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STANDING ROOM ONLY: WHY FOURTH AMENDMENT EXCLUSION AND STANDING CAN NO LONGER LOGICALLY COEXIST

*Sherry F. Colb**

INTRODUCTION

The Fourth Amendment protects the freedom from unreasonable searches and seizures and thus provides the constitutional source for our privacy from official observation. We can retreat into our homes and our personal papers and leave the government behind. This freedom, of course, is not absolute. The Fourth Amendment uses the words “probable cause” and “unreasonable searches,” and the Supreme Court has interpreted these phrases to mean that when police acquire information reliably linking a person to a crime, they can invade that person’s privacy to uncover evidence of misdeeds. In the presence of probable cause, then, the freedom from surveillance contracts, and the State’s power to protect against crime accordingly expands.

“Probable cause,” however, is not certainty. Police will often prove to have been mistaken in their selection of targets for official investigation. Innocent people will appear guilty and thus lose some of their well-deserved privacy. Guilty people will seem innocent and consequently maintain an undeserved freedom from exposure. To demand perfection from the police—either in avoiding searches of the innocent or in pursuing searches of the guilty—would be unrealistic and unfair, because the police are only human.

Because of the imperfect, human nature of police officers, probable cause can only approximate objective reality. The objective state of affairs it aims to approximate is this: only searches of guilty people concealing evidence of crime ought to occur. The approximation itself, however, derives from the standpoint of the particular police officer. A

* Professor of Law and Judge Frederick B. Lacey Scholar, Rutgers Law School-Newark. The author expresses thanks to Michael C. Dorf, Orin Kerr, George C. Thomas III, Sheri Johnson, and Peter Martin, for reading early drafts of this Article and for providing invaluable comments and suggestions. The author is also very grateful to all the members of the Cornell Law School faculty, for inviting her to give a workshop on an earlier version of this Article and for offering very helpful feedback. Finally, the author thanks Katherine Gallagher, Michael Isaac, Brad Jarman, Robert Lipschitz, and Stacy Posner for their tireless and expert research assistance.

police officer has probable cause when, from the perspective of the officer deciding whether to conduct a search, the facts currently known to her would persuade a reasonable officer that a search would uncover evidence of crime. It follows that a “reasonable search” might turn up nothing, just as an unreasonable search might uncover a major criminal enterprise. The reasonableness of a search—generally, the presence of probable cause—depends on the officer’s *ex ante* perspective, not on the *ex post* reality of what was or was not actually hidden in the targeted location when the search took place.

Fast-forward now to a criminal trial at which the defendant challenges a search that turned up evidence of his criminality. The defendant in this situation need not argue that the evidence is not incriminating. Indeed, if the evidence were not incriminating, the prosecutor would likely have no interest in introducing it. The defendant must instead demonstrate that from the police officer’s perspective, given what she knew prior to conducting the challenged search, the defendant did not *appear* to have been concealing evidence of crime (or, if the defendant did so appear, then the officer—given what she knew when she carried out the search—had the time and opportunity to obtain a warrant before proceeding but nonetheless failed to do so).

As with a police officer’s (or magistrate’s) before-the-fact assessment of the legality of a planned search, it is not *ex post* reality (that the defendant was or was not committing a crime or hiding evidence of crime) that determines the substantive outcome of the suppression motion; it is the *ex ante* perspective of the officer. If the officer did not *reasonably* expect to find evidence, then the evidence that she did in fact find should be suppressed at trial.

In order to prevail on her motion to suppress evidence, however, the defendant must prove more than the unreasonableness of the officer’s search. She must demonstrate as well that she, the defendant, had a *personal* right to be free from the officer’s unreasonable search. If, in other words, the police officer performing the search violated someone *else’s* Fourth Amendment rights, but not the defendant’s, then the defendant lacks what the Supreme Court used to call (and what I shall continue to call) “standing” to suppress the evidence.¹

¹ Though the Court no longer approves of the term “standing,” *see, e.g., Rakas v. Illinois*, 439 U.S. 128, 143 (1978), it is nonetheless a useful term for understanding when a criminal defendant lacks the legal ability to suppress evidence against him, regardless of the Fourth Amendment validity of the search that he wishes to challenge. *See infra* note 43 and accompanying text. Because of the differing objectives of each inquiry, I will continue to use the language of standing to refer to the second inquiry, in which a suspect attempts to prove that he was personally aggrieved by the search or seizure that he has claimed was unlawful. In other words, the “standing” inquiry asks about *which* individuals have the power to suppress the fruit of a Fourth Amendment violation when they are criminally prosecuted and the government offers

The Court has stopped referring to “standing” because it considers the “reasonable expectation of privacy” language of substantive Fourth Amendment law adequate to the task of describing both *when* a search has taken place (e.g., is there a reasonable expectation of privacy in having the police stay out of garbage left at the curb?) and *who* was victimized by a search such that if the search was unreasonable, then *he* would be one of the people authorized to suppress evidence that resulted from it (e.g., may a person visiting a house to deliver a couch bring a suppression motion when evidence illegally found at that house is offered against him?).

In both cases, we invoke the language of “reasonable expectations of privacy” to ask whether society is prepared to recognize the expectation at issue as a legitimate one, but the consequence of answering the question “yes” or “no” is slightly different in each case. The first has to do with what the Fourth Amendment permits the police to do, while the second concerns whether a particular criminal defendant is in a position to suppress the fruit of what is admittedly a police violation of the Fourth Amendment. Standing references the second of these two ideas.

“Standing,” in contrast to probable cause, does *not* turn on the searching police officer’s perspective. It turns instead on an omniscient or *ex post* perspective. Suppose, for example, that a police officer unreasonably searches a defendant’s car and finds evidence of crime there. In this situation, the defendant would have standing to suppress the incriminating evidence found in the car. Importantly, this would be true even if the police officer had every reason to think that the car belonged to someone other than the defendant, someone who had no relationship at all with the defendant. In such a situation, where the police reasonably (but, as it turns out, incorrectly) believe that the defendant lacks standing and unreasonably search, the defendant can successfully challenge the search and suppress the evidence.

Conversely, suppose now that the police unreasonably search a car that the defendant has in fact stolen but that the police reasonably believe actually belongs to the defendant. In such a situation, the defendant would lack standing to suppress the incriminating evidence that the police found in the car, because—from an *ex post* (or “reality-based”) perspective—the defendant lacked any reasonable expectation of privacy in the car that he stole, in spite of the police officers’ mistaken—albeit reasonable—belief that the car was his. A defendant’s standing therefore does not depend, one way or the other, on the reasonableness of an officer’s assumptions about the defendant’s connection to the area searched. It depends only on actual facts out

illegally obtained evidence against them.

there in the world: did the car belong to the defendant or did he otherwise exercise lawful dominion over it?

When a prosecutor challenges a defendant's *standing* to bring a suppression motion, then, the prosecutor cannot rely on the perspective of police officers performing the potentially illegal search. She must instead cite actual facts that have emerged *ex post*, about the defendant and his relationship to the property or the location at which the police conducted their allegedly unreasonable search. Standing is a feature of an omniscient, *ex post*, perspective that includes all of the facts, whether or not those facts were known to or reasonably understood by the police at the time of the search in question.

Because the standing inquiry requires a judge deciding a suppression motion to consider reality as it has emerged *ex post*, this Article proposes that the judge's consideration ought to include the fact that the person bringing the motion was in actuality concealing evidence of crime in the location that was searched. The Article explains why it is arbitrary for the law to consider the known facts about a driver's relationship to the car he was driving while ignoring the known facts about what the driver or owner of that car was doing in the hidden areas of that car.

After defending the thesis that the standing inquiry should encompass questions about the defendant's criminality, the Article demonstrates that the standing doctrine necessarily entails the demise of the Fourth Amendment exclusionary rule. Accordingly, the Article contends that a coherent approach to existing Fourth Amendment doctrine requires the abolition of either the exclusionary rule or the standing requirement; the two cannot sensibly coexist.

My attack on Fourth Amendment standing doctrine dovetails in some respects with conventional critiques of standing, although it does not rest on the same conceptual foundation. Existing liberal appraisals of the standing requirement tend to place it in the same category as other exceptions to the Fourth Amendment exclusionary rule, suggesting that such exceptions undermine deterrence and judicial integrity by permitting the fruit of illegal searches to enter our courtrooms.² Mine is a more fundamental critique. I propose that

² See, e.g., Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 478-79 (1991) (including the trend toward heightened standing thresholds among a list of developments in Fourth Amendment law demonstrating antipathy for the exclusionary rule); Donald L. Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 274 (1988):

If the exclusionary rule is designed exclusively to prevent future harm and has nothing to do with redressing harm suffered by the moving defendant, it makes little sense for the Court to insist that a defendant may not move to suppress evidence unless the

standing doctrine is not simply *in tension* with the goals of the exclusionary rule, but that, properly applied with the *ex post* perspective that defines Fourth Amendment standing, the doctrine altogether *precludes* the assertion of Fourth Amendment rights by any defendant bringing a suppression motion at his or her criminal trial. Whether the exclusionary rule or Fourth Amendment standing ought to yield is not my main concern. This Article thus represents primarily an analytic, rather than a normative, undertaking.

I. PROBABLE CAUSE: AN EX ANTE PERSPECTIVE

Television crime dramas have done a superb job of familiarizing the public with the phrase “probable cause.” Though laypersons may not be able to give a precise definition, everyone knows that it has something to do with protecting privacy, property, and liberty from the police: in the absence of “probable cause,” the police are not supposed to search or seize us or our things. Furthermore, the law requires that police obtain a warrant attesting to that probable cause, unless some exception to the warrant requirement applies.

Though suspicion falling short of probable cause will suffice in some categories of cases, television audiences basically have it right. Probable cause consists of some quantity of information, known to police, that is both necessary and sufficient to permit them to invade our privacy.³ A warrant is a document that certifies in advance that police had the probable cause they needed before embarking on their search or seizure.

At times, people speak of probable cause as if it were an actual fact out there in the world. They utter sentences like “you can’t search me, because there’s no probable cause” or “there’s probable cause to search that guy,” as though probable cause can either “exist” or “not exist” in some objective sense. Talking about probable cause in this manner reflects a significant confusion. It is, moreover, a confusion that infects the Supreme Court’s thinking and has led to incoherence in the law of search and seizure.

What do I mean when I say that “probable cause” does not simply exist out there in the world? Consider the following illustration. John

government conduct violated his rights when obtaining it.
Id.; Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2505 (1996) (“[T]he threshold requirement of standing . . . operates to limit the scope of exclusion in ways that seem to run counter to the deterrence rationale offered for the rule.”).

³ For simplicity, when some form of individualized suspicion is required, I may refer to that level as “probable cause,” even though the law will sometimes require “reasonable suspicion” or another lesser standard.

Doe, wearing a disguise, has stolen a hundred thousand dollars in cash, at gunpoint, from a bank called "Second Boston." Doe has stored the cash in a suitcase in the passenger compartment of his car. Assume that we are omniscient, so we know everything there is to know about the hypothetical world in which John Doe committed his robbery and subsequently attempted to conceal his crime. What we know is accurate, and we did not have to perform a search to find any of it out.

Under these circumstances, may a police officer legally search Doe's car or arrest Doe? The answer is that we do not know. Though we are omniscient about the facts in John Doe's world, we will only know whether a police officer has probable cause by learning what she knows (or has reliable evidence to believe) about John Doe.

Whether an officer can perform a search or seizure thus depends not on what we, the omniscient-of-all-facts-about-the-outside-world, know. It depends instead on what the officer reasonably (but perhaps incorrectly) believes to be true. It is the *ex ante perspective* of the police officer with limited knowledge—not the omniscient perspective—that determines whether a search or seizure was legal. Probable cause is accordingly something that the police have, not something that exists in the outside world.

From the omniscient or *ex post* perspective, John Doe has robbed Second Boston of a hundred thousand dollars. The money is in fact located in a suitcase inside the passenger compartment of Doe's car. It is meaningless for us to speak of there being "probable cause" against him, just as it would be meaningless for us to say of another person whom we know to be dying of pneumonic plague that he is "probably" or "probably not" sick with plague. He simply *is* sick.

Outside the realm of quantum physics, probabilities are predictions about living beings or inanimate things—predictions that we can make when we know some but not all of the facts about those beings or things. A person in the present is either infected or uninfected with plague. He is neither "probably" sick nor "probably" well, except in the sense that if we know facts A, B, and C about a person (that he exhibits some of the most common symptoms of plague), but not facts D, E, and F (whether he has begun coughing up blood, whether any *Y* testis bacteria have colonized his lungs), then we are in a position to predict that seven times out of ten, it will turn out that the person is sick with plague.

So what? Isn't "probable cause" simply a convenient shorthand for the proposition that "the police know that Doe was seen leaving Second Boston and throwing a ski-mask onto the ground immediately after a terrified teller reported a robbery of one hundred thousand dollars, and the police also know that Doe told a close friend that he, Doe, would soon be coming into some extra cash"? Doesn't everyone

know that we are not really talking about a fact out there in the world but simply a set of probabilities, given what a police officer reasonably believes, based on what he has seen or heard? Furthermore, what difference does it make that the actual facts in the world do not matter in an assessment of probable cause?

