ARNOLD LOEWY: THOUGHT LEADER, CHAMPION OF THE INNOCENT, PROGNOSTICATOR, SURVEILLANT

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Professor Arnold Loewy frequently cites his 1983 article, *The Fourth Amendment as a Device for Protecting the Innocent*, as his signature piece.[1] Although he has produced scores of other important books, articles, essays, and plays, there can be no doubt that this article is part of his lasting legacy. Not only was it groundbreaking in 1983, but it also accurately predicted some of the Supreme Court's most significant decisions and offered wise counsel on many of the most pressing Fourth Amendment questions that face us today.

I. ARNOLD LOEWY: THOUGHT LEADER AND CHAMPION OF THE INNOCENT

To appreciate fully the importance of this work, it is worth reminding ourselves of the worrying state of the Fourth Amendment doctrine in 1983. By that time, *Katz v. United States* was sixteen.[2] Prior to that landmark decision, the Supreme Court had tied the definition of *searches* in the Fourth Amendment to physical intrusions.[3] As a result, government agents enjoyed unfettered discretion to deploy and use wiretapping devices[4] and other eavesdropping technologies,[5] so long as they were careful to avoid physical

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

2. *See id.*; Katz v. United States, 389 U.S. 347 (1967).

3. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928), *overruled by Katz*, 389 U.S. 347, *and* Berger v. New York, 388 U.S. 41 (1967).

4. *Id.*

5. *See, e.g.*, Goldman v. United States, 316 U.S. 129, 131 (1942) (explaining that the use of "a detectaphone" applied to the exterior of a wall adjoining defendant's office is not a search).

intrusions onto "persons, houses, papers, and effects" when installing those devices.[6]

The Court famously broke from a physical definition of *search* with its 1967 decision in *Katz v. United States*.[7] Writing for the majority in *Katz*, Justice Potter Stewart located the Fourth Amendment's center of gravity in individual privacy interests, concluding that "the Fourth Amendment protects people, not places. . . . [and that] what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[8] In his famous concurring opinion, Justice John Harlan II reduced this new approach to "a twofold requirement, first that a person . . . exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[9]

Katz marked a progressive turn in the Supreme Court's Fourth Amendment jurisprudence. It shifted attention away from an artificially limited definition of search grounded in property rights and physical security toward a broader recognition of the privacy interests that may be invested in those places,[10]but often extend beyond them.[11] The shift also represented a critical response to significant expansions of governmental power enabled by new surveillance technologies, including wiretaps and eavesdropping

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6. U.S. CONST. amend. IV; *see, e.g.*, Silverman v. United States, 365 U.S. 505, 506 (1961) (using a "spike" microphone inserted through a party wall, making contact with the heating duct in defendant's home, is a search).

7. *See Katz*, 389 U.S. at 353.

8. *Id.* at 351.

9. *Id.* at 361 (Harlan, J., concurring).

10. *Id.* The Court's practice of defining a search exclusively in terms of physical intrusions traces to *Olmstead v. United States*. *Olmstead*, 277 U.S. at 466. Of course, that definition of a search excludes a host of activities that were regarded as searches by any common parlance use of the word. *See* DAVID GRAY, THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE 158–60 (2017). That discursive community includes colonial and early American courts. *See, e.g.*, WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at 320, 322 (2009) (quoting London Journal, Sat., 24 Apr. 1731 (no. 613), p.2, col. 4) (first citing English magistrate's order commanding "officers 'to make diligent search' for able-bodied vagrants"; then citing English magistrate's report describing "Rogues, Vagabonds, sturdy Beggars, and disorderly Persons apprehended by virtue of search Warrants[,] in Night Houses and other disorderly Houses or such as infest the Streets in the Night-time"); GENTLEMAN OF THE LAW, THE CONDUCTOR GENERALIS, OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 198 (M. Carey ed., Philadelphia 1801) (noting the authority of a constable or sheriff to "search in his town for suspected persons" and advising that "it is a good course to have the warrant of a justice of the peace when time will permit, in order to prevent causeless hue and cry"); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1233 n.304 (2016) (quoting William Sheppard, *The Offices of Constables*, ch. 8, § 2 n.13 (Hondgkinsonne 2d ed. c. 1675)) ("Th[e] Officer receiving a *Hue and Cry* after a Fellon, must, with all speed, make diligent pursuit, with Horse and Foot, after the offendors from Town to Town the way it is sent, and make diligent search in his own Town.").

11. *See* GRAY, *supra* note 10. Of course, the Court could have accomplished the same immediate goals while also building a firmer foundation for Fourth Amendment jurisprudence going forward by simply adopting a more familiar definition of search as: looking for, looking through, or trying to find. *Id.* at 158–60 (arguing that "search" in the Fourth Amendment should be read for its original public meaning).

devices.[12] It also reminded us that the Bill of Rights, inclusive of the Fourth Amendment, sets limits on government power preserving for the people a level of autonomy and personal sovereignty that would be dramatically curtailed by granting government agents unfettered discretion to conduct electronic surveillance.[13] Concerns about abuses of surveillance powers proved to be well-founded.[14] In the years following the *Katz* decision, journalistic and congressional investigations revealed that government agencies were engaged in programs of broad and arbitrary domestic surveillance.[15] Unfortunately, *Katz* also contained a poison pill—its focus on individual privacy interests.[16] In the years that followed, exploitation of that flaw resulted in a dramatic contraction of Fourth Amendment protections, compromising the security against unreasonable searches and seizures the Fourth Amendment guarantees.[17]

After Warren Burger was confirmed as Chief Justice in 1969, the Court set a course to curtail the progressive potential of *Katz*.[18] It did so by exploiting the fact that the Harlan test, which the Court adopted as its new definition of *search*, focuses primarily on the privacy interests of individuals—most of whom are criminals seeking to suppress evidence.[19] The fruits of those efforts were the public observation doctrine, the third-party doctrine, and rules governing "standing" in Fourth Amendment cases.[20] The public observation doctrine grants law enforcement officers unfettered discretion to conduct any observations they like and from any place where they have a lawful right to be.[21] The third-party doctrine holds that the Fourth Amendment is not implicated when government agents gain access to voluntarily-shared information through a third party.[22] Together,

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12. *See* Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 591–92 (2011).

