8. The Fourth Amendment (Internet)

- Administrative
  - Next Time: 380-412; 416-428
    - Small change from syllabus (skipping section on the "computer trespasser exception".)
    - Chapter 6 Available in the Fac Assts Office
  - News
    - NFL Dirty Bomb suspect tracked through internet web posting.
    - 125 arrested in CP web site case.
      - Probably seized the server and checked the logs.
- Last Time
  - The container question
    - What is the "container" over which you have an REP with your computer?
      - Comes up under scope of private search cases.
      - Comes up under scope of consent cases.
      - Comes up under third-party consent cases.
  - Consent
    - Withdrawn consent
      - Note 3: withdrawn after bitstream copy already made.
        - Desmonne: Who cares? Still the same evidence. Consent attaches to the information, in either original or copied form, and not to the physical computer.
      - Alternative Hypo: withdrawn while bit-stream copy still being
    - Third-Party Consent
      - Basic Rule: Matlock: Joint access or control for most purposes --> assumption of risk.
      - Metaphors?
      - Georgia v. Randolph
      - Password protection / user profiles?
        - Trulock
        - What if one party is "computer expert" and other is just casual web
  - Plain View
    - Gray and Carey
      - Carey (internal case) (10th Cir. 1999)
        - Warrant to search for drug evidence.
        - Accidently stumbled on one image of CP.
        - "Abandoned search for drug evidence" and spent hours looking for images of CP.
        - Didn't get a second warrant.
        - Held: Suppressed
      - Gray (E.D. Va. 1999)
        - Warrant to search computers for evidence of hacking.
        - Court goes to great lengths to talk about "ordinary way" in which CART agents do searches like this:
        - Here: found directories called "Teen" and then "Tiny Teen"
        - The co-mingling problem
      - Plain View
        - 1. officer is lawfully in a place from which the object may be plainly viewed.
          - For computers: usually means "you are searching with a warrant.
          - 2. Officer has lawful right of access to the object.
          - 3. Incriminating character is immediately apparent.
        - Orin's (radical) recommendation for this kind of search
- Fourth Amendment Online
  - Kerr tends to conflate two separate, different questions.
    - 1. Does this person have an REP in this communication at this point in space/time?
    - 2. Does a third party share (at least) dominion and control over the item such that they could consensually give the material to the police?
    - Scenario to highlight the difference
      - Scenario 1: Police get a warrant to seize and search a server suspected of having evidence of a crime. Do the individual users have separate fourth amendment rights, such that the police need to establish separate PC/ warrant (or an exception) for each one?
        - Horowitz (333)
          - Stole pricing info from Pratt and uploaded it to EMI/competitor.
          - Held: No REP
        - Butler (338)
          - Crime committed in student computer lab. Computers searched with consent of University / without a warrant.
          - Held: No REP
        - Gines-Perez (339)
          - Group portrait on computer store's website used to obtain photo of suspect in heroin smuggling.
          - Held: No REP
        - Guest v. Leis (358)
          - Two servers of BBSes seized when obscenity and CP reported to be found on them.
          - Users can't challenge standing b/c disclaimer.
        - Not such a common occurrence, and usually only when the BBS / site itself is implicated in the crime
      - Scenario 2: Police suspect that one user's communications hold evidence of a crime, so instead of getting a warrant or asking the user for permission, they ask the provider instead. The provider consents to the request.
        - Miller (subpoena for bank records)
        - Smith v. Maryland
          - Non-content dialing records.
        - Happens daily.
        - Hypo in Note 2 (336-37) is a little better
      - Do the results from the first set inform the answer to the Constitutional question presented in the second?
  - Important Themes / Fact Patterns
    - Technology Overview
      - Routing
      - IP Addresses
      - Packets
      - Headers
      - Sniffers
      - E-mail
    - Prospective vs. Retrospective Surveillance?
    - Human Appreciation / Automation changes
    - The Internet
      - Less expectation of privacy for basic subscriber information?
      - Difference between content and non-content?
        - Orin's dichotomy on 364.
        - Todd: Makes perfect sense to make this distinction.
      - Banners eliminate your Expectation of Privacy?
      - Do you have an REP in the content of your e-mail messages?
      - Todd: FBI Director (and AG) have recently called for ISPs to retain more information.
      - Additional Hypotheticals
    - Can Encryption create (by itself) an REP?
  - Most important Cases
  - Metaphors / Analogies