

## **Memorandum**

**To:** President Drew Faust

**From:** Committee on the Oversight of Electronic Communications

**Date:** March 16, 2015

**Re:** Policy Issues Raised by Attendance Study

The Committee on the Oversight of Electronic Communications submits this memorandum in response to your November 10, 2014 email inviting the Committee to consider certain issues raised by the attendance study conducted in 2014 by the Harvard Initiative for Learning and Teaching (HILT).

In accordance with the terms of your email, the Committee has not conducted an investigation of the attendance study, nor does it offer a judgment as to its propriety. Likewise, the Committee does not purport to provide an analysis of the legal rights and duties of the University, faculty, staff, or students.

Instead, this memorandum considers ways in which the study of classrooms might implicate community norms and expectations (understanding that there are likely to be disagreements about those norms). Our primary aim is to identify issues that are likely to arise in connection with research on classroom pedagogy through the use of photography or videography unaccompanied by audio recording. The use of audio recording technology involves distinct issues beyond those addressed below.<sup>1</sup>

### **I. Applicability of Electronic Information Policy**

The Committee was established in 2014 to address policy considerations arising in connection with the implementation of the University Policy on Access to Electronic Information. The Committee is charged with reviewing the implementation of the Policy, and with making recommendations to the University President for improvements.

The Policy governs “access to user electronic information stored in or transmitted through any University system.” The phrase “user electronic information” is defined as: (i) documents and communications that are located in files and accounts associated with a particular user (such as emails in a user’s inbox), and (ii) information generated by and pertaining to a particular user’s use of University systems (such as logs on a user’s work computer of his or her internet usage).

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<sup>1</sup> A Massachusetts statute essentially forbids a person from secretly recording the contents of another person’s communication without the other’s permission. A separate statute, the Commonwealth’s general privacy law, forbids the use of photography or videography insofar as either would amount to an “unreasonable, substantial or serious interference with . . . privacy.”

The Committee's understanding is that the attendance study involved the use of automated cameras in classrooms to conduct time-lapse photography of students occupying seats in those classrooms. The Committee further understands that the Study did not seek to identify individual students by name, and that the digital files containing the photographs were eventually destroyed.

Under the terms of the Policy, the photographing of students in their classroom seats is not an instance of the University gaining "access" to a user's "electronic information." The same conclusion applies to the temporary retention of digital files containing photographic images of students. Our understanding is that these files were not located in files and accounts associated with a particular user. Also, they did not amount to or contain information generated by automated processes triggered by the user's use of University systems, and, in any event, were apparently gathered without identifying or seeking to identify any particular user. Accordingly, the Policy appears not to be implicated in this instance, as HILT researchers were not accessing "user electronic information."

## **II. Potential Issues Raised by the Study of Classrooms**

The foregoing conclusion concerns only the applicability of the Policy on Access to Electronic Information to the attendance study. It does not resolve the broader question of whether the study, or studies of classrooms generally, raise concerns beyond the scope of the Policy. In accordance with your email, and on the assumption that the Committee's experience addressing issues pertaining to electronic communications may assist the University in addressing related issues, this memorandum offers some reflections on the broader question.

### **A. Scope of Discussion**

The following discussion concerns classroom studies, conducted as research into teaching and learning, involving the use of photography and video-only recording. In offering thoughts on these matters, the Committee is mindful that, unlike other University bodies, including Institutional Review Boards ("IRBs"), it is not charged with, nor expert in, the review of research protocols.

The classroom is not the only 'space' in which observation and data collection can occur in connection with research on teaching and learning. For example, course management software increasingly is available to serve as a research tool. Consistent with the Committee's charge, the focus of this memorandum is on classrooms. However, as indicated in concluding remarks below, we recommend that appropriate University officials carefully consider whether and how issues raised by classroom observation may carry over to other domains of teaching and learning.<sup>2</sup>

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<sup>2</sup> This memorandum also does not address the collection and analysis of data undertaken by the Office of Institutional Research ("OIR") in fulfillment of the University's mandatory reporting requirements. The Committee recommends that appropriate University officials consider whether and how the analysis contained in this memorandum bears on OIR activities.

Likewise, outside the context of classroom studies, photography and videography of outdoor and indoor campus spaces may raise sensitive issues. So far as the Committee is aware, there is no comprehensive University policy in place for addressing these issues, nor perhaps even clear awareness of what policies are in place or are not in place. The Committee further recommends that these matters be addressed by an appropriate University body.

