THE FOURTH AMENDMENT: HISTORY, PURPOSE, AND REMEDIES

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It is an honor to be invited to participate in this Symposium in honor of Professor Arnold Loewy's long and illustrious career. However, it was not easy to decide which Loewy article to discuss. Professor Loewy has produced a large and impressive body of work over the last half-century.

I chose to write about his article, *The Fourth Amendment: History, Purpose, and Remedies*, for a couple of reasons.[1] First and foremost, this area of the law is near and dear to my heart. Like the First Amendment, the Fourth Amendment is one of the cornerstones of a free society.[2] Second, and perhaps equally important, the article reveals Professor Loewy's ability to precisely analyze important constitutional issues.[3]

Few legal issues are more illustrative of U.S. constitutional history than the issues discussed in Professor Loewy's article. When the Framers drafted the U.S. Constitution, they decided to omit a bill of rights.[4] Since they had created a government of limited and enumerated powers, and one which reflected Baron de Montesquieu's ideas regarding separation of powers, they believed it was unnecessary to include a specific enumeration of rights.[5] The new Americans strongly disagreed, and it rapidly became clear that ratification of the proposed Constitution was in jeopardy.[6] In an effort to save

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1. Arnold H. Loewy, *The Fourth Amendment: History, Purposes, and Remedies*, 43 TEX. TECH L. REV. 1 (2010).
2. *See id.*
3. *See generally id.*
4. *See* Marsh v. Chambers, 463 U.S. 783, 815–16 (1983) (Brennan, J. dissenting) (discussing that the Framers did not intend to enact the Bill of Rights).
5. *See* Wallace v. Jaffree, 472 U.S. 38, 92–93 (1985) (Rehnquist, J., dissenting) ("During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny.").
6. *See* McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) ("But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution."); *see also*

the document, it was agreed that the Constitution would be ratified "as is," but that the first Congress would create what came to be known as the Bill of Rights.[7] That is why the Bill of Rights entered the Constitution as the first ten amendments.[8]

Ever since, the Fourth Amendment has served as an important bulwark against governmental repression. Professor Loewy's article insightfully explores the U.S. Supreme Court's analysis of the Fourth Amendment's history, role, and purpose.

I. THE HISTORY

We know quite a bit about the history of the Fourth Amendment.[9] In demanding protections against unreasonable searches and seizures, the colonists were motivated by a pattern of abuses during the colonial period.[10] British colonial authorities used writs of assistance, which allowed them to do no more than specify the object of a search, and thereby obtain a warrant allowing them to search any place where the goods might be found,[11] without limit as to place or duration.[12] Colonial officials also used "general warrants," which required them only to specify an offense, and then left it to the discretion of executing officials to decide which persons should be arrested and which places should be searched.[13] These British practices stirred up such a high level of anger among the colonists that the people objected to the idea of ratifying the proposed Constitution unless it contained explicit protections against similar abuses, as well as the protection of various other rights.[14]

Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) ("The first 10 Amendments were not enacted because the Members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.").

7. *See McDonald*, 561 U.S. at 769; *Marsh*, 463 U.S. at 783.

8. *See McDonald*, 561 U.S. at 768–69 (explaining that colonists feared governmental infringement of their rights absent the Bill of Rights).

9. U.S. CONST. amend. IV.

10. *See McDonald*, 561 U.S. at 815–19; Virginia v. Moore, 553 U.S. 164, 169 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) ("The driving force behind the adoption of the Amendment . . . was widespread hostility among the former colonists to the issuance of writs of assistance . . . and general search warrants . . . ."); Steagald v. United States, 451 U.S. 204, 220 (1981) ("The Fourth Amendment was intended partly to protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies.").

11. *See Moore*, 553 U.S. at 168–69; Samson v. California, 547 U.S. 843, 858 (2006) (Stevens, J., dissenting); Atwater v. City of Lago Vista, 532 U.S. 318, 339–40 (2001); *see also* RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 73 (5th ed. 2016) (explaining how writs of assistance allowed English officials to search colonists or their homes whenever the officials wanted).

12. *See Steagald*, 451 U.S. at 221; Gilbert v. California, 388 U.S. 263, 286 (1967) (Douglas, J., concurring in part) (quoting Boyd v. United States, 116 U.S. 616, 625 (1886)).

13. *See Moore*, 553 U.S. at 168–69; *Steagald*, 451 U.S. at 220; Payton v. New York, 445 U.S. 573, 608 (1980) (White, J., dissenting).

14. *See* Maryland v. Garrison, 480 U.S. 79, 91 (1987) (Blackmun, J., dissenting); *see also Verdugo-Urquidez*, 494 U.S. at 266 (describing that many colonists viewed a protection like the Fourth

As Professor Loewy correctly notes, the U.S. Supreme Court's use of history has been, at best, inconsistent. He points to *United States v. Watson*, a case that involved the question of whether the police could arrest someone who had committed a felony without a warrant.[15] Professor Loewy believes that the Court got it right in holding that a warrantless arrest is permissible provided that the arrest is based on a finding of probable cause to believe that the arrestee has committed a felony.[16] However, he takes the Court to task for ignoring the distinction between felonies as they were defined at the founding of this country and as they are defined today.[17] Loewy notes that common law felonies involved violent crimes for which capital punishment was routinely imposed.[18] By contrast, modern felonies do not always involve violence and rarely involve the sanction of capital punishment.[19] For example, governments of today cannot execute individuals for filing false tax returns or engaging in fraudulent credit transactions.[20] He rightly questions whether the common law arrest rule should automatically be applied to the modern and broader definition of the term "felony."[21]

As Loewy notes, the Court seemed to be less concerned about history in its decision in *Tennessee v. Garner*.[22] *Garner* involved the question of whether the police could use deadly force to prevent a fleeing felon—in that case, a burglar—from escaping.[23] Loewy notes that even though the common law would have permitted the police to use deadly force to apprehend a fleeing felon, *Garner* held to the contrary.[24] The Court decided to place a gloss on the common law by holding that the police do not have the right to shoot all fleeing felons.[25] The Court distinguished between the different types of felonies and concluded that the common law rule should not apply.[26]

It is difficult to quarrel with Loewy's conclusion that:

> [W]hatever might be said about the wisdom of the [*Watson* and *Garner* decisions], it seems clear that taken together, they illustrate the proposition that the Court tends to use history as a makeweight for a result that it desires on other grounds.

Amendment as necessary); Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) (explaining the colonists' apprehensions regarding a Constitution without explicit protections); *Boyd*, 116 U.S. at 625.

