2011 FOURTH AMENDMENT SYMPOSIUM: THE FUTURE OF FOURTH AMENDMENT ANALYSIS

INTRODUCTION

Thomas K. Clancy
The National Center for Justice and the Rule of Law
The University of Mississippi School of Law

OBJECTIVE:

After this session you will be able to describe the components of the 2011 Fourth Amendment Symposium.

REQUIRED READING:

No materials will be distributed for this session........................................................................ N/A
2011 FOURTH AMENDMENT SYMPOSIUM:

THE FUTURE OF FOURTH AMENDMENT ANALYSIS

THE FUTURE OF SEIZURE ANALYSIS

Professor José Anderson
University of Baltimore School of Law

Professor Ronald J. Bacigal
University of Richmond School of Law

Professor Richard E. Myers, II
University of North Carolina School of Law

REQUIRED READING:

<table>
<thead>
<tr>
<th>PAGE</th>
</tr>
</thead>
</table>
Is it Big Brother or Little Brother?
Surrendering Seizure Privacy for the Benefits of Technology

“They that can give up essential liberty to obtain a little temporary safety deserve neither safety nor liberty.”

-Ben Franklin

“We the People” have a serious choice to make. The onslaught of new technology that has improved the quality of our daily lives has also presented corresponding challenges that we are still grappling with in our government institutions. Law enforcement organizations, privacy advocates, and the judiciary are being confronted with the reality that technology will not wait on our decisions about how public or private we want our lives to be. A recent news report reflects the differences of perspective on the issue:

In testimony before a House Judiciary subcommittee, FBI General Counsel Valerie Caproni said it is "exponentially more difficult" to execute court-authorized wiretaps on new technology, noting that criminals can now communicate using wireless devices and anonymous avatars. The law enforcement official expressed concerns that new technology was going to cause many investigations to “go dark.”

In a response to the FBI’s complaint about hampered criminal investigations, one advocacy group representative commented:

“There were more wiretaps placed in 2009 by federal and state officials than ever in history. For each of the thousands of wiretaps that are placed, over 3,000 communications are intercepted. That's not an FBI going dark. That's an awful lot of light."

Greg Nojeim of the Center for Democracy and Technology

**Action needed to assure new technology can be wiretapped, FBI says**
By Mike M. Ahlers and Jeanne Meserve, CNN  February 18, 2011

Even Courts have not been able to avoid the controversy. Just last month a federal Appeals Court ruled that a cell phone was a “computer” for purposes of increasing a federal criminal sentence. In United States v. Kramer, Decided February 8, 2011 (8th Circuit Wollman, J.), the Court noted that “Indeed, modern cellular phones process data
at comparable or faster rates than the desktop computers that existed when § 1030(e) (1) was enacted “(the federal statute at issue). Slip op. at 3.

An important question is for all the stakeholders involved in the privacy discussion to determine the objectives each wants the technology to accomplish. Law enforcement wants the ease of proof that technology has offered. Local governments like the revenue producing ability through traffic and toll fee collection it has provided. Private Citizens love the ability to engage in multi-media communication our modern “smart phones” have delivered. So what is the big deal about privacy? If we are all agreed that technology offers all involved some benefit, what should we be concerned about the ease of tracking and accuracy of record keeping improved technology provides? The ability to rapidly seize and store such records and the government’s ability to gain access to those records will be the primary privacy issue of the next decade.

Some are concerned that we have not fully contemplated the full implications of a society when so much is stored so easily and accessed so quickly that we have little chance to sift and sort what we may want to protect from the probing of the government or even some curious member of the general public. Like the Eighth Circuit Court of Appeals, we may be asked to reexamine our most basic definitions of all things that effect our protection of privacy. If we do not take a hard look at how much privacy we want to protect, we may end up giving it away as quickly as a twitter. Access to this stored data is the issue of the future as technology makes the ease of seizure an increasing daily reality. Every thing from shopping habits to tool both photographs of passengers in our cars, we are confronted with a world where we have few choices about what is stored and who can use it. In the past decades wiretap law focused on making the rigor of seizure a part of privacy protection. That rigor has been diminished by technology, particularly in a world where we voluntarily surrender so much data when we are not sure of its many possible destinations.

In the post 9/11 Patriot Act season of constant international security threats, society is always balancing the fear of attacks with our concern about losing personal freedom. I often wonder what Ben Franklin would say to us today!

QUESTIONS TO CONSIDER

Review the attached opinion from the Court of Appeals in United States v. Kramer and decide if you agree with the judges’ definition of a cell phone as a computer?

If you were a prosecutor or a defense lawyer who now must deal with the consequences of this opinion, how would you advise law enforcement agencies or privacy groups to fashion proposed legislation to advance their goals?
WOLLMAN, Circuit Judge.

Steve Wozniak, co-founder of Apple Computer, recently mused: “Everything has a computer in it nowadays.”¹ But is an ordinary cellular phone—used only to place calls and send text messages—a computer? The district court,² relying on the definition of “computer” found in 18 U.S.C. § 1030(e)(1), concluded that Neil


²The Honorable Richard E. Dorr, United States District Judge for the Western District of Missouri.
Kramer’s was, and imposed an enhanced prison sentence for its use in committing an offense. We affirm.

I.

Neil Kramer pleaded guilty to transporting a minor in interstate commerce with the intent to engage in criminal sexual activity with her, a violation of 18 U.S.C. § 2423(a). He also acknowledged that he used his cellular telephone—a Motorola Motorazr V3—to make voice calls and send text messages to the victim for a six-month period leading up to the offense.

The district court—over Kramer’s objection—concluded that the phone was a “computer,” see 18 U.S.C. § 1030(e)(1), applied a two-level enhancement for its use to facilitate the offense, see U.S. Sentencing Guidelines Manual § 2G1.3(b)(3) (2009), and sentenced Kramer to 168 months’ imprisonment. Although this sentence is within both the original and enhanced guidelines ranges, the district court acknowledged that without the enhancement it would have sentenced Kramer to 140 months’ imprisonment.

