**The Future of the Fourth Amendment**



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The biggest challenge ahead for the Fourth Amendment is how it should apply to computers and the Internet.

The Fourth Amendment was written over two hundred years ago. But today’s crimes often involve computers and the Internet, requiring the police to collect digital evidence and analyze it to solve crimes.

The major question is, how much power should the police have to collect this data? What is an unreasonable search and seizure on the Internet?

Consider the example of a Facebook account. If you log in to Facebook, your use of the account sends a tremendous amount of information to Facebook. Facebook keeps records of everything. What you post, what messages you send, what pictures you “like,” even what pages you view. Facebook gets it all, and it keeps records of everything you do. Now imagine that the police come to Facebook and want records of a particular user. The police think the suspect used Facebook to commit the crime or shared evidence of the crime using the site. Maybe the suspect was cyberstalking and harassing a victim on Facebook. Or maybe the suspect is a drug dealer who was exchanging messages with another drug dealer planning a future crime. Or perhaps the suspect committed a burglary, and he posted pictures of the burglary for all of his Facebook friends to see.

Here’s the hard question: What limits does the Fourth Amendment impose on the government getting access to the account records? For example, is it a Fourth Amendment “search” or “seizure” for the government to get what a person posted on his Facebook wall for all of his friends to see? Is it a search or seizure to get the messages that the suspect sent? How about records of what page the suspect viewed? And if it is a search or seizure, how much can the government seize with a warrant? Can the government get access to all of the account records? Only some of the account records?

The courts have only begun to answer these questions, and it will be up to future courts to figure out what the Fourth Amendment requires. As more people spend much of their lives online, the stakes of answering these questions correctly becomes higher and higher.

In my view, courts should try to answer these questions by translating the traditional protections of the Fourth Amendment from the physical world to the networked world. In the physical world, the Fourth Amendment strikes a balance. The government is free to do many things without constitutional oversight. The police can watch people in the public street or watch a suspect in a public place. They can follow a car as it drives down the street. On the other hand, the police need cause to stop people, and they need a warrant to enter private places like private homes.

The goal for interpreting the Fourth Amendment should be to strike that same balance in the online setting. Just like in the physical world, the police should be able to collect some evidence without restriction to ensure that they can investigate crimes. And just like in the physical world, there should be limits on what the government can do to ensure that the police do not infringe upon important civil liberties.

A second important area is the future of the exclusionary rule, the rule that evidence unconstitutionally obtained cannot be used in court. The history of the exclusionary rule is a history of change. In the 1960s and 1970s, the Supreme Court dramatically expanded the exclusionary rule. Since the 1980s, however, the Supreme Court has cut back on when the exclusionary rule applies.

The major disagreement is over whether and how the exclusionary rule should apply when the police violate the Fourth Amendment, but do so in “good faith,” such as when the law is unclear or the violation is only technical. In the last decade, a majority of the Justices have expanded the “good faith exception” to the exclusionary rule. A central question is whether the good faith exception will continue to expand, and if so, how far.