

FOURTH AMENDMENT STANDING: A NEW PARADIGM BASED ON ARTICLE III RULES AND RIGHT TO PRIVACY

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This article has its origin in a misdemeanor narcotics possession tried by the author along these lines: The officer testified that the defendant had asserted that the bag containing the contraband was not his. The officer, in shaking and searching the bag, found the contraband. There was no probable cause to search the bag and the mere shaking itself violated state precedent.¹ But my motion to suppress was denied because the defendant had renounced the bag. I elected not to challenge the assertion that the bag was not his by incriminating the defendant. Predictably, the “self-serving” nature of the defendant’s statement was rejected and the defendant was convicted on the testimony of the officer.

I cannot say that the judge was in error under the present rules of standing. But I felt the entire procedure produced an unfair result. An illegal search went unsanctioned. Perhaps even worse was that the purpose of the exclusionary rule—the deterrence of police misconduct²—was defeated by a technical property-based analysis. There simply has to be a better way to decide these cases. I began to search for a paradigm that would not only deter police misconduct but also have some standard for seeking exclusion as a remedy. I began with the limitations and requirements of Article III standing—the “case and controversy”³ and the

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¹ See *Leake v. Commonwealth*, 265 S.E.2d 701, 704 (Va. 1980) (“We believe that Detective Craft’s grasping and shaking of the bag held by the defendant . . . was a search within the meaning of the Fourth Amendment.”).

² See *United States v. Leon*, 468 U.S. 897, 916 (1984).

³ See *Muskrat v. United States*, 219 U.S. 346, 356–57 (1911). Of course, the case or controversy requirement is textual. “[B]y the express terms of the Constitution, the exercise of the judicial power is limited to ‘cases’ and ‘controversies.’” *Id.* at 356. There is a serious question as to whether Congress can confer standing on a mere citizen. Compare *Alderman v. United States*, 394 U.S. 165, 175 (1969) (“Of course, Congress or state
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“direct injury”⁴ requirements—in search of a substitute for the present “legitimate expectation of privacy”⁵ Fourth Amendment standing principle. For some time, I have believed standing should arise when the product of the illegal search or the illegally seized item is sought to be introduced into evidence against the defendant. Certainly, both “injury in fact” and a true “case or controversy” exist when the illegally obtained evidence is introduced against that defendant. A thesis supported in history and in precedent is necessary to persuade the Court to adopt this new standing paradigm.

There is historical support for a broad reading of standing.⁶ Even the narrow, modern “injury in fact” rule would be sufficient to give standing to all aggrieved defendants.⁷ Moreover, my review of the cases produced a startling concept: a nexus between the Fourth Amendment and the right to privacy that the Court had held is encompassed in the Due Process Clause.⁸ This was the very historical and precedential answer for which I was looking. Support exists for liberalized standing in the substantive due process cases—especially where the vicarious standing was to prevent the threat of criminal liability.⁹ Thus, the Court can adopt this standing paradigm without violence to prior precedent. This nexus gives authority for the Court to adopt my thesis: any party against whom the evidence is to

legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose.”), *with Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (rejecting the view that “the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law”). *See also* Cass R. Sunstein, *What’s Standing after Lujan?: Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 165 (1992). Sunstein argues that *Lujan* bars Congress from enacting a statute creating citizen standing. This proposition poses a problem to my original thesis—that Congress can confer standing to enforce Fourth Amendment rights. Hence, I decided to look elsewhere: the right to privacy found in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), and *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁴ *See Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

⁵ *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

⁶ *See Sunstein, supra* note 3, at 170–71.

⁷ *See id.* at 193 (stating the modern “injury in fact” rule).

⁸ This was startling in the sense that I did not expect to find it and in that I am at best a skeptic on the issue of the privacy aspect of substantive due process.

⁹ *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

be introduced ought to have standing to object to the evidence on the ground of the illegal search or seizure of the evidence—even if the illegal search or seizure occurred to another person. If a litigant asks the Court to jettison prior precedent, that litigant has a duty to suggest its replacement.

In light of this duty, let us begin with a review of Fourth Amendment standing and related cases. I start with an 1886 case that I believe is essential for any discussion of Fourth Amendment standing. In *Boyd v. United States*,¹⁰ the Supreme Court used the following language to find that there was a violation of both the Fourth and Fifth Amendments by an illegal seizure of papers and their subsequent use at trial:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers *to be used as evidence to convict him of crime* or to forfeit his goods, is within the condemnation of that judgment.¹¹

This language was cited in *Mapp v. Ohio*¹² to justify the extension of the exclusionary rule to the states.¹³ *Mapp* cited *Jones v. United States*¹⁴ in support of the trend in the law favoring exclusion.¹⁵ According to *Mapp*, without this exclusion, the Fourth Amendment's mandate would be an

¹⁰ 116 U.S. 616 (1886). Of course, the “mere evidence” rule was abandoned in *Warden v. Hayden*, 387 U.S. 294, 300–01 (1967).

¹¹ *Boyd*, 116 U.S. at 630 (emphasis added). The “judgment” referred to is the judgment of the English jurist Lord Camden in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765). See *Boyd*, 116 U.S. at 626. This was a trespass case against English law enforcement for an illegal search and seizure arising from a general warrant. See *id.* at 625–26. This case was cited at great length in *Boyd*. It clearly suggests that the use of illegally seized evidence is part of the constitutional violation. See *id.* at 630. As far as the Fifth Amendment is concerned, this is still the law, as *Chavez v. Martinez*, 538 U.S. 760, 767 (2003), makes clear. See *infra* text accompanying note 119.

¹² 367 U.S. 643 (1961).

¹³ *Id.* at 646–47. The reference to “the condemnation of [Lord Camden’s] judgment” was replaced with “the condemnation . . . [of those Amendments].” *Id.* at 647.

¹⁴ 362 U.S. 257 (1960), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980). In *Jones*, Justice Frankfurter held for the Court that property interests were not controlling, *id.* at 266, but allowed standing if a person was “legitimately on premises.” *Id.* at 267. This latter proposition in *Jones* was abrogated by *Rakas v. Illinois*, 439 U.S. 128, 142–43 (1978).

