

COLLECTIVE STANDING UNDER THE FOURTH AMENDMENT

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INTRODUCTION

The Supreme Court’s landmark decision in *Katz v. United States*¹ changed the direction of Fourth Amendment law. There, the Court redefined “searches” as government actions that violate subjectively manifested expectations of privacy “that society is prepared to recognize as ‘reasonable.’”² Although perceived as progressive at the time, this reasonable expectation of privacy test³ has done significant violence to “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”⁴ Some of these wounds have been inflicted by the public observation doctrine⁵ and the third party doctrine,⁶ which together immunize a wide variety of government searches from Fourth Amendment scrutiny because they do not—in the Supreme

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1. 389 U.S. 347 (1967).

2. *Id.* at 361 (Harlan, J., concurring). Although this two-pronged test appears in Justice Harlan’s concurrence, the Court soon adopted his formulation as its own. *See, e.g.,* *Smith v. Maryland*, 442 U.S. 735, 740–41 (1979).

3. Although the Harlan test formally has two prongs, as Orin Kerr has pointed out, the *Katz* doctrine is best understood by focusing on the second prong. *See* Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015).

4. U.S. CONST. amend. IV. For an extended analysis of this point, *see* DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 68–103 (2017).

5. The public observation doctrine holds that individuals do not have a reasonable expectation of privacy in anything exposed to public view. Applying this doctrine, the Supreme Court has granted an unfettered license for government agents to make observations from any lawful vantage. *See* GRAY, *supra* note 4, at 78–84 (explaining the public observation doctrine and its consequences); *see also* *Florida v. Riley*, 488 U.S. 445, 451 (1989) (looking into a greenhouse located on private property through open roof panels from a helicopter in public airspace is not a search); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (looking into a fenced backyard from an airplane operating in public airspace is not a search); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (using a powerful telescope to look down from public airspace is not a search); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (using a beeper tracking device to monitor a suspect’s public movements is not a search).

6. The third party doctrine holds that individuals do not have a reasonable expectation of privacy in information shared with third parties, at least where government agents gain access to that information through the third party. *See* GRAY, *supra* note 4, at 84–89 (explaining the third-party doctrine and its consequences); *see also* *Smith*, 442 U.S. at 746 (using a pen register device to gather non-content information relating to telephone calls is not a search); *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 54 (1974) (subpoenaing of banking records is not a search); *United States v. White*, 401 U.S. 745, 751 (1971) (using a body wire worn by an undercover officer to record conversations is not a search); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (using an informant to report on private conversation is not a search); *Lopez v. United States*, 373 U.S. 427, 440 (1963) (carrying of electronic recording device by Internal Revenue agent did not violate defendant’s constitutional rights).

Court's view, at least—constitute “searches” at all.⁷ In recent years new and emerging surveillance technologies have exploited these doctrinal rules to a dramatic degree, facilitating a variety of programs that engage in broad and indiscriminate searches,⁸ subjecting each of us and all of us to the constant threat of searches based on bad reasons, insufficient reasons, or no particular reasons at all.⁹ Despite those threats, *Katz* places these programs outside the scope of Fourth Amendment regulation because the means and methods of searching employed are not considered “searches.”¹⁰

The problems following in the wake of the public observation and third party doctrines have been explored in depth by academics, critics, and the courts.¹¹ By contrast, rules governing Fourth Amendment standing that developed in the wake of *Katz* have largely escaped sustained critique.¹² That is unfortunate. These rules have set artificial constraints on who can challenge government searches; the ability of individuals and groups to challenge searches and seizures at the programmatic level; the kinds of evidence deemed relevant in Fourth Amendment cases; and the types of remedies litigants can pursue. These limits have had particularly deleterious effects on efforts to challenge racial bias in search and seizure practices, including stop and frisk programs and use of force protocols.¹³ This Article seeks to document some of the damage and to chart a way forward.

Part I describes the current state of affairs in government searches and seizures with a focus on stop and frisk practices. Recent investigations by the Department of Justice along with publicly available data show that stop and frisk programs demonstrably threaten the right of the people to be secure against unreasonable searches and seizures. Much of that threat is focused on perfectly innocent and law-abiding members of minority groups and the poor, too many of whom are subjected daily to the threat of being stopped and frisked. Part II provides a brief primer on the law of Fourth Amendment standing, which allows challenges only to

7. See *Smith*, 442 U.S.735; *Shultz*, 416 U.S. 21; *White*, 401 U.S. 745; *Hoffa*, 385 U.S. 293; *Lopez*, 373 U.S. 427.

8. See GRAY, *supra* note 4, at 23–67 (documenting and discussing a range of contemporary surveillance technologies and programs including the Section 215 telephonic metadata surveillance program administered by the National Security Agency and the Federal Bureau of Investigation).

9. See *id.*

10. *Id.* at 78–89 (discussing the doctrinal and practical consequences of the third party and public observation doctrines).

11. See, e.g., *United States v. Jones*, 565 U.S. 400, 414–18 (2012) (Sotomayor, J., concurring); Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 39 (2011). But see Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009) (defending the third party doctrine).

12. There was a spate of student notes decrying the Court's opinions in *United States v. Salvucci*, 448 U.S. 83 (1980) and *Rakas v. Illinois*, 439 U.S. 128 (1978), but interest quickly faded. Two notable recent exceptions to this dearth of scholarly interest are Christopher Slobogin, *Standing and Covert Surveillance*, 42 PEPP. L. REV. 517 (2015) and Nadia B. Soree, *Whose Fourth Amendment and Does It Matter? A Due Process Approach to Fourth Amendment Standing*, 46 IND. L. REV. 753 (2013).

13. See *infra* Part III.

individual instances of government action by those who have suffered a personal violation of their subjectively manifested and reasonable expectations of privacy. Part III explains how the rules governing Fourth Amendment standing have hamstrung the ability of the people to challenge unreasonable search and seizure practices by limiting who can sue, what evidence they can offer, and what remedies they can seek. Part IV outlines an alternative approach that takes seriously the collective dimensions of Fourth Amendment rights, which, after all, are guaranteed to “the people.” Recognizing the collective nature of Fourth Amendment rights affords broad standing for any member of “the people” to seek prospective remedies sufficient to guarantee for everyone the right to be secure against unreasonable searches and seizures.

I. THREATS OF UNREASONABLE SEARCH AND SEIZURE

There is no doubt that the people live in a state of insecurity where we are under the constant threat of searches and seizures that are “unreasonable” in that they are not justified by good and sufficient reasons.¹⁴ We are subject to pervasive visual observation by land-based surveillance cameras, license plate readers, and aerial drones.¹⁵ Our telephone calls are monitored and details about whom we call, when, from where, and for how long are recorded, stored, and analyzed.¹⁶ Every detail of our financial lives is aggregated and analyzed.¹⁷ Our Internet activities are monitored.¹⁸ Our movements and locations are tracked through our cellular phones and other GPS-enabled devices.¹⁹ We can also be tracked through our passports, driver’s licenses, and even our clothes.²⁰ Increasingly, we are also subject to biometric tracking and monitoring by technology capable of identifying us by recognizing our faces, scanning our eyes, or analyzing our gaits and

14. See GRAY, *supra* note 4, at 160–65 (documenting the original public meaning of “unreasonable” in the Fourth Amendment as “not agreeable to reason,” “exorbitant,” “claiming or insisting on more than is fit,” or “immoderate” and explaining particular founding era concerns with grants of broad and unfettered discretion for government agents to conduct searches and seizures for bad or insufficient reasons).

15. *Id.* at 23–38; Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM & MARY L. REV. 49, 52–61 (2015).

16. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT, 21–37 (2014), https://www.pcllob.gov/library/215-report_on_the_telephone_records_program.pdf [hereinafter, PCLOB TELEPHONE RECORDS REPORT].

17. See FRANK PASQUALE, THE BLACK BOX SOCIETY, THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION, 21–26, 101–37 (2015).

18. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, 16–48 (2014), <https://www.pcllob.gov/library/702-Report-2.pdf>.

19. Stephanie K. Pell, *Location Tracking*, in THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 44–70 (David Gray & Stephen E. Henderson eds., forthcoming 2017).

20. GRAY, *supra* note 4, at 27.

postures.²¹ And, we are subjected to routine stops and frisks by armed police officers.²² Many of these means and methods are deployed on a programmatic basis, rendering each of us and all of us vulnerable to constant threats of indiscriminate searches. Because, by definition, most of the searches conducted pursuant to these programs are “unreasonable” in that they are based on insufficient reasons, bad reasons, or no reasons at all.²³

Members of racial, ethnic, and religious minorities are particularly vulnerable. Threads of racial bias woven into the fabric of American society have long rendered substantial segments of the people insecure against threats of searches and seizures.²⁴ Racial profiling, whether conscious or unconscious, is endemic in traditional search and seizure practices.²⁵ That targeting is reflected in the deployment of modern surveillance technologies as well.²⁶ Matters are likely to get worse in coming years as federal agencies become more aggressive in enforcing immigration policy and local law enforcement agencies are pressed into action.²⁷ But the starkest examples of the racial impact of search and seizure practices are stop and frisk programs.²⁸ Take, as examples, stop and frisk programs deployed by the New York City Police Department (“NYPD”) and the Baltimore City Police Department (“BPD”).

21. Margaret Hu, *Biometric Surveillance and Big Data Governance*, in THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 121–49 (David Gray & Stephen E. Henderson eds., forthcoming 2017).