Kramer argues (1) that application of the enhancement was procedural error because a cellular telephone, when used only to make voice calls and send text messages, cannot be a “computer” as defined in 18 U.S.C. § 1030(e)(1), and (2) that even if a phone could be a computer, the government’s evidence was insufficient to show that his phone met that definition.

II.

We review a district court’s decision to apply a sentencing enhancement for abuse of discretion, including de novo review of the meaning of the guidelines. United States v. Blankenship, 552 F.3d 703, 704 (8th Cir. 2009).
The parties disagree over the meaning of this language. Kramer argues that the word "electronic" modifies "high speed data processing device" and therefore the device must be both "electronic" and "high speed." The government argues that "electronic, magnetic, optical, [and] electrochemical" data processing devices are, by their nature, "high speed," and the language "other high speed" was included to expand the statute to cover additional types of high-speed devices that were not, or could not be, enumerated. We need not resolve this dispute because even if Kramer’s reading of the statute is correct, a modern cellular phone can be a “high speed” electronic device. Indeed, modern cellular phones process data at comparable or faster rates than the desktop computers that existed when § 1030(e)(1) was enacted.

U.S. Sentencing Guidelines Manual § 2G1.3(b)(3) provides a two-level enhancement for “the use of a computer . . . to . . . persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct . . . .” “‘Computer’ has the meaning given that term in 18 U.S.C. § 1030(e)(1),” U.S. Sentencing Guidelines Manual § 2G1.3(b)(3) cmt. n.1 (2009), that is, it “means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device,” 18 U.S.C. § 1030(e)(1). It does not, however, “include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.” 18 U.S.C. § 1030(e)(1).

Kramer first argues that the district court incorrectly interpreted the term “computer” to include a “basic cell phone” being used only to call and text message the victim. In his view, the enhancement should apply only when a device is used to access the Internet. We disagree.

The language of 18 U.S.C. § 1030(e)(1) is exceedingly broad. If a device is “an electronic . . . or other high speed data processing device performing logical, arithmetic, or storage functions,” it is a computer. This definition captures any device that makes use of an electronic data processor, examples of which are legion. Accord

The parties disagree over the meaning of this language. Kramer argues that the word “electronic” modifies “high speed data processing device” and therefore the device must be both “electronic” and “high speed.” The government argues that “electronic, magnetic, optical, [and] electrochemical” data processing devices are, by their nature, “high speed,” and the language “other high speed” was included to expand the statute to cover additional types of high-speed devices that were not, or could not be, enumerated. We need not resolve this dispute because even if Kramer’s reading of the statute is correct, a modern cellular phone can be a “high speed” electronic device. Indeed, modern cellular phones process data at comparable or faster rates than the desktop computers that existed when § 1030(e)(1) was enacted.
Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minn. L. Rev. 1561, 1577 (2010) (“Just think of the common household items that include microchips and electronic storage devices, and thus will satisfy the statutory definition of ‘computer.’ That category can include coffeemakers, microwave ovens, watches, telephones, children’s toys, MP3 players, refrigerators, heating and air-conditioning units, radios, alarm clocks, televisions, and DVD players, in addition to more traditional computers like laptops or desktop computers.” (footnote omitted)). Additionally, each time an electronic processor performs any task—from powering on, to receiving keypad input, to displaying information—it performs logical, arithmetic, or storage functions. These functions are the essence of its operation. *See* The New Oxford American Dictionary 277 (2d ed. 2005) (defining “central processing unit” as “the part of a computer in which operations are controlled and executed”).

Furthermore, there is nothing in the statutory definition that purports to exclude devices because they lack a connection to the Internet. To be sure, the term computer “does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.” 18 U.S.C. § 1030(e)(1). But this hardly excludes all non-Internet-enabled devices from the definition of “computer”—indeed, this phrasing would be an odd way to do it. Whatever makes an automated typewriter “similar” to a hand held calculator—the statute provides no further illumination—we find few similarities between those items and a modern cellular phone containing an electronic processor. Therefore we conclude that cellular phones are not excluded by this language.  

---

Kramer’s reliance on *United States v. Lay*, 583 F.3d 436 (6th Cir. 2009), is misplaced. In *Lay*, the Sixth Circuit affirmed a § 2G1.3(b)(3) enhancement on the ground that the defendant used a computer to develop a relationship with the victim, even though future communications were exclusively by mobile phone and other “offline” modes. The court said that “[i]t allow a predator to use a computer to develop relationships with minor victims, so long as the ultimate consummation is
Of course, the enhancement does not apply to every offender who happens to use a computer-controlled microwave or coffeemaker. Application note 4 to § 2G1.3(b)(3) limits application of the enhancement to those offenders who use a computer “to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.” U.S. Sentencing Guidelines Manual § 2G1.3(b)(3) cmt. n.4 (2009). Therefore, the note continues, the enhancement “would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.” Id. This is a meaningful limitation on the applicability of the enhancement, but it is no help to Kramer.

We acknowledge that a “basic” cellular phone might not easily fit within the colloquial definition of “computer.” We are bound, however, not by the common understanding of that word, but by the specific—if broad—definition set forth in § 1030(e)(1). Now it may be that neither the Sentencing Commission nor Congress anticipated that a cellular phone would be included in that definition. As technology

first proposed through offline communication, would not serve the purpose of the enhancement.” 583 F.3d at 447. As Kramer sees it, Lay “implicitly distinguishes use of a cellular telephone from use of a traditional computer when applying the enhancement.” Appellant’s Br. at 16. That may be so. But in that case the government never argued that the mobile phone itself was a computer, nor did the court ever consider or decide that issue. Whether the court in Lay would have expressly adopted this implicit distinction we do not know, because the issue was never squarely presented to it. Lay, therefore, does not help us decide this case.

