

6.805/6.806/STS.085, Ethics and Law on the Electronic Frontier
Lecture 7: Profiling and Datamining

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Cars and Planes :
Profiling and Data-mining, post 9/11

Discussion - Midterm Logistics
Distinguish between the facts of the case and how the law applies to the facts. Keep facts and law separate.

Discussion – Term Paper and schedule

CARS

We've moved pretty far from where we were in England to modern day in the United States to having a clearer understanding of when a 4th amendment intrusion was happening.

What we see in the evolution of the 4th amendment, is now there is no longer a clear boundary for when the government has crossed over the line. The court has spent a lot of time trying to reconstruct that line.

The world is now a much more complicated place and people use other means (planes, cars) and technology to create other crimes. But there are also realms that make law enforcement work much easier.

Cars- increase people's power and the ability to increase crime and get away quicker. Lots of 4th amendment consideration with regards to how and when people use cars.

City of Indianapolis vs. Edmond

How does it work? Stop and standard search. Law enforcement stops every nth car at the checkpoint. Officer does external visual search of the car. Dogs are used to sniff around the car.

The idea that the cop can make you stop for this brief period of time is considered a personal seizure of property for the moment.

4A

- search/seizure
- warrantless
- -reasonable
- Suspicionless
 - o Special needs & nexus "immediacy"
 - o Standards (can't stop random cars based on suspicion)

Justice O'Connor makes the case that this a reasonable search and that a large number of cars are stopped. This is not random. In addition, there is no reason to believe that the cars stopped are suspicious.

Chief Justice Rehnquist says in his dissent that there has to be some kind of balancing, but Justice O'Connor doesn't agree.

Justice O'Connor believes there has to be special needs that must occur in order for a reasonable search such as this to occur. O'Connor wants to go in a more narrow direction with the special needs test. Some examples are drug testing, drunk driving.

Based on the standard of not stopping random cars based on suspicion, Justice O'Connor is trying to protect personal rights.

The courts realized that they don't really know what's going on in the mind of an officer who stops a vehicle.

The key thing about the sobriety checkpoints is that if you find someone driving while intoxicated on the road then you take them off the road immediately because of safety concerns. However using the same reasoning to eliminate drugs was not enough for the courts.

Not long after this case was decided, September 11th happened and the Patriot Act was passed.

Patriot Act – extended the rights of law enforcement to retrieve more information on extremists.

National security letters – equivalent to subpoena but doesn't come from the court. Instead it comes from the Foreign Intelligence Surveillance Court (secret court for foreign intelligence)

The courts can apply the standards set by FISA in a court.

What are the standards for the FISA court?

Pre-patriot – agents of a foreign power

Post-patriot – extended to cover domestic terrorist activity

Can the FISA court tap the phones of two American citizens that are terrorists? YES, the post-Patriot act extends to domestic terrorism.

Other changes in Patriot Act:

- one judge within 20 miles of DC
- sneak and peak warrants for broader terms
Test for sneak and peak: advance knowledge that something will occur
- roving wire tap became a little bit easier to use: allows a tap on a person in the geographic vicinity

The constituency that largely opposed the Patriot Act and was surprising was the librarians because of the business records. The delayed notification applied to the business records at libraries as well.

Prior to the Patriot Act, there was a wall between the Foreign Intelligence context and Criminal Investigation. In the immediate aftermath of 9/11, this wall was considered responsible for the FBI's failure in their response. As a result, the wall has been significantly reduced.

Foreign Intelligence | Criminal Investigation

There was concern that elimination of the wall would result in a violation of 4th Amendment rights. The commission wants to encourage sharing across the line, but wants to make sure that rights are protected and not abused.

Dissemination event – moving information received outside the jurisdiction of a particular judge

As a result of terrorism, the wall was eliminated because of the nature of it. Terrorism just doesn't occur in what region.

Foreign Intelligence

- CIA
- NSA
- DIA
- NGA

NCTC (responsible for the wall)

Criminal Investigation

- FBI
- DEA
- DHS

Sept. 11th also rearranged the National Intelligence community. Agencies have different responsibilities than what they had before.

From the commission's investigation, the coordination that should be happening to share information and identify threats just isn't happening yet.

One piece of prime homeland security strategy that has resulted since 9/11 is a shift from investigation to prevention. So the task to the larger law enforcement community has been to find out who these people are and prevent the crime from happening.

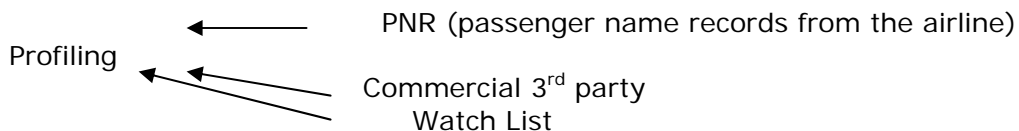
PLANES

Since 9/11

The first thing we want to prevent is bad guys from getting on airplanes.

Now skipping over to the creation of the Department of Homeland Security...

We now a significant part of the U.S. government who is responsible for making decisions on who can get on an aircraft or searched. They do this by profiling.



CAPPS II -

Personal records are published in the Federal Registry.

Two steps involved:

- Authentication

- Risk assessment - placing individuals in categories by checking against a watch list
- matching

Routine use: arrest/warrant check

For what purpose are these records being used?

One of the routine uses is to make the information available to agencies where people have outstanding crimes. This is a purpose in addition to the core purpose of passenger safety.

CAPPS II was never implemented and made operational.

Secure Flight

Under this system, the public has a chance to comment on the proposal of the system of records.

What changed between CAPPS II and Secure Flight?

Secure Flight was a proposal to test the system. They were testing based on one month's of data.

The airlines had the data in June 2004.

System of Records notice published in September 2004

The test was done in March 2005.

The notice to the public came after the data was collected.

When it came to Secure Flight, they eliminated the use of outstanding arrests and warrants.

Procedural transparency – this whole process is vindication of the laws that have been there since 1974. The process that is being developed has some kind of transparency associated with it.

This particular gov. agency was very forthcoming about their faults and the procedure being implemented.

Now let's focus on the various profiling that happens in these database queries. Is there any 4th Amendment violation in this query process?

What is the search that occurs when a bunch of databases get queried that have your personal information in it? It's a suspicionless search. Everyone who travels by plane goes through this search.

On what basis does the government get access to these records?

We are in a situation where there is some kind of seizure like this.

The TSA wants the data of the PNR from the airlines. The airlines don't want all of their marketing information in the hands of the federal government. The airlines in some ways feel the need to be the protectors of their consumer's information from the federal government.

Edmonds said that there was some kind of immediacy and a nexus between the collection of the data and the analysis of it.

Once we have enough information derived from a suspicionless search then we proceed to a Terry search.

Standards

Edmonds argued that standards consisted of a process that was consistently used.

If we find that there is no search and seizure, then the government can make policy freely in this area.

Reporter's Committee case

Conviction records are public information. A group of reporters tried to get large groups of information about conviction records and the courts ruled that this large scale collection may be an invasion of privacy.

After the midterm, we will look at areas where the 4th Amendment is unclear and how this relates to transparency.