13. *See Katz*, 389 U.S. at 358–59.

14. *See infra* note 149 and accompanying text (explaining that unchecked government surveillance is susceptible to abuse and may alter the relationship between citizens and the government).

15. *See, e.g.*, S. REP. NO. 94-755 (1976); *Wiretapping and Electronic Surveillance: Hearings on H.R. 1547, H.R. 7773, H.R. 9781, H.R 9815, H.R. 9973, H.R. 10008, H.R. 10331, H.R. 1624, H.R. 11830, & H.R. 13825 Before Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the Comm. on the Judiciary*, 93rd Cong. (1974); Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974 at A1.

16. *See Katz*, 389 U.S. at 350.

17. GRAY, *supra* note 10, at 78–92.

18. David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 9–13 (2013).

19. *See infra* notes 38–40 and accompanying text (explaining how Chief Justice Burger's curtailment of *Katz* gutted substantive Fourth Amendment Rights).

20. GRAY, *supra* note 10, at 78–92.

21. *See* Florida v. Riley, 488 U.S. 445, 450–52 (1989); Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986); California v. Ciraolo, 476 U.S. 207, 213–15 (1986) (holding that observations made from public airspace is not a search); United States v. Knotts, 460 U.S. 276, 284–85 (1983) (holding that use of beeper tracking devices to monitor movements on public roads is not a search).

22. *See* Smith v. Maryland, 442 U.S. 735, 745 (1979) (accessing call records from a telephone company is not a search); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 69–70 (1974) (accessing financial

these two doctrines grant government agents unfettered discretion to engage in a wide array of surveillance and investigative activities including: tracking,[23] monitoring telephonic "metadata,"[24] accessing financial data,[25] and surveilling the curtilage and interiors of homes from public space.[26] At the same time, the Court set strict limits on who can challenge a search,[27] and the ability of individuals to compel reform through demands for injunctive relief.[28] The rules governing standing pushed the Fourth Amendment doctrine further toward a focus on individual privacy interests.[29] Because Fourth Amendment claims arise most often in the context of criminal cases, this meant that Fourth Amendment rights came to be associated with the privacy claims by demonstrably guilty individuals seeking to exploit "technicalities" in an effort to avoid punishment.[30] The result was predictable: courts increasingly withdrew from the field, granting more discretion to government agents and dramatically diminishing Fourth Amendment rights.[31]

In a posture akin to Walter Benjamin's Angel of History,[32] Professor Loewy looked at this pile of constitutional carnage in 1983 and wondered whether we had made any progress at all in the years after *Katz*.[33] He thought not, and for one simple reason: the Court routinely failed to identify the real

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records through a bank is not a search); United States v. White, 401 U.S. 745, 754 (1971) (holding that it is not a search for a government agent to secretly record conversations).

23. *Knotts*, 460 U.S. at 284.

24. *Smith*, 442 U.S. at 745.

25. *Cal. Bankers Ass'n*, 416 U.S. at 76.

26. *See Riley*, 488 U.S. at 448–49; *Ciraolo*, 476 U.S. at 209–10.

27. *See* United States v. Payner, 447 U.S. 727, 732 (1980) (challenging the government's unlawful seizure of bank records); *see also* Rakas v. Illinois, 439 U.S. 128, 143 (1978) (explaining that only persons with a legitimate expectation of privacy have standing under the Fourth Amendment to challenge a search).

28. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that individuals may only demand prospective injunctive relief if they can both demonstrate a violation of their Fourth Amendment rights and "establish a real and immediate threat that" they will suffer a similar violation in the future).

29. David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77, 89–97 (2018).

30. *See* Loewy, *supra* note 1, at 1230–31.

31. *See* GRAY, *supra* note 10, at 68–103.

32. WALTER BENJAMIN, *Ninth Thesis on the Philosophy of History*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 257–58 (Hannah Arendt ed., 1968) ("'Angelus Novus' shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring; his mouth is open; his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.").

33. Loewy, *supra* note 1, at 1272 (footnotes omitted) ("Many 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.").

party of interest in Fourth Amendment cases.[34] In keeping with views tracing back to an infamous 1964 article by then-Judge Burger in the *American University Law Review*, the Court spent most of its emotional energy in Fourth Amendment cases worrying about windfalls to guilty defendants who sought to exclude the best evidence against them.[35] Recognizing rights in these individual cases meant suppressing critical evidence, with the result that the guilty would go free.[36] Following this rhetorical line, Justice Burger argued that the Fourth Amendment exclusionary rule could only be justified, if at all, as a general deterrent.[37] When he joined the Court as Chief Justice in 1969, two years after *Katz*, Chief Justice Burger led a sustained crusade to limit the damage to truth and justice wrought by the exclusionary rule.[38] Unfortunately, the Burger Court pursued this goal not by developing alternative remedies for Fourth Amendment violations, but by gutting substantive Fourth Amendment rights.[39] The result, as Professor Loewy pointed out in 1983, was a series of deep cuts to the Fourth Amendment, dramatically reducing the scope and force of its protections.[40]

In *The Fourth Amendment as a Device for Protecting the Innocent*, Professor Loewy squarely rejected the Court's decision to focus on the privacy interests of individual defendants in Fourth Amendment cases.[41] As a corrective, he argued that "in construing the [F]ourth [A]mendment, the Court's primary focus should be on the effect of its pronouncements on the innocent."[42] Courts should be concerned not with the litigant at bar, but with the effects of its decisions on the rest of us.[43] He derived this conclusion from a simple and profound proposition: that the Fourth Amendment is designed as a constraint on state power.[44] As he put it, "[t]he single theme running through the entire history of the [F]ourth [A]mendment is **arbitrariness**."[45] Pointing to the commandment-like language in the text—"the right of the

34. Loewy, *supra* note 1, at 1230–31, 1272.

35. Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 10–14 (1964); *see generally* Gray, *supra* note 18 (criticizing Justice Burger's article and the jurisprudence it spawned).