15. United States v. Watson, 423 U.S. 411, 418 (1976).
16. *See* Loewy, *supra* note 1, at 2.
17. *See id.* at 2–3.
18. *See id.* at 2.
19. *See id.*
20. *See id.*
21. *See id.* at 2–3.
22. Tennessee v. Garner, 471 U.S. 1, 11 (1985); *see* Loewy, *supra* note 1, at 2–3.
23. Loewy, *supra* note 1, at 2.
24. *See id.* at 2–3.
25. *See id.*
26. *Id.*

> To the extent that this is accurate, I do not think it is a good thing, nor can I give the Court high marks for its performance.[27]

II. The Purpose

In talking about the purposes and values of the Fourth Amendment, Loewy astutely questions the proposition that the value to be preserved by the Fourth Amendment is the protection of a "[r]easonable expectation of privacy" (REOP).[28] Of course, the Supreme Court articulated the REOP test in its landmark decision, *Katz v. United States*,[29] and that decision provided the dominant definition of the term *search* for more than half a century.[30] *Katz* was important because the Court answered for the first time the question of how to protect individuals against the encroachment of modern technology.[31]

When the Fourth Amendment was drafted and ratified, the state of surveillance technology was relatively crude and simplistic, and the government's ability to pry into the lives of private citizens was much more circumscribed.[32] As a result, the new Americans focused on the abuses committed by the British in using writs of assistance and general warrants; they could hardly have envisioned the surveillance technologies that would later develop.[33]

Since the early Americans were familiar with actual physical searches by British officials of their homes and persons, judicial decisions defined the term search in the way that the term might have been defined in ordinary parlance: A search involved an actual physical search of a particular place or person.[34] The Fourth Amendment was implicated when the government intruded or trespassed into a "constitutionally protected area."[35] Thus, if the police searched a person, then the Fourth Amendment was implicated.[36] Likewise, when the police broke into someone's house—a constitutionally protected area—and rummaged through its contents, the Court had no difficulty concluding that the police had carried out a Fourth Amendment

27. *Id.* at 3.
28. *See id.*
29. Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring).
30. *Id.* at 351–52 (majority opinion).
31. *Id.* at 352–53.
32. *See* cases cited *supra* note 11 (explaining the creation of the Fourth Amendment in light of writs of assistance and general warrants).
33. *See* cases cited *supra* note 11 (explaining the creation of the Fourth Amendment in light of writs of assistance and general warrants).
34. *See* Draper v. United States, 358 U.S. 307, 311 (1959).
35. *See, e.g.*, Silverman v. United States, 365 U.S. 505, 510 (1961); Goldman v. United States, 316 U.S. 129, 135–36 (1942), *overruled in part by* Katz v. United States, 389 U.S. 347, 353 (1967); Olmstead v. United States, 277 U.S. 438, 464–65 (1928), *overruled by* Katz v. United States, 389 U.S. 347, 356 (1967), *and* Berger v. New York, 388 U.S. 41 (1967) (holding that the Fourth Amendment requires adherence to the judicial process); *Ex parte* Jackson, 96 U.S. 727, 733 (1877).
36. *See* Payton v. New York, 445 U.S. 573, 585 (1980).

search.[37] Likewise, when the police made an unauthorized entry into a car—once automobiles came into existence—to rummage through the trunk, or when they seized an individual's briefcase to review its contents, the courts would likewise find that the police had conducted a search.[38]

Not until the early part of the twentieth century was the Court forced to consider the ramifications of technology and to think about whether the development of new technologies required a modification of the Court's definition of the term *search*.[39] When the issue finally did arise, there was an active debate between the Justices about whether the Court should adhere to its historical approach, or whether advances in technology demanded that it develop a new approach.[40] Illustrative is the decision in *Olmstead v. United States*, which involved an illegal conspiracy to buy and sell liquor and the police obtained evidence through wiretaps.[41] In installing the wiretaps, government agents did not trespass on the defendants' property, but instead installed the taps in the basement of a large office building and on wires located in the streets outside of defendants' residences.[42] In deciding the case, the Court declared that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted."[43] As a result, in the Court's view, the focus was on "material things—the person, the house, his papers, or his effects,"[44] and therefore, on whether there had been a trespass or an intrusion into a constitutionally protected area.[45] In light of this focus, the Court held that the wiretaps did not involve a prohibited invasion of Olmstead's property or office.[46] Because the phone lines were used by defendants to project their voices outside of their homes and office, and the police remained outside of those areas, there was no constitutionally prohibited intrusion.[47] Finding no search within the meaning of the Fourth Amendment, the Court was not required to decide whether the constitutionally required procedures had been satisfied.[48]

Olmstead produced vigorous dissents from Justices who were concerned about the onslaught of new technologies and the potential impact

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37. *See* Weeks v. United States, 232 U.S. 383, 398 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643, 653 (1961).

38. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153 (1925).

39. *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 304–05 (1967); *Olmstead*, 277 U.S. at 465.

40. *See Carroll*, 267 U.S. at 149, 164.

41. *Olmstead*, 277 U.S. at 455–56.

42. *Id.* at 456.

43. *Id.* at 465 (citing *Carroll*, 267 U.S. at 149).

44. *Id.* at 464.

45. *See supra* text accompanying notes 35–37 (explaining what, at the time, was considered a constitutionally protected area and when the Fourth Amendment was implicated).

46. *Olmstead*, 277 U.S. at 466.

47. *Id.*

48. *Id.*

of those technologies on individual privacy.[49] For example, Justice Brandeis argued with some prescience that the progress of science will not stop with wiretapping, and that "[w]ays may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and . . . expose to a jury the most intimate occurrences of the home."[50] Justice Brandeis inquired whether it can be said "that the Constitution affords no protection against such invasions of individual security."[51] Indeed, Justice Brandeis argued that the invasion of privacy is greater when the police use wiretapping to overhear a conversation:

> Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.[52]

Justice Butler also dissented in *Olmstead* and argued for a more expansive interpretation of the Fourth Amendment.[53] Since "communications belong to the parties between whom they pass," and "the exclusive use of the wire belongs to the persons served by it," he viewed wiretapping as a search within the meaning of the Fourth Amendment.[54] He argued that "the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words," and he viewed the monitoring of phone lines as equivalent to colonial officials rummaging through a house.[55]

