

third party doctrine

OPINION PAPER 1 – ISEC 3050



October 9, 2020

JAMIE LU

W0441213

Ethical frameworks change when there is a need to improve a situation, when people can no longer tolerate a conflict. This conflict of the privacy of data really calls for a change of ethical framework because of the spatial and temporal dimensions. The fourth and fifth amendments, along with the third-party doctrine were created during a time when the makers of these could not have anticipated the growth of the technological industry and how reliant people’s everyday lives have been to it.

The law has always evolved. It went from the time of the Justice Brandeis calling out for the people’s right to be left alone, to Olmstead v. United States case wherein the exclusionary rule could not be applied because Chief Justice William Taft mentioned previous decisions that characterized the fourth amendment as applying to only physical search and seizure, to when they created third party doctrine, stating that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties (Miller v. United States, 1958) in 1958. This has helped solved a lot of cases, including the Smith v. Maryland case of 1979.

Now is the time to move forward. There have been numerous cases wherein there has been a call to shape the law to what we need in the current context because so much has changed in the past years. One case in mind is the 2012 case of United States v. Fricosu, wherein Judge Blackburn of the District of Colorado granted the government’s motion to compel the defendant, Ramona Camelia Fricosu, to provide an unencrypted copy of her hard drive for evidence (Horth, 2012). The judge granted the motion because he gave immunity to the defendant that the evidence found in the encrypted hard drive would not be used against her. There is, however, an unanswered question on whether Fricosu’s right to self-incrimination was being violated by the motion despite the immunity the judge has given her. Can someone be legally compelled to unencrypt their data?

Data has already formed a major part in people’s everyday lives and one can derive so many things about a person from their data that is why there have been multiple articles stating its value and even stating it’s more valuable that gold or oil[[1]](#footnote-1). A person’s data should be theirs; they should be able to decide who would have access to it and to what extent. It should be part of their expectation of privacy. Data should be treated like any other person’s personal property, protected under both the fourth and fifth amendments.

According to the hierarchy of law, the constitution is the highest law of the land[[2]](#footnote-2). This means that it should be given precedence above all else. It also defines individual liberties and how laws should be shaped and how the government is structured. The third-party doctrine is below the fourth and fifth amendments, so the former should not be more supreme than the latter. Lobbyists have argued that the data industry will be destroyed if the fourth and fifth amendments are above it, but this is not the case. In my opinion, the third-party doctrine has already aged and must be revised in a way that protects the liberties of a person, especially in our new digital age.

With all things considered, I believe that data should be protected. However, I do not think that data should just simply be protected in the fourth and fifth amendment as this is too broad and vague. The fourth and fifth amendments should be used, nevertheless, as sort of the basis or starting point of laws that should be created specifically tailored to the 21st century or the technological era to complement the fourth and fifth amendments. As well as the third-party doctrine must be revised or there should be a change to protect a person’s liberties in the new digital age. I think this solution would be most beneficial to both the people and the courts. This will provide the protection of people’s rights, adhering to the fourth and fifth amendments, as well as provide courts with a better grasp on how to deal with cases in the 21st century.

# References

Arango, S. J. (2019, June 13). *The Third-Party Doctrine in the Wake of a “Seismic Shift”*. Retrieved from American Bar Association (ABA): https://www.americanbar.org/groups/litigation/committees/privacy-data-security/practice/2019/third-party-doctrine-wake-of-seismic-shift/

Bhageshpur, K. (2019, November 15). *Data is the new oil -- and that's a good thing*. Retrieved October 10, 2020, from Forbes: https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/#2eac14027304

BSE Institute. (2019, September 16). *Data is more valuable than gold!* Retrieved from BSE Institute: https://bseinstitute.wordpress.com/2019/09/16/data-is-more-valuable-than-gold/#:~:text=Data%20is%20more%20valuable%20than%20gold!,-Date%3A%20September%2016&text=With%20Data%20Scientist%20salaries%20touching,highest%20paying%20in%20the%20world.

Constitution Annotated. (n.d.). *Constitution of the United States*. Retrieved October 10, 2020, from Constitution Annotated: https://constitution.congress.gov/constitution/amendment-4/

Horth, B. (2012, February 2). *U.S. v. Fricosu: District Court Holds that Defendant Cannot Refuse to Decrypt Hard Drive under Fifth Amendment*. (A. Lauer, Editor) Retrieved October 10, 2020, from Harvard Journal of Law and Technology: http://jolt.law.harvard.edu/digest/u-s-v-fricosu

Miller v. United States, 357 U.S. 301 (U.S. Supreme Court June 23, 1958). Retrieved October 9, 2020, from https://supreme.justia.com/cases/federal/us/357/301/

Olmstead v. United States, 277 U.S. 438 (U.S. Supreme Court June 4, 1928). Retrieved October 9, 2020, from https://supreme.justia.com/cases/federal/us/277/438/

Smith v. Maryland, 442 U.S. 735 (U.S. Supreme Court June 20, 1979). Retrieved October 9, 2020, from https://supreme.justia.com/cases/federal/us/442/735/

*Sources of Law*. (n.d.). Retrieved October 10, 2020, from Law Shelf Educational Media: https://lawshelf.com/coursewarecontentview/sources-of-law-judicial/

The Economist. (2017, May 6). *The Economist*. Retrieved from The world's most valuable resource is no longer oil, but data: https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data

*The Hierarchy of Laws: Understanding and implementing the frameworks that govern elections.* (n.d.). Retrieved October 9, 2020, from https://www.ifes.org/sites/default/files/2016\_ifes\_hierarchy\_of\_laws.pdf

UNITED STATES of America, Plaintiff,, 10-cr-00509-REB-02 (United States District Court, D. Colorado January 23, 2012). Retrieved October 9, 2020, from https://scholar.google.com/scholar\_case?case=17911977035950841846

1. See reference: (Bhageshpur, 2019), (BSE Institute, 2019), and (The Economist, 2017) [↑](#footnote-ref-1)
2. See Reference: (The Hierarchy of Laws: Understanding and implementing the frameworks that govern elections) [↑](#footnote-ref-2)