Standing Room Only: Why Fourth Amendment Exclusion and Standing No Longer Logically Coexist

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Abstract

The Fourth Amendment exclusionary rule provides that a criminal defendant may suppress the fruits of unreasonable searches and seizures at his prosecution. The Fourth Amendment standing requirement limits the class of criminal defendants who may invoke the exclusionary rule to those who have personally suffered a violation of their rights. This Article argues that the two doctrines are logically inconsistent with each other. The exclusionary rule rests on a foundation of deterrence that takes as its point of departure the police officer’s subjective perspective of events and asks: did the information known to him justify his conduct? The standing requirement, by contrast, takes an objective approach and asks: did the reality of the criminal defendant’s situation entitle her to privacy? From an objective perspective, however, no one who uses her privacy to commit a crime deserves that privacy. Therefore, the entire class of people in a position to invoke the exclusionary rule—criminal defendants—ought necessarily to lack standing to suppress incriminating evidence. As a result, the Article proposes, courts must choose between abolishing the Fourth Amendment exclusionary rule and abolishing the standing limit on its application.
The Fourth Amendment exclusionary rule provides that a criminal defendant may suppress the fruits of unreasonable searches and seizures at his prosecution. The Fourth Amendment standing requirement limits the class of criminal defendants who may invoke the exclusionary rule to those who have personally suffered a violation of their rights. This Article argues that the two doctrines are logically inconsistent with each other.

The exclusionary rule rests on a foundation of deterrence that takes as its point of departure the police officer’s subjective perspective of events and asks: did the information known to him justify his conduct? The standing requirement, by contrast, takes an objective approach and asks: did the reality of the criminal defendant’s situation entitle her to privacy? From an objective perspective, however, no one who uses her privacy to commit a crime deserves that privacy. Therefore, the entire class of people in a position to invoke the exclusionary rule – criminal defendants – ought necessarily to lack standing to suppress incriminating evidence. As a result, the Article proposes, courts must choose between abolishing the Fourth Amendment exclusionary rule and abolishing the standing limit on its application.
INTRODUCTION

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

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

Because of the imperfect, human nature of police officers, probable cause can only approximate objective reality. The objective state of affairs it aims to approximate is this: only searches of guilty people concealing evidence of crime should occur. The approximation itself is subjective, rather than objective. A police officer has probable cause when, from the perspective of the police officer deciding whether to conduct a
search, the facts currently known to him would persuade a reasonable officer that a search would uncover evidence of crime. It follows that a “reasonable search” might turn up nothing, just as an unreasonable search might lead to the discovery of a major criminal enterprise. The reasonableness of a search -- generally, the presence of probable cause -- stems from the officer’s subjective perspective, not the objective reality of what was and was not actually hidden in the targeted location prior to the search.

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

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

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

“Standing,” in contrast to probable cause, does not turn on the searching police officer’s perspective. It turns instead on objective reality. If, for example, a police officer unreasonably searched a defendant’s car and found evidence of crime, then the defendant would have standing to suppress the incriminating evidence found in the car. This would be true even if the police officer had every reason to believe that the car belonged to someone other than the defendant, someone who might, in fact, have had no relationship at all with the defendant.

Conversely, police might unreasonably search a car that the defendant has stolen but that the police reasonably believe actually belongs to the defendant. In such a situation, the defendant would lack standing to suppress any evidence that the police found, because -- objectively speaking -- he lacked any reasonable expectation of privacy in the car, in spite of the police officers’ mistaken belief on that score. A defendant’s

¹ Though the Court no longer approves of the term “standing,” it is nonetheless a useful term for understanding when a criminal defendant lacks the legal ability to suppress evidence against him, regardless of the Fourth Amendment validity of the search that he wishes to challenge. See infra note 31 and accompanying text. The reason the Court has stopped referring to “standing” is that it considers the “reasonable expectation of privacy” language adequate to the task of describing both when a search has taken place (e.g., is there a reasonable expectation of privacy in having the police stay out of garbage left outside at the curb) and who was victimized by the search such that he is authorized to suppress evidence that resulted from it (e.g., may a person visiting a house to deliver pizza bring a suppression motion when evidence illegally found at that house is offered against him?). In both cases, we ask whether society is prepared to recognize the expectation at issue as a reasonable one, though the consequence of answering the question “yes” or “no” is slightly different in each case, because one has to do with what the Fourth Amendment permits the police to do, while the other concerns whether a particular criminal defendant is in a position to suppress the fruit of what is admittedly a police violation of the Fourth Amendment. Because of the differing objectives of each inquiry, I will continue to use the language of standing to refer to the inquiry about which individuals have the power to suppress the fruit of Fourth Amendment violations when they are criminally prosecuted and the government offers illegally seized evidence against them.
standing therefore does not depend, one way or the other, on the reasonableness of an officer’s assumptions about the defendant’s connection to the area searched.

When the prosecutor challenges a defendant’s standing to bring a suppression motion, then, she cannot rely on the perspective of the police officer performing the illegal search. She must instead cite objective facts about the defendant and his relationship to the property or the location at which the police conducted an allegedly unconstitutional search. Standing is a feature of objective reality, whether or not known to or reasonably understood by the police at the time of the search in question.

Because the standing inquiry requires a judge to consider objective reality, the judge’s consideration ought to include the fact that the person bringing a motion to suppress was in fact concealing evidence of crime in the location that was searched. This Article explains that it is arbitrary for the law to consider objective facts about a driver’s relationship to the car he was driving while ignoring objective facts about what the driver or owner of that car was doing in the hidden areas of the car.

After illustrating why the standing inquiry should encompass questions about the defendant’s criminality, the Article demonstrates that the standing doctrine entails the demise of the Fourth Amendment exclusionary rule. Accordingly, I argue, a coherent assessment of existing Fourth Amendment doctrine requires the abolition of either the exclusionary rule or the standing requirement. The two cannot logically coexist.

My attack on Fourth Amendment standing doctrine dovetails in some respects with conventional critiques of standing, although it does not rest on the same conceptual foundation. Existing liberal critiques of the standing requirement tend to place it in the same category as other exceptions to the Fourth Amendment exclusionary rule.
suggesting that such exceptions undermine deterrence and judicial integrity by permitting
the fruit of illegal searches to enter our courtrooms. Mine is a more fundamental critique.
I propose that standing doctrine is not simply in tension with the goals of the
exclusionary rule but that properly applied, it altogether precludes the assertion of Fourth
Amendment rights by any defendant bringing a suppression motion at his or her criminal
trial. Whether the exclusionary rule or Fourth Amendment standing ought to yield is not
my main concern. This Article is thus primarily an analytic, rather than a normative,
undertaking.

I. Probable Cause: A Subjective Perspective

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

Though suspicion falling short of probable cause will suffice in some categories
of cases, television audiences basically have it right. Probable cause is some quantity of
information that is both necessary and sufficient to permit police to invade our privacy.\(^2\)
And a warrant is a document that certifies in advance that police have the probable cause
they need.