## B. General Considerations Bearing on the Study of Classrooms

The classroom is a distinctive space. When teachers interact with students in class, and students interact with one another, they engage each other as co-participants and interlocutors. By contrast, researchers who study classroom activities treat teachers and students as objects of study. Inevitably, there is a tension between the University's establishment of classroom space as a locus of free and open discourse and its use of classrooms as 'laboratories' to study teaching and learning.

The point of noting this tension is not to suggest that there is something inappropriate about observing classrooms for research purposes. Methods of teaching and learning are appropriate objects of study, particularly study by educational institutions. Indeed, students and teachers are likely to be the chief beneficiaries of such study. The point instead is to acknowledge that there is a balance to be struck between the need for careful research and the legitimate expectations of faculty and students. Researchers ought to have access to classrooms in order to learn what can be learned about pedagogy from classroom observation, yet faculty and students are entitled to regard the classroom as, in certain respects, protected or honored. Frameworks for conducting and overseeing research that involves the study of classrooms should be designed in a manner that accommodates these expectations. Those that fail to do so risk inviting resentment and distrust.

## C. Student and Faculty Interests that May Be Adversely Affected When Classrooms are Photographed or Videotaped for Research Purposes

### 1. Students

Classroom studies involving photography or videography without audio recording have the potential to affect adversely several distinct student interests: (1) an interest in not being observed while in the classroom; (2) an interest in preventing the creation of, or limiting the distribution of, a durable image of oneself; and (3) an interest in knowing of or consenting to one's participation in a research project.

The first of these interests seems relatively insignificant. A student's mere presence in, or absence from, a classroom is routinely observable by professors and classmates, though not members of the public. A student perhaps has a related interest in how information about his or her presence or absence is used—especially if it is used in a way that would adversely affect an evaluation of his or her academic performance.

However, it is hardly obvious that a student is entitled not to have his or her absences noted by someone other than the instructor (e.g., by a classmate).<sup>3</sup>

The second potential interest noted above is more substantial, and concerns the fact that durable images can be distributed or used in inappropriate ways.<sup>4</sup> Thus, any study of a classroom by means of photography or videography should be conducted on terms ensuring that durable images and information derivable from them are not distributed improperly, are retained in an appropriately secure manner, and are destroyed when no longer needed for purposes of the study.

The third potential interest concerns when, if ever, it is appropriate for the University to conduct or authorize a study that involves observation of its students without their knowledge or consent. Any research on human subjects who are unaware of their involvement raises significant concerns.<sup>5</sup> Persons employed by the University, whether as administrators or researchers, should be especially sensitive to these concerns, given that students look to the University to be mindful and protective of their interests, and given that, other things being equal, it is desirable for members of the University community to communicate openly with each other.

The recognition of this interest does not dictate the particular means through which it should be protected. A requirement of prior individual notice and consent (or notice with an opt-out right) would be highly protective, but might also render important research impossible or unwieldy. By contrast, a requirement of general advance notice without consent—for example, an annual notification to students that their classes may be subject to observation for research purposes—would be less protective but more facilitative of research.<sup>6</sup> Between these alternatives, there are various possibilities: for example, a requirement that researchers make reasonable efforts to provide individualized notice to students that some of their classes may be observed.

Given the trust that students place in their University, some form of prior notice seems desirable except in an unusual case in which it would undermine the validity of a vitally important study that could not be performed without such notice.<sup>7</sup> Depending on the nature and potential value of the study in question, it may be that general notice to the student body alerting them to the possibility that some of their classrooms may be

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<sup>3</sup> The Committee's understanding is that, if a *record* of a particular student's presence or absence is maintained by the University, access to or use of that record is subject to the Family Educational Rights and Privacy Act (FERPA).

<sup>4</sup> For example it is unlawful in Massachusetts and other states to appropriate a person's image for commercial gain without his or her consent.

<sup>5</sup> The term "research" here means any University-sponsored or approved study of its own students, even if the study would not meet the technical definition of "human subject research" set by federal regulations governing the operation of Institutional Review Boards and therefore would not be subject to the review and consent requirements that apply to such research.

<sup>6</sup> Of course general notice would have to be provided in a suitably prominent manner, rather than buried in fine print.

<sup>7</sup> If there is a case in which advance notice is justifiably not given, students should receive prompt after-the-fact notice where practicable.

observed will ordinarily suffice.<sup>8</sup> Whatever notice is provided should be accompanied by credible assurances that the study (or studies) in question is (are) academically legitimate and important, and will be conducted on terms that warrant the trust of students being observed (for example, with adequate attention to the security of any data collected).