I have elsewhere argued that facts in the world do matter to the Fourth Amendment.⁴ Specifically, the universe to which the Fourth Amendment aspires is one that maximizes police searches and seizures of people who are, in fact, guilty and hiding evidence and minimizes police failures to search the factually guilty along with police decisions to search the factually innocent who are not in possession of criminal evidence.

We know this, I explain, because the Amendment speaks of probabilities connected to the commission of crime, in using the term “probable cause.”⁵ Since police are not omniscient, however, we cannot require that they search only the guilty and leave the innocent alone. Such a requirement would be impossible to fulfill.

On the other hand, we can and do require that police know *something*—that they have in their possession sufficient information to make it reasonable to predict that the person they are choosing to search will prove to be—in fact—guilty of committing a crime and of concealing evidence in the location in question.

In short, there is an actual state of affairs that the Fourth Amendment aims to achieve. And this is not simply my idiosyncratic view, but an implication of the Fourth Amendment itself and most of the doctrine. The standards by which we judge the behavior of the police, however, do not depend on the actual, *ex post* reality to which the Fourth Amendment aspires, but on the appearances that make their way into the perceptions of the officer who performs or authorizes a search. Probable cause is thus fundamentally a matter of a police officer’s perspective rather than of actual reality out there in the world.⁶

Return now to our earlier hypothetical example: Do the police have probable cause to search John Doe’s car for evidence that he robbed Second Boston? Neither the fact that he really did commit the robbery,

⁴ See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996).

⁵ *Id.* at 1476-77.

⁶ When I say “officer’s perspective,” I do not suggest that each individual police officer has a different and equally valid point of view or opinion about evidence and that this point of view or opinion is relevant to the meaning of probable cause. It is not. An officer might personally believe that a hunch is enough to justify a house search, or he might think he needs proof beyond a reasonable doubt before examining a vehicle. He would be mistaken in either case. When I refer to the officer’s perspective, I mean that the satisfaction of the probable cause standard depends entirely on what the police have evidence to believe occurred. Whether they are correct or not, as a matter of the real world, does not count, in either direction. Probable cause is thus, in this sense, based on appearances and not on reality.

nor the fact that he actually did conceal his ill-gotten gains inside the passenger compartment of his car, bears at all on the question of probable cause. Also irrelevant is whether some friend of John's saw the entire crime take place, if the friend has not shared her observations with the police.

Conversely, if a credible witness to the robbery has described what happened for the police, then the police have probable cause to search Doe's car. And if the credible witness decided to lie and say instead that Kevin Broe stole the money, then the police would have probable cause to search Broe, an innocent man, but not Doe, the guilty one.

This all makes sense. Police should avoid searching and seizing without good reason. But they should—and the Constitution permits them to—investigate freely when the evidence known to them reasonably supports such investigation.

To be sure, one could imagine a strict liability regime permitting police to search anyone—with or without probable cause—as long as the search turned up evidence, but requiring police to pay damages whenever a search turned up nothing.⁷ Such a regime, though, only *seems* to put a premium on *ex post* reality as a measure of police misconduct. In truth, a strict liability approach is generally a means of motivating police to strike the correct balance between maximizing fruitful searches and minimizing fruitless ones.⁸ Few people honestly expect (or even want) police either to stay their hands in the absence of complete certainty or to search whenever curiosity strikes.

II. STANDING: AN EX POST INQUIRY

When a criminal defendant wishes to press claims that police have acted unreasonably and that the judge should accordingly suppress evidence uncovered during a search, a second doctrine—one that is separate from probable cause—comes into play. That doctrine is Fourth Amendment standing. To suppress evidence resulting from a search or seizure, it is not enough for the defendant to prove that the search or seizure violated the Fourth Amendment. She must show as well that the

⁷ At common law, under this sort of approach, police who searched a home without a warrant would be liable for trespass if they found nothing, but blameless if they found something criminal, regardless of what their *ex ante* state of knowledge might have been. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 (1994), reprinted in AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 7 (1997).

⁸ See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL & ECONOMIC ANALYSIS* (1970). Such a regime may also represent an attempt to compensate all victims, regardless of a defendant's fault (or lack thereof) in bringing about the plaintiff's victimization.

alleged violation was of *her* Fourth Amendment rights, that it was—for example—*her* house that the police illegally searched.

In determining Fourth Amendment standing, as opposed to reasonableness, we do not consider what the police officer knew at the time he conducted a challenged search or seizure. The police officer's perspective does not matter at all for these purposes. It is instead the omniscient perspective—what a judge considering a motion to suppress knows, *ex post* reality—that drives standing doctrine.

Because the omniscient perspective governs standing, the judge's task of determining whether a particular criminal defendant can raise a Fourth Amendment objection to the admission of illegally obtained evidence against him calls for an examination of all available facts about this defendant and his relationship to the area in which a controversial search took place. In the language of *Rakas v. Illinois*,⁹ the judge must ask whether the defendant had a reasonable expectation of privacy that police invaded during an allegedly unlawful search. If the answer to this question is yes, then the defendant will have standing to raise an objection to admission of the evidence that resulted from the search, no matter what the police had reason to believe about the defendant's standing. And if the answer to this question is no, then the judge need not inquire further into whether the police invaded some *other person's* reasonable expectation of privacy or whether the police had good reason to *think* that they were violating *this defendant's* Fourth Amendment rights. Without an actual, personal, reasonable expectation of privacy at stake, a defendant lacks standing to complain of police officers' conduct.

Consider the following illustration. The police see Joe Defendant open the door to a house with his keys. Because of what they have just seen, they conclude that Joe lives in the house and therefore has a reasonable expectation of privacy there. The police nonetheless decide—for no good reason—that they would like to have a look around the house, so they break a window and climb inside.

It turns out that when the police arrived, Joe Defendant was in the process of breaking into the home in question to steal jewelry. Joe had obtained keys, without permission, by surreptitiously removing them from the homeowner's pocket when they were both shopping at a neighborhood supermarket.

By hypothesis, the police have acted unreasonably. They have entered a house without any basis for suspecting wrongdoing and without a warrant approving that entry, and they quite logically concluded that it was Joe's rights they were violating when they did so. In reality, however, the police violated someone else's privacy rights—

⁹ 439 U.S. 128, 143 (1978).

the homeowner's, not Joe's. Joe therefore lacks standing at his criminal trial to suppress evidence of the jewelry he was in the process of stealing from the house that the police entered illegally. The actual homeowner, by contrast, would have had standing to object to the admission of any evidence against *him*—the homeowner—at his own criminal trial.

Now change the facts. The police see Joe approach a different house, knock on the door of that house, and then wait for someone to answer. After a few seconds, a woman opens the door and begins talking with Joe. During their conversation, Joe hands a clipboard and a pen to the woman. She appears to use the pen to sign something and then returns the clipboard to Joe. After that, the woman says something to Joe, and he subsequently follows her into the house, after which she closes the door behind them.

The police decide at this point—for no good reason—that they want to have a look inside the house. They break a window and climb through. It turns out that Joe really does live in the house but was play-acting with his wife, the woman who answered the door. While illegally searching, the police find a marijuana plant growing inside the house and promptly arrest Joe. He is subsequently prosecuted for cultivation and possession of a controlled substance.¹⁰

Under existing precedents, Joe undoubtedly held a reasonable expectation of privacy in his own home at the time the challenged search took place. He will therefore have standing at his criminal trial to move for suppression of the marijuana plant that the police found during the search. The fact that Joe did not *seem* to the police (at the time of their break-in) to have a reasonable expectation of privacy in the particular home in no way defeats Joe's Fourth Amendment standing. In the standing context, only the actual facts count; appearances to the police do not. And that is true whether the disparity between reality and appearance benefits the police or whether it benefits the target of the search.

It may initially strike readers as unfair (to the police) not to permit appearances to play a role in determining a defendant's standing. After all, police can operate only on the basis of information they actually know or have reason to know. Judging them on the basis of a reality hidden from their view does not seem right.

But this apparent unfairness disappears on closer analysis. The police are under a constitutional mandate to refrain from conducting unreasonable searches and seizures. Based on what they knew in the two (Joe) examples above, the police—from their own perspective, which governs the substantive Fourth Amendment question—violated

¹⁰ 21 U.S.C. § 841(a)(1) (2000).

the Fourth Amendment, by invading houses without a warrant and without probable cause. It should therefore come as no unfair surprise to the police to learn that what they did in both instances violated the Constitution.

The fact that in the second case, the police believed that the person arrested would not himself have standing to object to the admission of the evidence does nothing to excuse police from their obligation to obey the Constitution. They are not allowed to violate *anyone's* Fourth Amendment rights. When no one turns out to have standing to exclude illegally obtained evidence, police may *get away with* their unconstitutional conduct. But this lapse in enforcement in no way converts an unlawful search into a lawful one. To the extent that the police benefit from the lack of a defendant with standing to suppress illegally obtained evidence, then, their gain represents an undeserved windfall, not an entitlement.

Accordingly, the unexpected emergence of a person with standing to hold the government accountable for violating the Fourth Amendment is no less fair than the unexpected emergence of a witness to a murder that the perpetrator reasonably believed went unobserved. We are all responsible for obeying the law, to the best of our ability. And the scope of that responsibility does not turn on how likely it is in a given instance that we will be held accountable when we transgress.¹¹ Fourth Amendment standing affects enforcement and thus deterrence, but it does not affect the scope of a police officer's duty to obey the Constitution.

In sum, the obligations of police who conduct searches and seizures depend on their perspective—literally what they see or otherwise reasonably believe to be true, based on reliable evidence. The fact that their reasonable conclusions may turn out to have been at odds with what we later learn to have been the facts does not undermine (or rehabilitate) the constitutional legitimacy of their conduct. The standing of a suspect to suppress evidence, on the other hand, turns exclusively on what we learn, *ex post*, was the suspect's actual relationship to the space in which he—or evidence of his wrongdoing—was discovered by the police. And that actual relationship need not be obvious to, or even reasonably ascertainable by, the police in order for it to invest a criminal defendant with standing or divest him of the same.

¹¹ But cf. Linda Rodgers & William Rogers, *Desuetude as a Defense*, 52 IOWA L. REV. 1 (1966) (discussing and rejecting the doctrine of desuetude, under which the long-time failure to enforce a criminal law operates as a *de facto* repeal of the law in question and therefore a defense to prosecution under that law).

III. A DEFENDANT'S CRIMINAL CONDUCT OUGHT TO INFORM THE STANDING INQUIRY

As we have seen, neither a suspect's actual relationship to an area searched nor his genuine innocence or guilt (or possession of sought-after evidence) plays any role in determining the legality of police conduct. This is because the police officer's perspective, rather than what turns out to be the factual truth, governs the Fourth Amendment reasonableness of searches and seizures. The officer's perspective, in turn, depends entirely on appearances. The reality that cannot be known to the officer (and which conflicts with reasonable appearances) does not bear on the constitutionality of his conduct.

In the standing inquiry, by contrast, we no longer take the perspective of the police officer. We look instead to what actually happened. And once we abandon the officer's perspective and examine all presently available facts for answers, the information that a person is guilty of a felony or engaged in concealing evidence of crime can and should become a relevant part of the calculus, just as the fact that a person really does (or really does not) live in the house that was searched is relevant under existing standing precedents. Current doctrine and, I suspect, most scholars, would resist this conclusion, but, as the balance of this Article aims to show, no sound reason justifies that resistance.

Standing doctrine has not thus far acknowledged the relevance of guilt or innocence to its application. Standing currently depends on whether a hypothetical person, regardless of her guilt or innocence, would retain a reasonable expectation of privacy under the circumstances in which the defendant found himself at the time of the search: in his own home, on the street, in a locked hotel room for which he had paid a fee, or in a closed public telephone booth engaged in conversation. An innocent person can accordingly occupy a space in which she holds no reasonable expectation of privacy (e.g., under *Rakas*, the back seat of a car in which she is a "mere passenger"),¹² just as a guilty person can occupy a space in which he *does* retain a reasonable expectation of privacy (such as his own home).

It is not clear, though, why the latter proposition should hold, given the *ex post* perspective of the standing inquiry. Actual guilt and innocence, like actual property relations, ought to play a role in determining who has and who lacks standing to suppress evidence at a criminal trial.

Consider the following example. Linda Smith kidnaps a one-year-old boy from his home, while everyone else in the house is asleep.

¹² *Rakas*, 439 U.S. at 148-49.

Linda takes the baby to her own home, which she rents from the owner, and places the baby in a locked room with no light. The boy's parents have no idea that their son has been kidnapped, and there is nothing outwardly suspicious about Linda's behavior on the way into her house. It is clear, on these facts, that the police lack probable cause (and therefore will be unable to obtain a warrant) to search Linda Smith's home. If police enter the house under these circumstances, in the absence of consent, they are unquestionably violating the Fourth Amendment.

Turn now to the issue of Linda's standing. Does Linda have a reasonable expectation of privacy such that she can bring a suppression motion at her later trial if police enter her home, find the kidnapped boy, and wish to testify against her on the basis of their findings? The current doctrinal answer is yes: Linda lives in the house, and residence gives a person a reasonable expectation of privacy in avoiding unreasonable searches and seizures in concealed portions of the place of residence.