5Indeed the Commission, explaining its reasons for “expand[ing] the enhancement” found in guidelines § 2G2.2(b)(5) to include the use of an “interactive computer service,” expressed its view that “the term ‘computer’ did not capture all types of Internet devices.” U.S. Sentencing Guidelines Manual supp. to app. C, amend. 664, at 59 (2009). Therefore, it continued, “the amendment expands the definition of ‘computer’ to include other devices that involve interactive computer services (e.g., Web-Tv).” Id.
continues to develop, § 1030(e)(1) may come to capture still additional devices that few industry experts, much less the Commission or Congress, could foresee. But to the extent that such a sweeping definition was unintended or is now inappropriate, it is a matter for the Commission or Congress to correct. We cannot provide relief from plain statutory text. See United States v. Mitra, 405 F.3d 492, 495 (7th Cir. 2005) (“As more devices come to have built-in intelligence, the effective scope of [§ 1030(e)(1)] grows. This might prompt Congress to amend the statute but does not authorize the judiciary to give the existing version less coverage than its language portends.”).

III.

Kramer’s second contention—that the government’s evidence was insufficient to demonstrate that his cellular phone was a computer—also fails. “The government must prove the facts needed to support a sentencing enhancement by a preponderance of the evidence, and we review the district court’s fact findings for clear error.” United States v. Kain, 589 F.3d 945, 952 (8th Cir. 2009).

The government introduced the phone’s user’s manual and a printout from Motorola’s website describing the phone’s features. See JA 1-120. The government did not, however, offer any expert testimony regarding the phone’s capabilities. Although doing so might have aided our review, the materials presented to the district court were sufficient to show by a preponderance of the evidence that Kramer’s phone was an “electronic . . . or other high speed data processing device” that “perform[ed]...

---

6In a now-famous understatement, Popular Mechanics once predicted: “Where a calculator like the ENIAC today is equipped with 18,000 vacuum tubes and weighs 30 tons, computers in the future may have only 1000 vacuum tubes and perhaps weigh only 1.5 tons.” Andrew Hamilton, Brains that Click, Popular Mechanics, Mar. 1949, at 162, 258.
logical, arithmetic, or storage functions” when Kramer used it to call and text message the victim.

The printout reveals that the phone is powered by a “680 mAh Li-ion” battery, JA 118, has “5MB” of memory, JA 119, is capable of running software, id., makes use of a “Graphic Accelerator” to run its color display screens, id., has a “User-customizable” main menu, id., and comes with “Preloaded” text messages, JA 118. Also, the user’s manual contains a “Software Copyright Notice” which warns that the phone “may include copyrighted Motorola and third-party software stored in semiconductor memories or other media.” JA 105. Together, these are sufficient to show that the phone makes use of an electronic data processor.

Furthermore, that processor performs arithmetic, logical, and storage functions when the phone is used to place a call. The user’s manual notes that the phone “keeps lists of incoming and outgoing calls, even for calls that did not connect,” JA 61, and “displays the phone number for incoming calls in [the] phone’s external and internal displays.” JA 66. Additionally, the phone keeps track of the “Network connection time,” which is “the elapsed time from the moment [the user] connect[s] to [the] service provider’s network to the moment [the user] end[s] the call by pressing [the end key].” JA 84. This counting function alone is sufficient to support a finding that the phone is performing logical and arithmetic operations when used to place calls.

The same is true when the phone is used to send text messages. Most fundamentally, the phone stores sets of characters that are available to a user when typing a message. See JA 42, 44. As the user types, the phone keeps track of the user’s past inputs and displays the “entered text,” see JA 44, i.e., the message being composed. The user may also delete characters previously entered, either “one letter at a time” or all at once. Id. In addition, the phone allows the users to “set different primary and secondary text entry modes, and easily switch between modes as needed when [they] enter data or compose a message,” including “iTAP” mode which uses
“software” to “predict[] each word” as it is entered. JA 35. These capabilities all support the district court’s finding that the phone performed arithmetic, logical, and storage functions when Kramer used it to send text messages to the victim.

IV.

For these reasons, we affirm Kramer’s sentence.

______________________________

10
Some Flaws of the Terry paradigm

Richard E. Myers II

[The following materials are an excerpt from a longer article written by the author]

I. Introduction

Psychological research suggests some additional problems that are inherent in the current stop-and-frisk paradigm, based on the reasonable and articulable suspicion standard laid out in Terry v. Ohio. First, psychologists who study the nature of expert decision-making suggest that police officers in the field may not be fully aware of much of the information on which they rely at the time they are using it.1 Second, research into the nature of memory itself suggests that by requiring officers to write reports and prepare testimony to match a particular verbal standard, the criminal justice system, based as it is on oral testimony, may be irrevocably tampering with the officer’s memory.2 I consider each of these claims in turn.

A. Naturalistic Decision Making (NDM)

At least some of the dissatisfaction with the Terry standard on the law enforcement side is based on a fundamental mismatch between the way emergency responders, such as police officers, and lawyers think. It seems unlikely the Terry standard adequately reflects the reality of the practice of experienced police officers. Research into the way experts perform their jobs in other disciplines that require rapid reaction to changing circumstances in a stress-filled environment—firefighters, military officers and jet pilots—has shown that decisions like these are not the product of the type of analysis in which judges and lawyers routinely engage.3 Simply put, the

---


2 Cf. Bennett L. Gershman, Witness Coaching by Prosecutors, 23 Cardozo L. Rev. 829, 839 (2002) (“Whereas witness preparation certainly can assist a witness in remembering and retrieving truthful information, preparation can also distort a witness’s underlying memory and produce a false recollection.”).

officer on the street is engaged in a different kind of thinking than a judge on the bench.⁴

Naturalistic Decision Making is the term for a new field of applied psychological research. NDM “seeks explicitly to understand how people handle complex tasks and environments. Instead of trying to reduce these to variables that can be studied at leisure, NDM examines the phenomena themselves in the context of the situations where they are found.”⁵