\(^2\) For simplicity, whenever any form of individualized suspicion is required, I will henceforth refer
to that level as “probable cause,” even though the level of suspicion may sometimes be “reasonable
suspicion” or some other standard.
At times, people speak of probable cause as if it were an actual fact out there in the world. They utter sentences like “you can’t search me, because there’s no probable cause” or “there’s probable cause to search that guy,” as though probable cause either does or does not “exist” in some objective sense. Talking about probable cause in this manner reflects a significant confusion. It is, moreover, a confusion that infects the Supreme Court’s thinking and has led to incoherence in the law of search and seizure.

What do I mean when I say that “probable cause” does not simply exist out there in the world? Consider the following example. John Doe, wearing a disguise, has stolen a hundred thousand dollars in cash, at gunpoint, from a bank called “Second Boston.” Doe has stored the cash in a suitcase that he has placed in the passenger compartment of his own car. Because we are omniscient, we know everything there is to know about the hypothetical world in which John Doe committed his robbery and subsequently attempted to conceal the crime. What we know is true, and we did not have to perform any searches to find it out.

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

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

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

Outside the realm of quantum physics, probabilities are predictions about living beings or things – predictions that we can make when we know some but not all of the facts about those beings or things. A person in the present is either sick or well. He is neither “probably” sick nor “probably” well, except in the sense that if we know facts A, B, and C about a person, but not facts D, E, and F, then we are in a position to predict that seven times out of ten, it will turn out that the person is sick.

So what? Isn’t “probable cause” simply a convenient shorthand for the proposition that “the police know that Doe was seen leaving Second Boston and throwing a ski-mask onto the ground immediately after a terrified teller reported a robbery of one hundred thousand dollars, and the police also know that Doe told a close friend that he, Doe, would soon come into some extra cash”? Doesn’t everyone know that we are not really talking about a fact out there in the world but simply a set of probabilities, given what a police officer reasonably believes, based on what he has seen or heard?

Furthermore, what difference does it make that the actual facts about the world do not matter in an assessment of probable cause?
I have elsewhere argued that facts about the world do matter to the Fourth Amendment. That is, the universe to which the Fourth Amendment aspires would maximize the scenario in which police search and seize people who are, in fact, guilty and hiding evidence and would minimize both the scenario in which police fail to search the guilty and the one in which police erroneously search the innocent who are not in possession of criminal evidence.

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

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

In short, there is an objective reality that the Fourth Amendment aims to achieve. And this is not just my idiosyncratic view but an implication of the Fourth Amendment itself. The standards by which we judge the behavior of the police, however, do not depend on the objective reality to which the Fourth Amendment aspires but on the appearances that make their way into the perceptions of the officer who performs or

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4 Id. at 1476-77.
authorizes a search. Probable cause is thus fundamentally a matter of a police officer’s perspective rather than objective reality out there in the world.5

Return now to our earlier hypothetical example: Do the police have probable cause to search John Doe’s car for evidence that he robbed Second Boston? Neither the fact that he really did commit the robbery nor the fact that he actually did conceal his ill-gotten gains inside the passenger compartment of his car, bears at all on the question of probable cause. Also irrelevant is whether some friend of John’s saw the entire crime take place, if the friend has not shared her observations with the police.

If, on the other hand, a credible witness has described what happened for the police, then the police have probable cause to search Doe. And if the credible witness decides to lie and say instead that Kevin Broe has stolen the money, then the police have probable cause to search Broe, an innocent man but not Doe, a guilty one.

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

One could imagine a strict liability regime in which police could search anyone, as long as the search turned up evidence, but would be liable to pay damages whenever a search turned up nothing.6 But such a regime only seems to put a premium on objective

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

6 At common law, under this sort of approach, police who searched a home without a warrant would be liable for trespass if they found nothing, but blameless if they found something criminal, regardless of what their ex ante state of knowledge might have been. See Akhil Reed Amar, Fourth Amendment First
reality as a measure of police misconduct. In truth, a strict liability approach is generally a means of motivating police to strike the correct balance between maximizing fruitful searches and minimizing fruitless ones.⁷ Few people honestly expect (or even want) police to stay their hands in the absence of complete certainty.

II. Standing: An Objective Inquiry

When a criminal defendant wishes to press the claim that police have acted unreasonably and that the judge should accordingly suppress the evidence uncovered, a second doctrine comes into play: Fourth Amendment standing. To suppress evidence resulting from a search or seizure, it is not enough for the defendant to prove that police violated the Fourth Amendment. She must show as well that the alleged violation was of her Fourth Amendment rights, that it was – for example – her house that the police illegally searched.

In determining standing, as opposed to Fourth Amendment reasonableness, we do not consider what the police officer knew at the time he conducted a challenged search or seizure. The police officer’s perspective does not matter at all for these purposes. It is instead the omniscient perspective -- objective reality -- that drives standing doctrine.

Because objective reality governs the standing inquiry, determining whether a criminal defendant has Fourth Amendment standing to object to the admission of evidence against him requires us to ask for the objective truth about this defendant and his relationship to the area in which a controversial search took place. In the language of

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Rakas v. Illinois, we will ask whether the defendant had a reasonable expectation of privacy that police invaded during their search. If the answer to the question is yes, then the defendant will have standing to raise an objection, no matter what the police had reason to believe about the defendant’s standing. And if the answer is no, then the Court need not inquire further into whether the police invaded some other person’s reasonable expectation of privacy or whether the police had good reason to think that they were violating this defendant’s Fourth Amendment rights. Without a personal, reasonable expectation of privacy at stake, a defendant lacks standing to complain of police officers’ conduct.

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

It turns out that Joe Defendant was in the process of stealing jewelry from the home in question when the police arrived. Joe had obtained keys, without permission, by surreptitiously removing them from the homeowner’s pocket when they were both shopping at a neighborhood hardware store.

By hypothesis, the police have acted unreasonably. They entered a house without any reason for suspecting wrongdoing and without a warrant approving that entry, and they quite logically concluded that it was Joe’s rights they were violating in doing so. In reality, however, the police violated someone else’s privacy rights -- not Joe’s.

Therefore, Joe lacks standing at his criminal trial to suppress evidence of the jewelry he

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was in the process of stealing from the house that police entered illegally (though the actual homeowner would have standing to object to the admission of evidence that he had committed a crime).

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

The police decide at this point -- for no good reason -- that they want to have a look around the house. They break a window and climb inside. It turns out that Joe really does live in the house but was play-acting with his wife, the woman who answered the door. While searching, the police find a marijuana plant growing inside the house and promptly arrest Joe. He is subsequently prosecuted for cultivation and possession of a controlled substance.9

Under existing precedents, Joe undoubtedly had a reasonable expectation of privacy in his own home at the time that the challenged search took place. He will therefore have standing at his criminal trial to move for suppression of the marijuana plant that the police found at his house. The fact that Joe did not seem to the police (at the time of their break-in) to have a reasonable expectation of privacy in the particular home does nothing to defeat Joe’s Fourth Amendment standing. In the standing context, only objective reality counts; appearances to the police do not. And that is true whether

the disparity between reality and appearance benefits the police or whether it benefits the target of the search.