36. *See, e.g.*, Loewy, *supra* note 1, at 1271 (highlighting Fourth Amendment distortion by the exclusionary rule); Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 571, 584 (2013) (proposing a fault-based alternative to the exclusionary rule to allow for redress of innocent parties); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 366, 401–05 (1999) (explaining structural and heuristic failures of the exclusionary rule and proposing instead an administrative damages regime).

37. Burger, *supra* note 35, at 4–10.

38. Gray, *supra* note 18, at 19–20.

39. Loewy, *supra* note 1, at 1256.

40. *Id.*; s*ee also* Arnold H. Loewy, *A Modest Proposal for Fighting Organized Crime: Stop Taking the Fourth Amendment So Seriously*, 16 RUTGERS L.J. 831 (1985) (displaying a satirical vision of the world, in the spirit of Jonathan Swift, as it would look were the underlying premises of the Court's Fourth Amendment and exclusionary rule doctrine followed to their logical ends).

41. Loewy, *supra* note 1, at 1231.

42. *Id.* at 1230.

43. *See id.*

44. *Id.* at 1239–40.

45. *Id.* at 1239 (emphasis added).

people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, **shall not** be violated"[46]—Professor Loewy contended that "the grand criterion of the [F]ourth [A]mendment is that there **shall be no** arbitrary, *i.e.*, unreasonable, searches and seizures."[47]

On Professor Loewy's account, recognizing these two profound truths about the Fourth Amendment should broaden the Court's field of vision in Fourth Amendment cases. Instead of focusing on individual defendants seeking to suppress evidence, the Court should recognize that it is writing rules to protect the rest of us—the innocents—against arbitrary uses of state power. The Court does not issue constitutional rules for individual cases.[48] It creates general rules that apply in all situations.[49] When, in order to avoid the suppression of evidence in a particular case, the Court fashions a rule granting broader discretionary powers to search or seize, that rule affects each of us and all of us, not just those who commit crimes.[50] By 1983, the hoary claim that only criminals need fear the police had been thoroughly debunked by the facts.[51] In reality, government agencies exploited their discretionary powers to target political rivals, civil rights advocates, and perfectly innocent citizens living in neighborhoods deemed "high crime."[52] More arbitrary or pernicious uses of state power are difficult to imagine.

In Professor Loewy's view, much of this disaster could have been avoided had the Court maintained a focus on protecting the innocent. For example, he argues that the Court would take a much more cautious approach to eavesdropping and recording devices.[53] That is because granting agents unfettered discretion to deploy and use these devices leaves us to wonder whether we are being recorded while exercising our basic rights to free speech.[54] It was only by virtue of the Court's myopic focus on individual defendants that the Court became blind to threats of broad and indiscriminate surveillance that follow from its decision to grant law enforcement agents arbitrary authority to use electronic monitoring devices.[55]

Professor Loewy takes a similarly dim view of the Court's consent jurisprudence, and particularly, its consistent holding that consent to search does not require knowledge of the right to refuse a request to search.[56] His criticism is twofold. First, he objects to the idea of consent searches, because

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46. U.S. CONST. amend. IV (emphasis added).

47. Loewy, *supra* note 1, at 1240 (emphasis added).

48. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285 (1976).

49. *See id.* at 1286.

50. *See* Loewy, *supra* note 1, at 1261, 1263.

51. *See generally id.* at 1250–56.

52. *See* sources cited *supra* note 15 (describing House Report hearing concerning broad and arbitrary domestic surveillance).

53. Loewy, *supra* note 1, at 1252–54.

54. *Id.* at 1252–53.

55. *See id.* at 1254–56.

56. *Id.* 1257–63.

by definition, they grant arbitrary power for government agents to interfere with innocent persons.[57] This is because the Court has held that police officers have carte blanche to ask for consent.[58] It then relies on citizens to know that they are free to simply ignore a police officer who hails them, and it relies on officers to shrug off being rebuffed.[59] All of this is folly, of course.[60] By contrast, limiting searches to situations where probable cause exists would protect most innocent people—most of the time—from the threat of petty harassment by police officers.[61] Second, by allowing officers to manipulate "voluntary" interactions with citizens and by not requiring them to notify targets of their right to refuse to consent, the Court denies innocent persons the knowledge, perspective, and power to control their engagements with police officers.[62] Here, again, the results are predictable: police officers exploit citizens' naiveté and fear to circumnavigate the Fourth Amendment's prohibition on the arbitrary use of state power.[63]

Professor Loewy also argues that the Court would take a different view of standing in Fourth Amendment cases were it to focus on innocents and the arbitrary use of government power, rather than on individual defendants' personal expectations of privacy.[64] By 1983, the Court had settled on general deterrence as the primary justification for the exclusionary rule.[65] On this point, Professor Loewy agreed with the Court precisely because general deterrence puts the focus on innocents, rather than individual defendants.[66] As he points out, however, the Court was intellectually unfaithful to itself when asked who should have standing to seek the exclusion of evidence.[67] In the Court's view, only individuals who have suffered personal violations of their reasonable expectations of privacy have standing to seek the exclusion of unlawfully seized evidence.[68] Focusing on guilty people licenses arbitrary and unjustified searches of innocent persons because by definition, innocent

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57. *Id.* at 1257, 1263.

58. *See id.* at 1257–63.

59. *See id.*

60. *See id.* On this point, consider *Morgan v. Woessner*, wherein Hall of Fame baseball player Joe Morgan was accosted by police officers at the airport, attempted to refuse their request that he "go with [them]," and was then thrown to the ground, handcuffed, and partially asphyxiated by the officers. Morgan v. Woessner, 997 F.2d 1244, 1248 (9th Cir. 1993). This command and control or "warrior" model of policing is widely implicated in all manner of unconstitutional policing, including excessive use of force. *See, e.g.*, Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 229–30 (2015). Although Joe Morgan was ultimately able to pursue some vindication of his rights, incidents such as these are common place in many neighborhoods. *See id.*; *Morgan*, 997 F.2d at 1262.

