TCU Common Reading

The Fourth Amendment and the Reasonable Expectation of Privacy

Prepared by the faculty of Texas Christian University

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Welcome to TCU and the 2008 Common Reading! Your professors, and the entire TCU community, are eager to help you take your next steps in intellectual and personal growth. As you prepare to begin one of the most exciting times of your life, full of new opportunities, challenges, and uncertainty, we endeavor to give you a taste of the intellectual process of open inquiry and civil discourse which represent the ethos of a university liberal arts education. We hope that the TCU Common Reading will be a valuable landmark, as it is your first opportunity to engage with a professor and your fellow students in an academic setting.

The Common Reading is also meant to initiate some personal reflections on the TCU Mission Statement, “To educate individuals to think and act as ethical leaders and responsible citizens in the global community.” We think that an “ethical leader and responsible citizen” should understand the need for the protection of individual rights in our society as well as the needs of those who are tasked with protecting those rights. To help you gain that understanding, this year’s Common Reading considers the issue of individual rights in the framework of the Fourth Amendment and the reasonable expectation of privacy.

We all anticipate that we have a right to privacy, but how, in a complex society, do we balance that right against the need for law enforcement officials to seek information about those who may have committed crimes? How does an “ethical leader and responsible citizen” determine what that balance should be? What impact has technology had on the balance and the ability of citizens to help determine the balance?

To help you grapple with these issues, we have chosen readings that vary from newspaper articles to web postings, from articles in law journals to excerpts from a book, from an excerpt from a play to a poem, and finally, to a discussion of your rights as a TCU student. We hope the number and variety of readings will engage as many of you as possible. We urge you to keep this booklet as it may be used in some of your future intellectual endeavors at TCU.

In preparation for your group discussion, we ask that you read the selections in the booklet and write a short reaction paper (400-500 words) to the questions found on page 55 of the booklet. The paper is due and will be collected at your Common Reading session on August 22. In addition, we ask that you email your paper as an attachment to tcucommonreading@tcu.edu. Be sure to include your name on the paper. Also, please keep a copy for your own files.

We look forward to seeing you on August 22!

Ed McNertney, Chair
2008 Common Reading Steering Committee
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The Fourth Amendment
to the Constitution

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.
Introduction: The Fourth Amendment

Eric Cox

The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinised.¹

When George Orwell wrote this initial description of the society that forms the backdrop for his novel 1984, he did not have in mind the debate over the 4th Amendment in the United States. His book provided a vision of a society in which the government, Big Brother, knew every aspect of an individual’s life, including a window into every home through the telescreen. In the book, those who criticize the government are subject to arrest, and no one has any reasonable expectation of privacy.

Though Orwell’s vision is arguably extreme, it does highlight many of the tensions regarding the balance between security and the proper application of the 4th Amendment as technological advances allow far greater monitoring of individual communication, movement, financial transactions, and online habits. The 4th Amendment is intended to protect persons against unreasonable searches and seizures of their “persons, houses, papers and effects.” In thinking about how to apply the 4th Amendment, we must ask several questions, including, “what is unreasonable, what constitutes a search and/or seizure, and what specific things are protected against searches?” Even further, to what extent can government entities conduct searches when there is no actual suspicion of a crime having occurred? The answers to these questions have evolved significantly over time since the principle of the individual’s right against unreasonable government intrusion evolved in the English common law tradition prior to the United States’ achieving independence. They also highlight the delicate balancing act between the individual’s right
to be free from undue government interference and the government’s need to investigate, prosecute and prevent criminal activity.

The readings selected for this year’s Common Reading at TCU shine a particular light on the role of technology under the 4th Amendment. In 1967, the US Supreme Court first ruled that a listening device that intercepted a phone call required the issuance of a warrant even if the listening device could be placed without entering the target’s private property. Since that time, the US Congress has enacted various restrictions on the monitoring of phone calls within the United States without the use of a warrant. In recent years, however, new questions have arisen over the legitimate needs of law enforcement to monitor a) calls that pass through the United States, but occur between people on different continents, b) calls that occur between US citizens and people outside of the country, c) other forms of electronic communication, and d) transactions that are now easily traceable that could signal the intent to commit criminal activity.

In trying to strike a balance between national security and the rights of citizens under the 4th Amendment, Congress and the Courts have been engaged in setting policies in an uncertain time. Technologies employed by various US government agencies have the ability to analyze billions of pieces of data to detect patterns in phone calls, internet traffic, and purchases to predict who is involved in potentially illegal activity. To what extent should there be restrictions on the use of “data mining,” that is, the exploration of our daily communications to predict potential criminal activity? Privacy advocates express concern over unregulated government powers to search phone records, citing past abuses by government agencies in spying American citizens, particularly in the 1950s and 1960s, as well as to recent incidents such as the documented abuse of a new type of warrant called a “national security letter.” Proponents of more expansive powers argue that the government polices itself well, as evidenced by the self-investigation of national security letter abuses, and that exposing government tactics to too much scrutiny will a) slow the process of monitoring communications down, and b) provide too much information to potential enemies of the United States about US surveillance patterns.

To try and make sense of the opposing sides, consider the words first of Senator Russ Feingold (D-Wisconsin), who says, “Do you folks realize that if you make a phone call or email or do what I did yesterday, I received an email from my daughter who’s in England, that that is no longer private? That the government can suck up all your emails and all your phone calls whether it be to your son or daughter in Iraq or your child that’s in their junior year abroad, or it’s a reporter over there, and there’s no court oversight of it at all. It’s just ‘trust us’ by the administration.”

2
In contrast to this view, Judge Richard Posner in discussing the debate surrounding the writing of an updated version of US rules on domestic surveillance, argues that, “The Foreign Intelligence Surveillance Act makes it difficult to conduct surveillance of U.S. citizens and lawful permanent residents unless they are suspected of being involved in terrorist or other hostile activities. That is too restrictive. Innocent people, such as unwitting neighbors of terrorists, may, without knowing it, have valuable counterterrorist information. Collecting such information is of a piece with data-mining projects such as Able Danger.”3

In 1984, the answer to all of these questions is quite simple: the government’s power to observe individuals is essentially unlimited. The government in that society uses that power to control every aspect of the lives of the individuals living in it. While it may be easy to agree that none of us wishes to live in such a society, determining a test with which we can achieve a workable balance between a desire for freedom from government interference and the desire to have the government provide for security is no easy feat. The following readings contain a variety of views on how restrictive (or expansive) government should be in using technology to observe individuals in the name of security.

The first set of readings is a proper response to the debate Orwell initiates. These readings reflect on the protections the 4th Amendment offers as the technology to monitor individuals increases, as well as arguments on why, at times, the increased observation of our daily lives can be a net positive. This section concludes with an excerpt from the play *Twilight of the Golds* which, though not directly tied with the 4th Amendment, does present the reader with a situation which serves as an example of the type of ethical dilemma that can occur when we know too much.

The next section of readings tackles the problem of DNA evidence. Increasingly, law enforcement officials are able to use creative means to use DNA identification in their investigative work. The two included selections pose several questions about how far law enforcement can and should go in collecting information, as well as suggesting the possibility that we should all register our DNA in some form. The final section of readings addresses the debate over how much power the government should have to launch investigations without court approval. It includes a brief poem, “The Skunk Hour,” written from the perspective of an individual who is obsessed by the lives of those around him. The section concludes with a discussion of your own expectations of privacy while you are a student at TCU.

This introduction has only scratched the surface of the nuance and debate surrounding the 4th Amendment. We have not mentioned items like sobri-
ety check points (legal), confiscation of material from a car at a traffic stop (usually legal), frisking a suspicious person on the street (legal), or the use of devices to look into a house without entering it (illegal without a warrant). Neither have we discussed the far more complex debate surrounding the right to privacy which is much broader than the 4th Amendment, drawing at a minimum from the 1st, 3rd, 9th and 14th Amendments, in addition to the 4th, as well as the English common law tradition. Rather, these articles focus on only a small part of the debate surrounding the balance between freedom from government interference and security. In reading the following selections, continue to think about this debate and, as importantly, what happens when the balance is tilted too far in one direction?

2. A video of Senator Feingold’s statement is available at http://www.youtube.com/watch?v=QDIYcn5HEs8

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The Fourth Amendment
and the Reasonable Expectation of Privacy

New York Surveillance Camera Players

“The protections of the Fourth Amendment are clear. The right to protection from unlawful searches is an indivisible American value. Two hundred years of court decisions have stood in defense of this fundamental right. The state’s interest in crime-fighting should never vitiate the citizens’ Bill of Rights.”

John Ashcroft
Chairman of the Senate
Commerce Committee on Consumer Affairs,
Foreign Commerce and Tourism, 1997

Despite their clarity, the Fourth Amendment’s protections against “unreasonable searches and seizures” have in fact been drastically weakened since they became the law of the land in 1791. As it stands today, unless there exists a “reasonable” expectation of privacy—that is, a “reasonable” expectation that what one does or says will not be seen or heard by someone else—neither local police nor federal law enforcement authorities are required to get a warrant or other court order before they start a surveillance operation. How does one establish whether, in a given instance, one’s expectation of privacy is “reasonable”? The criteria are as follows: 1) general legal principles; 2) the vantage point from which the surveillance is carried out; 3) the degree of privacy afforded by certain buildings and/or places; and 4) the sophistication and invasiveness of the surveillance technology employed.

1. General Legal Principles

The expectation of privacy is not reasonable if the behaviors or communications in question were knowingly exposed to public view. Neither the simple desire for privacy, nor the fact that one took steps to obtain it, entitles one to reasonably expect it. For example, even if one set up roadblocks, hung “no trespassing” signs and moved one’s house back into the woods, one might still be surveilled from the air without one’s Fourth Amendment rights being violated. And yet, as the court stated in People v. Camacho (2000) 23 Cal.4th 824, 835, “we cannot accept the proposition that [the] defendant forfeited the expectation his property would remain private simply because he did not erect an impregnable barrier to access.”

2. Vantage Point

The expectation of privacy is not reasonable if there exists a vantage
point from which anyone, not just a police officer, can see or hear what was going on and if this vantage point is or should be known or “reasonably foreseen” by the person being surveilled. If such a vantage point exists in theory, the police can actually use another vantage point from which to conduct their surveillance, because what matters is the expectation of privacy, which becomes “unreasonable” if any vantage point exists. But the police cannot use a vantage point if they have no legal right to take or occupy it. The police cannot commit trespassing; they haven’t if they have taken up a vantage point along a normal access route, an “open field,” or a common area.

