THE FOURTH AMENDMENT AS A DEVICE FOR PROTECTING THE GUILTY

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I. INTRODUCTION

Professor Arnold Loewy's celebrated article, *The Fourth Amendment as a Device for Protecting the Innocent*,[1] has been cited in more than one hundred scholarly articles and within a year of publication was cited in a Supreme Court opinion.[2] In this Article, I discuss three reasons why, almost forty years later, Professor Loewy's article still deserves our attention.

First, Professor Loewy's analysis of technological searches is relevant to current surveillance technologies not in existence in 1983. Extrapolating from limited precedents, he raised issues that would become central to Fourth Amendment theory in the next century.[3] We cannot understand the significance of the article without appreciating Professor Loewy's prescience about the relationship between future surveillance technologies and Fourth Amendment theory.

Second, Professor Loewy crafted his arguments so skillfully that they remain difficult to unpack. I examine two of his most important, and most artfully constructed, arguments in an attempt to explain how they manipulate the constitutional text to advance his arguments.

These first two topics amplify the importance of the third topic, which is Professor Loewy's Fourth Amendment thesis: "[T]he primary purpose of

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1. Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

2. United States v. Jacobsen, 466 U.S. 109, 123 (1984) (citing Loewy, *supra* note 1) ("Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest.").

3. *See generally* Loewy, *supra* note 1.

this provision is to protect the innocent."[4] I believe that this argument contradicts the essential meaning of the Fourth Amendment. Our disagreement comes as no surprise to Professor Loewy. We first debated the issue in the 1980s, and have returned to this discussion from time to time since then.[5]

My contribution to the Criminal Law Symposium has two goals. The first is to honor the work of a bold, creative, and influential scholar. The second is to continue this thirty-year-old discussion with Professor Loewy —a discussion that has helped shape my own scholarship and teaching. This remains a discussion worth maintaining because Professor Loewy's arguments force us to confront the meaning of the Fourth Amendment in a world of ubiquitous digital technology of the type he imagined all those decades ago.[6]

II. PROFESSOR LOEWY'S PROPHETIC MODEL OF TECHNOLOGICAL SEARCHES

When Professor Loewy's article was published, police investigations that employed sense-enhancing technologies had been the subject of Fourth Amendment disputes for more than a half-century.[7] Throughout the twentieth century, Supreme Court technological search cases involved analog devices that generally required some physical contact with the place or thing subjected to surveillance.[8] In those cases, federal and state investigators listened to conversations and conducted other technological surveillance by attaching a wiretap to an individual telephone line;[9] placing a listening device against a hotel room wall;[10] trespassing into a private home to install a "bug"—a device that both captured and broadcast conversations;[11] driving a "spike mike" through the foundation of a house;[12] mounting an electronic bug on the roof of a telephone booth;[13] and installing a pen register to monitor a single telephone line.[14] Government agents continued to employ

4. Loewy, *supra* note 1, at 1229.

5. *See, e.g.*, Morgan Cloud, *Innocence, Evidence, and the Courts*, 85 CHI.-KENT L. REV. 3, 13 (2010) (citing Arnold Loewy, *Taking Reasonable Doubt Seriously*, 85 CHI.-KENT L. REV. 63 (2010)) (discussing a potential source of error: A juror's misunderstanding of the meaning reasonable doubt and its effects on the determination of guilt or innocence of a defendant).

6. *See generally* Loewy, *supra* note 1.

7. *See, e.g.*, Olmstead v. United States, 277 U.S. 438 (1928) (explaining that federal agents placed a physical wiretap on telephone lines attached to a telephone pole and listened to telephone calls), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

8. *Id.* at 455–57.

9. *Id*. at 456–57.

10. Goldman v. United States, 316 U.S. 129, 131–32 (1942), *overruled in part by* Katz v. United States, 389 U.S. 347, 353 (1967).

