# PLSC 2023

## 1. Opening Comments

### *1.1. Summary*

#### 1.1.1. Framing

- This is a direct follow-up to last year's Reidenberg-Kerr prize winning article
  - In that paper, Yan Fang presented a rich trove of information about the underappreciated role played by the subpoena compliance offices of Google, Meta, Microsoft, and other information platform providers.
    - For purposes of these comments, I'm going to refer to "Google" as a stand-in for all companies.
  - Before Yan's paper, many of us who study this field paid attention to the intermittent spats that would happen when tech companies would resist search warrants for the data stored on their servers.
  - And many of us sensed that the offices Yan shed light upon were full of smart and hard-working lawyers and non-lawyers who played an outsized role as gatekeepers of our digital privacy.
  - But it took Yan to give us so much more information.
- Some of her key findings
- This year, she turns her attention to the normative implications of this system we had created.
  - Google has interposed itself as a key step in the criminal procedure of online investigations.
  - To the triad of judge-prosecutor-defendant, we now have a new third-party, the internet platform.
  - Influenced by whatever incentives they deem most important, they often push back on requests.
    - Indeed, one nice contribution of this follow-on paper is to retell the story of Geofence warrants as another great example of how Google systematically says "no" and forces prosecutors to narrow the information they seek.
  - My glib, back-of-the-envelope take would be: more privacy, more better!
    - If Google wants to be yet another hurdle between the police and the rest of us, who can complain?
      - Well, aside from the government, that is.
  - But Yan Fang is not glib and does not do things on the back-of-the-envelope, so she brings us a characteristically intelligent and nuanced analysis of the normative stakes.
    - But as I think Yan would concede, this reads like an earlier stage work than Yan brought us last year.

#### 1.1.2. Her major takeaways

1. Company interests may converge but they may diverge with the privacy interests of some of the parties involved.
2. We are deprived a focus on substantive law and fact finding as core functions of our formal legal institutions
3. Adversaries don't have the right incentives to constrain these practices, especially given opacity.

#### 1.1.3. II: Converging and Diverging Interests

- Of the three, let me summarize the first one as an example.
- Arguments for convergence
  - Google uses transsubstantive criteria that tend to advance user privacy interests
    - Supporting Rozenshtein's Surveillance Intermediaries
- But not so fast: interests may also diverge
  - Building on Waldman and others who have looked at how managerialism tends to favor the interests of business.

#### 1.1.4. Leading her in Part V to several proposals:

- Start with the judges. Give them more info and capacity to review the decisions and decisionmaking of these offices.
- Rule 41 Inventories
  - more info for judges to evaluate the extent to which a company has provided the evidence called for
  - Citing Laurent Sacharoff's proposal
- Have the AO systematically review random samples of these search inventories
  - Wiretap Report and Delayed-Notice SW reports as precedents
  - The information learned will in turn help evaluate whether we need Carter/Daskal's "National Digital Evidence Office"
- Other smaller recommendations omitted

### *1.2. My comments*

#### 1.2.1. Overall

- Yet again, this proves the enormous worth of the qualitative empirical work you have done. As I said last year, your interviews have unearthed a goldmine of new insights into something that has long been understood as potentially important, but until now, mostly a mystery.
- Last year, many people asked you to talk about the normative stakes.

- Should we care that Google (and other companies) is playing this role?
- How is this changing outcomes and incentives?
- And if we conclude this is a problem, what can we do about this?

- This year, Yan has tried to rise to the challenge of these questions.
- Of the many comments below, I want to focus on three before opening things up to the audience:
  - Thoughts about the frame you use for your normative analysis.
  - A thought about institutions
  - A thought about the category of "internet evidence"

