

August 2014

Legally Speaking-The Legal Basis for Library Video Surveillance

Bryan M. Carson

Western Kentucky University, bryan.carson@wku.edu

Bruce Strauch

The Citadel, strauchb@citadel.edu

Jack G. Montgomery

Western Kentucky University, jack.montgomery@wku.edu

Follow this and additional works at: <http://docs.lib.purdue.edu/atg>



Part of the [Library and Information Science Commons](#)

Recommended Citation

Carson, Bryan M.; Strauch, Bruce; and Montgomery, Jack G. (2010) "Legally Speaking-The Legal Basis for Library Video Surveillance," *Against the Grain*: Vol. 22: Iss. 5, Article 23.

DOI: <https://doi.org/10.7771/2380-176X.5656>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.



LEGAL ISSUES



Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Legally Speaking — The Legal Basis for Library Video Surveillance

by **Bryan M. Carson, J.D., M.I.L.S.** (Associate Professor, Coordinator of Reference and Instructional Services, Associated Faculty — Library Media Education Program, Western Kentucky University Libraries, 1906 College Heights Blvd. #11067, Bowling Green, Kentucky 42101-1067; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

Sometimes it takes an outsider to make us see ourselves. We often take our history, culture, and traditions for granted. In many instances, it is only when an outsider asks for clarification that we realize how much we have subconsciously assumed about ourselves and about our way of life.

This point was brought home to me recently by one of my colleagues at **Western Kentucky University**. In 2009, **Haiwang Yuan**, the library's Webmaster, was selected by the **Institute for Museum and Library Services** to participate in a panel of U.S. librarians helping to train library science students and practitioners in China. After responding to audience questions, **Haiwang** sent me the following email:

Q. What's the legal basis for monitoring the library with security cameras such as those installed [at Western Kentucky University]? We don't agree even among the speakers ourselves here, not to speak of the audience.

This is one of those basic questions that we almost never think about. The short answer is that if a person is in a public or semi-public place such as a library, his or her movements are not subject to a reasonable expectation of privacy. A library employee doesn't need a search warrant if he or she observes someone stealing a book. There is not a reasonable expectation of privacy in the person's movements. An employee or police officer could follow a library patron around the library to see if he or she is stealing books, but this is not practical to do all the time. The security camera is simply a technologically enhanced version of following a person around.

As Americans, we tend to take this for granted. Every store has a security system. Many cities have mounted cameras to catch drivers who run stoplights. And, of course, many libraries use video surveillance. But what is the actual legal basis for this practice? Where does it come from, and why is it legal? The answer to the question is much more difficult than it would appear, because so much of the answer depends upon an assumed understanding of the Anglo-American Legal System.



There are a number of different legal systems in place in the world, but most countries fall either into one of two categories. One is called the "Common Law" or "Anglo-American" system, and the other main type is called the "Civil Law" system. In the Civil Law system, laws that are passed are very specific and very detailed. A judge can only enforce what is actually found within the actual language of the statute. He or she has no power to interpret or to "apply" the statute to specific situations.

The Civil Law system involves positive *prescriptions* and negative *proscriptions*, all spelled out very specifically. In a Civil Law system, the legislature could specifically grant stores and libraries the right to use video surveillance. This would be a *prescriptive* use of legal power. A *proscriptive* use would be a law making it illegal to use video surveillance in public.

In the U.S. legal system, however, case law and the judiciary are as important as statutes and regulations. However, the Common Law or Anglo-American system is very different. Laws are much less specific in their language. While many laws are still prescriptive or proscriptive, there is also a great deal of latitude in between with room for interpretation.

In the early centuries of the Common Law system, judges made all laws; that is why it is called "common" law (as opposed to legislative law). The idea of parliaments, legislatures, or congress passing a statute was an innovation. In fact, many of the statutes have now codified the original Common Law rules. The power of judges to create rules was further constrained in the U.S. by the language of the Constitution. Indeed, the reasoning involved in passing statutes is very different due to the enhanced role of the common law judiciary.¹ However, modern Anglo-American judges still retain the superior power of interpreting the statutes, or in the U.S. of declaring a statute unconstitutional.