11. Irving v. California, 347 U.S. 128, 130–31 (1954).

12. Silverman v. United States, 365 U.S. 505, 506–07 (1961).

13. Katz v. United States, 389 U.S. 347, 348–49 (1967).

14. Smith v. Maryland, 442 U.S. 735, 737 (1979).

investigative technologies, including airplanes and helicopters, in the years immediately following publication of Professor Loewy's article.[15]

But Professor Loewy imagined a very different kind of technology; one that seemed more like science fiction than science in 1983. He imagined technology that enabled a person standing in a remote location to detect evidence of crimes inside buildings.[16] This imaginary technology did not require a physical trespass into the building, nor did it require agents to physically connect the surveillance device to the place, thing, or person under surveillance.[17] Professor Loewy imagined a "divining rod" for detecting evidence of crimes:

> In a Utopian society, each policeman would be equipped with an *evidence-detecting divining rod*. He would walk up and down the streets and whenever the divining rod detected evidence of crime, it would locate the evidence. First, *it would single out the house, then it would point to the room, then the drawer, and finally the evidence itself*. Thus, all evidence of crime would be uncovered in the most efficient possible manner, and no innocent person would be subject to a search. In a real society (such as ours), the [F]ourth [A]mendment serves as an imperfect divining rod.[18]

The virtue of this "evidence-detecting divining rod" was that—although it examined every building (and presumably people, vehicles, and bags) on the street—the intrusion was evanescent, and the device only responded to evidence of guilt.[19] Professor Loewy proposed this "Utopian" law enforcement technique to illustrate how and why the Fourth Amendment could be understood as a device primarily intended to protect only innocent people.[20]

Under Professor Loewy's innocence theory, such use of the divining rod would comport with Fourth Amendment rules because innocent people would suffer no damage from the inspection of their persons, houses, papers, and effects.[21]

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15. *See* Florida v. Riley, 488 U.S. 445, 448 (1989) (discussing visual surveillance of a single private home or business from the vantage point of a helicopter flying directly overhead); Dow Chem. Co. v. United States, 476 U.S. 227, 229 (1986) (involving aerial surveillance of an industrial facility); California v. Ciraolo, 476 U.S. 207, 209 (1986) (involving aerial surveillance of home and its curtilage); United States v. Jacobsen, 466 U.S. 109, 111–13 (1984) (concerning an agent's performance of a field test on a substance that appeared to be cocaine).

16. *See* Loewy, *supra* note 1, at 1244–46.

17. *Id.* at 1244.

18. *Id*. (emphasis added).

19. *See id*.

20. *See id*. One must assume that Professor Loewy's reference to a utopian society was unintentionally ironic when included in a discussion of democratic privacy and government authority; Thomas More's *Utopia* was a repressive society that suppressed individual autonomy and privacy. *See* Morgan Cloud, *More Than Utopia*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 77, 78–79 (Martha Albertson Fineman & Anna Grear eds. 2014).

21. *See* Loewy, *supra* note 1, at 1244–49.

One reason that Professor Loewy's innocence theory poses analytical challenges is that it invoked two conflicting theories. The "reasonable expectation of privacy" standard that has dominated much of Fourth Amendment doctrine since 1967 could be interpreted to support the use of the evidence-detecting divining rod.[22] A number of Supreme Court decisions in the 1980s concluded that even when government actors obtained information from a place where a person expected privacy, no Fourth Amendment violation occurred if society did not recognize that expectation as reasonable.[23] Two of those decisions are particularly relevant here.

The year that Professor Loewy's article was published, a Supreme Court opinion contained dicta concluding that a nontrespassory dog sniff of luggage seized from an air traveler was not a Fourth Amendment search.[24] The justifications for that conclusion paralleled those for the evidence-detecting divining rod.[25] The dog sniff was conducted without a physical trespass into or a manual search within the luggage; the dog exercised no discretion in deciding whether to alert to the presence of drugs—odors emanating from the closed bag either triggered a response from the dog or they did not; and the dog sniff provided no information about the contents of the luggage other than the presence or absence of drugs.[26] Under Professor Loewy's innocence theory, use of neither the dog nor the divining rod would violate any reasonable expectations of privacy because these detecting devices do no more than identify the presence of items people cannot legally possess (e.g., illegal drugs) or other items that provide evidence of criminal guilt.[27]

More direct support for Professor Loewy's theory appeared the following year in the Supreme Court's decision in *United States v. Jacobsen*.[28] Federal agents performed a chemical field test to determine whether white powder discovered in a package was cocaine.[29] Like the dog sniff and the divining rod, this was an "on/off" test answering only one question: in that case, was the powder cocaine?[30] The opinion cited Professor Loewy's article in support of the argument that "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest."[31]

Other Fourth Amendment doctrines lead to the opposite conclusion. Pointing the divining rod indiscriminately at apparently every structure,

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22. *Id.* at 1249–56.

23. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.").

24. United States v. Place, 462 U.S. 696, 705–07 (1983).

25. Loewy, *supra* note 1, at 1245–46.

26. *Place*, 462 U.S. at 707.

27. *See* Loewy, *supra* note 1, at 1245–46.