But does this answer make sense? We have seen that Fourth Amendment standing is based on what we later learn is actually happening—specifically, the suspect's relationship to her space and circumstances. Under such a scheme, the fact that Linda lives in the house should not necessarily be the only fact that informs the standing inquiry. Another appropriate feature of standing should arguably include the relevant individual's not using her space to commit a crime or to conceal evidence of crime.¹³

One potential response to this claim is that only the fact that Linda Smith lives in the home—not the fact that she is committing a kidnapping—is ascertainable by the police without a search of the premises. This answer, however, relies on the police officers' perspective rather than on what really turns out to be the case. Recall that for a person to lack standing to object to the legality of a search, it is not necessary that a police officer be able to *discern* the person's lack of standing prior to performing the search, just as a defendant can successfully bring a suppression motion even if the police could not possibly have known prior to the challenged search that the defendant

¹³ One way to capture the role that a defendant's crime should play in assessments of standing, on my approach, is to hypothesize a lease that automatically terminated a tenancy upon the commission of a crime on the premises. If she had this kind of a lease, Linda Smith (the kidnapper) could be said to have forfeited her residency at the house where she lived the moment she used it to effectuate a kidnapping. She would accordingly lack standing to complain of an unreasonable search on the rented premises; *cf.* International Crime Free Association, Crime-Free Lease Addendum, Arizona Version Sample, http://www.crime-free-association.org/lease_addendums_az_english.htm (providing that a tenant's (or a tenant's affiliate's) commission of a crime on or near the rented premises would represent an immediate and irreparable violation of the lease that would provide grounds for immediate termination).

I thank Peter Martin for calling my attention to this possibility.

would be among those whose rights were violated during the search. What matters, for standing purposes, is the truth, *not* what might or might not have been apparent to the police when they decided to conduct a search.

The Supreme Court has held, for example, that an invited overnight guest has standing (“a reasonable expectation of privacy”) in the part of the home where he is staying.¹⁴ This is the law, moreover, despite the fact that the police would ordinarily have no way of knowing in advance of a search whether guests on the premises were invited to stay overnight. Standing therefore does not rest on the accessibility of predicate facts to police considering a search. A person’s standing to object to the admission of evidence turns instead on the answer to a specific normative question: when would society deem legitimate and worthy of protection a person’s wish to keep the government out of her space, given the circumstances surrounding her occupation of that space?¹⁵

The fact that kidnapper Linda Smith legally resides in the house where police performed their search is surely *one* factor relevant to the determination of whether she is entitled to be left alone in that house. People generally have a reasonable expectation of privacy in their homes and lack a reasonable expectation of privacy in other peoples’ homes (unless they are invited overnight guests). But the activity in which Linda Smith was engaged—holding another family’s baby captive in her house—is an additional factor that would seem to militate (quite strongly) *against* the legitimacy of her privacy expectation there. Society undoubtedly would *not* feel prepared to honor as legitimate a kidnapper’s expectation of privacy in the place where she conceals the child whom she has kidnapped, even if it is her own home.

¹⁴ Jones v. United States, 362 U.S. 257, 266-67 (1960); Minnesota v. Olson, 495 U.S. 91, 97-100 (1990).

¹⁵ See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.”) (internal quotations omitted); Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (“[E]ven if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is prepared to recognize as reasonable. . . . This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”) (internal quotations omitted); United States v. Knotts, 460 U.S. 276, 281 (1983) (“The second question is whether the individual’s subjective expectation of privacy is one that society is prepared to recognize as reasonable, . . . whether, in the words of the Katz majority, the individual’s expectation, viewed objectively, is justifiable under the circumstances.”) (internal quotations omitted); Kyllo v. United States, 533 U.S. 27, 33 (2001) (“As Justice Harlan’s oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”); Oliver v. United States, 466 U.S. 170, 179 (1984) (“For these reasons, the asserted expectation of privacy in open fields is not an expectation that ‘society recognizes as reasonable.’”).

For the omniscient viewer—one who is aware of what turns out actually to have been taking place inside Smith's house—Linda Smith does not deserve privacy in the place where she holds another family's child captive. If we describe her circumstances in the following question, the equities come into focus: Does a person have a reasonable expectation of privacy in the house where she lives and where she is currently perpetrating and concealing the kidnapping of another family's young son? I suspect that nearly everyone would say that the answer to this question is no and that most people would conclude that such a person deserves—based on what she is *actually* doing—to have that part of her home concealing the boy exposed.¹⁶

"But that is not a fair characterization," some would say of the standing question I have framed. As long as a person does not "knowingly expose" what would otherwise be private, a search has taken place.¹⁷ And Linda Smith, as guilty as she is, did not "knowingly expose" the private corners of her house to the public.

It is true that Linda has not "knowingly exposed" the inside of her home. To the extent that in the absence of "knowing exposure," a person necessarily retains a reasonable expectation of privacy, Linda should therefore prevail in her claim of standing to object to the search of her home. The normatively relevant features of Linda's circumstances, however, go beyond the facts that she lawfully resides in her home and that it is well-concealed from the public. The determination that a person's expectation of privacy is "reasonable" likewise involves more than answering a simple empirical question about what one has or has not "knowingly exposed." It includes as well a normative question about the proper scope of protected privacy. The lack of knowing exposure is thus a *necessary* but by no means a *sufficient* condition to the finding that a search has taken place. Though one might manifest a subjective and empirically realistic expectation of privacy, in other words, society might not see fit to honor that expectation.¹⁸

¹⁶ I specify here the narrow exposure of the part of the house concealing the kidnapped boy, because there is no reason to propose an across-the-board forfeiture of privacy by virtue of a crime. It is the privacy that is used to perpetrate or conceal the misconduct that falls prey to such forfeiture. See Colb, *supra* note 4, at 1501 (explaining that "[t]he forfeiture of one's privacy entitlement . . . extends only so far as the abuse of the privacy right").

¹⁷ See Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 122 (2002) ("[T]he Court asks: 'What is a search?' To rule out activities that do not qualify, the Court denies privacy in whatever people 'knowingly expose' to the public. If a person knowingly exposes some object or activity to the public, there has accordingly been no search.").

¹⁸ See *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (finding that an "expectation 'that certain facts will not come to the attention of the authorities' is not the same as an interest in 'privacy that society is prepared to consider reasonable.'" (quoting *United States v. Jacobsen*, 466 U.S. 109, 122 (1984))); *Kyllo*, 533 U.S. at 27-28 (stating that "[a] 'search' does not occur—even when its object is a house explicitly protected by the Fourth Amendment—unless the

Furthermore, as Justice Harlan observed in *United States v. White*, “[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.”¹⁹ The law itself, in other words, shapes expectations of privacy. Accordingly, even empirical expectations ultimately reflect normative considerations. If we think that people should have more privacy than they do, we can change the law and eventually generate new expectations. For this reason, we do not simply ask whether people are *likely*, as a descriptive matter, to remain unexposed in their own homes. We ask whether people *ought to* remain unexposed there.

Once all of the facts—even those unavailable to the police prior to a search—matter, as they do in determining a particular person’s standing to complain of a Fourth Amendment violation, it is only by fiat that one takes note of Linda’s tenancy in her home while simultaneously excluding from the standing determination the fact that Linda is using her home to commit and conceal a kidnapping.²⁰

IV. CONSIDERING AN ANALOGY BETWEEN STANDING AND MERITS QUESTIONS

Is it truly fiat to exclude the fact of a kidnapping from the standing inquiry? Granted, both questions, “Does the defendant reside in this house?” and “Is the defendant committing and concealing a crime in this house?” are questions to which we seek true answers, not answers dependent upon the officer’s perspective at the time of a search. The two questions, however, nonetheless correspond to inquiries that are wisely treated separately in a slightly different context.

When a dispute arises about whether police have performed an unreasonable search or seizure, we determine first whether there was a search at all—by asking whether a person has a reasonable expectation of privacy, for instance, in a telephone call placed from a public phone

individual manifested a subjective expectation of privacy in the searched object, *and* society is willing to recognize that expectation as reasonable”) (emphasis added).

¹⁹ *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

²⁰ One might wonder here whether the *ex post* perspective of standing is simply a product of existing Fourth Amendment doctrine and whether, perhaps, the resolution of the *ex post/ex ante* conflict between standing and the merits lies in judging the former from the same *ex ante* police perspective that informs the latter. Under such a scheme, for example, a person would have standing if, from the perspective of the police, that person appeared to be the homeowner. The problem with such a scheme, however, is that we have already asked the appropriate police-perspective questions in assessing whether the police had reason to think that they were doing the wrong thing (i.e., that they were carrying out a search and that they lacked a good reason for doing so). Once we have determined that police have searched unreasonably, the only contribution of a “standing” requirement—in this as in other areas—is to examine a particular complainant’s actual victim status with respect to the events of which he complains.

booth. Only if the answer to this first question is yes do we have to ask whether it was reasonable for the police on a particular occasion to record a specific telephone conversation, i.e., whether the search at issue was legal.

The first question—whether there is a reasonable expectation of privacy—considers only the fact that the speaker is in a closed telephone booth, engaged in a conversation, after paying the toll. Whether he is committing a crime in that telephone booth has no relevance to this inquiry. It is only when determining whether the search was *reasonable*—after concluding that there *was* indeed a search—that we ask anything about criminal activity. We examine at that point whether there was a warrant supported by probable cause to believe that the conversation projected to be taking place in that telephone booth would constitute (or evidence) criminal activity.

In the context of assessing the legality of a police officer's conduct, then, we do not collapse the inquiry and ask whether a person who is apparently conducting a criminal enterprise on the telephone has a reasonable expectation of privacy in his conversation. We instead divide the inquiry into two parts, one of which—the “reasonable expectation of privacy” part—focuses on the relationship between a hypothetical person in the defendant's shoes and the space in which the person seeks privacy, and the other of which—the “reasonableness” of the search part—examines the likelihood that the actual suspect is engaged in criminal conduct. If that division—between one's relationship to a space and one's commission of a crime within that space—makes sense when assessing the conduct of the police, then why should we not employ the same division when assessing a criminal defendant's standing to raise objections to the police conduct in question and accordingly treat relationship-to-property separately from criminality-of-conduct? Moreover, does it not simply confuse matters to have the phrase “reasonable expectation of privacy” encompass two different things, as I suggest it should, depending on whether we are discussing the merits of a Fourth Amendment claim (“Is it a search?”) or whether we are instead determining a particular defendant's standing to ask a court to reach those merits? In my approach, the first “reasonable expectation of privacy” question ignores the suspect's criminality altogether while the second takes it squarely into account. Why?

To understand why I propose such distinctive treatment for Fourth Amendment standing, let us turn again to the matter of perspective (the officer's *ex ante* perspective versus the omniscient viewer's *ex post* perspective).

There is a reason we separate facts about one's relationship to a location, on the one hand, from facts about one's guilt or concealment

of evidence, on the other, when we analyze the *legality* of searches and seizures. The division corresponds to the structure of the Fourth Amendment inquiry. We ask first whether police have conducted a “search” at all, a question that translates doctrinally into asking whether, in the absence of any suspicion of crime, a person under the defendant’s apparent circumstances would have had a reasonable expectation of privacy, as defined by ownership/residence or other similar conditions.

It makes sense to limit the initial inquiry in this way because police do not have to act reasonably or gather preliminary evidence of guilt if the course of action they intend to pursue does not trigger application of the Fourth Amendment at all—if, in other words, those actions do not constitute a “search.” If a form of investigation does not represent a search at all, then police can carry it out against anyone, regardless of whether or why they suspect him of wrongdoing. If the police want to follow a driver’s vehicle, for example, because they have a hunch that he is a criminal, they may do so without accumulating either reasonable suspicion or probable cause.²¹

But if the police propose a course of action that *does* constitute a search, then they *do* need to make themselves aware of facts that give rise to reasonable inferences of guilt, in the form of probable cause.

Additionally, when police are engaged in Fourth Amendment-regulated activity, the facts about guilt and innocence that they must preliminarily gather—just like the facts that make the activity a search in the first place—will be analyzed from the perspective of the police officers; given what the officers knew, was it reasonable for them to believe they would find evidence of crime and, therefore, to act as they did?

When we consider a defendant’s standing to bring a suppression motion, by contrast, the omniscient viewer’s *ex post* perspective governs everything. We ask, simply, whether the person in question was entitled to privacy. Unlike in the substantive context, we need never reach the question of whether the police implicated or violated Fourth Amendment entitlements *in the abstract*, if police lack *ex ante* evidence of wrongdoing. Suppression is all about a specific defendant in all of his specificity, including what we have come to know about his *actual* conduct.

The *ex post*, highly specific perspective of the standing inquiry has significant implications for the need to separate relationship-to-property facts from guilt/innocence facts. The reason we generally abstract guilt information out of “reasonable expectations of privacy” inquiries when our question is whether something does or does not constitute a search,

²¹ See *United States v. Knotts*, 460 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

is that we are defining rights that police must respect when they lack complete information and wish to know whether they may nonetheless take desired measures. That is, when a police officer sees a person talking inside a closed telephone booth, the case law regarding searches and seizures must notify that officer that attaching a listening device to the top of the booth represents a “search” for Fourth Amendment purposes²² and that they may therefore not act without first securing a search warrant based on probable cause.

The fact that the specific individual in that booth will—unknownst to police—be making interstate bets on the telephone while he is being monitored cannot be part of the determination of whether police are engaged in a Fourth Amendment “search” when they monitor a telephone conversation; police do not know hidden facts until *after* they have acted. For the same reason, such facts cannot retroactively serve to make a Fourth Amendment search reasonable.