Decision researchers such as Gary Klein and Roberta Calderwood and Anne Clinton-Cirocco call the process that experts acting in these stressful conditions engage in “recognition-primed decisionmaking.”⁶ In these situations, experts don’t carefully choose among a series of generated alternatives. Instead, they rapidly pattern match, looking for an experience that fits the situation.⁷ We may be missing the big picture altogether by requiring explicit knowledge as the basis for a constitutional stop. According to Klein,

Many researchers are now advocating for a dual-system mode of thinking. The automatic system is fast, automatic, effortless and emotional, and uses tacit knowledge. The reflective system is slower, conscious, effortful, deliberate, logical and serial, and uses explicit knowledge. These two systems, which work in different ways, complement each other.”⁸

And these two systems don’t easily connect to each other.⁹ It is not hard to imagine that they also reflect the difference between the systems that take precedence for a police officer on the street, deciding whether he is or the public are at risk, and for a prosecutor or judge in the office trying to decide whether that decision meets the Terry standard.

⁴ See
⁷ Id.
⁹ Id.
Imagine a hypothetical officer observing a suspect on the street. Imagine that instead of the officer describing everything verbally, a camera worn by the officer records it. The same information that was available to the camera is now available to his supervisor, the prosecutor, the judge, and ultimately the jury. Ironically, much of the information that they will be processing may not be available to the officer, at least not consciously. While he is on the street, in the danger zone, if his instincts suggest something is wrong, and that the suspect may be dangerous, his focus may change. Instead of closely watching the suspect’s face, at least consciously, his focus may change to the suspect’s hands, and to the clothing where weapons may be hidden. His subconscious mind may be processing all of the details that we are watching on camera, but his attention is focused down on only a few things. This attention limitation may mean that at times, the officer will have less accessible to him than we might expect when he is called upon to testify in court about the basis of his actions.

B. Constructed Memory and Verbal Overshadowing: Going from that’s how it must have happened to that’s how it did happen

Constructed memory is one of the concerns that attorneys must grapple with for all witnesses. Memory is not a fixed point, and it is constructed, and reconstructed, from the moment of the event to the moment of recall on the witness stand. Many readers of this article have a memory of themselves involved in some significant event – a birthday party, Christmas, a wedding – where they can see themselves engaged in the activity in their mind’s eye. This third person view of the event is both real, and an artifact. Barring an out-of-body experience, it is unlikely that the person with such a memory truly saw themselves that way. The image may well comes from a photograph, or a video, or some other reconstruction based on family stories, fragmentary memories, and the rest of the memory is filled in around it. It may contain many important and accurate details, such as who was present, what was received, how one felt, but the image has become part of the memory in such a way that it is intertwined in one’s mind.


11 See Elizabeth F. Loftus, Memory Faults and Fixes, 18 ISSUES IN SCI. & TECH., Summer 2002, at 43.
Advances in memory research show that there are multiple paths in which a witness can develop a real, but false memory.\textsuperscript{12} Factors such as stress and gap-filling can affect the acquisition of information, stress and the post-event misinformation effect can also alter memories after they have been initially encoded, and memories can be significantly affected by the passage of time.\textsuperscript{13}

“People integrate new materials into their memory, modifying what they believe they personally experienced. When people combine information gathered at the time of an actual experience with information acquired later, they form a smooth and seamless memory and thereafter have great difficulty telling which facts came from which time.”\textsuperscript{14}

It gets worse. Post-event suggestion, which may include new information from other witnesses, photos, records, reports, or even leading questions, often does more than refresh and bolster a fading memory.\textsuperscript{15} It can create entirely new, and entirely false, memories.\textsuperscript{16} Many of the criticisms of hypnotically induced memory, for example, are based on this phenomenon.\textsuperscript{17} Memory researchers have been able to successfully implant genuinely believed but entirely false memories, demonstrating clinically that this phenomenon exists.\textsuperscript{18}

\textsuperscript{12} Frederick Charles Bartlett, Remembering: A Study in Experimental and Social Psychology (1997); Elizabeth Loftus & Katherine Ketcham, The Myth of Repressed Memory (1994)
\textsuperscript{13} Gary L. Wells & Elizabeth F. Loftus, Eyewitness Memory for People and Events, in 11 Handbook of Psychology: Forensic Psychology 149, 150 (A.M. Goldstein ed., 2003).
\textsuperscript{14} Elizabeth F. Loftus, Memory Faults and Fixes, 18 ISSUES IN SCI. & TECH., Summer 2002, at 43. Legal scholars have considered the dangers in the context of all witness preparation; see also Mirjan Damaska, Presentation of Evidence and Factfinding Precision, 123 U. PA. L. REV. 1083, 1094 (1975):

During the sessions devoted to "coaching," the future witness is likely to try to adapt himself to expectations mirrored in the interviewer’s one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer’s expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.

Id. at 1094.
\textsuperscript{15} Elizabeth F. Loftus, Memory Faults and Fixes, 18 ISSUES IN SCI. & TECH., Summer 2002, at 43.
\textsuperscript{16} Id.
\textsuperscript{17} See, e.g., Amanda J. Barnier and Kevin M. McConkey, Reports of Real and False Memories: The Relevance of Hypnosis, Hypnotizability, and Context of Memory Test, 101 Journal of Abnormal Psychology 521, 521-27 (1992)(comparing studies of the factors affecting false memory, including hypnosis).
\textsuperscript{18} Elizabeth Loftus and Jacqueline Pickrell, The Formation of False Memories, 25 PSYCHIATRIC ANNALS 720-21, (1995). (experimentally implanting false memories of being lost in a shopping mall as a young child); D.S. Lindsay, et al., True photographs and false memories. 15 PSYCHOLOGICAL SCIENCE, 149–154 (2004)(discussing implanted false memories of being hospitalized overnight for an ear infection, spilling a punch bowl on the bride’s parents at a wedding, getting one’s hand caught in a mousetrap, hiding the toy slime in the teacher’s desk, and witnessing a
Moreover, witness confidence in the quality of the memory can increase as the officer prepares for trial, even as the contamination increases.\textsuperscript{19} According to experimental research done to test the effects that witness preparation had on witness confidence:

Postevent questioning led to significantly higher later confidence ratings for incorrect responses in all three experiments, as well as for correct responses in one of the experiments. This finding is consistent with some anecdotal evidence from the legal arena that eyewitnesses often become more confident in their memories of a criminal episode as the time for testimony at trial draws near (and as the accumulated amount of postevent questioning increases).\textsuperscript{20}

This matters in the Terry context because honest officers trying to recall what happened are just as likely as other witnesses to experience all of these memory-altering effects. And because they may have been involved in hundreds of similar situations by the time they testify in court, the details of one may be blurring into another. As repeat players, officers may be more, not less, susceptible to the creation of false memories.\textsuperscript{21} An officer who has made 50 additional traffic stops in the same stretch of highway or has had 50 citizen encounters in the same area of his beat between the time he encountered a particular defendant and the time he testifies, may be unable to keep the details from blending. As we will see in the next section, asking him to reduce the experience to a written report, one that focuses on legally relevant facts, may preserve information, but also have the additional effect of changing the way his memory works altogether.\textsuperscript{22}

\textsuperscript{21} It is possible, of course, for police officers to lie, and for judges to fail to critically examine their testimony. See, e.g., Laurie L. Levenson, \textit{Unnerving the Judges: Judicial Responsibility for the Rampart Scandal}, 34 Loy. L.A. L. Rev. 787, 790-91 (2001) (asserting that judges sometimes “ignore telltale signs that police officers fabricate testimony to obtain convictions, including amazingly similar stories by officers regarding the conduct of unrelated defendants, inconsistencies in police officer reports, [and] dramatic recalls of memory.”).
\textsuperscript{22} Tanja Rapus Benton, David F. Ross, Emily Bradshaw, W. Neil Thomas & Gregory S. Bradshaw, \textit{Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts}, 20 APPLIED COGNITIVE PSYCHOL. 115 (2006); Richard A. Wise & Martin A. Safer, \textit{What U.S. Judges Know and Believe
The courts’ preference for articulable experiences, and the practical support systems that come with that in the form of written reports, may actually be altering the memories of officers and witnesses, over multiple stages. Translating a largely subconscious experience into Terry terms requires officers to go from recall of the event as a set of subjective experiences - sights, sounds, smells - to a set of verbalized experiences. By requiring officers to translate their conduct into articulable suspicion to meet the standard, we may have the unintended effect of reprogramming their memories of the event so that the standard we ask them to articulate actually alters the memory of the event to conform with the criteria.

In particular, the research of psychiatrist Jonathan Schooler has shown that using words to describe memories can interfere with recall of faces, or images. His work shows that recall favors the verbal description, however inaccurate it may have been initially, once the subject has committed to it. Verbal memory operates through a different area of the brain than visual memory. Schooler’s work has shown that committing to a verbal description actually changes the part of the brain that is accessed when recalling the event.

II. What policy implications should we draw from these insights?

Requiring “articulable suspicion” rather than an “inchoate hunch” may seem perfectly sensible to lawyers and judges -- after all articulating is what they do.\(^{23}\) Does the court mean that the articulation should arise before the officer acts? The answer is clearly no, although that would be the time most likely to regulate police conduct. The courts have decided that the inquiry is objective, not subjective, and that while the information must have been available to the officer at the time of the event, it need not have been processed by the particular officer as such. The question is not what did this particular officer think at the time, it is what might a reasonable police officer using the information available at the time have done.

\(^{23}\) See Craig S. Lerner, Judges Policing Hunches, 4 J.L. Econ. & Pol’y 25, 29-31 (2007). (arguing that courts privilege articulate explanations over mere hunches, often to the detriment of the search for truth).
This objective approach leads to a host of concerns about the process of translating an experience in the field into testimony. For example, when and how does the officer learn and formulate the information? Can a sergeant or a supervisor help the officer to prepare? Can departments create and use question-driven report processing that drives the officer toward meeting the legal standard? Is this simply careful capturing of information, or does framing the report to meet the anticipated constitution objections amount to impermissible witness coaching? Is it okay for the articulation to be the result of a searching inquiry by the prosecutor before the officer takes the stand? Can a prosecutor explain the rules, and ask the officer to reframe his observations in a format recognizable to the courts? And how much will the process of meeting the Terry standard contaminate the officer’s memory of the experience itself? Scholars such as Christopher Slobogin have written extensively and well on whether current Fourth Amendment doctrine and the exclusionary rule create incentives for officers to lie.\textsuperscript{24} But lying, in the latter context, means that the officer is testifying in deliberate disregard for the truth; the officer has a true memory of the event, which he then disregards while testifying, in favor of a false account that will permit the officer to meet the constitutional standard.

The contaminating effects of preparing to testify can also have a truth-distorting effect, even for honest officers and prosecutors. We should ask applied cognitive psychologists to study whether current Fourth Amendment doctrine and the mechanisms we have created to enforce it are having officers give subjectively true testimony regarding their encounters, i.e. statements that reflect their memory as they perceive it, that have been altered by the process of capturing and accessing the information in constitutional terms. Specifically, the existing research begs us to consider how much the inquiry that prosecutors go through when preparing the witness, or even a witness’s anticipation of the line of questioning, alters the way the police officer remembers the event.\textsuperscript{25} Given that words and

\textsuperscript{24} Some critics suggest that the officer is “testilying” when they alter their statements to conform with the requirements of reasonable suspicion or probable cause. Christopher Slobogin, \textit{Testilying and What to Do About It}, 67 U. COLO. L. REV. 1037, 1043 (1996).

