

Up-skirting and Camera Phones

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Abstract

Cellular phones have become common place in U.S. culture, and college students' phone practices follow national trends. However, the use of cell phones today transcends traditional phone calling and voice messaging. In particular, camera phones enable the act of up-skirting, or taking inappropriate pictures unbeknownst to a victim. Up-skirting poses significant challenges to institutions of higher education by raising new issues regarding student privacy rights, causing legal implications of inappropriate photographing, and creating the need for effective campus policies. The authors review current trends of institutional responses, suggest points of consideration for policy-making, and share proactive planning techniques designed to assist with the elimination of up-skirting issues within higher education.

Up-skirting and Camera Phones

According to recent studies, over half, and potentially as many as 3 quarters, of traditional college-age students own a cellular phone (Marklein, 2003; Summerville, 2003). These substantial numbers illustrate the growing trend in cell phone use on college and university campuses. Marklein found that some institutions no longer use landline phones in the residence halls due to waning demand from students. At other institutions, collaboration occurs between institutions and cell phone providers in an effort to offer students the services that best meet their needs (Marklein). The high volume of cell phone use at institutions of higher education is noteworthy, but the trends suggest students use portable phones for more than traditional phone service.

The accessories offered to accentuate ordinary cell phones attract a large portion of consumer attention. According to a Verizon Wireless associate, individuals often express interest in selecting add-ons for their phones, including ring tones, games, faceplates, and headsets (Summerville, 2003). A new addition to this list of options is camera phones, which according to recent reports, “are already outselling digital cameras” (Edwards, 2003, ¶ 6). The Yankee Group and Strategy Analytics, research analysts in the technology field, project that within the next three years nearly half of all cell phones will include a camera (Edwards). However, as with most technological advancements the infusion of camera phones into society presents a variety of new challenges and ethical issues. Institutions of higher education are finding that, “the problem with a new technology is that society has yet to come up with a common understanding about appropriate behavior” (Camera phones incite bad behavior, 2003).

Specifically, camera phones present the potential for misuse as seen through the rising trend of up-skirting.

ABC News (2004) describes up-skirting as “a form of voyeurism in which peeping toms either secretly rig up a system of mirrors and hidden video cameras, or simply crouch down with a camera, in order to secretly shoot up a woman’s skirt” (¶ 2). Small, inconspicuous devices such as camera phones enable up-skirting to occur on college campuses both with more ease and frequency. Due to the violating nature of the behavior, one might assume it is both inappropriate and illegal. Surprisingly, legal issues associated with high-tech voyeurism, or the act of deriving “sexual gratification from observing the naked bodies or sexual acts of others, especially from a secret vantage point” (Websters, 2000, n.p.), are quite complicated.

Incidents on College Campuses

In September 2004, both Cornell University and Ithaca College were faced with a violating incident of video-voyeurism affecting their students (James, 2004). A landlord, serving students from both institutions, was charged with placing small cameras in the bathrooms of the apartments he leased to college women in the area. Although New York State considers video voyeurism a felony, the institutions must now respond to the fears and anxieties of the students (James).

At Bowling Green State University (BGSU), Information Technology Services (ITS) maintains a web site that discusses the university’s dilemma surrounding the use of camera phones (ITS Information Security and Privacy, n.d.). Nationally reported incidents involving camera phones raised concern at BGSU and commanded a response from university officials. By providing various articles and examples of incidents facing

other institutions and organizations, as well as how the campus is responding to the issues of up-skirting, BGSU acknowledges its predicament and demonstrates an effort in working toward a solution.

Finally, an internet search about up-skirting will uncover numerous stories and incidents on college campuses. Many websites are dedicated to displaying inappropriate pictures taken of students on college campuses unbeknownst to the victims. Voyeuristic websites are often used to share pornographic pictures taken specifically with camera phones. These websites illustrate the prevalence of up-skirting and the need to address the issue.