22. See generally CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), www.justice.gov/opa/file/883366/download [hereinafter INVESTIGATION OF BALTIMORE POLICE]; N.Y. CIVIL LIBERTIES UNION, 2012 STOP AND FRISK REPORT (2013), https://www.nyclu.org/sites/default/files/publications/2012_Report_NYCLU_0.pdf [hereinafter NYCLU 2012 STOP AND FRISK REPORT].

23. See GRAY, *supra* note 4, at 160–65.

24. See Alvaro M. Bedoya, *The Color of Surveillance*, SLATE (Jan. 18, 2016), http://www.slate.com/articles/technology/future_tense/2016/01/what_the_fbi_s_surveillance_of_martin_luther_king_says_about_modern_spying.html; Dorothy Roberts & Jeffrey Vagle, *Racial Surveillance Has a Long History*, HILL (Jan. 4, 2016), <http://thehill.com/opinion/op-ed/264710-racial-surveillance-has-a-long-history>; Georgetown Law, *The Color of Surveillance: Government Monitoring of the African American Community*, C-SPAN (Apr. 8, 2016), <https://www.c-span.org/video/?407901-1/discussion-racial-bias-government> (exploring the racial bias of government surveillance at length in a 2016 conference held at Georgetown Law).

25. See *infra* notes 42–48 and accompanying text.

26. See Bedoya, *supra* note 24; Malkia Amala Cyril, *Black America’s State of Surveillance*, PROGRESSIVE (March 30, 2015), <http://progressive.org/magazine/black-america-s-state-surveillance>; Glenn Greenwald & Murtaza Hussain, *Meet the Muslim-American Leaders the FBI and NSA Have Been Spying On*, INTERCEPT (July 9, 2014 12:01 AM), <https://theintercept.com/2014/07/09/under-surveillance/>.

27. Matt Zapotosky, *Trump Wants to Empower Local Police to Enforce Immigration Law, Raising Fears of Racial Profiling*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/26/trump-wants-to-empower-local-police-to-enforce-immigration-law-raising-fears-of-racial-profiling/?utm_term=.558fd3e2a1dd; see ANDREW FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT (forthcoming 2017) (documenting how racialized data produces racially skewed results in law enforcement and immigration).

28. See *infra* notes 29–61 and accompanying text.

NYPD officers conducted 97,296 stops in 2002.²⁹ Although this number seems outlandish, it might be reasonably explained by the state of emergency that existed immediately after of the terrorist attacks of September 11, 2001. However, the stop rates continued to increase from there, eventually peaking at 685,724 in 2011.³⁰ Taking into account population numbers at the time, this means that over 8% of New Yorkers were stopped and questioned by law enforcement in 2011.³¹ Of those 685,724 documented stops in 2011, 381,704 included a frisk,³² which means that 4.5% of New Yorkers were frisked by law enforcement in 2011.³³ By way of comparison, there were 106,669 major felonies reported by the NYPD in 2011.³⁴ That number includes all homicides, rapes, robberies, felony assaults, burglaries, and grand larcenies, including auto thefts.³⁵ In 2011, New Yorkers were therefore six times more likely to be stopped and almost four times more likely to be frisked than they were to be a victim of a major felony.³⁶

There is little doubt that the NYPD's 2011 stop and frisk program threatened the people of New York with searches and seizures. But, did it threaten their security against "unreasonable" searches and seizures? The data certainly suggests that it did.³⁷ For example, those 685,724 stops yielded only 40,883 arrests, most for relatively minor offenses like possession of marijuana.³⁸ That is a yield rate of less than 6% as measured by arrests. This is not to suggest that there were not important law enforcement successes among those arrests.³⁹ There were thousands of arrests

29. N.Y. CIVIL LIBERTIES UNION, 2011 STOP AND FRISK REPORT 3 (2012), https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf [hereinafter NYCLU 2011 STOP AND FRISK REPORT].

30. *Id.*

31. GRAY, *supra* note 4, at 50. According to the 2010 census, there were 8,175,133 souls inhabiting New York City in 2010. N.Y.C. Dep't of City Planning, *Current and Project Populations: Current Estimates of New York City's Population for July 2016*, <http://www1.nyc.gov/site/planning/data-maps/nyc-population/current-future-populations.page>. Official estimates put New York's population at 8,244,910 in 2011. N.Y. State Dep't of Health, *Table 1: Estimated Population by Age, Sex and Religion, New York State - 2011* (2011), https://www.health.ny.gov/statistics/vital_statistics/2011/table01.htm.

32. See NYCLU 2011 STOP AND FRISK REPORT, *supra* note 29, at 8.

33. GRAY, *supra* note 4, at 51.

34. *Id.*

35. *Id.*

36. *Id.*

37. See Jeffrey Fagan et al., *Street Stops and Police Legitimacy in New York*, in *COMPARING THE DEMOCRATIC GOVERNANCE OF POLICE INTELLIGENCE: NEW MODELS OF PARTICIPATION AND EXPERTISE IN THE UNITED STATES AND EUROPE 206* (Thierry Delpuech & Jacqueline E. Ross eds., 2016) (explaining the lack of statistical evidence supporting the effectiveness of New York's stop and frisk program as a broad crime control measure).

38. See NYCLU 2012 STOP AND FRISK REPORT, *supra* note 22, at 17. Given this high proportion of marijuana arrests, some critics have suggested that New York's stop and frisk program is more accurately described as a "marijuana arrest program." *Id.* at 18.

39. Some supporters of aggressive stop and frisk policies argue that they are successful in reducing overall crime rates because they deter potential offenders. There is no reliable and convincing evidence bearing this argument out. See, e.g., David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 JUST. Q. 154, 181–84 (2014).

for crimes against persons, and police seized 780 illegal guns.⁴⁰ The problem is that those achievements represented a tiny minority of the total number of stops and frisks performed in 2011.⁴¹ Meanwhile, hundreds of thousands of perfectly innocent New Yorkers were seized and searched. The numbers alone suggest a program that licensed searches and seizures based on bad or insufficient reasons, thereby threatening the security of the people of New York against unreasonable searches and seizures.

The NYPD's stop and frisk program is even more problematic because of its racial impact. Over 86% of New Yorkers stopped and frisked in 2011 were Black or Latino,⁴² even though those groups made up only about 54% of the population in New York.⁴³ The racial disparity is sharper when one considers age. Black and Latino men between the ages of fourteen and twenty-four accounted for only 4.7% of the population of New York City in 2011 but represented 41.6% of stops.⁴⁴ By comparison, White men in that same age group comprised 2% of the city's population and represented 3.8% of stops.⁴⁵

These racial disparities might make sense in light of the fact that most stops and frisks occurred in majority Black and Latino precincts,⁴⁶ but that in itself is a problem. Moreover, the data from predominately White precincts shows that racial disparities in stop and frisk practices persisted across the city. For example, in the 19th Precinct, which covers the Upper East Side, Blacks and Latinos comprised only 9% of the overall population in 2011 but represented 71% of stops.⁴⁷ As another example, Blacks and Latinos represented around 8% of the populations of the 17th Precinct and the 6th Precinct in 2011, but approximately 71% and 77%, respectively, of stops in those neighborhoods targeted Blacks and Latinos.⁴⁸

Matters seem to have improved somewhat in recent years. For example, the overall number of documented stops and frisks performed by New York City police officers declined dramatically after the 2013 election of Mayor Bill de Blasio, dropping to 45,787 in 2014; 22,565 in 2015; 12,404 in 2016; and 2,862 through the first quarter of 2017.⁴⁹ Overall success rates also went up by about 50% as compared to 2011.⁵⁰ Even with those improvements, however, it remained

40. NYCLU 2011 STOP AND FRISK REPORT, *supra* note 29, at 13.

41. *Id.*

42. *Id.* at 5–6.

43. U.S. CENSUS BUREAU, AMERICAN FACT FINDER: NEW YORK, RACE AND HISPANIC OR LATINO ORIGIN: 2010, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=C>.

44. NYCLU 2011 STOP AND FRISK REPORT, *supra* note 29, at 7.

45. *Id.*

46. *Id.* at 6.

47. *Id.* at 7.

48. *Id.* at 6.

49. See N.Y. Civil Liberties Union, *Stop and Frisk Data: Annual Stop-and-Frisk Numbers*, N.Y. CIV. LIBERTIES UNION (May 23, 2017), <http://www.nyclu.org/content/stop-and-frisk-data>.