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

But this apparent unfairness dissolves on closer analysis. The police are under a constitutional mandate to refrain from conducting unreasonable searches and seizures. Based on what they knew in the two (Joe) examples above, the police -- from their own perspective -- violated the Fourth Amendment, by invading houses without a warrant or probable cause and by thus acting unreasonably. It should therefore surprise no one, including the police, to learn that what they did in both instances violated the Constitution.

The fact that in the second case, the police believed that the person arrested would not himself have standing to object to the admission of evidence does not absolve police of their obligation to obey the Constitution. They are not allowed to violate anyone’s Fourth Amendment rights. When no one has standing to exclude illegally obtained evidence, the deterrent effect of exclusion may diminish. But this lapse in enforcement in no way converts an illegal search into a legal one.

Accordingly, the unexpected emergence of a person with standing to hold the government accountable for violating the Fourth Amendment is no less fair than the unexpected emergence of a witness to a crime which a perpetrator believed went unobserved. We are all responsible for obeying the law, to the best of our ability. And

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the scope of that responsibility does not turn on whether we can expect to be held accountable when we transgress. Fourth Amendment standing affects enforcement, and not the scope of a police officer’s duty to obey the Constitution.

In sum, the obligations of police who conduct searches and seizures depend on their perspective -- literally what they see (or hear, etc.) or otherwise reasonably believe to be true, based on reliable evidence. The fact that their reasonable conclusions are at odds with what turns out to be objective reality does not undermine (or rehabilitate) the constitutional legitimacy of their conduct. The standing of a suspect to suppress evidence, on the other hand, turns on the objective reality of the suspect’s relationship to the space in which he – or evidence of his wrongdoing – was discovered by the police. And that objective reality need not be obvious to, or even reasonably ascertainable by, the police for it to invest a criminal defendant with standing or divest him of the same.

III. A Defendant’s Criminal Conduct Ought To Inform the Standing Inquiry

As we have seen, neither a suspect’s objective relationship to an area searched nor his actual guilt or innocence (or possession of sought-after evidence) plays a role in determining the legality of police conduct. This is because the police officer’s perspective, rather than objective reality, governs the Fourth Amendment reasonableness of searches and seizures. The officer’s perspective, in turn, depends entirely on appearances. The reality that is unknown to the officer does not bear on the constitutionality of his conduct.

In the standing inquiry, however, we no longer take the perspective of the police officer. And once we abandon the officer’s perspective and examine objective reality for
answers, the fact that a person is concealing evidence of crime or the fact that a person is guilty of a felony can and should become a relevant part of the calculus, just as the fact that a person really does (or really does not) live in the house that was searched is relevant under existing precedents.

Standing doctrine has not thus far acknowledged the relevance of guilt or innocence to its application. Standing currently depends on whether a hypothetical person, regardless of guilt or innocence, would retain a reasonable expectation of privacy under the circumstances in which the defendant found himself at the time of the search: in his own home, on the street, in a locked hotel room for which he paid a fee, or in a telephone booth talking on the phone. An innocent person can occupy a space in which she holds no reasonable expectation of privacy (e.g., under Rakas, the back seat of a car in which she is a “mere passenger”\(^{10}\)), just as a guilty person can occupy a space in which he does retain a reasonable expectation of privacy (such as his own home). It is not clear, however, why the latter proposition should hold, given the objective perspective of the standing inquiry. Guilt and innocence, like property relations, ought to play a role in determining who has and who lacks standing to suppress evidence at a criminal trial.

Consider the following example. Linda Smith kidnaps a one-year-old boy from his home, while everyone else in the house is asleep. Linda takes the baby to her own home and places him in a locked room with no light. The boy’s parents have no idea that their son has been kidnapped, and there is nothing outwardly suspicious about Linda’s behavior on the way into her house. It is clear, on these facts, that the police lack probable cause (and therefore will not be able to obtain a warrant) to search Linda

Smith’s home. To enter under these circumstances, in the absence of consent, would accordingly violate the Fourth Amendment.

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

But does this answer make sense? We have seen that Fourth Amendment standing is based on objective reality – specifically, the suspect’s relationship to her space and circumstances. Under such a scheme, the fact that Linda lives in the house should not be the only objective fact that informs the standing inquiry. Another appropriate feature of standing might include the relevant individual’s not using her space to commit a crime or to conceal evidence of crime.

One potential response to this claim is that only the fact that Linda Smith lives in the home – but not the fact that she is committing a kidnapping – is ascertainable by the police without a search of the premises. This answer, however, relies on the police officers’ perspective rather than on objective reality. Recall that for a person to lack standing, it is not necessary that a police officer be able to discern the person’s lack of standing prior to performing a search, just as a defendant can successfully bring a suppression motion even if the police could not possibly have known prior to the challenged search that the defendant would be among those whose rights were violated during the search.
The Supreme Court has held that an invited overnight guest has standing ("a reasonable expectation of privacy") in the part of the home where he is staying.\textsuperscript{11} This is the law, moreover, even though the police would not ordinarily have any way of knowing in advance of a search whether guests on the premises were invited to stay overnight. Standing therefore does not rest on the accessibility of predicate facts to police considering a search. A person’s standing to object to the admission of evidence rests instead on the answer to the equities question: when would society deem legitimate a person’s wish to keep the government out of her space?\textsuperscript{12}

The fact that kidnapper Linda Smith lives in the house where police perform their search is surely one relevant factor to consider in determining whether she is entitled to be left alone in that house. People generally have a reasonable expectation of privacy in their homes and lack a reasonable expectation of privacy in other peoples’ homes (unless they are there overnight, by invitation). The activity in which Linda Smith was engaged, however -- holding another family’s son captive in her house -- is an additional equitable consideration that would seem to militate \textit{against} the legitimacy of her privacy expectation there. Society certainly does \textit{not} feel prepared to honor as legitimate a


\textsuperscript{12} \textit{See} Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring) (1967) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’"); Smith v. Maryland, 442 U.S. 735, 743-44 (1979) ("even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not ‘one that society is prepared to recognize as ‘reasonable.’’ This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."); United States v. Knotts, 460 U.S. 276, 281 (1983) ("The second question is whether the individual’s subjective expectation of privacy is ‘one that society is prepared to recognize as ‘reasonable,’” --whether, in the words of the \textit{Katz} majority, the individual’s expectation, viewed objectively, is ‘justifiable’ under the circumstances.”); Kyllo v. United States, 533 U.S. 27, 33 (2001) ("As Justice Harlan’s oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”); Oliver v. United States 466 U.S. 170, 179 (1984) ("For these reasons, the asserted expectation of privacy in open fields is not an expectation that ‘society recognizes as reasonable.’").

