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Nothing to Hide: The False Tradeoff between Privacy and Security (Introduction)

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DANIEL J. SOLOVE



**Nothing
to Hide**

**The False
Tradeoff between
Privacy and
Security**

NOTHING TO HIDE

Nothing to Hide

*The False Tradeoff
between Privacy
and Security*

DANIEL J. SOLOVE

Yale
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To Pamela and Griffin, with love

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Contents

Preface	vii
1 Introduction	1
PART I: Values: How We Should Assess and Balance the Values of Privacy and Security	
2 The Nothing-to-Hide Argument	21
3 The All-or-Nothing Fallacy	33
4 The Danger of Deference	38
5 Why Privacy Isn't Merely an Individual Right	47
PART II: Times of Crisis: How the Law Should Address Matters of National Security	
6 The Pendulum Argument	55
7 The National-Security Argument	62
8 The Problem with Dissolving the Crime-Espionage Distinction	71
9 The War-Powers Argument and the Rule of Law	81

Contents

PART III: Constitutional Rights: How the Constitution Should Protect Privacy

10	The Fourth Amendment and the Secrecy Paradigm	93
11	The Third Party Doctrine and Digital Dossiers	102
12	The Failure of Looking for a Reasonable Expectation of Privacy	111
13	The Suspicionless-Searches Argument	123
14	Should We Keep the Exclusionary Rule?	134
15	The First Amendment as Criminal Procedure	146

PART IV: New Technologies: How the Law Should Cope with Changing Technology

16	Will Repealing the Patriot Act Restore Our Privacy?	155
17	The Law-and-Technology Problem and the Leave-It-to-the-Legislature Argument	164
18	Video Surveillance and the No-Privacy-in-Public Argument	174
19	Should the Government Engage in Data Mining?	182
20	The Luddite Argument, the <i>Titanic</i> Phenomenon, and the Fix-a-Problem Strategy	199
21	Conclusion	207
	Notes	211
	Index	236

Preface

The idea for this book began with an essay I wrote a few years ago called *“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy*. After I posted it online, I was stunned by the attention it received across the Internet and in the media. I realized that there was a lot of interest in the debate between privacy and national security and that the same group of arguments came up again and again. I also realized that there were many misimpressions about the law.

Increasingly, I’ve found it frustrating when I hear certain arguments in favor of heightened security that have become quite prevalent. I believe they have skewed the balance between privacy and security too much to the security side. One of my goals in this book is to respond to some of these arguments.

I have written this book for a general audience, avoiding legal jargon and wonky policy analysis. I’ve presented more detailed policy proposals in my law review articles, but for this book, I focus on the general arguments and principles rather than technical minutiae. Of course, the details are important, but even more important are the basic concepts and themes of the debate. I hope that this book will put to rest certain arguments so that the debate can move ahead in more fruitful ways.

Although I have focused primarily on American law, the ar-

Preface

guments and ideas in the debate are universal. Despite a few differences, the law in many countries operates similarly to American law, and it often uses the same techniques to regulate government information gathering. The arguments and policy recommendations I propose in this book are meant to be relevant not just in the United States but also in other nations whose lawmakers are struggling with these important issues.

Some of the material for this book was adapted from a few of my law review articles. These articles are much more extensive than their adaptations in this book, and they are often very different in form and argument. I have not fully incorporated these articles here, so they remain independent works. I recommend that you check them out if you want a more technical treatment of some of the issues in this book: *Fourth Amendment Pragmatism*, 51 BOSTON COLLEGE LAW REVIEW (forthcoming); *Data Mining and the Security-Liberty Debate*, 74 UNIVERSITY OF CHICAGO LAW REVIEW 343 (2008); “I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy, 44 SAN DIEGO LAW REVIEW 745 (2007); *The First Amendment as Criminal Procedure*, 84 NEW YORK UNIVERSITY LAW REVIEW 112 (2007); *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 FORDHAM LAW REVIEW 747 (2005); *Melville’s Billy Budd and Security in Times of Crisis*, 26 CARDOZO LAW REVIEW 2443 (2005); *Reconstructing Electronic Surveillance Law*, 72 GEORGE WASHINGTON LAW REVIEW 1264 (2004). My thinking has evolved since the publication of many of these articles, so this book represents my most current view of the issues. Moreover, writing this book forced me to think more broadly about the topic of privacy versus security, and there are many issues I address here that I haven’t addressed before.