61. Loewy, *supra* note 1 at 1257–63.

62. *See id.*

63. *See id.*

64. *Id.* at 1269–72.

65. *See* Gray, *supra* note 18, at 19–21.

66. Loewy, *supra* note 1, at 1269.

67. *Id.* at 1268–69.

68. *Id.* at 1269–71 (first citing Rawlings v. Kentucky, 448 U.S. 98 (1980); then citing Rakas v. Illinois, 439 U.S. 128 (1978)).

people will not be prosecuted, and therefore, will not seek the exclusion of evidence.[69] As a result, the Court "altered the right, not merely the remedy,"[70] which, "[f]rom the perspective of the innocent . . . is positively perverse."[71]

II. A TEXTUAL FOUNDATION FOR PROTECTING THE INNOCENT

Although Professor Loewy's 1983 article was revolutionary, there are good textual and historical foundations for his view that the true party of interest in Fourth Amendment cases is all of us—the innocents—otherwise unrepresented at bar. First, there is the text of the Amendment itself, which guarantees 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."[72] Notably, the text does not say anything about the right of individual persons to their subjectively manifested and reasonable expectations of privacy.[73] Given other uses of "the people" in the Constitution, including in the Preamble,[74] there is every reason to believe that the referent here is to the people of the United States as a whole[75]—to each of us and all of us, Professor Loewy's innocents.[76]

Historical events giving rise to the Fourth Amendment also support Professor Loewy's view that the primary parties of interest in the Fourth Amendment are the innocents. The primary bête noire for the Fourth Amendment was the general warrant[77] "whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence."[78] Eighteenth century concerns about general warrants run parallel to Professor Loewy's concerns for the innocent.[79] For example, Lord Camden held in 1763 that general warrants were contrary to common law because they granted "discretionary

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69. *Id.* at 1270. Professor Loewy's concerns in this regard are far from idle, as his citation to *United States v. Payner* shows. *Id.* (citing United States v. Payner, 447 U.S. 727 (1980)). In *Payner*, government agents deliberately carried out an illegal search of a third party's briefcase in order to obtain evidence against Payner. *See Payner*, 447 U.S. at 730. They did so knowing that they would face no consequences for their actions because Payner would not have "standing" to challenge the search. *See id.*; Gray, *supra* note 29, at 91.

70. Loewy, *supra* note 1, at 1271.

71. *Id.* at 1270.

72. U.S. CONST. amend. IV (emphasis added).

73. GRAY, *supra* note 10, at 146–58; *see* David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181 (2015) (providing an extensive defense of this interpretation).

74. U.S. CONST. pmbl. ("WE **THE PEOPLE** of the United States, in Order to form a more perfect Union . . . .") (emphasis added).

75. *See* 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 1478 (4th ed. 1777) (defining "PE'OPLE" as "A nation; those who compose a community.").

76. *See* Loewy, *supra* note 1, at 1229–30.

77. *See* GRAY, *supra* note 10, at 141–44, 160–65.

78. VA. DECLARATION OF RTS § X.

79. *See* Loewy, *supra* note 1, at 1239.

power . . . to messengers to search wherever their suspicions may chance to fall. . . . [which] affect[s] the person and property of every man in this kingdom,"[80] and "would destroy all the comforts of society."[81] Those worries crossed the Atlantic to become a central feature of our early Fourth Amendment culture.[82] For example, Chief Judge Reeve of the Connecticut Court of Errors opined in 1814 that allowing a general warrant to stand would leave "every citizen of the *United States* within the jurisdiction . . . liable to be arrested and carried before the justice for trial."[83]

So, from a textual and historical point of view, Professor Loewy is absolutely right to argue that the Fourth Amendment is designed to protect the innocent. Although individual litigants bring Fourth Amendment claims, they stand as class representatives of sorts. They represent each of us and all of us. Professor Loewy is also right to point out that the Court has lost sight of this basic feature of the Fourth Amendment. That is evident not only in its exclusionary rule jurisprudence but in every case where the Court calculates reasonableness by balancing competing interests. As Shima Baradaran has pointed out, these calculations often pit broad security and law enforcement interests against the privacy interests of individuals.[84] This results in a doctrine that, in Professor Loewy's words, is "positively perverse."[85] Those calculations would come out differently if we recognized that the interests of the people are on both sides of the equation.

There are also strong textual and historical grounds for Professor Loewy's view that the primary purpose of the Fourth Amendment is to guard against arbitrary uses of state power. That goal is evident in the warrant clause, which describes in clear terms a remedial measure designed to limit the discretionary and arbitrary use of search and seizure powers.[86] Concerns about broad grants of discretion and the arbitrary use of state power were also central to common-law critiques of general warrants.[87] For example, the court in *Money v. Leach* opined that "[i]t is not fit, that the receiving or judging of the information should be left to the discretion of the officer."[88] In *Wilkes v. Wood*, Chief Justice Pratt condemned general warrants because of the "discretionary power given to messengers to search wherever their

80. Wilkes v. Wood (1763) 98 Eng. Rep. 489 (KB).

81. Entick v. Carrington (1765) 95 Eng. Rep. 807, 817 (KB).

82. *See* Grumon v. Raymond, 1 Conn. 40 (1814) (addressing the dangers of general warrants).

83. *Id.* at 43.

84. Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 29 (2013).

85. Loewy, *supra* note 1, at 1270.

86. *See* GRAY, *supra* note 10, at 169–72; David Gray, *Fourth Amendment Rights as Remedies*, 96 B.U. L. REV. 425, 478–81 (2016).

87. *See* Money v. Leach (1765) 97 Eng. Rep. 1075, 1088 (KB).