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kidnapper’s expectation of privacy in the home where she conceals the child whom she kidnapped, even if it is her own home.

For the omniscient viewer -- one who is aware of objective reality and not simply the information available to the police -- Linda Smith does not deserve privacy in the place where she holds another family’s child captive. If we describe her circumstances in the following question, the equities come into focus: Does a person have a reasonable expectation of privacy in the house where she lives and where she is currently perpetrating and concealing the kidnapping of another family’s young son? I suspect that nearly everyone would say that the answer to this question is no, that such a person deserves -- based on what she is actually doing -- to have that part of her home concealing the boy exposed.13

“But that is not a fair characterization,” some would say of the standing question I have framed. As long as a person does not “knowingly expose” what would otherwise be private, a search has taken place.14 And Linda Smith, as guilty as she is, has not “knowingly exposed” her house to the public

It is true that Linda has not “knowingly exposed” the inside of her home. To the extent that in the absence of “knowing exposure,” there is necessarily a reasonable expectation of privacy, Linda should prevail in her claim of standing to object to the search of her home. The equities of Linda’s circumstances, however, go beyond the fact

13 I specify here the part of the house concealing the kidnapped boy, because there is no reason to propose an across-the-board forfeiture of privacy by virtue of a crime. It is the privacy that is used to perpetrate or conceal misconduct that falls prey to such forfeiture. See Colb, supra note 3, at 1501-02 (explaining that “[t]he forfeiture of one’s privacy entitlement . . . extends only so far as the abuse of the privacy right”).

14 See Sherry F. Colb, What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 STAN. L. REV. 119, 122 (2002) (“[T]he court asks: ‘What is a search’? To rule out activities that do not qualify, the Court denies privacy in whatever people ‘knowingly expose’ to the public. If a person knowingly exposes some object or activity to the public, there has accordingly been no search.”).
that her home belongs to her and is well-concealed from the public. And the
determination of whether a person’s expectation of privacy is “reasonable” likewise
involves more than a simple empirical question about what one has knowingly exposed.
It includes as well a normative question about the proper scope of protected privacy. The
lack of knowing exposure is thus a necessary but not sufficient condition to the finding
that a search has taken place. Though one may seek and expect privacy, in other words,
society may not see fit to fulfill that hope or guard that expectation.15

Furthermore, as Justice Harlan suggested in United States v. White16, the law itself
shapes expectations of privacy. Accordingly, even empirical expectations ultimately
derive from normative considerations. If we think that people should have more privacy
than they do, we can change the law and ultimately generate new expectations of privacy.
For this reason, we do not simply ask whether people are likely, as a descriptive matter, to
remain unexposed in their own homes. We ask whether such people actually deserve to
remain unexposed.

Once objective facts matter, as they must in determining a particular person’s
standing to complain of a Fourth Amendment violation, one excludes from the
determination of standing the reality that Linda is using her home to commit and conceal
a kidnapping only by fiat.

facts will not come to the attention of the authorities’ is not the same as an interest in ‘privacy that society
is prepared to consider reasonable.’” (quoting United States v. Jacobsen, 466 U.S. 109, 122 (1984)); Kyllo,
538 U.S. at 27-28 (stating that “[a] ‘search’ does not occur—even when its object is a house explicitly
protected by the Fourth Amendment—unless the individual manifested a subjective expectation of privacy
in the searched object, and society is willing to recognize that expectation as reasonable”).

16 United States v. White, 401 U.S. 745, 786 (Harlan, J., dissenting) (“Our expectations, and the risks
we assume, are in large part reflections of laws that translate into rules the customs and values of the past
and present.”).
IV. Considering the Analogy Between Standing and the Merits Questions

Is it truly fiat to exclude the fact of a kidnapping from the standing inquiry?

Granted, the question “Does the defendant live in this house?” is an objective question, just like “Is the defendant committing and concealing a crime in this house?” The two questions, however, correspond to inquiries that are wisely treated separately in a slightly different context. When a claim arises about whether police have performed an unreasonable search or seizure, for example, we ask first whether there was a search at all, by determining whether there is a reasonable expectation of privacy – for instance – in a telephone call placed from a public phone booth. Only if the answer to this first question is yes do we then turn to the question of whether it was reasonable for the police on a particular occasion to tape a specific phone conversation.

The first question – whether there is a reasonable expectation of privacy – considers only the fact that the speaker is in a closed telephone booth, engaged in a conversation, after paying the toll. The issue of whether he is committing a crime has no place in that inquiry. It is only in determining whether the search was reasonable -- after having concluded that there was indeed a search -- that we ask anything about criminal activity. We ask at that point whether there was a warrant supported by probable cause to believe that the conversation projected to take place in the future would constitute (or at least evidence) criminal activity.

In the context of assessing the legality of a police officer’s conduct, we divide the inquiry into two parts. If that division – between one’s relationship to one’s space and one’s commission of a crime within that space – works for assessing the conduct of the police, why should we not employ the same division when assessing a criminal
defendant’s standing to raise objections to the police conduct in question? Indeed, does it not simply confuse matters to have the phrase “reasonable expectations of privacy” encompass two different things, as I suggest it should, depending on whether we are discussing the merits of a Fourth Amendment claim or determining instead a particular defendant’s standing to ask a court to reach those merits?

To understand why I propose such distinctive treatment for Fourth Amendment standing, let us turn again to the matter of perspective (the officers’ versus the suspect’s).

There is a reason we divide facts about one’s relationship to a location, on the one hand, from facts about one’s guilt or concealment of evidence, on the other, when we analyze the reasonableness of searches and seizures. The division corresponds to the structure of the Fourth Amendment inquiry. We ask first whether police have conducted a “search” at all, a question that translates doctrinally into asking whether a person under the defendant’s apparent circumstances would have a reasonable expectation of privacy, as defined by ownership/residence or other circumstances from which we necessarily abstract away guilt and innocence.

It makes sense to limit the initial inquiry in this way, because police need not bother acting reasonably or gathering preliminary evidence of guilt if the course of action they intend to pursue does not trigger application of the Fourth Amendment at all -- if, in other words, these actions do not constitute a search.

And if what the police propose to do does constitute a search, then -- and only then -- do they need to know facts about guilt and innocence, in the form of probable cause.
Significantly, moreover, when police are engaged in Fourth Amendment-regulated activity, the facts about guilt and innocence that they must preliminarily gather will ultimately be analyzed from the perspective of the police officers: Given what the officers knew, was it reasonable for them to act as they did?

When a defendant’s standing to bring a suppression motion is at issue, by contrast, everything is objective. We ask, simply, whether the person in question was entitled to privacy. Unlike in the substantive context, we need never reach the question whether the police implicated or violated Fourth Amendment entitlements in the abstract. Suppression is all about a specific defendant in all of his specificity.