¹⁵ See *Mapp*, 367 U.S. at 653.

“empty promise.”¹⁶ *Mapp v. Ohio* is relevant to my thesis and I will take it up again later in this article.

Jones v. United States was the first modern case to deal with Fourth Amendment standing.¹⁷ In *Jones*, the Court defined the “person aggrieved” language of Rule 41(e) of the Federal Rules of Criminal Procedure to include “anyone legitimately on premises.”¹⁸ Justice Frankfurter refused to allow that language to permit standing in any case where the evidence is sought to be introduced against that defendant.¹⁹ The Court did, however, state the problem in terms of privacy:

¹⁶ *Id.* at 660. The Court in a different context stated that for the government to copy illegally seized documents and then be able to use that information to seek the facts discovered legally would reduce the Fourth Amendment to “a form of words.” See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920).

¹⁷ The Court first stated its modern standing rule in those words in *Goldstein v. United States*, 316 U.S. 114, 121 (1942). In *Goldstein*, a wiretapping case, Justice Roberts held for the Court that a defendant not recorded by an illegally divulged wiretap did not have standing under the Federal Communications Act, ch. 652, 48 Stat. 1064, 1103 (1934), to challenge the illegality of the use of the recording to obtain testimony from another witness. See *id.* The Court applied the policy of the Fourth Amendment in coming to this conclusion. It stated, “[T]he federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.” *Id.* at 121. This was dicta but important dicta indeed. *Goldstein* was cited with approval as a Fourth Amendment standing case in both *Alderman v. United States*, 394 U.S. 165, 172 (1969), and *Wong Sun v. United States*, 371 U.S. 471, 492 (1963).

¹⁸ 362 U.S. at 261, 267. Justice Frankfurter, a liberal intellect on the Court but a traditionalist in standing and justiciability questions, wrote the plurality opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), in which a challenge to the Connecticut statute struck down in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), was denied on standing grounds. See *Poe*, 367 U.S. at 501. Justice Frankfurter basically asserted that prosecution had not occurred in the past and was not reasonably likely to occur in the future, see *id.*, whereas in *Griswold*, there was both a prosecution and a conviction. See 381 U.S. at 480.

¹⁹ 362 U.S. at 261.

In order to qualify as a “person aggrieved by an unlawful search and seizure” one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

Id.

The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.²⁰

The seminal case of *Katz v. United States*²¹ changed the terms of the analysis: “The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”²² *Katz* overruled the *Olmstead v. United States*²³ holding that an actual trespass was necessary.²⁴

Katz rejected a general right to privacy but did uphold privacy aspects of the Fourth Amendment.²⁵ It created a new standing paradigm: the reasonable expectation of privacy.²⁶

²⁰ *Id.*

²¹ 389 U.S. 347 (1967).

²² *Id.* at 353.

²³ 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

²⁴ *See Katz*, 389 U.S. at 353; *Olmstead*, 277 U.S. at 464.

²⁵ 389 U.S. at 350–51.

[T]he Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

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In *Mancusi v. DeForte*,²⁷ the Court applied the new *Katz* formulation and came up with this phrase: “[A] reasonable expectation of freedom from governmental intrusion.”²⁸ The Court came very close to holding that a person could assert the rights of another entity.

Frank DeForte was a vice-president of a Teamsters Local in Nassau County, New York.²⁹ As such, he had an office at the Union’s local headquarters.³⁰ The Court asserted that DeForte had an expectation of personal privacy in that office and in its papers, even though they were not his papers.³¹ Justices Black and Stewart argued in dissent that the Court was allowing DeForte to assert the rights of the Union de facto.³² The dissent stated that according to the *Jones* formulation, the introduction of illegally obtained evidence alone was not sufficient to cause a Fourth Amendment violation, implying that this was exactly what the Court did.³³

In *Alderman v. United States*,³⁴ the Court again held that the mere introduction of evidence against a party did not create standing.³⁵ “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”³⁶ The Court also suggested that deterring police misconduct did not justify the extension of the exclusionary rule to anyone other than the victim of the illegal search or seizure.³⁷ It went on to hold that there was no special rule for “[c]oconspirators and codefendants.”³⁸

Id. (footnotes omitted).

²⁶ *See id.* at 353. The phrase “privacy upon which he justifiably relied” seems to be the closest to the term “reasonable expectation of privacy” in the *Katz* opinion. *See id.*

²⁷ 392 U.S. 364 (1968).

²⁸ *Id.* at 368 (citing *Katz*, 389 U.S. at 352).

²⁹ *Id.*

³⁰ *See id.* DeForte was the custodian of the seized papers and spent time in that office. *Id.* at 368–69.

³¹ *Id.* at 369.

³² *See id.* at 374–75 (Black, J., dissenting).

³³ *See id.* at 376. I submit that the dissent is correct. DeForte was asserting the Union’s rights.

³⁴ 394 U.S. 165 (1969).

³⁵ *Id.* at 171–72.

³⁶ *Id.* at 174.

³⁷ *Id.* at 174–75. The facts in *United States v. Payner*, 447 U.S. 727, 728–31 (1980), might cause some readers to question this assumption.

³⁸ *Id.* at 172.

The Court in *Rakas v. Illinois*³⁹ promulgated the present standing rule.⁴⁰ Rakas and another were passengers in a car allegedly involved in an armed robbery.⁴¹ Shells and a sawed-off shotgun found in the motor vehicle were used at trial to convict both men.⁴² The men neither owned the automobile nor “assert[ed] that they owned the rifle or shells seized.”⁴³ The Appellate Court of Illinois held that “a mere passenger . . . lacks standing to challenge the legality of the search of the vehicle.”⁴⁴ It further held that neither of the passengers were “persons aggrieved” by the search and that each only sought to bar “the use of evidence gathered as a consequence of a search and seizure directed at someone else and fail[ed] to prove an invasion of [his] own privacy.”⁴⁵

At the United States Supreme Court, Rakas and his fellow passenger argued that the use of evidence against them from the search of the vehicle was a Fourth Amendment violation.⁴⁶ They characterized their standing proposal as a “target” theory.⁴⁷ The Court reaffirmed that “Fourth Amendment rights are personal” in nature⁴⁸ and that there are ample legal rights to deter law enforcement:

There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights or seek redress under state law for invasion of privacy or trespass.⁴⁹

³⁹ 439 U.S. 128 (1978).