88. *Id.*; *see also* William De Grey, *Opinion of Attorney General De Grey upon Writs of Assistance*, 7th Geo. 3d, Ch. 46 (1768) ("[I]t will be unconstitutional to lodge such a Writ in the Hands of the Officer, as it will give him a discretionary Power to act under it in such Manner as he shall think necessary.").

suspicions may chance to fall."[89] The court in *Huckle v. Money* criticized agents of the crown for "exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of [the] general warrant."[90]

In the colonies, James Otis inveighed against writs of assistance and general warrants as "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," in part because they allowed representatives of the crown to "imprison, or murder any one within the realm" whom they might choose as a target.[91] Expanding on these concerns, James Otis worried about the rise of a surveillance state licensed by general warrants and a subsequent breakdown in social order in which "one arbitrary exertion will provoke another, until society be involved in tumult and in blood."[92] Commenting on this early history in *Boyd v. United States*, Justice Joseph Bradley noted that "[t]he struggles against arbitrary power in which [the founders] had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."[93] Justice Jackson reached the same conclusion in *United States v. Di Re*, writing that "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."[94]

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89. Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498 (KB); *see also* Entick v. Carrington (1765) 95 Eng. Rep. 807, 817 (KB) (explaining that the decision to search and seize was "left to the discretion of these defendants").

90. Huckle v. Money (1763) 95 Eng. Rep. 768, 769 (KB).

91. James Otis, *Against Writs of Assistance* (Feb. 1761), https://novaonline.nvcc.edu/Eli/his268/readings/Otis.pdf. John Adams would later describe Otis's speech as "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." 10 WORKS OF JOHN ADAMS 247–48 (C. Adams ed. 1856) (quoted in Riley v. California, 573 U.S. 373, 403 (2014)).

92. Otis, *supra* note 91, at 2 ("[I]f it should be established, I insist upon it every person, by the 14th Charles Second, has this power as well as the custom-house officers. The words are: 'It shall be lawful for any person or persons authorized,' etc. What a scene does this open! Every man prompted by revenge, ill-humor, or wantonness to inspect the inside of his neighbor's house, may get a Writ of Assistance. Others will ask it from self-defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.").

93. Boyd v. United States, 116 U.S. 616, 630 (1886).

94. United States v. Di Re, 332 U.S. 581, 595 (1948). The Court quoted Justice Jackson on this point in *Carpenter v. United States*. Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018). *See also* United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (quoting *Di Re*, 332 U.S. at 595) ("I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance.'").

III. ARNOLD LOEWY: PROGNOSTICATOR

What all this makes clear is that Professor Loewy rightly puts the people as a whole at the center of the Fourth Amendment. He is correct to recognize that rules promulgated by the courts apply generally, impacting the rights of each of us and all of us to be secure against unreasonable searches and seizures. Finally, he properly identifies broad discretion and the arbitrary use of state power as a primary source of danger for the security of the people, and therefore, a primary target for the Fourth Amendment. But we also know that by 1983, the Court had abandoned these principles.[95] So does that make the centerpiece of Professor Loewy's legacy merely academic? Fortunately for us all, the answer is no.

For thirty years after Professor Loewy published *The Fourth Amendment as a Device for Protecting the Innocent*, the Court largely ignored his sage advice. It continued to focus its attention in Fourth Amendment cases on the narrow privacy interests of individuals at bar, virtually forgetting the vast numbers of unrepresented innocents.[96] That started to change in 2012 when the Court began to grapple with new and emerging technologies.[97] That year, the Court asked whether the use of GPS tracking technology to monitor a driver traveling over public roads implicated the Fourth Amendment.[98] The question seemed to be well-settled by *United States v. Knotts*.[99] In that case, the Court held that, pursuant to the public observation doctrine, using a radio beeper tracking device to monitor a driver traveling over public roads is not a *search* for purposes of the Fourth Amendment.[100] Granted, GPS tracking technology is more efficient than radio beepers, but the *Knotts* Court anticipated the point, holding that such arguments "simply ha[ve] no constitutional foundation."[101]

During oral argument in *United States v. Jones*, the government relied heavily on *Knotts* and for good reason.[102] The use of GPS tracking just did not seem to raise a new constitutional question.[103] Then, just a few minutes into the government's argument, Chief Justice John Roberts asked Assistant Solicitor General Michael Dreeben whether "[y]ou think there would also not be a search if you put a GPS device on all of our cars, monitored our

95. *See* Loewy, *supra* note 40 (discussing Professor Loewy's analysis in 1983 of the Court's approach to the Fourth Amendment).

96. Loewy, *supra* note 1, at 1249, 1253–54.

97. *See* United States v. Jones, 565 U.S. 400, 409–11 (2012) (discussing the different information that is gathered from a GPS tracker compared to a radio beeper).

98. *Id.* at 416.

99. *See* United States v. Knotts, 460 U.S. 276 (1983).

100. *Id.* at 285.

101. *Id.* at 284.

102. *See* Oral Argument at 0:43, 1:15, 9:20, 12:08, 14:00, 20:29, 21:34, United States v. Jones, 565 U.S. 400 (2012) (No. 10-1259), https://www.oyez.org/cases/2011/10-1259.

103. *Id.* at 0:41.

movements for a month? You think you're entitled to do that under your theory?"[104] At that moment, Professor Loewy and his fans jumped out of their seats and cried "Hallelujah."

The Chief Justice's question during oral argument in *Jones* marked a turning point for the Court. It signaled a glimmering recognition that individual criminal defendants are not the only parties of interest in Fourth Amendment cases.[105] At long last, the Court seemed to remember that the Fourth Amendment is a device to protect the innocent, and if the Court granted government agents unfettered discretion to deploy and use GPS tracking devices, the Justices would be putting innocents—including themselves—at risk.[106]

The Court ultimately resolved *Jones* on narrow grounds by focusing on the physical intrusion required to install the tracking device rather than the tracking accomplished with the device.[107] But Justice Sotomayor, who joined the majority, wrote a separate concurrence that picked up on two major themes familiar from Professor Loewy's work: the breadth of the threat GPS tracking posed and the dangers arising from grants of arbitrary power to search.[108] She wrote:

> Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."
>
> . . . I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance."[109]

In subsequent cases, these themes have become central to the Court's application of the Fourth Amendment to modern technologies. Take, as an example, *Riley v. California*.[110]

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104. *Id.* at 7:03.

