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"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment

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"THE RIGHT OF THE PEOPLE": RECONCILING COLLECTIVE AND INDIVIDUAL INTERESTS UNDER THE FOURTH AMENDMENT

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Professor Doernberg examines a tension within fourth amendment jurisprudence and suggests a means of resolving it. On the one hand, the Supreme Court has conferred fourth amendment standing only upon those whose personal privacy interests have been disturbed. On the other hand, the Court has allowed such persons to invoke the exclusionary rule only in circumstances where, in the Court's view, it would serve as an effective deterrent. Professor Doernberg traces these two policies to different conceptions of the fourth amendment: the first interprets the amendment as a guarantor of individual rights; the second construes it as an instrument for securing a collective right. He then shows how the Court, by oscillating between these two conceptions, has eroded fourth amendment protections more severely than it could have done under either conception. The author suggests that the atomistic and collective views of the fourth amendment be harmonized and sets forth a view of the proper scope of standing to invoke the exclusionary remedy under a dualistic conception of fourth amendment rights.

INTRODUCTION

It has been observed that "[t]he fourth amendment cases are a mess,"[1] and, in a more restrained tenor, that "[f]or clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product."[2] In the years since Professors Dworkin and Amsterdam made those observations, the situation has not improved. As recently as 1981, the Court was badly split on two cases involving automobile searches decided the same day,[3] which generated one majority opinion, one plurality opinion, three brief concurrences, four dissents, and opposite results. That situation led one Justice to decry "the problems of wrestling with this Court's twisting and turning as it makes decisional law applying the Fourth Amendment . . . [and the] burdensome and frequently futile efforts . . . necessary to predict the 'correct' result in a particular case."[4]

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[1] Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. L.J. 329, 329 (1973).

[2] Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 349 (1974).

[3] New York v. Belton, 453 U.S. 454 (1981); Robbins v. California, 453 U.S. 420 (1981). *Robbins* was overruled by United States v. Ross, 102 S. Ct. 2157 (1982).

[4] Robbins v. California, 453 U.S. at 443-44 (Rehnquist, J., dissenting).

The fourth amendment was intended both to protect the rights of individuals and to prevent the government from functioning as in a police state. One of those goals is clearly personal; the other more generalized. Both the individual and collective views are partially correct. The Court has overtly espoused only an individualized view of the amendment, emphasizing personal privacy interests.[5] Anthony Amsterdam has argued, however, that the fourth amendment should be read as a broad regulation of government conduct in society.[6] This view implies a broad, collective purpose for the amendment, a mandate to preserve an open society:

> The evil [addressed by the Framers] was general: it was the creation of an administration of public justice that authorized and supported indiscriminate searching and seizing. It was against such a regime of public justice that the fourth amendment was set. I do not think that the phraseology of the amendment, akin to that of the first and second amendments and the ninth, is accidental. It speaks of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The vice of a system of criminal justice that relies upon a professional police and admits evidence they obtain by unreasonable searches and seizures is precisely that we are all thereby made less secure in our persons, houses, papers and effects against unreasonable searches and seizures.[7]

The two phrases, "the right of the people," and "to be secure,"[8] should guide those seeking fully to understand the fourth amendment. They imply that the amendment is a broad limitation on government; freedom from unreasonable searches is a constitutionally mandated social state. The collective view, though not endorsed by the Court, is implicit in many aspects of its fourth amendment decisions.

Two general areas of fourth amendment jurisprudence, corresponding to the individual and social aspects of the fourth amendment, have been of central focus over the past twenty years. First, the Court has repeatedly considered the question of who should be permitted to raise fourth amendment issues and in what contexts litigation of such issues should be permitted. These issues have, until re-

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[5] See text accompanying notes 18-70 infra.

[6] Amsterdam, supra note 2, at 367. Amsterdam calls for "new regulatory devices . . . that can be created and maintained in working order only by the stimulation and the oversight of courts enforcing constitutional law." Id. at 380. He views the fourth amendment as properly a "regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects." Id. at 367.

[7] Id. at 432-33.

[8] U.S. Const. amend. IV.

cently, been discussed under the rubric of standing.[9] Second, the Court has, particularly in the past decade, examined the question of when the exclusionary rule, developed by the judiciary as a remedy for violations of fourth amendment rights,[10] should be applied or withheld in individual cases.[11] The Court's treatment of fourth amendment law in these two areas has been doctrinally incoherent, drawing some highly critical reviews from commentators.[12] When considering a defendant's standing, the Court has tended to treat fourth amendment rights as being held only by individuals,[13] not by society at large. This has led the Court to reject a number of fourth amendment challenges, not because the police behavior in question was reasonable or lawful, but because the individual did not fit into the narrow standing confines established by the Court. At the same time, the Court asserts that the remedy is not for the individual at all[14] but rather is invoked for the benefit of society's interest in deterring government behavior which violates the fourth amendment.[15] Thus even where standing is uncontested, the exclusionary rule is not applied unless the Court feels that its application would significantly deter future government abuses of fourth amendment rights. Given this dichotomy in the theoretical underpinnings of the Court's fourth amendment cases, inconsistency is hardly a surprising result.

This Article examines the inconsistency in the Court's treatment of fourth amendment rights and remedies and explores the basis for eliminating that inconsistency by recognizing the collective aspect of the fourth amendment. Section I first discusses the development of the

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[9] Rakas v. United States, 439 U.S. 128 (1978), announced that the vocabulary of standing is inappropriate for fourth amendment questions, ruling instead that the proper inquiry is whether the defendant's substantive fourth amendment rights were violated. Id. at 138-40. See text accompanying notes 46-53 infra. Nonetheless, the Supreme Court, even on some occasions speaking through Justice Rehnquist, the author of *Rakas*, continues to discuss these issues in terms of standing, see, e.g., United States v. Salvucci, 448 U.S. 83, 85-97 (1980); United States v. Payner, 447 U.S. 727, 737-38, 748 (1980); Arkansas v. Sanders, 442 U.S. 753, 761 n.8 (1979), as do the lower federal courts. See, e.g., United States v. Kember, 648 F.2d 1354, 1365-66 (D.C. Cir. 1980); United States v. Penco, 612 F.2d 19 (2d Cir. 1979); United States v. Mazzelli, 595 F.2d 1157 (9th Cir. 1979), vacated on other grounds sub nom. United States v. Conway, 448 U.S. 902 (1980). This Article will use standing terminology for convenience.

[10] United States v. Calandra, 414 U.S. 338 (1974); Mapp v. Ohio, 367 U.S. 643 (1961).

[11] See generally text accompanying notes 71-125 infra.

[12] See, e.g., Amsterdam, supra note 2; Burkoff, The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine, 58 Or. L. Rev. 151 (1979).

[13] See generally text accompanying notes 18-70 infra.

[14] United States v. Calandra, 414 U.S. 338 (1974). See text accompanying note 116 infra.

[15] See text accompanying notes 114-25 infra.

Court's current doctrines allowing individuals to raise fourth amendment issues. It then reviews the development of the exclusionary rule, the purposes of the rule as developed in the Court's cases, and the Court's recent refusals to allow the remedy to be invoked in some cases where the individual claiming its protection clearly has standing to do so.[16] Finally, Section I demonstrates that the Court in recent years has oscillated between individual and collective views in the fourth amendment area, but always in such a way as to narrow the amendment's effective ambit.

Section II explores the dichotomy in the Court's approach and points out that were the Court to view fourth amendment rights and remedies consistently as being either individual or collective, the effective scope of the fourth amendment as a limitation upon governmental excesses would be greater. For example, if the Court considered collective concerns in fourth amendment cases, standing would have to be expanded to encompass those concerns, which transcend purely personal injuries. Conversely, if the Court were to consider individual deprivations of rights in deciding whether to apply the exclusionary rule remedy, it could no longer withhold the remedy simply because it created no broader deterrent effect.

Next, Section II suggests that the dichotomy be eliminated by consistently regarding the fourth amendment as contemplating collective as well as individual rights. This full protection of fourth amendment values requires substantial changes in the concept of standing to raise fourth amendment issues. The Article suggests that the collective component of the fourth amendment can be protected only by resurrecting a standing concept mentioned in one of the early standing cases:[17] the target of the search, *i.e.*, the person against whom the government proposes to use illegally seized evidence, should be permitted to challenge use of the fruits of the search in a subsequent criminal proceeding. The Court's resistance to this articulation of the standing concept is based on its assertion that there are no fourth amendment rights of the individual to be protected in such a situation. This is, however, only half the issue. If there are collective rights, they too must be protected, and the Court itself has repeatedly recognized that only the exclusionary rule provides an effective enforcement mechanism.

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[16] See text accompanying notes 114-25 infra.

[17] Jones v. United States, 362 U.S. 257 (1960).

I

THE DEVELOPMENT OF INCONSISTENT DOCTRINES

A. The Right to Raise Fourth Amendment Issues

The law of standing to raise fourth amendment issues has had a tortured history. The Supreme Court has long taken the position that constitutional rights may not ordinarily be vicariously asserted, that constitutional remedies may be had only by "the class for whose sake the constitutional protection is given."[18] Current fourth amendment standing doctrine embodies a highly restricted concept of that standard. The defendant wishing to suppress seized evidence must show that his personal right, his expectation of privacy from the whole world, was violated by government action.[19] Neither a reasonable expectation of privacy from government alone,[20] nor ownership of the seized evidence,[21] nor being the target of a search[22] suffices to accord him standing.

Standing has not always been so restrictively viewed. In *Jones v. United States*,[23] the first case in which the Court explicitly considered standing,[24] the Court took a broad approach. Jones had been staying in a friend's apartment searched without probable cause and was charged with possession of narcotics found there. The government, relying upon the law as it had developed in the lower courts, argued

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[18] Hatch v. Reardon, 204 U.S. 152, 160 (1907). Accord Alderman v. United States, 394 U.S. 165 (1969). In some circumstances, however, individuals may assert others' rights, particularly if there is no other effective enforcement mechanism for those rights. See note 184 infra.

[19] Professor Amsterdam, supra note 2, has called this the "atomistic" approach to the fourth amendment. The Court has not always been consistent in this regard. In Mancusi v. DeForte, 392 U.S. 364 (1968), the Court explicitly recognized that an individual might expect privacy from governmental intrusion, but not from the intrusion of coworkers. See text accompanying notes 32-37 infra.

[20] See text accompanying notes 33-35, 60-66 infra.

[21] See text accompanying notes 55-60, 68 infra.

[22] See text accompanying notes 38-46 infra.

[23] 362 U.S. 257 (1960).

[24] The Court noted that the lower federal courts had considered standing and had "generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." Id. at 261. See, e.g., Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932). See generally Mickenberg, Fourth Amendment Standing After *Rakas v. Illinois*: From Property to Privacy and Back, 16 New Eng. L. Rev. 197 (1981), suggesting that prior to *Jones*, the Court had simply considered standing to be a function of property rights and had not discussed it, except in Goldstein v. United States, 316 U.S. 114 (1942), which made the equivalence clear. Professor Mickenberg recognizes *Jones* as the appropriate determinant of standing because of its acceptance of privacy concepts instead of reliance upon property rules. Mickenberg, supra, at 208.

(1) that unless Jones were willing to claim ownership of the narcotics, he had too little interest in their seizure to object to their introduction in evidence, and (2) that Jones had insufficient interest in the premises to object to a search of them, since he was a mere guest or invitee. The Court immediately recognized the irony of the first argument: to establish standing to make his suppression motion, the defendant was, in effect, required to convict himself on the merits.[25] To avoid this dilemma, the Court fashioned what would later become known as the automatic standing rule: a defendant charged with a possessory crime was automatically permitted to challenge seizure of the evidence upon which the charge was based.[26] Thus the nature of the charge against the defendant, whether or not it arose from a search involving his personal property, could provide the basis for his standing to seek suppression.[27] In dictum, the Court addressed the government's second argument. It suggested that being the target of a search might itself suffice to confer standing on Jones. Under such a target theory, standing would be extended to "anyone legitimately on the premises when a search occurs . . . [if] its fruits are proposed to be used against

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[25] 362 U.S. at 261-62.