Similar fault lines were evident in the Court's decision in *Goldman v. United States*.[56] In that case, in the process of gathering evidence, the police—hoping to overhear a meeting between Goldman and others that was planned for the following afternoon—used a "detectaphone" to eavesdrop on the meeting.[57] The detectaphone is a device that, when placed against a wall, can detect sound waves from the next office and amplify those waves so that

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49. *Id.* at 469–88 (Holmes, J., dissenting; Brandeis, J., dissenting; Butler, J., dissenting; Stone, J., dissenting).
50. *Id.* at 474 (Brandeis, J., dissenting).
51. *Id.*
52. *Id.* at 475–76.
53. *Id.* at 485–88 (Butler, J., dissenting).
54. *Id.* at 487.
55. *Id.* at 488.
56. Goldman v. United States, 316 U.S. 129 (1942), *overruled in part by* Katz v. United States, 389 U.S. 347, 353 (1967).
57. *Id.* at 131.

they can be heard and understood in the next room.[58] As a result, the police could eavesdrop on the meeting without actually entering the room.[59] The majority held that the government's use of the detectaphone did not involve a search within the meaning of the Fourth Amendment because the police did not enter Goldman's office.[60] A dissenting Justice Murphy argued that police use of the detectaphone was a search within the meaning of the Fourth Amendment.[61] While Justice Murphy recognized that the literal language of the Fourth Amendment seems to require a trespassory invasion as a predicate to a finding of a search, he argued that the "conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide."[62] For Justice Murphy, it mattered not that there was no physical entry into Goldman's office because "science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment."[63]

Olmstead and *Goldman* were followed by the holding in *Silverman v. United States*.[64] By this time, the Court was becoming acutely aware of the intrusive nature of new technologies.[65] In *Silverman*, the petitioners were convicted of gambling offenses based on their conversations, which police overheard by means of a so-called "spike mike"—a microphone with a foot long spike, an amplifier, a power pack, and earphones.[66] The police inserted the spike under a baseboard in the second-floor room of a vacant house and into a crevice extending several inches into petitioners' house.[67] In distinguishing *Olmstead* and *Goldman*, the Court emphasized that the spike mike intruded into Silverman's home and created "an unauthorized physical penetration into the premises occupied by the petitioners."[68] The Court emphasized the importance of the home and the protections provided to the home by the Fourth Amendment,[69] and it suggested that it was well aware of "the Fourth Amendment implications of these and other frightening

58. *Id.*
59. *See id.* at 131–32.
60. *See id.* at 135.
61. *Id.* at 136 (Murphy, J., dissenting).
62. *Id.* at 138.
63. *Id.* at 136.
64. *See* Silverman v. United States, 365 U.S. 505 (1961); *Goldman*, 316 U.S. 129; Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).
65. *Silverman*, 365 U.S. at 507.
66. *Id.* at 506.
67. *Id.* at 506–07.
68. *Id.* at 508–09.
69. *Id.* at 511–12.

paraphernalia which the vaunted marvels of an electronic age may visit upon human society."[70]

As *Olmstead*, *Goldman*, and *Silverman* revealed, while the concepts of "trespassory invasions" and "intrusion[s] into . . . constitutionally protected areas" may have made sense as applied to a house, a car, or a briefcase, those concepts did not produce satisfactory results as advancing technology provided police investigators with evermore sophisticated surveillance technologies.[71] As a result, it was perhaps inevitable that the Court would begin to take notice of the ideas articulated by the dissenters in *Olmstead* and *Goldman* and begin to formulate a new approach responsive to advancing technology.[72] That happened in the Court's decision in *Katz v. United States*, in which the Court finally formulated a new approach for defining the term *search* under the Fourth Amendment, particularly as that term applies to technology.[73]

Katz involved a man who was suspected of involvement in an illegal bookmaking operation and placed a phone call from a telephone booth.[74] Police, anticipating that Katz would make the call, placed an electronic bug on the outside of the booth that enabled them to record the conversation.[75] During the call, Katz made incriminating statements that were used against him in a subsequent prosecution.[76] Relying on prior precedent, the government argued that the police did not engage in a search when they bugged the phone booth.[77] There was no intrusion into the phone booth, there was doubt about whether a booth qualified as a constitutionally protected area within the meaning of the Fourth Amendment, and the electronic bug had done nothing more than passively collect sounds emanating from the phone booth.[78] The Court disagreed with the government and held that the police use of the listening device to overhear Katz's conversation constituted a search within the meaning of the Fourth Amendment.[79] In the process, *Katz* departed from *Olmstead*'s focus on whether there had been an intrusion into a constitutionally protected area.[80] Instead, the Court focused on whether governmental officials had violated Katz's "expectation of privacy," and in doing so, the Court explicitly claimed to shift its Fourth Amendment focus

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70. *Id.* at 509–12.

71. *Id.* at 512; *see* Goldman v. United States, 316 U.S. 129 (1942), *overruled in part by* Katz v. United States, 389 U.S. 347, 353 (1967); Olmstead v. United States, 277 U.S. 438 (1928), overruled by *Katz*, 389 U.S. 347, *and* Berger v. New York, 388 U.S. 41 (1967).

72. *Silverman*, 365 U.S. at 508–09; *see Goldman*, 316 U.S. at 136 (Murphy, J., dissenting); *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).

73. *Katz*, 389 U.S. at 353–54.

74. *Id.* at 348.

75. *Id.*

76. *Id.*

77. *Id.* at 354.

78. *Id.* at 345, 354–55.

79. *Id.* at 353.

80. *Id.*

from places to persons.[81] As the Court stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[82] Justice Harlan, concurring, agreed with the Court that the focus should be on whether Katz had a REOP, but he argued that the expectation must be one that society was prepared to recognize as "reasonable."[83] Ultimately, the Court included Harlan's reasonableness requirement into the REOP test and inquired whether the police had intruded upon an individual's REOP.[84]

Under the *Katz* approach, a reviewing court must evaluate each case on its own facts.[85] In *Katz*, the Court concluded that government agents had conducted a search when they used the listening device to overhear Katz's private conversation because they intruded on Katz's expectation of privacy.[86] Even though the police had not entered the booth, Katz's expectation of having a private telephone conversation was thwarted by the use of the listening device.[87]

When it was initially decided, *Katz* might have been regarded as a hopeful decision for individual freedom and as creating a viable framework for dealing with the problem of advancing technology—a problem that had perplexed the Court for decades.[88] Indeed, the REOP test had the potential to reshape Fourth Amendment jurisprudence and provide substantial protection to individuals against the intrusions of modern technology. *Katz*'s holding was expansive because the Court found that the police had conducted a search in a context that would not have been regarded as a search under its pre-*Katz* precedent.[89]