105. *See generally* Loewy, *supra* note 1, at 1249, 1253–54 (explaining that the Court has an interest in protecting the innocent from intrusion).

106. David Gray, *Collective Rights and the Fourth Amendment After* Carpenter, MD. L. REV. (forthcoming 2019).

107. United States v. Jones, 565 U.S. 400, 411–13 (2012).

108. *Id.* at 416 (Sotomayor, J., concurring).

109. *Id.* (citations omitted).

110. *See* Riley v. California, 573 U.S. 373 (2014).

In *Riley*, a unanimous Court held that officers cannot rely on the "search incident to arrest" rule to justify the search of a cell phone.[111] In reaching that holding, the Chief Justice made tremendous hay about the ubiquity of cell phones, "which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy,"[112] something that "a significant majority of American adults now own."[113] In making these points, the Court shows its awareness that more was at stake than Riley's personal expectations of privacy.[114]

Following Professor Loewy's lead, the Court crafted its holding with a clear understanding that it was protecting the innocent. This is a point that became even more clear in the closing passages of the majority opinion, where the Chief Justice linked the Court's holding to founding-era battles against general warrants and writs of assistance, "the arbitrary claims of Great Britain," that inspired our founders to ratify the Fourth Amendment.[115]

Professor Loewy's influence appeared again in the Court's landmark 2018 decision in *Carpenter v. United States*.[116] The question presented to the Court in that case was whether government agents need a search warrant to obtain cell site location information (CSLI) from a cellular service provider.[117] CSLI is information that is shared voluntarily between cellular phone users and their service providers, and is gathered and stored by cell phone companies for their own business purposes.[118] By these lights, the third-party doctrine would exclude CSLI from Fourth Amendment protections for the same reasons it excludes telephonic metadata from Fourth Amendment protections.[119] In a controversial 5–4 decision, the *Carpenter* Court "decline[d] to extend" the third-party doctrine to cover CSLI, instead requiring officers to secure a warrant before accessing this information.[120]

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111. *Id.* at 401.

112. *Id.* at 385.

113. *Id.*

114. *Id.* at 391.

115. *Id.* at 403.

116. Carpenter v. United States, 138 S. Ct. 2206 (2018). This is also the precise approach Danielle Citron and I prescribed in a series of articles published in the months after *Jones*. *See* David Gray, *The ABA Standards for Criminal Justice, Law Enforcement Access to Third Party Records: Critical Perspectives from a Technology-Centered Approach to Quantitative Privacy*, 66 OKLA. L. REV. 919 (2014); David Gray & Danielle Keats Citron, *Addressing the Harm of Total Surveillance: A Reply to Professor Neil Richards*, 126 HARV. L. REV. F. 262 (2013); David Gray, Danielle Keats Citron, & Liz Clark Rinehart, *Fighting Cybercrime After* United States v. Jones, 103 J. CRIM. L. & CRIMINOLOGY 745 (2013); David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J. L. & TECH. 381 (2013).

117. *Carpenter*, 138 S. Ct. at 2211.

118. *Id.* at 2208.

119. *See* Smith v. Maryland, 442 U.S. 735, 743–46 (1979) (holding that the use of a pen register device to obtain metadata about telephone calls is not a search because that information is voluntarily and necessarily shared with telephone companies).

120. *Carpenter*, 138 S. Ct. at 2217, 2221.

Writing for the majority in *Carpenter*, the Chief Justice again returned to the theme of protecting the innocent. In the first sentence of his opinion, he pointed out that "[t]here are 396 million cell phone service accounts in the United States—for a Nation of 326 million people."[121] This statistic matters because "a cell phone—almost a 'feature of human anatomy'—tracks nearly exactly the movements of its owner" which "achieves near perfect surveillance, as if [the Government] had attached an ankle monitor to the phone's user."[122] Allowing officers unfettered access to CSLI would therefore "ma[k]e possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years."[123] And because that data is stored by service providers, "police need not even know in advance whether they want to follow a particular individual, or when. Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years."[124] So, the Chief Justice concluded, "CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power."[125]

The Court's decision in *Carpenter* proves out Arnold Loewy's powers as a prognosticator. Thirty-five years ago, he implored the Court to remember that the Fourth Amendment's critical role in our constitutional order is to protect the innocent against arbitrary uses of state power.[126] It guarantees the right of each of us and all of us—"the people"—to be secure against threats to our liberty and freedom posed by granting government agents broad and unfettered discretion to conduct searches and effect seizures.[127] As Professor Loewy pointed out in 1983, the Court was losing track of this core truth.[128] As a consequence, the Fourth Amendment was facing a crisis as the Court steadily eroded its force and authority by limiting the interests at stake in Fourth Amendment cases to the individuals at bar, which often meant the personal expectations of privacy held by the demonstrably guilty criminal defendants.[129] This narrow focus left the Court without the conceptual or doctrinal tools it needed to address new and emerging surveillance technologies in the twenty-first century.[130] One young, visionary law professor saw all of this coming in the first years of the Reagan

121. *Id.* at 2211.
122. *Id.* at 2218 (citations omitted).
123. *Id.* at 2219.
124. *Id.* at 2218.
125. *Id.* at 2222.
126. *See* Loewy, *supra* note 1, at 1239–40, 1272.
127. *See* U.S. CONST. amend. IV; Loewy, *supra* note 1, at 1239–40, 1272.
128. Loewy, *supra* note 1, at 1230–31, 1272.
129. *See id.* at 1249–56.
130. GRAY, *supra* note 10, at 78, 100.

administration; he predicted the crisis and he prescribed the cure.[131] Thirty-five years later, the Court appears at last to have caught-up to his lead.