28. *Jacobsen*, 466 U.S. at 123.

29. *Id.* at 111–12.

30. *Id.* at 112.

31. *Id*. at 123.

vehicle, and person the officer passes violates the most fundamental Fourth Amendment rule—its prohibition of general searches and seizures.[32] General searches authorized by writs of assistance and general warrants were so loathed among the founding generations that they were among the triggers for the revolution against Great Britain.[33] If using the divining rod to reveal information about the interior of a home is a search, the Fourth Amendment would require a judicial search warrant.[34]

In the twenty-first century, use of the divining rod as Professor Loewy describes "would single out the house, then it would point to the room, then the drawer, and finally the evidence itself,"[35] and would almost certainly violate the Fourth Amendment.[36] But even in the 1980s, language in Supreme Court opinions suggested the same conclusion.

A 1986 Supreme Court decision illustrates that conclusion in dicta and held that government surveillance of a private industrial facility from an airplane was not a Fourth Amendment search despite the use of sophisticated commercial cameras to gather incriminating evidence.[37] The result would have been different, however, if the government had used Professor Loewy's divining rod because using "[a]n electronic device to penetrate walls or windows . . . would raise very different and far more serious questions."[38]

The emergence of potent digital technologies in this century has forced the Supreme Court to decide cases involving surveillance technologies as intrusive as an electronic device used to penetrate walls or windows.[39] Of most direct relevance is *Kyllo v. United States*.[40]

Federal agents had reason to suspect that Kyllo was using heat producing halide lamps to grow marijuana in his home, but they lacked

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32. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 31, 49, 242–44, 300, 447–52, 604, 739–41 (2009).

33. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 624–25 (1886) ("In order to ascertain the nature of the proceedings intended by the [F]ourth [A]mendment to the [C]onstitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.").

34. Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that agents violated the Fourth Amendment when they aimed a thermal imager towards the exterior of a home without a warrant to detect marijuana).

35. Loewy, *supra* note 1, at 1229.

36. *See Kyllo*, 533 U.S. at 40.

37. Dow Chemical Co. v. United States, 476 U.S. 227, 238 (1986).

38. *Id.* at 239.

39. *See* Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018); Florida v. Jardines, 569 U.S. 1, 11–12 (2013); *Kyllo*, 533 U.S. at 40.

40. *Kyllo*, 533 U.S. at 40.

sufficient evidence to obtain a search warrant.[41] In an effort to develop probable cause, agents sitting in a car parked on a public street aimed a thermal imager at the exterior of Kyllo's home.[42] The device indicated that parts of the home were "relatively hot[ter]" than the rest of the home and the two attached residences.[43]

Justice Scalia, writing for a 5–4 majority, concluded that this warrantless use of the thermal imager to obtain information about the interior of the home was unconstitutional.[44]

> We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.[45]

Elsewhere, I have applied Fourth Amendment theory.[46] Another Scalia opinion, in *Florida v. Jardines*, published more than a decade after *Kyllo*, applied analogous reasoning when police officers with a drug detecting canine trespassed onto the front porch of a home.[47] After conducting an olfactory inspection of the home, the dog alerted indicating the presence of marijuana inside.[48] This *warrantless physical trespass* carried out to permit a technological intrusion into the home (where the trained dog was treated as technology) violated the Fourth Amendment.[49]

Both the *Kyllo* and *Jardines* opinions involved technological intrusions to gain information about the home, the place most protected by the Fourth Amendment.[50] But other recent opinions—majority, concurring, and dissenting—have employed the trespass theory, the *Katz* reasonable

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41. *See id.* at 29–30.

42. *Id.*

43. *Id.* ("Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home . . . showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was.").

44. *Id.* at 27.

45. *Id*. at 34–35.

46. *See* Carpenter v. United States, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (quoting Morgan Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37 (2018)).

47. Florida v. Jardines, 569 U.S. 1, 6–10 (2013).

48. *Id*. at 4.

49. *Id.* at 12.

50. *See Jardines*, 569 U.S. at 6; *Kyllo*, 533 U.S. at 37.

expectation of privacy standard, or both to require that police obtain a warrant before conducting technological surveillance outside the home. These have included GPS tracking of a motor vehicle,[51] searches of the contents of cell phones and smart phones,[52] and obtaining cell site location information from a suspect's cellular phone provider.[53]

In all of these twenty-first century cases, the defendants were factually guilty of crimes, yet all prevailed in the Supreme Court.[54] It would be foolish to predict that this establishes the permanent demise of the innocence theory of technology searches. As a practical matter, changes in the Court could produce different doctrines. Most dramatically, three of the most important of these decisions were authored by the late Justice Scalia for mere five-vote majorities.[55] New technologies, cases, and Justices could produce new rules and different outcomes.

