

Archivists as Amici Curiae: Activating Critical Archival Theory to Confront Racialized Surveillance

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ABSTRACT: Archivists are uniquely situated to problematize the use and misuse of records in a legal context. But along with the *ability* to think critically about how records are discussed and employed, archivists have a *responsibility* to act when records are being used as tools of oppression. This paper serves a dual purpose. First, it contributes to the field of Critical Archival Studies with original analysis and theory around records in legal discourse. It rethinks the 2018 US Supreme Court case *Carpenter v. United States* through critical examination of four archival frameworks: co-creation and third-party doctrine; the use of documents to control the movements of certain bodies; privacy in record-keeping; and the assumed neutrality of information infrastructure. Second, it moves beyond specific analysis of the particular case, which has already been decided, to provide other archivists with a conceptual and practical roadmap to problematize the status quo usage of records in a legal context. Archivists' increasingly nuanced conceptions of records and documentation are not cited as technical background or evidence in Supreme Court cases. Active introduction and application of these new theories to the legal field would disrupt broader societal conceptions of records in daily life, expose racism in legal invocations of records and record-keeping, and ultimately serve an emancipatory function. The paper ends with an appeal to archivists to intervene in the dominant narrative around records in legal discourse.

Keywords: Surveillance, Racism, Fourth Amendment, Co-creation, Migration, Policing



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In 2017, Caswell, Punzalan, and Sangwand named Critical Archival Studies (CAS), which they defined broadly as an approach of exploring and explaining the injustice of current archival practice and research and offering practical steps toward change. The ultimate goal of this field is emancipation, a transformational framework and reality for both the archival field and society more broadly (Caswell, Punzalan, and Sangwand 2017, 2–3). CAS is a call to action to examine power in record creation, keeping, and outreach. By breaking down what is taken for granted in this field, archivists might build a new archival practice that is liberating rather than oppressive.

Naming CAS was a crucial step in identifying a lineage of extant and forthcoming scholarship that interrogates, rethinks, and reframes archival concepts in critical ways; the act of naming was a formal recognition of scholarship that interrogated dominant archival concepts prior to 2017 and a call to action for archivists to continue doing this work. Though first named to promote CAS as an intervention in the humanities, challenging the subordinated position of archival studies within that field and the subordinating implications of fundamental assumptions about the scope and nature of records, CAS has been used as a framework through which to advocate for forcibly displaced populations; orphaned children; victims and survivors of racialized police violence; and others who have been traditionally pushed to the margins of archival theory, practice, and advocacy (Caswell, Punzalan, and Sangwand 2017, 4–5).

Archivists are uniquely situated to problematize the use and misuse of records in a legal context. But along with the *ability* to think critically about how records are discussed and employed, archivists have a *responsibility* to act when records are being used as tools of oppression. In this paper, I show that we have archival concepts to problematize the use of records in legal cases and that we have the power to apply and introduce these concepts through amicus briefs¹ and other methods. But we are not using these tools, which has material effects on the lives of people within and affected by the US legal system.

This paper serves a dual purpose. First, it contributes to the field of CAS with original analysis and theory around records in legal discourse. It rethinks the US Supreme Court case *Carpenter v. United States* through critical examination of four archival frameworks: co-creation and third-party doctrine; the use of documents to control the movements of certain bodies; privacy in record-keeping; and the assumed neutrality of information infrastructure.

1 Legal documents that come from non-litigant private individuals, state governments, nonprofits, tech companies, and other interested parties to advise courts on relevant, additional information about a case.

Second, it moves beyond specific analysis of the particular case (which has already been decided) to provide other archivists with a conceptual and practical roadmap to problematize the status quo usage of records in a legal context. Archivists' increasingly nuanced conceptions of records and documentation are not cited as technical background or evidence in Supreme Court cases. Active introduction and application of these new theories to the legal field would disrupt broader societal conceptions of records in daily life, expose racism in legal invocations of records and record-keeping, and ultimately serve a material emancipatory function.

