never by itself a justification to disregard the Constitution.<sup>389</sup>

382. *Id.* The growth rate of the security industry is twice that of law enforcement. *Id.* at 2.

383. *Id.* at 8. With video technology, police will be unrestrained from indiscriminately watching all young black men. Granholm, *supra* note 3, at 698. Police officers identify the black man with danger. Tracey Maclin, *Black and Blue Encounters - Some Preliminary Thoughts About the Fourth Amendment Seizures: Should Race Matter?* 26 VAL. U. L. REV. 243, 248 (1991).

384. Surette, *supra* note 16, at 81.

385. *Id.*

386. LESCE, *supra* note 164, at 11. Although "blacklists" are allegedly illegal, the government is free to use them. *Id.* at 13.

387. O'Donnell, *supra* note 15, at 16. The Defense Department is interested in using such technology to screen people going in and out of its building, but the use is unlikely to stop there. *Id.*

388. LOCKHART ET AL., *supra* note 116, at 565-71. See Justice Douglas' dissent in the Army surveillance case of *Laird v. Tatum*, 408 U.S. 1, 27 (1972):

"Surveillance of civilians is none of the Army's constitutional business . . . This case involves a cancer in our body politic. It is a measure of the disease which afflicts us. Army surveillance, like Army regimentation, is at war with the principles of the First Amendment. Those who already walk submissively will say there is no cause for alarm. But submissiveness is not our heritage."

389. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

Another problem with surveillance footage stems from its unreliability. Some individuals have been arrested and prosecuted based on the iron-clad surveillance footage simply because they resembled the criminal, only to later have the police realize that they arrested the wrong person.<sup>390</sup> In fact, it is possible to digitize an image such as the famous surveillance footage of Patty Hearst entering a bank with a shotgun.<sup>391</sup> Through this digitization technique, a criminal could be removed from a scene or placed in a scene, and it becomes impossible even for experts to tell a copy from an original master tape.<sup>392</sup> Another concern is the spread of the digitized images across the Internet, especially when cities like Anchorage, Alaska, allow citizens to access the surveillance footage on their own personal computers.<sup>393</sup> Furthermore, studies show that surveillance cameras merely displace crime rather than deter it.<sup>394</sup> Criminals simply move out of the range of the camera eye and take the crime with them.<sup>395</sup> One video surveillance proponent indicated that “[o]ur experience in many cases is that the criminals tend to move their drug dealing to more private areas.”<sup>396</sup> Moreover, some criminals learn all of the camera locations and simply focus their activities on other less protected areas of the city.<sup>397</sup> In the same vein, police officers become less efficient because they also do not want to be watched.<sup>398</sup> Law enforcement personnel frequently spend more time watching the cameras than watching the streets.<sup>399</sup> Although America may have a crime problem, the greatest threats to our constitutional freedom come in times of crisis.<sup>400</sup> But in such a time of crisis, the government response should not be a hysterical overreaction.<sup>401</sup> With the benefit of more efficient law enforcement mechanisms comes the burden of

390. See Moynihan, *supra* note 171, at 1. One person was held in prison for 13 months after being falsely accused of murder based on the tapes. *Id.*

391. *America Undercover: Shock Video 2, The Show Business of Crime and Punishment* (HBO television broadcast, Nov. 26, 1996).

392. *Id.* This digitization process was masterfully used in the film “THE CROW” after the lead actor Brandon Lee was killed. *Id.*

393. *1996 Report, supra* note 41, at 15.

394. Granholm, *supra* note 3, at 689; 20/20, *supra* note 41, at 8; Donna Reeves & Sacha Molitorisz, *Australia: Cameras to Spy on People in City Streets*, SYDNEY MORNING HERALD, Apr. 6, 1995, at 3; Haughey, *supra* note 164, at 7.

395. 20/20, *supra* note 41, at 8.

396. *1996 Report, supra* note 41, at 70.