Whether and when, in addition to notice, some manner of prior consent ought to be obtained is a question on which Committee members disagreed. Judgments will no doubt depend in part on the manner of consent—for example, asking students to sign, or agree to, a general consent form upon enrollment (or at the beginning of each academic year), as contrasted to obtaining individualized consent from those who will be subjected to a particular study. They will also depend on the nature of the study in question, the extent to which consent may interfere with it, the provision for alternatives to consent (such as notice), and the like.

## 2. Faculty

In addition to interests comparable to those identified above with respect to students, faculty arguably have unique interests at stake when classrooms are observed with photographic or videographic equipment. First, faculty expect to have control of the classroom during class meeting times. A researcher who, without the relevant faculty member's permission, non-disruptively placed himself in the back of a classroom and began taking photographs would violate this entitlement.

The unannounced use of photographic or video equipment in a classroom is arguably a different case. If done properly, it may come with no physical disruption. Still, faculty might feel pressure to alter their classroom behavior if they believe that their classes are subject to being photographed or video-recorded. And a faculty member who learns after the fact that his or her classroom was secretly observed may justifiably feel that there has been an infringement of his or her classroom authority, even if no additional harm or disruption followed from that infringement.

Again, to note the existence of an interest—here, the interest in faculty control of the classroom—is not to determine how it should be protected or accommodated. Some take the view that it is never legitimate to observe a faculty member's classroom without his or her explicit prior consent. Others believe that, depending on the nature of the observation, some form of advance notice could suffice, whether in the form of specific notice to a particular faculty member whose class is to be observed, or general notice to faculty at large of the possibility of observation. As was discussed above in connection with the discussion of students' interests, any such notice ought to be accompanied by credible assurances that the study in question is academically legitimate and important, and will be conducted on terms that warrant the trust of faculty whose classes are

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<sup>8</sup> The Appendix to this memorandum reproduces portions of two general notice provisions currently in use at Harvard: (1) provisions in the University's privacy policy for use of Canvas course management software, and (2) provisions in Harvard Business School's internal policy. These are offered by way of illustration: the Committee expresses no view on their merits.

observed (e.g., with adequate attention to the security of any data collected). In addition, the faculty member should be entitled to see the results of the study.

A second faculty interest at stake pertains to the observation of classes taught by faculty without tenure, as well as requests for permission to observe such classes directed to such faculty. Faculty without tenure will be particularly concerned about the use of classroom observations in connection with their renewal or retention. Likewise, they are likely to feel pressure to accede to a request to observe their classes, particularly if the request comes from, or with the support of, a senior administrator or tenured member of their school or department. Accordingly, any proposed study of a classroom, including those involving photography or videography, should be designed and implemented with credible assurances as to limitations on the use of any data collected, as well as sensitivity to the context in which a faculty member is being asked to consent to the study.<sup>9</sup>

### **III. Institutional Structure and Recommendations**

As required by law, the University has established Institutional Review Boards (IRBs), including the Committee on the Use of Human Subjects (CUHS), to review and approve protocols for human subject research, including classroom studies that aim to contribute to generalizable knowledge. The Committee's understanding is that, since the time of the attendance study, modifications have been made to CUHS procedures according to which any protocol for research involving Harvard students will automatically be subjected to greater scrutiny, and will include input from the Assistant Dean of Undergraduate Education acting as a liaison to CUHS.

In addition, the Committee understands that a research organization is being formed within the Office of the Vice Provost for Advances in Learning that will serve as an oversight body for learning-related research projects conducted at the University. It further understands that this research organization will operate with an advisory committee comprised of faculty members, and that, for each learning-related research project, the research organization will coordinate with an official or officials from the school(s) in which the research is being conducted.

The Committee respectfully recommends that the University's IRBs and the Office of the Vice Provost for Advances in Learning review the rules and practices that they employ for assessing proposed studies of teaching and learning (including future classroom studies) so as to ensure that those rules and practices are sufficiently attentive to, and protective of, the student and faculty interests identified above.

Because the use of new technologies for the study of teaching and learning seem likely to continue to generate trust issues between students and students, between students and faculty, and between students and faculty, on the one hand, and researchers and administrators, on the other, the Committee further recommends that the Office of

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<sup>9</sup> It is possible that students might experience analogous forms of pressure. For example, if consent to participate in a given study were required, students might, depending on the institutional role of the person making the request, feel pressure to give consent.

the President or the Provost take concrete steps to facilitate ongoing discussion of these matters, perhaps through occasional meetings overseen by the Office of the Vice Provost for Advances in Learning.