In the final Parts of this Article, I argue that the line of twenty-first century decisions cited above should not only be followed, but should be strengthened. This is because the innocence theory contradicts the text, history, and jurisprudence of the Fourth Amendment.

III. FOURTH AMENDMENT INNOCENCE THEORY AND THE CONSTITUTIONAL TEXT

Professor Loewy provides a succinct explanation of his innocence theory:

> The thesis of this Article is that the primary purpose of this provision is to protect the innocent. By "innocent," . . . I mean innocent of the crime charged or not in possession of the evidence sought.
>
> Implicit in this thesis are two interrelated (if not identical) propositions: (1) It is not unreasonable for the police to search for and seize evidence of crime; and (2) there is no [F]ourth [A]mendment right to secrete such evidence, *i.e.*, the right of the people to be secure in their persons, houses, papers, and effects does not include the right to be secure from the government's finding evidence of a crime.[56]

Professor Loewy's phrasing of the two interrelated propositions reveals a master advocate at work. Each proposition is partially correct and partially incorrect. The incorrect statements supply essential support for his innocence thesis and the correct statements do not. But Professor Loewy artfully blends

51. United States v. Jones, 565 U.S. 400, 402 (2012).
52. Riley v. California, 573 U.S. 373, 379 (2014).
53. Carpenter v. United States, 138 S. Ct. 2206, 2211–12 (2018).
54. *Carpenter*, 138 S. Ct. at 2223; *Riley*, 573 U.S. at 403; *Jones*, 565 U.S. at 410–13.
55. *See Jardines*, 569 U.S. at 2–3; *Jones*, 565 U.S. at 401–02; *Kyllo*, 533 U.S. at 29.
56. Loewy, *supra* note 1, at 1229.

the correct and incorrect propositions into a seamless argument that appears to rest on the language of the Amendment.

Consider, for example, how the first proposition manipulates the Amendment's wording. The first clause of the Fourth Amendment decrees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[57] The text confirms that government agents are permitted to conduct searches and seizures, but only if the agents' actions are reasonable.[58]

Now re-examine Professor Loewy's rewording of this clause: "It is not unreasonable for the police to search for and seize evidence of crime."[59] This blanket assertion that it is not unreasonable for police to conduct searches and seizures transforms the meaning of the text, which authorizes those actions only *if* they are not unreasonable.[60] To correctly state the constitutional rule, Professor Loewy's proposition would need to be circular, and state that it is not unreasonable for the police to search for and seize evidence of crime if they are not unreasonable in doing so.

By rearranging key words to create a new double negative—not unreasonable—and placing that double negative at the beginning of the clause, Professor Loewy transforms the text's meaning. The Constitution prohibits unreasonable searches and seizures by the police.[61] Professor Loewy's rephrasing declares that police searches and seizures are not unreasonable.[62] A prohibition is transformed into a permission.

The issue here is more important than just friendly quibbling by law professors about the order of words in a sentence. This rewording of the Fourth Amendment lays the foundation for the second proposition that "there is no [F]ourth [A]mendment right to secrete such evidence, *i.e.,* the right of the people to be secure in their persons, houses, papers, and effects does not include the right to be secure from the government's finding evidence of a crime."[63]

Once again we find an artful blending of correct and incorrect assertions. Government agents are, of course, entitled to search for and seize evidence of crimes in homes and other private places; the right to be secure does not grant the people immunity from government intrusions, as long as the intrusions are not unreasonable.[64] On the other hand, the Fourth Amendment does grant us the right to hide—to secrete—evidence of crimes in our homes.[65] Indeed, that is one purpose of the Amendment—to allow

57. U.S. CONST. amend. IV.
58. *Id*.
59. Loewy, *supra* note 1, at 1229.
60. *Id.*; *see* U.S. CONST. amend. IV.
61. U.S. CONST. amend. IV.
62. *See* Loewy, *supra* note 1, at 1229.
63. *Id.*
64. *See* U.S. CONST. amend. IV.
65. *See id.*

people to keep the secrets of their lives, including evidence of their crimes, hidden from government searchers unless those searchers comply with the Fourth Amendment's requirements.[66]

