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CONTINUOUS VIDEO SURVEILLANCE AND ITS LEGAL CONSEQUENCES
by Scott Sher

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Introduction

The use of continuous video surveillance of public areas does not raise significant legal obstacles. Although no courts have addressed this issue, under current Fourth Amendment, First Amendment and California tort law, video surveillance represents a valid use of a state's power to protect its citizens. Continuous video surveillance serves as a mechanical police officer. Video surveillance does not intrude upon an individual's sphere of privacy, rather, it records events occurring in public space for which individuals do not have reasonable expectations of privacy. Early reports from police departments in cities across the United States, including Redwood City in California, indicate that as a result of video surveillance, crime has been "significantly reduced."[1]

This paper will discuss potential wiretapping, First Amendment, Fourth Amendment, and tort law claims that may arise as a result of video surveillance. Additionally, the paper will discuss how courts have addressed similar issues throughout the country and predict how courts will address the legal issues surrounding continuous video surveillance in the future.

FEDERAL STATUTORY AND CONSTITUTIONAL CONSTRAINTS

I. Title I of the Electronic Communications Privacy Act

A. Silent Video Surveillance

Title I of the Electronic Communications Privacy Act ("Title I"),[2] limits law enforcement's ability to wiretap. Under Title I, police departments must obtain warrants prior to secretly intercepting some communications. Silent video surveillance on public streets does not have to comport with Title I because the Act only addresses devices which capture audio signals.

Title I does not mention silent video surveillance. Title I does prohibit a person from intentionally intercepting, or attempting to intercept, "any wire, oral or electronic communication. . . . "[3] "Wire communication" includes "any aural transfer made . . . through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception."[4]

However, the legislative history of Title I clearly indicates that silent videotaping does not violate the statute. The Senate noted that:

> if law enforcement officials were to install their own cameras and create their own closed circuit television picture of a meeting, the capturing of the video images would not be an interception under the statute because there would be no interception of the contents of an electronic communication.[5]

In fact, every circuit that has addressed the issue of silent video surveillance has concluded that Title I does not cover its use.[6]

B. Video Surveillance with Audio Capabilities.

Conversely, Title I does limit video surveillance with audio capabilities. Title I specifically states that it covers orders "authorizing or approving the interception of a wire or *oral communication.*"[7] In fact, the Supreme Court, in United States v. New York Telephone Company,[8] recognized that all audio surveillance falls within the ambit of Title III,[9] the predecessor statute to Title I. The Court, in holding that pen registers[10] do not implicate Title III, stated that pen registers "do not hear sound . . . . They do not accomplish the 'aural acquisition' of anything, [and they] present the information in a form to be interpreted by sight rather than by hearing."[11] In contrast, a device with audio capabilities falls within the rubric of Title I.

Thus, any continuous video surveillance that also has an audio component must comply with the

Title I. If a continuous video surveillance device can intercept sound, and the surveillance constitutes a search, the police must first obtain a warrant prior to the installation of the device. As will be discussed below, however, it appears that most video surveillance does not implicate the Fourth Amendment, and thus the limits of Title I will not present a concern for video surveillance even with audio capabilities.

II. Potential Fourth Amendment Implications of Video Surveillance of Public Streets.

The Fourth Amendment prohibits unreasonable "searches and seizures."[12] The Supreme Court case, Katz v. United States,[13] defined modern search law under the Fourth Amendment. In Katz, the Supreme Court declared that "the Fourth Amendment protects people, not places."[14] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," *but,* "what he [that person] seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." [15]

The Supreme Court has adopted a two-part test to determine whether or not policy activity constitutes a search of an individual: (1) Has the individual manifested a subjective expectation of privacy? and, (2) Is society prepared to recognize that expectation as reasonable or legitimate?[16] This test balances the privacy interests of individuals against society's desire to maintain effective law enforcement.[17]

A. Video Surveillance Of Public Streets.

1. *The Prevailing View: Video Surveillance Does Not Violate The Fourth Amendment*.