[26] Id. at 263-64. See United States v. Salvucci, 448 U.S. 83, 93 n.7 (1980); Brown v. United States, 411 U.S. 223, 228 (1973); which made clear that the Court did not view the automatic standing rule as applicable to nonpossessory crimes. Automatic standing was overruled by *Salvucci* in 1980. 448 U.S. at 85.

In the interim, the dilemma which caused the Court to create the automatic standing rule had been diminished in another way by Simmons v. United States, 390 U.S. 377 (1968), which held that a defendant's testimony in a suppression hearing was not admissible against him at trial on issues of guilt or innocence. Id. at 394. In fact, part of the majority's rationale in *Salvucci* for overruling the automatic standing rule was that *Simmons* had made automatic standing unnecessary. 448 U.S. at 89-90. The *Simmons* Court did not, however, state that a defendant's suppression hearing testimony cannot be used against him on questions other than guilt or innocence, such as credibility. That omission left open the possibility that *Simmons* affords a defendant less protection than did the automatic standing rule of *Jones*, which allowed defendants to seek suppression without having to testify at all. Cf. Oregon v. Haas, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971) (both holding that defendants' inconsistent statements taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), are admissible for purposes of impeachment). This question, in fact, was specifically reserved by the Court in United States v. Salvucci, 448 U.S. 83, 94 (1980).

[27] *Jones* also rejected the government's first argument that an individual lacked standing for fourth amendment purposes unless he could show ownership of the searched premises or some other legally cognizable form of control over them, such as being their lessee, 362 U.S. at 266, suggesting instead that anyone legitimately on the searched premises had standing to object to use of the fruits of the search. Id. at 267. This theory was finally rejected in Rakas v. Illinois, 439 U.S. 128 (1978). Thus the *Jones* Court repudiated the idea that standing to challenge a search and seizure should be governed by what it called "subtle distinctions, developed and refined by the common law in evolving the body of private property law." 362 U.S. at 266.

him."[28] Thus the individual with the greatest practical interest in challenging a search would be entitled to do so.

The Court expanded upon *Jones* in 1968, in *Mancusi v. DeForte*.[29] Deforte, seeking a writ of habeas corpus following his state conviction on conspiracy, coercion, and extortion charges in connection with his union job, objected to evidentiary use of papers seized from his union office.[30] The Court upheld DeForte's standing, noting that *Jones* had explicitly discarded reliance upon private property law concepts as the keys to standing.[31] It cited *Katz v. United States*[32] as making "it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[33] Thus the Court wedded the *Jones* holding to the expectation of privacy rationale as it had developed in more recent cases. By so holding, the Court reaffirmed two fourth amendment concepts: (1) ownership of the seized evidence was not required to confer standing provided the individual had a sufficient relationship with the premises from which it was seized;[34] and (2) neither title nor a formally recognizable property interest in the premises where the search occurred was required to give the individual standing.[35] The Court thereby reaffirmed that a defendant's legitimate presence on the premises would suffice to create standing for fourth amendment purposes.

The Court, in elaborating its privacy rationale, explicitly recognized that an individual might legitimately harbor different expectations of privacy with respect to the government than with respect to private individuals. The Court held that DeForte was entitled to expect that the papers in question would be available only to his coworkers and union superiors, not to government officials.[36] The

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[28] 362 U.S. at 267.

[29] 392 U.S. 364 (1968).

[30] Id. at 365.

[31] Id. at 369.

[32] 389 U.S. 347 (1967).

[33] 392 U.S. at 368.

[34] Id. at 367. The papers belonged to the union, not to DeForte himself.

[35] Id. at 367-68.

[36] Id. at 369-70. DeForte shared his office with other union officials. The state and Justice Black's dissent argued that DeForte's expectation of privacy (and hence his fourth amendment interest) was diminished by that fact and that he therefore lacked standing. Brief for Petitioner, Mancusi v. DeForte, 392 U.S. 364 (1968), cited in 20 L. Ed. 2d 1715.

Justice Black, joined by Justice Stewart, argued that *DeForte* allowed an individual to assert someone else's constitutional rights because DeForte did not own the seized records (they were the union's) and did not have exclusive control over the place from which they were seized. 392

Court recognized that expectations of privacy might be relative—applicable to some intrusions but not all. Specifically, the majority recognized that the expectation of privacy against the government is qualitatively different from that against private individuals and found support for that distinction in the facts of *Jones*.[37]

In *Alderman v. United States*,[38] the Court considered suppression motions made by persons who did not have even the limited interest in the searched premises asserted by DeForte. The Court rejected their claims, making it clear that standing concepts would not extend so far.[39] Petitioners had been convicted of conspiracy to transmit murderous threats in interstate commerce[40] and, in another case consolidated for argument, of conspiring to transmit national defense information.[41] In both cases, the government relied in part upon evidence procured by electronic eavesdropping which petitioners alleged violated the fourth amendment. Petitioners fell into three groups: persons whose conversations had been overheard, persons who owned or leased the premises in which the conversations were overheard, and persons implicated by the conversations. The Court held that only the first two groups had standing, the first because their conversational privacy was invaded[42] and the second because a homeowner has standing to object to use of any evidence seized from within his premises.[43] The third group was held to lack standing because its

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U.S. at 373-74. Justice Black also urged that *Jones*' legitimately-on-the-premises test was far too broad because it permitted such vicarious assertion of constitutional rights. The majority's response was to focus on DeForte's expectation of privacy from governmental intrusion by analogizing his case to those involving searches of private (as opposed to shared) offices. 392 U.S. at 369.

[37] Id. at 370. The Court again explicitly recognized this proposition, though in a different context, in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-95 (1971), allowing an individual to assert a claim for damages against federal officers who demanded and received entry to his home, even though the Court noted that a traditional action in trespass might have failed because the entry was acquiesced in by the homeowner in submission to asserted federal authority. Thus the Court recognized that official intrusion is different in kind, not merely in degree, from private intrusion. California has also recognized and retained this distinction. People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).

[38] 394 U.S. 165 (1969).

[39] "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Id. at 174 (citing Simmons v. United States, 390 U.S. 377 (1968)); Jones v. United States, 362 U.S. 257 (1960). But see note 184 infra.

[40] 394 U.S. at 167.

[41] Id. at 169.

[42] Id. at 176.

[43] The Court recognized that houses are explicitly protected by the fourth amendment.

> If the police make an unwarranted search of a house and seize tangible property belonging to third parties—even a transcript of a third-party conversation—the homeowner may

members had no relationship to the premises, or to the wiretapped conversations, beyond being mentioned in them.[44]

By denying the third group of petitioners standing, the Court implicitly rejected the target theory hinted at in *Jones*. Those petitioners argued that, since they were the target of the FBI investigation, they were persons "against whom the search was directed" and thus had standing. But *Alderman* held that petitioners' connection with the seized conversations was too tenuous:

> What petitioners appear to assert is an independent constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.[45]

The majority thus underscored its view of the personal nature of the rights encompassed by the fourth amendment.

The next major development came in *Rakas v. Illinois*.[46] The car in which petitioners were passengers was stopped and searched by police investigating a robbery, and evidence found was introduced against petitioners over their objection. The Illinois courts ruled that, because petitioners did not own the car, they lacked standing to challenge the search.[47] In affirming the convictions, the Supreme Court made three distinct pronouncements concerning fourth amendment standing. First, the Court explicitly rejected the target theory of standing derived from *Jones*.[48] Second, the Court repudiated the *Jones* concept that any person legitimately on the searched premises had

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> object to its use against him, not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment.

Id. at 176-77 (footnote omitted). Of course nothing guarantees that the homeowner will win such a challenge; it is merely established that he will be allowed to make it.

[44] Id. at 171-76.

[45] Id. at 174.

[46] 439 U.S. 128 (1978).

[47] People v. Rakas, 46 Ill. App. 3d 569, 360 N.E. 2d 1252 (1977).

[48] 439 U.S. at 135 (citing Jones v. United States, 362 U.S. 257, 261 (1960)). The Court disposed of petitioners' interpretation of *Jones*' target language quickly: "[That] language was meant merely as a parenthetical equivalent of the previous phrase 'a victim of a search or seizure.' To the extent that the language might be read more broadly, it is dictum which was impliedly repudiated in *Alderman v. United States*, . . . and which we now expressly reject." 439 U.S. at 135.

standing to object to the use of illegally seized evidence.[49] The majority stated that this formula extended fourth amendment protections far beyond the scope of the problems with which the amendment was intended to deal. The *Rakas* majority insisted that protecting reasonable expectations of privacy is the only proper aim of the amendment[50] and declared that not everyone legitimately on the premises enjoyed the same (or any) expectation of privacy as someone with a legally recognized possessory right.[51] Third, the majority rejected the vocabulary of standing in fourth amendment cases, declaring that the question of standing was in fact merely a masquerading question of the existence of fourth amendment substantive rights.[52] At the same time, Justice Rehnquist was careful to insist that the change in vocabulary would not itself work any substantive change.[53] *Rakas* left courts confronted with fourth amendment issues only two questions to answer: whether the moving party had a reasonable expectation of privacy in the place searched and, if so, whether the police acted unreasonably in conducting the search.

Later cases showed how difficult it would be to establish the first element. The *Rakas* reformulation of the fourth amendment inquiry has effectively restricted fourth amendment standing to a narrow personal zone of privacy with the concomitant result that many intrusive and unlawful searches cannot now be remedied. In *United States v. Salvucci*,[54] for example, defendants sought to suppress evidence that the police had seized from an apartment belonging to neither of them but to which one had unrestricted access. In denying suppression, the Court used its expectation of privacy analysis expressly to overrule the *Jones* rule granting automatic standing for possessory offenses.[55] Even acknowledged ownership of the seized items failed to confer standing: "We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."[56] Thus *Salvucci* demonstrates that the legitimate expectation of privacy de-

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[49] 439 U.S. at 142 (citing Jones v. United States, 362 U.S. 257, 267 (1960)). The *Rakas* Court noted with disapproval that virtually all lower courts had applied the *Jones* language broadly. 439 U.S. at 142 n.10.

[50] 439 U.S. at 143, 147.

[51] Id. at 148. In effect, the Court held that passengers have no fourth amendment rights with respect to vehicles or their contents.

[52] Id. at 139.

[53] Id. There is considerable reason to suspect that the new expectation-of-privacy analysis does change some cases' results. See note 57 infra.

[54] 448 U.S. 83 (1980).

[55] Id. at 85.

[56] Id. at 92.

pends largely upon ownership of the seized premises and may not easily extend to others.[57]

Rawlings v. Kentucky,[58] decided the same day as *Salvucci*, confirmed that property rights heavily influence standing. Kentucky police officers, arriving at a house to execute an arrest warrant, thought they smelled marijuana and decided to obtain a search warrant. The person named in the arrest warrant was absent, but in the meantime, the occupants of the house, including David Rawlings and Vanessa Cox, were told they could depart only if they consented to body searches.[59] One of the officers subsequently returned with a search warrant and in executing it discovered contraband secreted in Cox's purse, which had been on a sofa between Cox and Rawlings. Rawlings admitted ownership of the drugs and was subsequently convicted over his protest that the search of the purse and seizure of the drugs had violated the fourth amendment.