Analyzing the body of work created around the case through amicus briefs and Justices' opinions, I use *Carpenter v. United States* as a salient example of how to critically activate archival theories to think about the kinds of records examined and discourses employed in US legal contexts. First, I outline the records context of this case, and trace the lineage of racialized surveillance and property-based arguments which ground this case uniquely and squarely in a colonial American culture. Next, I read this case through the lens of CAS and offer challenges to dominant theoretical formations of the archival profession that reiterate the practices which underlie this case and others in its lineage. I conclude with a discussion of how these theories can and must inform broader societal conceptions of records and record-keeping to create a more just future, and I call on archivists to reflexively examine our practices, theories, and advocacy to confront the powerful racism of the status quo.

Carpenter v. United States

In April of 2011, four men were arrested in connection with numerous armed robberies of smartphones² at RadioShack and T-Mobile stores in Ohio and Michigan. One of those men turned his phone over to the police. Looking through his call records, the police identified sixteen additional suspects, including Timothy Carpenter. The officers then requested that cell service providers make available the suspects' cell-site location information (CSLI), data that is generated whenever a smartphone connects to the closest cell tower. From looking at 127 days of Carpenter's CSLI, the police determined that Carpenter's phone was in the vicinity of four of the robberies, and by extension and inference, that Carpenter was also present. Carpenter was sentenced to 116 years in federal prison for the robberies.

2 "Smartphone" in this paper will be used to refer to mobile phones which have computing capability and connectivity to cellular data networks. "Smartphone" is used intentionally rather than the broader term "cellphone," as a smartphone has abilities and purposes beyond calling and sending text messages

In mid-2017, the case went to the Supreme Court of the United States, with the question of “Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment”³ (Legal Information Institute 2017). Carpenter’s lawyers argued that the warrantless search and seizure of his smartphone records constituted a Fourth Amendment violation, while the Government contended that no warrant was needed because information about smartphone users’ locations and movements are not private. Oral arguments were heard in November 2017, and a decision was handed down in June 2018 in Carpenter’s favor.

The creation, movement, storage, and analysis of CSLI are presented in the case by the Respondent and the Respondent’s supporters as neutral, objective processes that are completely out of the hands of smartphone users. CSLI is packaged as public, non-content metadata which is produced when private information moves through communications infrastructure. However, framing the argument in this way also implies that the infrastructure of information networks is unbiased and equitable. In reality, the use of metadata can have material implications on people’s lives. Ruling in favor of the Government and allowing CSLI to be legally considered non-content metadata and thus not protected by the Fourth Amendment would have sanctioned and reiterated practices of surveillance of those who statistically disproportionately rely on cellular data: young people of color with low incomes and low levels of educational attainment.

The monitoring of CSLI, and the political and societal schema which allow that monitoring, are part of a lineage of racialized surveillance of the movements of Black bodies. Further, the limited conceptual discussion around records and record-keeping and the limited range of voices present in the court records reflect archival professionals’ failure to imagine and advocate for new records and record-keeping frameworks that account for anti-racist views of creatorship, ownership, and use of records.

A Racialized Lineage

After hearing *Carpenter v. United States*, Justice Roberts’s majority opinion urges the government to be ahead of new technologies and their use in surveillance practices. Even

3 The Fourth Amendment of the US Constitution is “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

while supporting Carpenter, what Justice Roberts misses is that in order to truly understand what brought the case to the Supreme Court, we must look not to future, but to the past.

In *Dark Matters: On the Surveillance of Blackness*, Simone Browne traces the lineage of racialized surveillance from slave ships and slave passes, runaway laws, and other forms of codifying spatial allowances for enslaved people to modern surveillance practices. In doing so, she disrupts the narrowness of and the privileging of whiteness in the field of surveillance studies (Browne 2015, 11). For decades, African-American communities and leaders have been targeted in surveillance programs by local and federal law enforcement agencies, and new technologies have only heightened the ubiquity of surveillance (Kayyali 2014; Kift 2016).

Surveillance is not a single action, but a cultural practice which is embedded in, the product of, and the producer of social norms (Monahan 2011, 495). As a cultural practice predicated on social sorting, it amplifies social inequalities (Monahan 2011, 498). It is, as John Fiske (1998, 71) says, “a perfect technology for non-racist racism,” which Fiske defines as racism encoded into race-neutral or even anti-racist discourses which have racially differentiated effects. Surveillance is so effective as a technique because it is tucked within a discourse of protective beneficence which obscures its repressive effects.

