

Mitchell's Musings 1-30-12: Matters of Degree

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Let's start with the admission that I am not a lawyer, let alone a constitutional scholar. So I can't really evaluate the U.S. Supreme Court's recent unanimous decision which voided the conviction of someone apparently dealing drugs that was obtained based on GPS evidence. All I can say is that the justices seemed upset with the idea of the police attaching a device to a private car which allowed tracking of the car's movements and eventual finding of incriminating evidence. Trust me; I will ultimately relate that decision to an employment concern.

It appears (to me) that the degree of efficiency in the technology utilized played an important role in the GPS decision although part of the discomfort of the court seemed related to the intrusion on the vehicle needed to attach the device. It also appears (to me) that if the police had done old fashioned following of the vehicle around with another car - and eventually found incriminating evidence as a result - that approach to obtaining evidence would have been OK with the Court.

If that interpretation is correct, there seems – to this non-lawyer at least – to be only a matter of degree between high-tech surveillance - which produced massive amounts of data according to the Court decision – and old fashioned tailing. But obviously the former was much more efficient and much less costly and labor intensive, than the latter. If privacy violations are cheap, they are more likely to occur than if they are expensive.

There are analogies in other controversies in the news involving evolving technology. The recent brouhaha surrounding the congressional political battle between Hollywood and Internet providers over measures to prevent piracy of films and such has similarities to the GPS decision. If you saw the film, *The King's Speech*, you may recall the scene – taking place in the 1930s – in which the speech therapist, using a new home phonograph record device said to be from America – records the King.



So it technically was possible in the 1930s, with what must have been an expensive device, to copy phonograph records – possibly violating copyright. After World War II, less expensive home tape

recorders and wire recorders became available. It was becoming easier to copy, say, radio broadcasts of the top-ten tunes, again possibly violating copyright. But record companies didn't panic since the means of copying and distributing was cumbersome involving reels of tape or spools of wire.



More concern concerning copyrights and intellectual property arose when home video cassette recorders came along and movies might therefore be copied from TV broadcasts. The Betamax case ultimately went to the U.S. Supreme Court on that issue. But home cassette recorders were allowed in the Court's 1984 decision. That controversy occurred before there was an effective Internet which would allow relatively easy distribution of copied movies by digital means.



In short, courts and legislators are now continually faced with changes in technology which make past transgressions that were once inherently limited much easier. Exactly where you draw the line between what is and what isn't going to be allowed is a matter of degree and discretion. And a decision at one point in time may be made obsolete as technology advances. There really is no absolute, timeless rule.

That observation brings me to issues of privacy and technology – and employment. A number of newspapers and other organizations have obtained court judgments saying that public payrolls and public pension rolls are public documents – and presumably always were. Therefore, it is OK to post them wholesale on the web *with the names of the employee or retiree included*.

Now it may well have been the case in a simpler age that one could have gone to a public office and obtained information on payments to employee X or retiree Y, using state and local equivalents of the federal Freedom of Information Act. But copying down the entire payroll of an agency would not have

been a simple matter. And wholesale and easy distributing the information, if one had the patience to copy it, would also have been difficult and costly. But currently such wholesale copying and distribution has become easy, thanks to computer technology and the Internet. With that technological advance, the process today raises issues of privacy and potential identity theft.

Most private employers would not think that publishing their payrolls wholesale, disclosing pay named employee by named employee, was a good idea as a human resource practice. We know that no private employers do it. And among the employers who do not choose to do it are the very newspapers making available public employer databases. Surely, their readers might like to find out what they (the newspapers) pay their editors, columnists, reporters, and – who knows – even their floor sweepers. But the fact that readers might be interested and that the newspapers already have the data on their own payrolls has not impelled any newspapers I know of even to contemplate such publication.

When pushed, the newspaper response is that the public has a right to know where its tax money goes.¹ But actually there are lines drawn. So far there have been no court decisions – again that I know of – that make wholesale health records of public employees available by name, even though taxpayers fund public health insurance benefits for employees. Internal personnel files with performance appraisals are not routinely made public on a wholesale basis. But couldn't it be argued that the public has a right to know about health expenses and performance reviews? So, in fact, as in the GPS case, it is a matter of degree and balance. Not everything funded by taxpayers is in fact a public document.

There are ways of balancing publication of public payroll data against privacy and identity theft concerns. Pay rates by occupation can be made available – but without names – so that outsiders can judge whether public pay rates are being set correctly. The California state controller, for example, has published municipal pay rates without names. One can learn, for example, that one “police evidence clerk” in the City of Santa Monica in base salary and overtime earned \$60,228 while the other earned \$59,923.² But no names are provided. If you are worried about whether Santa Monica overpays or underpays its police evidence clerks, now you have the data to decide.

The general exception about naming names in the private sector, at least for publically-traded firms, is that top executive pay is made public (with the names known). That practice might also be followed in the public sector. And it typically is - and has been. What the President of the United States is paid has not been top secret. And note that presidents, governors, mayors, or Supreme Court justices are public figures. Police evidence clerks are not.

¹ I rather doubt that the fact that subsidized mailing rates would be viewed by newspaper publishers as grounds to force them to make their payrolls public, even though one might argue that public money is involved in the subsidy. Newspapers also receive other public benefits including antitrust exemptions in some circumstances and, of course, First Amendment protections.

² Figures are for 2010. The full database is at <http://lgcr.sco.ca.gov/>.

Undoubtedly, the GPS decision by the Supreme Court will be revisited in the future as technology changes. What if it becomes possible to track a car without actually attaching a device? Cars of the future may have devices built in that transmit information for internal operating reasons. What if the police pick up those signals and use them for tracking?

Bottom line: The public employee payroll issue also needs renewed court and legislative attention. Many more people are affected. That is, many more people work in the public sector than there are drug dealers who police might want to tail. It is clear that those newspapers that are publishing payrolls by name are set on doing so. Sometimes they simply say it is legal – which it apparently is at present. But they don't routinely publish, say, the home addresses of crime victims or the names of rape victims even though these can be obtained in public police records. So they cannot really take the position that they simply publish everything that is legal without making any judgments about what is appropriate. Since their good judgment on crime victims is evidently not going to be applied to public payroll records, only if courts and legislators say it is not legal would wholesale public payroll publishing by name come to an end.