⁴⁰ *See id.* at 143.

⁴¹ *See id.* at 130.

⁴² *Id.* at 130–31.

⁴³ *Id.*

⁴⁴ *Id.* at 131 (quoting *People v. Rakas*, 360 N.E.2d 1252, 1253 (Ill. App. Ct. 1977)).

⁴⁵ *Id.* at 132 (quoting *Rakas*, 360 N.E.2d at 1254).

⁴⁶ *See id.*

⁴⁷ *See id.* at 133. The passengers also argued a more conventional argument: they were “legitimately on premises” and thus squarely under the prior precedent of *Jones v. United States*. *Id.* at 132. The Court rejected this argument as well. *Id.* at 148–49.

⁴⁸ *Id.* at 133 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

⁴⁹ *Id.* at 134 (citations omitted). The Court also emphasized the “substantial social cost” of exclusion, *id.* at 137, and stated that it was legitimate to consider the “class of persons” entitled to invoke the rule. *Id.* at 138. This shows the contrast between Article III

Rakas, in essence, overruled *Jones*'s "legitimately on premises" test for standing,⁵⁰ but clearly reaffirmed that privacy was the touchstone of Fourth Amendment rights.⁵¹ The *Rakas* Court applied the *Katz* test for determining whether there was a protected interest—a "legitimate expectation of privacy"—but refused passengers in a vehicle the right to challenge the search of that vehicle.⁵² The *Rakas* Court also rejected the "target" theory, citing the criticism of Justice Harlan in *Alderman* that it would be an undue burden on law enforcement, especially regarding things such as wiretapping.⁵³ Four members of the Court dissented and accused the majority of renouncing the central holding of *Katz*,⁵⁴ asserting, "The Court today holds that the Fourth Amendment protects property, not people."⁵⁵

The *Rakas* Court distinguished the injury in fact, e.g., Article III standing, formulation:

It should be emphasized that nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests

standing and Fourth Amendment standing. I submit that in a federal court, this rule ought to apply.

⁵⁰ *See id.* at 142–43.

⁵¹ *Id.* at 143.

⁵² *See id.* at 148.

⁵³ *See id.* at 135–37. Although the Court was correct to reject the "target" thesis and Justice Harlan was correct about the undue burden, the "target" thesis deserves a better burial than it received. *Jones* held, "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, *one against whom the search was directed*" *Jones v. United States*, 362 U.S. 257, 261 (1960) (emphasis added), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980). Much of Justice Harlan's criticism was wise in that it is impossible to determine who the target is in some cases. *Alderman v. United States*, 394 U.S. 165, 188–89 & n.1 (1969) (Harlan, J., concurring in part and dissenting in part). However, it is crystal clear against whom the evidence is being used in court: the defendant. No litigation will be wasted on that determination.

⁵⁴ "[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁵⁵ *Rakas*, 439 U.S. at 156 (White, J., dissenting).

rather than basing his claim for relief upon the rights of third parties.⁵⁶

Rakas also, in effect, questioned the “automatic standing” rule of *Jones*.⁵⁷ In *Jones*, the Court held that it was unjust to require the defendant in a possessory crime to admit to the crime to establish standing to challenge the illegal search.⁵⁸ *Jones* was no isolated case. The Court removed one rationale for the automatic standing rule in *Simmons v. United States*,⁵⁹ where the evidence to show standing could not be used to show guilt in the government’s case-in-chief.⁶⁰

In *Smith v. Maryland*,⁶¹ the Supreme Court fully adopted the *Katz* privacy paradigm⁶² and cited Justice Harlan’s characterization as precedent.⁶³ *Rakas* was followed in *Rawlings v. Kentucky*,⁶⁴ where the

⁵⁶ *Id.* at 139 (majority opinion). The use of illegally seized evidence is a clear injury in fact; however, it also amounts to the assertion of the rights of another unless the introduction of the evidence itself is the constitutional violation. As we shall see, it may not matter due to the privacy right that underlies the exclusionary rule being made applicable to the states. See *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

⁵⁷ See *Rakas*, 439 U.S. at 135 n.4. This question was answered in *United States v. Salvucci*, 448 U.S. 83, 85 (1980).

⁵⁸ 362 U.S. at 263–64 (“It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.”). *Jones* was technically a supervisory, not a constitutional, case. See *id.* at 264. The Court cited Rule 41(e) of the Federal Rules of Criminal Procedure, allowing a “person aggrieved by an unlawful search and seizure” to seek suppression. *Id.* Most states have a similar statute or rule. See, e.g., CAL. PENAL CODE § 1538.5 (West 2000); GA. CODE ANN. § 17-5-30 (2004); 725 ILL. COMP. STAT. ANN. 5/114-12 (West 1992); N.Y. CRIM. PROC. LAW § 710.20 (McKinney 1995); TEX. CODE CRIM. PROC. ANN. art 38.23 (Vernon 2005); VA. CODE ANN. § 19.2-60 (2004).

⁵⁹ 390 U.S. 377 (1968).

⁶⁰ *Id.* at 394. No “defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him.” *Id.* at 393. However, the testimony may be used to impeach the defendant. See, e.g., *People v. Sturgis*, 317 N.E.2d 545, 547–48 (Ill. 1974).

⁶¹ 442 U.S. 735 (1979).

⁶² *Id.* at 740 (“[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”).

⁶³ See *id.* Justice Harlan stated that there should be an “actual (subjective) expectation of privacy” and that that the expectation of privacy is “one that society is prepared to
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defendant had no standing to challenge the illegal search of his girlfriend's purse.⁶⁵ Finally, in *United States v. Padilla*,⁶⁶ the Court rejected a joint co-conspirator standing rule⁶⁷ arising from the allegedly illegal stop of a vehicle that uncovered the conspiracy.⁶⁸

Some scholars have criticized the *Rakas* decision. Professor Saltzburg is severe⁶⁹ in his criticism of the Court:

It was *Rakas* that held that passengers in an automobile have no expectation of privacy in the vehicle. If the driver chooses to share an expectation of privacy . . . —perhaps even taking turns driving—why is there no reasonable expectation on the part of the passenger? Suppose the passenger and the driver are lovers who seek to use the car as their private meeting place; giving the driver the only expectation of privacy makes little sense.