Affirming the conviction, the Court ruled that his asserted ownership of the seized items was insufficient to confer standing since they were not seized from an area in which he had a reasonable expectation of privacy.[60] The Court relied in part upon Rawlings' statement

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[57] *Salvucci* also strongly contradicts Justice Rehnquist's assertion in *Rakas* that the new, nonstanding vocabulary of fourth amendment analysis will not affect how cases are decided. *Salvucci*, typical of the Court's recent cases, fails to deal with the distinction between a person's expectation of privacy from the world at large and his expectation of freedom from governmental intrusion, the distinction mentioned in Mancusi v. DeForte, 392 U.S. 364 (1968). See text accompanying notes 36-37 supra. Yet in terms of an expectation of freedom from governmental intrusion, *Salvucci* is difficult to distinguish from *DeForte*. In both cases, the evidence was seized from an area not owned by the defendant but to which he had been given unrestricted access by the owner. In both cases, the owner or his agents presumably retained the right to enter the area. Nonetheless, *DeForte*, decided prior to *Rakas*, allowed the defendant to challenge the search, while *Salvucci*, decided after, did not.

[58] 448 U.S. 98 (1980).

[59] Id. at 100. Two people did consent to be searched and then left. Whether consent obtained in such circumstances should be regarded as truly voluntary, and thus effective to waive the constitutional right, was not addressed by the Court, since no one who "consented" to the search was found to possess contraband. It is at least arguable that such a consent would be ineffective. See Bumper v. North Carolina, 391 U.S. 543 (1968).

From the outset in the Kentucky courts, and subsequently in the Supreme Court, Rawlings maintained that to detain casual occupants of the house while the police sought to obtain a warrant was unlawful. But cf. Michigan v. Summers, 452 U.S. 692 (1981) (temporary detention of owner whose house was already the subject of a search warrant while the warrant was executed held permissible). The Kentucky courts did not address the issue, however, and the Supreme Court assumed that the detention was illegal because, on the majority's view of the case, the constitutional violation was irrelevant to Rawlings' situation. 448 U.S. at 106-10. But see note 60 infra.

[60] 448 U.S. at 105-06. The majority did not explain why Rawlings did not have a sufficient fourth amendment interest because of the constitutional guarantee that effects may not be unreasonably seized. See text accompanying note 68 infra. The Court's assertion that Rawlings'

that he did not expect the police to respect the privacy of Cox's purse[61] but went beyond that to make clear that, even had he entertained a subjective expectation of privacy, the Court would have refused to recognize it because Rawlings had not known Cox long;[62] he had never before had access to her purse;[63] he had no right to exclude others from the purse;[64] and he took no precautions to maintain the privacy.[65] *Rawlings* completed the burial of the concept of relative privacy derived from *Mancusi v. DeForte*.[66] Though Rawlings may not have anticipated total privacy vis-à-vis Cox and her invitees, he may nonetheless have expected that the government would be excluded. But as *Rakas*, *Salvucci*, and *Rawlings* now make clear, expectation of freedom from governmental intrusion is not sufficient to bring the fourth amendment into play; the new doctrine of standing requires expectation of freedom from any intrusion. Thus the Court intensified its view of the personal nature of fourth amendment rights.

These cases clearly contemplate that the rights secured by the fourth amendment are individual rather than a "right of the people" collectively held.[67] At the same time, the Court has indicated how extraordinarily limited in scope those individual rights are. Mere ownership of seized property is insufficient to invoke them despite the amendment's guarantee that effects shall not be unreasonably

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unlawful detention is constitutionally irrelevant, 448 U.S. at 106, underscores the tight restrictions the Court has imposed upon fourth amendment rights. The Court, faced with two illegal detentions (Rawlings' and Cox's), implicitly held that his unlawful detention yielded no fruits to be suppressed. By contrast, Cox's unlawful detention, which did produce the fruits ultimately used to convict Rawlings, was not a predicate for suppression on Rawlings' behalf, though presumably it was available to Cox.

[61] 448 U.S. at 104. It can be argued, however, that Rawlings' statement is ambiguous. He may have meant, as a legal matter, that he knew that, under the Court's recent pronouncements in the fourth amendment area, he would not be regarded as having a legitimate expectation of privacy in Cox's purse. This is, of course, the meaning relied upon by the majority in asserting that he had no subjective expectation of privacy. On the other hand, he may have been stating as a purely predictive, nonlegal matter that he knew the police would violate the privacy of Cox's purse. Either construction is possible from the exchange noted in the Court's opinion, id. at 104 n.3, and only the former supports the Court's inference that Rawlings was not seeking to keep the drugs private when he placed them in Cox's purse.

[62] Id. at 105.

[63] Id.

[64] Id.

[65] Id.

[66] 392 U.S. 364 (1968). See text accompanying notes 29-37 supra.

[67] Compare, for example, the wording of the fourth, fifth, and sixth amendments. U.S. Const. amends. IV, V, VI. The latter two are clearly addressed to rights held by an individual, whereas the fourth amendment discusses a right of "the people." See text accompanying notes 6-7 supra.

seized.[68] Mere permission of the owner of searched premises to store one's personalty is similarly insufficient.[69] To raise a fourth amendment claim, a defendant apparently must show that he is entitled to a reasonable expectation of privacy from the whole world in the searched premises.[70] In all other cases, where the defendant cannot demonstrate invasion of that narrow range of personal interest, the government may use the fruits of searches repugnant to the concerns of the fourth amendment. Society's interest in being free from such intrusive governmental conduct goes unvindicated. By neglecting that societal interest in the standing context, the Court renders its standing cases irreconcilable with its exclusionary rule cases, which are largely based on that collective rationale.

B. The Exclusionary Rule and Its Purposes

The exclusionary rule, which implements the fourth and fourteenth amendments,[71] commands that "evidence obtained by searches

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[68] This apparent conflict between the Court's holding in *Rawlings* and the wording of the fourth amendment itself was the subject of a bitter dissent. Rawlings v. Kentucky, 448 U.S. 98, 114-21 (1980) (Marshall, J., dissenting).

[69] United States v. Salvucci, 448 U.S. 83 (1980).

[70] The Court's continued emphasis of the requirement that a person have a legitimate expectation of privacy in the area searched is difficult to reconcile with its persistent assertion that the fourth amendment "protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). See also Smith v. Maryland, 442 U.S. 735 (1979); United States v. Chadwick, 433 U.S. 1 (1977); Couch v. United States, 409 U.S. 322 (1973); Desist v. United States, 394 U.S. 244 (1969); Terry v. Ohio, 392 U.S. 1 (1968). In *Katz*, Justice Stewart's majority opinion made clear the Court's dissatisfaction with counsel's fourth amendment arguments expressed in terms of "constitutionally protected areas," 389 U.S. at 351-53, though he noted that the Court itself may have contributed to the confusion in terminology. Id. at 351 n.9.

The recent standing cases raise a substantial question about the "people, not places" maxim of *Katz*. As one circuit has noted, it is impossible to speak of people's expectations of privacy without some reference to the place or area in which the entitlement to privacy occurs. United States v. Bellina, 665 F.2d 1335, 1339-40 (4th Cir. 1981) (citing Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring)). See also Patler v. Slayton, 503 F.2d 472, 478 (4th Cir. 1974): "The maxim of *Katz* that the fourth amendment protects 'people not places' is only of limited usefulness, for in considering what people can reasonably expect to maintain as private we must inevitably speak in terms of places." But the Court seems to have gone much further than would be required merely by the constraints of language. For example, in United States v. Salvucci, 448 U.S. 83 (1980), the majority, overruling *Jones*' automatic standing rule, referred almost exclusively to the place searched. See text accompanying note 56 supra. See also Rawlings v. Kentucky, 453 U.S. 98 (1980). In short, an individual's relationship to the seized item appears irrelevant for fourth amendment purposes. Ownership does not help him if he has no privacy interest in the place searched. See text accompanying notes 55-56, 60 supra. Moreover, the Court has firmly rejected the idea, suggested by *Jones*, that an individual has standing merely because he is the target of the search. Rakas v. Illinois, 439 U.S. at 134-35. See text accompanying notes 46-53 supra. Thus recent cases strongly suggest the conclusion that instead of protecting "people not places," the fourth amendment today protects places, not people.

[71] U.S. Const. amends. IV and XIV.

and seizures in violation of the Constitution . . . is inadmissible."[72] The rule did not exist at common law;[73] it is disdained by some of the present members of the Court[74] and by representatives of the executive branch.[75] In its practical operation, it does in fact appear to embody the result Cardozo feared: "The criminal is to go free because the constable has blundered."[76] However, as the unanimous Court that devised the rule in *Weeks v. United States*[77] recognized:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[78]

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[72] Mapp v. Ohio, 367 U.S. 643, 655 (1961). Actually, the question of what may be done with illegally seized evidence has been greatly complicated by recent Court decisions discussing individuals' standing to raise fourth amendment issues. At this point, it certainly is clear that the broad statement of *Mapp* is not accurate; as *Rakas* and the other standing cases demonstrate, illegally seized evidence can be used by the government in a variety of contexts. See, e.g., United States v. Salvucci, 448 U.S. 83 (1980) (evidence admissible at trial against defendant with no expectation of privacy in the place searched); United States v. Janis, 428 U.S. 433 (1976) (evidence admissible in civil tax proceeding brought by taxpayer); United States v. Calandra, 414 U.S. 338 (1974) (evidence usable by grand jury as foundation for questions to defendant); Walder v. United States, 347 U.S. 62 (1954) (evidence usable at trial for impeachment of defendant). See text accompanying notes 54-57 supra; text accompanying notes 114-25 infra.

[73] See People v. DeFore, 242 N.Y. 13, 24, 150 N.E. 585, 589 (1926).

[74] See, e.g., Robbins v. California, 453 U.S. 420, 437-44 (1981) (Rehnquist, J., dissenting); Stone v. Powell, 428 U.S. 465, 496-502 (1976) (Burger, C.J., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Blackmun, J., dissenting in part and concurring in part). See also id. at 490-92 (Harlan, J., concurring).

It was not always thus. One commentator, in fact, has made special note that the Court, although it divided in Mapp v. Ohio, 367 U.S. 643 (1981), over applying the rule to the states, retained the *Weeks* consensus about the rule itself:

> [T]he Court's division in the case, sharp as it was [five to four], did not concern the merits of the exclusionary rule. The disagreement concerned only the federal dimension of the constitutional question: should the states be left free to apply or not to apply the exclusionary rule according to state law? That is the issue on which the justices divided, and there is not a word in the dissenting opinions suggesting that the rule is intrinsically bad.

T. Taylor, Two Studies in Constitutional Interpretation 20-21 (1969).

[75] See, e.g., United States Department of Justice, Attorney General's Task Force on Violent Crime Final Report 55-56 (1981).

[76] People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). As some commentators have pointed out, however, the reasoning of Cardozo's statement is flawed. The criminal is to go free not because the constable blundered but because, had the constable acted lawfully, the criminal could not have been identified and convicted in the first place. "[A]n *after-the-fact* prohibition 'prevents convictions in no greater degree than would effective prior direction to police to search only by legal means.' " Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 337, 344 (1979) (footnote omitted) (quoting Note, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 161 (1948)).

[77] 232 U.S. 383 (1914).

[78] Id. at 393.

At least at its inception, therefore, the exclusionary rule was viewed as the only effective way to give life to the guarantees of the fourth amendment.

This section traces the development of the exclusionary rule and examines the purposes behind the rule expressed by the Court. The rule originally served as a remedy for violations of individual rights, a guarantor of judicial integrity, and perhaps a deterrent to future fourth amendment violations.[79] More recent cases, however, have invoked only the last consideration. The Court has substantially abandoned the judicial integrity theme[80] and has instructed that the exclusionary rule exists not to vindicate personal rights of the victim of an unlawful search and seizure but rather to protect the collective interest of society in deterring fourth amendment violations.[81] Thus when the Court has concluded that the deterrent effect of suppression would be minimal, it has refused to suppress seized evidence despite violation of the defendant's fourth amendment rights.