3. Certain Buildings and/or Pieces of Land


4. Technological Sophistication

It’s easy to forget that, at the time the Fourth Amendment was written and adopted, the photographic camera had not yet been invented; it wasn’t until 1826 that Daguerre patented the first photographic process. Because of the rapid development and increasing technological sophistication of televisal surveillance—first, photography, then, close-circuit television, and, finally, digital imagery—“Judicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance” (Dean v. Superior Court [1973] 35 Cal.App.3d 112, 116); “the Fourth Amendment must likewise grow in response” (United States v. Kim [1976] 415 F. Supp. 1252, 1257). This is especially true when it comes to “acquisition technology,” that is, devices that, in effect, create vantage points that weren’t previously there: audio bugs, wiretaps, and “video bugs” (covert wireless cameras), the use of which requires that the police must get warrants or other court orders.

The New York Surveillance Camera Players is a group founded in New York City in November 1996. The group feels that the use of surveillance cameras in public places violates our constitutional right to privacy. The web address for this article is http://www.notbored.org/privacy.html.
Is Privacy Overrated?
The Merits, Drawbacks, and Inevitability of the Surveillance Nation

Katherine Mangu-Ward

“Have you ever attended a political event? Sought treatment from a psychiatrist? Had a drink at a gay bar? Visited a fertility clinic?” A report on the proliferation of surveillance cameras—more than 4,200 below 14th Street—from the New York Civil Liberties Union asks: Would you have done those things if you had known you were being watched?

The answer, for most people, is yes. Though we may shy away from the idea of someone spying on our private lives, most people believe that we live in a country where rights are generally respected, and so we go about our business without fear. However, the report notes:

There is only limited recognition in the law that there are some places into which a surveillance camera is not allowed to intrude. And there are virtually no rules that prohibit police or private entities from archiving, selling or freely transmitting images captured by a video surveillance camera. The courts have yet to address the fundamental privacy and associational rights implicated by the phenomenon of widespread video surveillance.

In short, they’re worried about what will happen when New Yorkers no longer have an expectation of some degree of privacy in the public sphere. And they’re right: There is almost no privacy left in America, especially in cities. Sooner or later, you won’t be able to go anywhere without being tracked.

Debate about the use and abuse of surveillance cameras is worthwhile, but it is also worth keeping in mind the ways in which we benefit from the death-by-a-thousand-cuts that privacy suffers every day. While raising legitimate concerns about the camera boom in New York, the report ignores the significant gains to consumers living in a transparent society—both convenience and security—and the ways in which proliferation of video surveillance public and private can protect citizens from police misbehavior or other miscarriages of justice (for a more thorough look at the upside of zero privacy, see Declan McCullagh’s cover article in the June 2004 issue of reason.)
Let’s revisit the frightening picture painted by the New York Civil Liberties Union. For a session at the psychiatrist’s office or the fertility clinic, you would have paid with a credit card, right? If you bought a round of drinks at the gay bar, would you have hesitated to hand your card to the bartender, even to leave it with him to run a tab? To get there, you might have taken the subway using your registered, traceable Metro card. Or perhaps you drove, zipping past tollbooths in an EZ Pass lane, pitying the poor suckers waiting to pay with old-fashioned, anonymous cash. If you were concerned about getting lost, you could have used your phone’s GPS, leaving a wake of signals and records about your location and habits.

Perhaps you would have stopped to pick up some cash at an ATM before your outing. There, you would have created another digital record, stamped with the time and place of your withdrawal in the bank’s records. And that mirror above the ATM where you checked out your hair? It’s concealing a camera, there to protect you from anyone inspired to lift your newly-acquired cash or force you to take out more at gunpoint, or at least help identify and catch the mugger later. ATM cameras have been in general use for many years.

Your credit card, EZ Pass, and bank records can all be subpoenaed when necessary. So do a few thousand city cameras really represent a new invasion of our privacy? Hardly. My credit card company has long known where I buy underwear, but I don’t lay awake nights worried that prosecutors might demand knowledge of my preferences in skivvies. The ways in which that information can be accessed by the state are circumscribed by decades of legal precedent. We should remain vigilant that those precedents aren’t eroded, and we should work to strengthen protections where necessary, but the collection of the information in itself is an unstoppable force, mostly for good— I like that I can sift thorough records of everything I have purchased in the last three years.

New York already boasts three or four thousand cameras, mostly private, and the number will only continue to grow. The biggest boom will be in government cameras, though. The New York City police recently announced plans to create “a citywide system of closed-circuit televisions” operated from a central control center, funded primarily by federal anti-terrorism money. Admittedly, this is where the surveillance nation gets dicey. Concerns about misuse of public cameras by authorities are reasonable and violations should be punished— there are several cases wending their way through the courts now which are expected to set standards for how severely abuse of video can be punished, and what the proper parameters are for its use. But much of the abuse of the cameras often takes innocuous forms: a deputy police commissioner rewinding tape to locate his lost keys or keeping an eye on his kids as
they walk home from school. This type of behavior should not be confused with serious infractions.

And of course, cameras can and should also protect citizens from police misbehavior. Several protesters at the 2004 Republican convention in New York, for example, have beaten charges of resisting arrest with video evidence from private and public cameras. A few more cameras on the street when police fired 50 rounds at Sean Bell in Queens might have helped determine what really happened on the night of November 25th.

There have been several smaller occasions where do-it-yourself video privacy violations have paid off, as in the case of recent LAPD brutality caught on a mobile phone or handheld camera. Think Rodney King meets YouTube. In these cases, private cameras provided a check on police. Added surveillance of police also carries another benefit: police are smart enough to know to be careful when they are being taped, even when they’re being taped by their own colleagues. The report relates an interview with off-duty police officers at a labor demonstration. “A special NYPD unit was assigned to film the police officers as they demonstrated. ‘That’s Big Brother watching you,’ said one police demonstrator outside Gracie Mansion. Said another: ‘sends a chill down a police officer’s back to think that Internal Affairs would be tapping something.’”

Police concerned about who’s watching them will generally be police more prone to good behavior.

More worrying than the boom in public cameras, though, is a recent proposal to require New York’s hundreds of night clubs to install cameras on the premises. When businesses chose to install cameras for their own purposes, the cameras usually benefit consumers in the long run— with increased security or convenience. But when the city mandates the installation of private cameras, patrons are less likely to benefit. Such mandates can and should be fought as infringements on privacy and property.

Whether or not cameras deter illegal behavior is a legitimate debate, and it’s true that cameras in the London subways system didn’t deter bombers in July 2005. But perhaps it should have—the video footage led to the speedy identification and capture of the four bombers. The next terrorists (those not hoping for 72 virgins, anyway) might be inclined [sic] to rethink their plans.

If you’re inclined to avoid the cameras, go ahead. Here’s a map of the known cameras in the city to help you plan your route or figure out which way to angle your fedora to shade your face. The NYCLU report is concerned that the cameras are often disguised, that they “remain hidden to the un-
trained eye.” But in the same sentence, the report notes that “the corner deli” or other shopkeepers often operate cameras. Small shopkeepers have been using security cameras for many years, but even the most paranoid among us still go in to pick up some beef jerky when we pay for our gas. Our behavior suggests that we are already at peace with having our images captured on video.

Of course, issues like required surveillance on private property and protections for citizens who want to film police should be aired in the public square. Police occasionally arrest bystanders for taping a police encounter, an activity that should clearly be protected. But the debate shouldn’t ignore the fact that the kind of personal privacy many worry about losing to street corner cameras has already mostly been lost to credit cards, EZ Passes, and cameras in your ATM or deli. And more cameras and records, not fewer, may be the best guarantee against abuse of police power in the age of zero privacy.

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Excerpt from
Technology and the Fourth Amendment: Balancing Law Enforcement with Individual Privacy

Eleanor Birrell

Introduction
The constitution of the United States was constructed to safeguard the rights of American citizens. One of the rights that people could expect, as stated by the Fourth Amendment, was the right “to be secure in their persons, houses, papers, and effects against unreasonable search and seizure.” While the Fourth Amendment took a step towards guaranteeing privacy, its protection is limited by the interpretation of the phrase “unreasonable search.” Unfortunately, this phrase was never well defined, and its definition has become increasingly blurred by the technological advances of the last century.

With the aid of new technologies, privacy protection has been eroded in favor of law enforcement. This shift has undermined one of the rights that American citizens have depended upon for hundreds of years; the right to privacy against unreasonable searches. So how has this happened? And what, if anything, might be done to restore the fundamental protection once offered by the Fourth Amendment?

Tardy Regulation
One of the reasons for the imbalance between privacy and law enforcement is the lengthy gap between the availability of a new technology and the passage of regulations (either legal or judicial) governing its use. Without any legal or judicial restrictions, law enforcement agencies are free to take advantage of new technologies for years, potentially violating the privacy of American citizens.

One of the more famous examples of such exploitation of new technology is law enforcement’s use of wiretapping. The practice of wiretapping began as soon as telephones were introduced in the 1870s. Wiretapping “without authority” was prohibited during World War I as a defense measure, and many states outlawed wiretapping by the 1920s. However, at the same time that private wiretapping was being restricted, the technology was increasingly employed by law enforcement agencies to collect evidence against prohibition violators. When one such defendant appealed this use of federal wiretaps, the Supreme Court ruled that wiretapping was not a “search” in the sense of the Fourth Amendment and therefore did not require a warrant.
The first restriction placed on law enforcement’s power to wiretap telephone conversations did not appear until 1934, when Congress passed the Communications Act, more than fifty years after wiretaps had first been employed. However, although this regulation was reinforced when the Supreme Court ruled that the Communications Act applied to law enforcement agencies as well as private citizens, the restriction was widely ignored, and law enforcement agencies continued to employ unwarranted wiretaps for the next thirty years.

In 1967, the Supreme Court ruled in *Katz v. United States* that wiretapping was a search in the sense of the Fourth Amendment and that law enforcement agencies needed to obtain a warrant before they could tap a phone line. After ninety years, a significant restriction was finally placed on law enforcement agencies’ ability to wiretap private conversations.