What kind of world does the Supreme Court believe we live in and what kind of people inhabit that world? . . . When people open their homes or share the inner space of their cars, they do so believing that their guests benefit as they do from the place they inhabit. This is not how the Court sees it. For the Court, no one who accepts an invitation into a home, office or car has a right to assume that the owner has not only shared the space but the privacy that goes with it.⁷⁰

In addition to the academic criticism of *Rakas*, the Supreme Court of New Jersey, in rejecting *Rakas* as a matter of state constitutional law, held

recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁶⁴ 448 U.S. 98 (1980).

⁶⁵ *See id.* at 105. The purse contained his drugs. *Id.*

⁶⁶ 508 U.S. 77 (1993) (per curiam).

⁶⁷ *Id.* at 81. Instead, "[e]xpectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims." *Id.* at 82.

⁶⁸ *Id.* at 79.

⁶⁹ Certainly more severe than I would be comfortable with in print. I quote it as an example of scholarly criticism of *Rakas*. *See also* Wesley MacNeil Oliver, *Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. R. 100, 120 n.29 (2005); Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquist Begun?*, 62 IND. L. J. 273, 286 (1987).

⁷⁰ Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 144–45 (2003).

that *Rakas* and other cases prevent an owner or “legitimate possessor” to assert Fourth Amendment rights under some circumstances.⁷¹ Vermont’s highest court followed suit, criticizing the *Rakas* decision as being “markedly different from and more stringent than that announced in its predecessor, *Jones v. United States*, for it both altered the focus of Fourth Amendment analysis, and increased the burden imposed upon a defendant seeking to invoke the protection of the Fourth Amendment.”⁷²

Perhaps the most severe criticism of the personal “expectation of privacy” standing rule was the trial court and the dissenting opinion in *United States v. Payner*.⁷³

Jack Payner allegedly lied on his 1972 tax return as to a foreign bank account.⁷⁴ The Government sought to prove this by obtaining a loan guarantee using the foreign bank account as collateral.⁷⁵ They obtained the document by a “flagrantly illegal search”⁷⁶ of the briefcase of a third party.⁷⁷ The District Court for the Northern District of Ohio found that the United States “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

⁷¹ See *State v. Alston*, 440 A.2d 1311, 1318 (N.J. 1981). “Because we find that these recent decisions of the Supreme Court provide persons with inadequate protection against unreasonable searches and seizures, we respectfully part company with the Supreme Court’s view of standing and construe Article I, paragraph 7 of our State Constitution to afford greater protection.” *Id.* at 1318–19. The New Jersey Supreme Court also criticized *United States v. Salvucci*, 448 U.S. 83, 92–93 (1980) and *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980), both in which the U.S. Supreme Court held that there is no “automatic standing” rule and that only legitimate expectations of privacy are protected by the Fourth Amendment. *Alston*, 440 A.2d at 1313–19.

⁷² *State v. Wood*, 536 A.2d 902, 904 (Vt. 1987) (citation omitted). *Wood* held that the state constitution required automatic standing in all possessory offenses. *Id.* at 908. Other state courts have held similar to *Alston* and *Wood*. See *State v. Gonzalez*, 738 A.2d 1247, 1252 (N.H. 1999) (possessory offenses); *Commonwealth v. Watson*, 723 N.E.2d 501, 504 n.4 (Mass. 2000) (all possessory offenses); *Commonwealth v. Gordon*, 683 A.2d 253, 256 (Pa. 1996) (same); *State v. Simpson*, 622 P.2d 1199, 1206–07 (Wash. 1980) (same).

⁷³ 447 U.S. 727 (1980).

⁷⁴ *Id.* at 728.

⁷⁵ *Id.* at 728–29.

⁷⁶ *Id.* at 729.

⁷⁷ *Id.* at 730.

evidence against third parties.”⁷⁸ The District Court held that it could suppress the evidence under the supervisory power of the federal courts.⁷⁹ The Sixth Circuit affirmed the District Court.⁸⁰ The Supreme Court reversed and held that the supervisory power did not give a general power to exclude evidence.⁸¹

The three dissenting Justices—Marshall, Blackmun, and Brennan—stated that this decision turns the privacy standing rule “into a sword to be used by the Government to permit it deliberately to invade one person’s Fourth Amendment rights in order to obtain evidence against another person.”⁸²

One case does not make a trend. Nevertheless, this case was cited by Professor Dripps in his article on the contingent exclusionary rule as an example of the standing rules being used to avoid suppression.⁸³ Additionally, Professor Loewy asserted in the *Michigan Law Review*, “By admitting the evidence in this type of case, the Court has created a powerful incentive not to take the substantive rights guaranteed by the [F]ourth [A]mendment seriously.”⁸⁴

This federal standing rule is where the law stands in every state with one exception—Louisiana.⁸⁵ In 1974, the Louisiana Constitution was

⁷⁸ *Id.* (quoting *United States v. Payner*, 434 F. Supp. 113, 132–33 (N.D. Ohio 1977)). This is similar to the situation in which police were trained to violate willfully the *Miranda* rule to obtain an admission, discussed in *Missouri v. Seibert*, 542 U.S. 600, 609–10 (2004).

⁷⁹ *Payner*, 447 U.S. at 731.

⁸⁰ *Id.*

⁸¹ *See id.* at 733.

⁸² *Id.* at 738 (Marshall, J., dissenting).

⁸³ Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 14 & n.67 (2001).

⁸⁴ Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 912 (1989).

⁸⁵ In Louisiana, as a matter of state constitutional law, there is such a standing rule. *See State v. Roach*, 338 So. 2d 621, 623 (La. 1976). *See also* Mark Silverstein, Note, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 254–55 & n.363 (1989). “There is no equivalent under Louisiana constitutional law to the federal rule that one may not raise the violation of a third person’s constitutional rights.” *Id.* (quoting *State v. Owen*, 453 So. 2d 1202, 1205 (La. 1984)). Most states have rejected this rule. *See* cases cited in *Commonwealth v. Hawkins*, 718 A.2d 265, 269 n.6 (Pa. 1998) (rejecting the rule as well).