Individuals have no reasonable expectation of privacy on public streets and thus their activities are not protected under the Katz test.[18] "Generally, one walking along a public sidewalk or standing in a public park cannot reasonably expect that his activity will be immune from the public eye or from observation by the police."[19] As recognized by the Supreme Court in United States v. Knotts:

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [an individual] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of what ever stops he made, and the fact of his final destination when he exited from public roads onto private property.[20]

Furthermore "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded to them."[21] Courts, for the most part, have allowed police to employ videotaping to view individuals on public roads.[22] Transactions in plain view in a public forum simply do not implicate the Fourth Amendment.[23]

In United States v. Sherman, the Court of Appeals for the Ninth Circuit, in an unpublished decision held that individuals videotaped in public view have no reasonable expectations of privacy, and could not challenge the government's use of the videotape at trial as violating the Fourth Amendment. The court reasoned that:

> The transaction took place in plain view in a public place along a highway. Everything that was captured by the camera could just as easily have been seen by a person hiding in the trees where the camera was located. Videotaping of suspects in public places . . . does not violate the fourth amendment; the police may record what they normally may view with the naked eye.[24]

2. *The Minority View: The Fourth Amendment Is Violated.*

At least one commentator, however, has argued that the technological impact of continuous video surveillance may raise significant privacy concerns related to the Fourth Amendment.[25] The theory rests upon the individual's "lack of awareness of technological advances and possibilities."[26] Because, in general, people "do not understand the sophistication of--and therefore the potential for intrusion in--modern surveillance techniques,"[27] those people have manifested: (1) a subjective expectation of privacy, which (2) society should be prepared to accept as reasonable.

Video surveillance, it is argued, constitutes a search in violation of the Fourth Amendment, because video surveillance enhances law enforcement's ability to visualize an individual's activity and these cameras can be surreptitiously placed outside of public view:

> If an enhancement device is used, a search has taken place. Without the enhancing devise, the activity in question would not have been espied. . . . If a video camera can zoom in to focus on facial expressions, a license plate, or a letter we may be carrying, can we really claim that the cameras merely see what the beat cop would see if he was on a street corner?[28]

Moreover, it is argued, that law enforcement must possess an individualized suspicion prior to monitoring individuals.[29] In Ybarra v. Illinois, the Supreme Court held that the police cannot engage in a search of everyone in a particular establishment, merely because they have reason to believe that one individual at that location was involved in criminal activity.[30] Rather, the police must have an "individualized suspicion" that each person whom they decided to search was involved in criminal activity.[31] Because video surveillance acts as "mass monitoring" of citizens, law enforcement does not possess individualized suspicion and the surveillance violates the Fourth Amendment.[32]

However, in order for this theory to be valid, a court must first determine that the use of video cameras constitutes a search. If the video monitoring constitutes a search, then under the Supreme Court's requirement of "individualized suspicion," the search would violate the Fourth Amendment. Granholm's argument that continuous video surveillance constitutes a search in violation of the Fourth Amendment has not been accepted by any court to date. Because most courts recognize the inherent need for such devices to protect the public, and because the use of video surveillance only monitors individuals in public places, courts have held that such devices do not violate the Katz definition of a search.[33]

B. Possible Restrictions on Public Video Surveillance.

Based on Katz and its progeny, it appears that current Fourth Amendment jurisprudence would allow fixed video surveillance of public spaces.[34] However, rotating cameras that videotape activities occurring on private property and cameras possessing superior vision-enhancing devises may raise Fourth Amendment concerns. While the majority of courts have determined that rotating cameras and cameras equipped with superior visual devices will not raise Fourth Amendment issues, some courts have found similar devices to violate the Fourth Amendment.

1. *Rotating Cameras and the Fourth Amendment*

Non-technologically-enhanced surveillance by the government of activities occurring within an individual's house may constitute a search in violation of the Fourth Amendment. The Supreme Court has decided a series of cases regarding non-technologically-enhanced aerial surveillance by law enforcement, and has developed a test to determine if such surveillance would constitute a search in violation of the Fourth Amendment: (1) Does the surveillance occur from public navigable airspace? and, (2) Is the surveillance conducted in a physically non-intrusive

manner?[35] In the cases of rotating video cameras, the test would have two similar elements: (1) Does the video surveillance occur from publicly accessible space? and, (2) Was the surveillance non-intrusive? If both parts of the test are satisfied, and the activity does not violate a reasonable expectation of privacy, the video surveillance is not a search.[36]

While Fourth Amendment issues regarding continuous rotating video-surveillance cameras have not been adjudicated,[37] similar issues have arisen in lower courts. For example, courts have had to decide whether an officer violates an individual's Fourth Amendment rights when he views a residence through a telescope or binoculars from a public place.[38] Most lower courts have held that such surveillance does not violate the Fourth Amendment, because officers utilizing these visual enhancing devices do so within publicly accessible spaces, and because the devices are physically non-intrusive. In Fullbright v. United States, the Court of Appeals for the Tenth Circuit upheld a warrantless binocular surveillance of a home.[39] The court in Fullbright reasoned that because the surveillance occurred from public space, and because the surveillance did not physically intrude upon an individual's home, no violation of the Fourth Amendment occurred.[40]

