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The University at Odds with Itself: Furtive Surveillance on Campus

A REPORT FROM COMMITTEE A

Committee A on Academic Freedom and Tenure was recently asked its opinion of furtive surveillance on campus as a means of detecting violations of university rules. The occasion to consider the general question arose from a specific incident, the approximate facts of which are restated in the following report. After a lengthy discussion within Committee A, Professor William Van Alstyne was asked to draft a statement reflecting the Committee's views. The statement, approved at the November, 1982, meeting of Committee A, is being published for the information of the profession. It is in a style uncharacteristic of Committee A reports, in order that the reader might share the process that the Committee itself pursued in coming to terms with the general issue.

Associate General Secretary Jordan E. Kurland advised the Committee of the following case, with the request that the Committee consider its implications more generally:

Professor _____ called to report that the administration of his institution has invited him to resign, that he has refused, and that it has now instituted formal proceedings to dismiss him. He said that the case has been submitted to a preliminary committee of the faculty which has met with the administration and now wishes to meet with him. He said that he has engaged legal counsel who has requested that the meeting with the committee be deferred to give him and his counsel an opportunity to prepare.

The administration's cause of action, according to Professor _____, relates to an incident which occurred six months earlier. He is supposed to have given a student the answer sheet to an examination late one evening. The next morning the student took the examination and scored 100 on it. The student subsequently asserted that he helped himself to the answers when no one was looking and did not receive them from Professor _____, but the administration claims it has videotape, made from a hidden camera, that shows the professor handing the answers to the student.

The incident described may appear to trigger a complicated series of questions, the answers to which would appropriately provide a response to the basic question as to whether, under the circumstances, the videotaping was or was not improper. Among those more particular questions would be the following:

1. *Where did the taping occur?* Consider, for instance, the apparent distinctions among the following possibilities. Was the concealed camera: (a) secreted within the professor's own office; (b) behind a grill in a departmental anteroom used more generally; (c) hidden in a traffic corridor of a building generally devoted to classrooms and offices; (d) concealed within a classroom? The question seems plainly important insofar as the location of the device of covert surveillance may help determine the degree of "chill" to academic freedom.

2. *What more particular circumstances preceded the placement of the concealed camera?* Was it: (a) pursuant to a general policy according to which such cameras were permanently installed as part of a continuing and ubiquitous surveillance scheme; (b) in response to an *ad hoc* policy arising from concerns respecting the frequency of violent crime at certain locations and particular times on the campus; (c) installed after specific incidents focusing warranted suspicion on an identified member of the faculty, thus supplying plainly probable cause to believe that unprofessional and/or criminal misconduct were involved? The question seems plainly important as one might attempt to balance the actual threat to academic freedom against the degree of good faith effort by the institution to ascertain the truth of matters of obvious and vital concern to the college or university as a whole.

3. *Pursuant to whose determination was the concealed camera installed?* Was the decision made by: (a) a campus public safety office left to its own discretion; (b) the college or university president; (c) an *ad hoc* committee of three, including a member of the law faculty, a member of the humanities faculty, and the dean of students, acting pursuant to written, published guidelines? This question, too, would seem to have its own, self-evident

importance, as it bears upon the academic community's awareness of the policy and the community's reason for confidence or for lack of confidence respecting the (authorized) uses of these devices.

4. *What participating role, if any, did the faculty and/or the student body have in the decision that established the college or university policy on furtive surveillance? Was it:* (a) none at all; (b) consultative but not determinative; (c) a policy that was itself adopted on joint faculty-student initiative? This question, too, would appear to be important, insofar as it seeks to measure the perception of those whose own academic freedom is most at stake.

5. *What is the status of this taping under the law? Is it:* (a) forbidden by state or federal statute; (b) in conformity with fourth amendment requirements [is the institution private, or is it public?]; (c) a common law tort; (d) prompted by a suspected infraction of a major felony statute as distinct from a transaction not itself a legal offense but nonetheless involving serious and highly unprofessional conduct? This last question, too, surely must be germane. Congruence or incompatibility of the practice with the positive law may obviously determine certain practical matters that the college or university cannot ignore, such as financial liability, possibly even evidentiary uses of the material. Additionally, it may also tend to inform one's own views respecting the propriety or impropriety of what was done, as well as to reflect how others might regard the institution as either caring about or being indifferent to the criminal or civil misdeeds of its own community.

And, of course, this tentative list of clarifying questions need not be regarded as exhaustive. Certainly additional subsidiary questions might occur to many thoughtful persons.

This mode of proceeding on problems of this general kind may appear characteristic of, and appropriate for, the American Association of University Professors. The Association is zealously concerned with the protection of academic freedom, but it is not an apologist for rankly unprofessional conduct. Certainly it is not "neutral" on questions of professional ethics, and it is not indifferent to the need to protect students from professorial misconduct, the need to protect people from serious crimes on campus, or the social interest in having truth come out in whatever university hearings or civil or criminal trials are otherwise warranted. So, it may logically seem, what is needed is a careful development of policy respecting furtive surveillance on campus, much along the line implied in the list of questions just enumerated.

But, in fact, we think not. Rather, we think the appropriate policy for the Association to recommend is that academic institutions forswear the advantages of covert surveillance and not themselves seek to spy upon anyone within that community. The technology of furtive surveillance, from the simplicity of binoculars through the subtleties of parabolic microphones, remote receivers, miniaturized cameras—the whole array of furtive wonders—is to be legislated against

rather than to be legislated. Nice distinctions respecting "expectations of privacy" (one has it in her office, but not in the cafeteria?—one has it in his classroom, but not in the campus garden?) are to be eschewed. The university is not exempt from the general law, and thus may not be able to claim that a "bug" cannot be installed on a telephone on campus by a police technician acting under a prosecutor's direction backed by a judicial warrant. But a university will not itself install such a device in policing its own rules. And it will itself take no first step to break with a uniform understanding that *an academic community will not subject its members to the debilitating inhibitions and anxieties of covert surveillance.*

There are, of course, at least two branches to the issue of surveillance. With respect to one branch, we think the proper policy is an absolute prohibition of *furtive surveillance on campus by the college or university itself.* We cannot now think of a case sufficient to overcome the wisdom of an assurance that matters within a university are as they seem, i.e., that there is nothing concealed, nothing secreted, that the place where one finds oneself is never other than as it appears to be. Tricks, deceptions, illusions, constitute no part whatever of an academic community's practice toward those who find themselves in that community.

A second branch of the issue, the *open* installation and use of surveillance devices, seems to us to raise excellent questions themselves very serious, but serious as a separate subject and not as a part of this one. A videotape camera may be conspicuously fixed in a place beside the sole check-out desk of a university library, and not of itself raise the same degree of apprehension as a similar camera conspicuously fixed in place in a classroom, an office, or a gateway to the university itself. A student with an appointment who brings along a tape recorder and advises a faculty member that he or she wishes to record the ensuing conversation poses a perplexing issue, even as would be true were it not a tape recorder but, rather, a friend or even an attorney—whom the student discloses to be an attorney. These problems are independently genuine, and some of them may be genuinely hard. Their resolution does not, however, require any "bending" or exception of a uniform policy that a university will not engage in furtive or surreptitious monitoring of the university, whether by the primitivism of human beings lurking beneath eaves or the sophistication of electronic genius. What a university should want to teach, it should be prepared also to teach by example. Respectfully, we do not think that the example of Orwellian uncertainty is an example of an academic community.