The New Jersey Supreme Court held that anyone with a “proprietary, possessory or participatory interest in either the place searched or the property seized” has standing to
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revised in a state constitutional convention.⁸⁶ The search and seizure provision was one of the provisions revised.⁸⁷ It conferred standing on anyone against whom evidence is presented in court.⁸⁸ The Louisiana Supreme Court quoted a law review article, stating:

[The constitutional provision] was intended to give standing to third persons adversely affected, and “Thus, if evidence is obtained by an improper search or seizure, it cannot be used against anyone whose guilt it would tend to prove and thus practically cannot be used at all. The scope of the exclusionary rule is thus enlarged, with the expectation that its deterrent effect will be increased.”⁸⁹

A student note in the *Illinois Law Review* suggests that liberalizing standing did not substantially increase victories for defendants.⁹⁰

It is necessary now to begin with a brief historical overview of Article III standing. Article III standing is largely a limitation on federal court jurisdiction.⁹¹ In the twin cases of *Massachusetts v. Mellon* and *Frothingham v. Mellon*,⁹² the Court held that neither the state nor a

challenge the legality of the search or seizure. *State v. Alston*, 440 A.2d 1311, 1319 (N.J. 1981). *Alston* also allowed the “automatic standing” rule of *Jones v. United States*, 362 U.S. 257, 263 (1960), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980), to be asserted in possessory cases. *Alston*, 440 A.2d at 1320. The New Jersey Court did not go as far as Louisiana.

The Supreme Court of Alaska held that if the intentional unlawful act of law enforcement was directed at another party—as in *Payner*—then that targeted party has standing. *Waring v. State*, 670 P.2d 357, 362 (Alaska 1983).

⁸⁶ See *State v. Culotta*, 343 So. 2d 977, 981 (La. 1976).

⁸⁷ *Id.* at 981–82. The Louisiana Constitution states, in pertinent part, “Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.” LA. CONST. of 1974, art. I, § 5. This has been upheld by the Supreme Court of Louisiana in a line of cases. See, e.g., *Culotta*, 343 So. 2d at 981–82; *Roach*, 338 So. 2d at 623–24.

⁸⁸ LA. CONST. of 1974, art. I, § 5.

⁸⁹ *Culotta*, 343 So. 2d at 982 (quoting Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 23–24 (1974)).

⁹⁰ See Silverstein, *supra* note 85, at 255.

⁹¹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). I owe a great debt to Professor Sunstein’s article for this line of analysis. See Sunstein, *supra* note 3, at 164–65.

⁹² *Frothingham v. Mellon*, 262 U.S. 447 (1923). Both cases were heard together and have the same opinion and citation.

taxpayer had standing to argue a Tenth Amendment violation.⁹³ The Court's power under Article III extends only to proceedings "of a justiciable character."⁹⁴ Hence, there was no actual injury and no federal court jurisdiction.⁹⁵

That rule was relaxed to some extent in *Flast v. Cohen*,⁹⁶ but the injury in fact test for federal court jurisdiction has remained intact.⁹⁷ However, there is no hint that the Court has even discussed Article III standing in a search and seizure context. The Court in *Lujan v. Defenders of Wildlife* established a three-pronged test for the existence of standing:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."⁹⁸

Not every scholar agrees that injury in fact is the proper test for Article III standing.⁹⁹ Professor Cass R. Sunstein asserted in the *Michigan Law Review* that even the English common law before 1789 had a broader view of standing to sue.¹⁰⁰

⁹³ See *id.* at 479–80.

⁹⁴ See *id.* at 480.

⁹⁵ See *id.*

⁹⁶ See 392 U.S. 83, 101 (1968).

⁹⁷ See *id.* at 102–03. The Court in *Flast* stated that a taxpayer seeking to contest the use of tax monies in an alleged violation of the Establishment Clause has standing due to the nature of the violation: the Establishment Clause is a limitation on states' power to spend money. *Id.* at 103. The injury in fact test has been upheld in a number of cases. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218–19 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

⁹⁸ *Lujan*, 504 U.S. at 560–61 (alterations in original) (citations omitted).

⁹⁹ See Sunstein, *supra* note 3, at 166.

¹⁰⁰ *Id.* at 172.

Professor Sunstein posits that English practice called for various forms of suits, some brought by a stranger:

Before and at the time of the framing, the English practice was to allow strangers to have standing in the many cases involving the ancient prerogative writs. . . . “The English tradition of *locus standi* in prohibition and certiorari is that ‘a stranger’ has standing, but relief in suits by strangers is discretionary.”¹⁰¹

Professor Sunstein cites the 1793 case of *Chisholm v. Georgia*.¹⁰² Not many scholars talk about *Chisholm* as it was the first Supreme Court case overruled by a constitutional amendment.¹⁰³ *Chisholm*’s being allowed to sue the State of Georgia in a federal court produced a political firestorm that brought about the Eleventh Amendment.¹⁰⁴ Sunstein, however, cites it for a definition of “Case” and “Controversy” as used in the original Constitution: “It makes sense to begin with the text of Article III, which extends ‘Judicial Power’ to certain specified ‘Cases’ and ‘Controversies.’ In the original understanding, ‘cases’ included both civil and criminal disputes, where as ‘controversies’ were limited to civil disputes.”¹⁰⁵

Professor Sunstein suggests that standing is not required by the text of Article III, only a case (defined by Justice Iredell in *Chisholm* as a civil or criminal case) or controversy.¹⁰⁶ He concludes that if we go beyond the text in promulgating standing rules, we must do so on the basis of judicial history, from the Framers (and before) to this day.¹⁰⁷

Language in *Muskrat v. United States*¹⁰⁸ gives some support to that contention:

By cases and controversies are intended the claims of litigants brought before the courts for determination by

¹⁰¹ *Id.* at 171 (quoting Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1274 (1961)).