397. 20/20, *supra* note 41, at 8.

398. Granholm, *supra* note 3, at 689. Ironically, police officers were the first to complain and threaten legal action under a violation of their right to privacy when a restroom at a station house was placed under video surveillance to catch a thief or vandals. Edna Buchanan, *Police Put Camera Spy in Men's Room*, MIAMI HERALD, Dec. 3, 1983, at 1B. See also, Dean Congbalay, *Turmoil Divides Concord Police Department*, S.F. CHRON., Dec. 15, 1989, at B8.

399. Granholm, *supra* note 3, at 689.

400. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2407 (1995) (O'Connor, J., dissenting).

401. *Id.*

constitutional responsibilities, and the police cannot enjoy the advantages without facing the serious consequences.<sup>402</sup>

Statistics prove that very few cities have experienced a drop in crime where video surveillance operations were installed, and most video surveillance schemes are accompanied by a package of security initiatives, so a clear figure of success is hard to calculate.<sup>403</sup> Professor Bennet of Cambridge University, a researcher of video surveillance schemes, believes that surveillance camera success has yet to accurately be tested.<sup>404</sup> Indeed, several cities such as New York, Atlantic City, and Miami Beach have labeled the surveillance cameras a failure and dismantled them.<sup>405</sup> The surveillance cameras either did not produce a single conviction or they were considered much too expensive to operate based on how relatively ineffective they were.<sup>406</sup>

Video surveillance is an unreasonable intrusion because it can track a person from block to block without her knowledge to focus on a letter she is reading, words she may be mouthing, or an itch she may be scratching.<sup>407</sup> For instance, according to the Supreme Court, a woman has a protected liberty interest in seeking an abortion,<sup>408</sup> but this right is infringed upon when someone invades the woman's privacy by filming her entering a clinic from a superhuman vantage point.<sup>409</sup> The intrusion becomes even greater if the images are saved for some later use.<sup>410</sup> Furthermore, under the First

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402. *Arizona v. Evans*, 115 S. Ct. 1185, 1195 (1995) (O'Connor, J., concurring).

403. Haughey, *supra* note 164, at 7.

404. *Id.*

405. O'Donnell, *supra* note 15, at 16. The New York Times Square plan led to fewer than 10 arrests in the 20 months it was in operation. *Id.*

406. Granholm, *supra* note 3, at 688. Another problem is that the cameras are targeted to protect suburban shoppers and sales receipts in large shopping areas, rather than citizens in violent crime areas. *Id.* at 706.

407. *Id.* at 695.

408. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). In *Casey*, the Court found it appropriate to allow information to be reported about the women receiving abortions to state agencies, as long as the actual identity of the women remained confidential. *Id.* at 899. However, by being able to film all women entering a clinic, identity is discernable and capturable along with other potentially embarrassing personal information. This same example would hold true for a person going to an Alcoholics Anonymous meeting or a substance abuse clinic.

409. See *Planned Parenthood v. Aakhus*, 17 Cal. Rptr. 2d 510, 515 (Cal. Ct. App. 1993) (finding that photographing and videotaping clients violated the right to privacy under the California Constitution). *Chico Feminist Women's Health Ctr. v. Scully*, 256 Cal. Rptr. 194, 196-97 (Cal. Ct. App. 1989) (upholding an injunction against abortion protesters photographing license plates and people entering or leaving an abortion clinic).

410. O'Donnell, *supra* note 15, at 16. Recall that in Alaska residents using home computers can create a news letter with still photographs of potential criminals. *1996 Report*, *supra* note 41, at 15.