1. Development of the Exclusionary Rule

The rule, as noted above, originated in *Weeks v. United States.*[82] Weeks was arrested and charged with using the mails to operate a lottery. Local police officers conducted a warrantless search of his house, seizing certain papers and articles which they delivered to the United States marshal, who later conducted another warrantless search and seizure. Weeks' petition for return of the seized materials prior to trial was denied, and his ensuing conviction was ultimately reviewed by the Supreme Court. The Court held that the marshal's seizure had violated Weeks' fourth amendment rights and that he had been entitled to have the materials returned before trial. The conviction was reversed.[83] The exclusionary rule had been born.[84]

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[79] Id.

[80] See United States v. Payner, 447 U.S. 727 (1980), discussed at text accompanying notes 168-76 infra.

[81] See United States v. Calandra, 414 U.S. 338 (1974), discussed at text accompanying notes 114-19 infra.

[82] 232 U.S. 383 (1914).

[83] The Court's order did not, however, preclude the possibility of Weeks being retried without the returned evidence. The Court did distinguish between the evidence seized by the local police and presented to federal authorities on a "silver platter," see Lustig v. United States, 338 U.S. 74, 79 (1949), overruled, Elkins v. United States, 364 U.S. 206 (1960), and the evidence seized by the marshal himself, directing return only of the latter on the ground that the fourth amendment did not protect the defendant from the acts of local officials. The Court thus established the basis for the silver platter doctrine. Weeks v. United States, 232 U.S. 383, 398 (1914). See text accompanying note 101 infra.

[84] *Weeks* left unresolved many questions concerning the fourth amendment and the exclusionary rule. It did not make clear whether the amendment describes rights held collectively by

Silverthorne Lumber Co. v. United States[85] extended the exclusionary rule to the fruits of illegal searches and seizures. Government agents seized corporate records from Silverthorne's offices. The government photographed the seized records before the district court could act on defendants' application for their return. The originals were then returned pursuant to the district court's order, and an indictment was secured based in part upon the photographed documents. The government then subpoenaed the original documents and, upon defendants' refusal to produce them, obtained a contempt adjudication, from which defendants brought a writ of error. The Court held that the subpoena was unenforceable because it was based upon information gained from the government's unlawful conduct,[86] noting that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[87] Thus the Court appeared to insist that the government in no way be permitted to profit from its illegal activities.[88]

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the society at large, or individually, by those aggrieved by police misconduct on a more personal level; and it did not suggest how far the rule ought to be extended in service of whichever model was adopted. Professor Amsterdam has referred to the latter model as the atomistic approach and, with other commentators, has suggested that the Court clearly has adopted this view of the amendment. Amsterdam, supra note 2, at 367. See also Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy," 34 Vanderbilt L. Rev. 1289 (1981). The *Weeks* Court did not elaborate upon its statement that without exclusion of illegally seized evidence the fourth amendment would be a nullity. See text accompanying note 78 supra. It may fairly be inferred that the Court believed that no other remedy would be effective. The Court did mention potential civil remedies, but it is important to note that here the Court was discussing the defendant's potential remedies against state law enforcement officials to whom it recognized the fourth amendment did not apply. Weeks v. United States, 232 U.S. 383, 398 (1914). Accord Wolf v. Colorado, 338 U.S. 25 (1949). The Court may have felt that the defendant was entirely without a civil remedy with respect to federal law enforcement officials since direct actions implied under the fourth amendment were not recognized until Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Clearly the Court believed that the purpose of the amendment was to prevent the federal government from engaging in unreasonable searches and seizures and that prevention could properly be achieved by denying the government use of the spoils of its misconduct.

[85] 251 U.S. 385 (1920).

[86] *Silverthorne*, in fact, is properly regarded as the source of the fruit-of-the-poisonous-tree doctrine though the phrase was not coined until Nardone v. United States, 308 U.S. 338, 341 (1939), and was not fully explored by the Court until its decision in Wong Sun v. United States, 371 U.S. 471 (1963).

[87] 251 U.S. at 392.

[88] Neither *Weeks* nor *Silverthorne* discussed questions of standing; there was no challenge to petitioners' standing in either case. Whether the Court would have painted with so broad a brush if the defendants had been less closely connected with the evidence and the places from which it was seized is a matter for speculation.

The *Weeks* and *Silverthorne* Courts regarded the exclusionary rule as an indispensable remedy for individual rights. *Weeks* stated that fourth amendment rights "might as well be stricken from the Constitution"[89] without the exclusionary rule, and the exclusionary remedy *Weeks* prescribed included return of the excluded evidence to the defendant thus making him whole as well as depriving the government of the use of the evidence. The judicial integrity rationale in *Silverthorne*, while apparently an independent ground, also supports the conclusion that the exclusionary rule primarily served as an individual remedy. The Court demanded that illegally obtained information "find no sanction in the judgments of the Courts"[90] and that it "not be used at all."[91] Those concerns, however, were in turn rooted in the nature of federal courts, which the Court noted "are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[92] Thus remedying breaches of individual rights dominated the Court's early approach.

2. *The Exclusionary Rule and the States*

The exclusionary rule was not again closely examined by the Court until *Wolf v. Colorado*[93] declined to apply it to the states. *Wolf* was a peculiar case. It had a dual emphasis: the majority not only

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In one later case, the Court did give the rule its full scope but without reference to questions of standing. McDonald v. United States, 335 U.S. 451 (1948). McDonald and Washington were convicted of operating a lottery, based in part upon evidence seized by the District of Columbia police from McDonald's room. The Court found the warrantless search unreasonable because the officers had had enough time to secure a warrant. Id. at 454-56. It then reversed both convictions, McDonald's because his privacy was invaded and he was entitled under *Weeks* to return of the seized materials, and Washington's because, though the Court assumed without deciding that he had no privacy interest in McDonald's room, had the seized evidence been properly returned to McDonald, it would not have been available for use against Washington either. Id. at 456. Thus the government was denied all the benefit of its unlawful activities.

[89] 232 U.S. at 393.

[90] Id. at 392.

[91] *Silverthorne*, 251 U.S. at 392.

[92] *Weeks*, 232 U.S. at 392.

[93] 338 U.S. 25 (1949). Representatives of the Colorado district attorney, acting without a warrant, arrested Wolf, a physician, for conspiracy to commit abortion. While making the arrest at his office, they seized certain of his office records, which were subsequently used to convict him of a different abortion offense from the one the district attorney had been investigating. Wolf's suppression motion was denied by the Colorado courts. Wolf v. People, 117 Colo. 279, 281, 187 P.2d 926, 927 (1947) (en banc), aff'd, 338 U.S. 25 (1949).

recognized the *Weeks* exclusionary rule and "stoutly adhere[d] to it"[94] but also made it clear that the fourth amendment's guarantees were regarded as "implicit in the concept of ordered liberty" and thus applicable to the states.[95] At the same time, the majority carefully separated the exclusionary rule as a mere judicially created remedy from the constitutionally created rights of the fourth amendment, applying the right to the states while declining to apply the remedy.[96] In the course of making that distinction, the Court rejected *Weeks*' idea that no other effective remedies for fourth amendment violations existed:

> The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. . . . Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.[97]

The *Wolf* Court thus seemed to emphasize the deterrent aspects of the exclusionary rule without discussing the protection of judicial integrity or individual rights under the fourth amendment.[98]

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[94] 338 U.S. at 28.

[95] Id. at 26-28 (citing Palko v. Connecticut, 302 U.S. 319 (1937)). See also Elkins v. United States, 364 U.S. 206, 213 (1960); Frank v. Maryland, 359 U.S. 360, 362-63 (1959); Irvine v. California, 347 U.S. 128, 132 (1954); Stefanelli v. Minard, 342 U.S. 117, 119 (1951).

[96] Wolf v. Colorado, 338 U.S. 25, 28, 31 (1949). This separation was firmly rejected by the Court in Mapp v. Ohio, 367 U.S. 643 (1961), which, among other things, recognized the rule as having a firm constitutional basis. See text accompanying notes 107-11 infra.

[97] 338 U.S. at 30-31 (footnote omitted).

[98] The *Wolf* opinion drew dissents from three members of the Court. Justice Murphy, joined in dissent by Justices Douglas and Rutledge, set out at some length his dissatisfaction with the majority's rejection of *Weeks*' conclusion that the exclusionary rule was the only effective way to enforce the fourth amendment, reflecting his view of the impracticality of alternative theoretical methods of enforcement. Id. at 41-44.

By 1955, there was at least some persuasive evidence in the states that Justice Murphy's concerns were well founded. Despite *Wolf*'s clear statement that the exclusionary rule would not be forced upon the states as a matter of due process, several elected to adopt it. California was one:

> We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the gulity, [sic] and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court.

Eleven years after *Wolf*; the Court launched into a more explicit consideration of the purposes of the exclusionary rule in *Elkins v. United States.*[99] *Elkins* implicitly called into question *Wolf's* idea that fourth amendment rights and remedies could be dealt with separately. It confirmed the concept of the exclusionary rule as a deterrent but at the same time merged that purpose with *Weeks'* dictum that the fourth amendment would be meaningless without the exclusionary remedy.[100] The Supreme Court ruled that *Weeks* required rejection of the silver platter doctrine, which had previously permitted federal courts to use evidence unlawfully seized by the state.[101] In response to critics' complaints that the rule irrationally permitted criminals to escape deserved convictions without directly punishing Cardozo's blundering constable,[102] the Court pointed out that "these objections hardly answer the basic postulate of the exclusionary rule itself. The 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."[103]

People v. Cahan, 44 Cal. 2d 434, 445, 447, 282 P.2d 905, 911-12, 913 (1955). In Linkletter v. Walker, 381 U.S. 618 (1965), the Court characterized its decision in Mapp v. Ohio, 367 U.S. 643 (1961), as explicitly repudiating the factual bases upon which Wolf v. Colorado, 338 U.S. 25 (1949), had rested: "[T]he other means of protection had proven to be 'worthless and futile' and had not reduced the incidence of police lawlessness during the 12 years since *Wolf* was announced. . . . [Instead] *Wolf* had operated as a license for police illegality. . . ." Linkletter v. Walker, 381 U.S. at 634.

[99] 364 U.S. 206 (1960). State officers executing a search warrant (later determined invalid) seized certain materials tending to link petitioners with unlawful interception of telephone conversations. After failure of a state prosecution for possession of obscene materials by reason of the state courts' suppression of the seized evidence, a federal prosecution charging conspiracy and unlawful interception of telephone communications was commenced, using the unlawfully seized evidence delivered to the federal government by state officials.

[100] See text accompanying note 89 supra.

[101] 364 U.S. at 208.

[102] Id. at 217 (quoting 8 J. Wigmore, Wigmore on Evidence § 2184 (3d ed. 1940)). See text accompanying note 76 supra.

[103] 364 U.S. at 217. The *Elkins* Court briefly discussed another purpose of the rule: maintaining the integrity of the federal judicial process. Declaring its unwillingness to see the courts become "accomplices in the willful disobedience of a Constitution they are sworn to uphold," id. at 223, the Court established these considerations as distinct justifications for the exclusionary rule, citing McNabb v. United States, 318 U.S. 332 (1943) and Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis & Holmes, JJ., dissenting). The judicial integrity theme was subsequently echoed by the Court in Mapp v. Ohio, 367 U.S. 643, 659-60 (1961); United States v. Peltier, 422 U.S. 531, 536 (1975); Brown v. Illinois, 422 U.S. 590, 599-600 (1975); and Dunaway v. New York, 442 U.S. 200, 218 (1979). By the time Payner v. United States, 447 U.S. 727 (1980), was decided, however, the importance of this concept had clearly shrunk; the majority made clear that it was entirely subordinate to the question of the defendant's standing. Id. at 736 n.8.