50. Overall success rates for stops conducted in 2011, including both arrests and citations, was 12%. In 2014, that overall success rate improved to 18%. By 2016, that rate was 24%. See *id.*

the case that 76% of those stopped were completely innocent.⁵¹ More unfortunately, profound racial disparities persisted with 83% and 81% of those stopped in 2015 and 2016, respectively, identified in reports as Black or Latino.⁵²

Both in terms of dismal success rates and racial disparities, New York's stop and frisk program is far from unique. In fact, it is comparatively less unreasonable than stop and frisk programs in other cities, some of which are less effective and more discriminatory.⁵³ For example, according to a 2016 Department of Justice report, the success rate of stops and frisks performed by the Baltimore Police Department in 2014, as measured by arrests, was only 3.7%.⁵⁴ And, just as in New York, members of minority groups bore the brunt of the program in Baltimore. African American citizens experienced stops at a rate of 520 stops per 1,000 African American residents while White Baltimoreans, experienced only 180 stops per 1,000 White residents.⁵⁵ As was the case in New York, that disparity was replicated across Baltimore's policing districts, with African Americans representing the vast majority of stops even in areas where they are dramatically underrepresented in the residential population.⁵⁶

Overbreadth and racial disparities in stop and frisk programs raise a number of concerns. First, there is the danger that these programs are expressions of overt racism. Although some law enforcement officers may be explicit racists, the vast majority are not. The more likely explanation is that these racial disparities manifest the insidious influence of implicit bias.⁵⁷ The influence of implicit bias on

51. *Id.*

52. *Id.*

53. *See, e.g.*, Plaintiffs' Fifth Report to Court and Monitor on Stop and Frisk Practices, *Bailey v. City of Philadelphia* (E.D. Pa. Feb. 24, 2015) (No. 10-5952), <https://www.clearinghouse.net/chDocs/public/PN-PA-0013-0005.pdf>; INVESTIGATION OF BALTIMORE POLICE, *supra* note 22; CHI. POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES. THEY SERVE (2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf [hereinafter CHI. POLICE ACCOUNTABILITY TASK FORCE REPORT]; ACLU OF ILL., STOP AND FRISK IN CHICAGO (2015), <https://www.aclu-il.org/en/publications/stop-and-frisk-chicago>; L.A POLICE COMM'N, OFFICE OF THE INSPECTOR GEN., REVIEW OF SUSPICIOUS ACTIVITY REPORTS, FISCAL YEAR 2013/2014 (2015), http://www.lapdpolicecom.lacity.org/012715/BPC_15-0014.pdf; ACLU OF MASS., BLACK, BROWN, AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007-2010 (2014), <https://aclum.org/app/uploads/2015/06/reports-black-brown-and-targeted.pdf>; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT (2014), www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT (2011), www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf.

54. INVESTIGATION OF BALTIMORE POLICE, *supra* note 22, at 28, 63.

55. *Id.* at 48.

56. *Id.* at 49–50.

57. *See generally* MAHZARIN R. BANAJI & ANTHONY GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 9–24 (Justin D. Levinson & Robert Smith eds., 2012); Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 *PSYCHOL. SCI.* 53 (2006); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *AM. ECON. REV.* 991 (2004); Irene V. Blair et al., *Assessment of Biases Against Latinos and African Americans Among Primary Care Providers*

our daily social judgments and interactions is well-documented. Research reveals that, no matter our racial identities, we are all more likely to associate positive character traits and the potential for socially beneficial behaviors with Whites and negative character traits and the potential for antisocial behavior with people who exhibit phenotypically Black and Hispanic features and skin color.⁵⁸ Although these responses are usually preconscious and seldom erupt as explicitly racist thoughts, they shape the way we perceive, judge, and respond to others.⁵⁹ We are simply more likely to see the same behaviors as innocent if performed by someone who is White, but suspicious or criminal if performed by someone who is Black or Latino.⁶⁰ Law enforcement officers are not immune from the effects of implicit bias, which probably accounts for much of the racial disparities in search and seizure programs.⁶¹

This is cold comfort, of course. Whether the result of explicit racism or implicit bias, the fact remains that racial identity plays an outsized role in many stop and frisk programs. On the numbers, race seems to effectively determine who is stopped and who is not. Of course, racial identity is neither a good nor a sufficient reason for seizing or searching a person or his effects. Thus, to the extent that stops and frisks are conducted based on race, those stops and frisks are unreasonable because they are based on bad reasons. That race as a reason plays an unconscious role in most cases does not make those seizures and searches any more reasonable.

Pervasive racial disparities in stop and frisk programs are harmful. Being stopped or frisked is a demeaning experience by itself,⁶² but if it is part of a broader pattern of systematic discrimination, then it is also alienating.⁶³ When that alienation is pervasive, it results in sharp differences among racial groups' perceptions of law enforcement, their sense of security in public spaces, their

and Community Members, 103 AM. J. PUB. HEALTH 92 (2013); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010).

58. The most compelling such results come from the Implicit Bias Test. See, e.g., BANAJI & GREENWALD, *supra* note 57, at 41–46; John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCH. SCIENCE 315 (2000); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. OF PERSONALITY AND SOC. PSYCH. 1464 (1998); Kang & Lane, *supra* note 57; Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. OF EXPERIMENTAL SOC. PSYCH. 435 (2001); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES., & PRAC. 101 (2002). Readers can test themselves at Project Implicit, <https://implicit.harvard.edu/implicit/>.

59. BANAJI & GREENWALD, *supra* note 57, at 48–52, app. 1 184–87.

60. ABC News conducted a hidden camera experiment featuring a young White man, a young African-American man, and a young White woman trying to steal a bicycle that vividly documented this effect. *What Would You Do?: Bike Thief*, YOUTUBE (May 27, 2010), <https://www.youtube.com/watch?v=ge7i60GuNRg>.

61. See L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1148 (2011).

62. See generally Change the NYPD, *Stop-and-Frisk: The High School Senior*, YOUTUBE (July 29, 2013), <https://www.youtube.com/watch?v=01rsXYIXOrU>.

63. Cf. Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 375–90 (2001).

views on systemic fairness and justice, and the levels of respect they afford to the state and state authorities.⁶⁴ As a consequence, stops and frisks, the threat of being stopped and frisked, and awareness of racial targeting in stop and frisk programs all play a defining role in law enforcement engagements with minority groups, individuals' conceptions of themselves, their constructions of social status, and their views of law enforcement as an institution.⁶⁵ As a result of countless daily incidents of targeting and persistent historical patterns of discriminatory treatment, Black and Latino citizens and residents are far less likely to trust law enforcement or to believe that they live in a just and fair society governed by laws that deserve their obedience.⁶⁶

As a result of racial disparities in search and seizure programs, minority residents and those who reside in neighborhoods designated as "high crime" live in a surveillance state. Residents are subject to constant threats of being stopped and frisked. They are also watched by cameras mounted on poles and on remote platforms like drones and airplanes.⁶⁷ The results are deep and damaging dignitary harms that manifest as fear and distrust. It should surprise no one that this toxic situation sometimes erupts in violence. Although it would be too much to blame the deaths of Michael Brown, Eric Garner, and Freddie Gray, Jr., and the aftermath of these events on unreasonable search and seizure policies, there is no doubt that longstanding search and seizure practices in Ferguson, New York, and Baltimore played important roles. After all, these incidents each started with a stop.⁶⁸ Additionally, the subsequent protests after each of their deaths cited broad patterns of racial disparities in law enforcement practices as a primary concern.⁶⁹

None of these observations are new or groundbreaking. Racial disparities in law enforcement practices are well-documented and are frequent targets for reform

64. See CHI. POLICE ACCOUNTABILITY TASK FORCE REPORT, *supra* note 53, at 10, 13–14; Fagan et al., *supra* note 37; Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. OF CRIM. L. & CRIMINOLOGY 297 (2015). For some deeply affecting first-person accounts of the effects of contemporary stop and frisk programs on individuals, see Change the NYPD, *Stop-and-Frisk: The Pastor*, YOUTUBE (Aug. 12, 2013), <https://www.youtube.com/watch?v=XfcHk53Puxg>.

65. Cf. Tyler, *supra* note 63.

66. See *id.*

67. Kevin Rector & Luke Broadwater, *Report of Secret Aerial Surveillance by Baltimore Police Prompts Questions, Outrage*, BALT. SUN (Aug. 24, 2016, 10:22 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-secret-surveillance-20160824-story.html>.

68. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>; Andy Newman, *The Death of Eric Garner, and the Events that Followed*, N.Y. TIMES (Dec. 3, 2014), https://www.nytimes.com/interactive/2014/12/04/nyregion/04garner-timeline.html?_r=0; *Timeline: Freddie Gray's Arrest, Death and the Aftermath*, BALT. SUN (Apr. 12, 2015), <http://data.baltimoresun.com/news/freddie-gray/>.

69. See Shannon Luibrand, *How a Death in Ferguson Sparked a Movement in America*, CBS NEWS (Aug. 7, 2015), <http://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later/> (describing the Black Lives Matter movement).

efforts.⁷⁰ Despite these efforts, the problems persist. In light of these political failures, one might hope to find some constitutional ground for demanding reform. The Fourth Amendment seems to provide a particularly promising resource. After all, it guarantees “[t]he right of the people to be secure . . . against unreasonable searches and seizures”⁷¹ It is hard to imagine a more significant threat to that right than programs that seem to license searches and seizures based on skin color, which is neither a good nor a sufficient reason to invade the security of anyone’s person or effects. Likewise, it would seem that the Fourth Amendment should have something to say about the deployment and use of modern surveillance technologies that conduct searches on a broad and indiscriminate basis. Unfortunately, as we shall see in the next section, *Katz* and the doctrine of Fourth Amendment standing make it nearly impossible to mount any serious efforts to secure the right of the people to be secure against threats of unreasonable searches and seizures posed by new technologies and stop and frisk programs.

II. *KATZ* AND THE LAW OF FOURTH AMENDMENT STANDING

Article III, Section 2, of the Constitution requires that all claims heard in federal court present a “case” or “controversy.”⁷² To establish the existence of a case or controversy, litigants must demonstrate that they have “standing.” To have standing a litigant must have suffered an actual or threatened injury, the injury must be the result of the defendant’s action, and the court must be able to provide a meaningful remedy.⁷³ In cases alleging constitutional violations, this means that a litigant must show that she has suffered or is sufficiently likely to suffer a violation of her constitutional rights, that the defendant violated her rights, and that the court can provide meaningful redress in the form of compensation for past violations or protection from future violations.⁷⁴ This standing requirement is jurisdictional.⁷⁵ Courts do not have authority to adjudicate claims brought by litigants who cannot show standing.