In this case, both Congress and the Federal court system were slow to protect citizens against the privacy infringement enabled by the new technology. As a result, power was shifted in favor of law enforcement.

Although wiretapping is probably the most famous example of the failure of Fourth Amendment protections to keep up with new technology, it is far from the only such example. Many other technologies have been employed without restriction for years including electronic bugs, pen registers, and thermal scans.

COINTELPRO, an FBI counterintelligence agency that targeted communist party members, civil rights advocates, and antiwar protesters (among others) has become famous for what are now considered blatant violations against the Fourth Amendment rights of American citizens. COINTELPRO, which conducted more than 2000 operations between 1956 and 1971, made use of unwarranted electronic bugs to observe citizens, many of whom were not suspected of any specific crime. Because they did not charge these subjects, this practice of unwarranted electronic surveillance was not brought to public attention. One now notorious example of COINTELPRO’s programs was its observation of Martin Luther King, Jr. His house and hotel room were bugged by the FBI on no less than sixteen different occasions. COINTELPRO’s activities were not addressed or restricted until after Frank Church made a comprehensive report to the Senate in 1976; this report partially inspired the Electronic Communications Act of 1986. However, this law, which expanded preexisting protections to include modern technologies, only came after thirty years of privacy violations by the FBI. In the intervening years, electronic bugs had allowed law enforcement to infringe upon personal privacy.
Another example of the failure of regulations to keep up with evolving technologies is the case of pen registers and trap and trace devices. Pen registers allow law enforcement agents to record the phone numbers of all outgoing calls from a particular phone line; trap and trace devices record all incoming numbers. Both of these technologies were widely available by 1960, however, the Supreme Court did not rule on their use until Smith v. Maryland (1979). Although the Court ultimately decided that such devices only required a court order rather than a warrant, the fact that the issue was not addressed for twenty years is a further indication of the failure of the judicial system to respond to new technologies in a timely manner.

A more recent example of this phenomenon is thermal scanning. Since the late 1980s, police agents have employed thermal scanning as a means of gathering evidence with which to obtain a warrant. Thermal scans are particularly effective in detecting drug growing operations, because marijuana can be grown indoors with the aid of high intensity lamps. The issue was first addressed in 1994 and 1995, when several Circuit courts ruled on the use of thermal scans; the 7th, 8th, and 11th Circuits all ruled that thermal scans did not represent an illegal search in the sense of the Fourth Amendment. It was not until 2001, ten years after the new technology was first employed by law enforcement agencies, that the Supreme Court decided that thermal scans are a search under the Fourth Amendment and therefore require a warrant. Once again, a new technology enabled law enforcement agencies to infringe on the fourth amendment rights of American citizens.

There are several reasons for the delay in responding to a new technology. In the case of the judicial system, the only source of final decisions is the Supreme Court (and even these decisions can be reversed by a later decision). In order for the Court to decide on a new technology, the police must first take advantage of the new technology. Then the case must go to trial (instead of ending with a plea bargain). If the evidence is admitted to the trial court and the defendant is acquitted anyway, the case will stay at the trial court level. Otherwise, if the defendant chooses to appeal on the grounds that the new technology constituted an illegal search, then there is a chance of the case rising up through the appeals circuits to the Supreme Court, and then, if the Court chooses to hear the case, the technology will be addressed. Not only does this long process ensure that most cases never reach the Supreme Court, thereby extending the interim period between the introduction of a new technology and a judicial decision, but each individual case takes a long time to move through the system. In the case of Kyllo v. United States (in which the Supreme Court ruled on thermal scanning), the police agents used a thermal scanner to look at Kyllo’s home in 1992, but the case was not decided by the Supreme Court until 2001. This lengthy judicial process necessarily causes
large gaps between the advent of a new technology and the implementation of any judicial restrictions governing its use.

In the case of the federal legislature, one of the problems is that there are so many new technologies that it can be difficult to predict which ones will be used to encroach on Fourth Amendment rights until after it has happened. Another issue is that although Congress is capable of acting very quickly on occasion (for example, the Patriot Act of 2001 was passed within a month of the September 11 attacks on the World Trade Center), such haste is unusual. Instead of proposing legislation that could be interpreted as impeding justice or protecting criminals, politicians prefer to wait until a technology has clearly infringed upon privacy rights before enacting regulations.

Because of the institutional and political restrictions imposed on the judicial and legislative branches, the federal government is slow to enact regulations on the use of new technologies by law enforcement agencies. Accordingly, the availability of increasing numbers of new technologies has shifted the balance of power towards law enforcement agencies and away from individual privacy.

Conclusion
Over the last eighty years, technological development has expanded the scope and power of police searches and shifted power away from the private citizen into the hands of law enforcement agents. The long response time between the introduction of new technologies and their regulation, either by Congress or by the Supreme Court, has combined with cyclic interpretations of the Katz test to undermine the privacy protection afforded by the Fourth Amendment. However, this trend away from personal privacy is not inevitable; by establishing the existence of a minimum level of privacy and reinforcing Court decisions with legislative punishments, it would be possible to restore the privacy protection intended by the Fourth Amendment and simultaneously act to ensure that that protection will continue in the face of the unforeseen technological advances of a future age.

Eleanor Birrell is an undergraduate at Harvard University where she is currently pursuing a double major in Computer Science and Mathematics. She is primarily interested in algorithms and cryptography, and in how these theoretical concepts can be applied to real-world problems related to efficiency, security, and privacy. The complete paper can be found at http://www.eecs.harvard.edu/cs199r/Eleanor.pdf.
Excerpt from
The Twilight of the Golds

Jonathan Tolins

CHARACTERS:

DAVID GOLD, late twenties. Charming, sensitive, gay, aspiring set designer. A fervent Wagner fan.

SUZANNE GOLD-STEIN, early thirties, his sister. Bright, attractive. Feels as if she never lived up to her own potential. Works as a buyer for Bloomingdale’s department store.


PHYLLIS GOLD, fifties, David and Suzanne’s mother. An elegant woman, smarter than she sometimes lets on. Perpetually worried about her children.

WALTER GOLD, fifties, David and Suzanne’s father. A sometimes gruff New York businessman. Far more sensitive than he often appears.

•••

TIME: Early autumn through late winter
PLACE: New York

[from Act I, scene 1]

ROB: All right. But it’s not to leave this room. It looks like the Human Genome Project is a lot further along than everybody thinks.

PHYLLIS: Really. What’s that?

ROB: Basically, what I’m saying is that we’ve finally developed advanced procedures for individual gene identification. Including a way to do these tests through amniocentesis at the end of the first trimester.

WALTER: Which means?

ROB: The possibilities are endless. Think about it. This is an unbelievable breakthrough. It opens new doors. Unfortunately, it will be a while before the public knows about it because, typically, we’re fighting in court over the patents.
WALTER: Patents? On the equipment?

ROB: On the genes.

DAVID: You still didn’t answer my question. What does it mean?

ROB: What, you mean practical applications?

DAVID: That’d be good.

SUZANNE: Don’t be snotty.

ROB: Curing genetic diseases for one. There are people walking around with these ticking time bombs in their DNA waiting to go off. By locating the gene, we’re ten times closer to a cure.

PHYLLIS: I had a friend, remember Gloria Myers? Her mother had Huntington’s.

ROB: Perfect example.

PHYLLIS: I used to go to her house. Her mother couldn’t walk or eat by herself. She kept having these hysterics, wanting to speak, to communicate somehow, and just being defeated by her body. Finally, she gave up.

WALTER: Terrible thing.

PHYLLIS: And everywhere you looked in that house there were reminders of what she was like before. Pictures, paintings the mother used to do, the piano she used to play. I knew it was killing Gloria. Not only seeing her mother fall apart that way, but knowing that the same thing could happen to her. Can you imagine, feeling like you’re looking at your own future that way? Just awful, her mother. You’ve never seen anyone look so terrible.

DAVID: I have.

(A short pause.)

SUZANNE: How is Gloria? What happened to her?

PHYLLIS: We lost touch. I don’t remember why.
WALTER: Very sad.

DAVID: *(Back to business.)* There’s more to it, isn’t there?

ROB: What do you mean?

DAVID: All that genetic decoding. That’s dangerous stuff.

WALTER: What dangerous? Is anybody else starving to death?

ROB: Sure, there are going to be ethical questions. Who is privy to the information? The insurance companies? The government? Things like that will be argued case by case until we can come up with some sort of standards.

DAVID: What about the amniocentesis?

ROB: What about it?

DAVID: Why’d you mention it? What are you going to do with it.

ROB: Simple. By having the information available before birth, you’ll determine what problems or abnormalities may be present in the fetus. Doctors can be ready for any emergencies. And the parents can be trained to help the child overcome any behavioral pre-dispositions.

WALTER: We could have taught Suzanne to hate shopping.

ROB: Later on, by using this information, we can develop ways to correct or reverse the genes.

PHYLLIS: Maybe they could give me a sense of direction.

ROB: That’s years away. Until then, in tragic scenarios, the parents and doctors may choose to terminate the pregnancy.

DAVID: On what grounds?

ROB: I told you. At first, as with anything, it will be on a case by case basis.

DAVID: I don’t believe this. Do you people have any idea how dangerous this is?
SUZANNE: I thought you were pro-choice.

ROB: Look, David, we are, in effect, on the verge of creating a better world. That’s what science is— the pursuit of a better world, one that minimizes misery.

DAVID: Whose? Face it, Rob, this is Eugenics. It’s blatant Nazi philosophy.

[later in the scene]

SUZANNE: Oh, God, can we please stop this? I can’t take it any more. This conversation is so horrible.

WALTER: What?

PHYLLIS: Suzanne, what is it?

ROB: Suzanne?

DAVID: You need a drink?

SUZANNE: No. I’m pregnant.

[from Act I, scene 2— after amniocentesis]

ROB: Sit down, we have to talk.

SUZANNE: Oh no. Oh no. Oh, God. Oh, God. It’s deformed, isn’t it? It has no arms or it’s blind or, what? Oh, God. Oh, God. Oh, God.

ROB: (overlapping) No, no, no. No. Calm down, please, will you? It’s nothing like that.

SUZANNE: Well, what?

ROB: Sit down. Let’s go through it.

(Rob leads her to a chair. He then takes out a folder from his briefcase and sits next to her. He removes some computer printouts from the folder and lays them out in front of them.)
SUZANNE: My hands are sweating.