Amendment, an individual has the freedom to associate and attend a KKK rally or an NAACP march,<sup>411</sup> but such activities will be chilled when members of a group know that their activities will be monitored and scrutinized.<sup>412</sup> The law should recognize the difference between being seen in public and being closely scrutinized by unknown watchers or recorded on videotape or film.<sup>413</sup> Merely seeing someone is much different from photographing them because of the permanent record produced.<sup>414</sup> Even more obtrusive than photography is videotaping a person because much of the person's personality is captured by the tape.<sup>415</sup> Simply because a woman is wearing a skirt and prefers not to wear underwear in public does not give a videographer or surveillance technician the right to capture and exploit her image.<sup>416</sup>

Judge Posner of the Seventh Circuit recognized this same sentiment in one of his right to privacy decisions:

Most people in no wise deformed or disfigured would nevertheless be deeply upset if nude photographs of themselves were published in a newspaper or book. They feel the same way about photographs of their sexual activities, however "normal," or about a narrative of those activities, or about having their medical records publicized. Although it is well known that every human being defecates, no adult human being in our society wants a newspaper to show a picture of him defecating. The desire for privacy illustrated by these examples is a mysterious but deep fact about human personality. It deserves and in our society receives legal protection. . . . An individual, and more pertinently perhaps the community is most offended by the publication of intimate personal facts when the community, has no interest in them

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411. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557-58 (1963) (forbidding the government from demanding a membership list from the NAACP). However, if government agents wanted to identify the participants of a particular rally through the use of video surveillance, the same membership list purpose would be served. In *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 462 (1958), Justice Harlan stated: "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

412. Under the Supreme Court regime, the plaintiff would have difficulty proving the actual injury or likelihood of harm necessary to prove a chilling effect by not attending a rally. See *Laird v. Tatum*, 408 U.S. 1 (1972). Although camera crews may film the event for television coverage, the effect is not the same because news journalists are not checking names off a massive subversive list or using computer technology to match who each and every person is.

413. McClurg, *supra* note 3, at 1041.

414. *Id.*

415. *Id.* at 1043.

416. *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964). See *supra* notes 287-91 and accompanying text.

beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.<sup>417</sup>

Beyond the legal privacy arguments, advocates of surveillance are typically troubled by the fact that a video surveillance prohibition would aid the criminal by protecting the privacy of the person who is engaged in repugnant behavior.<sup>418</sup> Perhaps not enough is being done to compensate or protect victims of crime, but trading fundamental privacy rights can never be a solution. Victims of constitutional violations must be compensated and protected, especially since these victims receive harm at the hands of the state or its employees.<sup>419</sup> A widespread criticism of such protection proclaims that only the guilty are protected since the innocent have nothing to hide.<sup>420</sup> However, people who have nothing to hide want and deserve their privacy.<sup>421</sup> At some point in time, a police intrusion becomes so great that the intrusion will never be reasonable,<sup>422</sup> and video surveillance neatly fits this category.<sup>423</sup> The rights protected by the United States Constitution and state constitutions are for the innocent and the guilty alike.<sup>424</sup> Justice Clark summarized it best when he wrote, “[t]he criminal goes free, if he must, but it is the law that sets him free,” and the government will be destroyed if it fails to protect citizens.<sup>425</sup>

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417. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229, 1232 (7th Cir. 1993).

418. Citizens lament that the criminal is the only one protected by privacy expansions and police frequently remark “[i]f you are not doing anything wrong, what do you have to worry about?” Hermann, *supra* note 195, at 11. However, video surveillance intrudes upon the lives of average citizens as much as it does the lives of criminals. *Id.*

419. Bruce G. Berner, *Fourth-Amendment Enforcement Models: Analysis and Proposal*, 16 VAL. U. L. REV. 215, 222 n.29 (1982). *See infra* section V.

420. Berner, *supra* note 419, at 233 n.50.

421. *Id.*

422. Among the most intrusive types of searches are body cavity searches, *United States v. Ogberaha*, 771 F.2d 655 (2d Cir. 1985); strip searches, *United States v. Palmer*, 575 F.2d 721 (9th Cir. 1973); and surgery to remove evidence, *Winston v. Lee*, 470 U.S. 753 (1985).