¹⁰² *Id.* at 168 n.19.

¹⁰³ Mark Strasser, *Chisholm, The Eleventh Amendment, and Sovereign Immunity: On Alden’s Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 606–07 (2001).

¹⁰⁴ *See id.* at 620.

¹⁰⁵ Sunstein, *supra* note 3, at 168 (footnote omitted).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 169. Professor Sunstein cites a number of cases and other authorities in support of a broad view of standing, both before and after the adoption of the Constitution. *See id.* at 170–77.

¹⁰⁸ 219 U.S. 346 (1911).

such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case.¹⁰⁹

*Muskra*t continued its discussion, stating: “The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to “a case in law or equity” in which a right under such law is asserted in a court of justice.”¹¹⁰

Regardless of whether Justice Scalia or Professor Sunstein is correct, there is at the very least “injury in fact” when unconstitutionally obtained evidence is used against a defendant in court.¹¹¹ The Court, however, need only go as far as the *Lujan* test: use of illegally obtained evidence is first “an invasion of a legally protected interest” (the Fourth Amendment rights of some person), an interest that is “concrete and particularized”¹¹² (it either is or is not an illegal search or seizure) as well as “‘actual’ . . . not ‘conjectural’”¹¹³ (the defendant may well be convicted and is placed in greater danger of conviction by its use); there is “a causal connection between the injury and the conduct complained of”¹¹⁴ (in that the illegal search or seizure is the source of the evidence); and finally, it is certainly “‘likely’ . . . that the injury will ‘be redressed by a favorable decision.’”¹¹⁵

The injury to the defendant when evidence from the unconstitutional search or seizure is used meets the three-prong test in *Lujan*. Therefore, there ought to be standing in a federal court. The *Boyd* case gives historical support in a Fifth Amendment context and suggests that it was

¹⁰⁹ *Id.* at 357 (quoting *In re Pac. R. Comm’n*, 32 F. 241, 255 (1887)).

¹¹⁰ *Id.* at 358 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821)).

¹¹¹ See Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 81 (1985) (“Review of these cases makes it clear that *Rakas*, *Salvucci*, *Rawlings*, and *Payner* all had demonstrated injury-in-fact.”).

¹¹² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹¹³ *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

true in search and seizure cases.¹¹⁶ In such a Fifth Amendment context, the Court has held exactly that—in the 2003 case of *Chavez v. Martinez*.¹¹⁷

The United States Supreme Court held in *Chavez* that neither the Fifth Amendment nor the Due Process Clause was violated by the admittedly coercive questioning, but held that in the Fifth Amendment context, a violation does not occur until trial.¹¹⁸ Although *Chavez* arose in a different setting—the coercion of a statement to be used at court—I would also suggest that if a constitutional violation can occur at trial in the Fifth Amendment context, then there is no logical reason not to apply that principle to the admission of evidence obtained from an illegal search or seizure.¹¹⁹ Furthermore, both *Boyd* and *Mapp* contain language supporting the idea that the use of evidence obtained as a result of an illegal search or seizure is also a violation of the Fourth Amendment. The *Boyd* Court held: “[A]ny forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment [that it was an illegal search].”¹²⁰

Boyd was followed in *Mapp* as to this point: “[I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon”¹²¹ Furthermore, there is supportive language in

¹¹⁶ See *Boyd v. United States*, 116 U.S. 616, 630, 633 (1886).

¹¹⁷ 538 U.S. 760 (2003).

¹¹⁸ See *id.* at 767 (“Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial” (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990))). The Court held in *Verdugo-Urquidez* that the violation of the Fourth Amendment occurs at the time of the seizure, not at trial. 494 U.S. at 264. I do not disagree with that. However, I contend that the use of illegally seized evidence at trial creates injury and that the defendant ought to have standing to challenge that illegality.

¹¹⁹ There would not have to be an independent constitutional violation found by the use in court of the illegally seized evidence to show that its use would be injury in fact to the defendant. See *Jones v. United States*, 362 U.S. 257, 260 (1960) (“The issue of petitioner’s standing is to be decided with reference to Rule 41(e) of the Federal Rules of Criminal Procedure.”), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980).

¹²⁰ 116 U.S. at 630. Of course, much of the holding of *Boyd* was questioned, if not overruled, in *Couch v. United States*, 409 U.S. 322, 330 (1973), and *Bellis v. United States*, 417 U.S. 85, 89–90 (1974).

¹²¹ 367 U.S. 643, 655–56 (1961).

Silverthorne Lumber Co. v. United States,¹²² when the Court held, “The 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.*”¹²³

I recognize that the exclusionary rule is not constitutionally mandated today, but this historical support is nevertheless very compelling. Since *Rakas*, the Supreme Court has not been interested in even a chink in the armor of no vicarious standing. I would suggest that the introduction of illegal evidence does establish “injury in fact” sufficient to show Article III standing in the federal courts.¹²⁴

The Court in *Alderman v. United States* offered this rationale for refusing to “extend” standing to third parties:

There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so.¹²⁵

The problem with this analysis is that unless the defendant can assert the victim’s successful suppression in that defendant’s own case, the fruits of a judicially-found unconstitutional search are used as evidence and illegal behavior is not deterred. Suppose the victim is not charged but a third party is; an illegal search is neither effectively sanctioned nor deterred.

The Court’s hostility to the idea of vicarious rights becomes painfully apparent with this quotation:

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

¹²² 251 U.S. 385 (1920).

¹²³ *Id.* at 392 (emphasis added). The Court did not intend to overthrow standing in *Silverthorne*. *Silverthorne* demonstrates that my thesis is not foreign to the traditions and history of the Fourth Amendment.

¹²⁴ Of course, the limitation of Article III would be a limitation on Fourth Amendment standing. The introduction of evidence against a person triggers potential injury regardless of the source of the evidence, provided the evidence was procured by government in whole or in part.

¹²⁵ *Alderman v. United States*, 394 U.S. 165, 174 (1969).