ROB: Okay. Dr. Lodge was very pleased with how it went. He was able to get a good sampling of the genetic material and all the tests were completed. Now remember, we’re still in an experimental area. I mean, they can’t guarantee that this information is 100% accurate.

SUZANNE: Will you just tell me?

ROB: Okay. It’s a boy. No physical deformities.

SUZANNE: Ten fingers, ten toes?

ROB: Ten fingers, ten toes.

SUZANNE: Ten fingers and toes. Well, what then? Is it retarded?

ROB: No. As a matter of fact, it looks like it will be quite intelligent. Probably left-handed.


ROB: It will probably be like David. (A beat.) We matched the chromosomes from the test with the data compiled in the computer and found the presence of those genes that we’ve statistically linked to that trait. Then, to double check what we detected, we examined the magnetic image that we made of the brain. And, sure enough, the size of the hypothalamus is much smaller than the average, even at this early stage of development. Also, the anterior commissure connecting the cortex of the right and left sides of the brain is significantly larger than normal. Those are both in accordance with the latest studies. All of this information taken together has led Dr. Lodge to that conclusion.

SUZANNE: Oh.

ROB: He estimates it’s 90% certain. But he has a big ego, so who knows? Still, the evidence suggests that that’s what we’ve got.

(Pause.)

SUZANNE: What do we do?
ROB: I don’t know.

SUZANNE: They could be wrong.

ROB: Yes. That’s a definite possibility. And it’s not like you can point to one gene and say “aha.” It’s the whole composite of evidence that’s open to interpretation.

SUZANNE: So it could be a mistake.

ROB: Adrian says 90% sure. I believe him.

SUZANNE: Can we pretend we never heard this?

ROB: Can you?

SUZANNE: (Thinks a moment, then:) No. Will any kid we have … ?

ROB: That’s veryunlikely. There are cases of siblings, but almost never all of them.

SUZANNE: What about environment? I mean if we know before, couldn’t we raise it in a way that …

ROB: It’s possible, but who knows how? And judging by how clearly it shows up in the statistical evidence, we’d have a lot of nature to nurture against. But, yes, I guess we could try something like that if you want.

SUZANNE: I tried to think of everything. All my life, I’ve tried to visualize bad things really clearly so they wouldn’t happen, because things never happen when you expect them. But I never thought of that. I didn’t know they could …

ROB: Well, we can.

SUZANNE: Are you mad at me?

ROB: Of course not. What a stupid thing to say.

SUZANNE: But he’s my brother.

ROB: It’s nobody’s fault. That’s just the way it is.
SUZANNE: But you’re upset.

ROB: I’m not thrilled.

SUZANNE: How can you be sarcastic?

ROB: I’m answering your question. Yes, I’m upset.

SUZANNE. (Softly.) We could get rid of it. I mean …

(Beat.)

ROB: We could. Yes. We could …

SUZANNE: (Tentative.) I don’t want to …

ROB: I know. Sure.

SUZANNE: I mean, it’s not something I ever thought I’d have to do.

ROB: No. It would have to be considered very carefully.

SUZANNE: God. How …?

ROB: We don’t have to decide tonight.

SUZANNE: No, of course not.

ROB: But, you don’t want to take too much time with that decision. The earlier the better.

SUZANNE: Right. I know. Oh, God. What do other people do?

ROB: What do you mean?

SUZANNE: I mean, what’s the precedent?

ROB: There is no precedent. It’s just us. I’m going to get out of this suit. (He walks to the bedroom.)

SUZANNE: If only it were deformed.

ROB: Suzanne!

SUZANNE: It wouldn’t be so complicated, that’s all. This is so complicated.
ROB: We’ll be okay. *(He exits.)*

*(Suzanne sits still for a moment. She then picks up the telephone and presses the speed dial button.)*

SUZANNE: *(Into phone.)* Mom? It’s me. Don’t get hysterical.

*(Rob appears in the hallway and looks at Suzanne. MUSIC: the “Forest Murmurs” from Siegfried. END OF ACT I)*

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*[from Act II, scene 1]*

DAVID: Mom, what? Is there a problem with the baby? Mom?

PHYLLIS: There’s a problem.

DAVID: *(Rising)* Oh, God, no. Did she miscarry? Nobody’s told me anything.

PHYLLIS: I’m not supposed to say. Suzanne would kill me.

DAVID: It’s a little late for that now.

PHYLLIS: Please, David, leave it alone.

DAVID: Mom, I’ll call her right now if you don’t tell me.

PHYLLIS: She may not keep it.

DAVID: Why not?

PHYLLIS: They did that test at Oxy. Rob took her in.

DAVID: And?

PHYLLIS: It’s gonna be like you.

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*[from Act II, scene 2]*

SUZANNE: Mom told you. I knew she would. This family talks too much.

DAVID: So then it’s true. How can you? Do you realize what you’re doing?
SUZANNE: Funny, I don’t remember asking for your input.

DAVID: Suzanne, I can’t just sit by and let this happen.

[later in the scene]

DAVID: You and Rob wanted this baby. You can afford it. You’re ready to be parents. But now, because you know something about this person you’ve created that you don’t care for, you’re ending his life.

SUZANNE: It’s my choice, David. It’s my right to choose. And stop saying “his.”

DAVID: Ah, yes, the right of choice— the last refuge of the morally indefensible. We demand the right of choice when we know deep down what we want to do is wrong. Necessary maybe, regrettable yes, but definitely wrong. We demand our God-given right to take the easy way out.

SUZANNE: You don’t believe that.

DAVID: Yes. Right now, I think I do.

SUZANNE: No, I know you don’t. You’re talking like some Right-Wing Fundamentalist crackpot. Coming here in your own little “Operation Rescue.” Don’t you dare give me a sermon as if you had morality on your side. I think we know you don’t.

DAVID: That’s not what this is about. I would never take away your right. I’d march in the streets and write my congressman to make sure you keep it. But this is something new. This is a decision that no one’s ever had to make before. I’m asking you to choose carefully. Please. Think it over.

SUZANNE: I have.

DAVID: Think harder. How can you do this to me?

SUZANNE: Oh, this is about you, is it?

DAVID: You’re erasing me from the world. You’re rubbing me out. Why? I thought you loved me.

SUZANNE: Don’t play those games with me. They won’t work.
(Beat.)

DAVID: What does Rob say?

SUZANNE: Rob says a lot. He says he’ll be patient and support me in my choice, but I should hurry up and decide. And if I feel up to the challenge of raising this one, then he is too. The message is coming through loud and clear: Why put ourselves through this? And, frankly, I don’t blame him. This baby was going to change our lives and make everything better. Not that things are bad, but, I don’t know, we could use a clear sense of purpose. Now the whole thing is tainted. I wish we didn’t know, but we do. And it’s a problem.

DAVID: What wouldn’t be a problem with you?

SUZANNE: Oh, please.

DAVID: What if you found out the kid was going to be ugly, or smell bad, or have an annoying laugh, or need really thick glasses?

SUZANNE: Come on, David. We’re talking about something pretty serious.

DAVID: But where do we stop? You know we have relatives who died for less. So now we have this technology, what are we going to do with it? It starts with us, Suzanne.

SUZANNE: Oh, Shut up! Shut up! Shut up! I can’t take it anymore.

DAVID: That’s because you know I’m right.

SUZANNE: No, it’s because I’m sick of you. I’m tired of your lectures and the way you talk down to all of us. Goddam it, I am so sick of being “the shallow one.” Everybody dotes on you, with all your deep feelings and higher interests. The truth is you’re just a spoiled brat who always has to have his own way.

DAVID: (Putting on his coat, crossing to the door) Yes. You’re right. And so is Stephen. I’m a horrible little shit. I should get the hell out and grow up. And maybe I will. But when I’m done, I’ll come back and say the same things and I’ll still be right. (He opens the door.)

SUZANNE: (Faltering) Why are you doing this?
DAVID: (Stops in the doorway.) Because I’m fighting for my life. Do you have any idea how horrifying this is? To find out that the people who brought you into this world wish that they had slammed the door?

SUZANNE: This family has been very good to you in every way, David. Don’t play the martyr. We all love you, you know that. We love you.

DAVID: Then love him.

SUZANNE: (With a pained sigh.) I don’t have the strength for it. I wish to God I was as strong as you are, but I’m not. I can’t take it.

DAVID: Is that a good enough reason?

SUZANNE: (Sitting.) Probably not. But, think of that little boy. What would it be like for him? You know how people are. How would Rob and I be able to help him, feeling the way we do? It wouldn’t be fair to any of us. David, what kind of mother would I be if I didn’t understand my child?

DAVID: I’d say you’d be pretty typical.

[and the scene continues ... ]

Jonathan Tolins, the author of The Twilight of the Golds, also wrote The Last Sunday in June and If Memory Serves. A new play, Secrets of the Trade starring John Glover and Amy Aquino, recently finished an acclaimed run in Los Angeles. With Seth E. Bass, Tolins wrote and co-produced a film version of The Twilight of the Golds for Showtime that played at the Sundance and Chicago film festivals and enjoyed a theatrical release. It featured Faye Dunaway as Phyllis Gold, Jennifer Beals as Suzanne Stein, and Brendan Fraser as David Gold. The film was also nominated for the Humanitas Prize (awarded to films that best communicate and encourage human values). Martian Child, a second collaboration with Seth E. Bass, was released in November 2007 by New Line. For television, Jon worked as a writer for Night Rap, Queer As Folk, the Academy Awards, and was the sole writer of the 2003 Tony Awards starring Hugh Jackman. He is the author of Pushkin 200: A Celebration at Carnegie Hall and co-wrote The Divine Miss Millennium Tour with Bruce Vilanch, Mark Waldrop and Bette Midler in 1999. He has written articles for Opera News, Opera Monthly, TheaterWeek, Frontiers, Avenue, and Time Magazine. In September 2007, he became an adjunct professor of screenwriting at the University of Southern California. He is also a member of the Dramatists Guild and the Writers Guild of America.
Excerpt from
Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy

Elizabeth E. Joh

Introduction
“If you’ve ever handled a penny, the government’s got your DNA. Why do you think they keep them in circulation?”
The Simpsons, Who Shot Mr. Burns?