Professor Loewy's concerns about the *Katz* test have been vindicated.[90] The REOP test simply has not established a sound framework for Fourth Amendment analysis, or for dealing with the implications of advancing technology. Some Justices have viewed the *Katz* test expansively and aspirationally, in the spirit of the dissents in *Olmstead* and *Goldman*, whereas other Justices have viewed the *Katz* test more narrowly and restrictively.[91] These fault lines are evident in many different contexts. The net effect is that the Court simply has not developed a workable framework for determining whether a REOP exists, or for determining how the Court should apply the

81. *Id.* at 351–52.
82. *Id.* at 351 (citations omitted).
83. *Id.* at 361 (Harlan, J., concurring).
84. *Id.*
85. *See id.* at 352–54 (majority opinion).
86. *Id.* at 354.
87. *Id.* at 352.
88. *Id.*
89. *See id.* at 352–53.
90. Loewy, *supra* note 1, at 3–4 (explaining Professor Loewy's belief that the REOP is problematic).
91. *See id.*

REOP test to new technologies.[92] In other words, in the more than half-a-century since the *Katz* decision, U.S. Supreme Court decisions construing *Katz* have not always lived up to the promise or the hope of that decision.

As one analyzes the Court's post-*Katz* decisions, it becomes clear that *Katz* protects individuals against certain types of intrusions.[93] For example, absent unusual circumstances, the Court will find a REOP—and therefore, a search—if the police break into a private home and search it from top to bottom[94] or search an individual,[95] an individual's luggage,[96] or an owner's vehicle.[97] For example, in *Safford Unified School District No. 1 v. Redding*, the Court easily found a violation of a middle school student's REOP when school officials subjected her to a strip search and also searched her backpack.[98] Likewise, in *Winston v. Lee*, the Court held that a governmental attempt to force an individual to submit to surgery to remove a bullet (which would have provided evidence regarding his involvement in an attempted robbery) constituted a search within the meaning of the Fourth Amendment.[99]

These factual scenarios are hardly cutting-edge, however, and they do not involve the use of sophisticated technologies.[100] Moreover, all of these scenarios are explicitly protected under the literal language of the Fourth Amendment—which provides protection for persons, papers, houses, and effects—and one might guess that the Court would have found that a search had been committed in these situations even under its pre-*Katz* precedent.[101] All involve either searches of persons or searches of constitutionally protected areas, and all would have received protection under decisions like *Olmstead*, *Goldman*, and *Silverman*.[102]

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92. *See id.*

93. *Katz*, 389 U.S. at 350.

94. *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 107 (2006); Groh v. Ramirez*,* 540 U.S. 551, 555 (2004).

95. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368–69 (2009) (addressing a strip search of a middle school student); Terry v. Ohio, 392 U.S. 1, 16 (1968) (holding that a police officer's frisk of Terry constituted a search within the meaning of the Fourth Amendment, albeit a reasonable one).

96. *See, e.g.*, Florida v. Royer, 460 U.S. 491, 501 (1983) (holding that police intrusion into the contents of baggage constitutes a search within the meaning of the Fourth Amendment); *see also* Bond v. United States, 529 U.S. 334, 338 (2000) (holding that a search was committed when police physically manipulated Bond's bag in order to ascertain the nature of its contents).

97. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 345 (2009); California v. Acevedo, 500 U.S. 565, 567 (1991); New York v. Class, 475 U.S. 106, 112–13 (1986).

98. *Redding*, 557 U.S. at 374–75.

99. Winston v. Lee, 470 U.S. 753, 759 (1985).

100. *See* cases cited *supra* notes 97–98 (discussing searches under the Fourth Amendment).

101. U.S. CONST. amend. IV.

102. *See* Silverman v. United States, 365 U.S. 505, 510 (1961); Goldman v. United States, 316 U.S. 129, 135–36 (1942), *overruled in part by* Katz v. United States, 389 U.S. 347, 353 (1967); Olmstead v. United States, 227 U.S. 438, 466 (1928), *overruled by* Katz, 389 U.S. 347, *and* Berger v. New York, 388 U.S. 41 (1967); cases cited *supra* notes 95–97 (discussing Fourth Amendment searches on persons and things).

In more novel cases, the Court's application of the REOP test has been less than inspiring.[103] In the Court's standing decisions—which also applied the REOP test—as well as in its substantive Fourth Amendment decisions, there are few cases where the Court has found that a REOP existed when it would not have found a search under its pre-*Katz* precedent.[104] In a number of cases, the Court concluded either that there was no REOP (and therefore, no search) in a particular case before the Court or that defendants did not have standing to assert Fourth Amendment rights because they lacked a REOP.[105] In only a few limited situation has the Court expanded the definition of a search beyond its pre-*Katz* limits.[106] As a result, for those who hoped that *Katz* would expand Fourth Amendment jurisprudence and might provide a bulwark against advancing technology, those hopes have not been fully realized.

The limited impact of the REOP test is illustrated by the Court's decisions regarding standing to assert Fourth Amendment rights.[107] In those cases, the Court has generally construed the REOP test restrictively.[108] For example, even though *Katz* purported to abandon the property-based distinctions that prior decisions had relied upon, including the concepts of trespass and constitutionally protected areas, the Court has had difficulty developing secure moorings for the REOP test apart from property principles.[109] For example, in *Rakas v. Illinois*, the Court considered whether a passenger in a vehicle had standing to challenge a search of that vehicle.[110] Under the Court's pre-*Katz* precedent—specifically, *Jones v. United States*[111]—Rakas could have established standing on the basis that the search was "directed" at him, or on the basis that he was "legitimately on [the] premises" (or more precisely, in the vehicle) at the time of the search.[112] In *Rakas*, the Court reverted to property principles in deciding that a REOP did not exist.[113] A dissenting Justice White challenged what he regarded as the Court's fairly narrow conception of a REOP.[114] Even though *Katz* purported to abandon property principles in favor of the REOP test, he argued that the

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103. *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988); United States v. Dunn, 480 U.S. 294 (1987); Oliver v. United States, 466 U.S. 170 (1984); United States v. Place, 462 U.S. 696 (1983).

104. *See* Minnesota v. Olson, 495 U.S. 91, 98–99 (1990) (holding that an overnight guest had a reasonable expectation of privacy in the place he was staying).