Some courts, however, disagree. These courts have determined that the viewing of a home with binoculars or a telescope violates the Fourth Amendment. In United States v. Taborda,[41] the court held unconstitutional observations made by Drug Enforcement Agents with the aid of telescopic binoculars. The Taborda court noted that there was a high level of privacy expectation in an individual's home, and there existed a presumption of unconstitutionality of surveillance employing technologically enhanced devices.[42] The dissent, quite curtly, summarized the position of a majority of courts: "In my judgment there can be no reasonable expectation of privacy with respect to what can be seen by means of a long-familiar and generally used optical instrument."[43]

Based on Supreme Court precedent, as well as most lower court decisions, it is reasonable to conclude that rotating video cameras which have the capability of viewing activity occurring on an individual's private property would not violate the Fourth Amendment. First, the cameras would presumably be placed in publicly accessible space -- on a telephone pole, in a tree or at a bus depot -- and moreover, the camera would not physically intrude on an individual's private property. Thus, rotating video cameras viewing criminal activity occurring on an individual's private property -- in her living room while the shades are open, in an apartment lobby or in a car -- would not be a search, and the Fourth Amendment would not apply.

2. *Video Cameras with sensory-enhancing devices*

Some argue that cameras equipped with sensory enhancing devices that would enable law enforcement to view more than what the naked-eye or binocular enhanced surveillance would allow, violates the Fourth Amendment. For example, video cameras equipped with a device to penetrate tinted windows in an automobile or to discern the masked happenings in an apartment with clouded windows may constitute a search.

A search that reveals information within a private place that could not be discerned by the naked eye violates the Fourth Amendment protection against unreasonable searches.[44] In United States v. Karo, the Supreme Court held unconstitutional the monitoring of the movement of a container of chemicals inside various houses by the police. The Court concluded that "[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."[45] While binoculars magnify, they only have the capability of viewing events exposed to the public. If the shades are closed in an apartment, even very strong binoculars could not penetrate that shield. However, if a video camera had an infrared filtering device that had the capability to view things that a reasonable person sought to eliminate from public view, Fourth

Amendment concerns would arise.

III. Video Surveillance and the "Chilling Effect."

The secrecy of video surveillance may raise certain chilling effects associated with violations of the United States Constitution's First and Fourth Amendments. An individual may never know if law enforcement monitors her actions with the use of video surveillance. "Accordingly, all members of the community, law abiding citizens as well as criminals, may constantly fear ongoing law enforcement surveillance. . . . The Supreme Court has recognized the concerns raised by secret search techniques, noting that such undisclosed searches may have a chilling effect on First Amendment rights."[46]

The Supreme Court has found that constitutional violations may arise from the chilling effect of government regulations.[47] In none of those cases, however, did the unconstitutional chilling effect arise simply from "the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual."[48] Rather, in order for a private individual to be able to challenge an activity as violating the First Amendment, an individual must "show that he has sustained, or is immediately in danger of sustaining a direct injury as a result of that action."[49] Additionally,

> the existence of a “chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where [the state action] does not directly abridge free speech, but--while regulating a subject within the State's power--tends to have the incident effect of inhibiting First Amendment rights, it is well settled that the [state action] can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.[50]

This two part test relies on an objective, not subjective analysis.[51] Thus, in order to show that a first amendment violation has arisen as a result of law enforcement's use of video surveillance, an individual must show: (1) actual, objective harm, and, (2) that the restriction on speech is severe, and not outweighed by a legitimate government interest.

First, showing actual, objective, harm may be an insurmountable task for an individual challenging the constitutionality of video surveillance. In order to sustain a First Amendment claim of a "chilling effect," an individual must prove that she experienced actual mental anguish or distress as a result of the surveillance.[52] Since police officers already patrol the streets, it seems inconceivable that a court would consider a video camera which "observes" the same public area could harm an individual.[53]

Second, the protection of the public from crime outweighs any potential restriction on an individual's speech as a result of video surveillance. Video surveillance has been recognized as one of the most mentally disconcerting forms of monitoring performed by the government.[54] In fact, the Fifth Circuit has noted that "this type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the specter of the Orwellian State."[55] However, the protection of individuals from harm and crime is considered a paramount concern of the state,[56] and legislatures have broad powers to protect communities from harm.[57] Thus, even if an individual can show the severe intrusion of privacy rights by the government, in order to sustain a claim of a "chilling effect," an individual would have to overcome the state's legitimate interest in curtailing the crime rate.