#### 1.2.2. On the normative frame

- Must you be normative?
  - You aren't leaning on your competitive advantage nearly as much!
  - Maybe your time would be better spent doing some additional interviews? Or interviews of different people.
  - There might be some instrumental advice about getting a job on the law teaching market, and maybe we can get into that.
  - But let's assume the normative turn is the right one.
- I see this as a mostly consequentalist analysis, one that looks at the various values and interests at play
  - and then asks how the role of these private actors is affecting those values and interests.
  - in large part by asking how it affects the incentives on the various actors
  - and also on how it affects the information available to all interested parties.
- But there are two ways in which the consequentalist frame has left me wanting a bit more, so this is a suggestion to broaden the normative stakes.
- First, as you rightly point out, we don't know much about the underlying facts!
  - So it's impossible to assess the winners and losers of the consequentialist questions you raise.
  - So although you raise all sorts of intriguing possibilities that will be useful for others thinking about the role played by these questions, without the information you need, you end up mostly focusing on information-enhancing solutions.
  - Case in point: the extended discussion about whether and when Google staffers tend to have their interests aligned with the interests of defendants.
    - On the one hand, I love the creative thought and care that went into telling plausible stories about how Google's interests might sometimes align and sometimes contradict the interests of defendants. This seems entirely plausible and very interesting.

        - But on the other hand, you concede that we just don't know!
- More importantly, this leaves so many normative considerations on the table:
    - Most importantly: the frame of *legitimacy*.
    - Nobody enlisted Google to play this role.
    - Nobody selected these employees to wield such power.
        - And as you point out, they likely aren't trained in a way to give them the kind of public values and democratic accountability we should want.
    - Shouldn't you lodge that critique irrespective of the consequentalist outcomes?
        - It shouldn't matter if Google happens to be pro-defendant or pro-government if we have delegated to a private company and its employees far too much power in a system supposedly bound by the Rule of Law.
    - This focus on legitimacy changes your analysis in two key ways:
    - 1. It leaves less to depend on empirical facts.
        - We don't need to know more about these cases if we are worried about the democratic legitimacy and and accountability of Google doing this work.
        - We know it is problematic based on the little we know. Knowing more might strengthen or weaken the case, but not by much.
    - 2. It leads to a totally different set of recommendations.
        - It's no longer just, "we need to know more."
        - It's about new forms of injecting legitimacy or improving accountability.
            - Training Google employees
            - FOIA for Google
            - Giving the decision to a judicial officer.

#### 1.2.3. On paying attention to institutions

- I love the way you have positioned this as an extension of Cohen's thoughts on institutions and hers (and others) focus on managerialism.
    - I am deeply convinced by this approach, and I hope to see a lot of work that views the world through this lens.
- But throughout I wanted much, much more on the relative strengths and weaknesses of various institutions.
- On "judges"
    - Part V is about "strengthening judicial oversight" but are we talking about:
        - Specific judges

        - All judges
        - The judiciary as an institution
    - Also, this piece cries for a discussion of the relative power and training of magistrate judges (who sign most warrants) and their Article III counterparts.
        - You might cite Orin's (misguided) attempts to wrest ex ante restrictions on warrants away from MJs on how to debate the relative strengths/weaknesses of judges.
        - Or any one of a number of articles debating the relative institutional strengths of weakness of courts or Congress or agencies.
- On the AO:
    - The reporting role you imagine for the administrative office of the us courts sounds very different from the kind of reports they do today.
        - You point to the Wiretap and Delayed Notice reports as examples, but both of those cases see the AO as acting as a glorified Excel user. They simply collect data and release spreadsheets.
        - They aren't playing an analytic role. Nor a policy or law role.
    - What you sketch out (albeit briefly) sounds much more nuanced and much more involved in the details of specific cases.
        - A random sample of cases to elicit what facts?
        - And how to summarize them?
    - Are you advocating for a more robust role for the AO, and if so, why are the right institution for this kind of transformation?
- Smaller example: comparing the budgets of DAs, PDs, and Google
    - First, why is the full revenue or budget of an institution at all the right number to compare?
        - Google isn't devoting all of its annual revenue to the subpoena compliance unit!
    - Second, dollar figures don't account for accrued expertise, training, prestige (DAs may attract more talented lawyers than Google's office), and other advantages or disadvantages these offices have vis-a-vis one another.
    - Third, and none of this speaks to the infamous way public defenders offices are starved of money and information in a pretty systematic way!
        - "The resources available to PDs are no greater" may be the understatement of the year!