Neither the definition of *whether* a search is taking place at all nor the determination of whether a search that is taking place is *justified* may encompass information that is necessarily unavailable to the police before they act. It would not be fair to define “search” in a way that would preclude police officers’ knowing in advance whether what they planned to do would constitute a search. And it would be similarly unjust to decide whether a search was “reasonable” for Fourth Amendment purposes by consulting facts that the police could not possibly have known prior to searching.

The definitions of both “search” and “probable cause” (or “reasonableness”) thus track the perspective of the police officer. Similarly, as Justice Scalia said in *Kyllo v. United States*,²³ the *actual intimacy* of what the police happen to observe during their surveillance cannot define the legality of the surveillance, because “no police officer would be able to know *in advance* whether his . . . surveillance picks up ‘intimate’ details—and thus would be unable to know in advance whether it is constitutional.”²⁴

The determination of when the Fourth Amendment applies (i.e., when a “search” has taken place) and when—if it does apply—police have complied with its mandates (i.e., when police have probable cause) must necessarily abstract away facts that are unavailable to the police. The Constitution may make of the police only those demands that correspond to facts that are or can be known to the police. Appearances are necessarily decisive. And the appearances handily divide into two categories: those apparent facts that tell the officers whether they *need*

²² *Katz v. United States*, 389 U.S. 347, 352 (1967).

²³ 533 U.S. 27 (2001).

²⁴ *Id.* at 39.

probable cause, and those apparent facts that tell the officers whether they *have* it.

Consider in this light the pivotal case of *Katz v. United States*.²⁵ At the time of surveillance, respondent Katz was engaged in placing interstate bets from a public telephone booth with the door closed.²⁶ The police, who had suspected Katz's illegal activity but failed to obtain a warrant, attached a listening device to the top of the telephone booth with the intention (and result) of eavesdropping on Katz's conversations.

The Supreme Court addressed the question of whether the police had intruded on a legally protected expectation of privacy in recording Katz's conversation. In answering this question, the Court took into account the following facts: police were electronically eavesdropping on a conversation; the conversation was taking place inside a closed and occupied public telephone booth; and the target of this surveillance had paid to use the telephone. Katz's only activities that counted toward answering the crucial question of whether the Fourth Amendment applied, in other words, were activities that would be apparent and completely predictable (in light of what was apparent) to the police without their first having to listen to anything that Katz actually said in the course of his telephone conversation.

The Court notably did *not* take into account the fact that Katz's conversation consisted of committing a federal crime. The reason for this omission is that police could have become aware of *that* component of Katz's activities only *after* listening in on his conversation, an impractical guide to determining in advance whether or not to listen.

The Court's definition of "search" thus deliberately followed the perspective of the police officer deciding whether or not he could monitor Katz's conversation at will. After the holding in *Katz* came down, police—knowing that their target would be talking on the telephone with the door closed—would have enough information to conclude that if they used a transmission or recording device, they would be engaged in a "search or seizure" and would accordingly need to take an additional step before carrying out their electronic eavesdropping: obtaining a warrant based on probable cause.

Once police are engaged in a "search," the law must also judge its reasonableness from the perspective of the police contemplating the search in question. Probable cause must therefore consist of information available to the police before they attach the listening device to the top of the public telephone booth. The facts about prior gambling and informants' reports could therefore play a legitimate role in the calculation of probable cause. But the reality of what Katz in fact

²⁵ 389 U.S. 347.

²⁶ *Id.*

turned out to have discussed once he entered the phone booth and closed the door *necessarily* remained outside the scope of the “probable cause” or warrant that could justify the search.

Unlike the definition of “search” and the determination of the reasonableness of a particular search, the standing inquiry does not concern itself with the availability of information to the police. It does not need to consider the police officer’s perspective in this way because it does not—as the definitions of “search” and of the reasonableness of a search do—regulate police officers’ behavior. Standing is entirely about the suspect and the privacy to which she is actually entitled. It neither guides nor praises nor condemns the conduct of the police officer.

When Katz entered a public telephone booth, paid his toll, and began a conversation, all of these facts became relevant to his entitlement to privacy. Informants’ *reports* about prior gambling, by contrast, would have had no relevance to standing, because they were simply ways of placing odds on what Katz would actually do once he made his call.

If Katz spoke with his mother and expressed the hope that she would come through her back surgery intact, then that fact should accordingly become a relevant part of defining Katz’s entitlement to privacy in his telephone conversation: he would have been having a personal communication with a family member. Such a communication is legal, and, because it is conducted on the telephone inside a closed booth, it should be protected from the “uninvited ear.”²⁷

If Katz instead called a betting partner and arranged for a \$20,000 wager on a Lakers victory over the Knicks, then that fact too should play a role in determining Katz’s entitlement to privacy or his lack thereof.

The police, whose activities are regulated by the Fourth Amendment, must consider what to do by asking two questions: First, do the facts available to us (closed phone booth and conversation on phone) make our planned investigation of Katz a “search”? Second, do the facts available to us (informants’ reports, suspicious meetings) make our planned investigation one that is likely to uncover criminal conduct (and therefore a “reasonable search” under the Fourth Amendment)? Police must reach the second question only if the answer to the first one is yes.

The judge considering the standing question, by contrast, does not have to do a two-step inquiry. There is only one question, whether—regardless of the legality of the officers’ behavior—*this person* is entitled to complain about it. The facts that are only imperfectly

²⁷ *Id.* at 352.

approximated by the question “what is a search” (Katz’s relationship to the telephone booth) and the facts that are only imperfectly approximated by the warrant and probable cause (what Katz would be discussing on the telephone during surveillance) together make up Katz’s actual entitlement to privacy.

Whether Katz is entitled to be free of a search—viewed from a fully informed, *ex post* perspective—should thus naturally *combine* the question of whether a random person in Katz’s shoes (i.e., talking on the telephone in a booth) should be able to keep police “ears” out with the question of whether the activities in which Katz actually engaged during his telephone conversation (interstate bet placement) call for intervention.

The case of *Minnesota v. Carter*²⁸ helps illustrate the appropriate blending of these entitlement questions into one, when standing is at issue. In *Carter*, the Supreme Court faced the question of whether a police officer’s staring into a home through a gap in the Venetian blinds invades any reasonable expectation of privacy. The case asked, in other words, whether peering through a break in the blinds counts as a “search,” triggering the Fourth Amendment requirement of reasonableness (a warrant and probable cause, or some other requirement).

The Court ultimately declined to answer that question and focused instead on the individual cocaine packager’s (lack of a) reasonable expectation of privacy. The Court ruled that Wayne Carter, a defendant who was packaging cocaine in a dwelling when the officer peered inside, did not himself have a reasonable expectation of privacy in that home and therefore lacked any right to suppress the evidence discovered, regardless of whether or not the police might have violated the Fourth Amendment in acting as they did. Stated differently, Wayne Carter lacked Fourth Amendment standing.

Carter, the cocaine packager, neither lived in the home nor used it before the occasion in question. As the Court pointed out, moreover, on the visit at issue in the case, Carter was present for a mere two and half hours, and he was engaged in a *commercial* rather than a personal enterprise during that time.

Note that the Court did not end its standing inquiry in *Carter* with the consideration of whether the defendant lived in the location or would be spending the night there.²⁹ It asked as well about the nature of

²⁸ 525 U.S. 83 (1998).

²⁹ See *Jones v. United States*, 362 U.S. 257, 265-67 (1960) (finding that an invited overnight guest “legitimately on the premises” is entitled to suppress evidence obtained in violation of the Fourth Amendment during the search of those parts of the premises to which the invitation extended); *Minnesota v. Olson*, 495 U.S. 91, 97-98 (1990) (maintaining that the overnight guest has standing or a legitimate expectation of privacy in the premises to which he is invited, even though the “legitimately on the premises” test of *Jones* had been deemed overly broad in *Rakas v.*

the person's hidden activities *while* on the premises. If Wayne Carter had been there to take a nap at a friend's house after sitting for the Minnesota bar exam, for example, then—by negative implication—he might have had standing to raise objections to Peeping Tom police officers, even though he did not live on the premises.

But Carter was not at the house to nap. He was there to conduct business, and the Court announced the principle that commercial activity entitled Carter to less privacy—all things being equal—than personal activity might have. The Court thus considered the details of a criminal defendant's activities inside the home at issue to determine whether, overall, the equities of the situation entitled him to assert a privacy claim there.

To be sure, the Supreme Court—in deciding that Carter lacked a reasonable expectation of privacy—did not take into account the fact that Carter's "commercial" enterprise consisted of packaging cocaine. But this failure does not correspond to any self-evidently principled distinction. Because cocaine is a controlled substance, its packaging represents a criminal act. And if engaging in *commercial* activity generally entitles a person to less privacy than engaging in personal activity would, as the Court suggests, then it would seem to follow that engaging in *criminal* commercial activity would entitle a person to less privacy than engaging in a *legal* commercial enterprise would. Indeed, if someone committed murder—for *personal* reasons—in a third party's home, that act would appear to entitle the actor to *less* privacy than the use of the same home to conduct a *legitimate business* meeting would.

Once the Court deems it appropriate to ask what a person was actually *doing* in the house where the police have conducted an allegedly unreasonable search, the criminal nature of the person's behavior becomes a logical component of answering that question. To characterize Carter's activities as "commercial" but not as "criminal" is arbitrary, in part because a court must know *what* the activities *are* before being in a position to classify them as *either* commercial *or* criminal. And if either classification bears on a defendant's personal entitlement to be free of surveillance, then the other one does as well.

The reader might object at this point that a person should *always* have standing to raise Fourth Amendment objections to searches of *her* home, regardless of what she happened to have been doing there at the time. The defendant in *Minnesota v. Carter*, by contrast, was occupying a space that was *not* his own home when he was discovered by police. The sole basis of his relationship with that home was his having rented it out on a one-time basis for criminal business purposes.

Illinois, 439 U.S. 128 (1978) (holding that "mere passengers" in a vehicle, though legitimately on the premises, lacked a reasonable expectation of privacy in various parts of the vehicle that would have entitled them to suppress evidence obtained in violation of the Fourth Amendment)).

Taking such an assortment of facts into account in denying a petitioner standing is a far cry, one could argue, from denying a defendant standing to object to a search of *his own home*. If Wayne Carter had been at home instead of at a highly temporary place of business, the reader could assert, then under the doctrine, only a “knowing exposure” of what lay within that home would or should relinquish the defendant’s reasonable expectation of privacy there.

This is the distinction between Linda Smith (the kidnapper at home) and Wayne Carter (the cocaine bagger at a temporary business location), and it has the advantage of conforming more or less to existing case law. But the distinction does not hold up well to probing analysis. If the nature of a person’s actual activities within a house matters to the assessment of that person’s individual entitlement to privacy there, it is because some activities deserve greater protection than others, independent of where they take place. The home receives greater protection than the office,³⁰ in part because the home is a place where personal and constitutionally protected activities falling within the substantive rubric of privacy occur. If the people inside a home—whether residents or temporary visitors—are using it to carry out and conceal criminal activity, then this use entitles them to less privacy than others who carry out lawful private activities there.

To put the matter differently, the standing question asks us whether the surrounding community would view a particular person complaining of a Fourth Amendment violation as worthy of the privacy that he seeks under the circumstances in which he was discovered—perhaps unlawfully—by the police. When, in the service of making that determination, the community inquires about the person’s relationship to the property in which he asserts a privacy interest, the community seeks to know, based on the actual facts, whether the person legitimately sought to be left alone.

That a person was in a house briefly to deliver furniture registers as relevant to the community’s inquiry because knowing this fact leads the community to reject the person’s claim of an actual entitlement to privacy. And similarly, the community’s knowledge that a person was in his own house killing someone he had kidnapped would lead the community to reject the notion that the person had a legitimate entitlement to privacy there. The police might still have been violating the Fourth Amendment when they entered that home, of course, because they did not know, *ex ante*, the facts that, *ex post*, made clear that the person searched did not deserve to be left alone.

³⁰ See *O’Connor v. Ortega*, 480 U.S. 709 (1987) (holding that searches of public employees do not carry the same requirements as the search of a home and that a “reasonableness balancing” test is appropriate).

In standing doctrine generally, the success or failure of suppression motions depends largely on an assortment of facts beyond the officer's knowledge. These are the facts that determine whether the person against whom evidence was found—the defendant—happens to be the person (or one of the people) who had a reasonable expectation of privacy in the area that was searched. All that the police are reliably in a position to know in advance is whether they carried out a search (i.e., did they violate *someone's* reasonable expectation of privacy?) and, if they did, whether they had probable cause and a warrant to justify that search (i.e., was the search reasonable?)—the police-perspective questions.

Because standing is about the actual facts, viewed *ex post* in their totality, however, the determination of whether or not a defendant has standing does not require us to abstract away facts unknown to the police, the way we must do in figuring out whether police have performed a “search” and whether they were justified in doing so.

In determining standing, we thus take into account the fact that the home searched was not the defendant's home or residence or a place for him legally to spend the night. And we consider such facts even though the police might not have been aware of any of them at the time of the search, and even though the police *should not* have searched, in any event. Such facts are relevant to standing because they bear on the particular individual's personal entitlement to privacy, his standing to bring a Fourth Amendment claim.