\textsuperscript{25} For a review of the risks, see Bennett L. Gershman, \textit{Witness Coaching By Prosecutors}, 23 CARDOZO L. REV. 829 (2002). See also Fred C. Zacharias & Shaun Martin, \textit{Coaching Witnesses}, 87 KY. L.J. 1001 (1998-
experiences often reside in different parts of the brain itself, does the process of writing a police report fundamentally alter the nature of the memory itself? Is a form that directs thinking down certain paths, or training that directs officers to remember things in certain, court-approved ways, changing the nature of the experience itself? Given that memory is constructed, does the way we apply the standard help or hurt the courts in their quest for accuracy?\textsuperscript{26}

Once we have some answers from the applied psychologists, attorneys and the courts have a related set of questions to examine. How does the administrative decision to adopt these methods and train law enforcement to deploy them factor into Fourth Amendment reasonableness? Is there some deference due to the executive branch in this area?\textsuperscript{27} How sure do the courts have to be that the officer was wrong to suppress? How should the burdens be allocated - legally and in reality? Are there technological solutions that can help us sort through these problems?

III. Enforcement of the standard – Cameras as a Solution?

Courts enforce the Fourth Amendment through the exclusionary rule. And they have chosen to do so through a standard that reflects the courtroom’s inherent bias in favor of language skill. But while the courts will suppress evidence, they are loath to find an officer to have deliberately lied. It does evoke the question: How do we tell the honest but inarticulate officer from the corrupt officer? One way to interpret the deference that underlies many of the opinions and practices is that the courts have a sense that most police officers are doing a trying and dangerous job, that it is experiential, and that it may be hard to translate those experiences into words. And the


\textsuperscript{26} While this Article is focused on the Terry inquiries, the same questions apply to preparation based on the elements of an offense. If one spends enough time in traffic court, one will hear the almost liturgical repetition of the factors that led an officer to administer a Breathalyzer or equivalent blood alcohol test. It goes something like this: “I approached the vehicle and examined the subject. There was a strong odor of alcohol. The subject’s eyes were glassy and bloodshot. His speech was slurred and his response to questions was delayed, and he appeared confused. Based on these preliminary indicators, I chose to administer a field sobriety test, (and a field test for blood alcohol if appropriate in the jurisdiction), and then placed the subject under arrest, before transporting him to the station for the administration of a BAC test under controlled conditions.” I have personally seen officers give this speech, or a very close variant of it, on more than a dozen occasions over the course of a single day in traffic court.

\textsuperscript{27} For a discussion of the deference courts show to police, see, e.g., Charles L. Becton, The Drug Courier Profile: “All Seems Infected to th’ Infected Spy, As All Looks Yellow to the Jaundic’d Eye,” 65 N.C. L. REV. 417, 470-71.
courts assume that most of the time the officers are acting in good faith. It seems at least possible that the reluctance to punish police officers for Fourth Amendment violations stems in part from a tacit realization that there are genuine but inarticulable experiences that at least some of these police officers have relied upon to conduct what would otherwise appear to be violative stops. That is, good cops, with good street sense, have been bad at explaining why they were doing what they were doing. Judges implicitly recognize the memory contamination effects and the differential language skills of officers when they find an officer has testified incorrectly, but not falsely.

As detailed above, current Fourth Amendment doctrine may actually encourage practices that restructure an honest officer’s memory in unappreciated ways. Officers are witnesses, and are susceptible to the same faults of memory that apply to all eyewitnesses, including the raft of problems associated with constructed memory. Because memory is constructed, the searching inquiry that attorneys engage in when preparing or cross-examining the witness may alter irreparably the way the police officer remembers the event. Given that words and experiences often reside in different parts of the brain itself, the process of writing a police report tailored to meet Fourth Amendment demands may likewise fundamentally alter the nature of the memory itself. Report forms that direct an officer’s thinking down certain paths, or training that directs officers to remember things in certain, court-approved ways, may change the nature of the experience itself because officers have their attention directed and constrained.

Given these dangers, a new approach is warranted. Reasonable and articulable suspicion, the traditional Terry standard, should be reframed more broadly, as reasonable suspicion supported by credible evidence. Articulable suspicion is only a subset of a larger category, based on the reasonableness more generally. The important issue is whether the courts are able to meaningfully engage in oversight of the police and remain capable of protecting the citizenry’s Fourth Amendment rights

28 The problem I am discussing is different from the problem addressed by scholars such as Christopher Slobogin, who suggests that current Fourth Amendment doctrine and the exclusionary rule create incentives for officers to lie, and Melanie Wilson, who is seeking ways to empirically test this proposition. See generally Christopher Slobogin, Testifying: Police Perjury and What to Do About It, 67 U. COLO. L. REV. 1037, 1041-48 (1996) (discussing the issue of false police testimony and indications that it occurs). See also Stanley Z. Fisher, “Just the Facts, Ma’am”: Lying and the Omission of Exculpatory Evidence in Police Reports, 28 NEW ENG. L. REV. 1, 36-38 (1993) (discussing police access to exculpatory evidence and its absence from their reports.) See also David N. Dorfman, Proving the Lie: Litigating Police Credibility, 26 Am. J. Crim. L. 455, 470-71 (1999) (noting that opinions impugning the motives, honesty, or competency of police are rare.)
The courts should be able to make that determination based on any available evidence. Oral testimony is only one way to make the officer’s action amenable to judicial review, which is the purpose of the exercise.

We are now entering the age of widespread deployment of cameras in police cars and even on police officers themselves. Cameras are everywhere, and an increasing number of departments, and prosecutors, have worked through the logistics of using police cameras. With the widespread use of ever-cheaper digital video, it is now clear that the costs of deploying cameras can be managed, and that protocols for handling discovery issues can be developed. Given the hidden costs of the current regime, states should consider adopting policies that mandate the use of video.