Legal Issues to Consider

As many institutions have uncovered, the legal issues associated with up-skirting involve a person's right to privacy in both public and private places. For example, in the state of Washington the physical location of the individual being photographed rather than the part of the body captured became the determining factor in a court of law (ABC News, 2004). In 2004, the Washington State Supreme Court found the following:

The state's voyeurism law protects people who are in a place where they 'would have a reasonable expectation of privacy,' such as undressing while by themselves in an area where they could expect to be free of intrusion or surveillance. (ABC News, ¶ 9)

As a result, the law in Washington does not protect individuals from being photographed in a public place. This interpretation of high-tech voyeurism is not shared nationwide, which complicates the ability to consistently address the matter.

Legal or Illegal

Throughout the country a variety of viewpoints exist, several of which consider up-skirting to be illegal. For instance, “Texas is one of only four states that have now made it a crime to secretly photograph people for sexual purposes” (Click2Houston.com, 2004, ¶ 16). This decision evolved as a result of several businesses struggling with up-skirting and led to the establishment of consistent policies. For example, steps are being taken to ensure the physical comfort of individuals using sports clubs and gyms. Because of concerns regarding inappropriate camera phone use, “camera-equipped cell phones have been banned at all 300 clubs in the 24 Hour Fitness chain nationwide” (Searing, 2003, ¶ 7). Institutions of higher education are using the private sector as a guide, illustrated by the Ohio State University, which began deliberations about banning camera phones in work-out facilities (McIntyre, 2003). Such actions demonstrate the widespread incidence of high-tech voyeurism, along with the importance of creating policies to handle inappropriate camera phone use.

Legislation

Inconsistent state laws protecting victims of up-skirting caused federal lawmakers to create new legislation. The Video Voyeurism Prevention Act of 2004, referred to as the anti-snooping bill, is currently being debated by the 108th Congress after being put forth and passed by the Senate. This amendment to Title 18, outlining Crimes and Criminal Procedures, appearing as Section 1801, would be dedicated to video voyeurism and states:

- a. Whoever, in the special maritime and territorial jurisdiction of the United States, has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under

circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.

b. In this section—

1. the term `capture', with respect to an image, means to videotape, photograph, film, record by any means, or broadcast;
2. the term `broadcast' means to electronically transmit a visual image with the intent that it be viewed by a person or persons;
3. the term `a private area of the individual' means the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual;
4. the term `female breast' means any portion of the female breast below the top of the areola; and
5. the term `under circumstances in which that individual has a reasonable expectation of privacy' means—
 - A. circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the individual was being captured; or
 - B. circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place.

c. This section does not prohibit any lawful law enforcement, correctional, or intelligence activity.

d. Amendment to Part Analysis- The table of chapters at the beginning of part I of title 18, United States Code, is amended by inserting after the item relating to chapter 87 the following new item: --1801. (108th Congress of the United States of America, 2004, n.p.)

Regardless of future action taken, the legal management of high-tech voyeurism has been reactionary thus far. As a result, it is necessary for institutions of higher education to consider the issue and determine what, if any, action needs to be taken in an effort to appropriately manage this new trend on their campuses.

Potential Responsibility

It is important to determine the legal frame of reference within the college and university setting when addressing the crime of up-skirting, specifically when it comes to negligence. Various institutions have faced charges of negligence when a student was injured or harmed by a person, place, or thing that would, to the average individual, be perceived as presenting a reasonably foreseeable harm (Kaplan & Lee, 1995). Institutions ignoring any issue that raises potential harm to a student may be held responsible for negligence if it can be determined by a court of law that the institution had a duty to respond and the issue was foreseeable. In general, issues involving reasonably foreseeable harm are dealt with in regard to a specific individual or situation, unlike the common, everyday use of cell phones. Circumstances of negligence are dealt with on a case-by-case basis, thus institutions need to consider previous instances of up-skirting to develop policies and procedures for their individual campuses.