“When you’ve licked a stamp on your tax return you’ve sent the government a DNA sample.”
Victor Weedn, Head of Armed Forces DNA Identification Laboratory

We leave traces—skin, saliva, hair, and blood—of our genetic identity nearly everywhere we go. Should the police be permitted, without restriction, to target us and to collect the DNA that we leave behind? In a growing number of instances, the police, unburdened by criminal procedure rules, seek this “abandoned DNA” from criminal suspects in hopes of resolving otherwise unsolvable cases. Successful DNA matches of identity are virtually conclusive of guilt. What are the consequences of allowing this investigative method to remain unregulated? In stark distinction to the growing body of commentary on the compulsory collection of DNA samples from prisoners and parolees for state and federal DNA databases, little attention has been paid to this backdoor method of DNA collection.

This essay discusses why the government’s collection of “abandoned DNA” is a problem worthy of serious attention. But first, a definition is necessary: Abandoned DNA” is any amount of human tissue capable of DNA analysis and separated from a targeted individual’s person inadvertently or involuntarily, but not by police coercion. We can distinguish this method of DNA retrieval from samples obtained by force (by drawing blood) or by consent (for exoneration purposes). Abandoned DNA collection is also distinct from the acquisition of a suspect’s DNA sample pursuant to a court-issued warrant.

Deciding whether DNA might ever be “abandoned”—and with the DNA, an individual’s legitimate expectations of privacy—is important because abandoned DNA provides the means to collect genetic information from anyone, at any time. Currently, the rules of criminal procedure appear to pose no restrictions on the police when collecting this evidence. Not only does “abandonment” affect police behavior, it raises basic questions about
the changing nature of identity in the genetic age. How should we characterize the relationships between our physical bodies and our identities now that nearly any “body particle” can reveal entirely our genetic information?

“Abandoned” DNA as an Investigative Technique

As a practical matter, why do police choose to collect abandoned DNA when looking for incriminating evidence? The simple answer is that it is easy to collect. These DNA samples are available from anyone and can be collected without the targeted person’s knowledge and, therefore, without any objection or resistance.

Some police act as passive collectors, waiting for a suspect to discard a smoked cigarette or to spit on the floor. Because current techniques used by forensics labs require only a small amount of saliva, blood, or hair, the police need only obtain a minute tissue sample. In one case, Los Angeles police detectives solved a decades-old series of murders by retrieving DNA from the recently used coffee cup of Adolph Laudenberg, a man they had long suspected, but from whom they had been unable to obtain other evidence. The saliva taken from Laudenberg’s cup matched that of bodily fluid that had been found with the victims.

Other police have turned to more creative approaches. Imagine that police detectives suspect a person in a homicide investigation, and physical evidence from the crime scene yields the DNA sample of an unknown person. Perhaps the police have no more than a hunch about the suspect—that is, they lack a basis to obtain a warrant to collect the DNA—or they have limited resources to conduct a detailed investigation. Or perhaps the police suspect someone in a “cold” case, in which the crime occurred years, perhaps decades, ago and in which a prior investigation had proven unsuccessful.

Facing all three obstacles, Seattle police devised a clever ruse to obtain a DNA sample from John Athan, whom they long suspected in the 1982 murder of a thirteen-year-old girl. Writing on the stationery of a fictitious law firm, the police sent a letter in 2003 to Athan, then living in New Jersey, asking him to join a class action lawsuit to recover overcharged traffic fines. Athan complied, and by licking the return envelope, he provided the detectives with the DNA sample they needed. Athan’s DNA matched that found at the crime scene, and in 2004 he was convicted of second-degree murder.

These examples illustrate some fundamental differences between traditional police work and “abandoned DNA” collection. In more conventional police investigations, the Fourth Amendment poses clear restraints on police investigation. In most circumstances they must obtain a warrant, for example,
to enter one’s home, even if only to read the newspaper inside. In cases involving “abandoned DNA,” however, the police have been able to retrieve the most detailed genetic information, without being subject to the criminal procedure rules that normally apply to searches and seizures.

Thus, because it is grounded in physical boundaries, the Fourth Amendment fails to protect genetic privacy adequately. This inadequacy arises at a time when the boundaries of individual identity are undergoing dramatic changes. A wide variety of technologies have multiplied the ways in which individual identities arise: genetic (DNA), informational (public records), and digital (cyberspace) identities are but a few examples. It may be that traditional Fourth Amendment analysis is poorly suited for a world in which “the body itself may become a rather antiquated way of defining the individual.” While the Fourth Amendment continues to protect, as sociologist Gary Marx colorfully observes, our “meat space,” it fails to protect aspects of our genetic privacy once separated from that sphere.

Of course, the case that “abandoned DNA” has indeed been abandoned is not conclusive. Do we intend to renounce our actual expectations of privacy with respect to this genetic material when we shed our DNA? The volition that is implied in abandonment is simply unrealistic here. Courts may readily find that criminals have clearly intended to renounce all privacy claims to bags containing illegal firearms or to packages of drug paraphernalia when fleeing the police, but we hardly have a realistic choice in shedding DNA. One can shred private papers or burn garbage so that no one may ever delve into them, but leaving DNA in public places cannot be avoided.

Nevertheless, the Fourth Amendment’s protections appear to fall short of providing a constitutional basis from which to challenge abandoned DNA collection. No court has held police collection of abandoned DNA to be illegal. Once DNA is considered abandoned or knowingly exposed, the Fourth Amendment does not apply at all. By contrast, even those classes of persons who have been required to submit DNA samples according to state and federal DNA database laws have the benefit (albeit on the losing end thus far) of the Fourth Amendment’s balancing of interests between their individual rights and the legitimate interests of government. One can hardly fault the police for taking advantage of this distinction. Like all workers in complex organizations, the police work with the incentives and rules as they best understand them. In these situations, Fourth Amendment law permits and legitimizes their collection of this evidence.
The Implications of “Abandoned” DNA

The case for special consideration of abandoned DNA is made stronger when we consider the potential uses of this information. Although it has not yet been realized in practice, this particular DNA collection technique permits the collection of genetic information from virtually anyone; it is a backdoor to population-wide data banking. If criminal procedure law imposes virtually no restrictions over the collection of abandoned DNA, the police may collect it from anyone about whom they have only a vague suspicion, or none at all. While discretion is an inevitable aspect of police work, the risk of discriminatory treatment or harassment by the police surely increases when no legal justification for their actions is required. Collection is only the first place where unbounded discretion presents a problem, for as anthropologist Pamela Sankar notes, “[o]nce DNA samples exist, it is difficult to restrain their use.” Once the abandoned DNA is collected, what should happen to the sample? To what uses could the sample be put? The answer to the second question almost certainly will change as science evolves, but the answer to the first requires some law and policy decisions in an area already riddled with uncertainty.

First, once the police lawfully collect DNA for one investigation, the Fourth Amendment permits reanalysis of that sample for a wholly separate investigation. At least one lower court has decided that any further DNA analysis on a tissue sample already obtained for investigating a separate crime does not constitute a search, even if the initial collection of the tissue implicated the defendant’s Fourth Amendment rights. Thus, assuming its collection is constitutionally proper, an abandoned DNA sample can be analyzed as many times as the police wish.

Second, the Fourth Amendment does not appear to restrict the initial collection of abandoned DNA for any reason. Current uses of abandoned DNA suggest that the police seek a suspect’s DNA only to match it against DNA evidence found at a crime scene, but this limitation is generated by the police themselves. Little oversight exists regarding the intentional or accidental inclusion of such DNA evidence into CODIS [Combined DNA Index System], regardless of whether a positive match is made between the collected sample and existing forensic evidence. Nor do state laws appear to address explicitly how police ought to treat these tissue samples and DNA profiles in relation to state databanks.

In sum, the Fourth Amendment fails to protect citizens from having their identities—including their sensitive genetic information—revealed through the collection and analysis of abandoned DNA. Under this analysis, “identification” proves to be an elastic concept. Courts often note, for instance, that convicted persons lose their legitimate expectations of privacy in their identity. But what are the boundaries of “identity” in a world of genetic
analysis? Of course, fingerprints themselves, by linking a biometric identifier to a name, provide a window into that person’s past, vis-a-vis her criminal history. By linking a tissue sample to a criminal history and to personal medical information, a DNA profile looks both forwards and backwards in time.

Not only can DNA provide nearly unassailable evidence of identity, it may one day be used to identify and segregate those who possess a “crime gene.” The possibility of finding genetic causes for antisocial behavior is the most widely publicized research of “behavioral genetics.” (To explore that connection, the National Institutes of Health in 1992 funded a controversial conference to discuss the genetic basis of criminal behavior.) The discovery of a “crime gene” could provide justifications for preventive detentions or other means of social control for those identified as genetically predisposed to criminality. Even if today an individual police officer or a department possesses “little incentive to probe areas of the genome that would determine characteristics not discernible to individuals acquainted with a suspect,” more expansive DNA analysis would justifiably serve crime control purposes if science identifies markers for criminogenic behaviors, such as high levels of aggression, or for mental illness. For any of these diagnoses, only a single DNA sample would be required.

Overly deterministic explanations of criminality could also be used to bolster race-based genetic classifications. An emerging field in molecular genetics uses DNA information from groups, initially classified by race, to correlate multiple genetic differences among the groups and to test the groups’ responsiveness to drug treatments. In February 2005, the Perlegen Company announced it had constructed such a genetic diversity map. One troubling byproduct of this research, as sociologist Troy Duster argues, is the mistaken presumption that a genetic basis for race actually exists. The possibility of a racial genetic map renders it “not at all unreasonable” to expect a project proposing to identify race-based genetic variation among sex offenders or violent felons. Such an ability would permit the criminal law not only to be reactive, but predictive, by identifying would-be offenders on the basis of their genetic make-up.

The rapidity of scientific research in this area makes prediction about what will be possible difficult. The very idea of sequencing the human genome, for instance, was unthinkable a generation ago, but the recent completion of the Human Genome Project means that sequencing of an individual’s genome will be possible soon. After having retrieved your abandoned DNA, could the government sequence your genes? Technology, not the Fourth Amendment, provides the only obstacle.

If such projection sounds like an Orwellian fantasy, historical experience
has proven how “function creep” has altered and expanded the uses of other identification practices. The Social Security number is the most prominent example of an identifier now used for purposes not originally intended. Although originally meant solely to track the contributions of working Americans in order to calculate retirement benefits, the Social Security number today is a de facto substitute for a national identity card. Even fingerprinting, the dominant method of criminal identification in the twentieth century, was originally intended as a system of recordkeeping for civil, not criminal, purposes.