Many people helped me greatly with this project. My wife, Pamela, provided constant support and encouragement as well as superb suggestions on the manuscript. Many others have made immensely helpful comments on this book: Danielle Citron, Tommy

Preface

Crocker, Deven Desai, Chris Hoofnagle, Orin Kerr, Raymond Ku, Paul Ohm, Neil Richards, and Michael Sullivan. I would also like to thank my research assistant, Matthew Albanese, for his help. My editor, Michael O'Malley, was a joy to work with, and my copyeditor, Dan Heaton, carefully reviewed the manuscript. My agent, Susan Schulman, provided excellent guidance and encouragement throughout the publication process.

Introduction

“We must be willing to give up some privacy if it makes us more secure.”

“If you’ve got nothing to hide, you shouldn’t worry about government surveillance.”

“We shouldn’t second-guess security officials.”

“In national emergencies, rights must be cut back, but they’ll be restored later on.”

We hear these arguments all the time. We hear them in the conversations we have each day with our family, friends, and colleagues. We hear them in the media, which is buzzing with stories about government information gathering, such as the Total Information Awareness program, the airline passenger screening program, and the surveillance of people’s phone calls conducted by the secretive National Security Agency. We hear them made by politicians and security officials. And we hear them made by judges deciding how to balance security measures with people’s constitutional rights.

These arguments are part of the debate between privacy and security. The consequences of the debate are enormous, for both privacy and security are essential interests, and the balance we strike between them affects the very foundations of our freedom and democracy. In contemporary times—especially after the terrorist attacks on September 11, 2001—the balance has shifted toward the security

Introduction

side of the scale. The government has been gathering more information about people and engaging in more surveillance. Technology is giving the government unprecedented tools for watching people and amassing information about them—video surveillance, location tracking, data mining, wiretapping, bugging, thermal sensors, spy satellites, X-ray devices, and more. It's nearly impossible to live today without generating thousands of records about what we watch, read, buy, and do—and the government has easy access to them.

The privacy-security debate profoundly influences how these government activities are regulated. But there's a major problem with the debate: Privacy often loses out to security when it shouldn't. Security interests are readily understood, for life and limb are at stake, while privacy rights remain more abstract and vague. Many people believe they must trade privacy in order to be more secure. And those on the security side of the debate are making powerful arguments to encourage people to accept this tradeoff.

These arguments, however, are based on mistaken views about what it means to protect privacy and the costs and benefits of doing so. The debate between privacy and security has been framed incorrectly, with the tradeoff between these values understood as an all-or-nothing proposition. But protecting privacy need not be fatal to security measures; it merely demands oversight and regulation. We can't progress in the debate between privacy and security because the debate itself is flawed.

The law suffers from related problems. It seeks to balance privacy and security, but systematic problems plague the way the balancing takes place. When evaluating security measures, judges are often too deferential to security officials. And the law gets caught up in cumbersome tests to determine whether government information gathering should be subjected to oversight and regulation, resulting in uneven and incoherent protection. The law sometimes stringently protects against minor privacy invasions yet utterly fails to protect

Introduction

against major ones. For example, the Fourth Amendment will protect you when a police officer squeezes the outside of your duffel bag—yet it won't stop the government from obtaining all your Google search queries or your credit card records.

The privacy-security debate and the law have a two-way relationship. Many arguments in the debate are based on false assumptions about how the law protects privacy. And the law has been shaped by many flawed arguments in the debate, which have influenced legislation and judicial opinions.

I propose to demonstrate how privacy interests can be better understood and how security interests can be more meaningfully evaluated. I aim to refute the recurrent arguments that skew the privacy-security debate toward the security side. I endeavor to show how the law frequently fixes on the wrong questions, such as *whether* privacy should be protected rather than *how* it should be protected. Privacy often can be protected without undue cost to security. In instances when adequate compromises can't be achieved, the tradeoff can be made in a manner that is fair to both sides. We can reach a better balance between privacy and security. We must. There is too much at stake to fail.

