

## ***Is George Orwell's Big Brother Here at Last?***

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In George Orwell's 1984, the citizens could at least see the screen that was surveilling them. Not so today. Surveillance is often ubiquitous and because it may encompass public spaces, it is unknown to the casual observer.

Many municipalities are considering use of surveillance cameras. Other cities rely upon private surveillance and encourage shopkeepers and department building owners to place surveillance cameras outside their premises. There is, today, a great deal of sharing concerning surveillance footage by and between private enterprise and municipal authorities. We all see amazing footage of camcorders and surveillance equipment catching criminals in the act, natural disasters, funny moments and sad events.

The question is whether there are constitutional issues with respect to municipalities lodging surveillance cameras in public places and recording the movements of those who pass within the field of view of the cameras.

The issue has been discussed at some length in legal literature. See, *i.e.*, "Chicago's Video Surveillance Cameras: A Pervasive and Poorly Regulated Threat to our Privacy," *Northwestern Journal of Technology and Intellectual Property*, Schwartz, Adam, Vol. 11, Issue 2, No. 4 (2013). Although Schwartz was writing on behalf of the American Civil Liberties Union of Illinois, which obviously has a bias, the article takes the position that the cameras have powers that greatly exceed ordinary human observation, including automatic tracking of cars and magnification of small objects of great distances. Therefore, it was the view of the author that the cameras in effect "peered" far beyond what normal vision would be expected to notice. The ACLU urged Chicago police to adopt a policy, which they did, that the cameras may only monitor areas "where no legally protected reasonable expectation of privacy exists." Second, the officers may not base "the use of video enhancement or tracking capabilities on individual characteristics" such as race or national origin.

While, from an ethical point of view, the question of video surveillance is certainly worthy of great debate, the legal question is whether the individual who is the subject of surveillance has a reasonable expectation of privacy. If the municipality is observing movements down a public street, park or facility, generally speaking, reasonable people would not believe that their privacy has been invaded. On the other hand, reasonable people do not expect government to monitor whether they are entering a political or union meeting, viewing a controversial movie or art exhibit, visiting a doctor, attending a religious institution, distributing leaflets or meeting with a lawyer. What is being surveilled is the important issue.

From a legal perspective, video surveillance by a municipality is generally going to be found to be legal so long as proper guidelines are followed. The video surveillance should not profile people based upon invidiously discriminatory animus such as race, color, creed or nationality. The video surveillance should not be able to

capture what kind of facilities people are utilizing. The video surveillance should not be so enhanced as to peer beyond what would normally be seen by a police officer.

As with many matters in the law, the devil is in the details.

In the case of *United States v. Jones*, 565 U.S. 400, decided 2012, the United States Supreme Court addressed the question concerning the government's attachment of global-positioning-system (GPS) device to undercarriage of motor vehicle registered to the accused wife, and the government's use of that device to monitor the vehicle's movements, constitute a search under the Federal Constitution's Fourth Amendment. The court, Justice Scalia delivering the opinion, held that the attachment of the GPS and the subsequent use of that device to monitor the vehicle's movements on public streets did in fact constitute a search or seizure within the meaning of the Fourth Amendment.

The court's decision was based upon the fact that the Government physically occupied private property for the purposes of obtaining information. It was therefore a "search" within the meaning of the Fourth Amendment. The Government argued that no search occurred since the accused had no "reasonable expectation of privacy" in the area of his Jeep accessed by the Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. The court explained that its argument was irrelevant.

In discussing precedent, the opinion of the court noted that an open field is not one of those protected areas enumerated in the Fourth Amendment. The Government's physical intrusion on such an area, unlike its intrusion on the vehicle through use of the GPS, is of no Fourth Amendment significance.

Of significance is the concurring opinion that noted the fact that electronic devices are capable of peering beyond ordinary human vision. There are Justices on the Supreme Court who express concern that technological advances that have made possible non-trespassory surveillance techniques have the effect of shaping the evolution of societal privacy expectations. In other words, societal privacy expectations are influenced by what people now know is possible with technological advances.

Clearly, the question of ordinary municipal street monitoring utilizing surveillance cameras is still legal. However, it is understood that monitoring general movements of people, especially certain specific individuals or groups, can be misused. The expectation of privacy is changing, and with it an understanding by the population that safeguards should be in order so that ordinary municipal safety concerns do not usurp privacy considerations.

Therefore, while a city may have the right to effectuate general public surveillance in public places such as sidewalks and parks, there must be a code of principles to assure that what the city or police department does is not overly intrusive, is utilized for legitimate purposes, and does not intrude upon reasonable expectation of citizen privacy.

Of note in understanding the issue concerning limits on surveillance is *United States vs. Mazzara*, 2017 U.S. Dist. LEXIS 178575 (S.D. N.Y. Oct. 27, 2017). The District Court case looked carefully at the law in the context of a suppression motion. Mazzara contended that a twenty-one-month period of warrantless, uninterrupted video surveillance of a camera mounted on the utility pole across the street from his residence violated his reasonable expectation of privacy under the *Fourth Amendment*. The court included that the *Fourth Amendment* does not prohibit extended video surveillance even though it was directed at a specific individual. The officers were said to be acting in good faith.

Mazzara argued that the camera captured “outdoor interactions with his newborn child, his girlfriend, his ex-girlfriend, his friends, his family, and his acquaintances.” The police installed a Pole Camera without a warrant and never obtained a warrant at any point during the surveillance.

This case does not address what a municipality could or should do in connection with limiting surveillance intrusions because the case involved a specific police interest and a particular individual. It may be argued that generalized surveillance of public spaces in the community may receive even less respect than criminal defendants. On the other hand, to the extent that a municipality targets specific population groups, neighborhoods or activities, the courts may want to take a second look at the Public Places Doctrine.

Relevant investigations where a suspected wrongdoer may be available through surveillance is not quite the same as routine random snooping as a matter of simple population control. No doubt the government’s reason for surveilling a particular area, group or activity will inform the courts as to whether constitutional scrutiny should be enhanced.

When the municipal or police authorities benefit from private surveillance, to what extent is a private landowner acting under color of state law? These and other questions have yet to be answered. Even more complex is the question of drones in public airspace which may be publicly or privately operating. The law has yet to catch up with these potential intrusions into public space utilized for private reasons. When a drone or private surveillance magnifies the folks it is snooping on, do those whose personal space is violated have a reasonable expectation of privacy? The law has a tendency to lag behind society, but we cannot run away from technology forever.

*Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.*