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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



- If you spit on the ground and police take your DNA, is that a violation of your privacy?
- 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

# Changing the Question



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- 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?
- 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.
  - The view of the Supreme Court is completely different from a citizens point of view
- Evolving technology is another problem with reasonable expectation

Think about the two scenarios:

- 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
- 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.
- That is why DNA gathering should always be regulated by the Fourth Amendment, it should only be gathered with a warrant to investigate suspected criminal activity
- DNA samples should also be destroyed after a period of time if not used,

# Revitalizing the Fourth Amendment



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- The Fourth Amendment should be broad and protect people. It should restrict all "unreasonable searches"
- Whenever the government gathers information and it creates a problem that hasn't been addressed with regulation or oversight, it is unreasonable.
- Without regulation information gathering 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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- Suspicionless-searches argument: Terrorism requires broad surveillance and sweeping searches to detect the plotting terrorists.
- Warrants are impractical because swift action needed and "probable cause" standard for a warrant is difficult to meet because many terrorists haven't done any crimes yet.
- 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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Why warrants:

- Police power and discretion
- Dragnets or sweeping searches
- 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 hunch is not enough but a tip from a reliable source is enough

# Does the Process Work?



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- More than 80% of the time the law-enforcement officials find at least something they expected to find.
- 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

# 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
- 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

# Questions



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- 1) Would you allow government or police to come search your house without any warrant?
  
- 2) What is reasonable expectation of privacy to you?
  - For example: If it is said in user agreement that your information is shared, it is not reasonable to expect privacy.
  
  - BUT if it is not said, is it reasonable or not?



# THE END