Surveillance is neither equalizing nor equally applied, nor are its effects equally challenged by anti-surveillance advocates. Though it is racialized, the very process of surveillance being an exertion of power (Fiske 1998, 85–86), race is subordinated in a surveillance discourse dominated by a white mainstream, which remains relatively untouched by surveillance’s deep societal penetration (Beutin 2017, 7). Numerous leading tech companies, including Google, Apple, Nest, and Airbnb, filed a joint, neutral amicus brief in *Carpenter v. United States*. All of these companies are rolling out so-called smart home technology—networked electronics within a home that can turn on lights, lower blinds, and restock a refrigerator. Their limited argument is that data privacy is imperative because people will be more comfortable with pervasive, individualized, in-home technologies like smart thermometers and automatic pet feeders if they do not feel they are being watched. In the end, they are only advocating for protections for a privileged, segmented class of users.

Though internet access is essential to contemporary life and smartphone ownership is distributed roughly equally, the way people access the internet is not equal across demographics. People living in poverty and people without stable living or employment

situations are more likely to access the internet through smartphones, without an in-home or workplace wired broadband connection (Hofmann, Albert, and Selbst 2017, 34). The percentage of American adults who own smartphones with cellular data but do not use broadband at home is highly segmented by age (17 percent of adults eighteen to twenty-nine versus 7 percent of adults over sixty-five), race (9 percent, 15 percent, and 23 percent for White, Black, and Hispanic adults, respectively), income (21 percent of those earning less than \$30,000 versus just 5 percent for those earning over \$75,000), and education (27 percent of adults with less than a high school degree versus just 5 percent of college graduates) (Pew Research Center 2017). These disparities show up in real-world uses of smartphones. For example, 38 percent of African-American job-seekers searched for employment primarily using their smartphones, compared with 24 percent of white job-seekers (Hofmann, Albert, and Selbst 2017, 35). Despite these statistics, data privacy discussions at the highest levels do not express concern for these communities with intersectional marginalized identities.

The infrastructure of communication is not neutral, nor are the records produced through its use. Any surveillance practice relying primarily on CSLI, therefore, has “disparate effects on different populations” (Hofmann, Albert, and Selbst 2017, 35) and is a textbook case of Fiske’s non-racist racism. Lest we think settling *Carpenter v. United States* closed this practice, as Judge Alex Kozinski noted in *United States v. Pineda-Moreno* (2010),⁴ so many law enforcement agencies are requesting CSLI that cell providers have developed self-service websites for retrieving user data. The numbers are so high that “we can safely say that ‘such dragnet-type law enforcement practices’ are already in use” (Willen et al. 2017, 12), and the decision will not end those practices.

Critically Activating Archival Theory

Co-creation and third-party doctrine

As Justice Roberts states in his majority opinion, opposition to unfettered British rummaging of property and places during “the colonial era” (Supreme Court of the United States 2018, 4) was the first act of resistance in what would become the Revolutionary War. However, it was only in 1992 that the Fourth Amendment was clarified to cover people—not just property and places—and the discomfort with that recent expansion is apparent in other Justices’ writings. In his dissent, Justice Kennedy calls it “unprincipled and unworkable” to

4 In this case, the Supreme Court decided placing a GPS tracking device on a suspect’s personal vehicle violates the Fourth Amendment.

“unhinge Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases” (Supreme Court of the United States 2018, 3) and claims that “This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy” (Supreme Court of the United States 2018, 22). What both justices miss, in different ways, is the specifically racist roots of property-based constitutional arguments, and that “accepted” principles and protections are differentially applied and ontologically understood.

Critical Race Theory is a movement born of Critical Legal Studies that examines “the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law” (Delgado and Stefancic 2012, 64). By looking deeply into property protection’s racist roots, it is clear that property law is a colonial instrument which sets up “the conditions for colonial conquest, domination, and control” (Anderson 2015, 770). Justice Kennedy shudders at “The Court’s multifactor analysis—considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness—[which] puts the law on a new and unstable foundation” (Supreme Court for the United States 2018, 21). Western jurisprudence is based firmly on individual property rights and the very notion of a Western rule of law is thrown into question when property rights are perceived as being challenged.