105. *See* Rakas v. Illinois, 439 U.S. 128, 133–34, 143–44, 148 (1978) (holding that criminal defendants did not have a REOP in a vehicle that was not theirs, and that they lacked standing to assert a Fourth Amendment claim over items in which they did not have a possessory interest).

106. *See* cases cited *supra* notes 95–97 (explaining the Court was not bound to the limits of its pre-*Katz* search analysis).

107. *See Rakas*, 439 U.S. at 133–34.

108. *Id.*

109. Katz v. United States, 389 U.S. 347, 353 (1967).

110. *Rakas*, 439 U.S. at 129.

111. Jones v. United States, 362 U.S. 257, 261, 267 (1960).

112. *Id.*

113. *Rakas*, 439 U.S. at 148–49.

114. *Id.* at 167 (White, J., dissenting).

Court considered only property principles in determining whether Rakas's REOP had been invaded.[115] In his view, the Court construed the REOP test "contrary . . . to the everyday expectations of privacy that we all share."[116]

In other cases, the Court has also construed the REOP test restrictively.[117] Thus, the Court has held that there is no REOP when the police search through an individual's garbage;[118] when they enter open fields (even though the fields had been posted "No Trespassing" and were remote);[119] when the police use a canine sniff to determine whether illegal drugs are secreted in luggage;[120] and when they entered property to peer into a barn.[121] In addition, the Court held that there is no REOP for an individual who visits an apartment to consummate a business transaction,[122] or for an individual who places property in another person's purse.[123] Although the Court has found a REOP in some post-*Katz* decisions, most of these cases would have been decided the same way under the Court's pre-*Katz* jurisprudence (e.g., overnight guests have a REOP in the place where they spend the night).[124]

More importantly, the Court has generally chosen not to apply *Katz* expansively in cases involving new forms of technology.[125] There are a few encouraging decisions and some encouraging statements from the Court.[126] On balance, however, the Court's post-*Katz* technology decisions reveal many of the problems and difficulties that existed with the Court's pre-*Katz* precedent.[127] In a number of post-*Katz* technology decisions, the Court has restrictively construed the REOP test.[128] As a result, the Court has held that there is no violation of an individual (or company's) REOP when the police conduct surveillance using such devices as flashlights, electronic listening devices (except, of course, in *Katz*), or electronic beepers.[129] In addition, police have been allowed to combine technologies without violating a

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115. *Id.*
116. *Id.*
117. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83 (1998); Minnesota v. Olson, 495 U.S. 91 (1990); California v. Greenwood, 486 U.S. 35 (1988); United States v. Dunn, 480 U.S. 294 (1987); Oliver v. United States, 466 U.S. 170 (1984); United States v. Place, 462 U.S. 696 (1983); Rawlings v. Kentucky, 448 U.S. 98 (1980).
118. *Greenwood*, 486 U.S. at 36–37.
119. *Oliver*, 466 U.S. at 179.
120. *Place*, 462 U.S. at 707.
121. *Dunn*, 480 U.S. at 305.
122. *Carter*, 525 U.S. at 90–91.
123. Rawlings v. Kentucky, 448 U.S. 98, 104–05 (1980).
124. Minnesota v. Olson, 495 U.S. 91, 97–98 (1990).
125. United States v. Knotts, 460 U.S. 276, 283–84 (1983).
126. Kyllo v. United States, 533 U.S. 27, 40 (2001).
127. United States v. Jones, 565 U.S. 400, 411 (2012).
128. *See Jones*, 565 U.S. at 411; United States v. Karo, 468 U.S. 705, 719 (1984); *Knotts*, 460 U.S. at 283–84.
129. *See Knotts*, 460 U.S. at 280–83.

REOP.[130] For example, the police have been allowed to use both aircraft and photographic equipment together to spy down onto property.[131]

One of the most troubling decisions is the Court's holding in *Smith v. Maryland*, where the police used a pen register to record the numbers dialed from Smith's home phone.[132] A pen register is a device (installed by the phone company at its central offices) that can record the phone numbers dialed from a phone, although it does not record the contents of the telephone conversations themselves.[133] Smith argued that he had a REOP in the phone numbers he dialed from the privacy of his home.[134] Applying the *Katz* test, the Court disagreed, emphasizing that people realize the phone company has the capacity to record the numbers they call: It records the numbers for long-distance billing purposes and uses call records to help protect customers against unwelcome or harassing phone calls.[135] As a result, the Court concluded that telephone users do not have a REOP in the telephone numbers they dial.[136] The disturbing aspect of the *Smith* decision involved the Court's sweeping generalization that an individual "has no legitimate expectation of privacy in information he voluntarily turns over to third parties,"[137] including information turned over to the company's mechanical equipment.[138] Justice Marshall dissented, arguing that people expect privacy not only in the contents of their telephone conversations, but also regarding the phone numbers that they dial.[139]

Smith is hardly the only decision in which the Court has held that an individual does not hold an expectation of privacy in information turned over to a third party.[140] For example, in *United States v. Miller*, the Court held that copies of checks and other bank records turned over to a bank were not accompanied by a REOP, especially because a federal law (the Bank Secrecy Act of 1970) required that the records be kept.[141] In *Miller*, the Court rejected a Fourth Amendment claim, noting "that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest," and that Miller could not assert either ownership or possession over the papers

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130. *See* Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986).
131. *See id.*
132. Smith v. Maryland, 442 U.S. 735, 737 (1979).
133. *Id.* at 741.
134. *Id.* at 743.
135. *Id.* at 742–43.
136. *Id.* at 743.
137. *Id.* at 743–44.
138. *Id.* at 745.
139. *Id.* at 748–49 (Marshall, J., dissenting) (citation omitted) (footnote omitted) ("[E]ven assuming, as I do not, that individuals 'typically know' that a phone company monitors calls for internal reasons, it does not follow that they expect this information to be made available to the public in general or the government in particular.").
140. *See, e.g.*, United States v. Miller, 425 U.S. 435, 444 (1976).
141. *Id.* at 442–43.

because the bank kept those records pursuant to its statutory obligations.[142] Moreover, the Court concluded that because of the Act, "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."[143] Justice Brennan dissented, arguing that Miller had a legitimate expectation of privacy in the copies of his checks and other records held by his bank.[144] *Couch v. United States* involved a summons issued to Couch's accountant for the production of defendant's documents.[145] Couch attempted to rely on the accountant-client relationship to establish a REOP in documents held by the accountant on her behalf.[146] The Court disagreed, holding that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return."[147]