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.¹²⁶

I would respectfully suggest this is an unfair characterization of the argument. The right to be asserted is the identical Fourth Amendment right merely asserted by a third party. There can be no harm in asserting such a right if there is evidence from that search to be presented at trial. Moreover, if the Fourth Amendment right to privacy is identical to the substantive due process privacy right, then we would have to look to the standing rules in those cases to see if they are consistent. The cases suggest otherwise. The constitutional right violated is the same. There is no rational distinction at trial for the admission of evidence in one case and not the other.¹²⁷

It may be argued that the Fourth Amendment is textually different from the Fifth.¹²⁸ I agree. However, that is not fatal to this argument. The Court in *United States v. Verdugo-Urquidez*¹²⁹ held that the clause “[t]he right of *the people*” only includes the people of the United States, not persons abroad.¹³⁰ The *Chavez* Court used a textual analysis of the Fifth Amendment to hold that the actions of the police did not violate that Amendment.¹³¹ There is nothing preventing that argument in a Fourth Amendment setting to confer standing: if it is the “right” of “the people” to be free from illegal searches and seizures, then any one of those “people” (pardon my grammar here) should be able to challenge the use of illegally seized evidence when it is used against them because under the theory of *Verdugo-Urquidez*, it is the people of the United States that are protected

¹²⁶ *Id.*

¹²⁷ I do not intend to bring in an Equal Protection analysis or suggest the argument but counsel should consider that point as well.

¹²⁸ Compare U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”), with U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).

¹²⁹ 494 U.S. 259 (1990).

¹³⁰ *Id.* at 265 (emphasis added).

¹³¹ See *Chavez v. Martinez*, 538 U.S. 760, 766 (2003).

from invasion of privacy by government absent a warrant or probable cause.¹³²

Furthermore, there is an historically based public interest in the effective enforcement of the Fourth Amendment. *Carroll v. United States*,¹³³ for example, states, “The Fourth Amendment is to be construed . . . in a manner which will conserve public interests”¹³⁴ In addition, the Court in *Warden v. Hayden*¹³⁵ held that there is an intimate nexus between suppression of evidence and the protection of privacy rights:¹³⁶ “The *remedy of suppression* . . . made possible *protection of privacy from unreasonable searches* without regard to proof of a superior property interest”¹³⁷

There is further support found in case law, in an unusual nexus between the Fourth Amendment right to be free from an illegal search/seizure and the right of privacy found in substantive due process. The Court in *Mapp* stated the significant words “substantive protections of due process” in the context of both search and seizure and a right to privacy. And, there is a right to privacy arising from substantive due process.¹³⁸

In *Griswold v. Connecticut*,¹³⁹ the Court promulgated a “right to privacy” sufficient to strike down the Connecticut law prohibiting married couples from obtaining contraception.¹⁴⁰ The *Griswold* Court cited *Mapp* in these words: “We recently referred in *Mapp v. Ohio* to the Fourth Amendment as creating a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people.’”¹⁴¹ It is settled law that the Fourth Amendment has long been held explicitly to protect a right of privacy.¹⁴² This right to privacy was extended in other

¹³² 494 U.S. at 266.

¹³³ 267 U.S. 132 (1925).

¹³⁴ *Id.* at 149.

¹³⁵ 387 U.S. 294 (1967).

¹³⁶ *See id.* at 305.

¹³⁷ *Id.* at 307 (emphasis added).

¹³⁸ *See Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961).

¹³⁹ 381 U.S. 479 (1965).

¹⁴⁰ *See id.* at 485.

¹⁴¹ *Id.* at 484–85 (citation omitted).

¹⁴² See cases collected at Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 327 n.126 (1998). The oldest case cited is *Weeks v. United States*, 232 U.S. 383 (1914). Professor Clancy cites *Griswold*, 381 U.S. at 484–85, as holding that the Fourth Amendment, along with the Fifth, “created a right of privacy.” Clancy, *supra*.

cases such as *Roe v. Wade*,¹⁴³ *Moore v. City of East Cleveland*,¹⁴⁴ and *Zablocki v. Redhail*.¹⁴⁵

Prior to *Mapp*, the Court held in *Wolf v. Colorado*¹⁴⁶ that the Fourth Amendment's rights are "basic to a free society"¹⁴⁷ and even though the exclusionary remedy was not at that time applied to the states,¹⁴⁸ the Due Process Clause would and did forbid unlawful searches and seizures by state officials.¹⁴⁹ *Mapp* held that this arose from substantive due process.¹⁵⁰

Thus, these cases hold that the Fourth Amendment right to privacy and the substantive due process right to privacy are two aspects of the same right.¹⁵¹ Professor Cloud comes close to this new paradigm in his historical assessment of Fourth Amendment cases during the *Lochner*¹⁵² era as superior to the modern day Court's analysis—and he thinks the property-based nature of substantive due process was the reason.¹⁵³ The

¹⁴³ 410 U.S. 113, 153 (1973) (abortion rights). I do not intend by citing *Roe* that I concede the legitimacy or wisdom of the abortion cases. I happen to agree with Professor John Hart Ely: "It [*Roe*] is bad because it is bad constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935 (1973).

¹⁴⁴ 431 U.S. 494, 499 (1977) (arbitrary classification on "family living arrangements").

¹⁴⁵ 434 U.S. 374, 384 (1978) (right to marry).

¹⁴⁶ 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁴⁷ *Id.* at 27.

¹⁴⁸ *See id.* at 26.

¹⁴⁹ *Id.* at 27–28.

¹⁵⁰ *See* 367 U.S. at 655–56 ("[E]xtending the substantive protections of due process to all constitutionally unreasonable searches—state or federal."). The *Mapp* Court also referred several times to the "right to privacy" that has been cited in such cases as *Roe*. *Id.* at 651, 653. The Court retreated from the doctrine that the exclusionary rule was constitutionally required in *United States v. Calandra*, 414 U.S. 338, 348 (1974); however, that does not matter for this analysis as long as the exclusionary rule is required in state or federal prosecutions. *See id.*

¹⁵¹ *Graham v. Connor*, 490 U.S. 386 (1989), is not to the contrary. *Graham* is an excessive force case in the context of an illegal stop or seizure. *Id.* at 390. The Court held that the textual protections of the Fourth Amendment and its objective reasonableness standard override a substantive due process standard promulgated by a federal court of appeals. *See id.* at 394–95.