The objectivity and specificity of the standing inquiry have significant implications for the need to separate the relationship-to-property facts from the guilt/innocence facts. The reason that we generally abstract guilt information out of “reasonable expectations of privacy” inquiries when the question is what does or does not constitute a search, is that we are defining rights that police must respect when they lack complete information. That is, when a police officer sees a person talking inside a closed telephone booth, the case law regarding searches and seizures must notify that officer that attaching a listening device to the top of the booth represents a “search,” for Fourth Amendment purposes.\(^\text{17}\)

The fact that the specific individual in that booth will -- unbeknownst to police -- be making interstate bets on the telephone while he is being monitored cannot be part of the determination of whether police are engaged in a Fourth Amendment “search” when they monitor, for the same reason that the reality of the individual’s placing interstate bets cannot play any role in determining whether the search that police conduct during

\(^{17}\) *Katz*, 389 U.S. at 352.
monitoring is a “reasonable” one: police (by definition) do not know these hidden facts until after they have acted.

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

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

The determination of when the Fourth Amendment applies (when a “search” has taken place) and when -- if it does apply -- police have complied with its mandates (when police have probable cause) must necessarily abstract away any facts that are unavailable to the police. The Constitution may only make demands of police that correspond to facts that are or can be known to them. Appearances are necessarily decisive.

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19 *Id.* at 39.
Consider in this light the pivotal case of *United States v. Katz*.\(^{20}\) At the time of surveillance, respondent Katz had been engaged in placing interstate bets from a public telephone booth with the door closed.\(^{21}\) The police, who suspected Katz’s illegal activity, attached a listening device to the top of the telephone booth with the intention (and result) of eavesdropping on Katz’s conversations.

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

The Court did not take into account the fact that Katz’s conversation consisted of committing a federal crime. The reason for this omission is that police could have become aware of that component of Katz’s activities only after listening in on his conversation.

The Court’s definition of “search” thus deliberately followed the perspective of the police officer deciding whether or not he could monitor Katz’s conversation at will. After the holding in *Katz* came down, police -- knowing that their target would be talking on the telephone with the door closed – would have enough information to conclude that


\(^{21}\) *Katz*, 389 U.S. at 347.
they would be engaged in a “search or seizure” and would accordingly have to take an additional step before carrying out their electronic eavesdropping: obtain a warrant based on probable cause.

Once police are engaged in a “search,” the law must judge probable cause (and the warrant that, as a rule, must accompany it) as well from the perspective of the police contemplating the search in question, and probable cause must therefore consist of information that is available to the police before they attach the listening device to the top of the public telephone booth. The facts about prior gambling and informants’ reports could therefore play a legitimate role in the calculation of probable cause. But the objective reality of what Katz was in fact discussing once he entered the phone booth and closed the door necessarily remained outside the scope of any “probable cause” or warrant that could justify the search.

Unlike the definition of “search” and the determination of the reasonableness of a particular search, the standing inquiry does not concern itself with preliminary knowledge or the availability of information to the police. It does not need to consider the police officer’s perspective in this way, because it does not — as the definition of “search” and the reasonableness of searches do -- regulate police officers’ behavior. Standing is entirely about the suspect and the privacy that she objectively deserves. It neither praises nor condemns the police officer.

When Katz entered a public telephone booth, paid his toll, and began a conversation, all of these objective facts became relevant to his entitlement to privacy. Prior gambling and informants’ reports, by contrast, would no longer remain relevant, because they were simply ways of placing odds on what Katz would actually do once he made his call.
If Katz spoke with his mother and expressed the hope that she would come through her back surgery intact, then that fact would become a relevant part of defining Katz’s entitlement to privacy in his telephone conversation: he is having a personal communication with a family member. Such a communication is legal, and, because it is conducted on the telephone inside a closed booth, it should be protected from the “uninvited ear.”

If Katz instead called a betting partner and arranged for a $20,000 wager on a Lakers victory over the Knicks, then that fact too would be relevant to Katz’s entitlement to privacy or lack thereof.

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

The judge considering the standing question, by contrast, does not have to do a two-step inquiry. There is only one question, whether -- regardless of the legality of the officers’ behavior -- this person is entitled to complain about it. The facts that are only imperfectly approximated by the question of “what is a search” (Katz’s relationship to the telephone booth) and the facts that are only imperfectly approximated by the warrant and probable cause (what Katz would be discussing on the telephone during surveillance) together make up Katz’s entitlement to privacy. Whether Katz is entitled to be free from

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22 Katz, 389 U.S. at 352.
a search – from an objective perspective – thus combines the question of whether a random person in Katz’s shoes (i.e., talking on the telephone in a booth) should be able to keep police “ears” out and the question of whether the activities in which Katz actually engaged (interstate bet placement) call for intervention.

Consider as an illustration the case of *Minnesota v. Carter*.23 In *Carter*, the Supreme Court faced the question whether a police officer’s staring into a home through a gap in the Venetian blinds invades any reasonable expectation of privacy. In other words, the case asked: Is peering through a break in the blinds a “search” triggering the Fourth Amendment requirement of reasonableness (whether a warrant and probable cause, or some other requirement)?

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

Wayne Carter, the cocaine packager, did not live in the home and had never used it before the occasion in question. As the Court pointed out, moreover, even on that occasion itself, Carter was present for only two and half hours, and he was engaged in a commercial rather than a personal enterprise during that time.

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Note that the Court did not end its standing inquiry with a discussion of whether the defendant lived in the location or would be spending the night there. It asked as well about the nature of the person’s hidden activities while on the premises. If Wayne Carter had been there, for example, to take a nap at a friend’s house after sitting for the bar exam, then perhaps he would have had standing to object to Peeping Tom police officers.

But Carter was not on the premises to nap. He was there to conduct business, and the Court asserted that commerce entitles a person to less privacy – all things being equal – than personal activity would. The Court thus considered the details of a criminal defendant’s activities at the home at issue to determine whether, overall, the equities of the situation entitled him to assert a privacy claim there.

To be sure, the Supreme Court -- in deciding that Carter lacked a reasonable expectation of privacy -- did not take into account the fact that Carter’s “commercial” enterprise consisted of packaging cocaine. In fact, however, because cocaine is a controlled substance, the packaging of cocaine represents a criminal act. And if engaging in commercial activity generally entitles a person to less privacy than engaging in personal activity does, as the Court suggested, then it would seem only proper to conclude that engaging in criminal commercial activity should entitle a person to less privacy than engaging in a legal commercial enterprise would. Indeed, if someone committed murder -- for personal reasons -- in a third party’s home, that act should

24 See Jones, 362 U.S. at 265-67 (finding that an invited overnight guest “legitimately on the premises” is entitled to suppress evidence obtained in violation of the Fourth Amendment during the search of those parts of the premises to which the invitation extended); Olson, 495 U.S. at 98 (maintaining that the overnight guest has standing or a legitimate expectation of privacy in the premises to which he is invited, even though the “legitimately on the premises” test of Jones was deemed overly broad in Rakas v. Illinois, 439 U.S. 128 (1978) (holding that “mere passengers” in a vehicle, though legitimately on the premises, lacked a reasonable expectation of privacy in various parts of the vehicle, that would have entitled them to suppress evidence obtained in violation of the Fourth Amendment)).
arguably entitle the actor to less privacy than the use of the same home to conduct a legitimate business meeting would.