In these short sentences, the Court set out two fundamental postulates of its modern fourth amendment jurisprudence. First, the Court clearly did not ground application of the rule in an individual right. The rule, it said, is not designed to return the individual and the government to the positions they occupied prior to the government's illegal conduct. It is instead designed forcefully to persuade the police to honor general fourth amendment principles more scrupulously so that unlawful conduct will not be repeated.[104] Second, the Court explicitly recognized the practical reality Justice Murphy had addressed in *Wolf*: there is no way to enforce the amendment's guarantees without imposing the exclusionary rule.[105] Thus the Court found the rule to be essential.

The *Elkins* view that the rule is indispensable set the stage for the Court's decision in *Mapp v. Ohio*,[106] which extended the exclusionary rule to the states as a matter of constitutional law. In *Mapp*, the Court emphatically repudiated the assumption of *Wolf v. Colorado*[107] that the fourth amendment right could be separated from the exclusionary rule remedy:[108]

> [I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was

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[104] See United States v. Janis, 428 U.S. 433, 454 n.29 (1976): " 'The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in "exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers." ' " (quoting Amsterdam, Search, Seizure and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 388-89 (1964) (footnotes omitted)). But see Harrison v. United States, 392 U.S. 219, 224 n.10 (1968) (suggesting that one of the exclusionary rule's benefits is that it "restores the situation that would have prevailed if the Government had itself obeyed the law").

[105] See note 98 supra. As the Court recognized, this point of view was not peculiar to Justice Murphy. In fact, the Court, by quoting at length from Justice Jackson's dissent in Brinegar v. United States, 338 U.S. 160 (1949), credited him rather than Justice Murphy with the initial statement of this position. See Elkins v. United States, 364 U.S. 206, 217-18 (1960).

[106] 367 U.S. 643 (1961). Ohio police officers broke into Mapp's home, allegedly to search for gambling paraphernalia and an individual for whom they had an arrest warrant. Though at the time the police claimed to have a search warrant as well, it was never produced at trial. The officers did not find what they sought, but, in the general search of the house, they did discover sexually oriented printed matter, for possession of which Mapp was convicted.

[107] 338 U.S. 25 (1949).

[108] In fact, the *Mapp* Court characterized this portion of *Wolf* as establishing a double standard. 367 U.S. at 658. The Court's rejection of the *Wolf* assumption was unequivocal.

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom

> logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case.[109]

In fact, the Court traced the constitutional basis for the exclusion of unlawfully seized evidence back to 1886, noting that it had, even then, condemned use of unlawfully seized evidence as unconstitutional.[110] And, citing *Weeks*, the *Mapp* Court made clear the long-standing constitutional basis for the rule:

> [I]n that case [we] clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused. . . ." This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words."[111]

The majority did not, however, further discuss the underlying purposes of the exclusionary rule except by reference to *Elkins*.[112] Justice Harlan, dissenting, asserted that *Weeks*' exclusionary rule was intended only to deter police misconduct not to repair it.[113] That formu-

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> from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."
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> . . . .
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> In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

Id. at 655-56 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). See text accompanying note 103 supra.

[109] 367 U.S. at 655-56.

[110] Id. at 647 (citing Boyd v. United States, 116 U.S. 616, 638 (1886)).

[111] 367 U.S. at 648 (citing Weeks v. United States, 232 U.S. 383, 398 (1914) and Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). See generally Schrock & Welsh, Up From Calandra: The Exclusionary Rule As a Constitutional Requirement, 59 Minn. L. Rev. 251 (1974). Both before and after *Mapp*, a few decisions have regarded the exclusionary rule as an evidentiary rule, not of constitutional stature. See, e.g., Irvine v. California, 347 U.S. 128, 132 (1954) (plurality opinion); People v. Cahan, 44 Cal. 2d 434, 440, 282 P.2d 905, 908 (1955); Webster v. State, 59 Del. 54, 60, 213 A.2d 298, 301 (1965).

[112] 367 U.S. at 656.

[113] Id. at 680 (Harlan, J., dissenting): "[T]he *Weeks* exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future."

lation would characterize the Court's later approach as the individual remedy and judicial integrity concerns tended to vanish from exclusionary rule jurisprudence altogether.

3. *The Exclusionary Rule Outside of Criminal Trials*

In *United States v. Calandra*,[114] the Court's attention shifted from questions of which sovereigns were bound by the fourth amendment—the issue in *Weeks*, *Wolf*, *Elkins*, and *Mapp*—to questions of what parts of the governmental process were affected by fourth amendment requirements. The Court decided *Calandra* solely on deterrence grounds. Calandra was subpoenaed by a federal grand jury and moved to suppress evidence upon which the grand jury's questions to him were based because the government had unlawfully seized it from him. The Supreme Court reversed the lower court's order granting suppression on the ground that applying the exclusionary rule in the grand jury context would not produce sufficient deterrence to justify use of the rule.[115] In reaching that conclusion, the Court focused upon the purposes of the rule as seen by the majority:

> 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." [Citation omitted.] Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. . . . In sum, the 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.[116]

The majority took the position that the exclusionary rule was intended not to benefit the individual invoking it but rather was a remedy with a more general purpose. In Professor Amsterdam's terms, the majority viewed the rule as a "regulation of governmental conduct" rather than "a collection of protections of atomistic spheres of interest of individual citizens."[117] The Court thus echoed the deter-

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[114] 414 U.S. 338 (1974).

[115] "Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal." Id. at 351.

[116] Id. at 347-48.

[117] Amsterdam, supra note 2, at 367. In dissent, Justice Brennan, joined by Justices Douglas and Marshall, took sharp issue with the majority's implication that the exclusionary rule had only a deterrent purpose. Justice Brennan pointed out that the Court in Weeks v. United States, 232

rent philosophy of the *Elkins* Court[118] but with a difference. In *Elkins* the deterrence rationale had been used to expand the scope of fourth amendment protection through use of the exclusionary rule. *Calandra*, however, used the same rationale to circumscribe the amendment's reach. Because the Court no longer saw the rule as designed to benefit the individual, it felt free to condition its applicability on the anticipated deterrent effect.[119]

United States v. Janis[120] continued the trend begun by *Calandra*. A Los Angeles police officer, executing a warrant authorizing a search for bookmaking paraphernalia, seized certain records and some cash from Janis' apartment. The seized evidence was shared with the Internal Revenue Service (IRS), which thereafter filed an assessment against Janis and levied upon the funds which had been seized from him. Subsequently, a state gambling prosecution was begun in which, on Janis' motion, the warrant was quashed.[121] The state court also ordered that the seized records be returned to him. Janis then brought a civil proceeding seeking a refund of the assessment, successfully sought to suppress the IRS copies of the seized records, and won his refund.[122] On review, the Supreme Court reversed and remanded, holding that the evidence should have been admitted because exclu-

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U.S. 383 (1914), had enunciated two more important goals for the exclusionary rule: "enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful governmental conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). The dissent also traced the continued Supreme Court recognition of those objectives through Elkins v. United States, 364 U.S. 206 (1960) and Terry v. Ohio, 392 U.S. 1 (1968). Justice Brennan noted that the majority in Mapp v. Ohio, 367 U.S. 643 (1961), had spoken primarily in terms of the rule's deterrent effect but added that the *Mapp* Court realized that the rule "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." United States v. Calandra, 414 U.S. at 359-60 (Brennan, J., dissenting) (quoting *Mapp*, 367 U.S. at 660).

[118] See text accompanying notes 99-104 supra.

[119] As this Article goes to press, the Court is considering whether to extend the *Calandra* approach to the traditional criminal law context. In Illinois v. Gates, restored to calendar for reargument, 51 U.S.L.W. 3415 (U.S. Nov. 29, 1982) (No. 81-430), it has scheduled reargument on the question whether the exclusionary rule should be modified to include, for example, a good faith exception. The basis for such an exception would be, of course, the belief that good faith errors cannot be deterred by the exclusionary rule.

[120] 428 U.S. 433 (1976).

[121] The motion to quash was granted on the ground that the affidavit supporting the warrant was insufficient under the rules enunciated in Spinelli v. United States, 393 U.S. 410 (1969), decided just before Janis' motion to quash but after issuance and execution of the warrant. 428 U.S. at 437-38.

[122] Janis v. United States, 73-1 U.S. Tax Cas. (CCH) ¶ 16,083 (C.D. Cal. 1973).

sion would not, given the involvement of different sovereigns, have its intended deterrent effect.[123]

Janis thus echoed the trend, begun in *Calandra*,[124] toward restricting application of the exclusionary rule, even in the face of clearly unlawful searches and seizures, on the ground that the rule's deterrent function on society's behalf would not be served and the individual had no personal right to its invocation.[125] The Court's restrictive view of the proper scope of the exclusionary rule demonstrates the widening split between its perception of fourth amendment rights as exclusively personal and fourth amendment remedies as exclusively collective. This dichotomy will be explored in the next section.

II

THE FOURTH AMENDMENT AS GUARANTOR OF COLLECTIVE RIGHTS

A. The Anomaly and Its Effects: Rights Without Remedies and Remedies Without Rights

The Court's recent treatment of fourth amendment cases is bifurcated. On one hand, the Court repeatedly insists with respect to questions of standing that the fourth amendment recognizes rights belonging to individuals, which may not be vicariously asserted.[126] Thus the Court has refused to consider fourth amendment claims of persons unable to show invasions of their personal privacy, even

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[123] "[E]xclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." 428 U.S. at 454. The Court apparently overlooked its own reasoning in Elkins v. United States, 364 U.S. 206 (1960), which rejected evidence offered by a different sovereign on a silver platter for use in the federal courts. See text accompanying notes 99-101 supra.

[124] The restrictive trend had been foreshadowed but was not actually begun until *Calandra*. For example, in Walder v. United States, 347 U.S. 62 (1954), a case involving narcotics charges, the Court permitted use of illegally seized evidence to impeach the defendant. Walder testified on direct examination that he had no prior involvement with narcotics. Thereupon the government, over defense objection, introduced evidence of a prior, unlawful seizure of narcotics from Walder's person. The Court refused to reverse the ensuing conviction, finding the cross-examination proper because defendant's direct testimony had placed the matter in issue. Thus unlawfully seized evidence was permitted to be used despite the exclusionary rule. The Court did not, however, comment directly upon how this decision related to the purposes of the exclusionary rule, and *Walder* therefore did not give rise to a general doctrine of limiting the exclusionary rule's application as did *Calandra* and *Janis* two decades later.

[125] 428 U.S. at 446 (quoting United States v. Calandra, 414 U.S. at 348).

[126] See, e.g., United States v. Salvucci, 448 U.S. at 86-87, 95; Alderman v. United States, 394 U.S. at 174.

though their legal positions were clearly prejudiced by the government's misconduct.[127] On the other hand, the remedy which has been created in response to law enforcement officials' fourth amendment violations is said to be not personal but collective,[128] designed to prevent future violations rather than to repair those that have already occurred.[129] Its purpose is not to benefit the individual who invokes it but instead to protect society by deterring unlawful police behavior. When the Court speaks of fourth amendment rights, it speaks only of individuals; when it speaks of remedies, it speaks only of society as a collective unit. Clearly the Court is operating under different and inconsistent theories of fourth amendment rights and remedies.[130]

The effect of this dual approach is unmistakable: the ambit of the fourth amendment is far smaller under the Court's two-way analysis than it would be if either of its branches were used consistently to develop the law of both rights and remedies under the amendment. For example, if both fourth amendment substantive rights and the exclusionary rule remedy were regarded as personal rather than collective, refusal to apply the exclusionary rule in *United States v. Calandra*[131] and *United States v. Janis*[132] would be inappropriate. Calandra's personal privacy was clearly violated when federal agents seized the records subsequently used as the basis for the grand jury's questions to him.[133] There was no issue concerning his standing. Yet the Court declined to apply the exclusionary rule on the ground that the rule was a collective remedy, not a personal one, and its application in such circumstances would not have the intended deterrent effect.[134] Because of that distinction, Calandra's fourth amendment rights were without remedy. Had the exclusionary rule been regarded

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[127] See, e.g., Rawlings v. Kentucky, 448 U.S. 98 (1980); *Salvucci*, 448 U.S. 83. See text accompanying notes 46-65 supra.