The privileging of a dominant Western jurisprudence based on property rights over a justice system based on comprehensiveness and voluntariness explains the legal precedents which predated *Carpenter v. United States*. “Third-party doctrine” is the policy established by *Katz v. United States* (1967)⁵ and reaffirmed in *United States v. Miller* (1976)⁶ and *Smith v. Maryland* (1979)⁷ that a person who turns information over voluntarily to a third party has no reasonable legal expectation of privacy to that information. When someone tells her friend a secret, she may hope that her friend relays that secret to no one else, but she has no legal recourse if the friend then does tell someone else the secret. This doctrine is most often called upon in relation to business records. The Government argues that under the third-party doctrine, smartphone users who have signed contracts with cell service

5 In this case, the Supreme Court decided that police are required to obtain a search warrant to wiretap a public payphone, and that physical intrusion is not necessary to invoke the Fourth Amendment.

6 In this case, the Supreme Court decided that people have no right to privacy in bank records, which are considered business records belonging to the bank and not private papers.

7 In this case, the Supreme Court decided that there is no illegal search of “pen registers” owned by phone companies, as phone numbers are given over by consumers in the regular course of business. In the dissent, Justice Thurgood Marshall argued that because there is no practical alternative to dialing phone numbers through a phone company, this intrusion could impede free speech and political affiliation.

providers should not have the expectation of privacy to the information that is collected by their providers in the regular course of using their smartphones, and, further, that investigation of CSLI is therefore not a search of a person, but of a company. This is how law enforcement accessed Carpenter's CSLI without a warrant.

The definition of CSLI as consensual ignores the fact that "giving" CSLI might, in fact, be an involuntary relinquishing of information. Even when smartphones are kept in a user's pocket, with no phone calls, texts, emails, or visits to apps, they continuously, constantly, and automatically create CSLI. It is not realistic to call the disclosure of CSLI "voluntary" (Crocker et al. 2017, 19). The only way to produce no CSLI is to turn a smartphone on "airplane mode," halting it from sending signals to nearby towers. One could also keep their smartphone on, but leave it at home at all times. Of course, a mobile phone without CSLI is no longer a phone (Willen et al. 2017, 13), and a mobile phone without mobility is no longer mobile. What may have seemed voluntary even ten years ago has become a necessity of living and working in today's society. Providers argue that CSLI is collected "in the ordinary course of business," including "to find weak spots in their network and determine whether roaming charges apply" (Howe 2017b). Positioning CSLI as something incidental to the business of providing cell service glosses over the reality that CSLI is not *only* used to monitor the regular functioning of the cell network, and insinuates that CSLI is not a record of a user.

The current positioning of CSLI squarely within the third-party doctrine is in line with traditional, Western, property-based archival views on records as coming from a single creator. The critical archival theories of simultaneous multiple provenance and parallel provenance complicate this one-sided view and would add nuance to Carpenter's case. Scholars such as Frank Upward (2000), Sue McKemmish (Gilliland and McKemmish 2012), and Anne Gilliland (Gilliland 2017) have expanded the field's notions of creatorship and ownership through the Records Continuum Model first developed in the 1990s. Archivist and archival theorist Chris Hurley (2005, 81–82) posited over a decade before *Carpenter v. United States* that all participants in record creation—those involved in documentation activities as well as the subjects of those records—are jointly responsible for them, and thus have joint rights to them. Critically thinking of records in terms of co-creatorship destabilizes the hierarchical nature of record ownership and challenges us to consider the material impacts of subjectivism in records. Though relatively recent, and not ubiquitously accepted, these theories are not so new that they could not have been introduced as technical background to the courts.

Currently, CSLI is considered to be created by cell service providers, and therefore under neither customer nor governmental control. Providers, not users, determine how long these records are kept, and the records fall under different privacy policies than what is considered the private “content” of calls, texts, and emails (LaBahn 2017). This is a way of thinking that echoes dominant archival theory. But Chief Justice Roberts once called cellphone records a “joint venture” with the phone’s owner and service provider, an argument that grasps at the archival theory of co-creation between author and subject and where an archivist could lend her expertise to the legal discourse (Howe 2017a).