POTENTIAL TORT LIABILITY

California courts have recognized an action under tort law for the invasion of an individual's privacy.[58] Traditionally, the right to privacy encompasses four distinct torts: (1) unreasonable intrusion into a person's solitude or into her private affairs; (2) publicity which places an individual in false light in the public eye; (3) public disclosure of true, embarrassing facts; (4) unauthorized commercial use of an individual's personage.[59] Public video surveillance can only encompass the first of these privacy torts.[60] Thus, only if a court considers the use of continuous video surveillance an unreasonable intrusion into a person's private affairs would a municipality have concern about tort liability.

Under current California law, it is apparent that use of video surveillance would not give rise to a cause of action for the invasion of an individual's privacy under tort law.

First, the use of continuous video surveillance occurs on public streets. California courts have been reluctant to expand tort liability to cover an individual who knowingly exposes herself to the public view.[61] In fact, in Aisenson v. American Broadcasting Co., Inc.,[62] a California court held that the videotaping of an individual on a public street did not constitute an unreasonable intrusion into that person's solitude. The court stated that

> the right to be secure from intrusion is not absolute: one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[63]

However, where an individual subjects herself to the public view by, for example, parking her car on a public street, no invasion of privacy occurs if her activity is videotaped. The Aisenson court further noted that even video cameras with sensory enhancing devices do not give rise to tort action if the use of video taping occurred in a public forum, such as a city street. This is permissible because the individual was in public view.

Second, video cameras do not physically intrude into a person's sphere of privacy, and any invasion of privacy is minimal. Thus, because video surveillance occurs in a public forum -- a city street -- and because the surveillance is physically non-intrusive, tort liability would be precluded under current California tort law.

CONCLUSION

Continuous video surveillance does not implicate First Amendment, Fourth Amendment, or tort law concerns. Even though courts have not addressed the precise question as to whether or not continuous video surveillance would survive legal scrutiny, past Supreme Court and lower court decisions strongly suggest that this type of police monitoring is a valid exercise of a state's police powers.

Footnotes

1. 2/8/96 Star Trib. (Minneapolis-St. Paul) 16A. back to text

2. 18 U.S.C. § 2510. back to text

3. 18 U.S.C. § 2511(1)(a). back to text

4. 18 U.S.C. §2510(1). Additionally, oral communications are defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such

expectation . . . ." 18 U.S.C. § 2510(2). back to text

5. S.Rep. No. 541, 99th Cong., 2d Sess. 16-17. back to text

6. See, e.g., United States v. Falls, 34 F.3d 674, 679 (8th Cir. 1994); United States v. Biasucci, 786 F.2d 504, 508,09 (2d Cir. 1986); United States v. Torres, 751 F.2d 875, 879 (7th Cir. 1985). back to text

7. 18 U.S.C. §2510 (emphasis added). back to text

8. 434 U.S. 159 (1977). back to text

9. Title III, for purposes of audio and video surveillance is the same statute as Title I. back to text

10. Pen registers record phone numbers that a telephone subscriber is dialing. back to text

11. Id. at 167. back to text

12. U.S. Const., amend. IV. back to text

13. 389 U.S. 347 (1967). back to text

14. Id. at 359. back to text

15. Id. back to text

16. See Katz, 389 U.S. at 361 (Harlan, J., concurring); Smith v. Maryland, 442 U.S. 735 (1979). back to text

17. See Berger v. New York, 388 U.S. 41, 53 (1967). The Berger Court noted that the goal of the Fourth Amendment was as follows:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men. back to text

18. See California v. Ciraolo, 476 U.S. 207, 213-14 (1986); Illinois v. Andreas, 463 U.S. 765, 771 (1983). back to text

19. McCray v. State, 581 A.2d 45 (Ct. App. Md. 1990). back to text

20. 468 U.S. 276, 281-82 (1983). back to text

21. 468 U.S. at 282; see United States v. Jones, 31 F.3d 1304, 1317 (4th Cir. 1994) (Ervin, C.J., concurring in part). back to text

22. United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991); United States v Broadhurst, 805 F.2d 849, 855-56 (9th Cir. 1986). back to text

23. United States v. Sherman, 990 F.2d 1265 (9th Cir. 1993). back to text

24. 990 F.2d at 1265 (internal quotations omitted) (citing United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991)). back to text

25. Jennifer Mulhern Granholm, Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches, 64 U. Det. L. Rev. 687 (1987) (hereinafter "Granholm"). back to text