[128] See text accompanying notes 114-23 supra.

[129] Elkins v. United States, 364 U.S. 206, 217 (1960).

[130] This inconsistency has been explored at some length in Burkoff, supra note 12. Professor Burkoff attributes it to the Court's single-minded pursuit of a narrower scope of the fourth amendment. He calls on the Court at least to be consistent utilitarians and to recognize that expanding the scope of protection would serve important functions. Id. at 174-81.

[131] 414 U.S. 338 (1974). See text accompanying notes 114-19 supra.

[132] 428 U.S. 433 (1976). See text accompanying notes 120-25 supra.

[133] Officers executing a warrant authorizing seizure of gambling paraphernalia discovered and seized evidence they believed to be relevant to an ongoing investigation of loansharking. Calandra was subpoenaed by the grand jury with respect to the loansharking investigation. In the district court, he challenged the seizure of the evidence on the grounds that the affidavit supporting the warrant was insufficient and that the search had exceeded the scope of the warrant. The district and circuit courts upheld the challenge, and the government did not seek review of those findings in the Supreme Court. 414 U.S. at 341-42.

[134] See text accompanying notes 114-19 supra.

as a personal remedy complementary to Calandra's personal fourth amendment rights, the evidence would have been suppressed and Calandra would not have been required to answer the grand jury's questions.[135]

By a similar analysis, the result in *United States v. Janis*[136] also would be reversed. Janis' personal privacy was violated because the evidence was seized from him by state officers pursuant to an invalid warrant. The state officials then turned the evidence over to federal authorities. As in *Calandra*, there was no question of standing. Yet, as in *Calandra*, Janis was denied the benefit of suppression of the evidence on the ground that the deterrent effect of exclusion would be too attenuated because the sovereign under whose authority the evidence was seized was not the one being punished by its exclusion.

In both *Calandra* and *Janis*, the Court declined to apply the exclusionary rule because it felt the rule's application would not have a deterrent effect on future police misconduct.[137] In both cases, law enforcement behavior violating the fourth amendment went unpunished, and the courts proceeded in their duties with the aid of evidence unlawfully procured by the government.[138] That result was possible only because of the Court's view that fourth amendment rights are personal while the exclusionary rule remedy is collective.

On the other hand, if, to correspond with its view of the exclusionary rule as a collective remedy, the Court also analyzed fourth amendment rights as having a collective component, the results in the recent standing cases would be inappropriate. For example, if the fourth amendment were viewed by the Court as designed to protect society's collective interest in preventing unlawful police behavior (the purpose frequently announced for the exclusionary rule),[139] *United*

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[135] The *Calandra* Court also addressed the concept of standing, reaffirming the Court's then-emerging insistence that fourth amendment claims could not be raised by persons who had not suffered invasions of their personal rights, narrowly construed. 414 U.S. at 348. But at the same time, the opinion makes it clear that standing is not premised upon the exclusionary rule's deterrent effect. The Court has never found standing on the ground that application of the exclusionary rule would create a deterrent effect. Instead, the inquiry is sequential. First, the Court examines the individual's standing. Second, if the individual is found to have standing, the Court may use deterrence effectiveness analysis to contract further the application of the exclusionary rule within the confines of the standing doctrine.

[136] 428 U.S. 433 (1976). See text accompanying notes 120-23 supra.

[137] See notes 115, 123 and accompanying text supra.

[138] Prior to *Calandra* and *Janis*, one of the purposes of the exclusionary rule had been thought to be maintenance of judicial integrity—the thought that the courts should not become partners in or the beneficiaries of official lawlessness. See note 103 supra.

[139] See generally text accompanying notes 71-125 supra.

States v. Salvucci[140] would have resulted in reversal of the conviction rather than affirmance. In terms of the government's behavior, the existence of probable cause and the need for a warrant, it makes no difference whether the invaded apartment belonged to Zackular (Salvucci's codefendant) or Zackular's mother.[141] Similarly, in terms of the illegality of the detention and the resulting search, it is irrelevant from society's viewpoint that in *Rawlings v. Kentucky*[142] the contraband was found in Cox's purse rather than Rawlings'. In both of these cases, the protection of the exclusionary rule was denied to the defendants because the Court found that their individual privacy had not been violated. In both of these cases, law enforcement behavior violating the fourth amendment went unpunished, and the courts admitted evidence unlawfully procured by the government. The result was possible only because of the Court's view that fourth amendment rights are personal while the exclusionary rule remedy is collective. Thus the result of the Court's bifurcated approach is grossly diminished fourth amendment protection; neither the right's nor the remedy's objectives are being consistently served.

What is troublesome about the Court's approach, at least in part, is the discontinuity of its analysis. The Court is using two analytically distinct approaches to analyze fourth amendment cases, and these approaches are fundamentally at war with each other. This is, to put it charitably, intellectually unsatisfying. In some sense, each body of case law explains why the other is wrong. At the very least, the Court ought to choose one approach or the other and use it consistently. Yet such a choice would do considerable violence to established fourth amendment values which have been recognized over the years for sound reasons of policy. More than intellectual inconsistency is at stake. The Court's dual approach, as well as any simple application of either aspect of it, creates serious deficiencies in the scheme of fourth amendment rights and remedies. First, the individual is in many cases left with no remedy for infringements of fourth amendment rights. Second, the collective interest implied by the exclusionary rule decisions is not meaningfully anchored by the Court to a collective fourth amendment right. From a doctrinal standpoint, therefore, the prefer-

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[140] 448 U.S. 83 (1980). See text accompanying notes 54-57 supra.

[141] The courts are not clear about whose apartment was invaded. The Supreme Court says it belonged to Zackular's mother, 448 U.S. at 85, but the circuit court said it was his wife's. United States v. Salvucci, 599 F.2d 1094, 1094 (1st Cir. 1979), rev'd, 448 U.S. 83 (1980). For purposes of assessing the illegality of the police behavior or Salvucci's standing to challenge it, the difference is insignificant.

[142] 448 U.S. 98 (1980). See text accompanying notes 58-66 supra.

able solution would be to recognize the existence of the unarticulated collective right and individual remedy.

One may legitimately inquire what the individual's remedy is for violation of his fourth amendment rights if it is not the exclusionary rule. Specifically, in cases where the individual clearly has standing to seek suppression of illegally seized evidence, the Court has said that his standing derives from a recognizable violation of his individual rights.[143] Yet the Court also instructs that exclusion of the fruits of an illegal search or seizure is not for the benefit of the individual or to vindicate any right of his,[144] and *Mapp v. Ohio*[145] made it clear that the Court was unable seriously to regard civil, criminal, or administrative remedies as sufficient protection.[146]

What, then, does vindicate the individual's violated fourth amendment rights? The obvious answer, recognized in early cases though resisted by the present Court, is that the exclusionary rule does double duty, and in fact is partially designed to repair the damage to the individual by returning him and the government as nearly as possible to the positions they occupied prior to the unlawful governmental activity.[147] The Court, especially in the earliest exclusionary rule cases, recognized as much.[148] As recently as *Mapp*, the Court explicitly recognized the exclusionary rule as an individual remedy tailored in part to an individual right despite its earlier disclaimer of that concept in *Elkins*.[149] Were it not for this link, the Court would have been faced with the prospect of the existence of a fundamental right[150] for which neither the Constitution nor the courts had provided any remedy. This is, in fact, the consideration which led to *Weeks'* creation and *Mapp's* extension of the rule.[151]

The second question arising from the Court's dual approach is whether its conception of the exclusionary rule as a collective remedy

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[143] See, e.g., Alderman v. United States, 394 U.S. 165 (1969).

[144] At least one lower court has suggested that the exclusionary rule was intended in part to remedy the harm done to the individual. Suarez v. Commissioner, 58 T.C. 792 (1972). The Supreme Court repudiated that suggestion in United States v. Janis, 428 U.S. 433 (1976). See note 104 supra.

[145] 367 U.S. 643 (1961).

[146] Id. at 651-53.

[147] This concept was mentioned by the Court in Harrison v. United States, 392 U.S. 219, 224 n.10 (1968), but has not been adopted. In fact, it clearly runs directly opposite to *Elkins'* "prevent not repair" concept. See text accompanying notes 99-104 supra.

[148] See text accompanying notes 82-92 supra.

[149] 364 U.S. 206, 217 (1960).

[150] The individual's right under the fourth amendment was declared to be fundamental in Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

[151] See generally text accompanying notes 18-70 supra.

necessarily implies the concomitant existence of a collective fourth amendment right.[152] Remedies do not exist in the absence of perceived (though possibly unarticulated) rights.[153] Indeed, it is the pressure of violated rights that creates the impetus for legislatures and courts to invent appropriate remedies. The Court's repeated insistence that the exclusionary rule is not personal to the accused but is a judicially created remedy designed to vindicate a societal interest is thus an affirmation of the existence of a juridically cognizable societal interest.[154]

The Court's present scheme fails to address the full range of interests, collective as well as individual, that should be protected by

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[152] California has explicitly recognized this in construing its constitutional analogue to the fourth amendment, Cal. Const. art. 1, § 13.

> Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with *the constitutional right of all the people to be secure in their homes, persons and effects.*

People v. Cahan, 44 Cal. 2d 434, 439, 282 P.2d 905, 907 (1955) (emphasis added). In part, it was the recognition of this interest that caused California to discard standing requirements entirely in fourth amendment questions. See note 178 infra.

[153] "A remedy is defined . . . as 'the means employed to enforce a right, or redress an injury.' " Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 644 (1900).

> *Remedies*, in their widest sense, are either the final means by which to maintain and defend primary rights and enforce primary duties, or they are the final equivalents given to an injured person in the place of his original primary rights which have been broken, and of the original primary duties toward him which have been unperformed.

J. Pomeroy, Remedies and Remedial Rights by the Civil Action 2 (1876).

[154] The concept of constitutional rights being collectively held is by no means a new one. The Court has long treated the rights of assembly and association under the first amendment as having collective aspects. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Hague v. CIO, 307 U.S. 496 (1939); DeJonge v. Oregon, 299 U.S. 353 (1937). Similarly, in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), the Court noted that

> the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

Most recently, the Court held that there is a public right under the first amendment to attend trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). See also Pell v. Procunier, 417 U.S. 817, 839-40 (1974) (Douglas, J., dissenting); cf. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14-15 (1942) (recognizing a collective statutory right as having been created by Congress in the Communications Act of 1934, 47 U.S.C. §§ 151-155 (1976)); Newman v. Piggie Park Enters., 390 U.S. 400 (1968) (per curiam) (recognizing the individual as a private attorney general vindicating the collective interest of others pursuant to congressional policy reflected in title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1976)). Thus some constitutional and legislative provisions are viewed as having both individual and collective components. And indeed, this is hardly surprising under a Constitution which begins with the phrase "We the People" and is regarded as the quintessential example of a compact of society with itself.

the fourth amendment.[155] Current fourth amendment jurisprudence funnels all claims through the individual standing doctrine and only thereafter considers whether collective security is furthered by application of the exclusionary rule, further constricting fourth amendment protection. Thus collective security interests are never the initial inquiry in the analysis. As argued above, this bifurcated approach serves neither the individual nor the collective interest;[156] still less does it serve the whole range of protected fourth amendment interests.