Because of the unceasing nature of CSLI creation and collection, it is perhaps most appropriate to consider smartphone users as non-consenting or uninformed donors, “individuals,” as scholar Marybeth Gaudette (2003, 21–34) puts it, “whose creations are contained within a collection without their consent regardless of their knowledge of that fact.”⁸ Digital records travel through multiple times and spaces, giving them complex, layered, co-creator status (Waxman et al. 2017, 17). To make the matter even more complex, information is not just co-created, but actually simultaneously possessed by both the user and the third-party (Ferguson et al. 2017, 23). Justice Kennedy truthfully summarizes that “The defendants could make no argument that the records were their own papers or effects” (Supreme Court of the United States 2018, 9), because there is not currently a definition of creation and ownership in archival and records theory, let alone in mainstream legal scholarship, that is nuanced enough to give users rights to their own CSLI. As he says, “Customers like [Carpenter] do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process” (Supreme Court of the United States 2018, 2). His boiled-down reasoning, that “Customers do not create the records” (Supreme Court of the United States 2018, 12), underscores power and powerlessness in records, a status quo which is operational and not inherent, and which we would do well to challenge.

Instead, building on CAS scholars’ expanded theory of records creation, I would propose to the courts an even more expansive view which accounts for what may be called corporeal co-creation, wherein a person would have the right to the documentation stemming from the very existence of their body and their movements. This would alter records subjects’ access to their own records and subvert the power imbalances in cases such as Carpenter’s.

8 Gaudette’s constructed term for this phenomenon, “blind donors,” has been paraphrased here to avoid repeating language that is ableist in nature.

The use of documents to control the movements of certain bodies

By introducing a broader definition of co-creatorship and by subsequently urging co-creators' full rights to their records in legal contexts, archivists can problematize the history of employing documentation to surveil and control people of color in the US.

In the archive of transatlantic slavery, critical media studies scholar Lyndsey Beutin (2017) finds the law to be a method of monitoring and regulating the movements of Black bodies and legal suspicion of criminal activity. In this archive, Beutin finds slave patrols, the Fugitive Slave Acts, Black Codes, lynchings, and other nodes in a larger rhizome of surveillance of movement in what Fiske (1998, 68) summarizes as the “rapidly developing control mechanism directed particularly upon the Black male as he moves through its so-called public spaces.” When “Justice Gorsuch wonders ‘why someone’s location when using a phone’ is sensitive” (Supreme Court of the United States 2018, 16), he ignores this exact history.

To keep a phone in service, CSLI must be sent and recorded every few seconds. CSLI is thus the record of which cell tower the user was nearest to at almost any given moment, and as an aggregate, the movement of a user between towers. With each network rollout, more cell towers are built, distances between towers decrease, and cells get smaller, making CSLI an increasingly precise record of a person’s location.

To argue that CSLI records are non-controversial because of their germaneness is a fallacious argument against the essentiality of records of daily life. It is the boring, mundane nature of CSLI that makes it incredibly potent. As Justice Sonia Sotomayor noted in 2011, seemingly prosaic tasks that users carry out are revealing troves of information to third parties every minute (Castellano 2017). Over time, CSLI reveals individual users’ social circles, morning and nighttime routines, political affiliations, religious beliefs, medical conditions, romantic entanglements, and more (Willen et al. 2017, 5). Put another way, CSLI is a personal archival collection, and may be understood, advocated for, and analyzed in light of CAS scholar Sue McKemmish’s (1996) landmark “Evidence of Me.”

People go to particular places for particular reasons. Noting a person’s repeated appearance at a medical specialist’s office, for example, one can infer the person is receiving specialized medical treatment; seeing a person’s CSLI every Saturday morning near a synagogue’s location, one can infer the person is Jewish (Willen et al. 2017, 29). CSLI also aggregates “boundary-crossing information over time,” allowing an analyst to determine not just where a person went, but, combined with their speed of travel and their route across known paths

such as railways and ferry lines, how they got there (Willen et al. 2017, 21). Combining this data with publicly available records such as map data and even social media posts can give a complete snapshot of a person's intimate life, as the German politician Malte Spitz showed when he sued for six months of his CSLI and geolocated his whereabouts to the minute to prove that CSLI is rich, invasive, and potentially useful as a tool of political repression ("Tell-all Telephone" n.d.). Far from being boring, CSLI can provide a vibrant, living, pattern-based image of an individual's thoughts and movements across time.

