

From Revolution to Evolution: How Technology Can Revitalize the Fourth Amendment

By Mirriam Seddiq

The practice of law frequently feels incredibly constraining; we are bound by rules, statutes, precedent, persuasive authorities. No one encourages us to think outside the box, because that sort of thinking is disruptive to the neat, clean, and orderly way in which people perceive the law. But as criminal defense attorneys the very essence of what we do should be disruptive to the very neat, clean, and orderly way in which the government wants to lead our clients to the prison door. Thinking outside the box, finding the loose ends and loopholes to what everyone deems ‘clearly established precedent’ should be the heart of soul of how we approach every single case.

The word ‘loophole’ has many negative connotations. Lay people believe this means we are somehow pulling a fast one and circumventing what is otherwise deserved punishment for our clients and thwarting the imposition of justice. But almost always the loophole is found in the very foundation of our system of government -- the Constitution. Things we take for granted as the ‘law’ are sometimes contrary to the document that establishes how police and prosecutors should conduct themselves in the criminal justice system; and the clearly established precedent succumbs to the constraints of the Constitution.

A few weeks ago, a client asked whether a search warrant was obtained for a pole camera that was focused on a residence. My immediate reaction was that no warrant was required for a pole camera since it was a visual inspection (albeit one that can last for a very long time), but I looked it up just to be sure. Much to my surprise, neither the Maryland courts nor the Fourth

Circuit has decided that a warrant is not required for pole cameras. In fact, I could not even ascertain that this was something that anyone had ever challenged; it seems we've simply taken for granted that pole cameras may be placed in front of homes without warrants. This led me down a rabbit hole of technology, surveillance, and the Fourth Amendment. What exactly does the Fourth Amendment protect, and should we be relying on our old notions of privacy rights when dealing with new technology? Is there an opportunity to reinvigorate the Fourth Amendment and potentially loop back around to challenge things we take for granted, like pole cameras?

In order to do this, we must begin at the beginning and re-read the Fourth Amendment, which states:

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.

U.S. Const. amend. IV.

This simple paragraph has been torn apart to make it easier for the government to do exactly what it protects us against. At its heart it says nothing more than that we should be free from government intrusion into our private lives and effects except in certain limited circumstances and that generally such intrusion should never occur without a warrant. This maxim has been riddled with so many exceptions that it barely exists anymore. However, with emerging technologies we have a chance to revitalize the Fourth Amendment. Thinking outside the box is essential when teaching judges how technology impacts privacy concerns, and there is an exciting opportunity to go back to the basics.

We begin the inquiry into how we should look at technology, surveillance, and privacy with *United States v. Jones*. 565 U.S. 400 (2012). In *Jones*, the Supreme Court was asked to decide if warrants are required for GPS tracking devices placed on cars to detect their movements. Justice Scalia authored the opinion for the Court, noting that “at bottom we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” *Id.* at 407. Despite the newness (at that time) of GPS technology and GPS tracking, Justice Scalia reiterated that the basic premise of the Fourth Amendment is the protection of people against trespass by the government and that the ease of new technologies doesn’t eviscerate that premise.

Even though the technology was new, the concept of protection against government intrusion into privacy was not. And, if a warrantless search would be deemed unreasonable in the 18th century, then it should not be acceptable now.

It is this reasoning that leads us to the rule that visual inspections do not violate the Fourth Amendment. Eyes cannot trespass, and if something is visible to a person standing in a public place, even if it is within the curtilage of a house, then a warrant is not required. Ergo, the government’s belief that a GPS tracking device was nothing more than a superior and enhanced way of watching a car travelling on a public roadway going from one location to another. The device acts as nothing more than technologically advanced eyes. However, as the concurring opinion in *Jones* noted, the police used the GPS device not to track Jones's "movements from one place to another," but rather to track Jones's movements 24 hours a day for 28 days. *Id.* at 414. The ultimate violation wasn’t the tracking of any one of these movements but the fact that the GPS was able to track him as he moved around, discovering the patterns of how he lived his day to day life.

This is, fundamentally, how surveillance works with new technology. It doesn't just make the job of the investigator or police agency easier, it pries deep into the intimate details of our lives, implicating fundamental privacy concerns.

Nowhere are these concerns more relevant and prevalent than in the discussions of cell phones and search warrants. In *Riley v. California*, the Supreme Court decided that, unlike a wallet or crumpled up papers in a coat pocket, a cell phone could not be searched without a warrant, even incident to arrest. 573 U.S. ____ (2014), 134 S.Ct. 2473. When we look at the words of the Fourth Amendment, we must not forget that a warrantless search must be reasonable; and the privacy rights implicated in a warrantless search must be one we as a society are willing to give up. A cell phone can be opened, just like a wallet; it can be flipped through and skimmed across, just like a wallet. However, the Court held that, unlike a wallet, the items stored in cell phone may very well be like those stored in our homes. Yet, we now carry those same items with us everywhere; and we do, in fact, have an expectation that a police officer would not be privy to all our photographs, diaries, and texts with our spouses, simply by going into our pockets.

This brings me back to my original point about my client and the pole camera and how I took for granted that pole cameras were nothing more than visual inspections of the outside of a home. But the more I thought about it, the more it became apparent that it was closer to a GPS tracker in what type of surveillance it can show. A pole camera is usually placed 20-30 feet above ground. Most humans don't go much higher than six feet, which substantially limits their visual range. Most pole cameras are left up for days or weeks at a time, and they are on 24 hours a day. Most of us would notice a car or a person sitting in front of our house 24 hours a day, seven day a week for weeks at a time. We'd probably call the police (not realizing it was the

police out there in the first place). Pole cameras do much more than simply track what a person from the street could see, and yet we are told that this technology only simplifies regular police work. They can rewind, fast forward, pause, and zoom. A pole camera can tell the police if you are going outside to sneak a cigarette at 2:00 a.m. or if your mother-in-law drives up to the house and then decides she doesn't want to deal with you and backs out. A pole camera can see beyond foliage that may block a house from a roadway; it can see above and around trees and fences; and ignores "do not trespass" postings. And while 'clearly established precedent' may state that this type of surveillance passes constitutional muster, the newer cases that deal with the latest technology may be able to give us insight into how to challenge these notions. Technology that can make the government's job easier should be lauded and used; however, technology – whether it be old or new – should not be used to intrude into areas where a warrant would otherwise be required.

We lawyers are always walking a fine line between respecting what has come before and challenging the status quo. But as technology changes the way in which we live our lives, we must be willing to step outside our comfort zone and find ways to curtail what could otherwise be unmitigated warrantless government surveillance. It is incumbent upon us to find ways to give strength to the Fourth Amendment, and the new landscape of technology is a great place for us to do exactly that.

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