From the omniscient viewer's perspective, considering the complete facts about the petitioner's situation, however, he is not simply occupying himself in a location that is or is not his home. He is also committing (or not committing) or hiding (or not hiding) a crime. Indeed, in some cases, it is impossible to separate the petitioner's lack of a substantial property relationship to the premises from his involvement in the commission of a crime there. Such cases help illustrate why the separation is not called for, even when possible.

Consider the case of William, Joan, and Donald. William was an abusive husband and father who repeatedly committed acts of violence against his wife, Joan, and his young son, Donald. Eventually, Joan divorced William. In the division of marital assets, Joan won custody of Donald and possession of the marital home, and William received the couple's vacation residence on Shelter Island. Their bank accounts were divided equally, and William agreed to place a sum of money into an escrow account, the interest on which would cover all future child-support payments. A court has also issued a preliminary injunction against William's approaching within thirty feet of Joan's home or either of its occupants for a full year.

About a month after the divorce became final, William decided to try to reconcile with Joan and his son. In direct violation of the injunction against him, William traveled to his old house—which now belonged to Joan—and knocked on the door. No one answered. William knocked again, louder this time, but the knock once again met with silence.

William initially began to walk away but then, impulsively, turned around and approached the house from the back, where no neighbors would have had visual access. William broke a window and climbed inside, where he perused the area and found that no one was home. He suddenly felt very tired and decided to spend the night. Filled with nostalgia, he climbed his old staircase and went to sleep in his former bed.

The police had no idea that any of this was going on. No one had seen or heard anything suspicious. However, the police had for some time been curious to see the inside of Joan's house, having heard that she had original Rembrandt paintings hanging on the walls. Several officers approached the house and listened to determine whether anyone was awake. The house was silent, so they used a glass-cutter to take out one of the front windows, and they stepped inside.

The police walked around and looked at paintings and into drawers throughout the house until they stumbled across William in the upstairs bedroom, fast asleep. One of the officers recognized William and remembered from news accounts that he had been ordered not to appear anywhere near his old house. After hearing of this history, another officer called for backup, woke William, and arrested him for violating a court order and for criminal trespass.

At William's trial for contempt and criminal trespass, the prosecutor hopes to introduce the testimony of police officers who found William after illegally entering Joan's home. From the police officers' *ex ante* perspective—based on appearances—they conducted a search (by entering and examining the inside of a home, where people have a reasonable expectation of privacy). They did so, moreover, in the absence of probable cause or a warrant. In short, they acted in blatant violation of the Fourth Amendment.

William, however, will not be able to suppress the police officers' testimony simply by proving that they obtained their information by violating the Fourth Amendment. He will have to prove as well that *he* was entitled to keep the police away—that the police violation of the Fourth Amendment victimized *him* in particular. Under the facts here, he will not be able to do so.

Why not? On conventional standing principles, William lacked any reasonable expectation of privacy in the home that the police entered. He accordingly lacks standing to object to the admission of the

officers' testimony, even though the police failed to adhere to the dictates of the Fourth Amendment.

But how exactly do we determine that William lacked a reasonable expectation of privacy in the home that police searched? What facts deprive him of standing?

William was present in the home at the time of the search, so he does have some connection to the place. He was also sleeping there, which gives a personal—rather than commercial—cast to his presence. Empirically, moreover, since he was comfortable enough to lie down and go to sleep, we can infer that he actually (if foolishly) expected to enjoy privacy from any intrusion. He believed, in other words, that he would be left alone.

His expectation of privacy, nonetheless, was unreasonable and illegitimate, from a normative standpoint, because he had no legal right to be inside the home where he was found and therefore no right to exclude others from it. He no longer owned the house, he did not live there, he had no permission to be inside, and he was specifically ordered by a judge to stay away. His presence in the home that was illegally searched, in other words, was a crime, and the commission of that crime did not give him any right to exclude the police.

We cannot abstract away the facts regarding guilt and innocence from the determination of whether William held a reasonable expectation of privacy. To ask what William's relationship was with the place where he now asserts a reasonable expectation of privacy is to ask under what circumstances he occupied the premises. These circumstances, in turn, were that he had entered a house against the wishes of the owner and in violation of an injunction. Therefore, the facts surrounding his entry and presence in the home are inextricably bound up with the commission of a crime and accordingly grant him no Fourth Amendment entitlement to exclude the police.

Had William instead been watching television in his own home, or spending the night at a friend's house to which he was invited, when the police entered, he would have had a reasonable expectation of privacy and, thus, Fourth Amendment standing to complain about the entry.

To make the point slightly differently, the standing question in William's case calls directly for consideration of the fact that he was engaged in criminal activity. One cannot put to one side the criminal circumstances, because they comprise the essence of William's relationship to the premises searched. They are the objective facts that tell us whether or not William held a personal, legitimate expectation of privacy.

This example helps illustrate the arbitrariness of dividing the standing inquiry into questions about guilt-related facts (whether the person is conducting or concealing criminal activities on the

premises)—which are doctrinally off-limits—and questions about more “neutral” facts (what connection the person has to the premises)—which are currently an accepted part of the calculus.

Return again to the *Katz v. United States* scenario. The Court there found that Katz held a reasonable expectation of privacy in his telephone conversation. The Court ignored the fact that Katz had been placing interstate bets over the phone at the time that he was recorded. The reason it properly ignored this fact in considering the reasonableness of Katz’s expectation of privacy is that the privacy expectations at issue there came from the *police officer’s perspective*. The question was whether the police had performed a “search,” such that their failure to obtain a warrant rendered their conduct unconstitutional. Police necessarily could not have been expected to plan their course of action and make a decision about whether to obtain a warrant to record Katz’s conversation on the basis of facts that would only come to light during the course of the recording.³¹

The standing determination presents an altogether different set of concerns, as we have already seen. To determine whether Katz personally held a reasonable expectation of privacy in the telephone booth (for purposes of standing), we do not have to consider what the police were or were not in a position to know prior to carrying out their surveillance. Eligibility for Fourth Amendment standing has everything to do with the individual objecting to a search or seizure and nothing to do with the police conducting that search or seizure.

As discussed earlier,³² standing doctrine prevents defendants from objecting to a search even when the police officers conducting the search had every reason to believe that the privacy they were violating at the time *was* the defendant’s privacy. The government, in other words, can—when opposing a motion to suppress evidence—take advantage of a defendant’s lack of standing even when the police officers who violated the Fourth Amendment could not possibly have anticipated that lack of standing.

Accordingly, our hypothetical William (the divorced batterer) is barred from objecting to a blatantly unconstitutional search, despite the fact that the police had every reason to think that whoever they might

³¹ For this reason, Justice Scalia wrote for the majority in *Kyllo v. United States*, 533 U.S. 27 (2001), that a police officer’s failure to detect anything personal or private when using a thermal detection device has to be irrelevant to the question of whether the use of such a device constitutes a search. The police must be in a position to know whether their actions will trigger the Fourth Amendment’s requirements *before* actually taking the actions in question. *Id.* at 38-39. Because the use of the thermal detection device at issue in *Kyllo* *could have* exposed personal information about the home, said the majority, its use required probable cause and a warrant. Accordingly, from the perspective of the police proposing a search, “in the home . . . *all* details are intimate details.” *Id.* at 37.

³² See *supra* Part II.

find in the house would have a privacy right not to be viewed there. William is barred because in reality—notwithstanding the officers' *ex ante* ignorance of this fact—William's relationship with the place he occupied was that of a trespasser and an injunction-violator, and that relationship does not give rise to a legitimate expectation of privacy in the house.

Once we may consider facts about the defendant's actual entitlement to privacy—independent of what was or was not evident to the police at the time of a search—there is no reason to divide such facts about the defendant into those that in general would entitle innocent people to privacy (such as occupying one's own home) and those that involve the commission of a crime (such as engaging in the packaging of cocaine in the place that is searched).

Both types of information are equally relevant to a factually complete determination—one not constrained by the officer's limited perspective—of whether we as a society believe that a person occupying space under a given set of circumstances is entitled to be left alone by the government, the announced test for “reasonable expectations of privacy.”³³

The relevance of guilt facts accounts for why a police officer who has good reason (as confirmed by a magistrate) to *suspect* that a person is engaged in criminal activity may search that person's home: precisely because we believe that even a home-owner or resident loses the right to keep out police when he commits a crime inside his home.³⁴ In that sense, the standing inquiry should properly combine the two steps by which we evaluate the substantive legality of an investigation from the police officer's perspective.

First, police consider whether they propose to invade *anyone's* reasonable expectation of privacy—a question they can answer based on what they know. Second, police scrutinize whether that invasion is justified because *facts known to them* evidence a forfeiture of privacy through the commission of crime or the concealment of evidence.

For standing, we ask our questions from an *ex post* or fully informed perspective. First, we inquire about whether this defendant actually had an ownership and/or other interest in the space that would ordinarily entitle a person to privacy. Second, we find out whether this individual had avoided forfeiting any privacy interest he might otherwise have had in the space, a forfeiture accomplished through the

³³ United States v. Knotts, 460 U.S. 276, 281 (1983) (“The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is justifiable under the circumstances.”) (internal quotations omitted).

³⁴ See Colb, *supra* note 4, at 1507-08 (explaining how the link between “probable cause” and criminality demonstrates the inherent connection between Fourth Amendment protection of privacy, on the one hand, and actual innocence, on the other).

commission or concealment of crime there. If the answer to either question is no, then the law should deny him standing to object to what may nonetheless be—from the police officer's perspective—an unreasonable search.

V. HOW FOURTH AMENDMENT STANDING DOCTRINE LOGICALLY REQUIRES THE ABOLITION OF EXCLUSION

If a person who commits a crime or conceals evidence inside otherwise private spaces loses his standing to suppress that evidence, as I suggest, the Fourth Amendment exclusionary rule cannot survive. Yet giving such a person standing to suppress evidence—as the doctrine currently does—is logically untenable.

Consider why this is so. As described earlier, the “reasonableness” of police searches and seizures depends entirely on the perspective of the police officer in possession of information that he has accumulated at the time of a search (or that a magistrate has before her when issuing a warrant). The *ex post* perspective—revealing whether the evidence actually is where it was expected to be or whether the suspect truly did commit the crime—is irrelevant to the reasonableness of an officer's conduct under the Fourth Amendment, to the extent that the reality is not apparent to the officer prior to the search.

We have observed, however, that by contrast to assessments of the “reasonableness” of a search, what gives a defendant standing to object to a search or seizure is, notably, *not* what *appears* to be true, from the perspective of the officer, but what *actually* is true of the defendant. Whether or not an officer knew or reasonably could have known that it was the defendant's bedroom he was searching does not matter. The reality that it *was* the defendant's bedroom, under current doctrine, is what gives that defendant standing to object to the admission of evidence found in the course of the illegal search, the officers' ignorance notwithstanding.

This difference in perspective, between the definition and reasonableness of a search, on the one hand, and the defendant's standing to suppress evidence resulting from the search, on the other, renders the doctrine internally incoherent and logically entails the demise of either the exclusionary rule or the Fourth Amendment standing doctrine limiting its application.

Recall the example in which Linda Smith kidnapped a child and hid him inside her house. We earlier addressed the question of whether, if police illegally searched Linda's home and found the child, Linda ought to have standing to object to the admission of incriminating evidence against her. Linda's putative privacy right to exclude people

from her home, under existing law, turns on the legal entitlement that she has to the property searched (whether owned or rented) and on the sorts of customary social understandings extended to people who mind their own business in their own homes. If instead of minding their own business, however, people use their homes as a place to commit crimes and conceal evidence, I have suggested, most Americans would *not* view such people as entitled to privacy. From an omniscient perspective, based on complete, after-the-fact information about a defendant's behavior and circumstances, the killer concealing a body at home has no greater entitlement to privacy than an innocent person yelling about personal matters to a friend seated ten feet away from her on a train.

Police, of course, have no right to enter a house until such information—regarding crime and its concealment—becomes known to them. As we have repeatedly seen, however, the standing question does not turn on what police or a magistrate might have known or had reason to know. And as we saw in our earlier discussion of *Minnesota v. Carter*,³⁵ the Supreme Court has begun implicitly to recognize and incorporate into its own case law the necessary relevance of a more complete picture of the facts to a Fourth Amendment standing inquiry, though it has chosen not to extend that recognition to guilt-related facts.

So what happens if we retain the Fourth Amendment standing doctrine and, in applying it, consider both property-relationship facts and guilt/innocence facts, as I have proposed is the only principled way to apply existing standing doctrine? Suppose we accept my argument that in determining whether a defendant had a reasonable expectation of privacy under a particular set of circumstances, a court ought to ask whether or not the defendant was engaged in criminal activity or in the concealment of crimes at the time. What would the effect of that acceptance be?