These basic rules governing standing mean that, normally, litigants can only assert their own legal rights and interests. They cannot seek remedies based on violations of the rights or interests of absent third parties.⁷⁶ There are, however, certain circumstances where the Court has allowed litigants to press claims *jus*

70. See, e.g., *United States v. Balt. Police Dep’t*, Civ. No. JKB-17-99, 2017 WL 1301500, at *1–2 (D. Md. Apr. 7, 2017) (approving consent decree between the Department of Justice and the Baltimore Police Department mandating reforms of, *inter alia*, stop and frisk practices).

71. U.S. CONST. amend. IV.

72. U.S. CONST. art. III, § 2 cl. 1.

73. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

74. See *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 68–69 (1974).

75. *Summers*, 555 U.S. at 492–93.

76. See *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

tertii,⁷⁷ meaning on behalf of absent third parties. For example, in *Singleton v. Wulff*, the Court granted physicians standing to challenge abortion regulations based on the due process rights of their patients.⁷⁸ In *Powers v. Ohio*, the Court permitted a criminal defendant to challenge a prosecutor's use of peremptory challenges based on jurors' equal protection rights.⁷⁹ The Court's provision of third-party standing in some cases does not represent an exception to the Article III case or controversy requirement, however.⁸⁰ Anyone pressing a claim *jus tertii* must also establish standing by demonstrating a personal injury.⁸¹

Third-party standing is a prudential doctrine defined by both principle and practicality. In most cases, those whose rights are actually violated are in the best position to advocate on behalf of themselves.⁸² Courts maintain that it is better for individuals to litigate their own claims whenever possible.⁸³ Moreover, suits *jus tertii* invite courts to adjudicate issues, rights, and claims that may be tangential to the controversy at bar, risking the issuance of advisory opinions.⁸⁴ Third-party actions may also raise problems with stare decisis if absent third parties do not regard themselves as bound by the results.⁸⁵

In light of these dangers, courts allow litigants to raise third-party claims only when three requirements are met. First, the "litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute."⁸⁶ Second, "the litigant must have a close relation to the third party" that is sufficient to ensure real motivation, effective advocacy, and adversity to the defendant.⁸⁷ Finally, "there must exist some hindrance to the third party's ability to protect his or her own interests."⁸⁸ If a third party can press his own claims, then either he should or courts should respect his decision not to. Only when he cannot, or cannot do so effectively, should someone else be permitted to press his claims on his behalf.

77. *Singleton v. Wulff*, 428 U.S. 106, 112–18 (1976).

78. *Id.*

79. 499 U.S. 400, 410–16 (1991).

80. *Singleton*, 428 U.S. at 112.

81. *Id.*

82. *Id.* at 112–14 (noting the danger that litigants pressing claims *jus tertii* may not be truly adverse to defendants at bar); see also *Barrows v. Jackson*, 346 U.S. 249, 259 (1953) (permitting owner to challenge racial covenants based in part on the equal protection rights of prospective tenants because her interests in free disposal of her property guaranteed her zealous advocacy).

83. *Singleton*, 428 U.S. at 114, 115–16; *Barrows*, 346 U.S. at 255–57; see also *NAACP vs. Alabama*, 357 U.S. 449, 458–60 (1958) (granting NAACP standing to assert the First and Fourteenth Amendment rights of its anonymous members in resisting an effort to divulge those members' names because "[t]o require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion").

84. See *Singleton*, 428 U.S. at 113–14.

85. *Id.* at 114.

86. *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

87. *Id.*

88. *Id.*

In addition to demonstrating standing under Article III, litigants raising Fourth Amendment claims must also establish eligibility under the Fourth Amendment. Before *Rakas v. Illinois*⁸⁹ was decided in 1978, this requirement was commonly referred to as Fourth Amendment “standing.”⁹⁰ In *Rakas*, the Court turned away from this language in favor of the *Katz* reasonable expectation of privacy test. The *Rakas* Court held that, to press a Fourth Amendment claim, a litigant must demonstrate that the government has intruded upon her *personal* reasonable expectations of privacy.⁹¹ Because “Fourth Amendment rights are personal rights,” the Court held that they “may not be vicariously asserted.”⁹² In reaching this holding, the *Rakas* Court rejected the proposition that being the “target” of investigative searches or seizures automatically confers standing to challenge the constitutionality of those searches or seizures.⁹³ Targets of investigations may suffer intrusions upon their subjectively manifested reasonable expectations of privacy, and those who suffer intrusions upon their subjectively manifested reasonable expectations of privacy may be targets. However, being a target is neither necessary nor sufficient to establish eligibility to raise a Fourth Amendment claim. It therefore made no sense, in the Court’s view, to confer automatic standing to targets.⁹⁴ Instead, the Court advised that the question of standing is determined solely by whether the litigant’s reasonable expectations of privacy were violated.⁹⁵

Although the *Rakas* Court suggested that eligibility to raise a Fourth Amendment claim is distinct from standing under Article III, the end result is that the *Katz* test determines whether a litigant has suffered a “personal injury” for purposes of Article III.⁹⁶ Thus, after *Rakas*, a litigant can only demonstrate Article III standing to raise a Fourth Amendment claim if she can establish that government agents intruded upon her personal expectation of privacy.⁹⁷ Absent that showing, she cannot establish a Fourth Amendment injury and therefore cannot claim standing. As we shall see in the next section, the rules governing Fourth Amendment

89. 439 U.S. 128 (1978).

90. *Id.* at 133, 138–40.

91. *Id.* at 140 (noting the Supreme Court’s “long history of insistence that Fourth Amendment rights are personal in nature”).

92. *Id.* 133–34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)); see also *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (same).

93. *Rakas*, 439 U.S. at 134–38.

94. *Id.*

95. *Id.* The Court extended *Rakas* two years later in *United States v. Salvucci*, which held that presence on a premises does not automatically confer standing under the Fourth Amendment. 448 U.S. 83, 95 (1980).

96. See Slobogin, *supra* note 12, at 541–42 (pointing out that “when the Fourth Amendment is the basis for the claim, the Supreme Court has explicitly conflated standing with the Amendment’s substance”).

97. See Soree, *supra* note 12, at 754 (noting that, in *Rakas*, “the Court conditioned a defendant’s ability to challenge the Government’s investigatory activities on her ability to demonstrate that the substantive definition of a search, derived from *Katz v. United States*, has been met *as to her*, thereby merging standing with the substantive scope of the Fourth Amendment”) (emphasis added).

standing compromise the security of the people against unreasonable searches and seizures by limiting their ability to challenge search and seizure means, methods, and programs that are often detrimental to vulnerable groups.

III. THE CONSEQUENCES OF *KATZ* FOR THE FOURTH AMENDMENT RIGHTS OF THE PEOPLE

The rules governing Fourth Amendment standing under *Katz* have dramatically diminished the security of the people against threats of unreasonable search and seizure. Four effects deserve particular attention. First, *Katz* excludes from review a whole host of searches because the Court does not regard them as “searches” at all. Second, rules governing Fourth Amendment standing set strict limits on who can challenge search and seizure programs. Third, *Katz* and derivative rules on standing limit the type of evidence that is relevant and admissible in Fourth Amendment cases. Finally, these rules limit the remedies that litigants can pursue. Individually and together, these limits on what can be subject to Fourth Amendment challenge; who can raise that challenge; the evidence they can cite, and the remedies they can seek have put many search and seizure methods; means; and programs beyond the reach of effective Fourth Amendment regulation. As a result, we are left vulnerable to threats of unreasonable searches and seizures. That vulnerability is particularly acute for members of minority groups.

Katz has dramatically diminished the right of the people to be secure against unreasonable searches and seizures by limiting the range of government activities regarded as “searches” under the Fourth Amendment. As a result, government agents enjoy unfettered discretion to engage in a wide array of search activities completely free from Fourth Amendment regulation. For example, they can search through your trash.⁹⁸ They can conduct visual searches of your backyard⁹⁹ and peer through open windows.¹⁰⁰ They can search your bank records.¹⁰¹ They can search your telephone call records.¹⁰² They can search for you high and low as long as they do not physically enter a constitutionally-protected space.¹⁰³ They can hide tracking devices in things you buy and then use those devices to search for you.¹⁰⁴ Strangely, they can even trespass upon private property to search, as long as that land is an “open field.”¹⁰⁵ They can do all of this because these searches do not violate reasonable expectations of privacy, at least according to the United

98. See *California v. Greenwood*, 486 U.S. 35, 41–42 (1988).

99. See *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

100. See *Florida v. Riley*, 488 U.S. 445, 449–50 (1989).

101. See *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 52–53 (1974).

102. See *Smith v. Maryland*, 442 U.S. 735, 741–42 (1979).

103. See *United States v. Knotts*, 460 U.S. 276, 284–85 (1983).

104. See *id.* at 277, 285.

105. See *United States v. Dunn*, 480 U.S. 294, 303–04 (1987).

States Supreme Court.¹⁰⁶ As a consequence, these searches are not really “searches” at all, and therefore stand immune from Fourth Amendment review or regulation.¹⁰⁷

The consequences of *Katz* have become particularly troubling as of late. In recent years we have seen an explosion in technologies that allow government agents to conduct all manner of searches more efficiently than ever before and on an almost unimaginable scale.¹⁰⁸ They can search for any cellphone user anytime using cell site location information.¹⁰⁹ They can search for users of smartphones, cars, computers, and personal trackers using GPS technologies embedded in these devices.¹¹⁰ They can gather and search through the records of everyone’s phone calls and Internet activities.¹¹¹ They can conduct constant, blanket searches of public spaces using networked surveillance cameras, license plate readers, and drones.¹¹² They can search for, store, and then mine data associated with every commercial transaction, Internet search, email, and social networking post.¹¹³ Thanks to *Katz*, government agents can do all of this searching free from Fourth Amendment constraint because none of this activity violates reasonable expectations of privacy.¹¹⁴ As a consequence, government agents have deployed and used these technologies as parts of programs engaged in broad and indiscriminate search.¹¹⁵ Precisely because they are broad and indiscriminate, these programs subject each of us and all of us to the threat of searches based on insufficient reasons, bad reasons, or no reasons at all.