Pushed to their logical extreme, decisions like *Smith*, *Miller*, and *Couch* raise troubling questions regarding the meaning of the REOP test.[148] In a modern society, many items of personal information are voluntarily conveyed to third parties.[149] In addition to phone calls, most people send e-mails through Internet service providers (ISPs), send text messages through their cell phone providers, and some even maintain their computer data on sites maintained by others (e.g., so-called "cloud computing").[150] Most people would be inclined to think that their e-mails and texts—as well as information stored on the cloud—are protected by a REOP.[151] The difficulty is that because the information stored on the cloud is conveyed to a third party (the owner of the cloud) for storage, *Smith*, *Miller*, and *Couch* suggest that the information might not be protected against governmental prying.[152] Indeed, if strictly applied, *Smith* may suggest that even the *Katz* decision is no longer good law because Katz conveyed his conversation through the phone company.[153]

The Court's decisions regarding police use of electronic beepers to track a suspect's movement are also not expansive in terms of the Court's interpretation of the REOP test.[154] In the Court's initial decision in *United States v. Knotts*, the police placed a beeper in a bottle of chloroform that

142. *Id.* at 440, 442.
143. *Id.* at 443.
144. *Id.* at 447–48 (Brennan, J., dissenting).
145. Couch v. United States, 409 U.S. 322, 323 (1973).
146. *Id.* at 335.
147. *Id.*
148. *See* Smith v. Maryland, 442 U.S. 735 (1979); *Miller*, 425 U.S. 435; *Couch*, 409 U.S. at 335.
149. *See* United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).
150. *See* David A. Couillard, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205, 2216 (2009).
151. *See id.* at 2205–06.
152. *See Smith*, 442 U.S. at 742–46; *Miller*, 425 U.S. at 442–43; *Couch*, 409 U.S. at 335–36.
153. Katz v. United States, 389 U.S. 347, 353 (1967).
154. *See Smith*, 442 U.S. at 741–46; *Miller*, 425 U.S. at 440–47; *Couch*, 409 U.S. at 332–36.

Knotts bought (the beeper was placed in the bottle before Knotts bought it) and used it to learn that Knotts was headed to a remote cabin—where, as it turned out, he was making illegal drugs.[155] Knotts argued that the police's use of the beeper constituted a search because the police obtained information from the beeper—the location of the cabin—that they could not have easily obtained otherwise.[156] The Court disagreed, holding that an individual has a lesser expectation of privacy in an automobile, that Knotts was traveling on a public highway, and that the beeper simply allowed the government to monitor things that the police could have observed from the highway with their own eyes.[157] Although the Court concluded that Knotts had an expectation of privacy in the interior of his cabin, he could not claim a REOP for his drive to the cabin.[158] In its holding, the Court completely ignored the realities of the situation.[159] Knotts, aware that he was manufacturing illegal drugs at the remote cabin and having purchased chemicals for use in that operation, would have had a heightened sense of awareness regarding the possibility that he was being watched or surveilled during his drive from the store to the cabin.[160] Had the police tried to tail Knotts after he made the purchase, and had Knotts been aware that he was being tailed, he would not have gone to the cabin.[161] Likewise, the police could have posted monitors along the route to the cabin if they had been able to obtain good advance information regarding the location of the cabin and the route that Knotts might take, but it was unlikely that the police would have had reliable advance information.[162] Despite the Court's assertions, the beeper provided the police with the only viable means to monitor Knotts's route and destination.[163]

Knotts was followed by the holding in *United States v. Karo*, a case that also involved police use of an electronic beeper.[164] In *Karo*, although the police again monitored the beeper to learn the whereabouts of a remote cabin, they continued to monitor the beeper even after it arrived at the cabin.[165] As a result, they were able to ascertain how long Karo kept it there, when he moved it, and where he took it.[166] The Court again held that police's monitoring of the beeper's movement to the cabin did not involve a search within the meaning of the Fourth Amendment.[167] Nevertheless, the Court

155. United States v. Knotts, 460 U.S. 276, 277 (1983).
156. *Id.* at 285.
157. *Id.* at 281–82.
158. *Id.* at 282.
159. *Id.* at 281–85.
160. *Id.* 277–79.
161. *Id.*
162. *Id.*
163. *Id.*
164. United States v. Karo, 468 U.S. 705, 708–10 (1984).
165. *Id.* at 708.
166. *Id.*
167. *Id.* at 713.

held that the police violated Karo's REOP by continuing to monitor the beeper once it entered the house.[168] By doing so, they learned information about how long the beeper remained there as well as when it was moved—and therefore, there was a search within the meaning of the Fourth Amendment.[169] The Court focused on the fact that police had intruded on the privacy of Karo's home, emphasized the importance attributed to homes under the Fourth Amendment, and found it offensive that the government had used the beeper to obtain information regarding the interior of the home.[170] Because the police had used the beeper to learn more than they could have learned simply from observing from public streets, the Court held that the police had committed a search within the meaning of the Fourth Amendment.[171]

In some post-*Katz* cases, the Court has reverted to the old trespass test.[172] For example, in *United States v. Jones*, another case dealing with electronic beepers, rather than inserting the beeper in a bottle of chloroform that the defendant had purchased, the police directly attached the beeper to the defendant's vehicle, and then used the beeper to track his movements.[173] The Court found that the police trespassed when they attached the beeper.[174]

Cases like *Knotts* and *Karo* contain hopeful language regarding the REOP test and the implications of advancing technology, but they also raise troubling implications for whether police can use other types of technology in public places.[175] For example, suppose that the government decides to set up cameras in order to monitor what happens in public places. From a privacy perspective, such cameras raise the specter of "big brother" constantly monitoring our every movement.[176] By contrast, from a law enforcement perspective, these cameras can be highly effective in catching criminals.[177] For example, England maintains a fairly elaborate camera system that enables it to monitor what happens in public places, such as subway stations.[178] When a bomb went off in the London Underground a few years ago, the police were able to identify and ultimately apprehend the perpetrators by reviewing closed-circuit television tapes from the affected

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168. *Id.* at 714.
169. *Id.*
170. *Id.* at 715.
171. *Id.* at 714.
172. *See* United States v. Jones, 565 U.S. 400, 413 (2012).
173. *Id.* at 402–04.
174. *Id.* at 410.
175. *See Karo*, 468 U.S. at 721; United States v. Knotts, 460 U.S. 276, 284–85 (1983).
176. *See* Neal Litherland, *The Pros & Cons of Surveillance Cameras*, TECHWALLA, https://www.techwalla.com/articles/the-pros-cons-of-surveillance-cameras (last visited Nov. 20, 2019).
177. *See id.*
178. *See generally* LONDON: THE STATIONERY OFFICE, *Report of the Official Account of the Bombings in London on 7th of July 2005*, 2005–6, HC 1087, at 1 (UK), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/11_05_06_narrative.pdf.

place.[179] Under decisions like *Knotts* and *Karo*, it would seem that government could set up similar closed-circuit televisions in the United States and monitor what happens in all public places all the time, or review the tapes afterward in an effort to uncover evidence of illegal conduct.[180] Perhaps governments could supplement these closed-circuit systems with facial recognition technology so that they could better identify those who enter public places.