2011 FOURTH AMENDMENT SYMPOSIUM:  THE FUTURE OF FOURTH AMENDMENT ANALYSIS

THE FUTURE OF SEARCH ANALYSIS

Professor Ric Simmons
The Ohio State University Moritz College of Law

Professor Wesley M. Oliver
Widener University School of Law

REQUIRED READING:

Ric Simmons, The Future of Search Analysis (Feb. 2011) [NCJRL Document] .........................1
The Future of Search Analysis
Professor Ric Simmons
Moritz College of Law, The Ohio State University

There are four trends from the past twenty years that are likely to continue:

I. Blending of statutory and Fourth Amendment analysis

Traditionally we think of the Fourth Amendment as the primary restriction on a government’s search authority, but that is not always the case with new technologies. Federal legislation has set the rules for many of the newer surveillance methods. See Orin Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801 (2004).

A. Key statutory provisions

   a. Sets restrictions for all oral, wire and electronic communications
   b. Requires a “Title III” order (more than a warrant)

   a. Regulates government access to "stored wire and electronic communications and transactional records" held by third-party internet service providers (“ISP’s”)
   b. Creates two categories of data:
      (1) “Electronic Communication Service” Covers unopened email that has been in storage for 180 days or less. Search warrant is required to access this information.
      (2) “Remote Computing Service” Covers communication held for over 180 days which is held “solely for the purpose of providing storage or computer processing services.” Probably also covers opened e-mail that has been held for less than 180 days. Search warrant not required; only a “2703(d) order” showing “specific and articulable facts.”
   c. Creates remedies for violation.

3. Foreign Intelligence Surveillance Act of 1978 (“FISA”)
   a. Sets rules for electronic surveillance of agents of foreign powers
   b. Creates a new court (“FISA court”) to issue warrants when needed
   c. Creates civil and criminal penalties for unauthorized surveillance
d. Protect America Act--amendment in 2007 which briefly allowed warrantless surveillance of United States citizens if the call began or ended in a foreign country

4. USA PATRIOT Act of 2001
   a. Amends FISA to allow FISA surveillance as long as “primary” purpose is counterintelligence (not “sole” purpose)
   b. Amends ECPA to allow “sneak and peek” warrants (delayed notification of suspect) – provision struck down in 2007

B. Fourth Amendment jurisprudence adopts standards from federal legislation
   1. Covert video standards are adopted from Title III rules on audio surveillance See United States v. Torres, 751 F.2d 875 (7th Cir. 1984).

   2. When statutes do exist to regulate surveillance in a given area, courts will show deference to the legislature and wait for the legislature to respond to shifting technologies. “The existence of the statutory Wiretap Act effectively displaces any constitutional remedies that in theory should exist under Katz and Berger.” Kerr, Constitutional Myths, at 853.

II. Broadening “spectrum” of standards for different levels of intrusiveness

   Courts that conduct a search analysis today are not merely making a binary decision as to whether or not a “search” occurred under Katz. Instead, they must fit the government’s actions into the proper place on a spectrum, with each spot on the spectrum representing a different level of intrusiveness and requiring the government to meet a different standard.

   As courts continue to analyze new surveillance techniques, the question for each new technique will be: where should this technique fit along the spectrum of intrusiveness?

   This task is complicated by the fact that—as noted in Part I—courts must look to both Constitutional and statutory schemes, which create subtly different spectra, with different criteria to determine how “intrusive” a search actually is.

A. Fourth Amendment
   1. No search (cameras in public places)
   2. “Reasonable suspicion” (Terry stop)
   3. Probable cause (standard search)
   4. “Super-warrant” (video surveillance; audio surveillance; no-knock searches; bodily intrusions)

B. Statutory Creations
   1. No warrant needed (surveillance of non-U.S. citizens if primary
purpose is counter-intelligence (FISA as amended by USA PATRIOT Act)

2. “Address” information (pen tap/trace of phone numbers) – requires “certified relevance” under ECPA 18 U.S.C. § 3122(b); United States v. Fregoso, 60 F.3d 1314 (8th Cir. 1995) (judicial role in approving this surveillance is “ministerial in nature”).

3. “Historic information” (subscriber records, stored, opened e-mail) – requires only “specific and articulable facts” under SCA

4. Sent information which no longer “in transit” (unopened e-mail) – need warrant under SCA

5. Information “in transit” (telephone conversations, content of e-mail as it is sent) – requires a “super-warrant” under Title III.

C. What factors should a court consider when deciding where a given surveillance technique fits on the spectrum?

1. “Reasonableness” – Is the search “reasonable?”
2. “Reasonableness plus security” – Allows for Terry stops and suspicionless searches at airports and public buildings

III. Do courts perceive that the government is proactively using a new type of search technology or responding to a suspect’s use of a new type of technology?

A. Proactive uses of new search technologies

1. “Non-search” surveillance which is more efficient but not more intrusive (e.g. video cameras in public places; GPS tracking in public places; using helicopters or satellites to observe “open fields”) See United States v. Knotts, 460 U.S. 276 (1983); California v. Ciraolo, 476 U.S. 207 (1986).

2. Searches with new technology that are equivalent to other, more traditional searches (e.g. thermal scan of private residence) See Kyllo v. United States, 533 U.S. 27 (2001).

3. Hyper-intrusive searches that require a showing greater than probable cause (e.g. covert video surveillance) See United States v. Torres, 751 F.2d 875, 885 (7th Cir. 1984).

B. Reacting to criminals’ use of new technology

1. Roving wiretaps to defeat disposable cell phone technology (See Section 206 of the USA PATRIOT Act; 18 U.S.C. §3123(a)(3)(A)).