In addition to setting strict limits on what constitutes a “search,” *Katz* and its progeny have set narrow limits on who can challenge search and seizure practices and programs. This is evident in the Court’s application of the rules governing Fourth Amendment “standing.” The paradigm case on point is *United States v. Payner*.¹¹⁶ *Payner* involved an Internal Revenue Service (IRS) investigation of

106. See e.g., *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988); *Dunn*, 480 U.S. 294; *California v. Ciraolo*, 476 U.S. 207 (1986); *Knotts*, 460 U.S. 276; *Smith*, 442 U.S. 735; *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974); *United States v. White*, 401 U.S. 745 (1971).

107. For a full critique of this aspect of *Katz*, see GRAY, *supra* note 4, at 76–89; David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14 (2017).

108. See GRAY, *supra* note 4, at 23–68.

109. See *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016); *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016); *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015). On June 5, 2017, the Supreme Court granted certiorari in *Carpenter* and will hear argument during the October 2017 term. However, the Court has not yet set a date to hearing the argument. For more information, see <http://www.scotusblog.com/case-files/cases/carpenter-v-united-states-2/>.

110. See Pell, *supra* note 19.

111. See PCLOB TELEPHONE RECORDS REPORT, *supra* note 16.

112. See Blitz et al., *supra* note 15.

113. See Rachel Cohn & Angie Liao, *Mapping Reveals Rising Use of Social Media Monitoring Tools by Cities Nationwide*, BRENNAN CTR. FOR JUSTI. (Nov. 16, 2016), <https://www.brennancenter.org/blog/mapping-reveals-rising-use-social-media-monitoring-tools-cities-nationwide>; GRAY, *supra* note 4, at 38–48; FERGUSON, *supra* note 27.

114. See GRAY, *supra* note 4, at 78–89, 100.

115. See *id.* at 23–68; FERGUSON, *supra* note 27.

116. 447 U.S. 727 (1980).

American citizens suspected of hiding income in offshore banks.¹¹⁷ Frustrated by a lack of progress in their investigation, IRS agents conspired to steal banking records from an employee of one of the suspect banks.¹¹⁸ When the banker was in the United States on business, the agents arranged a date for him.¹¹⁹ While he was out on the town, an investigator, working for the agents, stole the banker's briefcase.¹²⁰ IRS agents copied the contents of the stolen briefcase, which included documents showing Payner's efforts to hide income.¹²¹ Importantly, the entire scheme was approved by IRS supervisors and in-house counsel because they knew that Payner would not have "standing" to raise any Fourth Amendment objections when the illegally seized evidence was offered at trial.¹²²

At trial, Payner sought to suppress evidence gathered during this illegal search.¹²³ The trial court was appalled by the agents' behavior and the institutional approval of their activities provided by supervisors and attorneys.¹²⁴ To discourage such lawlessness in the future, the trial court granted Payner standing to seek suppression of the evidence.¹²⁵ On appeal, the Supreme Court reversed. Doubling down on *Rakas*, the Court held that the bank employee was the only person with standing to raise a Fourth Amendment claim.¹²⁶ That holding not only allowed the government to exploit a premeditated violation of the Fourth Amendment, it also issued an effective license for government agents to adopt similar strategies in the future.¹²⁷

117. *Id.* at 729–31; *United States v. Payner*, 434 F. Supp. 113, 118–22 (N.D. Ohio 1977); *United States v. Baskes*, 433 F. Supp. 799, 801–02 (N.D. Ill. 1977).

118. *Payner*, 434 F. Supp. at 118–19.

119. *Id.*; *see also Baskes*, 433 F. Supp. at 801 (“Casper arranged an assignation for Wolstencroft with a certain Sybil Kennedy.”).

120. *Payner*, 447 U.S. at 730.

121. *Payner*, 447 U.S. at 739 (Marshall, J., dissenting); *Payner*, 434 F. Supp. at 119–20, 121 n.40., 130 n.66; *see also Payner*, 447 U.S. at 730 (quoting the trial court's finding that, “the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . .”).

122. *See Payner*, 447 U.S. at 729–31; *Payner*, 434 F. Supp. at 131–33.

123. *Payner*, 447 U.S. at 729.

124. *Payner*, 434 F. Supp. at 131–33.

125. *Id.* (granting Payner's motions to suppress in order “to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit”); *see also id.* at 131–33 (“It is evident that the Government and its agents . . . were, and are, well aware that, under the standing requirement of the Fourth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties [whose] own privacy expectations are not subject to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties. This Court finds that, in its desire to apprehend tax evaders, a desire the Court fully shares, the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel.”).

126. *Payner*, 447 U.S. at 733–37.

127. *See* David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 54–55 (2013); David Gray et al., *The Supreme Court's*

More recently, in *Clapper v. Amnesty International*, the Court again used rules governing Fourth Amendment standing to insulate government search programs.¹²⁸ There, the Court held that plaintiffs—a group of attorneys, journalists, and activists regularly in contact with non-U.S. persons located abroad—could not challenge the constitutionality of newly enacted 50 U.S.C. § 1881a, which provided broad authority for government agents to surveil the communications of non-U.S. persons located abroad.¹²⁹ But the plaintiffs could not establish that *their* communications had been intercepted or were certain to be intercepted.¹³⁰ Absent such a showing, the Court held that the plaintiffs did not have standing to challenge § 1881a or surveillance programs licensed by § 1881a.¹³¹ The result was to render § 1881a effectively immune from Fourth Amendment review because surveillance programs conducted under § 1881a were top secret, leaving no way for the plaintiffs to establish that their communications had, in fact, been intercepted.¹³² All they could establish was that the law existed and that it did license surveillance.¹³³ But, in the Court's view, that alone was not sufficiently concrete and particularized to establish individual standing under the framework outlined by *Katz* and *Rakas*.¹³⁴

Courts have also wielded rules governing Fourth Amendment standing to bar service providers from seeking to protect their customers' constitutional rights. For example, in *California Bankers Association v. Shultz*, the Supreme Court concluded that a bank compelled to disclose information relating to customers' financial transactions did not have standing to claim that those reporting requirements violated their customers' Fourth Amendment rights.¹³⁵ In *Ellwest Stereo Theaters, Inc. v. Wenner*, a panel of the Court of Appeals for the Ninth Circuit, which included then-Judge Kennedy, held that the operator of a business featuring private viewing booths "has no standing to assert the [F]ourth [A]mendment rights of [his] customers."¹³⁶ More recently, a federal court in Seattle denied Microsoft Corporation standing to challenge on Fourth Amendment grounds the gag order provisions of 18 U.S.C. § 2705(b), which the government invoked routinely when

Contemporary Silver Platter Doctrine, 91 TEX. L. REV. 7, 41–46 (2012) [hereinafter Gray et al., *Supreme Court's Silver Platter Doctrine*]; Soree, *supra* note 12, at 753–63.

128. 133 S. Ct. 1138 (2013).

129. *Id.* at 1147–48.

130. *Id.*

131. *Id.* at 1150.

132. See Ryan Calo, *The Catch-22 That Prevents Us from Truly Scrutinizing the Surveillance State*, ATLANTIC (Mar. 5, 2013), <https://www.theatlantic.com/technology/archive/2013/03/the-catch-22-that-prevents-us-from-truly-scrutinizing-the-surveillance-state/273738/>.

133. *Clapper*, 133 S. Ct. at 1143–46, 1149.

134. *Id.* at 1148–49.

135. 416 U.S. 21, 68–70 (1974).

136. 681 F.2d 1243, 1248 (1982).

compelling Microsoft to disclose electronic information relating to its customers.¹³⁷

Katz and derivative rules governing Fourth Amendment standing also limit the kinds of evidence deemed relevant when challenging search and seizure practices and programs. This has the effect of largely immunizing many search and seizure programs, including those that demonstrably target racial minorities, from Fourth Amendment review. Take, for example, *Whren v. United States*.¹³⁸ In that case plain-clothes officers patrolling a “high drug area” of Washington, D.C., observed two young black men in a Nissan Pathfinder who stopped “for an unusually long time” at an intersection and then accelerated away at an “unreasonable” speed.¹³⁹ The officers stopped the vehicle, purportedly to issue a warning to the driver.¹⁴⁰ Upon approaching the stopped vehicle one of the officers observed illegal narcotics in Whren’s lap.¹⁴¹

At trial, Whren attempted to challenge the stop on grounds that the officers stopped him in part because he was black.¹⁴² On appeal, Whren argued that the officers’ claim that they were concerned about traffic safety was mere pretext, which opened the door to racially biased policing.¹⁴³ To support that concern, Whren offered compelling evidence of racial targeting by police during traffic stops.¹⁴⁴ Nevertheless, the Court, relying on the narrow scope of inquiry licensed by *Katz*, held that this evidence was irrelevant to the Fourth Amendment question.¹⁴⁵ Even if the officers who stopped Whren were acting on racist motives or under the auspices of a demonstrably racist search and seizure program, the Court held that the scope of Fourth Amendment inquiry is limited to the facts surrounding a particular search or seizure and whether the circumstances surrounding that search or seizure give rise to reasonable suspicion or probable cause.¹⁴⁶ Evidence of a broader pattern of unreasonable practice was, the Court held, simply

137. *Microsoft Corp. v. U.S. Dep’t of Justice*, 233 F. Supp. 3d 887, 899–903 (W.D. Wash. 2017). Deputy Attorney General Rod Rosenstein issued a Memorandum on October 19, 2017, setting new guidelines governing the use of 2705(b) orders. Rod J. Rosenstein, Deputy Attorney Gen., Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b) (Oct. 19, 2017), <https://www.justice.gov/criminal-ccips/page/file/1005791/download>. Going forward, Department of Justice attorneys will be required under these guidelines to seek 2705(b) orders only where necessary in light of the specific facts of a particular case. They will also be barred from seeking 2705(b) orders lasting more than one year, except in extraordinary circumstances. *Id.* Notably, these reforms largely trace the relief sought by Microsoft.

