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# CT60A7000 Critical Thinking and Argumentation

## Daniel J. Solove – Nothing to Hide chp 12 & 13

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# 12. The Failure of Looking for a Reasonable Expectation of Privacy



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- If you spit on the ground and police take your DNA, is that a violation of your privacy?
- Or if you seal an envelope with your saliva and mail it to the government and they obtain your DNA from that envelope, is that a violation of your privacy?
  
- The "reasonable expectation of privacy test" has been in use from 1967
  - Boundaries are: "Fourth Amendment protection against government information gathering by asking whether a person exhibits an "expectation of privacy" that *society* recognizes as "reasonable."
  - The standard has been unstable as in some cases the protection of privacy is extremely narrow and in some cases it has been really wide
  - Court often recognizes privacy as total secrecy
- People have argued a long time about this but author thinks the whole debate is mute because it is not focused on the right question
  - It would be better to focus on practical solutions than fruitless debate

# Changing the Question



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- What is and what isn't protected by the Fourth Amendment often bears no relation to the problems the government causes with their information gathering
- It doesn't relate to whether the law-enforcement activity should have judicial oversight or not and what it should consist
- There are two central questions in the Fourth Amendment analysis:
  - 1) The Coverage Question: Does it provide protection against a particular form of information gathering?
  - 2) The Procedure Question: How should it regulate this form of information gathering?
- The author provides simple solutions for the first question:
  - 1) Whenever a particular government information-gathering activity creates problems of reasonable significance, the Fourth Amendment should require regulation and oversight.
- The procedure question is harder to answer but there will be one possible at the end of this slide show (chapter 13)

# The Reasonable Expectation of Privacy Test



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- As in the first slide, the reasonable expectation is something what the society recognizes.
  - This however is not true, because often the view of the Supreme Court is completely different from a citizens point of view
  - Supreme Court is often critiqued because of this but following polls and surveys could neglect the minority
- Another problem with reasonable expectation is the evolving technology. For example cloud computing, can you reasonably expect that the files there are private?
- The debate over the meaning of "privacy" has taken the focus away from actual problems. For example:
  - 1) Squeezing people's luggage without opening it is a violation against the Fourth Amendment
  - 2) Gathering and storing everyones DNA indefinitely in a giant database and use it however you want is NOT a violation against anything

# Genetic Information and Deceptive Tactics



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- DNA isn't private if it was obtained from something you threw away (or spat on the ground)
- DNA itself is not a bad thing but there is no limit of how long government can hold people's DNA
- There is also no regulation whose DNA they gather
  
- A huge DNA database can give government immense power. Like in earlier chapters, DNA can be linked to medical past, future, family members and in many other similar cases.
- That is why DNA gathering should always be regulated by the Fourth Amendment, it should only be gathered to investigate suspected criminal activity and there should be no reason to gather DNA with deceptive tactics (like from an envelope). A warrant should be fairly easy to obtain to get DNA if you're 99% sure that it's the correct guy but just need the DNA to confirm it.
- DNA samples should also be destroyed after a period of time if not used, they should not be kept indefinitely

# Revitalizing the Fourth Amendment



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The Fourth Amendment should be broad and protect people. It should restrict all "unreasonable searches" which it currently does not.

Whenever the government gathers information and it creates a problem that hasn't been addressed with regulation or oversight, it is unreasonable.

The other option is to allow government engage in information gathering without any regulation or protection which would quickly result in blackmailing, sensorship and other stuff that belong to dictatorships, not in democracy.

# 13. The Suspicionless-Searches Argument



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- People try to justify the suspicionless search with the argument that terrorism requires broad surveillance and sweeping searches to detect the plotting terrorists.
- It is also said that warrants are impractical because swift action is often needed. Some argue that the current "probable cause" standard for a warrant is difficult to meet because many terrorists haven't done any crimes yet.
- There are numerous exceptions to the warrant process as the U.S Supreme Court can recognize situations involving "special government needs" where it is then too much a pain to acquire a warrant.

# Why Require Warrants Supported by Probable Cause?



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Warrants are used so that the police can't just barge into people's houses and start ransacking for evidence. The author gives the following reasons for warrants:

- Police power and discretion: Warrants are issued by a neutral judge and they always need to be justified
- Dragnets or sweeping searches: Dragnets can be used to find criminals yes but most of normal people have done something illegal which could be used against them when found (illegal downloading, fail to return a book to a library, giving a drink to a minor, etc.)
- Hindsight bias: Warrants need to be obtained *before* the search. Why? If a policeman searches a house because of a hunch without a warrant and finds something major, could you question the validity of his hunch then?

Probable cause isn't something that is hard to get. A mere hunch is not enough for a probable cause but for example a tip from a reliable source or suspicious behaviour from the suspect is enough for a probable cause and to get a warrant.

# Does the Process Work?



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- Some might argue that the warrants are merely a rubber stamp but more than 80% of the time the law-enforcement officials find at least something they expected to find.
- The warrants work because the law-enforcement officials refrain from making search requests if they are not actually sure are they going to find something or not
  - Not finding real evidence will only make it harder to obtain a warrant in the future
- What if the investigators need to prevent a crime like terrorism and they would like to use surveillance?
  - Just looking around a place suspiciously could be used as a probable cause to get a warrant (planning of future crimes IS a crime)
    - > engage in electronic surveillance if they have trustworthy information. They don't need to start surveying everyone, just those that act suspiciously.

# Beyond Warrants and Probable Cause



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- There could be times when government wants to engage in broad surveillance as they don't have a suspect in mind
  - Judges should be extremely skeptical about these requests and they should ask the government justify the reasons why there is no need for a warrant
    - If the request is justified and the surveillance has reasonable limits (not just fishing in the water), then courts could grant approval
- The following should be ensured:
  - 1) Searches as limited as possible and no dragnets
  - 2) Searches without warrants should only be done when there are no alternatives
  - 3) Government must prove convincingly why the searches are impractical without a warrant
  - 4) The value must outweigh the harms caused by the search (invasion of privacy)
  - 5) People's rights are adequately protected and law-enforcement officials don't abuse their power
  - 6) Government needs to delete unused information after a certain period of time



# THE END