423. “For many people, a government order allowing agents secretly to tape intimate activities would be as shocking as a government order to submit to surgery.” Greenfield, *supra* note 3, at 1070. In fact, it may be even more intrusive than the surgery order in *Winston*, because surgery only occurs one time for one piece of evidence as opposed to video surveillance which occurs over an extended period of time and gathers information about a person’s health, life, and activities that have nothing to do with a criminal investigation. *Id.* “The constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein.” *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 343 (1990) (Stevens, J., dissenting).

424. *Illinois v. Gates*, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting) (quoting *Draper v. U.S.*, 358 U.S. 307, at 314 (1959) (Douglas, J., dissenting)).

425. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

## V. PROPOSAL TO CURTAIL VIDEO SURVEILLANCE

States in the age of "New Federalism" need to develop a model statute with which to evaluate video surveillance plans proposed by the police and local governments.<sup>426</sup> State supreme courts could adopt the following statutory sections as model reasoning; however, a model state statute based upon the state constitutional right to privacy would more specifically protect citizens confronting street video surveillance implementation. This model statute is intended to address the above described pitfalls of privacy intrusion in a state system and protect the fundamental right to privacy implicit or explicit in a state constitution.<sup>427</sup> These statutory sections will apply when police want to establish multi-camera street surveillance. Although this proposal does not focus on video surveillance in the private sector, certain alternative state statutory safeguards are available, such as prohibiting stores from monitoring dressing room areas,<sup>428</sup> and prohibiting private voyeurism into homes.<sup>429</sup> Under the proposed model statute, the police will be able to establish surveillance of one specific person or of a particular crime ring if they follow the rigorous guidelines provided. However, the police and local governments will not be able to set up surveillance of an entire community. Thus, police are not entirely estopped from surveillance; they are only curtailed from blanket surveillance operations where the average citizen is subjected to constant street camera

426. For almost every ruling of the Berger or Rehnquist Courts that could be characterized as retracting from the thrust of a Warren Court precedent, state courts have reached contrary rulings under their respective state constitutions, and this is the essence of "new federalism." LAFAVE & ISRAEL, *supra* note 263, at 95.

427. See *supra* notes 268-69 for examples of relevant provisions in the Montana and Hawaii Constitutions. This model statute is geared to state courts rather than federal courts because the states have broader constitutional guarantees and because a favorable federal privacy expansion seems unlikely. See *supra* notes 77-154 and accompanying text.

428. MASS. GEN. LAWS ANN. ch. 93, § 89 (West Supp. 1996) (emphasis added):

No person who owns or operates a retail establishment selling clothing shall maintain in a dressing room a two-way mirror or electronic *video camera* or a similar device capable of filming or projecting an image of a person inside such dressing room. Whoever violates the provision of this section shall be punished by a fine of one hundred dollars.

See also R.I. GEN LAWS § 11-41-26 (1987). *But see* Lewis v. Dayton Hudson Corp., 339 N.W.2d 857, 858 (Mich. Ct. App. 1983) (denying a customer recovery from a retailer for invasion of privacy when signs were clearly posted that the dressing area was under surveillance).

429. Indiana provides the following regulation of private voyeurism:

(a) A person who: (1) Peeps; or (2) Goes upon the land of another with the intent to peep; into an occupied dwelling of another person, without the consent of the other person, commits voyeurism, a Class B misdemeanor. However, the offense is a Class D felony if it is knowingly or intentionally committed by means of a camera, a *video camera*, or any other type of video recording device. (b) "Peep" means any looking of a clandestine, surreptitious, prying, or secretive nature.

