Moral and Legal Foundations of Privacy

February 14, 2023

III. Privacy and the Government

1. The Fourth Amendment

What Is the U.S. Constitution?

- A founding document of the United States that sets out the national framework of the U.S. government
  - Executive Branch
  - Legislative Branch
  - Judicial Branch
- Created in 1787; became effective 1789
- Has been amended 27 times since then, including the Bill of Rights in 1791 (Amendments 1-10)
  - These first ten amendments were largely prohibitions against government action in certain areas of life:
    - Freedom of speech, religion, and press, etc.

The 4th Amendment to the U.S. Constitution

- "**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated**, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
- Questions to ask:
  - Was the government involved?
  - Was there a search or seizure?
  - Was the search or seizure reasonable?

Olmstead v. U.S.

Privacy over Physical Property Alone?

Presentation by: Aditya Gaur

Olmstead v. U.S. (1928)

- Defendant was engaged in bootlegging, the government tapped his telephone.
- The Court looks to the 4th Amendment and finds no violation:
  - "The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the house or offices of the defendants. . . ."

Olmstead v. U.S. (1928)

- The Court's analysis continues:
  - "The language of the [Fourth] Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched."

Olmstead v. U.S. (1928)

- "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the 4th Amendment."

Olmstead v. U.S. (1928)

- Brandeis dissents from the majority opinion:
  - Thinks the protection of the 4th Amendment is much broader than physical property, and includes "the right to be let alone."
  - (This is the same Brandeis as the author of "The Right to Privacy" from last week)
  - To Brandeis, it is immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement.

Katz v. United States

The Expectation of Privacy

Presentation by: Vinayak Khandelwal

Katz v. U.S. (1967)

- Government tapped a public telephone booth, and was allowed to introduce the recordings at trial.
- The Supreme Court reversed, finding that the 4th Amendment "protects people, not places."
- Thus, it is immaterial that a phone booth is "public" if the person reasonably expects privacy in the content of the call – even if the booth is made of glass.

Katz v. U.S. (1967)

- "One who occupies [the phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.
- "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

Katz v. U.S. (1967)

- The government argued that there was no physical intrusion into the phone booth.
  - The Court disagreed: "the underpinnings of . . . [Olmstead] . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine … can no longer be regarded as controlling."
  - "The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance."

Katz v. U.S. (1967)

- The Court finds the fact that the government was restrained in its action is of no matter, and its conduct cannot be "retroactively" validated.
- Justice Harlan's concurrence:
  - Created what is now known as the "reasonable expectation of privacy" test.
  - "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

Katz v. U.S. (1967)

- Justice Harlan's concurrence:
  - "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."
  - Here, in Katz's case, the "critical fact" is that one who occupies a telephone booth, "shuts the door behind him, and pays the toll that permits him to place a call surely is entitled to assume that his conversation is not being intercepted. The point is not that the booth is 'accessible to the public' at other times, but that it is a temporary private place whose momentary occupants' expectation of freedom from intrusion are recognized as reasonable."

Katz v. U.S. (1967)

- Justice Black's dissent:
  - He reads the 4th Amendment as written and says that it only protects tangible things from being searched and seized.
  - "A conversation overheard by eavesdropping, whether by plain snooping or wire-tapping, is not tangible" and thus "can neither be searched nor seized."
  - If the Framers had wanted to prohibit eavesdropping, they would have used appropriate language in the 4th Amendment.

Smith v. Maryland

The Third-Party Doctrine

Presentation by: Gaurav Narwani

Smith v. Maryland (1979)

- Local case from Baltimore in 1976.
- Patricia McDonough was robbed then later received threatening phone calls from someone who claimed to be the robber.
- The police found the man (Michael Smith) and had the telephone company install a pen register to record the numbers he dialed from his home phone.
- The register revealed that Michael Smith was calling Patricia McDonough.
- Smith was later arrested and at trial claimed the pen register was a violation of his 4th Amendment rights.

