Virtual Searches: Regulating the Covert World of Technological Policing

By Christopher Slobogin
Director, Criminal Justice Program
Vanderbilt University Law School
Nashville, U.S.A.
New York: New York University Press, 2022

Reviewed by Luke Chambers
Associate Lecturer in Law
Northumbria University
U.K.

Virtual Searches is a timely and well-written addition to the widespread debate on how surveillance technologies should be regulated and by whom. It explores police investigatory techniques carried out technologically rather than via physical intrusion, as well as how the Fourth Amendment and the regulatory landscape is dealing with many of these new police abilities. Potentially most interesting about Slobogin's book is that it takes a different stance from some elements of the present thought surrounding topics such as predictive policing. It resists the typically prevailing abolitionist perspectives and instead putting forward, with evidence from case law and notable use case examples, the idea that there is a non-zero-sum game in which both government and the public can regulate these new technologies to gain their benefits with mitigations in place against potential drawbacks. The book concludes with a list of concrete suggestions for regulation of novel policing technologies in a way designed to harness their anti-crime power whilst protecting against many of the negative social and ethical repercussions surveillance brings with it. How effective these would be is likely to be the subject of fruitful future discussion in this area. In all, Virtual Searches is a great addition to ongoing police technology debates, likely to be of use to legal scholars from both the U.S. and abroad due to the universality of its themes and the clear way that U.S. legal concepts are explained and explored throughout.

I   Review

Virtual Searches provides a deep and thorough exploration of how the Fourth Amendment of the U.S. Constitution and its prohibition of unreasonable searches and seizures impacts, presently and in the future, many of the new technologies in the surveillance world which are arising thanks to both technological and social changes in wider society. The book covers many of the same themes as Slobogin's 2007 book *Privacy at Risk* but is updated for the modern nascent technologies which are arising in everyday law enforcement such as facial recognition, geofencing, and big data. In addition, significant Supreme Court decisions since 2007 have been highlighted along with their impact on the surveillance landscape since his last book, as well as how social changes and interpretations of the law have shaped regulation of these technologies.

Despite being focused on the Fourth Amendment of the U.S. Constitution and dealing primarily with U.S.-centric topics, many of the themes translate well to international examples across North America, Europe, and further afield as many of the challenges explored in the book are also being grappled by other legal systems globally. The themes are presented in a way in which non-U.S. legal scholars will find the book easy to read and understand, despite not specialising in U.S. law, due to the author's obviously great effort to explore potentially complicated U.S. legal concepts in a clear, easily translatable, and well explained way to an interdisciplinary and multinational audience. Though an understanding of U.S. Constitutional law is obviously beneficial, it is by no means required to understand the arguments made in the book.

II   Structure

Slobogin's book is structured around 3 chapters of foundation-building exploration of the Fourth Amendment and privacy, exploring case law and some historical grapples with new technologies, as well as a chapter on proportionality analysis. This sets the background for many of the arguments made later.

It begins with an overview of the legislative struggle surrounding virtual searches in the modern age and spends time covering the constitutional constraints on searches and seizures, along with why modern technologies provide challenges in both defining what is or is not a search or seizure in the digital age and how case law has dealt with these questions in the past.

The third of these chapters, Proportionality Analysis, then explores how elements such as reasonable suspicion and probable cause have been treated historically and the challenges posed by new technologies.

The book then follows a chapter-per-search structure in which the core themes are divided into the type of search, such as *Suspect-Driven*, *Profile-Driven*, *Event-Driven*, *Program-Driven*, and *Volunteer-Driven* virtual searches.

Suspect-Driven Virtual Searches, such as those covered in Slobogin's earlier work, focus on the use of technology to digitally search or seize in relation to an already identified suspect.

New to the exploration in this book are *Profile-Driven* searches (algorithms detecting yet undiscovered crime or suspects), *Event-Driven* searches (matching crime scene data or other information to particular individuals), *Program-Driven* searches (surveillance and data infrastructure which supports searches) and finally the rapidly growing area of *Volunteer-Driven* searches (private parties undertaking searches on behalf of government in a way that may class them as government searches).

The book concludes with a chapter giving concrete suggestions for regulators including government, private entities, and the public on how the themes from the book could be implemented to regulate many of these technologies. It also addresses directly some of the criticisms the author has faced for these ideas in the past, offering arguments to mitigate against many of the criticisms offered from traditionally abolitionist stances.

III   Main Themes

Though much of the book is dedicated to exploring the legal difficulties surrounding applying the Fourth Amendment to various new types of searches or seizures, one of the primary underlying themes is that the decisions of how this regulation occurs should not be left to the judiciary but should be reached via a democratic, somewhat public-led process. Though this isn't strictly a break from tradition due to algorithmic transparency standards[1] and similar being trialled in other countries, the focus on a non-judiciary solution as a main benefit instead of a mere mechanism is relatively novel here.

Slobogin argues that though the judiciary is useful for putting into place 'guardrails' via constitutional and administrative law, it is ultimately the legislative branches along with community-led grassroots input from the public which are the best entities for contextually deciding which technologies should be regulated and how. This is not a new argument, but the book puts forward detailed frameworks surrounding how such a concept would function in practice, which is more in depth than similar works.