One need not be a committed textualist to object to a rearranging of the words in the Fourth Amendment to change its meaning. I am not arguing that the Fourth Amendment's text is unambiguous, simple, or subject to only one interpretation. In another article written for this Symposium almost a decade ago, I argued that, in fact, the Fourth Amendment's text is rife with ambiguities.[67] I argued that examining the Amendment's fifty-four words reveals that there are "a dozen ambiguous words and phrases: right, people, secure, persons, houses, papers, effects, unreasonable, searches, seizures, probable cause, and particularity."[68]

We should exercise a rigorous skepticism of claims of certainty about the meaning of this sentence. But it does not require a skilled linguist to recognize the impact of converting a command requiring that police searches and seizures *must not be unreasonable* into a permissive authorization that *police searches are not unreasonable*, and therefore, guilty people have no Fourth Amendment right to hide evidence of their crimes.[69]

Both the history of the Fourth Amendment and its interpretation by the Supreme Court confirm that it protects innocent and guilty people alike.[70] This is not an accident.

IV. HISTORY AND PRECEDENT

The complex history of the Fourth Amendment's origins is poorly suited to efforts to reduce it to simple rules providing literal solutions for contemporary problems.[71] It does, however, offer broad principles that can inform our decisionmaking in the present.[72] One of those principles is, I propose, that the Fourth Amendment protects guilty as well as innocent people.

Here, I will discuss just two examples from history that support this claim. The first involves English litigation well-known in the American colonies in the years before the Revolution and the adoption of the Fourth

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66. *See id.*

67. Morgan Cloud, *A Conclusion in Search of a History to Support It*, 43 TEX. TECH L. REV. 29, 34–35 (2010).

68. *Id.* at 34.

69. *See supra* notes 59–66 and accompanying text (rearranging keywords changed the meaning of the Fourth Amendment).

70. *See infra* notes 93–100 and accompanying text (illustrating the Supreme Court's interpretation of the Fourth Amendment).

71. *See* CUDDIHY, *supra* note 32 (discussing the text of the leading history of the Fourth Amendment's origins and approaching 800 pages in length).

72. *See* Morgan Cloud, *Searching Through History, Searching for History*, 63 U. CHI. L. REV. 1707, 1746–47 (1996).

Amendment.[73] The lawsuits were brought by the victims of intrusive and destructive searches and seizures conducted by government agents executing general warrants issued by a Secretary of State.[74] The lawsuits, both those tried and those settled, produced large damage awards for the targets of the searches, although many of them were in fact guilty of involvement in the publication of the seditious tracts.[75] For example, it seems beyond dispute that John Wilkes, the most prominent plaintiff, was one of the people with primary responsibility for publication of *North Briton 45*.[76] Despite his guilt, Wilkes prevailed and received the largest damage award of the almost two dozen plaintiffs because his personal rights had been violated.[77]

These 1760s British cases influenced the Whig theories of liberty that produced the revolution and the Bill of Rights,[78] including the Fourth Amendment, which "was not, in fact, designed primarily to protect the innocent, but was instead a profoundly antigovernment amendment designed to control governmental power."[79]

The Supreme Court has emphasized the importance of one of these cases, *Entick v. Carrington*,[80] for more than 120 years, repeatedly affirming that it is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" with regard to search and seizure.[81]

My second example requires a willingness to act as an amateur psychologist evaluating people who lived more than two hundred years ago. It is logical to conclude that many of the founders and framers recognized

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73. *See* Money v. Leach (1765) 97 Eng. Rep. 1075 (KB); Wilkes v. Halifax (1765) 95 Eng. Rep. 797 (KB); Beardmore v. Carrington (1764) 95 Eng. Rep. 790 (KB); Huckle v. Money (1763) 95 Eng. Rep. 768 (KB); Wilkes v. Wood (1763) 98 Eng. Rep. 489 (KB). Publications that criticized the English government triggered searches and litigation. *See, e.g.*, *Huckle*, 95 Eng. Rep. 768. Publication of *North Briton No. 45* prompted most of the searches and resulting lawsuits. *Id.* The Supreme Court did refer to these lawsuits in *Boyd v. United States*. Boyd v. United States, 116 U.S. 616, 624–26 (1886). A separate seditious publication, *The Monitor*, produced an opinion that is still influential in Fourth Amendment doctrine. *See* Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB).

74. *See* CUDDIHY, *supra* note 32, at 440–58.

75. *Id.*

76. *See, e.g.*, *Halifax*, 95 Eng. Rep. at 797; *Wood*, 98 Eng. Rep. at 493.

77. *Wood*, 98 Eng. Rep. at 493.

78. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 349–51(Enl. ed., 1967); Cloud, *supra* note 46, at 42–43; *see also* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 52 (2009) (arguing that "the notion that the Framers viewed the Fourth Amendment as a protection only for the innocent seems remarkably foolish" in the context of colonial law and sentiment at the time and the circumstances of the lauded *Wilkes* case).

79. Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533, 535 (1999) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)).

80. Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB).

81. Brower v. Cty. of Inyo, 489 U.S. 593, 596 (1989) (quoting Boyd v. United States, 116 U.S. 616, 626 (1886)); *see* Florida v. Jardines, 569 U.S. 1, 7 (2013); United States v. Jones, 565 U.S. 400, 405 (2012).

that guilty people possessed the right to be secure from unreasonable searches and seizures because they, themselves, had been criminals in the years before and during the Revolution.[82] In the 1760s and early 1770s, these crimes were typically commercial in nature.[83]

> Many of those most vociferously opposed to the writs of assistance were guilty of systematic violations of the customs laws; for them and their friends the objection to those writs was not that they interfered with the rights of innocent people, but that they permitted the enforcement of certain laws . . . .[84]

Enforcement meant random, suspicionless searches of homes and other buildings—deemed odious whether the targets of the intrusions were innocent or guilty.[85] General searches could, of course, transgress the rights of people who had not violated laws—imposing customs duties and excise taxes, and prohibiting Americans from importing goods not produced in England or its territories. But they also violated the rights of Americans who violated these laws. Samuel Adams and others complained early and often that when agents of the British or colonial governments ransacked houses in search of smuggled goods, they violated the rights of both those who were innocent and guilty of smuggling.[86]

An even larger number of the founders and framers were guilty of the capital crime of treason when they revolted against England.[87] Our most revered patriots, including Washington, Adams, Franklin, Jefferson, and Madison, were traitors against the King, the parliamentary government, and their Mother Country, England.[88]

There can be no doubt that the American Revolutionaries recognized that their actions might well lead to their executions as traitors.[89] For example, in February 1776, the Continental Congress learned in the

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82. *See generally* Saby Ghoshray, *Doctrinal Stress or in Need of a Face Lift: Examining the Difficulty in Warrantless Searches of Smartphones Under the Fourth Amendment's Original Intent*, 33 WHITTIER L. REV. 571, 608 (2012).

83. *Id.* at 595.

84. James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1273 n.a1 (1983).

85. *See, e.g.*, Michael Campbell, Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post*-Katz *Jurisprudence*, 61 WASH. L. REV. 191, 203 (1986) ("Much of the hostility to the colonial writs of assistance and general warrants, which led to the adoption of the [F]ourth [A]mendment, was inspired not by the execution of the writs and warrants themselves, but by the use of the writs and warrants to enforce unpopular laws against smuggling, sedition, and libel.").

86. Ghoshray, *supra* note 82, at 608 (citing SAMUEL ADAMS, A STATE OF THE RIGHTS OF THE COLONISTS (1772), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION, 1763–1776, 243–44 (Merrill Jensen ed., 1966)) (discussing Samuel Adams's description of the British government ransacking houses to find smuggled items to demonstrate the context of the Founder's conception of the Fourth Amendment).

87. *See generally* Roots, *supra* note 78.

88. *Id.* at 34 ("The Founders lived in a period when even 'guilty' people were privileged to use violence against government officials who forcefully violated their Fourth Amendment rights.").

89. *See generally* DAVID MCCULLOUGH, JOHN ADAMS 91 (2001).

preceding December that Parliament had "denounced as traitors all Americans" who did not submit to English authority.[90] "The punishment for treason, as every member of Congress knew, was death by hanging."[91]

The risk facing the revolutionaries is expressed in a comment generally attributed to Benjamin Franklin: "We must all hang together, or most assuredly we shall hang separately."[92]

It may be that people who committed crimes themselves, including capital crimes for which they could be executed, believed that those who violated laws should not possess the right to be free from arbitrary and unjustified searches and seizures by government agents, but I doubt it.

In addition to these eighteenth-century historical examples, it is beyond any reasonable dispute that many Supreme Court opinions issued in the nineteenth, twentieth, and twenty-first centuries expressly employed the Fourth Amendment to protect the rights of criminals.[93] Even Professor Loewy acknowledges that "[m]any substantive [F]ourth [A]mendment decisions, particularly those dealing with expectations of privacy and consent, have focused on the rights of the guilty to such an extent that their impact on the innocent has been lost."[94] He is correct.