There are a few cases which suggest that the Court attaches a higher value to expectations of privacy in the home, and therefore, the Court is more likely to be protective against police use of technology in that context.[181] In *Kyllo v. United States*, when the police sought to use a forward-looking infrared detector (FLIR) to determine the amount of heat emanating from a residence, the Court found a violation of Kyllo's REOP.[182] In that case, police thought that Kyllo might be growing marijuana in his attic, and the FLIR allowed police to determine whether excessive levels of heat were coming from the roof, and thereby to establish probable cause to obtain a warrant to search Kyllo's home.[183] The Court could have held that the FLIR did not actually enter the house, but instead simply measured heat emanating from the house, and that the police could have obtained information about the heat emanating from Kyllo's house without using any technology.[184] For example, following a snow or rain storm, the police could have observed the house from the street to determine whether the snow or precipitation dried more quickly on the suspect's house than on surrounding houses.[185] The Court held instead that police use of the FLIR constituted a search within the meaning of the Fourth Amendment, noting that the police were using the FLIR to obtain information about Kyllo's home, including the interior of the home, and emphasizing the sanctity of the home under the Fourth Amendment.[186] As a result, even though the technology the police used in *Kyllo* was relatively crude (off-the-wall technology that allowed police to determine no

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179. *See id.* at 2 (indicating a "picture of the bombers' movements," which the police gleaned from closed-circuit television); *New 7 July Bomber Image Released*, BBC NEWS, http://news.bbc.co.uk/2/hi/uk_news/4301512.stm (last updated Oct. 2, 2005, 12:28 AM) (showing the image of the bomber, which the police received from closed-circuit television).

180. *See Karo*, 468 U.S. at 713–14 (noting that if a car's movements were observable to the naked eye, no Fourth Amendment violation occurred when an electronic tracking device also monitored the car's movements); United States v. Knotts, 460 U.S. 276, 283 (1983) (stating that no expectation of privacy exists when the police could have discovered the facts through visual surveillance from public places).

181. *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 237 n.4 (1986) (upholding aerial photography of an industrial complex and suggesting that the result might be different if the photography had occurred "immediately adjacent to a private home, where privacy expectations are most heightened").

182. Kyllo v. United States, 533 U.S. 27, 40 (2001).

183. *Id.* at 29–30.

184. *See id.* at 42–43 (Stevens, J., dissenting) (noting that the infrared camera in that case "passively measure[d] heat emitted from the exterior surfaces of petitioner's home" and that those measurements only showed "relative differences in emission levels").

185. *Id.* at 43.

186. *Id.* at 34–35 (majority opinion).

more than the amount of heat emanating from the house) and provided only limited information about what was happening inside the house, the Court found a search had occurred because the police were using the technology to snoop at a person's home, a situation in which an individual's REOP is particularly strong.[187] Moreover, the Court expressed concern that the police might use FLIR technology to obtain intimate details about what was happening inside the house (e.g., the hour at which the lady of the house took her bath).[188] *Kyllo* concluded that the minimal nature of the intrusion should not defeat Kyllo's REOP, because in the home, all details are intimate details, so that the Fourth Amendment draws a firm and bright line at the entrance to the house and requires a warrant.[189]

However, *Kyllo* contained an ominous warning regarding the advance of technology, stating that government may not gain information regarding the interior of the home using sense-enhancing technology when "the technology in question is not in general public use."[190] This limitation might not raise particular concerns regarding the use of thermal imaging technology. Only particularly nosy neighbors might be interested in knowing whether high levels of heat emanate from a neighbor's home, and therefore, limited numbers of people might be inclined to purchase such technology. However, neighbors might be inclined to purchase and use other technological devices (e.g., sophisticated-listening devices) that would allow them to ascertain what their neighbors are saying or doing inside their homes. Moreover, such devices are becoming increasingly cheaper and easier to obtain.[191] The same can be said for spyware that police might use to track an individual's movements on the internet from a remote location or even to invade someone's computer.[192] As a result, *Kyllo* may have opened up a gaping hole in the Fourth Amendment.[193] If an individual does not have a REOP in an activity, then there is no search when the police surveil it.[194] If a

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187. *Id.*

188. *Id.* at 38.

189. *Id.* at 37, 40.

190. *Id.* at 34 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

191. *See, e.g.*, Marc Weber Tobias, *The Best Inexpensive Tools to Spy on People*, FORBES (Oct. 27, 2011, 10:40 AM), https://www.forbes.com/sites/marcwebertobias/2011/10/27/the-best-inexpensive-tools-to-spy-on-people/ (exploring some forms of "covert surveillance equipment" available to both civilians and law enforcement).

192. *See, e.g.*, John Kelly, *Cellphone Data Spying: It's Not Just the NSA*, USA TODAY, https://www.usatoday.com/story/news/nation/2013/12/08/cellphone-data-spying-nsa-police/3902809/ (last updated Aug. 11, 2015, 11:51 AM) (noting that, in many states, "police can get many kinds of cellphone data without obtaining a warrant" and that many people are unaware that a smartphone "is an adept location-tracking device").

193. *See Kyllo*, 533 U.S. at 33–34 (noting that the degree of privacy which the Fourth Amendment secures for citizens has not gone entirely unaffected by technological advances).

194. *See* Smith v. Maryland, 442 U.S. 735, 740 (1979); Katz v. United States, 389 U.S. 347, 351 (1967) ("For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

REOP disappears as to technology that is in common use, then the advance of technology could eventually obliterate Fourth Amendment protections.