Finally, given the evolving educational and technological environment, the Committee invites the Office of the President or the Provost to identify the University and unit-level bodies that currently bear oversight responsibility for aspects of University-related privacy matters, and to consider whether there is a need for greater coordination among them (e.g., regular meetings of committee chairs), or for some manner of reorganization to ensure that issues raised by the use of photography and videography in the classroom and elsewhere, as well as other technologies such as course management software, are identified and appropriately addressed.

Committee on the Oversight of Electronic Communications:

John C. P. Goldberg (Chair), Eli Goldston Professor of Law

Amanda Claybaugh, Professor of English

Angela Q. Crispi, Executive Dean for Administration, Business School

Michael Kan, Executive Dean of Administration, School of Public Health

Barbara McNeil, Ridley Watts Professor, Medical School

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## Appendix

### Harvard Privacy Policy for Canvas Course Management Software

#### Use of Information

Harvard may request, use and retain your personal information, other information collected about you, and communications from you, to:

- Help troubleshoot and diagnose issues with this Canvas Site, third party Apps accessed through this Site, and related services
- Send you surveys regarding usage of and satisfaction with this site, such Apps, and related services
- Generate aggregate data and statistical reports about usage of this site and its content
- Support the administration of courses, course instruction, and the delivery and intake of course content and information
- Respond to your inquiries, customize your experience on the site, improve content and provide you with email notifications and other communications related to your courses.

*Research* - Harvard also intends to use data about your use of this Canvas site and information relating to your course participation, such as quiz and test data and information about online course participation, task completion, and other course activity data, for research purposes. Such research will comply with Harvard research policies and all relevant laws and regulations. If applicable rules require us to obtain your consent for any such research, then Harvard will not use your data for this purpose unless we have obtained your specific consent.

#### Disclosure of Information

Harvard may disclose personally identifiable information about you if Harvard believes that doing so is necessary or appropriate to: satisfy any applicable law, regulation, legal process or governmental request; investigate compliance with or enforce this policy or our Acceptable Use Policy for Canvas<[link](#)>; detect, prevent or otherwise address fraud, security or technical issues; or protect the rights and safety of site users, Harvard or others.

As described above, Harvard may share aggregated, de-identified data with third parties for its own purposes.

Harvard complies with FERPA and other applicable laws in the operation of this site, and Harvard complies with all applicable Harvard policies.

## **HBS Policy Provisions (posted on myHBS): (I) Notice to Students Concerning Recording of Classroom Activities and (II) Notice to Faculty Concerning Recording of Classroom Activities**

### **Notice to Students**

#### **Video/Audio Recording of Classroom Activities by HBS**

On occasion, HBS videotapes and/or audiotapes classes for educational purposes. All classroom recordings are owned by HBS, and all rights to the recordings rest with the President and Fellows of Harvard College. HBS students and participants should be aware that a class may be videotaped or audiotaped at any time for internal educational or faculty development purposes without specific notification.

If there is a possibility that a videotape will be used for any non-educational purpose or used outside of HBS for any reason, all students whose images are captured on the videotape will be asked to sign a release form prior to such usage. The faculty member using the videotape is responsible for ensuring the necessary releases have been obtained prior to use. Videotaped classes that capture audio recordings but not video images of students will not require a release as long as the audio recording does not disclose a student's identity.

To protect the privacy of students and the integrity of the learning environment at HBS, the School does not permit outside agencies to film, videotape, or photograph events inside HBS buildings, unless permission is obtained from the Communications Office. Please see [Video/Audio Recording of Classroom Activities by Students](#).

#### **Video/Audio Recording of Classroom Activities by Students**

Unless instructed by faculty member(s) to do so as part of HBS coursework, HBS students are not permitted to make audio or video recordings of any kind of classroom sessions or other HBS learning activities without the express written permission of the faculty member(s) conducting the session, the student participants, and the MBA Registrar's Office, unless such recording is an approved accommodation for a student with a disability in which case the faculty member would be notified by MBA Support Services.

### **Notice to Faculty**

**Permission for Recording.** Permission for electronic recording (audiotape, videotape, digital devices, and so on) of research participants must be obtained from the participants in advance, either orally or in writing. Written permission is required for all videotaping and for any recording that will be played publicly. The sole exception to the permission policy is naturalistic observation in public places, where the recording will not be used to identify individuals or affect them in any way. Guidance on videotaping permission can be obtained from the [Case Services](#) department.