One reason has been the judicially imposed remedy of evidence suppression. For the past century, the exclusionary rule has been the principle remedy available to those claiming that their Fourth Amendment rights were violated.[95] Because the remedy of suppression is relevant only when there is something to suppress, it is not surprising that cases reviewed by the Supreme Court are likely to include the discovery of incriminating evidence.[96] These decisions suppressing incriminating evidence can function as a general deterrent that protects the rights of others, including innocent people, by deterring police misconduct.[97]

But when the courts suppress evidence, it is because the defendants' personal rights were violated.[98] Indeed, the Supreme Court has been unwavering in insisting that Fourth Amendment rights are personal and cannot be asserted to benefit anyone not a victim of an illegal search or seizure.[99] The decisions enforcing the property or privacy rights of guilty

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90. *Id.*

91. *Id.*

92. *Id.* at 138.

93. *See* Loewy, *supra* note 1, at 1230.

94. *Id.* at 1272 (footnotes omitted).

95. *See* Weeks v. United States, 232 U.S. 383, 391–93 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643, 653 (1961); *see also* Roots, *supra* note 78, at 4–5.

96. United States v. Leon, 468 U.S. 897, 901–02 (1984).

97. *See, e.g.*, Herring v. United States, 555 U.S. 135, 137 (2009); *Leon*, 468 U.S. at 901–02.

98. *See* United States v. Payner, 447 U.S. 727, 734–35 (1980).

99. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 111 (1980); United States v. Salvucci, 448 U.S. 83, 87 (1980); *Payner*, 447 U.S. at 735; Rakas v. Illinois, 439 U.S. 128, 132 (1978).

individuals are legion,[100] and even after decades of Supreme Court opinions weakening the exclusionary rule, the Court continues to enforce the Fourth Amendment rights of people manifestly guilty of criminal conduct.[101] The Constitution does not immunize guilty people from government investigations, but it does guarantee their right to be secure from unreasonable searches and seizures.

V. CONCLUSION

Professor Loewy's conclusion includes three elements that illustrate why the debate about the innocence theory is more important now than when he articulated it nearly forty years ago. First, the number of *divining rod* technologies is far greater today.[102] In 1983, he could justify his argument by offering the one example common in litigation of that era.[103] "Therefore, devices such as marijuana-sniffing dogs which can only detect contraband and do not intrude upon the innocent ought to be allowed regardless of probable cause or a warrant."[104] Today, police still use drug-detecting canines. But ubiquitous twenty-first century digital technologies permit searches and seizures of information that are infinitely more intrusive than a trained canine's olfactory powers.[105]

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100. *See* Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018) ("Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection."); Riley v. California, 573 U.S. 373, 408 (2014) (Alito, J., concurring in part) (citation omitted) ("Modern cell phones are of great value for both lawful and unlawful purposes. They can be used in committing many serious crimes, and they present new and difficult law enforcement problems. At the same time, because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests . . . ."); Florida v. Jardines, 569 U.S. 1, 9 (2013) ("The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics."); Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that thermal imaging outside a home cannot be used without a warrant to detect marijuana plants within the home); Katz v. United States, 389 U.S. 347, 363–64 (1967) (White, J., concurring) (stating that wagering information gathered by the government on a public payphone could not be used against the defendant without a warrant); Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring) (quoting *Weeks*, 232 U.S. 383 at 393) ("[I]f evidence seized in violation of the Fourth Amendment can be used against an accused, 'his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.'"); *Weeks*, 232 U.S. at 393 ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by" sacrificing the great fundamental rights secured by the Constitution.); Boyd v. United States, 116 U.S. 616, 629 (1886) (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB)) ("[T]he law oblige[s] no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust . . . .").

101. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2222; *Riley*, 573 U.S. at 401; *Jardines*, 569 U.S. at 11; United States v. Jones, 565 U.S. 400, 412 (2012); *Kyllo*, 533 U.S. at 34.

102. *See* Loewy, *supra* note 1, at 1244.

103. *See id.*

104. *Id.* at 1272.