138. 517 U.S. 806 (1996).

139. *Id.* at 808.

140. *Id.* at 809.

141. *Id.*

142. See Oral Argument, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 195296, at *45–46.

143. Brief for the Petitioner, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841), 1996 WL 75758, at *21–30.

144. *Id.*

145. 517 U.S. at 813.

146. *Id.* at 812–13.

irrelevant.¹⁴⁷

As Shima Baradaran has pointed out, the evidentiary limits that flow from *Katz* lead to an irrational tilting of the reasonableness analysis inherent in Fourth Amendment cases.¹⁴⁸ The Court has long held that assessing Fourth Amendment reasonableness entails a balancing of citizens' privacy and property interests against law enforcement's interests in effective crime control and officer safety.¹⁴⁹ In the wake of *Katz*, however, courts have taken a narrow view of citizen interests. As a result, when courts weigh the reasonableness of a particular search or seizure, evidence relating to programmatic success rates and patterns of racial bias is deemed irrelevant.¹⁵⁰ This has some dire consequences.

First, disregarding such evidence limits the ability of litigants to challenge the reliability of the particular grounds cited by officers as supporting probable cause. As Baradaran argues, that allows officers to continue to cite factors in favor of reasonable suspicion and probable cause that simply do not bear out in the data.¹⁵¹ For example, if data were to show that "furtive movements" as a ground for reasonable suspicion resulted in stops that failed to disclose criminality in the vast majority of cases and also was used disproportionately when justifying stops of African-Americans, then there would be good reason to conclude that "furtive movements" do not, in practice, provide good and sufficient reasons for stops. As a Fourth Amendment matter, a program allowing for "furtive movements" as grounds for conducting stops would require modification in order to guarantee the security of the people against unreasonable seizures.

Second, it allows programs that routinely produce unreliable results to continue unchallenged. As we saw in Part I, that means that stop and frisk practices are largely immune from Fourth Amendment review at the programmatic level. That is because a particular person may only challenge a particular instance of stop or frisk, which leaves unexamined the aggregate failures and effects of the policy and program that produced that stop or frisk.

Third, it often pits the privacy interests of the person at bar against broader public interests in crime control. This skews the moral math by pitting the law enforcement interests of society at large against the privacy interests of an individual. As a result, search and seizure programs that demonstrably threaten the

147. *Id.* at 813. The *Whren* Court conceded that evidence of racial bias may be relevant in the context of an Equal Protection challenge. *Id.* But these kinds of Fourteenth Amendment challenges raise their own difficulties. *See, e.g.,* *McCleskey v. Kemp*, 481 U.S. 279, 308–09 (1987) (rejecting evidence of racial disparities in patterns of sentencing and requiring plaintiff to show intentional discrimination against him). At any rate, the fact that another amendment may provide a source of constitutional relief does not justify artificially limiting the scope of Fourth Amendment protections.

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

149. *See, e.g.,* *Wilson v. Arkansas*, 514 U.S. 927, 934–36 (1995); *New York v. Class*, 475 U.S. 106, 128–29 (1986); *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *United States v. Place*, 462 U.S. 696, 703 (1983).

150. Baradaran, *supra* note 148, at 3, 13.

151. *See id.* at 6, 20–25.

right of the people to be secure against unreasonable searches and seizures remain largely immune from Fourth Amendment review because the evidence that is most relevant to establishing that threat is deemed irrelevant when the rules governing standing tell us that the only issue at stake is whether the litigant at bar has, himself, been the victim of an unreasonable search or seizure. These artificial evidentiary constraints do particular violence to the rights of minority groups who are both most likely to suffer under the yoke of unreasonable search and seizure practices and also explicitly barred from citing statistical evidence of programmatic racial bias when advancing Fourth Amendment claims.¹⁵²

Rules governing Fourth Amendment standing also set limits on what kinds of remedies litigants can pursue. Most Fourth Amendment claims arise in the context of criminal trials where the remedy sought is exclusion of illegally seized evidence.¹⁵³ This exclusionary remedy plays a critical role in the context of reform efforts because exclusion is justified primarily by its potential to deter Fourth Amendment violations.¹⁵⁴ Unfortunately, the modern Court has set severe limits on the extension of the exclusionary rule.¹⁵⁵ As *Payner* shows, some of those limits derive from rules governing standing.¹⁵⁶ The consequence of all these exceptions has been to render the exclusionary rule largely ineffective as a tool for controlling Fourth Amendment violations.¹⁵⁷ That ineffectiveness is particularly acute for members of minority groups and residents of “high crime” areas.¹⁵⁸ Of course, the exclusionary rule provides no remedy at all for the millions of perfectly innocent persons who are stopped, frisked, or subjected to broad and indiscriminate surveillance.

More promising than exclusion as a tool for reform is the possibility of pursuing declaratory judgments or injunctive relief. By seeking these kinds of remedies,

152. *Id.* at 6. As an example, these evidentiary constraints left Judge Scheindlin largely unable to assess the Fourth Amendment issues raised by statistical evidence of racial bias in New York’s stop and frisk program. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 578–79 (S.D.N.Y. 2013).

153. *See, e.g.,* Richard Myers, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 571, 577–78, 588 (2013) (addressing the fact that most Fourth Amendment claims are raised in the context of suppression hearings because “that is the cadre of motivated individuals—with access to state-paid attorneys—who will develop the Fourth Amendment doctrinally” and arguing for the establishment of a small claims court allowing more ready access to civil remedies for Fourth Amendment violations).

154. *See Herring v. United States*, 555 U.S. 135, 139–40 (2009).

155. *See* Gray et al., *Supreme Court’s Silver Platter Doctrine*, *supra* note 127, at 10. Among these limits are the “good faith exception,” first established in *Leon v. United States*, 468 U.S. 897, 925 (1984), and the many iterations of its contemporary silver platter doctrine, which allows the admission of illegally seized evidence in proceedings such as grand jury investigations, *United States v. Calandra*, 414 U.S. 338, 354 (1974); civil tax suits, *United States v. Janis*, 428 U.S. 433, 454 (1976); habeas proceedings, *Stone v. Powell*, 428 U.S. 465, 493–94 (1976); immigration removal procedures, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); and parole revocation hearings, *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998).

156. *See supra* notes 116–27 and accompanying text.

157. *See* Baradaran, *supra* note 148, at 11–14; Gray et al., *Supreme Court’s Silver Platter Doctrine*, *supra* note 127, at 10; Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 743–44 (2011).

158. Gray et al., *Supreme Court’s Silver Platter Doctrine*, *supra* note 127, at 43–46.

litigants might hope to clarify the constitutional status of search and seizure methods, practices, and programs. They might also hope to impose reform measures sufficient to guarantee the right of the people to be secure against unreasonable searches and seizures such as barring the use of rote platitudes like “furtive movements” to justify stops.¹⁵⁹ Unfortunately, doctrinal constraints and rules governing Fourth Amendment standing make it nearly impossible to pursue declaratory or injunctive relief in most Fourth Amendment cases.¹⁶⁰

Even where someone can show that he has personally been a victim of an unconstitutional search or seizure, the rules governing standing in Fourth Amendment cases make it nearly impossible for a litigant to pursue declaratory or injunctive relief. For example, in *Los Angeles v. Lyons*, plaintiff Adolph Lyons sued the Los Angeles Police Department (LAPD) and the City of Los Angeles after officers put him in a chokehold during a traffic stop.¹⁶¹ Lyons lost consciousness as a result and also suffered damage to his larynx.¹⁶² Although Lyons clearly had standing to seek remedies at law based on violations of his Fourth Amendment rights, the Court held that he did not have standing to demand equitable relief in the form of a prospective injunction because he could not “establish a real and immediate threat that he would again be stopped for traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”¹⁶³ The concern that LAPD officers might still be engaging in a pattern and practice of using unjustified chokeholds, thereby jeopardizing the Fourth Amendment rights of the people of Los Angeles, was irrelevant.¹⁶⁴

The collective damage done to the security of the people against unreasonable searches and seizures by *Katz* and derivative rules governing Fourth Amendment standing is profound. The vast majority of modern search technologies lie outside the scope of Fourth Amendment review because they do not violate reasonable expectations of privacy and thus are not considered searches. Even programs that do employ means and methods recognized as “searches” and “seizures” lie beyond the reach of effective Fourth Amendment regulation because the rules governing standing leave these programs largely immune from Fourth Amendment challenge at the programmatic level. That is certainly the case with stop and frisk, but is also

159. See *United States v. Police Dep’t. of Balt.*, No. 1:17-cv-00099-JKB, at *65 (D. Md. Jan. 12, 2017). This is an example of one of many useful reforms dictated by consent decree entered into by the Dep’t of Justice and the Baltimore City Police Dep’t.