¹⁵² *See generally* *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹⁵³ *See* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 620 (1996).

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prior history of both aspects of the privacy right support the extension of standing in Fourth Amendment cases to exclusion of evidence admitted against one party from the illegal search or seizure of another party.¹⁵⁴

However, another aspect of the right to privacy cases is a greater willingness to allow some degree of vicarious standing to assert the constitutional rights of another—especially to prevent criminal exposure. In *Griswold*, the persons distributing the contraceptives to married couples were allowed to assert the constitutional rights of their customers under an aider and abettor theory.¹⁵⁵ In *Eisenstadt v. Baird*,¹⁵⁶ the Court removed all pretense: “There can be no question, . . . that Baird has sufficient interest in challenging the statute’s validity to satisfy the ‘case or controversy’ requirement of Article III.”¹⁵⁷ The Court in *Baird* asserted that the “[e]nforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives.”¹⁵⁸ Single persons could not assert their own rights—Baird was the only party that could.¹⁵⁹

However, Professor Cloud does not assert that the substantive due process privacy right is one portion of the privacy right that the Fourth Amendment protects. *See id.* at 562–63, 620.

¹⁵⁴ *See id.* at 618–20. Professor Cloud argues in his article that “the formalist linkage between property, privacy, and liberty was more effective than in contemporary theory at implementing the [Fourth] Amendment’s purposes and was more consistent with its text and history, particularly when it imposed substantive as well as procedural limitations on searches and seizures.” *See id.* at 563. Professor Reitz asserts in his article, “Third party standing has also been recognized to permit a private school to challenge the constitutionality (under the substantive due process right of privacy) of a statute requiring parents, upon pain of criminal penalties, to send their children to public schools.” John C. Reitz, *Standing to Raise Constitutional Issues*, 50 AM. J. COMP. L. 437, 448 (2002).

¹⁵⁵ *See* *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). Because the official handing out the contraceptive was criminally liable just as the married couple to which he gave it, he could assert the couple’s constitutional rights. *See id.*

¹⁵⁶ 405 U.S. 438 (1972).

¹⁵⁷ *Id.* at 443. The Massachusetts law provided that anyone who distributed a contraceptive, other than a licensed physician or a pharmacist filling a valid prescription for a married couple, was guilty of a *felony*. *See id.* at 440–42.

¹⁵⁸ *Id.* at 446.

¹⁵⁹ *See id.* Single persons were “not themselves subject to prosecution and, to that extent, [were] denied a forum in which to assert their own rights.” *Id.* The victim of an illegal search may seek a civil remedy. However, under the present standing rule, the party against whom the illegally seized evidence is introduced is “denied a forum in which to assert [his/her] own rights” unless there is standing to allow such a challenge to the evidence in court. *Baird*, 405 U.S. at 446. Thus, *Baird* is supportive.

Finally, in *City of Akron v. Akron Center for Reproductive Health, Inc.*,¹⁶⁰ the Court held that a physician could assert the constitutional rights of minors seeking abortions because he was “subject to potential criminal liability.”¹⁶¹ I would argue that the assertion of another’s alleged invasion of privacy right when that illegally seized evidence is used in court is not constitutionally different from these cases. All touch on potential criminal liability.¹⁶²

Because *Wolf/Mapp* established a substantive due process right arising from the Fourth Amendment, this creates a constitutional basis (and I would submit a duty) for Article III standing to require exclusion in a federal court (and a state court as well). It also calls into question many of the other standing cases cited throughout this article. I would suggest that the Court’s entire premise becomes faulty if there is a substantive due process/right of privacy aspect to illegal searches and seizures when the Court has in those substantive due process cases allowed that very right to privacy to be asserted vicariously to avoid criminal prosecution. I do not seek to overthrow the *Katz* expectation of privacy formulation. Expectations of privacy are still important in Fourth Amendment jurisprudence; they may determine if there is a search or seizure. The *Katz* rule broadens the protections and reach of the Fourth Amendment, but they should not limit who can challenge an illegal search or seizure.

Hence, this nexus is a new paradigm that the Court cannot (and should not) ignore. I suggest that this constitutional paradigm requires at the very least a reconsideration of the standing requirement promulgated by the Court.¹⁶³ By restricting this right to only cases when the evidence is used

¹⁶⁰ 462 U.S. 416 (1983).

¹⁶¹ *Id.* at 440 n.30 (citing *Bellotti v. Baird*, 443 U.S. 622, 627 n.5 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976), *abrogated by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Doe v. Bolton*, 410 U.S. 179, 188–89 (1973)).

¹⁶² *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925), stated that the injury to the private school was “very real, not a mere possibility in the remote future” and that “[p]revention of impending injury by unlawful action is a well recognized function of courts of equity.” The private school asserted the parents’ right to “choose schools where their children will receive . . . appropriate training.” *Id.* at 532. In addition, the challenged act, styled as a compulsory education act, was criminal in nature, with a misdemeanor penalty. *See id.* at 530. In effect, *Pierce* agrees with the later cases in that respect.

¹⁶³ Of course, Congress could enact a statute to establish Fourth Amendment standing in federal cases as a matter of criminal procedure. The property-based standing rule is not constitutionally mandated, so neither *Dickerson v. United States*, 530 U.S. 428, 437 (2000), nor *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), would bar Congress from acting.

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against the defendant, it will not increase litigation and will not be foreign to the modern Court's "injury in fact" rule or its reluctance to sanction use of the exclusionary rule. There would have to be both an illegal search or seizure and a party against whom the evidence is being introduced. The legal system must deter illegal searches and seizures and this formulation would do so. No more *Payner* evasions; no more briefcase capers. This paradigm has the added advantage of being true to the text of the Constitution, its history, and prior cases, as well as the goals of exclusion. Counsel in criminal cases should immediately begin to make this argument under both state and federal constitutions. SDG¹⁶⁴

Congress certainly has power to enforce the Fourteenth Amendment by legislation so long as existing rights are not compromised. *See Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

¹⁶⁴ *Soli Deo Gloria*—To God Alone Be the Glory. This is how J.S. Bach ended every music manuscript.