IND. CODE ANN. § 35-45-4-5 (Michie 1996) (emphasis added).

surveillance. Therefore, every proposed state video surveillance activity should be required to conform with the following statutory sections:

- §1 All surveillance operators must be trained, professional, certified police or federal agents.
- §2 Operators should disclose to targets of surveillance that they are under surveillance or were under surveillance along with a general public disclosure of the video surveillance activities of police departments to citizens who must be given an opportunity to contribute written comment or comment at public hearings.
- §3 Operators must prove, by a showing of both probable cause and compelling government interest to a neutral magistrate, that video surveillance is necessary and that the least restrictive method of surveillance will be employed.
- §4 To receive an order granting the use of video surveillance, operators must delineate specific targets, times, and goals of the surveillance. Upon the granting of an order to use video surveillance, operators must report to a neutral magistrate every ten days to prove by a showing of probable cause and compelling government interest why continued surveillance is necessary.
- §5 Failure to comply in all respects with this statute will result in the unilateral suppression of the use of all improperly obtained video information in a judicial proceeding.
- §6 Failure to comply in all respects with this statute shall be grounds for criminal penalties and employment discharge. Under no circumstances shall the contents of any captured video images be exploited for purposes of profit, publication, or distribution, and any such violation will carry a mandatory fine and prison sentence.
- §7 Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any citizen to a deprivation of privacy through video surveillance as secured by the state constitution shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress.

*Statutory Comments*

- §1 All surveillance operators must be trained, professional, certified police or federal agents.

*Commentary*

The professional officer requirement provides an administrative check on camera operators by employing training and professional responsibility requirements. This section will end the practices of cities like Anchorage, Alaska, where video images from street surveillance cameras are sent to private residents' home computers rather than to a police station.<sup>430</sup> Also, California, Maryland, New Jersey, and Oregon all currently allow unsupervised private citizens to monitor the street video cameras. Based upon the abuses inherent in such a system, this section will require at least minimal training of police before they are allowed free reign over the camera lens. Each state can establish its own certification procedures, but operators should have at least a minimal comprehension of the ethical, moral and fundamental privacy ramifications of video surveillance. Video operators will need to become familiar with this statute in order to follow the mandated procedures. Operators should also be aware that deviations from this statute could result in criminal and civil penalties. Thus, under this section, cameras will no longer be operated by unaccountable security guards and private citizens.<sup>431</sup>

- §2 Operators *should* disclose to targets of surveillance that they are under surveillance *or were* under surveillance along with a general public disclosure of the video surveillance activities of police departments to citizens who must be given an opportunity to contribute written comment or comment at public hearings.

*Commentary:*

Although this section is phrased in a discretionary format, a particular state legislature may choose to make the public disclosure mandatory. The statutory provision provides a local government with the flexibility of prior warnings such as conspicuous signs stating that the streets are under surveillance, or in the alternative, a state or federal agency must at least let the target of the surveillance know at a later date that the surveillance took place. The public hearings will provide an opportunity for a possible community veto based upon

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430. 1996 Report, *supra* note 41, at 15.

431. See *supra* notes 180-251 and accompanying text for security guard problems.

widespread objection to a surveillance operation.<sup>432</sup> Such bureaucratic devices will clearly hamper the police use of video surveillance technology, but the comment provisions will function in the same fashion as when citizens are given an opportunity to comment under proposed environmental regulations that dramatically affect a town.<sup>433</sup> A disclosure of plans and specific targets will largely eliminate the problem of uninformed citizens.<sup>434</sup> Furthermore, the success of such video operations can realistically be established when the statistics from public disclosure reports are printed and independently confirmed. Citizens will then be able to accurately determine whether video surveillance has an effect on crime.<sup>435</sup>

- §3 Operators must prove, by a showing of both probable cause and compelling government interest to a neutral magistrate, that video surveillance is necessary and that the least restrictive method of surveillance will be employed.