A Short History of Privacy and Security

The law and policy addressing privacy and security is quite extensive, involving the U.S. Constitution, federal statutes, state constitutions, and state statutes. Quite a number of federal agencies are involved, such as the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), National Security Agency (NSA), Department of Homeland Security (DHS), Transportation Security Administration (TSA), and others. There are countless state and local police departments. In order to understand how privacy and security are balanced, I will first explain briefly how we got to where we are today.

Introduction

The Right to Privacy

People have cared about privacy since antiquity. The Code of Hammurabi protected the home against intrusion, as did ancient Roman law.¹ The early Hebrews had laws safeguarding against surveillance. And in England, the oft-declared principle that the home is one's "castle" dates to the late fifteenth century.² Eavesdropping was long protected against in the English common law, and in 1769, the legal scholar William Blackstone defined it as listening "under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales."³

The right to privacy emerged in countries all around the world in many different dimensions. Protections arose against invasions of privacy by nosy neighbors and gossipy newspapers, as well as against government searches and seizures. In England, for example, the idea that citizens should be free from certain kinds of intrusive government searches developed during the early 1500s.⁴

In America, at the time of the Revolutionary War, a central privacy issue was freedom from government intrusion. The Founders detested the use of general warrants to conduct sweeping searches of people's homes and to seize their papers and writings.⁵ As Patrick Henry declared: "They may, unless the general government be restrained by a bill of rights, or some similar restrictions, go into your cellars and rooms, and search, ransack, and measure, everything you eat, drink, and wear. They ought to be restrained within proper bounds."⁶

These sentiments were enshrined into the Bill of Rights. The Fourth Amendment to the U.S. Constitution prevents the government from conducting "unreasonable searches and seizures." Government officials must obtain judicial approval before conducting a search through a warrant that is supported by probable cause. The Fifth Amendment affords individuals a privilege against being compelled to incriminate themselves.

Introduction

The Rise of Police Systems and the FBI

Security is also a universal value, tracing back to antiquity. People have long looked to their governments to keep them secure from bandits, looters, and foreign invaders. They have also wanted to ensure social order by protecting against robberies, rapes, murders, and other crimes. But for a long time, many countries lacked police forces. In medieval England, for example, posses hunted down criminals and summarily executed them. Later on, patrolling amateurs protected communities, but they rarely investigated crimes.⁷

By the twentieth century, police forces had transformed into organized units of professionals.⁸ In the United States, policing developed locally at the city and state levels, not nationwide. The rise of the mafia and organized crime required law enforcement to find means to learn about what crimes these groups were planning. The government began to increase prosecution of certain consensual crimes, such as gambling, the use of alcohol during Prohibition, and the trafficking of drugs. Unlike robberies or assaults, which are often reported to the police, these crimes occurred through transactions in an underground market. Undercover agents and surveillance became key tools for detecting these crimes.

The FBI emerged in the early years of the twentieth century, the brainchild of Attorney General Charles Bonaparte. He twice asked Congress to authorize the creation of a detective force in the Department of Justice (DOJ), but he was rebuffed both times.⁹ Congress worried about secret police prying into the privacy of citizens. As one congressman declared, “In my reading of history I recall no instance where a government perished because of the absence of a secret-service force, but many there are that perished as a result of the spy system.”¹⁰

But Bonaparte was not deterred. He formed a new subdivision of the DOJ called the Bureau of Investigation, and brought in people from other agencies to staff it. In 1908 President Theodore Roosevelt issued an executive order authorizing the subdivision.

Introduction

Table 1 Growth of the FBI

Year	Agents	Support Staff
1933	353	422
1945	4,380	7,422
2008	12,705	17,871

J. Edgar Hoover soon took the helm of the Bureau, which was re-named the FBI in 1935.¹¹

Throughout the rest of the century, the FBI grew dramatically (see Table 1). During President Franklin Roosevelt’s tenure, the size of the FBI increased more than 1000 percent.¹² It has continued to grow, tripling in size over the past sixty years.¹³ Despite its vast size, extensive and expanding responsibilities, and profound technological capabilities, the FBI still lacks the congressional authorizing statute that most other federal agencies have.