IV. ARNOLD LOEWY: SURVEILLANT

Of course nobody, not even Professor Loewy, is without blind spots. There is certainly some myopia in his signature 1983 article. For example, in his zeal to protect the innocent, Professor Loewy argues that the Fourth Amendment does not protect the guilty at all:[132]

> It is not unreasonable for the police to search for and seize evidence of crime; and . . . 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.[133]

Taken literally, this view would eviscerate the warrant clause while also cutting against common law understandings of "reasonable search." As Laura Donohue has shown, eighteenth-century common law gave warrants and prior judicial review pride of place when assessing the reasonableness of searches.[134] On her account, searches conducted in the absence of a warrant were regarded as unreasonable by definition.[135] Although that view is somewhat controversial,[136] there can be no doubt that the Fourth Amendment itself implies that warranted searches are reasonable and that the Court itself has routinely held that unwarranted searches are presumptively unreasonable absent clear showing of exceptional circumstances.[137] In 1983, Professor Loewy adopted the unique view that any search yielding evidence of a crime is by definition "reasonable."[138]

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131. *See* Carpenter v. United States, 138 S. Ct. 2206, 2241 (2018). Although not explicit in the *Carpenter* majority opinion, there is evidence that the Court is also taking seriously Professor Loewy's call to rethink the Fourth Amendment standing doctrine. That evidence comes mainly from dissenting opinions by Justices Anthony Kennedy and Clarence Thomas. *See id.* (Kennedy, J., dissenting) (quoting U.S. CONST. amend IV.) ("Fourth Amendment rights, after all, are personal. The Amendment protects '[t]he right of the people to be secure in *their* . . . persons, houses, papers, and effects'—not the persons, houses, papers, and effects of others."); *Id.* at 2241–42 (Thomas, J., dissenting) ("Although phrased in the plural, '[t]he obvious meaning of ["their"] is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.'").

132. *See* Loewy, *supra* note 1, at 1248.

133. *Id.* at 1229.

134. *See* Donohue, *supra* note 10, at 1185–86.

135. *Id.* at 1185.

136. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) ("We need to read the Amendment's words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable.").

137. GRAY, *supra* note 10, at 169–72.

138. *See* Loewy, *supra* note 1; *see also* Amar, *supra* note 136, at 767–68 (reaching a similar conclusion in 1994).

Professor Loewy's views on the guilty opens the door to a host of means and methods of conducting searches that would only detect evidence of a crime. He captures this possibility with the image of an "evidence-detecting divining rod."[139] In his "Utopian society, each policeman would be equipped with" a device capable of ferreting out all evidence of all crimes, with the result that "all evidence of crime would be uncovered in the most efficient possible manner, and no innocent persons would ever be subject to search."[140] On this account, Professor Loewy again proved himself to be a prognosticator. Months after his article went to press, the Court licensed the use of drug-detection dogs precisely because they alert only to the presence of contraband.[141]

The problem with this view is that it grants an unfettered license to conduct searches of persons, houses, papers, and effects without needing to show good cause or to secure the prior approval of a court. Granted, searches of innocent persons' homes using an evidence-divining rod would only report negative results—what is not inside—but that is a search nevertheless.[142] The only way to make sense of the claim that using an evidence-divining rod is not a search is to define *search* as a function of reasonable expectations of privacy. But of course, that is the source of all the problems Professor Loewy identifies.[143] Not to mention that the one and only referent for that definition of *search* is *Katz*.[144] Dictionaries in the eighteenth century and today define a search as looking for something.[145] This is precisely what evidence-divining rods do.[146] This is important because what was science fiction in 1983 is science today.[147] Although the Court regarded drug-detection dogs as sui generis, the twenty-first century has ushered a new age of surveillance promising a toolbox of evidence-divining rods.[148] The possibility that these technologies can be broadly, indiscriminately, and arbitrarily deployed and used subjects each of us and all of us to the dystopian threat of constant surveillance.[149] One such technology is DNA testing.[150]

In recent years, Professor Loewy has become a leading advocate for universal DNA testing.[151] He has proposed that, going forward, DNA

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139. Loewy, *supra* note 1, at 1244.
140. *Id.* at 1244 (footnotes omitted).
141. United States v. Place, 462 U.S. 696, 707 (1983).
142. *See* Loewy, *supra* note 1, at 1244.
143. *Id.* at 1272.
144. *See* Katz v. United States, 389 U.S. 347, 360 (1967).
145. GRAY, *supra* note 10, at 158–60.
146. Loewy, *supra* note 1, at 1244.
147. *See id.*
148. *See* United States v. Place, 462 U.S. 696, 707 (1983); Loewy, *supra* note 1, at 1244.
149. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1936–42 (2013).
150. *See generally* Arnold H. Loewy, *A Proposal for the Universal Collection of DNA*, 48 TEX. TECH. L. REV. 261 (2015).
151. *See id.*

samples should be taken from all babies born in the United States.[152] All other United States persons would have two years to present themselves at a DNA donation site, where they would submit samples, perhaps by spitting into a cup.[153] Once the samples are taken, they would be catalogued in a database akin to the Federal Bureau of Investigation's (FBI) Combined DNA Index System (CoDIS).[154] Thereafter, whenever DNA evidence is found at a crime scene, that evidence would be tested against the universal database.[155]

On Professor Loewy's telling, submitting a sample to the database would be minimally disruptive in the lives of individuals—well below the threshold of say, jury duty. [156] On the other hand, having the resource available would provide considerable advantages for society. Criminal cases would be solved in record time,[157] corpses would be quickly identified,[158] and lost amnesiacs and sufferers of dementia would be returned to their families.[159] Although Professor Loewy recognizes that a universal DNA database is not a panacea for law enforcement—DNA evidence is not always available for testing[160]—he maintains that it would provide a valuable resource in cases involving many of the most serious crimes, including rape and murder,[161] and an invaluable resource in otherwise time-intensive "who dunnit" kinds of cases that might otherwise go unsolved.[162]

In addition to saving law enforcement time and allowing investigators to solve difficult cases, Professor Loewy argues that a universal DNA database can protect the innocent.[163] Here, he points to the case of Timothy Cole, a student at Texas Tech University who was wrongly accused of rape.[164] As Professor Loewy points out, a universal DNA database would have cleared Mr. Cole of wrongdoing.[165] Of course, taking a DNA sample from Mr. Cole during the investigation of that particular crime would have achieved the same result.[166] By way of response, Professor Loewy points out that in a world where a universal database is available, innocent persons like Mr. Cole would never become suspects at all, saving the innocent from the

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152. *Id.*; Arnold H. Loewy, *The Wisdom of Universal DNA Collection: A Reply to Professor Meghan J. Ryan*, 20 SMU SCI. & TECH. L. REV. 21, 21 (2017).