### Commentary

Under the current status of the law, courts are unsure if warrant requirements apply to video surveillance or if video surveillance is less intrusive or more intrusive than audio surveillance.<sup>436</sup> This section will essentially provide that a state needs to use the protective provisions of Title III when confronting video surveillance.<sup>437</sup> Through this proposed section, a court will engage in a multifactor balancing of the compelling government interest in crime prevention in comparison with the fundamental right to privacy.<sup>438</sup> The fundamental right to privacy stems from state constitutional language as previously discussed under "new federalism."<sup>439</sup> The largest change this section will make to Title III at a state level is the use of the compelling government interest test that has become standard in Supreme Court

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432. Robb, *supra* note 3, at 601. Robb suggests a licensing scheme that includes a "community veto," which would help prevent these systems in the same fashion a community can veto a liquor establishment. *Id.* at 601 n.116. Robb also suggests that in a licensing system, a community could employ inspectors to make unannounced visits to monitoring facilities to verify complaints. *Id.* at 602.

433. Federal environmental laws establish mandatory notice and comment provisions under the Emergency Planning and Community Right To Know Act of 1986. See 42 U.S.C. §§ 11001-11050 (West 1995 & Supp. 1996).

434. See *supra* notes 159, 378 and accompanying text.

435. See *supra* notes 180-86 and accompanying text.

436. See *supra* notes 125-54 and accompanying text.

437. See *supra* notes 140-48 and accompanying text.

438. As Justice Thurgood Marshall recognized: "We are dealing in factors not easily quantified and, therefore, not easily weighed one against the other . . . each deserving of our most serious attention." *United States v. Robinson*, 414 U.S. 218, 254 (1973) (Marshall, J., dissenting).

439. See *supra* notes 252-73 and accompanying text.

jurisprudence. Therefore, all proposed street surveillance systems must pass a strict scrutiny analysis.<sup>440</sup>

Second, the court will examine a police department's showing of probable cause to justify each particular surveillance proposal.<sup>441</sup> Probable cause has been defined as a standard where the facts and circumstances are sufficient to warrant a reasonable person of reasonable caution to believe that objects are located at the place to be searched.<sup>442</sup> The probable cause and strict scrutiny tests are both necessary because strict scrutiny, for example, would require a showing that a compelling government interest exists in prohibiting a specific drug trafficking problem and that this interest outweighs an individual's fundamental right to privacy. However, the probable cause test forces police to narrowly target whom they want to film and describe what they reasonably believe they will find. Therefore, by applying both tests, a police department will need to overcome substantial constitutional hurdles to conduct any type of general surveillance.

The third part of this proposed statutory section provides for the use of a neutral magistrate, thereby preventing the practice of a police department using its own best judgment as to when video surveillance is appropriate.<sup>443</sup> Finally, this section provides that video surveillance should only be used when other methods are clearly not practicable. This heightened standard of clearly articulated necessity should increase in direct proportion to the intrusiveness of the technology being used.<sup>444</sup>

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440. See *supra* note 335 for different scrutiny tests.

441. By using a probable cause determination, the video surveillance can be seen as a "search." *Hawaii v. Bonnell*, 856 P.2d 1265, 1273 (Haw. 1993).

442. C. WHITEBREAD, CRIMINAL PROCEDURE § 5.03 (1990).

443. Allowing police officers, who are attempting to ferret out crime, to make such a surveillance judgment destroys privacy protection. *Dunaway v. New York*, 442 U.S. 200, 213 (1979). This section is also supported by statutes like a Massachusetts statute that prohibits the secret use of modern electronic surveillance unless conducted under strict judicial supervision and limited to the investigation of organized crime. MASS. GEN. LAWS ch. 272, § 99 (1994).

444. See *United States v. Tortorello*, 480 F.2d 764, 774 (2d Cir. 1973); *United States v. Messa Rincon*, 911 F.2d 1433 (10th Cir. 1990); *Greenfield*, *supra* note 3, at 1059. Moreover, when police make the argument that they could have gotten the same view by merely peeking over a fence, the government admits that video surveillance is not necessary because conventional surveillance would have sufficed. *Id.* at 1061.