The Growth of Electronic Surveillance

The FBI came into being as the debate over surveillance of communications entered a new era. Telephone wiretapping technology appeared soon after the invention of the telephone in 1876, making the privacy of phone communications a public concern. State legislatures responded by passing laws criminalizing wiretapping.

In 1928, in *Olmstead v. United States*, the U.S. Supreme Court held that the Fourth Amendment did not apply to wiretapping. “There was no searching,” the Supreme Court reasoned. “There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”¹⁴ Justice Louis Brandeis penned a powerful dissent, arguing that new technologies required rethinking old-fashioned notions of the Fourth Amendment: “Subtler and more far-reaching

Introduction

means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.” He also mentioned that the Founders of the Constitution “conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”¹⁵

In 1934, six years after *Olmstead*, Congress passed a law to prohibit wiretapping.¹⁶ But the law was largely ineffective, since it was interpreted only to preclude the introduction of wiretapping evidence in court.¹⁷ The government could wiretap freely so long as it did not seek to use the product as evidence at trial.

During World War II and the ensuing Cold War, presidents gave the FBI new authorization to engage in wiretapping.¹⁸ J. Edgar Hoover, still at the helm of the FBI, ordered wiretapping of hundreds of people, including dissidents, Supreme Court justices, professors, celebrities, writers, and others. Among Hoover’s files were dossiers on John Steinbeck, Ernest Hemingway, Charlie Chaplin, Marlon Brando, Muhammad Ali, Albert Einstein, and numerous presidents and members of Congress.¹⁹ When Justice William Douglas complained for years that the Supreme Court was being bugged and tapped, he seemed paranoid—but he was right.²⁰

Protecting National Security: New Agencies and More Surveillance

During the 1940s and 1950s, enormous threats to national security loomed on the horizon. Concerns about the spread of communism and the Cold War with the Soviet Union led to an increased need for the government to engage in spying and foreign intelligence

Introduction

gathering. In 1942 President Roosevelt created the Office of Strategic Services (OSS) to engage in these activities, but it was eliminated after World War II. Just a few years later, however, President Truman revived the OSS's activities by creating the modern CIA with the National Security Act of 1947.

In 1952 Truman created the National Security Agency (NSA) to handle cryptology—the breaking of encryption codes so that any foreign communications collected could be analyzed. For a long time, the NSA operated with a low profile, and the few in the know quipped that its acronym stood for “No Such Agency.”

Domestically, fears grew that communism was a threat not just from abroad but also from within. In the 1950s the FBI began the Counter Intelligence Program (COINTELPRO) to gather information about political groups viewed as national security threats. The FBI's tactics included secretly attempting to persuade employers to fire targeted individuals, anonymously informing spouses of affairs to break up marriages, and using the threat of Internal Revenue Service investigations to deter individuals from attending meetings and events.²¹ The primary target was the American Communist Party, but by the late 1950s and early 1960s, COINTELPRO had expanded its interests to include members of the civil rights movement and opponents of the Vietnam War.²² Included among these individuals was Martin Luther King, Jr., whom Hoover had under extensive surveillance. FBI recordings revealed that King was having extramarital affairs, and the FBI sent copies of the recordings to King and his wife, threatening that if King failed to commit suicide by a certain date, the recordings would be released publicly.²³

The Criminal Procedure Revolution

In the 1960s the U.S. Supreme Court, led by Chief Justice Earl Warren, radically transformed criminal procedure. Police sys-

Introduction

tems around the country had grown substantially, and the FBI and other federal law-enforcement agencies were increasingly active. There wasn't much law regulating how the government could go about collecting information about people.

To fill this void, the Supreme Court began boldly interpreting the Fourth and Fifth Amendments to regulate what law-enforcement officials could search and seize as well as how they could question suspects. In 1961, in *Mapp v. Ohio*, the Supreme Court held that evidence obtained in violation of the Fourth Amendment must be excluded from evidence in criminal trials.²⁴ In 1967 the Supreme Court overruled *Olmstead* in *United States v. Katz*, declaring that wiretapping was covered by the Fourth Amendment.²⁵ The Court articulated a broad test for the scope of Fourth Amendment protection—it would apply whenever the government violated a person's "reasonable expectation of privacy." In 1968, just a year after *Katz*, Congress enacted a law to better regulate electronic surveillance.²⁶ The law provided strict controls on government wiretapping and bugging.