#### 1.2.4. Lots of thoughts on how important "internet evidence" is today, and how important it will be tomorrow

- I just taught Computer Crime Law this semester for the first time since 2017.

- I was struck by how much the Fourth Amendment and statutes material had shifted in six years.
    - First, the smartphone revolution is complete.
        - Everything seems to have shifted now that people hold small supercomputers in their pockets that are portals to their cloud accounts.
        - Carpenter is exhibit A, but it's really every part of this area of law.
    - Second, the SCA seems like such an unimportant afterthought at this point.
        - Theofel and Warshak have simplified the infamous SCA chart.
- But with this recent experience fresh in my mind, I was struck by how the phrase you use throughout–"internet evidence"–feels like a bit of an anachronism:
    - "Internet" seems not to account for the key role of social media.
    - And it doesn't really seem to capture the way the cloud and smartphones dominate everything.
- To be clear, I'm not sure how this cashes out.
    - It might be that all the trends I have pointed to make Google and their judgments about warrants more important.
    - But it might be that some of this has diminished or will diminish Google's role.
        - Maybe we'll have more end-to-end encrypted services like WhatsApp, meaning the providers won't play any role, and it'll all become about buying spyware from the NSO group.
        - Maybe we'll increase our use of the Dark web, meaning it'll be harder to find email addresses that hold data.
        - Maybe the tech bro fever dreams about web3 decentralization will win out, and the police will be chasing mastodon hosts and subpoenaing bluesky server owners run out of abandoned oil derricks on the north sea.
- This also implicates your repeated attempts to connect your findings to questions of race and police injustice.
    - Who uses "internet evidence" anyway?
        - Maybe it's all white men, meaning Google is exacerbating these problems by protecting them?
        - Or maybe it's all white men, and Google's cynical managerialism means more of them are being pursued and caught?

#### 1.2.5. What Laurent doesn't get about search warrant inventory returns

- I haven't read Laurent Sacharoff's article about bolstering the use of Rule 41 search warrant inventory returns, but it seems to misunderstand what returns tend to contain.
    - In a pre-digital age, they were simple, dry lists that said, "box of files" or "accounting ledger."

        - A far cry from the kind of information revelation you seem to be seeking.
    - In a digital age, it's become worse–now the lists just say, "computer".
        - So maybe Laurent is trying to bring things to a point where it is level with the pre-digital age, meaning, "hard drive with 20,000 files".
            - But that still seems like it won't do the work he or you want it to do.
        - And maybe he wants to bolster them for digital files to a much richer level:
            - Here's a file listing of every disk we seized
            - Or here's a copy of everything we seized.
            - But if that's what he's arguing for, it's a much heavier lift, and is asking Rule 41 to do much more than it ever has before.
- But regardless of how well Laurent accounts for all of this, I think it's incumbent on you to discuss this, at least a little bit.
    - This seems to be a significant expansion of what we've asked this part of Rule 41 to do to date.
        - If you agree, defend it!
        - If you disagree, explain why.

**1.2.6. Other possible solutions you don't tackle:**

1. Why don't you ever suggest giving companies the affidavits?
2. What about a role for amici, like when the 4th Circuit recruited Susan Freiwald and Kevin Bankston to brief and argue an email warrant case?

**1.2.7. The geofence "three step" is a very important example. It might even justify a reframing around it.**

**1.2.8. The 2-3 places you try to connect this to debates about policing and race are not well developed or integrated yet**

## *1.3. Her cover letter questions to us:*

1. Which arguments and ideas do you find compelling?
    1. Which require more consideration? Which seem plain wrong?
    2. What have I overlooked?
2. Do you have suggestions for additional literature on police investigations?
    1. For example, articles that focus on the impact of search warrants on minorities, particularly compared to warrantless searches, patrol activities, or police interviews and interrogations?
    2. Or research that discusses the impact of internet evidence on the types of cases that are investigated, charged, or dismissed?
    3. Or studies about the relationship between internet evidence and the racial or economic backgrounds

of those who are charged or exculpated?

Author: Paul Ohm

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