DNA collection already has experienced its own function creep. When the U.S. military began collecting mandatory DNA samples from soldiers in 1992, the Department of Defense announced that the use of the samples would be restricted to the identification of dead or injured soldiers. By 1996, proposals had already been made to extend the use of these samples for medical research. Today all DNA samples collected from the military are included in CODIS.

Finally, while there may be little public objection to the inclusion of convicted offenders and other “suspect” classes for DNA data banking, the public may feel quite differently when it is their DNA that is subject to systematic collection. Reports of pervasive resistance to the most recent census questionnaire and to proposals for national identification cards after the September 11, 2001 terrorist attacks, for example, suggest widely felt concerns about the government’s collection of personal information from ordinary citizens.

Even if public resistance exists towards the practice, the police now need no legal justification to collect abandoned DNA. True, the police have not gone so far as to propose, for instance, that we tattoo persons identified as carrying a “criminality” gene. And true, a population-wide database is yet only a topic of policy debates. But it would be unwise to wait until the harms of technological innovation are actually visited upon us to consider the appropriate responses when the legal means to do so exist now.

Conclusion
The collection of abandoned DNA by police threatens the privacy rights of everyone. The law permits it, and the police seek it. Advances in molecular genetics will permit ever greater exploitation of that personal information once it is acquired.

First, while Fourth Amendment law may not appear to protect a privacy interest in the human tissue left behind as the detritus of our daily lives, it is far from obvious that people do not harbor a privacy expectation in genetic
information that society is prepared to recognize as reasonable. While it may be difficult to sympathize with the offenders who are convicted as a result of their shed saliva, few of us would characterize our own genetic information as lacking any protection in these circumstances.

It may be that we are already moving toward a system in which the government will have access to the genetic information of everyone in the population, which will be used to solve crimes ranging from murders to littering. If we want unrestricted government access to DNA information, however, that ought to be the subject of public debate rather than made possible through means such as analogizing DNA to trash.

Without meaningful consideration of abandoned DNA, we lose the ability to protect our genetic information. Those who wish to avoid becoming targeted by such techniques can resort to unconventional behavior, like that of the excrement-collecting testator in John Barth’s novel *The Floating Opera*, or of the legendary eccentricities of the elderly Howard Hughes. Most will not find such behavior palatable.

The real objections here are not to the use of DNA data banking itself. As social theorist David Garland observes, surveillance technologies are an essential part of modern societies that require some means of data gathering. One day DNA identification for the entire population may indeed be as ordinary as the Social Security number, or as mundane as a t-shirt slogan. The problem that abandoned DNA raises so acutely, however, is that the means by which total population DNA data banking might be achieved have arrived without general public awareness and thus without discussion of how it may be regulated against abuse.

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Excerpt from
The Case for National DNA Identification Cards

Ben Quarmby

Foes of the United States have demonstrated their ability to strike at the heart of this country. Fear of renewed attacks and a desire for greater national security have now prompted many to call for improvements in the national personal identification system. In particular, the possibility of a national identification card containing the carrier’s DNA information is being seriously considered. However, this raises difficult questions. Would such a card system, and the extraction of individuals’ DNA it entails, violate the 4th Amendment of the Constitution? This article will show that such a card system could in fact be found to be constitutional under the law of privacy as it stands today.

National Identification Cards

Ever since September 11, 2001, the U.S. has remained on alert. More attacks are likely, according to the White House. Vigilance is required. The apparent ease with which the hijackers entered the country and integrated into American society prior to their strike has forced the national security authorities to reevaluate their methods. How can terrorists in our midst be identified, and further attacks prevented?

The current identification system, based on the social security number, driver’s license and signature, is no longer adequate.\(^1\) The U.S. now needs a foolproof identification system to avert the threat within its borders. One step towards this goal is illustrated by the Driver’s License Modernization Act of 2002,\(^2\) which would allow for cards with computer chips to carry “not only fingerprint information but other data, ranging from medical data to credit card numbers—security and e-commerce on one piece of plastic.”\(^3\) Similar ID cards, carrying biometric\(^4\) information and targeted exclusively at improving the effectiveness and efficiency of the national identification process, are being considered for the near future.\(^5\)

DNA Data

A card containing biometric information relating to fingerprints, while certain to be somewhat controversial, could in all likelihood be introduced without too much public opposition. Relinquishing your personal fingerprint information seems a small price to pay in the fight against terrorism.

But fingerprints are only the first step. Indeed, even Alan Dershowitz, a Harvard law professor known for his liberal opinions on a variety of
issues, has recently argued that the state should create a “near foolproof system of identification using fingerprints, or for even greater accuracy, DNA information.” 6 Most Americans would not, in his opinion, be averse to disclosing the information required by such a scheme and seeing that information accumulated in vast databanks, despite the loss of privacy this entails.

Scope of the Scheme
DNA databanks of the sort at issue here have been around for a while. U.S. law enforcement authorities began building DNA databases in the early 1990s. 7 At first, only individuals convicted of serious criminal sexual crimes were listed. Nowadays, however, the scope of the databases has been broadened in many states to include data on individuals convicted of murder, violent felonies, and in some states, misdemeanors. The trend is for a relentless expansion of the scope of such information banks: bills have now been introduced in several states to broaden the scope of the databases to include arrestees. 8

Opponents of the card scheme proposed by Mr. Dershowitz insist that the scope of the suggested DNA identification system should be limited. 9 Some argue, for example, that the scheme should only include individuals entering the country, or people with a criminal record. However, an identification system applying only to a small cross-section of the population would be of little use for national security purposes, and would inevitably lead to racial profiling and unfair singling out of specific minorities. 10 A nationwide card system therefore seems most appropriate under the present circumstances.

We might scoff at the possibility of such a DNA card ever being introduced in our lifetimes, and may feel protected by the 4th Amendment, but this is not a clear cut issue. September 11th may have touched our lives in more ways than we know.

Footnotes
4. Biometric information is defined as information relating to the statistical analysis of biological observations and phenomena.
5. Arkansas Company’s DNA Card Gaining Attention, AP Newswires,


8. Id.


**Ben Quarmby** received a J.D. in 2004 from Duke University Law School and a B.Sc. in Biochemistry in 2001 from the University of Bristol. He is currently a Law Clerk in the Chambers of the Hon. Judge Brown, U.S.D.J. — Trenton, NJ. This article appeared in the 2003 Duke L. & Tech. Rev. 0002.
The Roe vs. Doe story began on July 8, 2005, when [George] Christian got a call from an employee he supervised. An FBI agent had called to ask who could receive service of a national security letter addressed to the Library Connection, which provides computer services for twenty-six Connecticut libraries. As executive director, Christian was responsible for the organization’s legal affairs. The letter should be directed to him. The following week, two FBI officers showed up in Christian’s office. He was handed a letter demanding electronic records that would determine who had used a library computer between 4:00 and 4:45 P.M. on a specific day six months earlier.

“I told the agent he was out of luck,” Christian said. “When a computer is turned on, a router assigns it to an IP address, and the routers use address translation to hide the computers behind them— if only to make hacking more difficult.” The specific information wasn’t available unless all the information on every library patron was turned over to the FBI. The agents were looking for an electronic needle in a haystack.

“But worry, we’ve got ways,” Agent Aram Crandall replied. He told Christian to pull the information together and comply with the demand stated in the letter.

While two FBI agents waited in Christian’s office, he read the third paragraph of his national security letter, which cited a statute and certified that the information the agent had requested was “relevant to an authorized investigation against international terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted solely on
the basis of activities protected by the first amendment to the Constitution of
the United States.”

Christian had never heard of a national security letter. He says he would have cooperated if he believed there was a genuine and immediate terrorist threat. It was July 8. The letter was dated May 19. Almost a week had passed since the FBI had called his office. The letter was not even addressed to him but to the Library Connection employee FBI agents had initially contacted. “This didn’t look like the FBI was in hot pursuit of anyone,” Christian said. The third paragraph of the letter prohibited the recipient from “disclosing to any person that the FBI has sought or obtained access or information to [sic] records under these provisions.”

Christian made up his mind that he wasn’t going to comply before the agents walked out of his office. He called the Library Connection’s attorney, whose work is focused on keeping non-profits in compliance with federal and state law. “She had never seen those three words used together like that.” The lawyer assigned several law students the task of researching national security letters. When they completed their research, she told Christian he was in a real bind. Denying the FBI’s demands would entail taking on the “attorney general of the United States.” Christian called the consortium’s vice president, Peter Chase, and requested an emergency meeting of the executive board.

“They were going after our patrons with a national security letter?” Chase said. “Our lawyer told us the targets of national security letters don’t even have to be suspected of any criminal activity themselves. And the FBI doesn’t have to show anyone that this investigation has anything to do with national security.

“There was no oversight. When we heard that, we said no, no, no! We’re not going to do this.”

Their attorney put them in touch with the American Civil Liberties Union, whose attorneys Ann Beeson and Jameel Jaffer drove up to Connecticut from New York to meet the librarians. Beeson said she didn’t feel secure discussing the case over the phone. The lawyers told no one in their office where they were going, fearing an inadvertent leak might result in charges files against them and their prospective clients. It was not clear that a recipient of a national security letter could speak to a lawyer without breaking the law.
Beeson’s other national security letter client, a John Doe plaintiff . . . had won a lower court ruling nine months earlier, when a federal judge ruled that the national security letter that John Doe had received violated his First Amendment and Fourth Amendment protections.

To say John Doe won is an understatement. Federal district judge Victor Marrero wrote a 120-word opinion that declared national security letters violations of Fourth Amendment protections against search and seizure and the First Amendment guarantee of free speech. Under the law governing the use of national security letters, as modified by the Patriot Act in 2001, the FBI could compel a recipient to produce documents or electronic files with no opportunity to challenge the demand in court. Searches and seizures, the judge wrote, “must be performed pursuant to a valid warrant based upon probable cause,” which requires approval by a judge. Yet NSLs were being issued by any one of fifty-six supervisors in regional FBI offices.

“The literal terms of the non-disclosure order,” the judge wrote, “would bar the recipient from even consulting with an attorney to file such a challenge . . . Even if he were to challenge the NSL on his own, the recipient would necessarily have to disclose the fact of the NSL’s issuance to the clerk of the court and to the presiding judge, in violation of the literal terms of the non-disclosure provision,” wrote Judge Marrero in a blistering, indignant opinion.