Smith v. Maryland (1979)

- The Supreme Court starts by reviewing the *Katz* decision and its two conclusions:
  - The Fourth Amendment "protects people, not places."
  - What matters is whether the person has a "reasonable expectation of privacy."
- The Court then distinguishes over *Katz*.
  - "[A] pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications. … Given a pen register's limited capabilities, therefore, [Smith's] argument that its installation and use constituted a 'search' necessarily rests upon a claim that he had a 'legitimate expectation of privacy' regarding the numbers he dialed on his phone."

Smith v. Maryland (1979)

- The Court thus rejects Smith's claim because it "doubt[s] that people in general entertain any actual expectation of privacy in the numbers they dial."
- People have to realize that they "convey" phone numbers to the telephone company, since the telephone company has to set up the call.
- The telephone company also lists all of the numbers you call on your monthly bills.
- "Although most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls."

Smith v. Maryland (1979)

- The Court also finds that "the site of the call is immaterial." While Smith made the call at home may have kept the "contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed."
- Thus the Court defines what is now known as the "third-party doctrine":
  - A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.
- The basis of the third-party doctrine is that the person disclosing the information "assumes the risk" that the third-party can disclose it to anyone.

Smith v. Maryland (1979)

- If Smith had placed the call through an operator, he could claim no legitimate expectation of privacy.
- The Court sees this as no different than that situation. When Smith dialed the numbers he "assumed the risk that the [telephone] company would reveal to police the numbers he dialed."
- Justice Stewart's dissent:
  - Dialing numbers is inherently necessary for making phone calls, just as is talking into the phone.
  - Following the Court's opinion, the conversation would no longer be private because it too "must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment."

Smith v. Maryland (1979)

- Justice Marshall's dissent:
  - Even if the public knows of pen registers (and Justice Marshall doubts they do), "it does not follow that they expect this information to be made available to the public in general or the government in particular."
  - "Privacy is not a discrete commodity, possessed absolutely or not at all."
  - Justice Marshall rejects the "assumption of risk" argument.
  - If you disclose certain records to a bank or telephone company for a limited purpose, you need not assume the information could be used for other purposes.
  - If so, a person "cannot help but accept the risk of surveillance" unless one chooses to forego "personal or professional necessity," like using the telephone.

Hardee – Kyllo v. U.S.

Emerging Technologies

Presentation by: FNU Shruthi Duraisamy

Kyllo v. US (2001)

- Police used a thermal camera on Danny Kyllo's house in Oregon from an officer's car across the street.
- The camera showed that an unusual amount of heat was radiating from the roof over the garage and the side of his home.
- The officers concluded that this heat was from lamps used to grow marijuana in his house.

Kyllo v. US (2001)

- The officers used the imaging information (and other things) to get a search warrant.
- The search led to officers finding more than 100 marijuana plants.
- Kyllo moved the court to suppress the seized evidence because it was obtained in violation of his Fourth Amendment rights.

Kyllo v. US (2001)

- The trial court denied his motion.
  - Found no rays or beams enter house, "cannot penetrate walls or windows to reveal conversations or human activities."
- Kyllo appealed to the 9th Circuit (the intermediate appellate court).

Kyllo v. US (2001)

- 9th Circuit found that Kyllo had shown no subjective expectation of privacy because he made no attempt to conceal the heat escaping from the home
- Even if he had, he had "no objectively reasonable expectation of privacy" in the heat radiating from his house. The camera provided no private details, only amorphous hot spots.

Kyllo v. US (2001)

- The Supreme Court found that there was a "search"
  - The camera obtained information that would otherwise not be obtained.
  - That the heat left the house was no different that the wiretap of a phone booth in Katz.
- The government argued that the search was proper because it did not detect private activities in private areas.
  - But support was from *Dow Chemical* case.

Kyllo v. US (2001)

- Supreme Court (Scalia) held that:
  - (1) Use of sense-enhancing technology to gather any information regarding interior of home that could not otherwise have been obtained without physical intrusion into constitutionally protected area constitutes a "search," and
  - (2) Use of thermal imaging to measure heat emanating from home was search.

Kyllo v. US (2001)

- "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant."