The explanation almost certainly lies in the Court's dissatisfaction with the exclusionary rule.[157] Regarding the rule as only one of many possible remedies, the Court elects to apply it only in the narrow range of circumstances in which it is felt to be most effective.[158] Such a choice might be permissible if the Court were simply choosing one fourth amendment remedy from a larger arsenal. Its decisions would then be no more controversial than, for example, the customary denial of injunctive relief when damages are an adequate remedy. But that is not the situation. Having acknowledged the proper range of fourth amendment protection, the Court has refused to tailor its remedies to match. The Court's scheme is both inconsistent and incomplete. The Court has a responsibility to provide a network of remedies broad enough to protect both the individual and the collective rights under the fourth amendment.[159] Some combination of remedies must vindicate both individual and collective fourth amendment interests, or large parts of the amendment will remain a nullity.

This Article proceeds on the assumption that the Court's partial picture of the fourth amendment must be supplemented. The Court itself should do so; Congress has not acted in the nearly seventy years since the announcement of the exclusionary rule and is unlikely to do so.[160] Moreover, the Court's artificial constriction of fourth amend-

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[155] See text accompanying notes 5-8 supra.

[156] See text accompanying notes 126-42 supra.

[157] See *Rakas*, 439 U.S. at 157 (White, J., dissenting) ("If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue squarely instead of distorting other [*i.e.* standing] doctrines in an attempt to reach what are perceived as the correct results in specific cases."); see also note 119 supra. See generally Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting) (advocating abandonment of the exclusionary rule and development of alternative remedies).

[158] See text accompanying notes 114-25 supra.

[159] While the Court, following the lead of Justice Burger, may question the efficacy of the exclusionary rule and search for alternatives, it should heed the Chief Justice's warning that the rule should not be discarded until substitutes are in place. *Bivens*, 403 U.S. at 420-21 (Burger, C.J., dissenting).

[160] See Amsterdam, supra note 2:

> The long-time, wholesale 'legislative default' in regulating police practices is no accident. Legislatures have not been, are not now, and are not likely to become sensitive to the

ment rights warps the utility of possible alternative remedies. Even if Congress were to provide them, they would be controlled by the Court's definition of the scope of the right. Remedies as such are not the primary problem; it is the Court's failure to articulate the collective right which its exclusionary rule decisions[161] implicitly recognize and its further failure to provide remedies for the already recognized individual right.

B. The Individual Right Unvindicated

Because the exclusionary rule is, in part, an individual remedy, some of the Court's decisions refusing to apply it in cases where the individual clearly has standing require reexamination. In *Calandra* and *Janis*, the Court declined to apply the exclusionary rule because it asserted that the rule's use in those contexts would not further the rule's deterrent purpose.[162] This focuses inappropriately upon the fourth amendment's collective aspect to the neglect of its individual aspect. The exclusionary rule is, in part, an individual remedy corresponding to an individual right, and the Court has recognized as much from the day it created the rule.[163] Refusal to apply it in

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> concern of protecting persons under investigation by the police. . . . [Rather than undertake serious institutional change, legislatures will tend to perpetuate] the myth that crime is simply a matter of criminals who can be brought to book in due order if the police are given a free hand and sufficient hardware. Under this view, if the police fail to solve the crime problem or commit excesses in their zealous efforts to solve it, *they* are left holding the bag. There seems to me little doubt which ticket most legislators will choose to run on, now or in the future.

Id. at 378-79. Amsterdam goes on to opine that only constitutional decisons by the Court (or the apprehension of them) will move legislatures to action. Id. at 379.

Further aggravating the situation is the Court's historical willingness to take responsibility for this area of the law. It fashioned the exclusionary rule as well as the *Bivens* remedy. Perhaps the legislature regards the fourth amendment, like the other provisions of the Bill of Rights, as the Court's problem.

[161] See text accompanying notes 71-125 supra.

[162] The Court has never supported its assertion that deterrrence of unlawful governmental conduct will not result from suppression of all evidence come by illegally, whatever the procedural context. Thus this argument is itself suspect; the Court suggests no basis for distinguishing the remedial effect of suppression on an officer's behavior when the evidence is offered at trial from when it is offered to a grand jury.

[163] See text accompanying notes 147-51 supra. Cynics may note, of course, that the only time the Court has insisted the amendment is designed to protect individuals from governmental invasion of privacy is when it is about to declare that the privacy of the individual claiming fourth amendment protection was not invaded thus denying his claim for relief. See, e.g., *Alderman*, *Rakas*, *Rawlings*, and *Salvucci*; text accompanying notes 38-66 supra. Similarly, the only time the Court insists that the exclusionary rule is a collective remedy is when the individual claiming the fourth amendment protection clearly has had his individual privacy invaded, but the Court does not wish to apply the exclusionary rule for his benefit. See, e.g., *Calandra* and *Janis*. The Court thus singlemindedly refers to the individual and collective articulations selec-

situations such as those presented in *Calandra* and *Janis* gives rise to two bad results. First, it leaves individual fourth amendment rights wholly without effective remedy. Second, it teaches government that any person's fourth amendment rights may be violated without penalty except when the government seeks to use the fruits of the search against that person in a criminal trial. Both of these results do violence to the Court's repeated insistence that the fourth amendment is designed to protect individuals from government invasions of their privacy. The way to avoid both results is to recognize that the exclusionary rule is appropriately invoked on behalf of the individual as well as society at large thus providing the individual remedy to correspond with the individual right the Court has recognized.

In order for the exclusionary rule to serve as an individual remedy, the Court would have to alter its standing doctrine. Universal standing is not required, but something like the *Jones* target theory[164] is, for the obvious reason that only criminal defendants invoke the exclusionary rule. If the government violates some third party's privacy to obtain evidence against a defendant, current standing doctrine drives a wedge between the person with the means to invoke the rule, the defendant, and the person with the fourth amendment cause of action, the third party. The target theory of standing would remedy the situation by recognizing that a defendant convicted by use of illegally obtained evidence suffers a cognizable fourth amendment injury.

Only the Court's dissatisfaction with the exclusionary rule had led it to narrow its concept of what constitutes a fourth amendment injury, but the Court should not let an important constitutional right go without remedy simply because alternative remedies, thus far unarticulated by the Court, might conceivably supply the missing answer. The Court's deterrence rationale for withholding fourth amendment protection teaches the government that it may violate individual rights in many contexts. Fourth amendment remedies, whatever they are, must correspond to the fourth amendment rights recognized by the Court.

C. Collective Rights

1. The Collective Right Unvindicated

The Court's implicit recognition through a deterrence rationale of a societal interest compels a return to the question of how that

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tively in such a way as always to refuse relief to the individual. See generally Burkoff, supra note 12.

[164] See text accompanying note 28 supra.

interest is to be vindicated. The difficulties of securing law enforcement compliance with the principles of the fourth amendment led to the adoption of the exclusionary rule as a constitutionally based remedy.[165] In the years following *Weeks*, the remedy was thought to be effective,[166] but recent fourth amendment cases cast doubt on that conclusion. In many cases, because of the Burger Court's new standing rules, law enforcement conduct violating the fourth amendment has not been deterred.[167] Moreover, those rules have actually encouraged law enforcement officials deliberately to violate fourth amendment principles because they know that the fruits of such violations will not be excluded and will benefit the government's case.

United States v. Payner[168] exemplifies that cynical reliance upon the new standing rules. While investigating American citizens' financial connections in the Bahamas, government agents surreptitiously seized a bank officer's briefcase, photographed its contents and returned the case to his possession. Thereafter the photographs were used as the basis for subpoena of the original documents, which helped to convict Payner of falsifying his income tax return. The Court, following *United States v. Miller*[169] and *Rakas v. Illinois*,[170] held that Payner was not entitled to suppression of the documents because his privacy had not been violated; he had no legitimate expectation of privacy in either the bank's records or the bank officer's briefcase.[171] Therefore, despite the majority's declaration that "[n]o court should condone the unconstitutional and possibly criminal be-

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[165] See Linkletter v. Walker, 381 U.S. 618, 634 (1965); Mapp v. Ohio, 367 U.S. 643, 648, 656-57 (1961); text accompanying notes 106-13 supra.

[166] Perhaps equally important, the remedy was not perceived by the *Mapp* Court as having hindered effective law enforcement on the federal level.

> [It cannot] lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. *Elkins v. United States*, . . . [364 U.S. 206,] 218. The Court noted that
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> > "The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting but seemingly inexorable." *Id.*, at 218-219.

Mapp v. Ohio, 367 U.S. 643, 659-60 (1961).

[167] See text accompanying notes 131-42 supra.

[168] 447 U.S. 727 (1980).

[169] 425 U.S. 435 (1976). *Miller* held that bank records are the bank's property not the depositor's; the individual has no privacy expectation with respect to them.

[170] 439 U.S. 128 (1978). See text accompanying notes 46-53 supra.

[171] 447 U.S. at 731-32.

havior of those who planned and executed this 'briefcase caper,' "[172] the evidence was received.[173]

Justice Marshall, joined in dissent by Justices Brennan and Blackmun, demonstrated at length that the government's agents knew their activities were illegal but were undeterred nonetheless. The agents recognized that, under the Court's fourth amendment standing analysis, evidence thus seized would be admissible against all but the owner of the briefcase. Justice Marshall quoted the findings of fact made by the trial court:

> "This Court finds that, in its desire to apprehend tax evaders, a desire the Court fully shares, *the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties,* who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel."[174]

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[172] Id. at 733.

[173] Some things never change. The government's behavior in *Payner* bears an eerie resemblance to its earlier activities in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). See text accompanying notes 85-88 supra. The only significant difference is the result; the Court's new standing rules led to its acceptance of activities which it had, sixty years earlier, declared constitutionally repugnant.

[174] 447 U.S. at 743 (emphasis added). Justice Marshall's opinion also noted:

> The most disturbing finding by the District Court . . . related to the intentional manipulation of the standing requirements of the Fourth Amendment by agents of the United States, who are, of course, supposed to uphold and enforce the Constitution and laws of this country. The District Court found:
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> > "It is evident that the Government and its agents, including Richard Jaffe, were, and are, well aware that under the standing requirement of the Fourth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties who's [sic] own privacy expectations are not subject to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties. . . . Such governmental conduct compels the conclusion that Jaffe and Casper transacted the 'briefcase caper' with a purposeful, bad faith hostility toward the Fourth Amendment rights of Wolstencroft in order to obtain evidence against persons like Payner. . . ." [footnotes omitted].
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> The Court of Appeals did not disturb any of these findings. . . . Nor does the Court today purport to set them aside. . . . It is in the context of these findings—intentional illegal actions by Government agents taken in bad-faith hostility toward the constitutional rights of Wolstencroft for the purpose of obtaining evidence against persons such as the respondent through manipulation of the standing requirements of the Fourth Amendment—that the suppression issue must be considered.

Id. at 742-43 (Marshall, J., dissenting).