The judge also had a problem with a perpetual gag order that “presupposes a class of speech, that, for reasons not satisfactorily explained, must forever be kept from public view, cloaked by an official order that will always overshadow the public’s right to know.”

“Democracy,” Judge Marrero wrote, “abhors undue secrecy, in recognition that public knowledge secures freedom.”

The judge stayed his decision for ninety days, to allow the government time to submit motions to protect sensitive information that might be compromised by his orders. And he observed that some possible legislative fixes were moving through Congress. But he ruled that an FBI agent walking into someone’s office with a letter that demanded private information, gagged the recipient forever, denied access to an attorney, and provided no recourse to a judge was flatly unconstitutional.
To the ACLU the Library Connection case was timely. While Beeson and Jaffer sat down to listen with the librarians in Connecticut, Congress was debating and revising the Patriot Act. John Doe New York was gagged and in the middle of an appeal, unable to testify before Congress or even speak to a member of Congress about his experience. Attorney General Alberto Gonzales was reassuring the public that the Patriot Act was not being used to go after libraries.

The librarians signed a retainer agreement with the ACLU attorneys, and the ACLU signed on to the case as both counsel and co-plaintiffs. They filed suit in federal court, making the same Fourth, Fifth, and First Amendment arguments they had made on behalf of John Doe New York. Their most urgent request was an immediate preliminary injunction that would allow their clients to speak about their experience with a national security letter.

The assistant U.S. attorney defending the government went, to use a lay term, ballistic. To disclose that the Library Connection had received a national security letter would jeopardize national security, argued Lisa Perkins. The subject who had used library computers would be made aware that the FBI was looking over their shoulders and adapt their tactics to avoid surveillance. An instrument Congress had authorized to fight terrorism would be undermined.

The case was tried under the highest national security standards, with every document filed under seal and scrutinized by U.S. attorneys, who would redact much of the information before turning it over to the court, where it would become part of the public record. The librarians would remain gagged for the duration of their trial, prohibited from telling family members and employees that they had received an NSL. There were also two Jane Does, Barbara Bailey and Janet Nocek, also Library Connection board members.

Even the evidence used against them was top secret. The FBI’s demand for their library records was based on a classified file that could not be made public without putting national security at risk. The librarians, their lawyers, and the judge would have to trust that the threat to national security was serious enough to warrant gagging the librarians for the rest of their lives.

... Judge Janet C. Hall ... quickly came up with a Solomonic solution regarding the classified evidence. She had her own high-level security clearance, obtained before she was appointed to the federal bench. She announced that she would read the classified file in her chamber.
The judge found nothing in the classified files or the arguments of the government’s attorneys that justified suspending the librarians’ First Amendment rights.

The ban on the librarians’ speech was “particularly noteworthy,” Judge Hall wrote, because Patriot Act proponents had reassured the public—and librarians in particular—that the act was being narrowly applied. The judge quoted a speech Attorney General John Ashcroft had made in Memphis in 2003, when he ridiculed librarians, “accusing those who fear executive abuse of increased access to library records under the PATRIOT Act of ‘hysteria’ and stating that ‘the Department of Justice has neither the staffing, the time nor the inclination to monitor the reading habits of Americans.’”

The Patriot Act was up for renewal, Judge Hall wrote, and “the very people who might have information regarding investigative abuses and overreaching are preemptively prevented from sharing that information with the legislators who empower the executive branch with the tools used to investigate matters of national security.”

The government appealed and got an automatic stay on its decision, and the four librarians from Hartford found themselves stuck in a through-the-looking-glass judicial process.

They had already shredded, hidden, or destroyed any paperwork, correspondence, or electronic files related to their national security letter. They had to hide their role in the lawsuit from their spouses, children, family members, and friends; should anyone learn about the national security letter and even inadvertently leak the information, he would be subject to prosecution and prison.

Several days before Judge Hall handed down her decision, Alison Leigh Cowan, the enterprising New York Times reporter who had pored over the court records, called Chase at home. She began her phone interview with an innocuous question about his work as chair of the Connecticut Library Association. When Cowan asked Chase if he had seen the trial in Hartford, he panicked. A cannot-tell-a-lie kind of guy, Chase knew the reporter had been in the courtroom and was aware the plaintiffs weren’t there. If he answered yes, he would by default admit that he was one of the plaintiffs who’d watched from a remote site. He hung up, confirming her suspicion. The Library Connection plaintiffs were required to report any contact with the media, so
Chase called his attorneys in New York. They told him he had to leave town.

By November, Cowan reported that the Library Connection was the recipient of the NSL. . . . Though the government was engaged in what might [be] described as *redactio ad absurdum*, it had failed to redact its own court filing.

It was right there, in bold type, on Page 7 of an Aug. 16 memorandum of law, in between black splotches applied by government censors to wipe out hints of the organization’s identity.

It was also on Page 18 of the memo, and it was visible in the header line on a court Web site to anyone who looked up the case using the file number.

The name of the organization was so evident, both through telltale clues and explicit references, that *The New York Times* published it six times in news reports on the continuing court case, and it was named in other publications as well. Yet the federal government continues to argue in federal courts in Bridgeport, Manhattan and Washington that the identity of Library Connection, a consortium of libraries, must be kept secret, in the interest of rooting out potential terrorists.

Although their organization’s name had been revealed, Christian and Chase (and executive board members Barbara Bailey and Janet Nocek) were forced to continue the invisible-plaintiff charade throughout the appeals process, under threat of prosecution should they reveal that the Library Connection had received an NSL, which, of course, had already been revealed by the *Times*. When the ACLU attorneys attached a copy of *The New York Times* to a motion they filed, the government, in a hearing closed to the public, insisted that the *Times* article had to be redacted. And although the cat was out of the bag, Department of Justice attorneys insisted on redacting the phrase “the cat was out of the bag” from pleadings filed by the ACLU attorneys.

Despite the manifest absurdity of national security secrets that could be found in *The New York Times* and anonymous plaintiffs whose identities were widely known, the appellate court judges refused to lift the gag on the librar-
ians. “That’s why we took the radical, or somewhat radical, action of going to the Supreme Court with an emergency motion,” Beeson said.

Supreme Court justice Ruth Bader Ginsburg’s opinion, some of which was redacted and classified, was sympathetic with the “anomaly” the librarians confronted: “Doe— the only entity in a position to impart a first-hand account of his experience— remains barred from revealing its identity, while others who obtained knowledge of Doe’s identity— when the cat was inadvertently let out of the bag— may speak freely on the subject.”

Although Justice Ginsburg used the previously redacted phrase “cat . . . let out of the bag,” she refused to lift the gag order on the librarians.

The highest court in the country had ruled that the librarians would not be able to relate their experiences to members of Congress who were considering renewing the very provision that had the librarians gagged.

Then the FBI folded. After nine months of hardball litigation, the government lifted the gag order and dropped the demand for computer records. ... Approximately two weeks after President Bush signed the renewed Patriot Act, the John Does of Connecticut were free to call their senators and representatives. “After the revised Patriot Act was signed into law,” Chase said, “the government suddenly decided that our identity was not really a security threat after all and that our gag should be lifted. Nothing had changed in the case, so what happened to the threat to national security?”

To the government, the librarians were now irrelevant. They had been gagged long enough to keep them out of the public debate of the law that kept them gagged. John Doe New York’s case was remanded back to Judge Marrero’s courtroom to be retried, taking into consideration the changes Congress had made to the Patriot Act.

Congress had made some improvements in the act. Recipients of national security letters would be allowed to consult an attorney. There was now a process by which NSL recipients could go to court to challenge the FBI. And the penalty for violating the terms of an NSL— five years in federal prison— was spelled out so that anyone who might violate the law wouldn’t be left in the dark.

The most cynical, or perhaps “sinister,” reform eliminated the perpetual gag order while at the same time keeping it in place. Recipients of NSLs can
now go to court to challenge their gag orders at one-year intervals after the first-year anniversary of the letter. But there’s a catch. Judges are required to accept as conclusive the FBI argument that a specific gag remains essential to national security. Call it the Judge Hall amendment. No judge can lift a gag unless the FBI agrees it can be lifted.

Six months after the Second Court of Appeals sent John Doe New York back to Judge Marrero’s court for a new trial, the inspector general of the Department of Justice released a report that documented the volume of NSLs the FBI had issued between 2003 and 2005: 44,000 NSLs containing 142,074 requests, in one investigation demanding information relating to 11,000 telephone numbers. The report excoriated the FBI for its abuse of NSLs, and exigent letters intended to be used in the most dire circumstances, such as kidnapping or an imminent threat. Many of the letters had been issued in violation of the agency’s own guidelines.

Molly Ivins’ column was syndicated in more than three hundred newspapers, and her freelance work appeared in Esquire, The Atlantic Monthly, The New York Times Magazine, The Nation, Harper’s, and other publications. Bill of Wrongs: The Executive Branch’s Assault on America’s Fundamental Rights is her last and was published after her death in January 2007. Excerpts from Chapter 6, Roe V. Doe, are reprinted here with permission from her co-author Lou DuBose and The Estate of Molly Ivins with special assistance from Betsy Moon, Ivins’ professional assistant.

Lou Dubose has written about Texas and national politics for thirty years. He was editor of The Texas Observer and politics editor for The Austin Chronicle, and currently edits The Washington Spectator.
Skunk Hour

Robert Lowell

For Elizabeth Bishop

Introduction

Robert Lowell is a well-known twentieth-century poet, and “Skunk Hour” is actually one of his better known poems. It is dedicated to Elizabeth Bishop, and both Lowell and Bishop are closely associated with a poetic style that is loosely known as confessional, a style of poetry characterized by the poet persona’s unflinching inward gaze. Confessional poets are known for openly and publicly exploring all that is private and personal.

In “Skunk Hour” Lowell definitely reveals what is private and personal, but he does so ironically. The poem opens with the poet persona’s gossipy comments about a local “hermit heiress” who thirsts for the “hierarchic privacy” of Queen Victoria. The irony here is that the more the heiress craves privacy, the more the poet persona and others like him become fixated on her and turn her into a public figure. There are a couple more examples of the poet persona’s fixation on the private lives of others (the summer millionaire and the decorator), but then the poet persona reveals an even greater obsession to invade the privacy of others. He confesses that he has been voyeuristically watching for “love-cars” in a local secluded area known for love trysts.