To answer this question, consider again the plight of Linda Smith, our hypothetical kidnapper. We would say, on our above concession, that Linda Smith lacks a reasonable expectation of privacy in those parts of her home that she used to commit and conceal a kidnapping. Accordingly, if police happen to search Smith's house illegally and discover evidence of her crime, prosecutors would be free to introduce such evidence and to call the police as witnesses during her criminal trial to testify about what they found there.³⁶

³⁵ *Id.*

³⁶ I do not here suggest that a guilty person has suffered no constitutional harm at all when a police officer searches the place of her criminal concealment without a warrant or probable cause. As I proposed in Colb, *supra* note 4, a police officer who performs a search without probable cause or a warrant commits a targeting harm against the person whose home or other private location he has searched. See Colb, *supra* note 4, at 1487, 1500 (arguing that a "targeting harm" occurs when a person is "singled out from others through an exercise of official discretion that is

Though, on these facts, the police *did* violate the Fourth Amendment, the circumstances under which Linda Smith was occupying parts of her home at the time of the search would deprive her of an individual entitlement to privacy there. More importantly, for our purposes, virtually *any time* a person discovered committing a crime is prosecuted, this will be the case; the very fact that the individual was using her home or other location for criminal acts and/or their concealment divests her of standing to object to the admission of evidence found in those locations, even if the police have illegally exposed what was previously a private location. On this approach, a criminal defendant would virtually never have Fourth Amendment standing to suppress illegally obtained evidence.³⁷ Fourth Amendment standing doctrine, as I have analyzed its foundations, thus destroys the Fourth Amendment exclusionary rule.

But how could that be? Wouldn't the universal incapacity of defendants to bring suppression motions imply that police are in fact free to disregard the Fourth Amendment in many cases? Yes and no. The position, which the Fourth Amendment holds, that a home should be free of police intrusion in the absence of probable cause and a warrant carries no necessary implications for the composition of the class of people entitled to complain when police have clearly crossed that legal boundary. The scope of standing doctrine, in other words, does not reflect the view that the police have done nothing wrong when their illegal searches turn up evidence of crime.³⁸

Assume, for example, that police search a home without a warrant or probable cause and find evidence of crime. If several people share that home, and one of the occupants—but not the others—has engaged

not based on an adequate evidentiary foundation"). Therefore, in a lawsuit to recover compensatory damages, even a guilty target could—at least in theory—prevail on the basis of the targeting harm. *Id.* at 1519 (stating that "monetary compensation should be tailored to the unreasonableness of the decision to search, to the insult to [the suspect] in being targeted in the way that he was") (emphasis omitted). If the person has not suffered a *privacy* harm, however, the sort of harm that connects with one's actual (if undetected) use of one's space, then he or she would lack standing to object to the admission of evidence found while violating the privacy to which the individual had no entitlement.

³⁷ If a person is ultimately acquitted, of course, then she can argue that she actually *was* personally entitled to privacy from that search after all. But in such a case, by definition, the admission of the illegal evidence was harmless error, because it did not affect the outcome of the trial, though a civil remedy for violation of the Fourth Amendment would still—theoretically—remain available.

³⁸ See *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (rejecting suppression when police execute a search warrant without adhering to "knock and announce" requirements and find evidence during the house search that follows); see also Sherry F. Colb, *No Knock-and-Announce? No Problem: The Supreme Court Holds Evidence from No-Knock Entries Admissible In Court*, FINDLAW, June 28, 2006, <http://writ.news.findlaw.com/colb/20060628.html>; Sherry F. Colb, *When Should Fourth Amendment Violations Lead to Suppression of Evidence? The Supreme Court Takes a "Knock and Announce" Case*, FINDLAW, July 13, 2005, <http://writ.news.findlaw.com/colb/20050713.html>.

in criminal acts, the residents who have not committed any crimes could bring a lawsuit against the police for violating the Fourth Amendment.³⁹ But like someone unlawfully on the premises (and therefore lacking standing to object to the fruits of an illegal entry), the resident who lawfully occupies the premises but unlawfully conducts a kidnapping there does not deserve to complain about invasions of privacy—from an individual entitlement perspective. And the standing doctrine purports to revolve around what privacy the individual calling for Fourth Amendment suppression is personally entitled to have.

Because the actual facts (rather than appearances) are what count when Fourth Amendment standing is at issue, there is no reason—in determining who has standing—to privilege the fact that kidnapper Linda Smith *lives* in the house where she is holding a child captive, over the fact that she is engaged in *holding a child captive* there. The exclusionary rule cases say that Fourth Amendment rights are “personal” rights,⁴⁰ notwithstanding the fact that the suppression remedy is a deterrent rather than a personal entitlement. The upshot is that even if one is occupying a home and that home is one’s own home, if one is acting unlawfully there—just as if one is using the place for commercial rather than personal behavior—then one’s entitlement to complain about police intrusions ought to diminish accordingly.

One could respond that even if the line is somewhat arbitrary, the drawing of a line between the terms of one’s relationship with a place (such as a home), on the one hand, and the legality of the activity in which one is engaged *in* that place, on the other, is essential. Without that line—as I have suggested above—there will be no one who has both an *interest* in suppressing evidence in a criminal case (i.e., Article III standing to bring a suppression motion) *and* Fourth Amendment standing to object to the admission of the evidence. The class of people who could legitimately complain of police misconduct, in other words, would include only innocent people, and innocent people—not engaged in crime or the concealment of criminal evidence—would not ordinarily have the opportunity to suppress incriminating evidence because they would not typically face a trial at which suppression would be an option.⁴¹

³⁹ They could in theory collect damages, moreover, for both a privacy harm and a targeting harm. See Colb, *supra* note 4, at 1491-95 (explaining the “targeting harm” which occurs when police target a person for Fourth Amendment invasions without a sufficient basis for doing so).

⁴⁰ See *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

⁴¹ As I explained earlier, *supra* note 36, an innocent person could find himself on trial for an offense he did not commit. However, such a person should be acquitted (even when the evidence illegally obtained is included). And once acquitted, the outcome of the trial necessarily renders the introduction of evidence that, retrospectively, should have been excluded harmless error. If an innocent person is nonetheless convicted of a crime, the resulting injustice is not a product of an unreasonable search and seizure, but a product of human error in assessing what would have

The exclusionary rule would essentially disappear. Rather than eliminate the rule and, with it, an important source of deterrence against Fourth Amendment violations, shouldn't the law continue to declare, even if arbitrarily and by fiat, that engaging in crime does not deprive a person of standing to object to Fourth Amendment violations?

This approach may sound sensible, but it lacks coherence. If we are truly concerned about the deterrent value of the exclusionary rule, then we should eliminate the standing doctrine altogether. As discussed above, it makes no sense to have a deterrent rule that we enforce only when the evidence that officers who perform illegal searches happen to find incriminates the particular person who holds a property or property-like interest in the place searched. If police violate the Fourth Amendment, then the sensible and coherent *deterrence* approach is to permit anyone against whom the illegally obtained evidence is offered to object to its admission.⁴² And if a lack of individual entitlement precludes standing, then no criminal defendant against whom reliable evidence is located should be able to complain of its admission.

VI. FOURTH AMENDMENT STANDING AND ITS CIVIL SUIT ANALOGUE

As I have said, my proposal regarding standing—that it must expand to encompass a suspect's guilt and thereby ultimately prove incompatible with the exclusionary rule to which it applies—is agnostic on the question of whether to address the incompatibility by abolishing exclusion or by abolishing standing. In this section, I will consider the precedents that govern standing to sue in federal court. They offer some

been admittedly probative evidence. As I have suggested elsewhere, *see, e.g.*, Colb, *supra* note 4, at 1523, such errors are tragic and, in an important sense, deprive a person of something that truly ought to be his, despite the lack of a procedural harm. It thus ought to carry compensation, despite the lack of government misconduct.

⁴² This approach might be preferable to the abolition of the exclusionary rule for a second reason as well. In addition to accomplishing deterrence, it would permit the adjudication of targeting harms committed by the police. *See* Colb, *supra* note 4, at 1499:

The value placed on avoiding mistreatment of even the "right" people for the "wrong" reasons is reflected in what this Article has called the targeting harm. We have seen, of course, that the presence of the targeting harm is not contingent upon the nature of the "guilty" person's conduct. Whether a person is engaged in criticizing the government or in growing marijuana, he has a right not to be singled out without a legitimate basis.

Id. Even when a guilty person is searched by the police without probable cause, she is harmed by the fact that she was unfairly targeted for the search. *Id.* The targeting harm, in other words, is a harm defined by the police officer's perspective and simultaneously experienced by the police target, no matter what the latter's relationship to the property is *and* without regard to his guilt or innocence. Permitting all criminal defendants to suppress unlawfully obtained evidence would, in a significant number of cases, mean that the person who suffered a targeting harm would have an opportunity—probably the only opportunity he will ever have—to protest the targeting harm and to have a court rule on that protest.

useful ways to think about why one might resolve the dilemma in favor of abolishing the Fourth Amendment standing doctrine.

When the Supreme Court speaks of a particular person having a reasonable expectation of privacy, such that he can move to suppress evidence obtained through a constitutional violation, it is referencing a “standing” notion.⁴³ We are familiar with standing from substantive constitutional law; to appear before a federal court and argue for an outcome, a person must have a live case or controversy. This constitutional prerequisite to federal litigation is known as “Article III standing,” and it requires that a person be in a position to obtain redress in court for some injury that he has suffered.

In addition to the case or controversy requirement underlying Article III standing doctrine, the Court has also announced “prudential” standing principles that further limit the universe of people who may litigate a legal violation, even among those who have suffered an injury and could benefit from the litigation (and therefore qualify for entry into federal court under Article III). As a matter of prudential standing, the person injured and bringing a case ordinarily must—him or herself—be the one whose legal rights were violated. Secondary sufferers of the violations of others’ legal rights accordingly face obstacles to bringing a cause of action in federal court.⁴⁴ It is this prudential limit on third-party standing that most closely resembles Fourth Amendment standing in the exclusionary rule context and might appear, at first glance, to provide support for such a doctrine as well. As I show in the rest of this Part, however, the federal prudential standing doctrine actually militates *against* requiring Fourth Amendment standing of defendants who move to suppress the fruits of an illegal search or seizure. This is because of the peculiar “private attorney general” quality that characterizes the defendant who attempts to suppress evidence at his criminal trial.

To understand constitutional and prudential standing, consider an example. You are outraged by the arrest of a person exercising his right to assemble peaceably. Nonetheless, you cannot head into federal court and bring a suit against the government for violating the First Amendment. You lack Article III standing because you did not personally suffer an injury at the hands of the government, and the federal court accordingly cannot redress an injury *to you* in a suit against the government.

⁴³ *But see Rakas*, 439 U.S. at 128 (adopting the language of reasonable expectations of privacy to replace “standing”). In spite of the change in language, however, the term “standing” continues to be a useful one for distinguishing between substantive assessments of police compliance with the Fourth Amendment, on the one hand, and the identity of those who may raise claims of noncompliance, on the other. *See Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring).

⁴⁴ *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

But what if you *did* suffer an injury? Let us assume that a person exercising his First Amendment right to assemble was arrested and, as a result, was unavailable to drive you to the airport, as he had planned and promised to do. As a result, you missed your plane, because you waited for him (while he unsuccessfully sought his custodians' permission to reach you by telephone) and therefore did not make alternative arrangements. You lose a big account at work by failing to appear for an important meeting at your flight destination.

Even though you did suffer a financial injury as a result of the government's violation of the First Amendment, there is nothing in the First Amendment right of free speech and assembly that contemplates protecting *you* from what occurred. In other words, your injury is not one that the First Amendment recognizes as a constitutional harm. You therefore lack prudential standing—though you may technically have Article III standing—and cannot go to federal court and sue the government to compensate you for the injuries that you suffered as a consequence of its violation of the First Amendment.

In the Fourth Amendment area as well, these issues can arise in a civil suit brought under 42 U.S.C. § 1983. If you wish to sue the government for a police officer's searching a car without probable cause, for example, you must have Article III standing. That means that you must have suffered an injury as a result of the officer's actions and the injury must be redressable by a federal court.⁴⁵

In addition to these minimal requirements, if you want to maintain a suit against the government for violating the Fourth Amendment, you must generally also have prudential standing. That is, the injury that you have suffered must be one against which the Fourth Amendment is designed to protect. Assume that the police searched some random car on the highway, and the search took time and thus held up traffic. The delay, in turn, made you late for work, for which you were docked pay. You may technically have Article III standing, because you suffered an injury that could be redressed by a court. But you lack prudential standing, because the Fourth Amendment does not protect against traffic delays, and motorists on the highway whom the police do not detain are not intended beneficiaries of the Fourth Amendment. Not every consequence of a Fourth Amendment violation, in other words, turns its sufferer into a Fourth Amendment victim.

The Court has created an important exception to the prudential bar on third-party claims, however, for cases in which a third party is especially well-placed to pursue the rights of an intended beneficiary, and first-party sufferers are unable or unlikely to sue on their own behalf. In *Griswold v. Connecticut*,⁴⁶ which explained and applied this

⁴⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁴⁶ 381 U.S. 479 (1965).

principle, a challenged law prohibited the distribution of contraceptives to married people. Such a law, the Court concluded, violated the right of married couples to substantive privacy—specifically, the right to determine whether or not to conceive children. The petitioners in *Griswold*, however, were not a married couple seeking to use contraception. They were, instead, Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut (“the League”), and C. Lee Buxton, Physician, Professor at Yale Medical School and Medical Director for the League’s center in New Haven, convicted as accessories under an aiding-and-abetting statute.⁴⁷

Those who challenged the Connecticut law, did not, moreover, claim a federal constitutional right to *provide* other people with contraceptives. Because they had not been barred from exercising their *own* constitutional rights, the usual prudential standing rules would accordingly have barred an organization like Planned Parenthood and the other petitioners from litigating the issue in federal court.