- §4 To receive an order granting the use of video surveillance, operators must delineate specific targets, times, and goals of the surveillance. Upon the granting of an order to use video surveillance, operators must report to a neutral magistrate every ten days to prove by a showing of probable cause and compelling government interest why continued surveillance is necessary.

*Commentary*

This requirement will effectively rule out perpetual street camera surveillance systems found in at least fifteen cities because it will force the police to memorialize surveillance activities within the four corners of a document. This section will also guarantee that the government is not merely on a fishing expedition to infiltrate subversive groups or inhibit free expression.<sup>445</sup> This section will help eradicate the racist use of video surveillance as a protection device against blacks, hispanics, and other minorities. If the police only indicate a need to “spot crime,” this clearly will not be enough of a compelling government interest to override a citizen’s fundamental right to privacy. This prong establishes a perpetual judicial check and provides for a reshewing of the necessity and the likelihood of success each time the surveillance order is renewed. As previously mentioned, the police will need to meet both the strict scrutiny and the probable cause tests on a continuing basis. Police officers, under this section, must stop the video surveillance when the probable cause runs out or when the government interest is no longer compelling. Overall, this section seeks to eliminate egregious abuses of power as when a police department watches and films suspects for over a year with only a “hunch” as to potential illegal activity.<sup>446</sup>

- §5 Failure to comply in all respects with this statute will result in the unilateral suppression of the use of all improperly obtained video information in a judicial proceeding.

*Commentary*

This bright line rule establishes that if proper provisions were not followed in obtaining judicial permission for a video surveillance order, then all video evidence will be suppressed as fruit of a poisonous tree when introduced in court.<sup>447</sup> This all or nothing rule will create incredible motivation in the police

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445. Greenfield, *supra* note 3, at 1063.

446. Hawaii v. Bonnell, 856 P.2d 1265 (Haw. 1993). See *supra* notes 321-28 and accompanying text.

447. See *supra* note 321 (describing the fruit of a poisonous tree).

to properly obtain permission to conduct any video surveillance.<sup>448</sup> Although an exclusionary rule is currently being applied to certain types of electronic surveillance, this section unambiguously establishes that video surveillance evidence must always be excluded if police do not follow the statutorily established guidelines.<sup>449</sup> An exclusionary rule will have three main effects: (1) it will deter unreasonable use of video surveillance; (2) it will assure potential victims of unlawful government conduct that the government will not profit from its lawless behavior; and (3) it will create a dramatic increase in the amount of search warrants used for video surveillance in a field where nearly none were used before.<sup>450</sup> Certain jurisdictions may choose to extend a "good faith exception" to situations where police officers acted properly and followed every video surveillance guideline, but the magistrate made some error. However, such an exemption is beyond the scope of this Note.<sup>451</sup>

§6 Failure to comply in all respects with this statute shall be grounds for criminal penalties and employment discharge. Under no circumstances shall the contents of any captured video images be exploited for purposes of profit, publication, or distribution, and any such violation will carry a mandatory fine and prison sentence.

### *Commentary*

Although the police may be able to argue some qualified immunity defense, this section places the police in a position where a distribution violation could result in an officer's loss of employment, savings and freedom. This should provide police departments with enough incentive to develop some type of administrative check on police video surveillance activities for fear of vicarious tort liability and criminal sanctions.<sup>452</sup> This section is also intended to stop illegal pirate surveillance videos from surfacing. As statutory section one indicates, the surveillance power must be taken away from the average citizen.

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448. An exclusionary rule provides powerful incentive to promptly correct problems. *Arizona v. Evans*, 115 S. Ct. 1185, 1200 (1995) (Ginsburg, J., dissenting). However, if police are not trying to capture the person and introduce evidence, the exclusionary rule may present some inherent problems, but no more so than its current universal use under the Fourth Amendment. LAFAVE & ISRAEL, *supra* note 263, at 107-08.