Thus, through the efforts of the Supreme Court and Congress, legal regulation of government information gathering expanded significantly in the 1960s.

Regulating National Security Surveillance

An open question, however, existed for matters of national security. Were they to be treated differently from regular criminal investigations? In 1972 the U.S. Supreme Court addressed the question but didn't provide a definitive answer. It concluded that the Fourth Amendment applied to government surveillance for national security, though the rules to regulate it might differ from those involving ordinary crime.²⁷

J. Edgar Hoover died in 1972, while still head of the FBI. He had been its director for nearly fifty years. Many presidents and mem-

Introduction

bers of Congress had feared Hoover and declined to take him on, but a few years after his death, Congress finally decided to take a closer look at the FBI, an inquiry spurred by the Watergate scandal and President Nixon's abuses of surveillance. Watergate involved electronic surveillance—the Watergate Office Building was burglarized in order to bug the phone of the Democratic Party chairman. Some of the charges in Nixon's impending impeachment involved misuse of officials at the FBI, the Secret Service, and other agencies to conduct electronic surveillance for improper purposes.

After Nixon resigned, on August 9, 1974, Congress realized that it needed to examine more thoroughly the way various government agencies were engaging in surveillance. Congress formed a special eleven-member committee in 1975 to investigate surveillance abuses over the previous forty years.²⁸ Led by Senator Frank Church, the committee published fourteen volumes of reports and supporting documents. The Church Committee concluded that the government had engaged in numerous abuses of surveillance, often targeting people solely because of their political beliefs. Specifically, the committee declared: "Too many people have been spied upon by too many Government agencies and [too] much information has [been] collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power."²⁹ As the committee noted, every president from Franklin Roosevelt to Richard Nixon improperly used government surveillance to obtain information about critics and political opponents.³⁰

In part as a response to shocking findings of the Church Committee Report, Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978.³¹ The purpose of FISA was to erect a "secure framework by which the executive branch could conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual

Introduction

rights.”³² Additionally, the attorney general established a set of guidelines for FBI investigations in 1976.³³ Moreover, major reforms were instituted at the FBI to prevent the kinds of abuses that had occurred during Hoover’s reign as director. The FBI director was limited to a term of no longer than ten years.

Receding Fourth Amendment Protection and the Rise of the Information Age

In the 1970s and 1980s the Supreme Court issued several decisions narrowing the scope of Fourth Amendment protection. For example, the Court concluded that there was no reasonable expectation of privacy when the police obtained a list of the phone numbers a person dialed or gathered a person’s bank records or peered down on a person’s property from a helicopter or rummaged through a person’s trash left out for collection.³⁴

During the 1990s the rise of computers, the burgeoning use of the Internet and email, and the increasing use of digital records began to pose severe challenges for the federal wiretap statute, which had not been created with these new technologies in mind. In anticipation of the increasing use of computers, Congress updated its electronic surveillance law in 1986 with a statute called the Electronic Communications Privacy Act (ECPA).³⁵ This law aimed to provide protection of email, stored computer files, and communications records. Unfortunately, the law has not been dramatically restructured since its passage. Changes have been made here and there, but the ECPA remains largely the same. A quarter of a century after its passage, it has gone far out of date.

The War on Terrorism

Then came the terrorist attacks of September 11, 2001. We became aware of dangerous terrorist cells within our borders. In an

Introduction

extremely short time following the September 11 attacks, Congress passed the USA Patriot Act of 2001, which made a series of updates to ECPA and FISA, generally giving the government greater power to engage in surveillance.³⁶ To better facilitate information sharing among the various federal agencies, many agencies were merged into DHS.

Throughout this time, the government engaged in many clandestine information-gathering programs. The NSA began wire-tapping phone calls between U.S. citizens and people abroad. Various federal agencies collected records from airlines and other businesses for use in data mining.

Privacy, Security, and the Law

Throughout the past century, as we moved into the Information Age, the government has expanded its arsenal of techniques to protect security. Law enforcement in the past mostly involved searches of homes, people, and papers. Now the government uses technology to gather records and data, to engage in audio and visual surveillance, and to track movement. Much law-enforcement activity with implications for privacy involves “information gathering.” I’ll use this term broadly to encompass the wide variety of ways the government can find out what people are doing, thinking, or planning. In addition to gathering information, the government also stores it, uses it, analyzes it, combines it, and sometimes discloses it. All these activities can threaten privacy.