The book bases this on the idea that whether a community or area wants to be regulated, and to what extent, can be decided contextually by utilising the aforementioned 'Proportionality Principle' along with inspiration from search and seizure case law (in particular *Terry*,[2] *Jones*,[3] and *Carpenter*[4]) to ensure that the government must justify any attempt to monitor its citizens in line with the degree of intrusion. Slobogin states his belief that the job of policing accountability is in many ways the job of the public and not the courts, and that this can be achieved via transparent reporting of policing capabilities amongst other methods.

Slobogin states in his book that the government's enhanced surveillance abilities with modern technology should not automatically be considered a bad thing, particularly when the impacts on privacy and autonomy are minimised. He argues that the rights of citizens to be secure from their government and the government's duty to keep its citizens safe can conceivably be reconciled in this manner by balancing the potential good with the degree of intrusion instead of relying on a blanket probable cause for any and all digital searches or seizures.

Interestingly, the author diverges from the opinions of many similar scholars in not outright writing off predictive policing but suggesting that such efforts should have to justify both its use and any searches or seizures that result via police observation corroborating results. He also suggests that algorithms should not consider certain factors (such as minor crime) in this manner

---

[1] *Algorithmic Transparency Recording Standard Hub* (January 2023), online: <https://www.gov.uk/government/collections/algorithmic-transparency-recording-standard-hub#:~:text=The%20Algorithmic%20Transparency%20Recording%20Standard,how%20algorithmic%20tools%20support%20decisions>.

[2] *Terry v Ohio*, 392 US 1 (1968).

[3] *United States v Jones*, 565 US 400 (2012).

[4] *Carpenter v United States*, 138 S Ct 2206 (2018).

to avoid racialized policing - yet how effective this would be given past failures[5] in attempting to remove biased data classes is not explored in much depth and is open to challenge.

Despite this dissenting opinion, much of Slobogin's work is in line with prevailing thought including his view that police uses of technology should be governed by rational policies informed by community participation and an acceptable level of transparency.

The book's exploration of hybrid regulation, where a combination of criminal and civil remedies to police overreach along with accountability mechanisms is the most effective way to regulate new technologies given its success in Title III's protective rules, is another area the author appears to agree with other scholars in this area.

One of the major differences between this book and many others on the topic, and one which may split opinion, is that the book generally does not deeply discuss or critically explore either accuracy/efficacy or underlying social issues such as racial bias except in the later stages of the book where it is particularly salient to the discussion. This appears to be a purposeful decision by the author wherein he chooses to focus specifically on the administrative and functional issues posed by the technologies instead of getting bogged down in philosophical and ethical explorations of wider social problems, but the argument could be made that discussing these topics without this added social justice context paints only half of a picture.

However, this choice to focus largely on the constitutional and administrative issues of the technologies does help to keep the book both clear and to a reasonable page count. In this vein, *Virtual Searches* is very specific in its scope and those unfamiliar with these technologies would likely need to pick up additional books covering these issues in order to fully appreciate the reasoning behind some of Slobogin's arguments. This in no way detracts from the overall aim of the book and its exploration of the topic, but means it is not an 'all you need to know' like some lesser specialised books on these technologies and their regulatory challenges.

This focus on specific issues does the book justice in the end, due to how detailed and married to administrative reality many of its ideas are compared to many other contemporary books which take a more philosophical ethics-focused and privacy-centric approach to exploring many of the given themes. Its difference in approach compared to other, similar, texts such as essay anthologies like *Algorithmic Regulation*[6] or novel technology focused criminal law framework books such as Quattrocolo's *Artificial Intelligence, Computational Modelling and Criminal Proceedings*[7] works well to set it apart in both its ideas and how they are presented. There are a large number of specific use cases on regulation across a number of U.S. cities, with detail on the debates and the reasoning behind decisions - as well as what this means for the wider surveillance landscape.

---

[5] Obermeyer, Ziad et al. "Dissecting racial bias in an algorithm used to manage the health of populations" (2019) 366:6464 Science 447.

[6] Yeung, Karen & Martin Lodge, eds. *Algorithmic Regulation* (Oxford: Oxford University Press, 2019).

[7] Quattrocolo, Serena. *Artificial Intelligence, Computational Modelling and Criminal Proceedings: A Framework for A European Legal Discussion* (New York: Springer, 2020).

The only potential improvement to the book which stood out was that future editions may want to explore how the technology works in greater detail and link these to why they pose the challenges to regulation that they do. Techno-social concepts seemingly core to the discussion such as algorithmic bias and real-world efficacy are alluded to but not explained in functional detail to the reader.

IV   Concluding Thoughts

Christopher Slobogin's *Virtual Searches* explores well how the U.S. Constitution's Fourth Amendment grapples with new technologies, including how interpretations and impacts have changed since his last book, and writes in a way accessible to scholars both in the U.S. and internationally. The book would be useful to both policing and privacy scholars interested in how modern technologies and their challenges to fair and well-regulated law enforcement could be managed by government, law, and society. The specific use case examples and recommendations do much to lay out a potential framework for future regulation of technologies which are governed by the Fourth Amendment and similar laws. The author's opinions on the potential merits of controversial areas of technology and crime such as predictive policing when restrained correctly are also a fresh perspective on this area which is sure to generate further discussion from both legal scholars and ethics scholars alike.