The Court's protectiveness of the home—as reflected in *Kyllo*—has not necessarily carried over to other scenarios.[195] In *California v. Ciraolo*, the police suspected that Ciraolo was growing marijuana in his fenced backyard, but they found it difficult to view the property from the ground because a ten foot fence surrounded it.[196] Police, therefore, decided to fly a helicopter about 1,000 feet above the property in order to confirm their suspicions.[197] From that height, "the officers readily identified marijuana plants 8 feet to 10 feet in height growing in a 15- by 25-foot plot in respondent's yard," took photographs with a standard thirty-five millimeter camera, and obtained a search warrant which led to the seizure of seventy-three marijuana plants.[198] The Court held that police's use of the helicopter did not constitute a search within the meaning of the Fourth Amendment.[199] While recognizing that the courts have historically accorded greater protection to the curtilage surrounding a home, and noting that Ciraolo had gone to great lengths to preserve the privacy of his curtilage, the Court held that Ciraolo did not have a REOP because the police operated the helicopter in navigable airspace and could view the marijuana plants with the naked eye from that position.[200] Likewise, in *Florida v. Riley*, police flew at an even lower level (400 feet) in order to determine whether a property owner was growing marijuana inside a greenhouse located in a rural area near Riley's mobile home.[201] "A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a 'DO NOT ENTER' sign."[202] By using the helicopter, a police officer could observe the fact that Riley was growing marijuana in the greenhouse.[203] Although the Court concluded that Riley had a subjective expectation of privacy in the greenhouse, the Court relied on *Ciraolo* in holding that the expectation is not objectively reasonable because Riley had the roof open, making the interior of the greenhouse viewable from the air, and aircrafts were allowed to fly over his property (and helicopters even lower).[204] Justice Brennan disagreed, noting that the police were using a "very expensive and sophisticated piece of machinery" which allowed them to view Riley's property from a vantage point "to which few ordinary citizens

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195. *See* Florida v. Riley, 488 U.S. 445, 448 (1989); California v. Greenwood, 486 U.S. 35, 37 (1988); California v. Ciraolo, 476 U.S. 207, 209 (1986).
196. *Ciraolo*, 476 U.S. at 209.
197. *Id.*
198. *Id.* at 209–10.
199. *Id.* at 215.
200. *Id.* at 213–14.
201. Florida v. Riley, 488 U.S. 445, 448 (1989).
202. *Id.*
203. *Id.*
204. *Id.* at 450–51.

have access," and he expressed concern that police could "drive[] back into the recesses of their lives by the risk of surveillance."[205]

Even though courts have not used the REOP test in a manner that is terribly reliable or workable, there are indications that the Court may (finally) be starting to wake up to the dangers of advancing technology.[206] For example, in *Riley v. California*, the Court limited its search incident to legal arrest precedent by holding that the police may not routinely search through the contents of an individual's cell phone when they make a search incident to a legal arrest.[207] The Court was concerned about the privacy implications of allowing the police to search through cell phone content.[208]

So in the final analysis, Professor Loewy is correct. The REOP is a Court-made rule, one that has not proven to be terribly reliable or effective, and it is not clear that the Framers intended to protect one's reasonable expectation of privacy (whatever those words can be taken to mean).[209] Others have argued that we should conceptualize Fourth Amendment protections quite differently.[210] For example, Professor Luke Milligan argues that Fourth Amendment analysis should focus on the actual language of the Fourth Amendment—in particular "[t]he right of the people *to be secure* in their persons, houses, papers, and effects."[211] Milligan closely examines the meaning of the right "to be secure," pointing to founding-era dictionaries and popular usages, constitutional structure, and the debates surrounding the ratification of the Fourth Amendment.[212] He concludes that the Amendment's original meaning guarantees more than "a mere right to be 'spared' unreasonable searches and seizures," but also a right to be free from fear against such intrusions.[213] This approach has interesting ramifications for current doctrine, particularly in the context of standing and the exclusionary rule.[214] As Professor Loewy suggests, it is time for society to rethink its focus on the REOP test.[215]

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205. *Id.* at 457–66 (Brennan, J., dissenting) (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402 (1974)).

206. *See supra* text accompanying notes 90–92 (explaining that the REOP test is difficult to determine and to apply to new technology).

207. Riley v. California, 573 U.S. 373, 401 (2014).

208. *Id.* at 403.

209. *See* Loewy, *supra* note 1, at 3.

210. *See, e.g.*, Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713 (2014).

211. *See id.* at 717 (quoting U.S. CONST. amend. IV).

212. *Id.* at 717–19, 732–50.

213. *Id.* at 760.

214. Loewy, *supra* note 1, at 10.

215. *Id.* at 3–7.

III. REMEDIES

In the final section of his article, Professor Loewy discusses remedies for Fourth Amendment violations.[216] He agrees with the Court that the exclusionary rule is not constitutionally mandated in Fourth Amendment cases, and he has some sympathy for the Court's use of a cost-benefit test in deciding whether to apply the exclusionary evidence rule in particular cases.[217] Nevertheless, he expresses concern that the Court may have "grossly overstated the cost of the Fourth Amendment," and "grossly understated the value of meaningfully enforcing the Fourth Amendment."[218]

Professor Loewy's observation is undoubtedly correct. Although the Court glibly talks about the importance of cost-benefit analysis in applying the exclusionary rule, the Court has never provided courts or commentators with an accurate or reliable test for assessing those costs and benefits.[219] Not uncommonly, the Court simply declares that the costs of exclusion are too high, and therefore, allows the government to use the evidence.[220] There is no attempt to quantify the actual costs or benefits, or to undertake a systematic comparison of those costs against the benefits.[221]

IV. CONCLUSION

Professor Loewy has contributed an incredible amount of scholarship over the years, and the extraordinary aspect of his work is that it has impacted so many different areas of the law. The piece that I chose to write about focuses on one of his most important subject areas: The Fourth Amendment. Professor Loewy's work hones in on the important aspects of the Amendment, in particular, the history, the values, and the remedies.[222]

As with all his work, Professor Loewy's article raises critical issues.[223] He notes that the Court has been inconsistent in its use of history,[224] and that, in applying the Fourth Amendment, the Court's use of the reasonable expectation of privacy test may be misguided.[225] Finally, he correctly suggests that the Court's analysis of the costs and benefits of applying the exclusionary evidence rule leaves a lot to be desired.[226]

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216. *Id.* at 7–11.
217. *Id.* at 7–8.
218. *Id.* at 8.
219. *See, e.g.*, United States v. Leon, 468 U.S. 897, 907 (1984).
220. *See, e.g.*, *id.* at 922.
221. *See id.*
222. *See* Loewy, *supra* note 1.
223. *See id.*
224. *Id.* at 1.
225. *Id.* at 3.
226. *Id.* at 11.