Avoiding negligence can be difficult and it is nearly impossible to create guidelines and expectations to prevent liability issues entirely. While institutions cannot protect students from random acts of violence or unforeseeable accidents, it is important they make an active attempt to prevent reasonably foreseeable harm (Kaplan & Lee, 1995). For example, in the case of up-skirting, unless an individual displayed voyeuristic behavior in the past, it would be difficult for the college or university to reasonably foresee such behavior. However, if a student did show signs of voyeuristic tendencies and no action was taken, the university is likely to incur some liability in the event of an incident of up-skirting. In addition to the importance of avoiding liability whenever possible, the implications of the less literal and more philosophical concept guiding institutional action, *in loco parentis*, must be considered when responding to up-skirting issues on campus.

The Unwritten Responsibility of the University

The concept of *in loco parentis* has existed since colonial times and gave colleges and universities the freedom “to develop and enforce rules and regulations as if they were the parents” (Komives & Woodard, 2003, p. 66). According to Komives and Woodard, by the 1960s colleges and universities began fostering student independence, as the philosophy of *in loco parentis* became less influential. However, the concept of universities as parents appears to be increasing as campus officials respond to the needs of the current generation of college students, the Millennials (Howe & Strauss, 2000). The rise of *in loco parentis* may have great implications for institutions of higher education, particularly surrounding their responsibility to respond to incidents of up-skirting.

The term *Millennial* is used to define the generation of students born in the 1980s and 1990s (Howe & Strauss, 2000). Millennials are described by Howe and Strauss as optimistic and productive individuals who place emphasis on pleasing and trusting in authority figures. The Millennial generation is considered the “most watched-over generation in memory” (Howe & Strauss, n.p.). Since Millennials rely on relationships with clearly defined authority figures, there appears a demand for more structure and protection at institutions of higher education. As a result, the role of the university may need to be reevaluated in terms of today’s traditional college-age students and their specific needs. More specifically, proactively responding to the needs of the Millennial generation and the concerns of up-skirting may require the use of specific guidelines and policy enforcement.

Recommendations

Although institutions may not be able to anticipate specific instances of high-tech voyeurism, it is possible for colleges and universities to make students, staff, and faculty aware of potential risks. It is realistic to expect institutions to make appropriate changes in response to incidents of up-skirting in order to ensure campus safety. Moreover, it is important to combine awareness campaigns with policy changes to provide information on the trend of up-skirting, as well as to set expectations for appropriate camera phone use within the campus setting.

Policy Adaptation

When planning for policy changes regarding up-skirting, administrators must consider the influence of semantics on the legal interpretation of the policy. The National Center for Victims of Crime (NCVC) (2003) stresses that language choice is critical in

creating laws and policies to provide a broad protection of all rights for all students. For instance, it is more appropriate to use the word *technology* instead of *cyber*. Restricting a policy with the word *cyber* limits its jurisdiction to only computers and the Internet (NCVC), whereas *technology* is an all inclusive term that is unlikely to be outgrown in the future.

Similarly, it is important to look to university policies already in existence, such as sexual harassment and sexual misconduct policies, which protect students from the invasion of up-skirting. For example, the Florida International University (FIU) student handbook identifies sexual misconduct as a behavior for which students, organizations, and clubs can be held accountable (Student Government Association [SGA], 2003). The FIU student handbook defines sexual misconduct as:

1. Any sexual act that occurs, regardless of personal relationship, without the consent of the other person, or that occurs when the other person is unable to give consent.
2. Obscene or indecent behavior, which includes, but is not limited to, exposure of one's sexual organs or the display of sexual behavior that would reasonably be offensive to others.
3. Conduct of a sexual nature that creates an intimidating, hostile, or offensive campus, educational, or working environment for another person. This includes unwanted, unwelcome, inappropriate, or irrelevant sexual or gender-based activities, comments, or gestures. (SGA, 2003, p. 16)

The comprehensive nature of the FIU student handbook encompasses new trends, such as up-skirting, and eliminates the need to relentlessly update university policies. Similarly, policies prohibiting the misuse of technology and disruptive

conduct can be created in such a way that includes new trends as they arise. Yet, university policies present only one of many ways to protect students from up-skirting.