He then confesses: “My mind’s not right.” The final two stanzas of the poem are dominated by imagery about skunks, and the ironic conceit is that the poet persona recognizes that he and the mother skunk in the final few lines share an affinity in their obsession with another’s garbage. Like the skunk, the poet persona acknowledges that, in his gossip and voyeurism, he feeds on garbage and is willing to invade another’s privacy to satisfy his cravings.

The poem can be discussed as Lowell’s ironic recognition that, while we want our own privacy, we are fascinated by opening up the privacy of others. The more privacy people want, the more we seek to deny them privacy. Quite often, we are most drawn to those moments and areas that people want to keep the most private.

Dan Williams, Chair
Department of English at TCU
Nautilus Island’s hermit
heirress still lives through winter in her Spartan cottage;
her sheep still graze above the sea.
Her son’s a bishop. Her farmer
is first selectman in our village,
she’s in her dotage.

Thirsting for
the hierarchic privacy
of Queen Victoria’s century,
she buys up all
the eyesores facing her shore,
and lets them fall.

The season’s ill—
we’ve lost our summer millionaire,
who seemed to leap from an L. L. Bean
catalogue. His nine-knot yawl
was auctioned off to lobstermen.
A red fox stain covers Blue Hill.

And now our fairy
decorator brightens his shop for fall,
his fishnet’s filled with orange cork,
orange, his cobbler’s bench and awl,
there is no money in his work,
he’d rather marry.

One dark night,
my Tudor Ford climbed the hill’s skull,
I watched for love-cars. Lights turned down,
they lay together, hull to hull,
where the graveyard shelves on the town. . . .
My mind’s not right.

A car radio bleats,
‘Love, O careless Love . . . .’ I hear
my ill-spirit sob in each blood cell,
as if my hand were at its throat . . . .
I myself am hell,
nobody’s here—
only skunks, that search
in the moonlight for a bite to eat.
They march on their soles up Main Street:
white stripes, moonstruck eyes’ red fire
under the chalk-dry and spar spire
of the Trinitarian Church.

I stand on top
of our back steps and breathe the rich air—
a mother skunk with her column of kittens swills the
    garbage pail
She jabs her wedge-head in a cup
of sour cream, drops her ostrich tail,
and will not scare.
Search and Seizure and Privacy at TCU

Mike Sacken

The concept of privacy draws meanings from law, including the Constitution and the Bill of Rights. It affects every citizen as a limit on government. Perhaps we all best understand the concept in terms of the 4th Amendment—thanks to all those cop shows and movies—and the requirement for a warrant before agents of the government can search or seize our property. This provision in the Bill of Rights has somehow turned “to mirandize” into a well known verb.

There is endless case law investigating the limits and exceptions to this protection of our reasonable expectations of privacy as against governmental invasions. There is another concept of privacy less explicit but derived from constitutional rights, one the great Supreme Court Justice Louis Brandeis described as the right to be left alone in matters where the government has no reasonable or compelling interest to regulate or investigate. Perhaps the most famous or infamous representation of that form of privacy is Roe v. Wade, in which the Supreme Court recognized limits on the ability of government to interfere with a woman’s right to terminate a pregnancy.

If you think about it, for lots of students, coming to college is the first time they get to claim substantial independence over decisions in their lives that have been scrutinized and controlled by adults and institutions. Since you were born, adults have claimed the right to dictate many parts of your life. The law requires parents to actively regulate your decisions under the threat of a charge of parental neglect or abuse. And school, well, until this year you’ve had little choice about whether, where, or when you attend. Or over what you studied and how you acted.

College culminates a process of gradual emancipation that has been emerging since you entered the teens and slowly acquired the right, under law (if not under the law of your parents!) to make certain decisions for yourself. While you’re in college, you’ll turn 21 and acquire most of the rights accorded all adult citizens in this country. But these last few years of partial controls over you, by parents and by institutions like TCU, can really chafe. The boundaries that protect your rights to be left alone seem to stretch ever so slowly.

The right to make decisions is not the same as a right to avoid consequences for those decisions. That never changes in our society. If you speed and get caught, the fine doesn’t vary whether you’re 17 or 71. But the issues of your privacy—your reasonable expectation that some things you can de-
cide and keep to yourself from authorities—those are far from resolved while you remain a student at a university.

Let’s start with where you live. Most non-local students start off in a campus residence hall. Some students live on campus the entire time they attend TCU. So, what about your dorm room? What is the scope of your right to privacy in regard to your room and the possessions there? Who can enter or go through your room and why? Many students are sharing a bedroom for the first time here—how much privacy are you entitled to vis-a-vis your roommate? The RA? Campus police? What about your car if parked on campus? When can it be searched? One thing to consider is whether the scope of your privacy rights here is the same as your expectations?

And think about records created and kept about you. Information about you & your friends may already be more accessible than any generation—with bits and pieces of info floating around about you in cyberspace. Some of the info you disclose intentionally, but other things just seem to appear without your ever knowing or agreeing to it. So maybe having all these records and info about you here at TCU is nothing upsetting. How much ought your parents be able to find out about you and your experiences at TCU from TCU? This is an expensive place and most students are partially or fully dependent on parents or others to fund their education. If your folks are ante-ing up $25k/year for you, should they have a right to know whatever anyone working for TCU knows about you as a student? Your grades? Your conduct in and out of class? Your medical experiences? As most of yall are 18 now or soon, laws give you some control over what TCU can tell even your parents about what you’re doing while a student, even if you’re screwing things up royally. Of course, you and I know if the parental units can turn off the money, they have leverage to force disclosures from you, but even if they’re paying every cent, that doesn’t mean they can force TCU to disclose certain things. Did you know that? And when, if ever, or why there are exceptions and TCU can/must disclose info? The boundaries aren’t always clear—e.g., in matters involving students’ mental health. When can and when must we disclose?

You’d be surprised how often these issues arise, because we at TCU know things about you your own parents don’t know, but logically would really want to know. TCU is kind of a small town with fairly benign controls, compared to a lot of places where there are plenty of rules, formal and informal. For many students, this environment is the freest they’ve ever enjoyed. But there are limits. There are always limits. Because the limits here are so different from many homes and high schools, you may estimate wrongly what they are. And if you do, as always, there are consequences. Some of them, like exile from the university, are pretty harsh. Every year, these conse-
quences are applied to students.

That’s another thing to remember: TCU didn’t have to admit you, and it doesn’t have to keep you. This year’s applicant pool for entering students was the largest ever, and every semester students transfer in to take places that come open. You need to understand the limits of your autonomy and privacy—some matters are private and you have the right to be left alone by any authority. Even then, however, not every choice is consequence free.

Mike Sacken is a Professor of Education at TCU.
From TCU's Residential Services, our search and seizure policy for dorm rooms:

**Search and Seizure**

Every effort will be made to protect the rights of students against search and seizure of their residence hall rooms and personal property. University officials reserve the right to enter and inspect residence hall rooms, when necessary, to protect and maintain the property of the University, preserve the health and safety of its students, or to maintain discipline. These procedures are followed:

1. Every effort will be made to notify the resident(s) in advance and to have the resident(s) present at the time of entry.
2. Entry and inspection of residence hall rooms to determine the existence of fire or health hazards for maintenance and repair purposes may be made by residence hall staff and/or authorized maintenance personnel provided notification is made to the student whose room is entered and inspected. Safety and health inspections will be made during each semester.
3. When a violation of University regulations or criminal or civil law is suspected, a student’s room may be entered and searched after a student has signed a Consent to Search Form or after approval is granted by the Dean or Associate/Assistant Dean of Campus Life or the Vice Chancellor for Student Affairs. The student, if available, will be advised of the suspicion and allowed to be present at the time of the entry and search. An additional witness to the entry and search is required.
4. In emergency situations where danger to life, health, safety or property is reasonably feared or if there is substantial evidence that violation of University regulations is in progress and that delay in securing a search warrant will lead to destruction or withholding of evidence, a room may be entered without written permission of designated Student Affairs staff. In such cases, two witnesses must accompany the University representative conducting the search.
5. Articles found in residence hall rooms which may be in violation of University policies or civil or criminal law can be confiscated and removed from the room. A receipt acknowledging the seizure will be presented to the student. All personal property will be returned to the student as soon as possible, providing its possession is not in violation of University regulations or civil or criminal law.
Writing Assignment

In order to enhance the value of the Common Reading, we would like you to reflect on the following:

Consideration of the 4th amendment to the U.S. Constitution evokes an imaginary line situated between the rights of the individual and the needs of society. Pinpointing the exact position of this line in the abstract proves nearly impossible as individual situations must be considered and evaluated on their own respective merits. One thing is certain: the 4th amendment provides that this line, wherever it might fall, may be crossed only as permitted by a court of law.

- What does “an imaginary line situated between the rights of the individual and the needs of society” mean to you?

- Describe a situation where you felt this line was crossed without just cause. This example may be drawn from first-hand experience or from observation.

- Now consider the readings in this booklet and choose one or more that seem to relate most closely to your example. Discuss similarities between your example and the readings.

In response to the readings and the above questions, please write a short reaction paper (400-500 words) which will be due and collected on August 22 at your Common Reading session. In addition, we ask that you email your paper in an attachment to tcucommonreading@tcu.edu. Be sure to include your name on the paper. Also, please keep a copy for your own files.

Please also keep this booklet. Some of your professors, particularly those in Written Composition 1 (English 10803) and Introduction to Speech Communication (COMM 10123), may use some of the readings and/or your reaction paper in their courses. The paper may also be used as a baseline writing sample.
Our Mission, Vision, and Values

Our Mission: to educate individuals to think and act as ethical leaders and responsible citizens in the global community.

Our vision: to create a world-class, values-centered university experience for our students.

Our Core Values: TCU values academic achievement, personal freedom and integrity, the dignity and respect of the individual, and a heritage of inclusiveness, tolerance and service.

2008 Common Reading Steering Committee

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Eric Cox  Maggie Thomas
Political Science  Journalism

Blaise Ferrandino  Peggy Watson
Music  Honors Program

Andy Fort  Dan Williams
Religion  English

Barbara Brown Herman  Carrie Zimmerman
Student Development Services  Student Development Services