105. *See* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2019) (arguing that the corporate motive to profit from the extreme connectivity of modern society threatens basic human

Second, even in 1983, Professor Loewy was concerned that the Supreme Court "has failed to recognize the value of the exclusionary rule as a device for protecting the innocent. Consequently the rule has been restricted so much that it fails to offer innocent citizens the protection to which they should be entitled under the [F]ourth [A]mendment."[106] Many of those restrictions were imposed in the preceding decade.[107] In the succeeding decades, the Court has imposed much greater limits on the scope of the suppression remedy.[108] From the perspective of advocates of the innocence theory, the exclusionary rule is now a less effective device for protecting innocent people from unreasonable government intrusions.[109]

Third, Professor Loewy's arguments require us to define the essential nature and purpose of the Fourth Amendment. He argues that:

> The [F]ourth [A]mendment is designed to protect innocent people, *i.e.*, people who have not committed a crime or who do not possess sought-after evidence. Criminals or those who possess evidence of crime are allowed to object to the manner in which such evidence was obtained only because the search or seizure may have created an unjustifiably high risk of an intrusion upon an innocent person's privacy.[110]

This theory contradicts the text, history, and long-established jurisprudence of the Fourth Amendment. The right to be secure from unreasonable searches and seizures does not depend upon the results of the government intrusion.[111]

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freedoms and democratic governance). *Compare Riley*, 573 U.S. at 394–98 (discussing how cell phones contain vast amounts of information), *with Jardines*, 569 U.S. at 8–9 (exploring whether a police officer and a drug-sniffing dog had an invitation to sniff around a home).

106. Loewy, *supra* note 1, at 1272.

107. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 147–49 (1978) (discussing that vehicle passengers lacked legitimate expectation of privacy in areas of the vehicle subject to search); Harris v. New York, 401 U.S. 222, 222 (1971) (statement inadmissible due to *Miranda* violation may be used to impeach defendant's trial testimony).

108. *See, e.g.*, Herring v. United States, 555 U.S. 135 (2009) (holding that an error in police records did not trigger the exclusionary rule); Hudson v. Michigan, 547 U.S. 586, 586–87 (2006) (holding that a violation of the knock-and-announce rule did not require the suppression of all of the evidence found in the search); United States v. Leon, 468 U.S. 897 (1984) (stating that the exclusionary rule is inapplicable where police acted in reasonable reliance on an invalid search warrant); s*ee also* Morgan Cloud, *A Conservative House United*: *How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 512 (2013) (discussing cases that strengthened characteristics of the exclusionary rule).

109. Loewy, *supra* note 1, at 1272.

110. *Id.*

111. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1309–10 (1990) (footnote omitted) ("The [F]ourth [A]mendment prohibits *all* arbitrary government intrusions—even intrusions that later reveal that a person is guilty of a crime. The [F]ourth [A]mendment was meant to limit government authority, even when that authority appears to serve benevolent purposes."); *see also* Batchelor v. State, 125 N.E. 773, 778 (Ind. 1920) ("The safeguards erected by the Constitution are intended to protect the rights of all citizens alike. They protect the rights of the guilty as well as those of the innocent."); Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 509–10 n.260 (1986) ("[I]t is disingenuous to argue, as many do, that the framers meant the guarantee against unlawful search and seizure to protect only the innocent."); Stephen

The Amendment was not created to facilitate government intrusions into the property and privacy of the people.[112] It was enacted to serve as a limit on that power and to protect the innocent and guilty alike.[113]

No one has surpassed Justice Brandeis's explanation of why technological intrusions may pose the greatest threats to our liberties—although he wrote about simple analog wiretapping technology used by federal agents nearly a century ago.

> When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify —a compulsion effected, if need be, by torture. . . . But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.[114]

The threats to privacy and liberty posed by contemporary digital technologies exceed anything possible from when Justice Brandeis wrote. The new conditions we face today, like the conditions experienced by those who created the nation and the Bill of Rights, support the conclusion that the innocence theory is simply wrong.[115]

This conclusion does not diminish the importance of Professor Loewy's critique. Any legal scholar would be pleased to discover that his ideas were relevant almost two generations after they were published. Professor Loewy's work remains vital today because of the sophistication and prescience of his ideas and advocacy. This is work that shapes the ideas of both those who adopt it and those who dispute it. This is the work not just of an important scholar. It is the work of an essential thinker, scholar, and teacher.

A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 15 (1986) (footnote omitted) ("In a footnote the Court added that '[c]ertainly the Framers did not intend that the Fourth Amendment should shelter criminal activity whenever persons with criminal intent choose to erect barriers and post no trespassing signs.' But surely this is exactly the Framers' intent if the activity that is criminal takes place in a house or . . . another constitutionally protected area.").

112. *See, e.g.*, Maclin, *supra* note 111, at 1309–10.

113. *See id.*

114. Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

115. *See* ZUBOFF, *supra* note 105; Boyd v. United States, 116 U.S. 616, 624–25 (1886).