Timothy Carpenter was a regular churchgoer⁹ who one night slept over at a house that was not his own. One of his lawyers, Nate Wessler, argued that this is exactly why CSLI should be protected. Over the course of 127 days, any person would participate in activities outside their main occupation, whether they are a schoolteacher or an armed robber:

Timothy Carpenter's life on a day to day basis was pretty boring in the way all of our lives are pretty boring on a day to day basis: we get up in the morning, we have breakfast, we might see a friend or go to work or meet up with a family member—we all have routines. The point to us here, none of us in our daily lives, as boring or interesting as they might happen to be, expects that there's a little government agent sitting in our pocket with a notepad writing down a record of everywhere we've come and gone over the course of that day and that week and that month . . . And that is in some way what our cellphones have become and have allowed. (Chang and King 2017)

In this case, the government agent is one who can travel back to any point in a person's life, who works twenty-four hours a day without breaking for lunch or the restroom, who never forgets anything, and who never gets bored no matter how boring the person he is watching happens to be (Chang and King 2017). It is simply not possible to target only the extraordinary or legally relevant moments of a person's personal archive.

What this does, then, is reiterate the violence of policing the movement of Black bodies by way of third-party documentation and record-keeping. As Justice Roberts warns, "Under Justice Alito's [dissenting] view, private letters, digital contents of a cell phone—any personal information reduced to document form, in fact—may be collected by subpoena for no other reason than 'official curiosity'" (Supreme Court of the United States 2018, 20–21). Browne (2015, 25, 53) identifies the dehumanizing connecting factor of surveillance

⁹ As one radio host quipped, "I guess he missed the sermon about not stealing phones from RadioShack" (Chang and King 2017).

and governance of movement: whether by restricting literacy to white pens or by relegating movement to what is within eyesight of the white gaze, the removal of a person's ability to represent themselves autonomously on and in their own terms is an exertion of power.

The ubiquity of mobility datasets and the uniqueness of human traces coalesce in CSLI to give a highly accurate snapshot of a person's identity. While twelve points are needed to identify a person using fingerprint matching, just four data points of hourly CSLI are enough to identify 95 percent of individuals in a given area (Montjoye et al. 2013, 1). The integral nature of Carpenter's physical involvement in creating CSLI refutes many states' collective argument that Carpenter's location records are ones "he did not make or own and has never seen or kept, and that contain information he voluntarily conveyed to a third party" (Bondi et al. 2017, 2). It follows, then, that the data is not just *about* a person, but is actually embodied content.

Surveillance dehumanizes by removing autonomy, but, further, by creating something that is a non-corporeal stand-in for a human: "The observed body is of a distinctively hybrid composition. First it is broken down by being abstracted from its territorial setting. It is then reassembled in different settings through a series of data flows. The result is a decorporealized body, a 'data double' of pure virtuality" (Haggerty and Ericson 200, 611). The assumption in this case and in generally monitoring CSLI is that whether there was probable cause or not, the ability to monitor the movements of people of color and the documents facilitating and produced by those movements without a warrant is taken for granted. Archivists can problematize this assumption.

Privacy in record-keeping

There is not yet a widespread critical examination of surveillance within archival studies, even within CAS. This aligns with the broader context of the under-examined nature and meaning of privacy in the profession. The archival profession has been "frustratingly vague" on guidelines for ensuring privacy (Gaudette 2003, 23). The 1993 Society of American Archivists Code of Ethics recommended that "Archivists respect the privacy of individuals who created, or are the subjects of, documentary materials of long-term value, especially those who had no voice in the disposition of the materials" (Society of American Archivists 1993), but in the most recent revision, this language has disappeared (Society of American Archivists n.d.). The International Council on Archives says archivists "must respect the privacy of individuals who created or are the subjects of records, especially those who had no voice in the use or disposition of the materials" (International Council on Archives 1996),

but gives no further guidelines on how to do this. Though many archival codes of ethics mention privacy, they never give a definition of the term. Law enforcement agents want access to as much information as possible to form a solid case on an individual, just as a historian wants her work to be as thoroughly researched as it can be. But there is an unanswered question about when researchers' and agents' needs supersede the rights of non-consenting donors.