160. Jennifer Laurin has done tremendous work exposing doctrinal limits on litigants’ efforts to secure relief for Fourth Amendment violations in both the civil and criminal contexts. See, e.g., Laurin, *supra* note 157, at 670–744; Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1002–77 (2010); Jennifer E. Laurin, *Melendez-Diaz v. Massachusetts, Rodriguez v. City of Houston, and Remedial Rationing*, 109 COLUM. L. REV. SIDEBAR 82, 82–91 (2009).

161. *City of Los Angeles v. Lyons*, 461 U.S. 95, 97–98 (1983).

162. *Id.*

163. *Id.* at 105.

164. *Id.* at 105–06.

true of car stops and a host of other means and methods of search and seizure. Individuals do not have standing to bring the claims, introduce the evidence, or seek the relief necessary to challenge these programs. As a consequence of this effective immunity from Fourth Amendment review, each of us and all of us must live with the daily threat of being searched or seized for insufficient reasons, for bad reasons, or for no reason at all. That is not the world guaranteed to us, the people, by the Fourth Amendment. Fortunately, as the next section argues, the solution is to take the text and history of the Fourth Amendment seriously.

IV. THE PATH FORWARD

Much of the crisis in contemporary Fourth Amendment law traces to *Katz*, its idiosyncratic definition of “search,” and the myopic focus on individual incidents of search and seizure courts have adopted in its wake. The solution is to adopt an originalist reading of the Fourth Amendment that takes seriously its text and history.¹⁶⁵ Doing so yields a much more intuitive definition of “search.”¹⁶⁶ It also reveals the fundamentally collective nature of the Fourth Amendment as a bulwark against programs and practices that grant broad licenses for government agents to conduct searches and seizures based solely on their unfettered discretion.¹⁶⁷ After all, these are the kinds of government activities that threaten the security of “the people.” Faced with these sorts of general threats, any member of “the people” should have standing to pursue prospective constitutional remedies sufficient to guarantee their security.

Most eighteenth century readers would have defined “search” in much the same way one might today: “To examine; to explore; to look through” and “[t]o make inquiry” or “[t]o seek; to try to find.”¹⁶⁸ On this definition, entering a home “to examine” what is inside or to “try to find” something or someone would be a search. So too would looking through or examining documents or other “papers,” *including* banking records and telephone call logs. Looking through a garbage can for evidence would also be a search, as would a police officer’s “trying to find” someone in a home, at a shopping mall, or on a downtown street. On this reading, there is no need to “reconsider”¹⁶⁹ the third party doctrine or the public observa-

165. This section draws on longer and more detailed discussions of the collective nature of Fourth Amendment rights in DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* (2017), David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425 (2016) [hereinafter Gray, *Fourth Amendment Remedies*], and David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181 (2015) [hereinafter Gray, *Dangerous Dicta*].

166. Gray, *Fourth Amendment Remedies*, *supra* note 165; *see also* Gray, *The Fourth Amendment Categorical Imperative*, *supra* note 107, at 8–10 (defending a common public understanding of “search” in Fourth Amendment cases).

167. *See generally* David Gray, *Dangerous Dicta*, *supra* note 165.

168. SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (10th ed., 1792).

169. *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

tion doctrine. These are rules built on a doctrinal edifice erected in *Katz*.¹⁷⁰ Although courts might rely on that edifice to provide additional protections beyond those guaranteed by the text, it cannot provide a means to reduce the scope and reach of the Fourth Amendment or the rights it guarantees¹⁷¹ and therefore cannot be used to immunize from Fourth Amendment review government activities that patently constitute “searches.” By its text, the Fourth Amendment guarantees a right “of the people.”¹⁷² Much as any native speaker would today, “the people” would have been understood in 1792 America as referring to “a nation” as a whole.¹⁷³ In particular, our forebears would have read “the people” in the text of the Fourth Amendment as referring to the people of the United States. After all, we had just won a revolution by which, in the language of the Declaration of Independence, “one people . . . dissolve[d] the political bands which ha[d] connected them with another [people].”¹⁷⁴ We had also just abandoned the more modest project described in the Articles of Confederation, which represented a mere contract of “mutual friendship and intercourse among the people of the different States.”¹⁷⁵ In its stead, we ratified the Constitution, which opens with the phrase “[w]e the People of the United States”¹⁷⁶ As a matter of plain meaning and *in pari materia*, then, we should read the Fourth Amendment as guaranteeing a collective right of the people of the United States.¹⁷⁷

The collective dimensions of the Fourth Amendment are also evidenced in the history of its drafting. State constitutions of the time offered the First Congress two competing models for what would become the Fourth Amendment. The 1776 Pennsylvania Declaration of Rights provided that “the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure”¹⁷⁸ By contrast, the Massachusetts and New Hampshire bills of rights each provided that “[e]very subject has a right to be secure from all unreasonable searches, and seizures”¹⁷⁹ The First Congress ultimately chose the collective

170. See *supra* notes 5–10 and accompanying text.

171. See *Jones*, 565 U.S. at 406–09 (pointing out that the *Katz* test is additive, and not a substitution for traditional Fourth Amendment standards and rejecting arguments that the *Katz* test can operate to diminish protections afforded by those traditional standards).

172. U.S. CONST. amend. IV.

173. See JOHNSON, *supra* note 168.

174. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

175. See ARTICLES OF CONFEDERATION OF 1781, art. IV.

176. U.S. CONST. pmbl.

177. To be sure, the Constitution and the Bill of Rights also guarantee important individual rights and liberties. For example, the Third Amendment guarantees that no “[o]wner” shall be compelled to quarter troops and the Fifth and Sixth Amendments secure procedural rights for each “person” and every “accused.” The Fourth Amendment is just not one of these rights. See Gray, *supra* note 129.

178. PA. CONST. art. X (1776).

179. MASS. CONST. pt. 1, art. XIV. The New Hampshire Constitution uses “hath” rather than “has,” but is in all other respects identical. See N.H. CONST. pt.1, art. XIX. See also RATIFICATION STATEMENT FROM NEW YORK (1788) (recommending that the Constitution protect, inter alia, the right of “every Freeman . . . to be secure from all

rights approach represented in the Pennsylvania Declaration of Rights.¹⁸⁰ That choice would have been particularly significant for those who read the Fourth Amendment in 1791. John Adams drafted the language in the Massachusetts Declaration of Rights that provided the basic DNA of the Fourth Amendment.¹⁸¹ For this reason Adams is widely hailed as the intellectual father of the Fourth Amendment.¹⁸² Despite Adams's influence on the structure and content of the Fourth Amendment, the drafters ultimately chose Pennsylvania's "the people" rather than Adams's "every subject."¹⁸³ Eighteenth century readers could not have missed the significance of that choice for the scope and meaning of the Fourth Amendment.

The history of events that gave rise to the Fourth Amendment reinforces its status as a collective right.¹⁸⁴ Like many provisions of the Bill of Rights, the Fourth Amendment was motivated by founding-era struggles with abuses of executive power.¹⁸⁵ The principal targets of the Fourth Amendment were general warrants and writs of assistance, which provided broad licenses for executive agents to conduct searches based on their unfettered discretion.¹⁸⁶ In a series of cases decided in the mid-eighteenth century, courts in England rejected general warrants as unreasonable and contrary to the common law.¹⁸⁷ Those cases, which were well known in late eighteenth-century America,¹⁸⁸ highlighted the collective impact of search and seizure programs licensed by general warrants.¹⁸⁹ For example, the court in *Wilkes v. Wood* pointed out that if a government can grant

unreasonable searches and seizures"); RATIFICATION STATEMENT FROM VIRGINIA (1788) (same); RATIFICATION STATEMENT FROM NORTH CAROLINA (1788) (same).

180. See WILLIAM CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 729 (2009) (identifying the Pennsylvania Constitution as the origin of the phrase "the right of the people," as used in the Fourth Amendment).

181. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1046 (2011); Cf. *Boyd v. United States*, 116 U.S. 616, 625 (1886); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 43 (1969).

182. Clancy, *supra* note 181, at 979–80.

183. See CUDDIHY, *supra* note 180, at 729.

184. See *Boyd*, 116 U.S. at 624–25 ("In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England.").

185. TAYLOR, *supra* note 181, at 19.

186. *Riley v. California*, 134 S. Ct. 2473, 2494 (2014).

187. See, e.g., *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498; 4 WILLIAM BLACKSTONE, *COMMENTARIES* *374.

188. *Boyd*, 116 U.S. at 630 ("Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures?").

189. *Id.* (The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés [sic] of the sanctity of a man's home and the privacies of life."); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366 (1974) ("[T]he specific incidents of Anglo-American history that immediately preceded the adoption of the [Fourth] amendment we shall find that the primary abuse thought to characterize the general warrants and the

“discretionary power . . . to messengers to search wherever their suspicions may chance to fall . . . it certainly may affect the person and property of every man in this kingdom”¹⁹⁰ On this side of the Atlantic, James Otis attacked writs of assistance as “destructive of English liberty” because they granted “a power that places the liberty of every man in the hands of every petty officer.”¹⁹¹

Given this context, it is fitting that the Fourth Amendment secures a “right of the people” rather than a right of each person or every subject. The historical goal, after all, was to provide for the general security of the nation and society as a whole against threats posed by broad grants of unfettered discretion to government agents to conduct searches and seizures.¹⁹² Reflecting on this history, Professor Tony Amsterdam has written that the “evil” targeted by the Fourth Amendment “was general: it was the creation of an administration of public justice that authorized and supported indiscriminate searching and seizing.”¹⁹³

Although the Fourth Amendment protects a collective right of the people, it also provides important protections for individuals. Just as the right of the people to elect their representatives guaranteed in Article I entails a right of individuals to vote or otherwise contribute to the process of selecting representatives, so too rights reserved to “the people” by the Fourth Amendment provide protections for individuals.¹⁹⁴ We all have a right to be secure against unreasonable searches and

writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause” which threatened “the whole English nation.”)