153. Loewy, *supra* note 150, at 262.

154. *Id.*

155. *Id.*

156. *Id.* at 262–63.

157. *See* Loewy, *supra* note 152, at 23–24.

158. *See* Loewy, *supra* note 150, at 266.

159. *See id.*

160. Loewy, *supra* note 152, at 24.

161. *See* Loewy, *supra* note 150, at 261 (demonstrating through a hypothetical the potential benefits of a universal DNA database).

162. Loewy, *supra* note 152, at 24; Loewy, *supra* note 150, at 265.

163. *See* Loewy, *supra* note 150, at 265 (explaining that without a universal DNA database it has taken significant time to exonerate prisoners).

164. *Id.*

165. *Id.*

166. *Id.*

anxiety and inconvenience that comes with being targeted by investigators.[167] Along these lines, Professor Loewy points out that having a DNA database might help eliminate a considerable amount of racial bias, at least insofar as "race" can be identified in a DNA sample.[168]

It is hard to square this proposal with the image of Professor Loewy as a champion of the innocent. After all, we are talking about a search regime that covers everyone, the vast majority of whom are innocent and always will be.[169] Furthermore, DNA is not an evidence-divining rod. DNA is not evidence of anything, save perhaps identity.[170] The proposal therefore looks precisely like the kind of pervasive surveillance regime and arbitrary use of state power categorically barred by the Fourth Amendment.[171] Professor Loewy anticipates some of these objections.[172] For example, he contends that, because the DNA is donated rather than taken, there is no *search* involved.[173] And to the extent taking a DNA sample is a search, the intrusion is pretty minimal while, on the other hand, the gains for society are considerable.[174] Professor Loewy also suggests a number of practical constraints, including limiting the circumstances when law enforcement could access the database and holding officers liable for instances of misuse, the sum of which would render the scheme "reasonable" from a balancing of interests point of view.[175] But despite all these rationalizations, it is hard to shake the sense that universal DNA testing is Fourth Amendment blasphemy.

Professor Loewy's proposal for a universal DNA database is reminiscent of a comment on general warrants made by the Canadian Freeholder in 1779, where he opined that executive agents are "fond of . . . doctrines of reason of state, and state necessity, and the impossibility of providing for great emergencies and extraordinary cases, without a discretionary power in the Crown to proceed sometimes by uncommon methods not agreeable to the known forms of law."[176] This is the telos of governments in their executive modes. It is not necessarily evil. It is just a reflection of the executive function. The pursuit of security inevitably drives

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167. *Id.*

168. Loewy, *supra* note 150, at 22–23.

169. *See* Michelle Ye Hee Lee, *Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2016, 9:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/ (stating that as of July 4, 2014, the U.S. population was approximately 319 million, approximately 2.24 million of which were in prison).

170. *See* Maryland v. King, 569 U.S. 435, 451 (2013).

171. Loewy, *supra* note 150, at 261.

172. *Id.* at 262.

173. *Id.* at 267.

174. *See id.* at 266–68.

175. *See id.* at 263–67.

176. 2 FRANCIS MASERES, THE CANADIAN FREEHOLDER: IN THREE DIALOGUES BETWEEN ENGLISHMEN AND A FRENCHMAN, SETTLED IN CANADA, at 243–44 (1779) (emphasis omitted).

executive agents and agencies to claim greater powers and to effect greater degrees of social control.[177] The utopian dream of autocratic regimes is perfect security. By contrast, liberty requires living with insecurity. For theologians, the existence of freewill is proof that God preferred liberty over perfect security.[178] In a secular mode, we, the people of the United States, explicitly elected freedom over perfect security by hobbling the powers of the state at the moment of its creation.[179] Three good examples are the Fourth, Fifth, and Sixth Amendments, which individually and together create considerable inefficiency in our criminal justice system, often leading to the result that the guilty go free.[180] These are the costs of liberty and limited state power. The prospect of a universal DNA database seems to embrace a quite different vision that would "alter the relationship between citizen and government in a way that is inimical to democratic society."[181]

V. CONCLUSION

Arnold Loewy has an enviable legacy as a thought leader and champion of the innocent—a legacy upon which he continues to build. His 1983 article, *The Fourth Amendment as a Device for Protecting the Innocent*, is not only a crown jewel in his career, but one of the most impactful and forward-thinking contributions to the Fourth Amendment canon. Its central insights offered a timely corrective during a period when the Supreme Court was taking its doctrine down a dark path. Unfortunately, the Court declined to follow Professor Loewy's lead in the twentieth century. As a result, the modern Court has found itself with sparse resources for dealing with new and emerging technologies in the twenty-first century. In this moment of crisis, the Court seems to have rediscovered the wisdom of Professor Loewy's fundamental insights: The true parties of interest in Fourth Amendment cases are the absent innocents; and the primary purpose of the Fourth Amendment is to guard against arbitrary uses of state power. If the Court continues to abide these principled propositions, then the Fourth Amendment will have ample resources to deal with new and emerging challenges; and we will all owe a debt of gratitude to Professor Loewy for being a thought leader and prognosticator of the first order.

177. *See* Andrew Napolitano, *Giving Up Liberty for Security*, REASON (July 25, 2013, 7:46 AM), https://reason.com/2013/07/25/giving-up-liberty-for-security/.

178. *See id.*

179. *See id.*

180. *See Criminal Procedure*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/criminal_procedure (last visited Nov. 20, 2019).

181. United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (citations omitted).