Increasing Awareness

Developing preventative measures in response to the growing trend of high-tech voyeurism can educate members of the campus community regarding the issue of up-skirting. Faculty, staff, and students need to be aware of potentially inappropriate behavior associated with camera phones. Self-awareness empowers a community to protect themselves, educate those around them, and use this information for future violations of policy. Information about up-skirting can be disseminated to faculty and staff at departmental meetings, while programming on campus can be utilized to raise awareness amongst students. For example, incorporating a campus safety fair into orientation activities would offer a venue to provide information about up-skirting as well as the university policies responding to it. It is important to raise awareness of self-defense and harassment; equally beneficial is assisting students in their development as ethical decision-makers. In addition to providing information about up-skirting and other inappropriate behaviors associated with technology, students must understand the implications of violating the rights and privacy of others. The overall theme promotes providing individuals with knowledge that encourages responsibility for personal actions and behaviors.

Restorative Justice

As the occurrence of up-skirting invades institutions of higher education, administrators must meet the needs of victims and the community, while considering the

ramifications for the perpetrator. According to Cavanagh (n.d.), restorative justice is the practice of working together with the victim, the offender, and the impacted community in an effort to reinstate balance and right the wrong that has been committed. Addressing the needs of all parties affected by up-skirting is vital to reshaping a community, and restorative justice is one option that can be used in response to incidents of high-tech voyeurism.

Restorative justice is a process in which all involved parties are brought together by a trained facilitator to discuss the incident and determine how best to reestablish a balanced community. Restorative justice allows the victim to regain a sense of control, the offender to better understand the harm caused, and the community an opportunity to contribute to the repair of the problem (Cavanagh, n.d.). Sharing one's point-of-view not only provides all involved a right to be heard, but also an opportunity to understand and empathize with the impact the alleged incident. Once participants have shared their perspectives it is necessary for the individuals to decide how trust and balance can be restored and how the offender can facilitate that process (Cavanagh).

In order to effectively implement restorative justice in the event of incidents of up-skirting, it is necessary to have the willing participation of the victim. According to Cavanagh (n.d.), when victims have the opportunity to share the feelings of violation associated with high-tech voyeurism they help the offender understand the harm caused. This type of interaction also allows the safety of the campus community to be restored because the offender learns from the situation instead of merely being reprimanded. It is important to caution that while restorative justice does provide empowerment and a voice to the victim, it is critical that the individual is not re-traumatized through reliving the

experience. While this approach may meet the needs of certain instances of up-skirting, it cannot offer a unilateral resolution for all cases.

Conclusion

Up-skirting is a new form of sexual harassment on campuses that cannot be ignored by university administrators. Officials must acknowledge the violation to student privacy in the event of up-skirting, as well as their obligation to protect students from harm. Although specifically addressing the issue of up-skirting is necessary, many other concerns are presented through the use of cell phones, which require additional research on college campuses. CBS News (2003) reported that camera phones also enable cheating in schools, digital shoplifting of printed material, corporate espionage, and terrorist activity; these are all highly controversial issues that cause concern for both institutions of higher education and our society as a whole.

It is important to make a practice of preparing for technological advances understanding that new issues are constantly developing. A proactive approach promotes awareness and accountability, which is beneficial to both the students being served and the institutions. Policies may help reduce inappropriate behavior, but education about the danger associated with such violations of person and privacy allows individuals to understand the issues and make appropriate choices. Finally, the utilization of education recognizes the importance of student rights and the need to protect them from excessive policy change.

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