190. *Wilkes*, 98 Eng. Rep. at 498. See also *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817 (“[W]e can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society”); Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 749–50 (2014) (“Here is the critical point: it is the *potential* for an unreasonable search or seizure—not simply its actuality—that impacts deliberations regarding the exercise of speech or religious rights.”).

191. See James Otis, *Against Writs of Assistance* (Feb. 24, 1761), http://www.constitution.org/bor/otis_against_writs.htm; See also JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, 489 (1865) (quoting *Boston Gazette*, Jan. 4, 1762 report on *Paxton’s Case*) (“[E]very housholder in this province, will necessarily become *less secure* than he was before this writ had any existence among us; for by it, a *custom house officer* or any other person *has a power given him, with the assistance of a peace officer, to enter forcibly into a dwelling house, and rifle any part of it where he shall please to suspect uncustomed goods are lodgd!*—Will any man put so great a value on his freehold, after such a power commences as he did before? . . . Will any one then under *such* circumstances, ever again boast of *british honor* or *british privilege?*”).

192. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (“[General searches] are denounced in the constitutions or statutes of every State in the Union.”); *Marron v. United States*, 275 U.S. 192, 195 (1927) (“General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them.”); *Boyd*, 116 U.S. at 630.

193. Amsterdam, *supra* note 189, at 432–33.

194. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 129–31 (2012) (citing the canon of interpretation that the plural includes the singular). Cf. *District of Columbia v. Heller*, 554 U.S. 570, 580–81 (2008) (concluding that “the people” as used in the Second Amendment describes rights “exercised individually and belong[ing] to all Americans.”); *id.* at 636, 645 (Stevens, J., dissenting) (arguing that “the people” in the Second Amendment describes a collective right, but “Surely it protects a right that can be enforced by individuals.”).

seizures.¹⁹⁵ Individuals also have the right to challenge instances of government action and policies of search and seizure.¹⁹⁶ The important point missed by contemporary Fourth Amendment doctrine is that when a member of “the people” challenges a governmental search or seizure, she does not stand for herself alone. When invoking our collective right to be secure she stands for “the people” as a whole.¹⁹⁷

This “collective rights” reading has important implications for the doctrine of Fourth Amendment standing. As we have seen, the Supreme Court has applied *Katz* in such a way that only individuals who suffer violations of their personal expectations of privacy may bring a Fourth Amendment claim.¹⁹⁸ Furthermore, current doctrine limits the scope of these challenges to the facts of particular searches or seizures.¹⁹⁹ As a result, individual litigants have a hard time challenging the programs and policies that threaten the right of the people to be secure against unreasonable searches and seizures. They are also largely barred from seeking the kinds of declaratory and injunctive remedies necessary to guarantee our collective Fourth Amendment right to be secure.²⁰⁰ Taking seriously the text and history of the Fourth Amendment reveals that this is upside down. The Fourth Amendment is concerned primarily with policies and practices that, like general warrants and writs of assistance, threaten the security of the people as a whole,²⁰¹ leaving each of us and all of us to live in fear of being subjected to unreasonable searches and seizures. Individual cases may provide examples of these kinds of policies and practices in action but the primary concern is the threat to the right of the people that such instances represent.²⁰²

195. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528 (1967) (“The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is ‘basic to a free society.’”); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (“The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.”); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (The Fourth Amendment’s protection “reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws”). But see *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (“The [Fourth] Amendment protects persons against unreasonable searches of ‘their persons [and] houses’ and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual.”).

196. See *supra* notes 116–34 and accompanying text.

197. PETER D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 32 (1996) (quoting Wilkes as claiming that his suit in the famous General Warrants Cases was brought “for the sake of every one of my English fellow subjects.”); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1263–72 (1983) (arguing that the main parties of interest in search and seizure cases are the vast numbers of regular Americans not represented at trial).

198. See *supra* notes 72–97 and accompanying text.

199. See *supra* notes 154–70 and accompanying text.

200. See *supra* notes 153–64 and accompanying text.

201. See *supra* notes 165–93 and accompanying text.

202. See GRAY, *supra* note 4, at 146–72; Gray, *The Fourth Amendment Categorical Imperative*, *supra* note 107.

Any member of “the people” forced to live in fear of unreasonable searches or seizures by definition has standing to challenge search and seizure means, methods, and programs. But that does not mean that courts should hear these kinds of claims from just anyone. When it comes to standing to assert Fourth Amendment rights, it is important to make sure that the people have the best representation they can get. On this score, many of the prudential considerations that underlie traditional standing analysis should have a role to play. As the Court has explained, the Article III case and controversy requirement ensures zealous advocacy by litigants who have a real interest in the outcome, narrows the scope of litigation, prevents courts from indulging in advisory opinions, and ensures the efficient use of scarce judicial resources.²⁰³ When determining whether a potential claimant can effectively serve the interests of the people in Fourth Amendment cases, courts should take these considerations and concerns to heart. In particular, they should prefer litigants who are most immediately affected by a search and seizure practice or program, litigants who are demonstrably zealous in their advocacy, litigants who have adequate resources to pursue their claims, and litigants who can plausibly claim to represent “the people.” As Professor Christopher Slobogin has pointed out, that type of person is easy to find when it comes to civil rights impact litigation, which tends to attract skilled public interest lawyers and highly motivated activists.²⁰⁴ Moreover, “[a]micus briefs can and will fill any gaps in constitutional argumentation left by the parties.”²⁰⁵ Questions about the scope of each challenge and the effects of *stare decisis* may present some difficulties. However, in light of the fact that these suits are likely to target programs as a whole and to attract broad interest, Professor Slobogin concludes that “any ambiguity about how the program worked in a particular instance against a particular plaintiff will not affect the ability of the court to resolve the issues raised.”²⁰⁶

Taking seriously the collective dimensions of Fourth Amendment rights would not only open the courthouse door to suits by a broader range of persons on behalf of “the people,” it would also open the record to critical evidence. As Shima Baradaran has shown, courts operating under current doctrine must ignore evidence critical to determining whether search and seizure practices are “unreasonable.”²⁰⁷ For example, officers routinely cite factors such as “furtive movements” as grounds for conducting stops.²⁰⁸ But statistical evidence shows that stops based

203. Slobogin, *supra* note 12, at 531.

204. *See id.*

205. *Id.*

206. *Id.* at 532.

207. Baradaran, *supra* note 148, at 8–14.

208. *Floyd v. City of New York*, 861 F. Supp. 2d 274, 302 n.148 (S.D.N.Y. 2012) (referencing proposed expert testimony criticizing the prevalence of “furtive movements” and “high-crime area” among New York City police officers as grounds for conducting stops and pointing out that the low hit rates of these stops “raises doubts about whether stops based on these factors are valid . . .”).

on “furtive movements” yield shockingly low results in terms of arrests.²⁰⁹ Baradaran contends that courts should be able to evaluate this kind of statistical evidence when determining whether a stop was reasonable.²¹⁰ Unfortunately, that evidence is largely irrelevant under current doctrine, which dictates blindness, or at least severe myopia, to the general effects of policies and practices challenged in particular cases. By contrast, reading the Fourth Amendment in light of its text and history would recognize that evidence documenting general effects and broader threats is highly relevant to assessing and protecting the right of the people to be secure against unreasonable searches and seizures.

Finally, adopting a collective rights reading of the Fourth Amendment would allow litigants to more easily pursue declaratory judgments and injunctive relief, which are essential to guaranteeing the right of the people to be secure against unreasonable searches and seizures. Under present doctrine, litigants are virtually barred from challenging searches and seizures at the programmatic level and face even higher hurdles if they want to demand reforms rather than monetary compensation. If we take seriously the collective nature of Fourth Amendment rights, however, then we see that it is exactly these kinds of suits courts should entertain. At base, the imperative command that the “right of the people to be secure in their persons, houses, papers, and effects . . . *shall not* be violated”²¹¹ can only be achieved by the provision and enforcement of prospective remedial measures that can effectively prevent violations in the first place. The Court has stumbled onto this a couple of times with the warrant requirement and the exclusionary rule, but has otherwise largely abdicated its constitutional duty to hear and decide cases specifically designed to impose constitutional constraints on government search and seizure practices and programs.²¹² Under a collective rights reading of the Fourth Amendment, these are precisely the kinds of cases courts would be most anxious to hear.

CONCLUSION

There is no doubt that *Katz* was progressive for its time, or at least it aspired to be. But its novel definition of “search” has become more of a sword than a shield, inflicting repeated wounds on the security of the people against unreasonable government action, rather than protecting us from threats posed by natural and inevitable expansions of government power.²¹³ Justice Sotomayor was right to

209. *Id.* at 285.

210. Baradaran, *supra* note 148, at 39–43, 52–56.

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

212. GRAY, *supra* note 4, at 190–249; Gray, *Fourth Amendment Remedies*, *supra* note 165, 464–81.

213. See David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 96–97 (2013) (explaining the natural tendency of executives to pursue broader powers, the Founders’ awareness of the threat posed by these inevitable expansions to rights, and the role of the Bill of Rights as a bulwark).

suggest in *United States v. Jones* that it is time to rethink this mess.²¹⁴ As this Article has suggested, to find the path forward we just need to take seriously the text and history of the Fourth Amendment. By doing so, and perhaps only by doing so, can we hope to secure our collective right to be secure against unreasonable searches and seizures.

214. *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (suggesting that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties”).