As the history I have sketched illustrates, the law has responded in many ways to the clash between privacy and security. Today the government has tremendous power and technological capabilities to enforce the law and promote security. The law establishes privacy protections to ensure that the government doesn’t abuse its power. The Fourth Amendment to the U.S. Constitution is the primary form of regulation of government information gathering.

Introduction

Under our system of law, the Constitution provides the minimum level of privacy protection. A state can't provide any less protection. Nor can a federal statute. Other amendments, such as the Fifth and (as I'll argue later) the First, protect some dimensions of privacy.

In addition to the Constitution, several federal laws regulate certain forms of government information gathering. ECPA regulates wiretapping, bugging, and searches of computers, among other things. FISA regulates foreign intelligence gathering on foreign agents on U.S. soil. Other statutes provide some regulation of government access to our records, such as cable or health records.

There are also state constitutional protections of privacy and state statutes. These can supply additional privacy protections, though they restrict only police departments within a particular state. They can't limit FBI agents or any other federal law-enforcement officials even when they're acting within the state. Federal agents are limited only by the U.S. Constitution and federal statutes. In this book, my focus will be almost entirely on the U.S. Constitution and federal law.

Does the law provide a good balance between privacy and security? I believe the answer is no. Lessons learned after previous surveillance abuses have been forgotten. Protections put into the law in response to these abuses have been removed. I'll explain how the law regulating privacy and security works, point out its failings, and suggest how it can be improved.

A Roadmap

In this book I shall explore four general issues, and I have organized it accordingly, devoting the four parts to (1) *values*—how we should assess and balance the values of privacy and security; (2) *times of crisis*—how the law should address matters of national security; (3) *constitutional rights*—how the Constitution should protect privacy; and (4) *new technologies*—how the law should cope with changing technology.

Introduction

Within each part are chapters exploring various subtopics. You can read chapters independently of one another.

Values

Part I involves the values of privacy and security. How should we assess and understand these values? Can they be reconciled? How should we balance them when they conflict? The chapters in this part are concerned with how we can better understand what privacy protection entails, how we can more thoughtfully evaluate the costs and benefits of security measures, and how we can balance privacy and security in a way that isn't skewed too much toward security. Privacy is often misunderstood and undervalued when balanced against security. It is possible to have potent security measures and to protect privacy too, since protecting privacy doesn't entail scrapping security measures but demands only that they be subjected to oversight and regulation.

In Chapter 2 I examine the “nothing-to-hide argument.” Those making this common argument contend that they have nothing to hide from the government. I demonstrate why this argument is faulty.

Chapter 3 tackles another argument, that in order to increase security, we must sacrifice privacy. I call this the “all-or-nothing fallacy” because it falsely assumes that privacy and security are mutually exclusive.

In Chapter 4 I explore the “deference argument”—that we should be careful about second-guessing the judgments of security officials because they have more expertise in dealing with national security than judges or legislators. Courts often defer to security officials, and I argue that this deference unduly skews the balance between privacy rights and security.

In Chapter 5 I argue that privacy isn't merely an individual

Introduction

right. The balancing between security and privacy is often conducted improperly because the security interest is characterized as beneficial for all society while the privacy interest is viewed as a particular individual's concern. I contend that privacy should be understood as a societal value.

Times of Crisis

In Part II I examine the law during periods of crisis. When we're facing a threat to national security, the government frequently curtails rights, circumvents laws, and demands greater discretion, more secrecy, and less oversight. The chapters in this part demonstrate that these special powers and exceptions to the rule of law are often unnecessary and wrongheaded.

In Chapter 6 I address the "pendulum argument"—that in times of crisis, we must sacrifice some liberties, which will be restored when the crisis is over. I contend that this argument has it exactly backward. In times of crisis, we should be at our staunchest in protecting liberty.

In Chapter 7 I critique the "national security argument"—that government information gathering about U.S. citizens in the name of national security should be subjected to less regulation and oversight than the investigation of ordinary crime. I argue that the distinction between matters of national security and regular crime is fuzzy and incoherent.