In contrast, it is very rare for a statute to be found unconstitutional in Civil Law systems. Often Civil Law countries have special constitutional courts that can adjudicate these kinds of cases. In the ordinary courts,

the legislature is superior, and the role of the judge is to apply the law the legislature has written. Here is a basic explanation of the differences between Civil Law and Common Law systems:

Civil-law countries have comprehensive codes, often developed from a single drafting event. The codes cover an abundance of legal topics, sometimes treating separately private law, criminal law, and commercial law. While common-law countries have statutes in those areas, sometimes collected into codes, they have been derived more from an ad hoc process over many years. Moreover, codes of common-law countries very often reflect the rules of law enunciated in judicial decisions (i.e., they are the statutory embodiment of rules developed through the judicial decision-making process).²

Common Law judges don't pull their interpretations out from thin air. They are bound by previous decisions of higher courts. If a court has ruled that a statute is to be interpreted in a particular way, any courts that are lower must follow that decision. This is called "*Stare decisis*," and comes from the Latin phrase *Stare decisis et non quieta movere*, "to stand by things decided."³

Because the courts are an equal branch with the legislature in the U.S., anything that is not specifically prohibited by the state or Federal constitution is allowed. **Congress** or the state legislature could prohibit the use of security cameras. However, they have never done so. Similarly, a judge could interpret an existing law or constitutional provision to prohibit security cameras. However, no judge has ever done so.

For example, the Federal and state governments have both passed laws prohibiting someone from recording a telephone conversation without permission. (This is called "wiretapping.")⁴ The rationale for prohibiting wiretapping is related to keeping the government from intruding into someone's privacy. Thus, the government (by virtue of the 4th Amendment) can't record a conversation unless a judge has issued a search warrant.⁵

continued on page 54

Part of the rationale for prohibiting secret recordings by individuals under the wiretapping law is that they could turn information over to the government as an informant, circumventing the requirements of the 4th Amendment. Or the individual could do other prohibited things with the information, such as blackmail.⁶

However, there are no prohibitions against using a security camera. Because there is no prohibition, cameras are allowed for surveillance purposes. **Congress** or the state legislature could pass a law tomorrow making it illegal, and we would have to turn off the cameras. However, until that happens, it is legal to use a camera.

Part of the distinction between recording a conversation and recording a person's movements has to do with the legal concept of "expectation of privacy." Judges have interpreted the 4th Amendment as providing citizens with an expectation of privacy. This is not found anywhere in the words of the 4th Amendment, but is entirely judge-made law. The 4th Amendment reads:

*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.*⁷

Beginning in the mid-20th-century, judges have interpreted this provision as creating a reasonable expectation of privacy that a person has in his or her own house.⁸ A person should not have to look over their shoulder when they are at home, in their car, at the office, etc. However, if the person does something in plain view of the police, he or she is fair game.⁹

Suppose the police believe that **George** is smoking marijuana. They can't put a camera in his house or his car—or search his house or car—unless they have convinced a judge to issue a search warrant. The judge can't issue a search warrant unless there is probable cause to believe that **George** has committed a crime.

However, if the police see **George** smoking marijuana in plain view (for example, on the street in front of the police station) they don't need a search warrant. This is called the "plain view" doctrine.¹⁰ Judges have interpreted the plain view doctrine as meaning that if a police officer is walking past **George's** car and sees **George** smoking marijuana through the window, he or she does not need a search warrant. In fact, if the crime occurred in plain view, this can also provide the necessary probable cause to get a search warrant for **George's** car. **George** may have an expectation of privacy in his car, but if he committed a crime that was visible through the window his privacy expectation is not "reasonable."¹¹

The issue of reasonable expectation of privacy and plain view relates back to our original question of the legality of security cameras for surveillance. If the person is in a public or semi-public place such as a library, his or her movements are not subject to a reasonable expectation of privacy. (Someone may expect privacy, but that is not reasonable.)

For example, a library employee doesn't need a search warrant if he or she observes someone stealing a book. There is not a reasonable expectation of privacy in the person's movements. An employee or police officer could follow a library patron around the library to see if he or she is stealing books, but this is not practical to do all the time. The security camera is simply a technologically enhanced version of following a person around.

The surveillance issue is different from the question of what books have been borrowed by a specific person. With only two exceptions, every state or territory in the U.S. has made it illegal to disclose which books a library patron has borrowed unless a judge has issued a search warrant for probable cause.¹² In fact, this reasonable expectation of privacy was behind protests over the **PATRIOT Act** before it was rewritten.¹³ (Actually, there were also serious constitutional issues over the meaning of probable cause, First Amendment freedom of speech, and even judicial oversight of search warrants. So the **PATRIOT Act** raised a fair number of questions beyond the issue of borrowed books.)¹⁴

A library patron has a reasonable expectation of privacy in what they read. This comes from these statutes. However, an **FBI** agent could follow someone around the library and look over the person's shoulder as he or she opens books. That is perfectly legal. The security camera is simply a technologically enhanced version of following a person around. And that is the real answer to the question "why is library surveillance video legal." 🌿