Thompson - U.S. v. Jones

GPS Tracking of a Vehicle

Presentation by: Xianglong Wang

US v Jones (2012)

- Police had a warrant to install a GPS device on Jones's vehicle within 10 days in DC.
- Police did not install until the 11th day and in Maryland.
- They tracked Jones's car for 28 days.
- Trial court granted motion to suppress evidence regarding position when vehicle was parked. Jones had no expectation of privacy while moving.

US v Jones (2012)

- Supreme Court:
  - 4th Amendment applies to vehicles, and using GPS to monitor movements is a search.
    - Attachment of the GPS device, coupled with its use to monitor Jones's movements, was a search.
  - Focuses on "in their persons, houses, papers and *effects*" from the 4th Amendment.
    - Jones's car is an "effect".
  - Government failed to argue that the search was reasonable, so that issue was not considered.

US v Jones (2012)

- Justice Sotomayor concurred, and discussed whether there is a reasonable expectation of privacy, even though that issue was not before the Court.
  - Also said we may need to reconsider privacy in information given to third parties in the digital age.
- Justice Alito and others said wrong to use physical attachment; *Katz* should be the rule.
  - Trespass neither "necessary nor sufficient" in *Katz*.

McCubbin - Carpenter v. U.S.

Cell Phone Location and Movement of Users

Presentation by: Zeyin Zhang

Carpenter v. US (2018)

- Background facts:
  - Cellular service providers track and log the location and movement of modern cell phones constantly.
  - This is called Cell Site Location Information ("CSLI").
  - When a cell phone connects to cell towers, the towers record CSLI.
  - The more towers in the area, the more precise the CSLI information is (precise to 0.5 to 2 miles).

Carpenter v. US (2018)

- In 2011, Detroit police arrested four people (including Carpenter) they thought had robbed several Radio Shack and T-Mobile stores in the area.
- The government requested cell phone location records from the cellular providers of Carpenter and the others (MetroPCS and Sprint).
- Did not seek the information under a warrant.
- The government received almost 13,000 CSLI for Carpenter (an average of 101 points per day).
- CSLI showed that Carpenter had been near the robbery locations.

Carpenter v. US (2018)

- Chief Justice Roberts starts with the evolution of Fourth Amendment analysis through some of the cases we've analyzed in class.
- This case, and CSLI, however, do not "fit neatly under existing precedents" and is at the "intersection of two lines of cases": those related to geolocation and those related to the third-party doctrine.

Carpenter v. US (2018)

- "Much like GPS tracking of a vehicle" (the *Jones* case), "cell phone location information is detailed, encyclopedic, and effortlessly compiled."
- It is "tireless and absolute surveillance", "near perfect surveillance, as if it had attached an ankle monitor to the phone's user."
- It "provides an all-encompassing record of the holder's whereabouts."

Carpenter v. US (2018)

- The Court finds a reasonable expectation of privacy in CSLI because "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"
- CSLI presents an even greater privacy concern than GPS monitoring because a cell phone is almost "a feature of human anatomy"

Carpenter v. US (2018)

- There has been a "seismic shift" in digital technology since the early Fourth Amendment cases that force the Court to reanalyze its previous analyses:
  - "There is a world of difference between the limited types of personal information addressed in" the early cases and that "casually collected by wireless carriers today."
- Finds that the third-party doctrine (*Smith*) does not apply because of the amount of information collected and the "unique nature of cell phone records."

Carpenter v. US (2018)

- Four dissenting opinions (which is a lot):
  - Justice Kennedy dissents primarily on the third-party doctrine, finding that cell-site records are no different from other records, like credit card records.
    - Finds that CSLI is not as accurate as Roberts believes.
  - Justice Thomas does not think any "property" of Carpenter has been searched. He believes CSLI is property of the wireless carriers.
  - Justice Alito's dissent is along similar lines as Justice Thomas, but goes into details on warrants (which is outside the scope of this class).

Carpenter v. US (2018)

- Justice Gorsuch believes the Court overstepped its precedent in basically ignoring the third-party doctrine and *Smith* because the Roberts did not like the result.
- Justice Gorsuch says so what? "Live with the consequences" of having judicial precedent and following it, rather than creating new law.
- Instead, Justice Gorsuch believes that *Smith* and the third-party doctrine are "on life support."