The majority did note that Congress had looked into the government investigation techniques revealed in *Payner* and that the Commissioner of Internal Revenue subsequently adopted guidelines apparently intended to limit such behavior. But even the *Payner* majority saw this as a

The majority, directly confronted by the practical results of its standing doctrine, nevertheless remained unswayed.[175]

Payner is highly relevant to the concept of the exclusionary rule as a collective remedy. One may justly ask what the rule is a remedy for if such egregious violations are beyond its reach. While the majority's standing analysis in *Payner* may *arguendo* be considered to be consistent with Payner's individual rights under the fourth amendment, it entirely fails to account for the fourth amendment rights of society—the collective interest in security which justifies deterrence of violations. It can hardly be less offensive to society that the government illegally seized a briefcase belonging to the bank officer rather than to Payner. The government's behavior is egregious in either case, and society's interest in regulating the behavior is equally great. The vindication of society's interest in preventing unconstitutional government activity is made to hang on the fortuitous circumstance of ownership of the briefcase. The upshot of *Payner*, therefore, is that the collective fourth amendment interest in securing proper behavior of

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limited step: "[T]hese measures appear on their face to be less positive than one might expect from an agency charged with upholding the law. . . ." Id. at 733 n.5. And the Court did, of course, allow the evidence to be admitted.

[175] *Payner* bears out the predictions of prescient commentators who feared that the Court's standing doctrines would lead the police to violate the fourth amendment rights of "little fish," sacrificing the possibility of convicting them in order to obtain evidence to convict "big fish." See Amsterdam, supra note 2, at 433; Burkoff, supra note 12, at 176. By contrast, similar activities by government officials were seen as fit subjects for criminal prosecution in the case of the infamous break-in directed at the psychiatrist of an individual suspected to have been involved in delivering the Pentagon Papers to the press. United States v. Erlichmann, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977).

The dissenters urged unsuccessfully that the Court suppress the seized evidence under its supervisory powers rather than under the fourth amendment. 447 U.S. at 744-51 (Marshall, J., dissenting). Indeed, this was the exact result reached by the district and circuit courts. Id. at 731. The majority declined to invoke the supervisory power at the instance of an individual unable to show a violation of his own rights. Id. at 734-35. This limitation by the majority is clearly inconsistent with the purpose of the Court's exercise of supervisory powers in nonadministrative matters. Indeed, logic suggests that if the individual can show a violation of his individual rights, invocation of the Court's supervisory powers would be superfluous. See id. at 748-49 (Marshall, J., dissenting). They are designed, in part, to vindicate interests not traceable to an individual. For example, in Ballard v. United States, 329 U.S. 187 (1946), the defendant challenged the exclusion of women from the grand and petit jury rolls in the Southern District of California. The Court adjudicated the claim under its supervisory powers without a showing of individual harm because "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Id. at 195. See also Hill, The Bill of Rights and the Supervisory Power, 69 Colum. L. Rev. 181, 182 (1969): "[The supervisory power] has been regarded as a basis for implementing constitutional values beyond the minimum requirements of the Constitution, or at least affording a basis for their implementation on other than constitutional grounds."

law enforcement authorities is not being vindicated at all.[176] Thus the Supreme Court's fourth amendment jurisprudence as it has developed in recent years not only restricts the individual to enjoyment of the benefits of the exclusionary rule in cases where his own (in addition to society's) fourth amendment rights have been violated,[177] but also makes impossible the vindication of society's rights when the individual's rights have not been simultaneously violated.[178]

2. *Enforcing the Collective Right*

The Court should alter this situation by focusing on underlying fourth amendment values. Recognizing the proper scope of fourth amendment protection, the Court should explicitly recognize the societal interest for what it is—a collective constitutional right. The challenge presented by the current state of facts is to develop a method by which the collective right can be vindicated whenever it is violated. The ultimate question is whether the courts should ever permit the government to benefit from its unlawful activities. The logical method of preventing such abuses is the one devised by the Court itself but which the Court seems to have forgotten. The exclusionary rule was designed in part for this purpose;[179] the problem of today's fourth amendment jurisprudence is that the Court is unwilling to prescribe the medicament[180] in the cases where it is needed because it dislikes

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[176] The results of *Rawlings*, *Rakas*, and *Salvucci* further confirm that point. See text accompanying notes 46-66, 139-42 supra.

[177] See text accompanying notes 46-66 supra.

[178] Prior to the adoption of Proposition 8, in which voters amended the state constitution to eliminate the state exclusionary rule, see Cal. Const., art. I, § 28(d) (effective June 9, 1982), California had discarded the concept of standing in search and seizure cases on the ground that the deterrence function of the exclusionary rule is frustrated if rigid standing concepts apply.

> [I]f law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. . . . [A defendant's right to seek suppression] must rest, not on a violation of his own constitutional rights, but on the ground that government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law. . . . Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights.

People v. Martin, 45 Cal. 2d 755, 760-61, 290 P.2d 855, 857 (1955). Similarly, the Louisiana Constitution of 1974 abolishes standing rules in such cases for the same reason. See Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1 (1974).

[179] See text accompanying notes 89-92 supra.

[180] "[T]he rule is a needed, but grudingly [sic] taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, Search, Seizure, and Section 2255, 112 U. Pa. L. Rev. 378, 389 (1964). This, of course, begs the question of how much is needed.

the side effects.[181] The result is judicial condonation of lawless governmental activity such as in *Payner*. It is proposed, therefore, that in any case where the government violates the fourth amendment, the exclusionary rule's application is appropriate, for in its absence, there is no effective deterrent to such violations.

What is proposed here, therefore, is the resurrection (on a different basis) of the target theory of standing mentioned in *Jones v. United States*[182] but rejected by the Court in *Rakas v. Illinois*.[183] In the absence of such a broadened theory of standing, the collective fourth amendment right cannot be vindicated at all.[184] Such a reexpansion of

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[181] The Court repeatedly emphasizes the cost to society of suppressing concededly relevant evidence to deter future government illegalities. See, e.g., United States v. Janis, 428 U.S. 433 (1976); Alderman v. United States, 394 U.S. 165 (1969). What the Court has not considered is the cost to society of failing to penalize the government's disregard of fundamental constitutional principles. "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." B. Franklin, Historical Review of Pennsylvania (1759) (cited in J. Bartlett, Bartlett's Familiar Quotations 422 (14th ed. Boston 1968) (1st ed. n.p. 1855)).

[182] See text accompanying notes 28, 164 supra.

[183] See text accompanying note 48 supra.

[184] This proposal involves an individual defendant vindicating the collective fourth amendment rights in circumstances where his personal privacy was not invaded, and it is this sort of assertion of the rights of others against which the Court has inveighed. See text accompanying notes 18, 46-66 supra. But assertion of the constitutional rights of others is not unknown in American law. In Barrows v. Jackson, 346 U.S. 249 (1953), the Court permitted whites who sold real property to blacks in violation of a restrictive covenant to assert the equal protection rights of the black purchasers and would-be purchasers in defense to the ensuing damage action on the ground that those rights could not otherwise be protected. Limiting the traditional standing rule, the Court asserted that "the reasons which underlie [the Court's] rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect fundamental rights which would be denied by permitting the damages action to be maintained." Id. at 257. The *Barrows* Court viewed the civil damage action against the white sellers as sufficient to give them the personal stake in the action normally required by standing concepts. Id. at 254-56; see Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970); Baker v. Carr, 369 U.S. 186, 204 (1962).

The Court relied, in part, upon Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (organizations permitted to assert first amendment rights of their members); Helvering v. Gehardt, 304 U.S. 405 (1938) (workers for Port of New York Authority seeking immunity from federal income taxation permitted to assert constitutional rights of the states of New York and New Jersey to be free of federal taxation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private school challenging compulsory education law permitted to assert constitutional rights of parents to control education of their children). See also Craig v. Boren, 429 U.S. 190 (1976) (beer vendor permitted to assert equal protection rights of prospective purchasers); Eisenstadt v. Baird, 405 U.S. 438 (1972) (distributors of contraceptives barred to unmarried users by state law had standing to challenge the statute and assert the constitutional privacy rights of prospective users). See generally Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974). In the typical case involving fourth amendment claims, the individual has at least as much at stake in the action as was present in *Barrows*: he stands to be convicted and imprisoned by the use of illegally seized evidence. And, as in *Barrows*, there is no effective

fourth amendment standing concepts would give the amendment wider application than it now enjoys. The ultimate effect would be to raise the possibility of penalizing government conduct which violates the fourth amendment[185] in all, or substantially all, of the cases in which it occurs. Certainly this is a far cry from the situation which obtains today. And while a broader sweep for the fourth amendment may be anathema to those of a conservative bent, it is submitted that the Court's recent attempts to create a narrower amendment have resulted in lines of analysis irreconcilable with each other because they lack a consistent, articulable theoretical basis.[186] That inconsistency harms the Court as an institution. First, it artificially restricts the scope of a constitutional provision more than can be analytically justified, warping the tools of decision to the perceived exigencies of the moment and raising the suspicion that there are no guiding principles underlying the Court's decisions, but that it is instead demonstrating result-oriented jurisprudence. Second, it undermines respect for the Court as an institution, because when the means used to reach decisions become suspect, the decisions themselves and their makers have abandoned the legitimacy necessary to sustain an institution which relies upon moral suasion as the basis of its power. Reconciliation of the Court's divergent and inconsistently applied theories of decision is therefore required. Adoption of a standing rule consonant with all of the purposes of the fourth amendment recognized by the Court over the past hundred years appears to be the only way, short of repudiating long, well-established lines of decision, of effecting such a reconciliation. The target theory of standing achieves the necessary balance between vigorous enforcement of fourth amendment principles and society's need to insure effective prosecution of criminal activity. Standing under the target theory is appropriately limited to those individuals having the personal stake in the outcome of the

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way for the parties whose rights have been violated, the society as a whole, to vindicate those rights. It is true, of course, that an individual whose fourth amendment privacy is invaded may have a civil action against the government for violation of his civil rights either directly under the fourth amendment, as in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), or pursuant to 42 U.S.C. § 1983 (1976). However, such an individual may be unable or unwilling to undertake the investment of time and resources to prosecute such an action. See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 854-55 (1970). In such a case, there is no spokesman for the public right.

[185] Even in those cases where the individual was denied the right to seek suppression, the Court has never maintained that the police conduct did not violate someone's fourth amendment rights. It merely refuses to invoke the fourth amendment where the violation was not of the defendant's privacy. The net effect is that the governmental conduct which did violate the fourth amendment goes unpunished.

[186] See text accompanying notes 126-42 supra.

controversy which has always been required of a litigant, and yet the increased availability of fourth amendment challenges will help to protect society's interest in having government behave within the limits of the Constitution.

CONCLUSION

If the courts tolerate fourth amendment violations by allowing their fruits to be admitted in evidence, then indeed our view of permissible law enforcement activities will have come full circle. The fourth amendment was enacted, at least in part, in response to the colonial experience with writs of assistance, "which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' "[187] In *Boyd*, Justice Bradley dwelt upon the essentiality of the amendment's protection to the American constitutional system.[188] It can hardly be seriously contended that the people who designed the fourth amendment to prevent such abuses did not intend it to preclude police invasion of one person's privacy to secure the conviction of another. Indeed, *Boyd* exhorts that the fourth amendment's guarantee not be so narrowly construed:

> [C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.[189]

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[187] Boyd v. United States, 116 U.S. 616, 625 (1886).

[188] Justice Boyd appealed to fundamental values:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in Entick v. Carrington, 19 Howell's State Trials (1765)].

116 U.S. at 630.

[189] Id. at 635.

And, more recently, Justice Brandeis warned of yet another danger of permitting government to violate the law:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[190]

Today the Court's face is less resolutely set against condonation of government as lawbreaker than Justice Brandeis had in mind. In large part, this has occurred because the Court seems to be afflicted with tunnel vision: it focuses so intently upon the fourth amendment's relation to individual rights that it has overlooked the amendment's collective component, the very aspect of the amendment which the exclusionary rule is designed to protect. Until the Court again chooses to recognize that society has a cognizable interest under the fourth amendment in lawful governmental behavior, that constitutional provision, while perhaps not yet quite the mere form of words Justice Holmes predicted,[191] is far from the shield against illegal governmental conduct which the framers envisaged.

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[190] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[191] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). See text accompanying note 111 supra.