Once the Court deems it appropriate to ask what a person was actually doing in the house where the police have conducted an allegedly unreasonable search, the criminal nature of the person’s behavior becomes a logical component of answering that question. To characterize Carter’s activities as “commercial” but not as “criminal” is arbitrary, in part because one must know (rather than just reasonably suspect) what the activities are before one is in a position to classify them as either commercial or criminal. If either one bears on the assessment of a defendant’s personal entitlement to be free from surveillance, then the other one ought to as well.

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

Taking such an assortment of facts into account in denying a petitioner standing is a far cry, one could argue, from denying a defendant standing to object to a search of his own home. If Wayne Carter had been at home instead of at a highly temporary place of business, the reader could assert, then, under the doctrine, only a “knowing exposure” of what lay within that home would or should relinquish the defendant’s reasonable expectation of privacy there.
The distinction, for example, between Linda Smith (the kidnapper at home) and Wayne Carter (the cocaine bagger at a temporary business location) has the advantage of conforming more or less to current case law. But does the distinction hold up to logical analysis? Recall the basis for a person’s legitimate privacy expectation in her home. It is the belief we share as a society, that one’s home should be a place of retreat, a locus of privacy, where police therefore lack the power to enter without a very good reason, captured by the requirement of probable cause and a warrant. This account of why we protect the privacy of a home, however, means only that the government must not intrude upon the home without sufficient justification. It does not guarantee that anyone will have standing to suppress the fruits of governmental misconduct.

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

Because standing is entirely objective in character, the determination of whether or not a defendant has standing does not require us to abstract away facts unknown to the police, the way we must do in figuring out whether police have performed a “search” and whether they were justified in doing so.
In determining standing, we can take into account the fact that the home searched was not the defendant’s home or residence or a place for him legally to spend the night. We can consider such facts even though the police were not aware of any of them at the time of the search, and even though the police should not have searched, in any event. Such facts are relevant to standing because they bear on the particular individual’s personal entitlement to privacy, i.e., his standing to bring a Fourth Amendment claim.

From the individual’s perspective, considering the objective facts about his situation, however, he is not simply occupying his time in a location that is or is not his home. He is also committing (or not committing) or hiding (or not hiding) a crime. Indeed, in some cases, it is impossible to separate his lack of a substantial property-relationship to the premises from his involvement in the commission of a crime there. Such cases help illustrate why the separation is not appropriate, even when possible.

Consider the case of William, Joan, and Donald. William is an abusive husband and father who repeatedly commits acts of violence against his wife, Joan and his young son, Donald. Eventually, Joan divorces William. In the division of marital assets, Joan gets custody of Donald and possession of the marital home, and William gets the couple’s vacation residence on Shelter Island. Their bank accounts are divided equally, and William agrees to place a lump sum of money into an escrow account, the interest on which will cover all future child support payments.

A court also issues a preliminary injunction against William approaching within thirty feet of Joan’s home or either of its occupants for a full year.

About a month after the divorce, William decides he wants to try to reconcile with Joan and his son. In direct violation of the injunction, William travels to his old house --
which now belongs to Joan -- and knocks on the door. No one answers. William knocks again, louder this time, but the knock once again meets with silence.

William initially begins to walk away but then, impulsively, turns around and approaches the house from the back, where no neighbors have visual access. William breaks a window and climbs inside, where he peruses the area and finds that no one is home. He suddenly feels very tired and decides to spend the night. Filled with nostalgia, he climbs the old staircase and goes to sleep in his former bed.

Police have no idea that any of this is going on. No one saw or heard anything suspicious. However, the police have for some time been curious to see the inside of Joan’s house, because they have heard that she has original Rembrandt paintings on the walls. Police approach the house and listen to determine whether anyone is awake. The house is silent, so they use a glass-cutter to take out one of the front windows and step inside.

The police walk around and look at paintings and into drawers around the home until they stumble across William in the upstairs bedroom, fast asleep. One of the officers recognizes William and remembers from news accounts that he was ordered not to be anywhere near his old house. After hearing of this history, another officer calls for backup, wakes William, and arrests him for violating a court order and for criminal trespass.

At William’s trial for contempt and criminal trespass, the prosecutor hopes to introduce the testimony of police officers who found William after illegally entering Joan’s home. From the police officers’ subjective perspective – based on appearances – they conducted a search (by looking inside a home, where people have a reasonable
expectation of privacy). Their search, moreover, was not based on probable cause or a warrant. In other words, they acted in blatant violation of the Fourth Amendment.

William, however, cannot suppress the police officers’ testimony simply by proving that they violated the Fourth Amendment to obtain their information. He will have to prove as well that he was entitled to keep the police away -- that the Fourth Amendment violation, in other words, victimized him in particular. Under the facts here, he cannot do so.

Why not? On conventional standing principles, William lacks any reasonable expectation of privacy in the home that the police entered. He accordingly lacks standing to object to the admission of the testimony, even though the police failed to conform their conduct to the dictates of the Fourth Amendment.

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

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

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

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

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

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

This example helps illustrate the arbitrariness of dividing the “standing” inquiry into
questions about guilt-related facts (whether the person is conducting or concealing
criminal activities on the premises) -- which are off-limits – and questions about more
“neutral” facts (what connection the person has to the premises) -- which are an acceptable part of the determination.

Return again to the United States v. Katz scenario. The Court there found that Katz had a reasonable expectation of privacy in his telephone conversation. The Court ignored the fact that Katz had been placing interstate bets over the phone at the time that he was taped. The reason it did so in considering the reasonableness of his expectation of privacy is that the privacy expectations question there came from the police officer’s perspective. The question was whether the police had performed a “search,” such that their failure to obtain a warrant rendered their conduct unconstitutional. Police necessarily could not have been expected to make their decision about whether to tape a conversation without a warrant on the basis of facts that would only come to light during the course of the taping.

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

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26 Kyllo, 533 U.S. at 38-39.  
27 Id. at 37.
Standing presents an altogether different set of concerns, as we have already seen. To determine whether Katz personally had a reasonable expectation of privacy in the telephone booth (for purposes of standing), we do not have to consider what the police were or were not in a position to know prior to carrying out their surveillance. Eligibility for Fourth Amendment standing has everything to do with the individual objecting to a search or seizure and nothing to do with the police conducting that search or seizure.

