

DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* (2017).

Cambridge University Press, 2016

ISBN: 978-1-107-58978-0

Price: \$24.99, pp. 314

Reviewed by John Montgomery

Journal of High Technology Law

Suffolk University Law School

---

### **The Fourth Amendment in an Age of Surveillance**

*The real threat to our constitutional utopia in an age of surveillance is not the evil overlord. It is the benevolent tyrant who asks us to trade liberty for security while offering us the easy comforts of familiar platitudes and unquestioning trust.<sup>1</sup>*

#### **Introduction**

Professor David Gray's *The Fourth Amendment in an Age of Surveillance* offers readers a comprehensive overview of Fourth Amendment jurisprudence with a focus on the threat to civil liberties from emerging surveillance technology. Gray argues that three major doctrines emerged after *Katz*, the public observation doctrine, the third-party doctrine, and the Fourth Amendment standing doctrine, that they all effectively weakened the Fourth Amendment liberties enshrined in the constitution, and that each doctrine obstructs the effort to rein in the government's use of new technology to invade the privacy of individuals.<sup>2</sup> After discussing competing proposals concerning regulation of surveillance technology, Gray makes the argument for a technology-centered approach, writing that

[R]ather than focusing on *what* information is gathered we should focus instead on *how* information is gathered. In our view, what is troubling about life in our age of surveillance is the prospect of living in a world where each of us and all of us are subject to the constant and real threat of broad and indiscriminate surveillance. . . . The principal sources of these threats lie in the prospect of

---

<sup>1</sup> David Gray, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE*, 298 (2017).

<sup>2</sup> *Katz v. United States*, 389 U.S. 347 (1967).

granting law enforcement and other government agents an unlimited license to deploy and use modern surveillance technologies. If this is the source of the threat, then it makes good sense to address the threat directly by limiting law enforcement's access to these technologies.<sup>3</sup>

Gray gives other approaches to regulating surveillance technology a fair hearing, weighing the positives and negatives of each proposal. He also details the problems posed by the three post-*Katz* doctrines, before offering readers a word-by-word, phrase-by-phrase history of search and seizure law in England and Colonial America. In just over 300 pages, Gray makes a valuable contribution to the ongoing discussion of how the Fourth Amendment protects individuals' privacy against the newest technology employed by government agents and investigators.

### **About the Author**

David Gray is a tenured Professor of Law at University of Maryland Francis King Carey School of Law, where he teaches criminal law, criminal procedure, evidence, international criminal law, and jurisprudence.<sup>4</sup> He was voted "Professor of the Year" in 2012.<sup>5</sup> Gray also wrote *The Cambridge Handbook of Surveillance Law* (2017), in addition to publishing journal articles in the *Harvard Law Review*, *Stanford Law Review*, *Vanderbilt Law Review*, and *Texas Law Review*, among others.<sup>6</sup> Previously, Gray practiced law at Williams and Connolly, LLP, and clerked for The Honorable Chester J. Straub, U.S. Court of Appeals for the Second Circuit.<sup>7</sup>

Gray holds multiple degrees, including a Juris Doctorate from New York University School of Law, a Doctorate in Philosophy from Northwestern University, where he focused on both the philosophy of law and social and political philosophy, a Master of Arts in Philosophy

---

<sup>3</sup> David Gray, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE*, 124 (2017).

<sup>4</sup> See *Biography*, David Gray archived at <https://perma.cc/RQW5-J255>.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

from Northwestern University, and a Bachelor of Arts in Anthropology and Philosophy from the University of Virginia.<sup>8</sup>

### **About *The Fourth Amendment in an Age of Surveillance***

*The Fourth Amendment in an Age of Surveillance* focuses on search and seizure law, including the history of it, recent applications of it, and proposals for adapting it to emerging technologies. In the introduction, Gray briefly detours into legal philosophy, writing cogently about parallels between the modern surveillance state and the architectural concept of the panopticon, originally proposed by Jeremy Bentham. Gray argues that privacy “is about power” and is “a necessary condition of personhood”, and that the absence of privacy “is associated with psychological degradation and authoritarian control.”<sup>9</sup> Gray asserts that a surveillance state is incompatible with self-government because it hinders the citizenry’s freedoms, undermines citizen-government trust, and damages the perceived legitimacy of the government.<sup>10</sup>

The remainder of the book is divided into six chapters. Chapter one discusses the emerging technologies and existing practices that government agents and investigators are using to search and seize information. The new technologies discussed include GPS technology, metadata, cell site location information, radio frequency identification, drones, and cell site simulators. Chapter two is a tour de force of Fourth Amendment history. Gray starts with the use of general warrants and writs of assistance in England and in the American Colonies, also discussing the seminal lawsuits brought by the colonists challenging the legality of these warrants. The chapter also includes a short section detailing why Fourth Amendment issues infrequently came before the courts in the first century of the republic, namely because the rights

---

<sup>8</sup> See *id.*

<sup>9</sup> See Gray, *supra* note 3, at 7-8.

<sup>10</sup> See Gray, *supra* note 3, at 11.

the Fourth Amendment guaranteed were already established in the common law, there were very few government agents and investigators whose work required standard review by the judiciary, and that the Fourth Amendment did not apply to state and local officials until the early twentieth century.<sup>11</sup> Gray describes how the Fourth Amendment became tethered to the idea of physical intrusion in *Boyd*<sup>12</sup> and *Olmstead*<sup>13</sup>, before moving to *Katz*<sup>14</sup> and the three aforementioned doctrines that emerged in the following years, describing the major cases associated with them.