One unaddressed issue which is critical to this case is the question of how long, in a horometrical sense, "privacy" extends. This is a question that is unique to digital records. On the Respondent's side, supporters argue that there is no way or logical reason to develop a time boundary around CSLI, since one point is no more or less revealing than any other. If there is some arbitrary total time limit set—say, twenty hours—must that be twenty hours between nine and five? All in one day? In five-minute intervals over four months? Justice Sonia Sotomayor noticed this oversight in the case. Even if a person gives up their right to privacy in single CSLI data points, it is not a stretch to imagine someone would have an expectation of privacy in their whereabouts at some point over 127 days, the length of Carpenter's searched CSLI records (Howe 2017a). Since the law enforcement agencies likely already had some cause to get Carpenter's actual phone records for those months, it is potentially a serious overreach to search 127 days' worth of CSLI (Brown et al. 2017, 31). Some digital records can be endlessly historical. The archival profession, which is on the forefront of critically examining digital records and their preservation, needs to proactively produce policies which address the ethics of "how long" a record can be.

Given their concern with best practices in record-keeping and creation, archival professional organizations can be leaders and pioneers in the area of responsible custody of private information. Rather than waiting for direction from other fields of study, or from corporations with interests in protecting only privileged users' information, CAS theorists can actively shape the way society understands data privacy.

The assumed neutrality of information infrastructure

Unlike the nuanced discussions of records and bias within CAS, the term "records" is invoked in Carpenter's case as a synonym for incontrovertible, objective fact. This creates a false equivalency between "factual" and "neutral." Carpenter's counsel, Harold Gurewitz, is rightfully frustrated by the presentation of CSLI as impossible to discredit: "It's the kind of evidence that in the end is the most difficult to argue to a jury—that they shouldn't credit [it] because the records are what they are and they're presented with the blessing of an FBI

agent who says ‘I’m an expert and this is what I think they mean’” (Chang and King 2017).

The neutrality of CSLI is reinforced by defining it as a byproduct of communications infrastructure: “The records and data were created and maintained by the carriers concerning their own infrastructure for their own business purposes; the data consisted purely of routing information, not content...” (Bunn, Castellano, and Cantoni 2017, 2). Certainly, as is widely cited in the briefs, cell service providers use CSLI for billing purposes and business efficiency. But CSLI and automation are portrayed as neutral incidentals of regular infrastructure functioning to support a claim that they are easily—and only—manipulated in the wrong hands (Bunn, Castellano, and Cantoni 2017, 24–25).¹⁰ In his brief, Michael Varco worries that if CSLI is protected, serial killers will just take Ubers to commit murder, knowing that David “Son of Sam” Berkowitz was ultimately caught by a parking ticket (Varco 2017, 17). It is only criminals taking advantage of data, it is argued, that make it a weapon. The dissenting justices invoke and cite Varco’s ludicrous argument, lending it credence and a permanent place in the legal archive.

Couched in a language of guardianship against threat and using coded racialized language, surveillance is packaged as a public good and thwarting it an open invitation for abstract criminal activity. As Fiske (1998, 68) further states, “The development of surveillance technology is fueled, of course, by the social need to see, and that, in its turn, is motivated by the social significance of that which must be seen...the need to have the threatening other always in sight is paramount.” In Justice Kennedy’s dissent to the *Carpenter v. United States* majority decision, he worries—or, more accurately, asks the American public to worry—that “The Court’s newly conceived constitutional standard will cause confusion; will undermine traditional and important law enforcement practices; and will allow the cell phone to become a protected medium that dangerous persons will use to commit serious crimes” (Supreme Court of the United States 2018, 14). He asks us to worry further that “The new rule the Court seems to formulate puts needed reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes” (Supreme Court of the United States 2018, 1).

10 “...criminals actively use, and hide their crimes in, the digital maze. They use Bitcoins to conduct illicit business, hide proceeds, and launder money, take advantage of the increased access presented by online forums to perpetrate their frauds against the young, the gullible, and the elderly, and use internet advertising to sell child sexual services and illicit wares.”