The Supreme Court determined in *Griswold*, however, that “appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship.”⁴⁸ When the real party in interest is unable or unlikely to sue on her own, the Court sometimes allows a third party whose litigation objectives overlap substantially with those of the real party in interest, to bring suit. In *Griswold*, it was fair to assume that few married couples would undergo the embarrassment of publicly suing for the right to use contraception. The Court explained that “[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.”⁴⁹

How does the concept of prudential standing bear on the litigation of suppression motions? As we know, when police violate a suspect’s Fourth Amendment rights and, in the course of doing so, turn up evidence, the suspect—if he becomes a criminal defendant—may bring a motion to exclude the evidence obtained in violation of his constitutional rights. Ordinarily, when a party to federal litigation objects to evidence proffered by an opponent, the question of standing does not arise. The party in court necessarily has standing to participate in the litigation or the case would have been dismissed, and the resolution of the question of whether or not to admit evidence obviously *affects* the party raising the objection. Nonetheless, in the context of the Fourth Amendment, a defendant must prove something analogous to prudential standing in order to prevail in his evidentiary motion to

⁴⁷ *Id.* at 480.

⁴⁸ *Id.* at 481.

⁴⁹ *Id.*

suppress, even if the police have unquestionably violated the Fourth Amendment. That something, we have seen, is Fourth Amendment standing.

As is true of prudential standing generally, a person can raise a Fourth Amendment objection to the admission of illegally seized evidence only if the police violated *that* person's Fourth Amendment rights in the course of obtaining their evidence. If Jane Doe wishes to block introduction of a gun in evidence against her at a homicide trial, she must prove, not only that the gun was found during an unconstitutional search or seizure, but that the search specifically violated *her* right against unreasonable searches and seizures.

Elaborating on Jane Doe's example, imagine that police illegally search the home of innocent third-party Jim Roe, without a warrant or probable cause. In the course of that search, they find a gun that Jane Doe used to kill Veronica Victim. Assume further that this gun is located at Jim's house because Jane secretly stole it from Jim and then returned it after committing murder.

When the police illegally searched Jim's home, they violated *Jim's* but not *Jane's* Fourth Amendment rights. Jane therefore lacks Fourth Amendment standing to object to the introduction of the gun against her at trial. In terms that the Court currently uses to describe standing, Jane lacked any reasonable expectation of privacy at Jim's house.⁵⁰

But notice that *no one* has the necessary standing to suppress evidence in such a case. Jim theoretically has Fourth Amendment standing, because police have violated his rights. But Jim lacks Article III standing to exclude the evidence, because he has no legally cognizable stake in the outcome of a criminal prosecution against Jane Doe for homicide. In the absence of a privilege, only parties to the litigation can object to the introduction of evidence. The upshot is that no one can object to the introduction of Jim's gun in evidence against Jane, notwithstanding the fact that the police were able to retrieve the gun only by violating the Fourth Amendment.

That upshot might not seem like much of a problem. If Jim wants to recover damages for the violation of his Fourth Amendment rights, he can do so by bringing a § 1983 suit against the police who illegally searched his home.⁵¹ Jane, on the other hand, experienced no harm, so she arguably should have no right to enjoy the benefit of suppressing the weapon that she used to commit homicide.⁵² Only victims of Fourth

⁵⁰ *Rakas v. Illinois*, 439 U.S. 128, 140, 143 (1978); *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980).

⁵¹ 42 U.S.C. § 1983 (2000).

⁵² Had the police refrained from performing their illegal search, Jane might have avoided capture, but she would in that event have been an incidental, rather than an intended, beneficiary of the Fourth Amendment right against unreasonable searches and seizures. See generally Colb, *supra* note 4, at 1476-77, 1524-25.

Amendment violations are entitled to damages—in the form of payment or suppression of evidence, right?

The fly in the ointment in responding to this question with an unqualified “yes” is that the Supreme Court has specifically said that the Fourth Amendment itself does not, in truth, entitle *anyone* to suppress probative evidence of guilt. The Fourth Amendment prohibits only unreasonable searches and seizures; it does not bar the subsequent use of evidence turned up when an illegal search or seizure takes place.⁵³ Unlike victory in a civil suit, which is intended—at least in part—to be compensatory, the suppression of illegally seized evidence at a criminal trial does not constitute a kind of payment of compensation due a criminal defendant who has suffered a Fourth Amendment violation. It instead functions simply as a means of deterring police from violating the Fourth Amendment.⁵⁴

Relying on this conception of the Fourth Amendment exclusionary rule, the Court has seen fit to eliminate the suppression of illegally obtained evidence in a variety of contexts in which the marginal deterrent effect of exclusion, in the Court’s judgment, is insufficient to justify the larger cost in the loss of probative evidence. Examples include the introduction of evidence at grand jury proceedings,⁵⁵ review of convictions at habeas corpus proceedings,⁵⁶ the impeachment of a criminal defendant’s testimony at trial,⁵⁷ and the failure to adhere to

⁵³ See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“In sum, the [Fourth Amendment exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

⁵⁴ See *Stone v. Powell*, 428 U.S. 465, 486 (1976) (“The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-Mapp Decisions have established that the rule is not a personal constitutional right.”); see also *Calandra*, 414 U.S. at 347:

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: “[T]he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.” Instead, the rule’s prime purpose is to deter unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.

Id. (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965)); see also *Elkins v. United States*, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

⁵⁵ See *Calandra*, 414 U.S. at 338 (permitting the introduction of illegally obtained evidence at grand jury proceedings).

⁵⁶ See *Stone*, 428 U.S. at 481-82:

We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Id.

⁵⁷ See *Walder v. United States*, 347 U.S. 62 (1954); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971) (refusing to allow criminal defendants to exploit the exclusionary rule by testifying falsely in reliance on the government’s inability to introduce

“knock and announce” requirements in executing an otherwise valid search warrant.⁵⁸

Suppression therefore works—if it works at all—as a tool to prevent the police from violating the Fourth Amendment again in the future. It is *not* a personal entitlement that arises under the Fourth Amendment itself or an award due the victim of a Fourth Amendment violation as compensation for that violation.⁵⁹ When a criminal defendant moves to suppress a gun, he is therefore acting as a “private attorney general” whose incentive to exclude incriminating evidence coincides well with the convenience of such a forum as a venue for keeping police officers honest by denying them the fruits of their misconduct.⁶⁰

One reason the Court adopted suppression in the first place and has yet to eliminate it is that other methods of deterring violations, such as civil rights suits and criminal prosecution of police, have apparently not proven very effective. As Justice Frank Murphy put it in his dissent in *Wolf v. Colorado*, “there is but one alternative to the rule of exclusion. That is no sanction at all.”⁶¹

The deterrence approach outlined above is in considerable tension with the Fourth Amendment standing doctrine, however. If suppression motions are purely a means of disciplining police officers for violating the Fourth Amendment, then whether or not the police happen to have violated the particular defendant’s Fourth Amendment rights on a given occasion should make no difference to his eligibility to serve as a private attorney general (that is, one who would be motivated by the windfall of suppression). And when the Court responds that “Fourth Amendment rights are personal rights,”⁶² its response is a non-sequitur.

On the Court’s own reasoning, suppression is neither meant nor required as a personal remedy for sufferers of Fourth Amendment violations. Its objective is instead to track deterrence potential. And notably, it is suppression—and *not* violation of the Fourth Amendment itself—that is at issue when a court grants or denies a criminal

evidence demonstrating the falsehood of their testimony).

⁵⁸ See *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

⁵⁹ See *supra* note 54 (discussing the reparative role of exclusion rejected by such decisions as *Calandra* and *Elkins*).

⁶⁰ Justice Brennan conceptualized the “private attorney general” as a litigant asserting a legal claim “on behalf of those absent parties whose rights are at stake” when the principles of federal law “justify her status.” U.S. Dep’t of Labor v. Triplett, 494 U.S. 715, 736 (1990) (concurring and releasing a “separate statement”). The term is used in a variety of contexts. See *Flast v. Cohen*, 392 U.S. 83, 108 (1968) (citing state decisions based on a taxpayer-litigant representing the public interest); see also Meltzer, *supra* note 2, at 267-78; Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 315 (1984); AMAR, *supra* note 7, at 796.

⁶¹ *Wolf v. Colorado*, 338 U.S. 25, 41 (1984) (Murphy, J., dissenting).

⁶² *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); see *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980).

defendant standing to suppress the products of a Fourth Amendment violation.

The suppression remedy applies, then, when it will have the effect of removing the evidentiary incentive of law enforcement to violate the Fourth Amendment. What matters is the *impact* of suppression as a disciplinary tool against police in various contexts. And the most effective use of suppression to discipline the police does not turn at all on whether the evidence the police retrieved while violating the Fourth Amendment happens to incriminate the person whose home was invaded during the Fourth Amendment violation or an unrelated third party. Effective deployment of the suppression deterrent would provide that *anyone* against whom unconstitutionally obtained evidence is offered can suppress it, at least in high-deterrence contexts.⁶³

In place of fortifying the deterrent value of suppression, standing limits on exclusion water down deterrence (the stated purpose of exclusion). They do so, moreover, to accommodate the notion of individual constitutional entitlement, which the Court has explicitly rejected for the suppression of evidence. Scholars have noted this oddity in the standing doctrine,⁶⁴ a peculiarity which might superficially

⁶³ The Court could—consistent with its approach to exclusion—still maintain zones (such as grand jury proceedings, habeas corpus petitions, and impeachment) where Fourth Amendment suppression would not occur, by virtue of its trivial contribution to deterrence in such contexts, coupled with the cost of exclusion to the project of criminal justice. Such zones, of course, may misconceive the nature of deterrence as case-by-case rather than systemic. See *United States v. Leon*, 468 U.S. 897, 953 (1984) (“[T]he chief deterrent function of the [exclusionary] rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.”) (Brennan, J., dissenting).

⁶⁴ See generally Doernberg, *supra* note 2; William J. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 859 (2000) (“If exclusion is designed to deter police illegality, why should it matter whether the person seeking suppression can complain of a violation of his or her rights?”); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 871 (1991) (“Despite the intelligibility of corrective justice as a means to rectify wrongful dealings between the police and suspects, a corrective approach to exclusion of evidence has been rejected by American courts. It is strongly resisted by those who oppose the social costs of the exclusionary remedy.”); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 912 (1989):

At times the Court takes an extremely individualistic or atomistic view of the fourth amendment, holding that only those whose personal fourth amendment rights have been violated may invoke the exclusionary rule. In other cases, the Court has stressed the collective rather than individual nature of the exclusionary remedy. Defendants in these cases have been denied the exclusionary remedy because, in the opinion of the Court, the deterrent or disincentive value of the remedy was not worth the cost of exclusion.

Id. (internal quotations omitted); Wayne R. LaFare, *Being Frank About the Fourth: On Allen’s “Process of ‘Factualization’ in the Search and Seizure Cases”*, 85 MICH. L. REV. 427, 433 (1986) (“[T]he Court adopted an individual rights approach to the fourth amendment, conveniently ignoring the fact that it had previously characterized the exclusionary remedy as designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than

have seemed consistent with other exceptions to the exclusionary rule, because all such exceptions—including the standing requirement—limit the aggregate “cost” of exclusion by restricting its application.

The Fourth Amendment standing doctrine thus fails to keep faith with the deterrent purpose that the Supreme Court has attached to the exclusionary rule and corresponds instead to an individual-rights orientation, an approach that the Court has otherwise eschewed in its exclusionary rule precedents.

The evident tension between Fourth Amendment standing requirements and deterrence becomes even harder to justify when we consider again the operation of the prudential standing doctrine in federal common law. Recall that Jane Doe in the earlier (gun suppression) example lacked any individual Fourth Amendment right to assert when the police illegally searched Jim’s home. She did, however, appear to satisfy the requirements for triggering an exception to prudential standing principles.

By the Court’s calculus, the exclusionary rule exists, at least in part, because other remedies are ordinarily ineffective at preventing violation of Fourth Amendment rights.⁶⁵ Jim—an innocent person—is unlikely to sue the police successfully for having searched his house without a warrant or probable cause.⁶⁶ If the police did not utterly

a personal constitutional right of the party aggrieved.”) (internal quotations omitted).

⁶⁵ See *Mapp v. Ohio*, 367 U.S. 643, 652-53 (1961) (“The obvious futility of relegating the Fourth Amendment of [sic] the protection of other remedies [than the exclusionary rule] has . . . been recognized by this Court.”); *Wolf*, 338 U.S. at 41 (Murphy, J., dissenting) (“For there is but one alternative to the rule of exclusion. That is no sanction at all.”).