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

Accordingly, our hypothetical William (the divorced batterer) is barred from objecting to a blatantly unconstitutional search, despite the fact that police had every reason to think that whoever they might find in the house would have a privacy right not to be viewed there by the police. William is barred because in reality -- notwithstanding the officers’ ex ante ignorance of this fact – William’s relationship with the place he occupied was that of a trespasser and an injunction-violator, and that relationship does not give rise to a legitimate expectation of privacy in the house.

Once we can consider facts about the defendant’s actual, objective entitlement to privacy -- independent of what was or was not evident to the police at the time of a search -- there is no reason to divide such facts about the defendant into those that in general would entitle innocent people to privacy (such as occupying one’s own home) and those

\[28\] See text accompanying notes 7-9.
involving the commission of a crime (such as engaging in the packaging of cocaine in the place that is searched).

Both types of facts are equally relevant to an *objective* determination – one that does not turn on an officer’s limited perspective -- of whether we as a society believe that a person occupying space under a given set of circumstances is entitled to be left alone by the government, the announced test for “reasonable expectations of privacy.”

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

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

For standing, we ask our questions from the defendant’s fully informed perspective. First, we inquire about whether this individual actually has an ownership and/or other relationship to the space that ordinarily entitles a person to privacy. Second, we find out whether this individual has avoided forfeiting any privacy interest he might

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29 *Knotts*, 460 U.S. at 281 (“The second question is whether the individual’s subjective expectation of privacy is ‘one that society is prepared to recognize as “reasonable,”’ — whether, in the words of the *Katz* majority, the individual’s expectation, viewed objectively, is ‘justifiable’ under the circumstances.”).

30 *See Colb, Innocence, Privacy and Targeting in Fourth Amendment Jurisprudence*, supra note 3, at 1507-08 (explaining how the link between “probable cause” and criminality demonstrates the inherent connection between Fourth Amendment protection of privacy, on the one hand, and actual, objective innocence, on the other).
otherwise have had in the space, a forfeiture accomplished through the commission and concealment of crime there. If the answer to either question is no, then the law should deny him standing to object to what may be -- from the police officers’ perspectives -- unreasonable searches.

V. Fourth Amendment Standing and its Civil Suit Analogue

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

In addition to the case or controversy requirement underlying Article III standing doctrine, the Court has also announced “prudential” standing principles that further limit the universe of people who may litigate a constitutional violation, even if they have suffered an injury and would benefit from the litigation (and therefore qualify for entry into federal court under Article III). As a matter of “prudential” standing, the person injured and bringing a case ordinarily must – him or herself – be the one whose legal rights were violated. Secondary sufferers of the violations of others’ legal rights

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31 *But see* Rakas v. Illinois, 439 U.S. 128 (1978) (adopting the language of reasonable expectations of privacy to replace discussions of “standing”). In spite of the change in language, however, the term “standing” continues to be a useful one for distinguishing between substantive assessments of police compliance with the Fourth Amendment, on the one hand, and the identity of those who may raise claims of noncompliance, on the other. *See* Rawlings v. Kentucky, 448 U.S. 98, 112-13 (1980) (Blackmun, J., concurring).
accordingly face obstacles to bringing a cause of action in federal court.\textsuperscript{32} It is this prudential limit on third-party standing that most closely resembles Fourth Amendment standing in the exclusionary rule context and might appear, at first glance, to provide support for such a doctrine as well.

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

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

Even though you did suffer a financial injury caused by the government’s violation of the First Amendment, there is nothing in the First Amendment right of free speech and assembly that contemplates protecting you from what occurred. In other words, your injury is not one that the First Amendment recognizes as a constitutional

harm. You therefore lack prudential standing – though you may technically have Article
III standing – and cannot go to federal court and sue the government to compensate you
for the injuries that you suffered as a consequence of the government’s First Amendment
violation.

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

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

The Court has created an important exception to the prudential bar on third-party
claims, however, for cases in which a third party is especially well-placed to pursue the

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rights of an intended beneficiary, and first-party sufferers are unable or unlikely to sue on their own behalf. In *Griswold v. Connecticut*,\textsuperscript{34} for example, the challenged law prohibited the distribution of contraceptives to married people. Such a law, the Court concluded, violated the rights of married couples to substantive privacy – specifically, the right to determine whether or not to conceive children. The petitioners in *Griswold*, however, were not married couples seeking to use contraception. They were, instead, Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut ("the League"), and C. Lee Buxton, Physician, Professor at Yale Medical School and Medical Director for the League's center in New Haven, convicted as accessories under an aiding-and-abetting statute.\textsuperscript{35}

Those who challenged the Connecticut law, moreover, did not claim a federal constitutional right to *provide* other people with contraceptives. The usual prudential standing rules would therefore have barred an organization like Planned Parenthood and the other petitioners from litigating the issue in federal court. No constitutional right of *theirs* was violated.

The Supreme Court in *Griswold*, however, determined that "appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship."\textsuperscript{36} When the real party in interest is unable or unlikely to sue on her own, as in *Griswold*, the Court will sometimes allow a third party whose litigation objectives overlap substantially with those of the real party in interest, to bring suit. The Court explained that "[t]he rights of husband and wife, pressed here, are likely to be

\begin{footnotes}
\item \textsuperscript{34} 381 U.S. 479 (1965).
\item \textsuperscript{35} *Griswold*, 381 U.S. at 480.
\item \textsuperscript{36} *Griswold*, 381 U.S., at 481.
\end{footnotes}
diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relationship to them.”

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

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

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

When the police illegally searched Jim’s home, they violated Jim’s but not Jane’s Fourth Amendment rights. Jane therefore lacks Fourth Amendment standing to object to the introduction of the gun against her at trial. In terms that the Court currently uses to describe standing, Jane lacked any reasonable expectation of privacy in Jim’s house.\footnote{Rakas, 439 U.S. at 140, 143; Rawlings, 448 U.S. at 104-06.}

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

That upshot might not seem like much of a problem. If Jim wants to recover damages for the violation of his Fourth Amendment rights, he can do so by bringing a section 1983 suit against the police who illegally searched his home.\footnote{42 U.S.C. § 1983.} Jane, on the other hand, experienced no harm, so she arguably has no right to enjoy the benefit of suppressing the weapon that she used to commit a homicide.\footnote{Had the police refrained from performing their illegal search, Jane might have avoided capture, but she would in that event have been an incidental, rather than an intended, beneficiary of the Fourth Amendment right against unreasonable searches and seizures.} Only victims of Fourth
Amendment obligations are entitled to damages -- in the form of payment or suppression of evidence, right?

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

Relying on this conception of the Fourth Amendment exclusionary rule, the Court has seen fit to eliminate suppression of illegally obtained evidence in a variety of contexts in which the marginal deterrent effect of exclusion, in the Court’s judgment, is insufficient to justify the cost of losing probative evidence. Examples include grand jury

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41 See United States v. Calandra, 414 U.S. 338, 348 (1974) (“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.”).