C. Greater deference to government if the perceived use is responsive instead of proactive

“In this day and age, it appears that on a daily basis we are overwhelmed with new and exciting, technologically advanced gadgetry. Indeed, the amazing capabilities bestowed upon us by science are at times mind-boggling. As a result, we must be ever vigilant against the evisceration of Constitutional rights at the hands of modern technology. Yet, at the same time, it is likewise true that modern-day criminals have also embraced technological advances and used them to further their felonious purposes. Each day, advanced computer technologies and the increased accessibility to the Internet means criminal behavior is becoming more sophisticated and more complex. This includes the ability to find new ways to commit old crimes, as well as new crimes beyond the comprehension of courts. As a result of this surge in so-called “cyber crime,” law enforcement’s ability to vigorously pursue such rogues cannot be hindered where all Constitutional limitations are scrupulously observed.” United States v. Scarfo, 180 F.Supp.2d 572, 583 (D.N.J. 2001) (allowing government to intercept password from defendant’s computer to counteract defendant’s use of advanced encryption technology).

IV. Rejecting the formalism of Smith and examining the content of the information acquired.

A. The dark legacy Smith v. Maryland, 442 U.S. 735 (1979)
“Regardless of the phone company’s election [to record or not record specific phone numbers], petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record.” Id at 745.

B. Formalism still alive and well
1. United States v. Scarfo, 180 F.Supp. 2d 572 (2001) (key logger system does not require wiretap authorization if modem is turned off at the time).
2. United States v. Ropp, 347 F.Supp. 2d 831 (C.D. CA 2004) (defendant not guilty of violating Wiretap act because information was intercepted before the “send” key was pressed); United States v. Councilman, 373 F.3d 197 (1st. Cir. 2004); vacated en
banc United Sates v. Councilman, 418 F.3d 67 (2005) (defendant originally not guilty of violating Wiretap act because messages were in “temporary storage”)


C. Courts that look beyond formalism

1. In Re Application for Historical Cell Cite Information, 509 F.Supp. 2d 64 (D. MA. 2007) (treats “historical” cell phone information as real-time tracking information).

2. In the Matter of Applications for Pen Registers and Trap and Trace Devices, 515 F.Supp. 2d 325 (E.D. NJ 2007) (“pass-through” digits of telephone numbers are content and not “address” information)

3. United States v. Warshak, 2010 U.S. App. LEXIS 23415 (6th Cir. 2010) (third party’s ISP’s “access” to stored e-mails does not eliminate the warrant requirement)
2011 FOURTH AMENDMENT SYMPOSIUM:  
THE FUTURE OF FOURTH AMENDMENT ANALYSIS

WHAT THE AMENDMENT PROTECTS: “SECURITY” IN THE 21ST CENTURY

Professor Morgan Cloud  
*Emory University School of Law*

Professor Jack W. Nowlin  
*The University of Mississippi School of Law*

Professor Margaret L. Paris  
*The University of Oregon School of Law*

REQUIRED READING:

*No materials will be distributed for this session*  
.................................................................................................................. N/A
2011 FOURTH AMENDMENT SYMPOSIUM: THE FUTURE OF FOURTH AMENDMENT ANALYSIS

THE FUTURE OF “REASONABLENESS” ANALYSIS: WHEN IS A SEARCH OR SEIZURE JUSTIFIED?

Professor Cynthia Lee  
George Washington University Law School

Professor Tracey Maclin  
Boston University School of Law

Professor Donald Dripps  
University of San Diego School of Law

REQUIRED READING:  
Donald Dripps, Abstract: Is Fourth Amendment Originalism Possible? (Feb. 2011)  
[NCJRL Document] .................................................................1
Is Fourth Amendment Originalism Possible?
Donald A. Dripps, University of San Diego School of Law

The text of the Fourth Amendment forbids, but does not define, “unreasonable searches and seizures.” One possible approach to the textual mystery consults founding-era practice, as evidenced primarily by the common law. The Supreme Court sometimes has taken this path. In *Carroll v. United States*, the Court upheld searches of automobiles, without warrants, given probable cause, by analogy to the founding-era practice of searching ships without warrants. In *Wilson v. Arkansas* the Court ruled that the Fourth Amendment incorporates the common law’s “knock and announce” requirement for executing warrants. Other instances can be cited.

Yet in other cases the Court has either held constitutional searches or seizures that were apparently contrary to founding-era practice, or held unconstitutional searches or seizures that just as clearly comported with founding-era practice. At common law, warrants could be issued to search for stolen goods, but not for documentary evidence. The modern Court, however, has overruled *Boyd* and held that documentary evidence is fair game for search and seizure. The common law permitted deadly force to apprehend fleeing felons in general, and fleeing burglars in particular. In *Tennessee v. Garner* the Supreme Court held that shooting a fleeing burglary suspect was an unreasonable seizure. Again, other examples could be given.

I shall argue that the inconsistent resort to founding-era practice reflects larger problems than those that inevitably attend collective decisions about difficult issues. Changes in the criminal justice system outside the confines of the constitutional text have extirpated, root and branch, the eighteenth-century system of criminal justice that gave the founders the context for the Bill of Rights. The eighteenth-century system was nonprofessional, reactive, and primarily governed by the general common-law tort rules that applied to private persons generally. The modern system that emerged in the nineteenth century is professional, proactive, and, when not subject to constitutional restraints, regulated primarily by statutes and administrative law.

Would the framers have retained every element of the common-law tort actions, in a world in which law enforcement is the responsibility of full-time, professional, paramilitary police, the substantive criminal law covers a sweeping array of possessory and regulatory offenses, and the Amendment’s terms apply to the states as well as the federal government? The Fourth Amendment does not say in terms that “the common law actions of trespass, false arrest, and false imprisonment shall not be altered.” The founders knew that absent constitutional constraints, the common-law actions could be modified, even abolished, by statutes or subsequent court decisions. What does the text mean, when everything about American law enforcement other than the text itself has changed, changed utterly? In the end it means what I call “aspirational balance-of-advantage maintenance,” a criterion based so generally on history as to differ little if at all from an inquiry into reasonableness according to a contemporary sense of shared values as informed by tradition.