⁶⁶ “[P]rivate remedies against officers for illegal searches and seizures are conspicuously ineffective.” *Monroe v. Pape*, 365 U.S. 167, 191 (1961); see William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 449 (1997) (explaining that “[t]he victim of police misconduct must have suffered the kind of harm that juries and judges are likely to value—the case must be ‘worth’ something—or it will not be brought”); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 114-15 (2003):

Jurors are considerably more reluctant to identify with a criminal defendant who brings a tort action against the police for violation of his rights. In these cases, the plaintiff is a criminal and the jurors do not see themselves in that way. Of course, the mechanism works a little bit better when the illegal search was of innocent people. Even there, however, the jurors tend not to identify with the people searched. All to [sic] often, jurors think those people are the sort likely to be criminals even if they have not committed a crime in the case at hand. Hence, they view the plaintiffs as different from themselves. The result is that plaintiffs bringing tort actions against the police often fail to get jury verdicts. Even in the most serious cases, where people have been badly beaten up by the police, it is, in my experience, very unlikely that a jury will render a plaintiff’s verdict. When juries do give a verdict, the damage award is likely to be very small, for juries do not want to reward criminals. Because damages are hard to quantify in such cases, it is almost always necessary to guess at them. As a result, any jury disinclination to give significant awards is extremely difficult for courts to control.

Id.; cf. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 901-02 (1991):

Suppose a police officer illegally searches my house for drugs, and finds none.

ransack his home, his projected damages are unlikely to justify the cost of bringing suit, even if he can, in theory, recover attorney fees. Therefore, the admission of the evidence acquired through an illegal search will permit police to get away with their misconduct and accordingly to feel less inhibited about violating the Fourth Amendment in the future. Jane, on the other hand—because of her automatic incentive to avoid a criminal conviction—is well situated to do what it takes to suppress the evidence and thereby ensure that police misconduct has painful consequences for its perpetrators.

It might seem intuitively wrong for Jane to benefit from a violation of *Jim's* Fourth Amendment rights. If Jane's windfall in playing the role of undeserving private attorney general seems unfair, however, remember that it is most likely to be innocent people who suffer when the police fail to accumulate probable cause before embarking on a search. Innocent people enjoying their privacy are both the intended and—in the run of cases—the actual beneficiaries of the Fourth Amendment.⁶⁷ And the objective of suppression at criminal trials is ultimately to prevent police from performing searches of innocent people like Jim Roe in the future, *not* to compensate the criminal defendant by assisting in his or her bid for an undeserved acquittal.

As discussed, individual sufferers of Fourth Amendment violations hold no personal constitutional entitlement to the suppression of evidence. It is therefore hard to understand what elevates such sufferers over similarly situated criminal defendants who hope to suppress evidence obtained in violation of innocent third-parties' Fourth Amendment rights. That Jane Doe—the private attorney general—is guilty of a crime and that she did not personally experience a Fourth Amendment violation ought both to be equally irrelevant to the application of exclusion, a deterrent rather than compensatory tool. The

Suppose further that my wife and I do not feel especially harmed, and would, if we were candid, value the injury we have suffered at one hundred dollars. It does not follow that the officer's misconduct caused only one hundred dollars worth of harm. Indeed, the real harm such searches cause, the harm that matters most to society as a whole, is the diminished sense of security that neighbors and friends may feel when they learn of the police misconduct.

Id.

⁶⁷ See Colb, *supra* note 4, at 1459:

People feel differently about guilty versus innocent holders of Fourth Amendment privacy rights. The right is not entirely independent of what a person does with it. All of us begin with an entitlement to privacy, but some seem by their actions to forfeit part of that entitlement. The idea of forfeiture captures the intuition that guilty people really do not deserve the right when its exercise consists of the concealment of incriminating evidence.

Id.; see also *id.* at 1525 (“From the perspective of the Fourth Amendment, it is a harm whenever an innocent person is searched, and it is costly whenever a guilty person harboring evidence is not searched. These are the substantive values that animate the Fourth Amendment.”).

true beneficiaries of suppression are accordingly understood to be innocents like Jim Roe.

It is indeed not only counterproductive but arguably perverse that police can, under existing precedents, escape their rightful discipline in our hypothetical example precisely because they violated the rights of an innocent person, like Jim Roe, rather than the rights of someone guilty of murder, like Jane Doe, who could—if the weapon were found in *her* home—have successfully moved to exclude it from evidence.

The Supreme Court's Fourth Amendment standing rules thus fail to honor either the deterrence approach to the Fourth Amendment exclusionary rule or the considered exceptions to the prudential standing doctrine in other litigation contexts. Standing rules undermine deterrence by reducing the cost to police of violating the Fourth Amendment,⁶⁸ and the denial of third-party standing to a well-situated private attorney general like the criminal defendant likewise betrays prudential standing principles.

Moreover, as we saw in our earlier discussion of *Minnesota v. Carter*⁶⁹, recent developments in Fourth Amendment standing law bring into sharper relief the deep instability of what amounts to a rigid prudential standing doctrine in the context of Fourth Amendment suppression, an instability that threatens to unravel the exclusionary rule altogether if taken to its logical conclusion.

VII. AN ALTERNATIVE DOCTRINE OF AUTOMATIC STANDING

A now-defunct doctrine may provide another useful model for eliminating the Fourth Amendment standing requirement as an alternative to abolishing the exclusionary rule. In the 1960 case of *Jones v. United States*,⁷⁰ the Supreme Court conferred “automatic standing” on the class of criminal defendants charged with offenses for which one essential element was possession. If a person was charged,

⁶⁸ See *Rakas v. Illinois*, 439 U.S. 128, 168-69 (1978) (White, J., dissenting) criticizing the majority's denial of standing to “mere passengers” in a vehicle on the ground that:

[t]his decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. . . . The suppression remedy for those owners in whose vehicles something is found and who are charged with crime is small consolation for all those owners *and* occupants whose privacy will be needlessly invaded by officers following mistaken hunches not rising to the level of probable cause but operated on in the knowledge that someone in a crowded car will probably be unprotected if contraband or incriminating evidence happens to be found. After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person.

Id.

⁶⁹ 525 U.S. 83 (1998), discussed in text accompanying *supra* notes 28-29.

⁷⁰ 362 U.S. 257, 261-65 (1960).

for example, with possession of narcotics, he could move to suppress illegally obtained narcotics evidence offered by the government, without having first to demonstrate that he individually suffered a violation of *his* Fourth Amendment rights. In other words, he could go directly to the merits and argue that the police had violated the Fourth Amendment in the course of acquiring evidence. And if his substantive argument succeeded, the judge would suppress the evidence.

The Court justified its conferral of automatic standing on two separate grounds. First, for a person accused of possession (of narcotics, for example) to prove standing would likely require him to testify that he was in fact in possession of the contraband in question. That testimony—offered in his defense—would then prove incriminating at his trial on the substantive count. Demanding such testimony as part of a suppression motion would therefore present an improper Fifth Amendment dilemma: the defendant would have to choose between guarding his right against providing self-incriminating testimony and securing his right against unreasonable searches and seizures.

The second reason for automatic standing, the Court explained, was that the government should not be allowed to deny possession for purposes of suppression only to assert possession for purposes of prosecution. To allow such tactics, according to the Court, “would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. . . . It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.”⁷¹

In time, the justifications for automatic standing lost their force, and the doctrine itself consequently fell out of favor. First, the Court held, in *Simmons v. United States*,⁷² that the statements of a criminal defendant at his suppression motion would be inadmissible against him at trial, regardless of whether or not the motion succeeded. After *Simmons*, a defendant testifying in defense of his standing to bring a suppression motion would therefore no longer be providing evidence against himself. Even if he gave a complete confession to the crime charged, the confession would be insulated—in effect immunized—from use at trial. *Simmons* therefore removed the Fifth Amendment dilemma that had previously confronted the defendant charged with possession of items he hoped to suppress as fruits of the violation of his Fourth Amendment rights.⁷³

⁷¹ *Id.* at 263-64.

⁷² 390 U.S. 377 (1968).

⁷³ For a thorough discussion of why the Fifth Amendment does not bar government compulsion of self-incriminating statements, provided that such statements will not be used in a criminal prosecution against the speaker, see Steven D. Clymer, *Are Police Free to Disregard*

In addition to this change in the law, the Court later altered the contours of standing doctrine itself. Under the new approach, a defendant would no longer have Fourth Amendment standing to suppress evidence simply in virtue of her having been in possession of that evidence at the time of an unlawful search.⁷⁴ With this development, the prosecution could simultaneously deny the factual foundation for a defendant's standing (i.e., by asserting that a defendant lacked any reasonable expectation of privacy) *and* maintain the same defendant's commission of a possession offense, without implicating itself in "contradictory assertions of power by the Government."⁷⁵ The doctrine of automatic standing thus lost its conceptual foundations and, in *United States v. Salvucci*,⁷⁶ was abrogated by the Supreme Court.

There remains, however, a significant contradiction of a different sort in the government's prosecution of defendants with evidence obtained through Fourth Amendment violations.

When it opposes suppression on standing grounds, the government takes an *ex post* perspective and claims that the defendant did not in fact own or reside in the premises searched and therefore should not be able to bring violations of the Fourth Amendment to the court's attention. Evidence of police wrongdoing, in other words, is—at the government's behest—effectively labeled "inadmissible" for purposes of adjudicating the suppression motion. At the same time, the government, by using a technicality to avoid the consequences of its own violation of the Fourth Amendment, demands that the trial court *refuse* to allow the technicality of a Fourth Amendment violation to hinder a conviction. To avoid a windfall to the criminal defendant who did not himself suffer a Fourth Amendment violation, the government thus obtains a windfall from the fortuity of its having violated a *different* person's rights.

To put the point differently, just as the criminal defendant may not *deserve* to have privacy in the place where he happened to commit and conceal his crime—regardless of the fortuity of what the government happened to know when it performed a search—so then the government does not *deserve* to be able to utilize evidence that it obtains by violating the Fourth Amendment, regardless of the fortuity of whether the criminal defendant and the person whose rights the police violated happen to be one and the same person. To avoid reaching the merits for purposes of suppression only to demand a full merits consideration at trial indulges in a contradiction as unpalatable as the one that motivated the automatic standing doctrine of the 1960's.

Miranda?, 112 YALE L.J. 447 (2002).

⁷⁴ See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

⁷⁵ *Jones*, 362 U.S. at 264.

⁷⁶ 448 U.S. 83 (1980).

To eliminate the Fourth Amendment standing doctrine—to grant “automatic standing,” that is, to all criminal defendants against whom the government offers illegally obtained evidence—thus enforces the rules against the enforcer of the rules, by requiring that the government—which hopes to prosecute a defendant on the merits of his alleged misconduct—defend its own compliance with the Fourth Amendment, on the merits, at the suppression motion.

CONCLUSION

I have proposed in this Article that Fourth Amendment standing doctrine is at war with the Fourth Amendment exclusionary rule. Up until relatively recently, this war had gone unnoticed, because the Court—in assessing particular defendants’ reasonable expectations of privacy—tended to ignore facts about what particular defendants were actually doing at the time of a search or seizure. *Minnesota v. Carter* changed that, however, and, in the process, exposed the fault lines of a doctrine that was already (and inherently) incoherent. *Carter* demonstrated exactly what was and is wrong with Fourth Amendment standing doctrine.

The police officer’s perspective gives us a definition of protected privacy—and of the reasonableness of searches—that makes actual guilt (as opposed to apparent guilt) immaterial. If an officer sees a private home and lacks any basis for suspecting the concealment of criminal evidence there, then the officer must stay away. If he does otherwise, then he performs a search that violates the Fourth Amendment prohibition against unreasonable searches.

The Fourth Amendment standing doctrine, however, with its *ex post* factual perspective, brings reality—rather than its appearance—into the picture. A look at the facts in their entirety is at the core of the Fourth Amendment standing inquiry; it asks whether the particular person against whom evidence was found had an actual relationship to the location that was illegally searched, such that he may now complain of the search. Whether the police did know or even could have known of that relationship—the *appearance* of standing—has no bearing on *which* defendants may bring suppression motions at their criminal trials.

Once reality (rather than its *ex ante* appearance to the police) controls, it is arbitrary to take account of one’s legal relationship to the space that one occupies without also taking into account one’s legal relationship to the *activities* in which one is engaged in that space.

And the moment that the reality which drives Fourth Amendment standing appropriately includes facts about guilt, no one will properly

have Fourth Amendment standing to suppress evidence at her own criminal prosecution.

I remain at least somewhat agnostic on the question of how we ought to respond to the incoherence of standing doctrine. I bring this incoherence to the attention of readers not because I oppose the exclusion of evidence. Exclusion may well be the most effective deterrent to Fourth Amendment violations, and Fourth Amendment violations are most likely to harm innocent people—people who are, under any account, deserving of their privacy. At present, however, the entire foundation of standing doctrine ignores this deterrence rationale in favor of an entitlement theory of Fourth Amendment exclusion. And an entitlement theory—one that asks what expectations the public is prepared to recognize as reasonable—is and always has been antithetical to deterrence, because it corresponds to what a defendant actually deserves rather than to what “the people” as a whole—who have a right to privacy—should be *effectively* guaranteed.

Taking all of the facts into account, it is wrong to privilege those who commit crimes in their own homes over those who commit crimes in other people’s homes. Neither is entitled—from a normative societal perspective—to remain at large and undiscovered. But by the same token, an individual’s actual entitlement cannot rationally drive a deterrent rule like exclusion. If we accept exclusion as defined under existing doctrine, it is necessarily as a tool of the undeserving to protect the larger group of innocents. And if the Court concedes as much, it will abolish Fourth Amendment standing doctrine altogether. If it does not accept this vision, on the other hand, then it ought to abolish exclusion, because there is no principled defense of suppression when only the *deserving* are thought worthy of its use.