Endnotes

1. **James G. Apple** and **Robert P. Deyling**, *A Primer on the Civil-Law System* at 36 (Washington: Federal Judicial Center, 1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).
2. **Apple & Deyling**.
3. **Black's** law dictionary (9th ed. 2009). For more information on *Stare decisis*, see *generally*, 20 *American Jurisprudence 2d Courts* § 129.
4. The Federal wiretapping statute is contained in 18 U.S. Code §§2510 – 2522.
5. The first case dealing with this issue was *Olmstead v. United States*, 277 U.S. 438 (1928). In the *Olmstead* case, the Supreme Court ruled against the need for a search warrant in recording phone conversations. However, the Supreme Court later over-ruled the *Olmstead* case in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967).
6. Electronic Surveillance and the Fourth Amendment. In **Killian, Johnny H., & Costello, George A.** (1992-2000). *The Constitution of the United States of America: Analysis and Interpretation*. Available at <http://caselaw.lp.findlaw.com/data/constitution/amendment04/05.html>.
7. U. S. Constitution, 4th Amendment.
8. **Julie, Richard S.** (2000, Winter). High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations Of Privacy In The Technological Age. 37-1 *American Criminal Law Review* 127-143.
9. However, there are some questions about the use of GPS monitoring and whether that requires a search warrant. In an article for *Findlaw's Writ*, **Sherry Colb** explained how several courts have handled short-term tracking in a different way from long-term tracking. See, **Colb, Sherry F.** (2010, September 15). D.C. Circuit Holds that month-long police GPS monitoring triggers Fourth Amendment. *Findlaw's Writ*. available at <http://writ.lp.findlaw.com/colb/20100915.html>. See also, *United States v. Knotts*, 460 U.S. 276 (1983); *U.S. v. Maynard*, 2010 U.S. App. LEXIS 16417 (August 6, 2010), available at <http://pacer.cadc.uscourts.gov/common/opinions/201008/08-3030-1259298.pdf>; **Shah, Ramya**, From Beepers to GPS: Can the Fourth Amendment Keep Up with Electronic Tracking Technology? (Recent Developments Section), *University of Illinois Journal of Law, Technology & Policy* (Spring 2009), available at <http://www.jltp.uiuc.edu/recdevs/Shah.pdf>; **Hutchins, Renee**, Tied up in Knotts? GPS technology and the Fourth Amendment, 55-1 *UCLA Law Review* 409-465 (2007), available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1517&context=fac_pubs.
10. See generally, **Clancy, Thomas K.**, What is a search within the meaning of the Fourth Amendment, 70 *Albany Law Review* 1 (2006-2007).
11. **Julie, Richard S.**, High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations Of Privacy In The Technological Age, 37-1 *American Criminal Law Review* 127-143 (Winter 2000).
12. The two states that don't have statutes are Kentucky and Hawaii. Both have Attorney General opinions instead of statutes. The opinions for both states are available on my website at <http://people.wku.edu/bryan.carson/librarylaw/>. See, Request by **James A. Nelson**, State Librarian; opinion by **Steven L. Beshear**, Attorney General; **Carl Miller**, Assistant Attorney General, OAG 81-159, 1981 Ky. AG LEXIS 273 (April 21, 1981); Request by **James A. Nelson**, State Librarian; Opinion by **Steven L. Beshear**, Attorney General; **Carl Miller**, Assistant Attorney General. OAG 82-149, 1982 Ky. AG LEXIS 487 (March 12, 1982); Request by **Bartholomew A. Kane**, State Librarian, **John R. Penebacker**, Special Assistant to the State Librarian; opinion by **Hugh R. Jones**, Staff Attorney, Approved by **Kathleen A. Callaghan** Director, OIP Opinion Letter No. 90-30 (October 23, 1990).
13. See, **Carson, Bryan M.**, *The Law of Libraries and Archives* (Lanham, MD: Scarecrow Press, 2007). See also, *Search Warrants and Records: What Libraries and Bookstores Need to Know*, 14-4 *Against the Grain* 75-77 (September 2002).
14. **Gorham-Oscilowski, Ursula, & Jaeger, Paul T.**, *National Security Letters, the USA PATRIOT Act, and the Constitution: The tensions between National Security and Civil Rights*, 25-4 *Government Information Quarterly* 625-644 (October 2008). See also, **Carson, Bryan M.**, *Surveying Privacy: Library Privacy Laws in the S.E. United States*, 49-3/4 *Southeastern Librarian*, 19-28 (January 2002); **Carson, Bryan M., John Doe** and the **PATRIOT Act**, 18-4 *Against the Grain* pp. 70-72 (September 2006), available at <http://www.wku.edu/%7Ebryan.carson/articles/legallyspeakingsept06.pdf>.