



Surveillance & Society

Book Review

Review of Slobogin, Christopher. 2022. *Virtual Searches: Regulating the Covert World of Technological Policing*. New York: New York University Press.

272 pp. \$30.00. Hardcover. ISBN: 9781479812165.

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In 1928, as the United States Supreme Court upheld the authority of police to conduct wiretaps of telephones without a judicial warrant, Chief Justice William Howard Taft confided to his brother, “The truth is we have to face the problems presented by new inventions. Many of them are most useful to the criminals in their war against society and are at once availed of...” (Taft qtd. in Post 2006: 153). In *Virtual Searches: Regulating the Covert World of Technological Policing*, Christopher Slobogin gives witness to the fact that police, too, have always availed themselves of cutting-edge technology. Now, nearly a century later, the range and impact of these technologies well-nigh threatens the ability of courts and legislatures to understand, much less regulate, their use.

A leading expert in American criminal law, Slobogin uses *Virtual Searches* to propose an optimal approach to fast-moving surveillance technologies. But whereas court-centric approaches dominate this field in the United States, this book urges interventions by legislatures and regulatory bodies in addition to courts. As many readers of this review know, the Fourth Amendment to the US Constitution proscribes warrantless searches. From the start, Slobogin recognizes that all virtual searches implicate the Fourth Amendment. But because judicial oversight of all surveillance would impose such a heavy burden, so much so that courts would be unwilling to exercise much scrutiny, Slobogin’s major claim is that a regulatory framework—best adopted by legislatures—will be needed to balance the needs of law enforcement with concerns over privacy, transparency, and democratic accountability.

One of the two primary aims of this book is to develop this framework; the second is to discuss its application through a systematic tour of the types of virtual searches, one that serves as a wake-up call to a flood of challenges. Both elements of the book—a proposal and its application—promise to be generative for readers beyond the American context.

The *raison d’être* for this book scarcely needs to be mentioned, and so the book offers a breezy but compelling “you had me at hello” critique in the opening chapters. Legislative bodies are busy grappling with technological policing, from local and state bodies making decisions about automated license plate

Bank, Talia, and Patrick Schmidt. 2023. Review of Slobogin’s *Virtual Searches: Regulating the Covert World of Technological Policing*. *Surveillance & Society* 21 (2): 226-228.

<https://ojs.library.queensu.ca/index.php/surveillance-and-society/index> | ISSN: 1477-7487

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readers and warrantless drone use to federal proposals concerning facial recognition technology, biometric and genetic data, and additional aerial surveillance. Revisiting the well-trodden ground of the Supreme Court's Fourth Amendment jurisprudence isn't any less worrying for its familiarity. The doctrines that Slobogin charts leave so much to definitions of "reasonableness," and the Court's recent decisions have left even more in "disarray" (29). The net result has favored the interests of the government at a time when technological advances make it hard for many citizens to maintain an expectation of privacy.

Developing the ideas that he articulated in *Privacy at Risk* (2007), the heart of Slobogin's proposal is a "proportionality principle," that "the justification for a search or seizure should be roughly proportionate to its intrusiveness," noting that Fourth Amendment jurisprudence has reflected the notion that the "government's burden should vary depending on the effect of its actions on the individual" (41). Although such a common-sense notion is consistent with the Fourth Amendment's warrant requirement for unreasonable searches, the crux of his position is that this would be good policy. Legislatures could lead, and courts would act as "nudgers and backstops" instead of regulators (49). Legislative consideration of policing is different from what courts can do, and could include the study of societal norms as expressed through positive law and survey data. Given his previous development of this idea, and the simplicity of the concept, his first statement of the idea (in Chapter 3) may appear thin: What can such a notion resolve? How would we determine what has gone too far? Could, as he suggests, surveys of citizens give us meaningful insight into what types of searches go too far? The ambiguities or proportionality play directly into his call for democratic deliberation.

And then, fortunately, he offers the bulk of the book (Chapters 4 through 8) as a closer study of the nuances. Slobogin's work to traverse a typology of searches is useful in its own right for anyone trying to grasp the waterfront of contemporary police search techniques. The goals of police change with the circumstance, which prove distinctive: In Chapter 4, Slobogin takes up the classic work of police in searches driven by the identification of individual suspects, after which he moves to searches drawing on a range of problematic technologies. Predictive policing involving algorithms (Chapter 5)—e.g., guiding officers as to where to conduct traffic stops—and "event-based" policing that starts with a crime scene and casts a wide net (Chapter 6) reflect police work that will be familiar to most readers but has been breathtakingly transformed by data-driven technologies. Chapters 7 and 8 go into even more uncharted waters, namely systematic surveillance programs and searches involving information held by third or private parties, respectively. In each of these chapters, he complements his survey with model proportionality analyses. Many readers will encounter and shudder at least a few of the new techniques he describes; what's coming in the near future may be positively shocking.

How will we meet these challenges? Slobogin's direct answer is a conclusion chapter titled, "Making it Happen." Here he returns to his vision of legislatures as the leading regulator, notwithstanding the courts' continued constitutional litigation. The reconciliation between the needs of police and civil liberties "is a job for the democratic process" (201). But then, it is vital that the public be made aware of virtual search and surveillance practices and that democratic guidance is enforced in practice.

Democracy and "balance" seem ideal, though in an era of polarization it might be a compromise that appeals to few people, if it really is a compromise at all. Slobogin's sensitivity to police abuses, invasive surveillance, and threats to equality may strengthen the appeal of the proportionality principle—given, as he says, that the police benefit from the present system. Proportionality should give stakeholders, including the state and the public, a more equal footing. But since law enforcement has to-date adopted emerging technologies with little apparent concern for democratic accountability, we are fairly skeptical of the capacity and willingness of democratic institutions to stem the invasions of privacy.

Nor is it clear that he seeks significant new pushback from city councils and state legislatures. Because "fighting crime is not one of the government's success stories," it would not make sense to restrict virtual searches—a potentially useful tool—unless the privacy costs are significant (40). Moreover, though Slobogin recognizes police shortcomings in terms of fighting crime, it is unclear how concerns about the

efficacy of virtual searches should weigh into the deliberations on proportionality. Police departments are eager to avail themselves of new technologies, and the luster of shiny new toys often proves spellbinding to the democratic bodies charged with providing accountability. It is even harder for citizens to factor the strengths and weaknesses of technologies into their assessments. Of course, democratic processes provide escape valves from the pressures of interest groups, media-driven crime “crises,” and faulty assessments of technology’s costs and benefits. Namely, deliberative bodies can take up new evidence and reconsider, perhaps more dynamically than courts. Given the track record of courts in the century since Chief Justice Taft tipped the balance toward police, it may be worth embracing Slobogin’s suggestion of enhanced democratic deliberation. But though the proportionality principle of *Virtual Searches* may be right in concept, will such a flexible concept provide reliable direction when given to political bodies who face a dizzying array of new technologies?

There’s a refreshing quality in a book that seeks solutions in democratic decision making, even if we must be skeptical about their resilience in this era of policing. It has never been a popular position to tie the hands of police who are asking for creative powers to fight crime, but this is also an era in which more scholars are turning away from courts as the natural or inevitable locus of accountability. Slobogin’s timely survey of the array of technologies becoming available to police reminds us that the guarantee of liberties begins with understanding.

References

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