Chapter three focuses on five categories of approaches and proposals offered to help regulate new technologies under the Fourth Amendment. The first category is market-based proposals, which means the individual citizen or organization protecting their information and data via encryption technology. The second category is amount-based proposals, which means trying to limit the amount of data collected, also referred to as the mosaic theory, wherein the government would be limited from collecting more than a specified amount of information. The third category is duration-based proposals, which partially overlaps with the second, focusing on the duration of surveillance. Gray points to opinions written by Justice Alito and Justice Sotomayor in *Jones*<sup>15</sup> where both justices indicate support for limiting the duration of surveillance. However, Gray also argues that if there is not a reasonable expectation of privacy for a short period of surveillance, it is difficult to argue that when only the duration of that surveillance changes that the individual's reasonable expectation of privacy can then go from nothing to something more than nothing (Gray also presents this mathematical notion as an argument against the mosaic proposals described above). The fourth category is content-based

---

<sup>11</sup> See Gray, *supra* note 3, at 71-72.

<sup>12</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>13</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>14</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>15</sup> *United States v. Jones*, 565 U.S. 400 (2012).

proposals, which focus on the nature or content of information that is collected. Gray discusses a variety of possibilities, but generally the level of protection would vary based on the content of the information, so that organizations such as a bank would be more protected when they are understood to hold personal, intimate, or private information given to them by the individual. The fifth category is technology-based proposals, which focus not on what information is collected but instead on how it is collected. Gray argues that this is the best way forward, keeping the courts from making value judgments about duration or content. Government agents and investigators would still be free to conduct extensive human surveillance as under current law, but using emerging technologies to surveil would invoke a higher level of scrutiny precisely because of how such technology removes the practical constraints of physical surveillance.

In chapter four, Gray elaborates on his argument for a technology-centered approach, making persuasive arguments for it and answering the anticipated counter-arguments. In this chapter, Gray also goes into a detailed history of the original text and meaning of the words and phrases used in the Fourth Amendment by the Founding Fathers. He examines the language used in a model document, the Pennsylvania Bill of Rights, and finds that the rights enshrined in the Fourth Amendment were arguably seen as collective rights by the Founders, as opposed to individual rights. Gray concludes that in the Fourth Amendment “these individual guarantees are derivative of the collective right rather than freestanding individual rights”.<sup>16</sup>

Chapters five and six focus on prior judicial and legislative fixes to Fourth Amendment problems, such as the warrant requirement, exclusionary rule, and Miranda rights. Gray describes how these previous fixes came into play and what effect they had on Fourth Amendment cases, as well as offering comparable fixes to current Fourth Amendment issues.

---

<sup>16</sup> See Gray, *supra* note 3, at 152.

## Analysis

*The Fourth Amendment in an Age of Surveillance* argues that a technology-centered approach to search and seizure law is necessary as government agents and investigators use the newest technology to collect data and information about individuals and organizations. Gray offers readers a concise, clear, and convincing argument for why such an approach is required, given the history of search and seizure law, the Fourth Amendment, and related Supreme Court decisions. Gray's book is educational in nature and appropriate for anyone studying the issue or just generally interested in it at a high school level or beyond. While the thorough footnotes and citations make the book useful for legal scholars and practitioners alike, Gray is careful not to get too deep into legal lingo, though he still writes knowledgeably and authoritatively.

Some critics might take issue with Gray's discussion of a collective right in the Fourth Amendment and the way he traces that collective right to historical documents, namely the Pennsylvania Bill of Rights. Gray takes an originalist approach in that section, literally defining each word and phrase, tracing them to when they appeared in other documents written by the Founding Fathers, discussing their meaning and intent. Some will agree with his conclusions, others will not. Beyond that, the book does not present faulty assumptions or unsupported positions, and the arguments are logically sound.

## Evaluation

Gray's book is an important contribution to the ever-growing library on Fourth Amendment jurisprudence because it comes at exactly the time when the judiciary considers how to apply the Fourth Amendment to emerging technologies. As seen in the recent *Carpenter*<sup>17</sup>

---

<sup>17</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

decision, the Supreme Court is willing to revisit Fourth Amendment precedent given the new technology available to government agents and investigators.

Gray's goal with the book is to argue both that there is a need for rethinking the Fourth Amendment and that a technology-centered approach is the correct approach. He successfully accomplishes both goals in the book, making persuasive, convincing arguments on both counts. The depth of research, especially into historical documents, words, and phrases, is especially remarkable. Gray presents readers with all the information they need to draw their own conclusions, before offering his own. Gray's writing, specifically the tone and structure, is at a high level, yet he avoids the typical academic pitfall of a boring, neutral style.

## **Conclusion**

In summary, I enjoyed the book as someone who is interested in Fourth Amendment jurisprudence and legal philosophy. Gray wrote the book for a wider audience though, and it would be enjoyed by people interested in law, privacy, technology, or philosophy. The book is very informative and is easily digested, whether the reader is learning about Fourth Amendment history for the first time or just refreshing their recollections of previous books or classes. Gray makes a convincing argument that the Fourth Amendment needs to be adapted to emerging technologies with a technology-centered approach that allows government agents and investigators to continue using older tools as they are accustomed while also restricting their use of new technologies that permit unprecedented depth and breadth of information to be gathered in mere moments. Students, professors, and legal practitioners should all read *The Fourth Amendment in an Age of Surveillance* as the field collectively prepares to answer the challenging questions of government surveillance and modern technology.