26. Id. at 695. back to text

27. Id. back to text

28. Id. back to text

29. Ybarra v. Illinois, 444 U.S. 85 (1979). back to text

30. Id. at 89. back to text

31. Id. back to text

32. Granholm, supra note 25, at 702. back to text

33. See generally United States v. Sherman, 990 F.2d 1265, 1265 (9th Cir. 1993) (unpublished decision) (holding that because individuals were standing on a public street, everything caught on video was constitutional, because there is no Fourth Amendment right to be free from surveillance in any public area). back to text

34. See id. back to text

35. Florida v. Reilly, 488 U.S. 445 (1989); California v. Ciraolo, 476 U.S. 207 (1986). back to text

36. If an individual has a reasonable expectation of privacy, and the government breaches that reasonable expectation, then the activity would violate the Katz test. See supra part II.A. back to text

37. Interestingly, in cities such as Redwood City and Baltimore, where video and audio surveillance is underway, law enforcement agents note that they can focus their sensors to listen to conversations inside houses, or tilt their cameras to look inside windows. 2/8/96 Star. Trib. (Minneapolis-St. Paul) 16A. back to text

38. See Note, Telescopes, Binoculars and the Fourth Amendment, 67 Cornell L. Rev. 379 (1982); see also On Lee v. United States, 343 U.S. 747, 754 (1952) ([t]he use of bifocals, field glasses or the telescope to magnify the object of a witness's vision is not a forbidden search"). However, the applicability of On Lee is in question, since it was decided before Katz, and well before the advent of video-cameras. back to text

39. 392 F.2d 432, 434 (10th Cir. 1968); see United States v. Christensen, 524 F. Supp. 344, 346-48 (N.D. Ill. 1981); United States v. Grimes, 426 F.2d 706, 708 (5th Cir. 1970). back to text

40. Id. back to text

41. 635 F.2d 131 (2d Cir. 1980). back to text

42. Id. at 135-37. back to text

43. Id. at 140 (Dumbauld, Sr. District Judge, dissenting). back to text

44. United States v. Karo, 468 U.S. 705 (1984). back to text

45. Id. at 722. back to text

46. David E. Steinberg, Making Sense of Sense-Enhanced Searches, 74 Minn. L. Rev. 563, 570-71 (1990); see Laird v. Tatum, 408 U.S. 1, 11 (1972); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); Karo, 468 U.S. at 735 (Stevens, J., dissenting).

47. See, e.g., Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

48. Laird, 408 U.S. at 11.

49. Id. at 12 (quoting Ex parte Levitt, 302 U.S. 633, 634 (1937) (internal quotations and punctuation omitted)).

50. Granholm, supra note 25, at 710 (quoting Younger v. Harris, 401 U.S. 37, 51 (1971)). back to text

51. United Public Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947). back to text

52. Laird, 408 U.S. at 10. back to text

53. Additionally, courts have never sustained a First Amendment claim when law enforcement make use of undercover agents in public areas. Granholm, supra note 20 at 708. back to text

54. United States v. Cuevas-Sanchez, 821 F.2d 248, 50-51 (5th Cir. 1987); Ricks v. State, 537 A.2d 612 (Md. 1988). back to text

55. Cuevas-Sanchez, 821 F.2d at 50-51; see also United States v. Torres, 751 F.2d 875, 877 (7th Cir. 1984) (noting that video surveillance is "reminiscent of the 'telescreens' by which 'Big Brother' in George Orwell's 1984 maintained visual surveillance of the entire population . . ."). Note, however, that courts at the same time, do not find these devices physically intrusive for purposes of the Fourth Amendment. See Torres, 751 F.2d at 874. back to text

56. See generally Addington v. Texas, 441 U.S. 418, 430-31 (1979) ("[T]he state has authority under its police power to protect the community from the dangerous tendencies of some" individuals.). back to text

57. Accord Jacobson v. Massachusetts, 191 U.S. 11, 25-29 (1905); Hawaii v. Standard Oil Co., 405 U.S. 251, 257-59 (1972); Mormon Church v. United States, 136 U.S. 1, 56-58 (1890). back to text

58. See, e.g., Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). back to text

59. See Johnson v. Hartcourt, Brace, Jovanovich, Inc., 43 Cal. App. 3d 880, 885 (2d Dist. 1975). back to text

60. The other three privacy torts generally relate to the publishing of information that is either untrue, or unnecessarily intrusive into an individual's private life. Most often, these individuals are professional athletes, actors and other high-profile individuals. back to text

61. People v. Triggs, 26 Cal. App. 3d 381 (1972) (no privacy right for an individual making use of the public portion of a public restroom). back to text

62. 220 Cal. App. 3d 146 (2d Dist. 1990). back to text

63. Id. at 161. back to text