449. One of the broad suppression applications of oral surveillance under Title III is that the exclusionary rule applies to all governmental judicial, quasi-judicial, and administrative proceedings. *KAMISAR ET AL.*, *supra* note 321, at 370. Such a rule for video surveillance would also be appropriate.

450. For a general discussion of the use of the exclusionary rule in criminal procedure, see LAFAVE & ISRAEL, *supra* note 263, at 107-08.

451. See generally *United States v. Leon*, 468 U.S. 897 (1984), for use of the good faith exception.

452. One possible check would be unannounced inspections to video surveillance monitoring stations. See Robb, *supra* note 3, at 602.

Once the surveillance devices are only controlled by trained professionals, a municipality will be much better situated to enforce guidelines about the distribution of surveillance tapes.

§7 Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any citizen to a deprivation of privacy through video surveillance as secured by the state constitution shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress.

### Commentary

This new tort will be similar to invasion of privacy torts for “ride along” or “reality show” cases by establishing a clear zone of privacy that surrounds the individual and cannot be pierced unless the model statute’s guidelines are explicitly adhered to.<sup>453</sup> This section will also be similar to §1983 interpretations<sup>454</sup> so that a municipality may rely upon civil rights jurisprudence in establishing the operation of this provision. Overall, this statutory exploitation provision will prevent opportunists from using street surveillance footage for rapacious profit while disregarding the privacy of innocent victims.<sup>455</sup>

## VI. CONCLUSION

Over twenty years ago, Justice Rehnquist stated that there exists “a rebuttable presumption that the government will know more about each of us than it did fifty years ago and that in a very real sense we will have much less privacy.”<sup>456</sup> As the Rehnquist Court continues to restrict privacy doctrine expansions, and a gridlocked Congress refuses to address privacy issues, the potential for the prophecy coming true is astounding. Justice Brandeis was equally prolific in recognizing that the progress of science is not likely to stop with wire-tapping,<sup>457</sup> and, indeed, the rapid expansion of technology will likely

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453. See *supra* notes 297-302 and accompanying text.

454. 42 U.S.C. § 1983 (1994). Section 1983 is the codification of a reconstruction era civil rights statute that gained its significance in the landmark decision of *Monroe v. Pape*, 365 U.S. 167 (1961). The Supreme Court has since vindicated the use of Section 1983 as an independent federal remedy against acts violative of state law. Several states have also incorporated a state civil rights statute that operates in conjunction with Section 1983. Section 1983 has become the most used statute in federal court when a person seeks a private right of action for civil rights violations committed by state actors.

455. See *supra* notes 165-69 (discussing Barrie Goulding’s “Caught in the Act” video).

456. Rehnquist, *supra* note 103, at 15.

457. *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

result in even greater intrusions than video surveillance in the future. As cities like Anchorage, Baltimore, Tacoma, and Virginia Beach turn to video surveillance, the threat becomes even greater that society is moving towards Huxley's and Orwell's nightmare.<sup>458</sup> The states need to be the leaders in the privacy protection revolution by moving towards new federalism and adopting model state statutes based upon explicit and inherent privacy rights in state constitutions.<sup>459</sup>

Privacy is a basic human need, and the states should adopt model statutes to protect the fundamental liberty interest in privacy from street video surveillance systems. Foreign examples and America's own sordid experience establishes that street video surveillance systems are exceedingly intrusive and inherently indiscriminate. This area of the law cries out for attention before it becomes impossible to correct the problem because the zones of privacy have dissipated. The silent unblinking lens of the camera must be stopped.<sup>460</sup>

Quentin Burrows

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458. See *supra* notes 187-227 and accompanying text.

459. See *supra* notes 252-73 and accompanying text.

460. "But it was all right, everything was all right, the struggle was finished. He had won the victory over himself. He loved Big Brother." ORWELL, *supra* note 155, at 245.