However, Justice Kennedy's dissent takes the argument further, reverse engineering CSLI to conclude that "Among other things, providers aggregate the records and sell them to third parties along with other information gleaned from cell phone usage. This data can be used, for example, to help a department store determine which of various prospective store locations is likely to get more foot traffic from middle-aged women who live in affluent zip codes" (Supreme Court of the United States 2018, 5). By calling upon this specific demographic, Justice Kennedy, as so many have done before him, invokes the specter of white womanhood to normalize whiteness and contrast threat and non-threat. It is the criminals (with an implication of specifically non-white criminals) taking advantage of records, it is argued, that make such records weapons.

Police departments and other law enforcement agencies, and the automated data-analyzing systems they employ, are beyond the critique of Kennedy and those who support his views. The investigators used a CSLI-analyzing software package to analyze Carpenter's CSLI (Chang and King 2017). With the increase in police departments' requests for CSLI, there has been a parallel growth in the market for CSLI-analyzing software marketed to police departments (Willen et al. 2017, 26). The boundaries between what is considered a "neutral" automated system and what is a "human" system in the realm of digital records is fluid and arbitrary. Though humans may not sit in front of a computer screen and go through every line in the data which is at a given moment in an automated system, humans wrote the algorithms in those software packages, and they wrote them in response to humans' needs and requests. While the dissenters worry about how data might be manipulated by those they label criminals, there is a notable silence when it comes to the weaponization of data by people in law enforcement agencies.

By not engaging with CAS's critical examination of records, the courts overlook the complexities of what records are and how they can be employed in unjust ways. And, by not entering into legal discourse, archivists perpetuate a disconnect between building emancipatory theory and the contexts in which this theory can make a material difference.

Conclusion

Timothy Carpenter will be in a federal prison for the rest of his life. The Supreme Court case which bears his name, however, will live on long past his sentence. Though the Supreme Court has seen numerous cases about digital records, privacy, and Fourth

Amendment violations, this is the first case to test the Court's opinions on smartphone records in particular.

The arguments for both Carpenter and the Government would be aided by and given nuance through incorporating critical archival theories and record-keeping expertise. Positioning the argument squarely within the third-party doctrine ignores the layers of co-creators that are involved in producing digital records, and completely denies the rights of individuals who are subjects of these records. Ultimately, the arguments against protecting CSLI boil down to the objectivity of communications infrastructure and automated analysis; however, these arguments fail to account for the biased nature of infrastructure and algorithms, and open the door for further racially-motivated policing and surveillance of a demographic which is already disproportionately affected by those structures. Archival professional organizations should construct stronger privacy policies in the face of the proliferation of these involuntary records, and lead other fields in being active, responsible custodians of private information. It is time for archivists to enter the legal discourse.

Filing amicus briefs is one salient way explorations in CAS can enter into the broader societal discourse around records and record-keeping. Professional organizations like the Society of American Archivists and the American Library Association regularly file¹¹ amicus briefs; the practice is not new in this field, but it is certainly not comprehensive or without flaws. The American Library Association, for example, apologized for never filing any amicus briefs supporting lawsuits to desegregate public libraries, among other silences, but has still largely only filed amicus briefs related to First Amendment rather than Fourth Amendment issues (American Library Association 2018). These are generally filed through committees within these organizations, and may be an avenue for concerned archivists to enter into advocacy on a state or national level. Amicus briefs do matter: almost 40 percent of US Supreme Court cases referred to amicus briefs filed, while over 80 percent of state supreme courts discussed arguments made in amicus briefs (Sungaila 2015). Briefs are critical to providing background and technical information that no one in the courtroom offers, as well as to providing impressive and symbolic shows of unity and support for a given issue that will affect generations to come. Emancipatory theories on record-keeping and creation can enter into the legal discourse through this avenue.

There are numerous adjacent and emergent record-keeping paradigms which will increasingly give nuance to and challenge assumptions in this argument, including new

11 Amicus briefs are filed through an attorney who is an admitted member of the bar.

scholarship on performance studies and archives and urgent, creative scholarship around the records of displaced persons and other migrants. Additional scholarship in these areas and increased cross-dialogue and multidisciplinary approaches will certainly aid in shaping a more robust archival field, but archivists and theorists will also need to refuse to remain “neutral” in global issues which employ records and documentation to reiterate systemic inequalities.

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