In Chapter 8 I discuss the importance of "crime-espionage distinction"—separating the rules regulating criminal investigation from the rules regulating espionage. After September 11, the distinction was significantly dissolved. I argue that the distinction must be kept intact.

In Chapter 9 I examine how law protecting privacy and other civil liberties is often violated in times of crisis. A prime example was

Introduction

the NSA surveillance program, under which the NSA contravened the law by engaging in warrantless wiretapping of phone calls. If we can't ensure that the law is followed, the rule of law becomes meaningless.

Constitutional Rights

Part III focuses on constitutional rights. What do our constitutional rights entail? How do they protect us? Frequently, people think that constitutional rights protect a lot more than they actually do. As I explain in this part, numerous government information-gathering activities are completely unregulated. If the Constitution is to provide for meaningful regulation and oversight of government data gathering in the Information Age, then the Supreme Court's interpretations of the Constitution need a radical overhaul.

In Chapter 10 I discuss the latest tools of government information gathering, many of which aren't restricted by the Fourth Amendment. The scope of Fourth Amendment regulation, which depends on whether the government violates privacy, is unduly constrained because the U.S. Supreme Court understands privacy as a form of total secrecy. I call this view of privacy the "secrecy paradigm," and I demonstrate that it is antiquated and flawed.

In Chapter 11 I analyze the "third party doctrine," which holds that whenever a person or business exposes information to another entity, no reasonable expectation of privacy remains, and thus no Fourth Amendment protection applies. In the Information Age, however, an unprecedented amount of personal data is in the hands of third parties, effectively removing Fourth Amendment protection from it.

In Chapter 12 I argue that Fourth Amendment law needs dramatic reform. In many cases, government activities are unregulated because the Supreme Court doesn't think "privacy" is involved. I propose that paradoxically, Fourth Amendment law would do a better job of protecting privacy by no longer focusing on privacy.

Introduction

In Chapter 13 I explain the “suspicionless-searches” argument, which contends that requiring law enforcements to establish suspicion before engaging in a search isn’t compatible with efforts to prevent terrorism. I show that abandoning the suspicion requirement—as embodied in warrants and probable cause—provides law-enforcement officials with too much power and discretion and too little oversight.

In Chapter 14 I examine whether the exclusionary rule—which makes evidence gathered in violation of the Fourth Amendment unusable at trial—is an appropriate remedy, especially when a heinous crime or terrorist act is involved. I discuss how the Fourth Amendment can be enforced without the exclusionary rule.

In Chapter 15 I argue that the First Amendment should protect you when the government seeks information about your speech, association, beliefs, or reading habits.

New Technologies

Part IV is concerned with the challenges that new technologies pose for the law. How should the law cope in a world of rapidly changing technology? In this part I examine the ways statutory law regulates government information gathering and the difficulty of keeping statutes up-to-date. The best way to protect privacy is never to lose sight of general principles. To avoid becoming outmoded when the technology evolves, laws should be built around general principles rather than specific technologies.

In Chapter 16 I focus on the Patriot Act, a law many argue should be repealed. But what if the Patriot Act were to simply disappear tomorrow? Contrary to the conventional wisdom, little would change.

In Chapter 17 I critique the “leave-it-to-the-legislature argument”—that legislatures are better than courts at making the rules when new technologies are involved. I argue that courts must

Introduction

remain actively involved in order to ensure that the law keeps up with new technology.

In Chapter 18 I examine government data mining—the use of databases of personal information to analyze for patterns to determine who is acting suspiciously. Currently, the Fourth Amendment does not do much to protect against data mining. I distinguish between when the government should be allowed to engage in data mining and when it shouldn't.

In Chapter 19 I argue that the law doesn't adequately regulate public video surveillance. In the United Kingdom millions of surveillance cameras watch everything people do. Such a system could readily be implemented in America—and it currently is being implemented in various cities. I explain how the law can provide better regulation.

In Chapter 20 I critique the “Luddite argument”—that opposition to new security technologies (such as biometric identification) stems from an aversion to new technology. I argue that concerns about these technologies are often legitimate. While many of the technologies offer great upsides, they can have catastrophic consequences if they fail.