42 See Stone v. Powell, 428 U.S. 465, 486 (1975) (“The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-Mapp Decisions have established that the rule is not a personal constitutional right.”); see also United States v. Calandra, 414 U.S. at 347 (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)) (“The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: ‘[T]he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.’ Instead, the rule’s prime purpose is to deter unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.” See also Elkins v. United States, 364 U.S. 206, 217 (1960) (“The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way- by removing the incentive to disregard it.”).
proceedings, habeas corpus petitions, and the impeachment of a criminal defendant’s testimony at trial.

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

One reason the Court adopted suppression in the first place and has yet to eliminate it is that other methods of deterring violations are apparently not very effective. As Justice Frank Murphy said in his dissent in Wolf v. Colorado, “there is but one alternative to the rule of exclusion. That is no sanction at all.”

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44 See Stone, 428 U.S. at 481-82 (“We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”).
46 See supra note 42.
The deterrence approach outlined above is in considerable tension with the Fourth Amendment standing doctrine, however. If suppression motions are purely a means of disciplining police officers for violating the Fourth Amendment, then whether or not the police happen to have violated a particular defendant’s Fourth Amendment rights on a given occasion should make no difference to his eligibility to serve as a private attorney general (one who would be motivated by the windfall of suppression). And when the Court responds that “Fourth Amendment rights are personal rights,” its response is a non-sequitur.

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

The suppression remedy applies, then, when it will have the effect of removing the evidentiary incentive of law enforcement to violate the Fourth Amendment. What matters is the impact of suppression as a disciplinary tool against police in various contexts. And the most effective use of suppression to discipline the police does not turn at all on whether or not the evidence the police retrieved while violating the Fourth Amendment happens to incriminate the actual victim of the Fourth Amendment violation or a third party. Effective deployment of the suppression deterrent would provide that

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49 Rakas, 439 U.S. at 133-34; Rawlings, 448 U.S. at 104-05.
anyone against whom unconstitutionally obtained evidence is offered can suppress it, at least in high-deterrence contexts.\textsuperscript{50}

In place of fortifying the deterrent value of suppression, standing limits on exclusion water down deterrence (the stated purpose of exclusion). They do so, moreover, to accommodate the notion of individual constitutional entitlement, which the Court has explicitly rejected for the suppression of evidence. Scholars have noted this oddity in the standing doctrine,\textsuperscript{51} a peculiarity which might superficially have seemed consistent with other exceptions to the exclusionary rule, because it too limits the aggregate “costs” of exclusion by restricting its application.

The Fourth Amendment standing doctrine thus fails to reflect the deterrent purpose that the Supreme Court has attached to the exclusionary rule and corresponds

\textsuperscript{50} The Court could – consistent with its approach to exclusion – still maintain zones (such as grand jury proceedings, habeas corpus petitions, and impeachment) where Fourth Amendment suppression would not occur, by virtue of its trivial contribution to deterrence in such contexts, coupled with the cost of exclusion to the project of criminal justice. Such zones, of course, may misconceive the nature of deterrence as case-by-case rather than systemic.

\textsuperscript{51} See generally Donald J. Doernberg, The Rights of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. Rev. 259 (1983); William J. Heffernan, The Fourth Amendment Exclusionary Rule as a Constitutional Remedy, 88 Geo. L.J. 799, 859 (2000) (“If exclusion is designed to deter police illegality, why should it matter whether the person seeking suppression can complain of a violation of his or her rights?”); Kent Roach, The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies, 33 Ariz. L. Rev. 859, 871 (1991) (“Despite the intelligibility of corrective justice as a means to rectify wrongful dealings between the police and suspects, a corrective approach to exclusion of evidence has been rejected by American courts. It is strongly resisted by those who oppose the social costs of the exclusionary remedy.”); Arnold H. Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907, 912 (1989) (“At times the Court takes an extremely individualistic or ‘atomistic view’ of the Fourth Amendment, holding that only those whose personal Fourth Amendment rights have been violated may invoke the exclusionary rule. In other cases, the Court has stressed the collective rather than individual nature of the exclusionary remedy. Defendants in these cases have been denied the exclusionary remedy because, in the opinion of the Court, the deterrent or disincentive value of the remedy was not worth the cost of exclusion.”); Wayne R. LaFave, Being Frank About the Fourth: On Allen’s ‘Process of ‘Factualization ‘ in the Search and Seizure Cases, 85 Mich. L. Rev. 427, 433 (1986) (“[T]he Court adopted an individual rights approach to the Fourth Amendment, conveniently ignoring the fact that it had previously characterized the exclusionary remedy as ‘designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.’”)}
instead to an individual rights civil-suit-like approach that the Court has otherwise
eschewed in its exclusionary rule precedents.

This interference of standing doctrine with deterrence becomes even harder to
justify when we consider again the prudential standing doctrine of federal common law.
Recall that Jane Doe in the earlier (gun suppression) example lacked any individual
Fourth Amendment right implicated when the police illegally searched Jim. She notably
did, however, appear to satisfy the requirements for triggering an exception to prudential
standing principles.

By the Court’s calculus, the exclusionary rule exists, at least in part, because other remedies are typically inadequate.52 Jim is unlikely to sue the police successfully for searching his house.53 Therefore, the admission of the evidence will permit policeto get away with their misconduct and accordingly feel less inhibited about violating the Fourth

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52 See Mapp v. Ohio, 367 U.S. 643, 651-53 (1961)(“The obvious futility of relegating the Fourth Amendment of [sic] the protection of other remedies [than the exclusionary rule] has . . . been recognized by this Court.”); Wolf, 338 U.S. at 41 (Murphy, J. dissenting) (“For there is but one alternative to the rule of exclusion. That is no sanction at all.”).
53 “[P]rivate remedies against officers for illegal searches and seizures are conspicuously ineffective.” Monroe v. Pape, 365 U.S. 167, 191 (1961); William J. Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J.L. & Pub. Pol’y 443, 449 (1997) (explaining that “[t]he victim of police misconduct must have suffered the kind of harm that judges are likely to value- the case must be ‘worth’ something- or it will not be brought”); Guido Calabresi, The Exclusionary Rule, 26 Harv. J. L. & Pub. Pol’y 111, 114-15 (2003) (“Jurors are considerably more reluctant to identify with a criminal defendant who brings a tort action against the police for violation of his rights. In these cases, the plaintiff is a criminal and the jurors do not see themselves in that way. Of course, the mechanism works a little bit better when the illegal search was of innocent people. Even there, however, the jurors tend not to identify with the people searched. All too often, jurors think those people are the sort likely to be criminals even if they have not committed a crime in the case at hand. Hence, they view the plaintiffs as different from themselves. The result is that plaintiffs bringing tort actions against the police often fail to get jury verdicts. Even in the most serious cases, where people have been badly beaten up by the police, it is, in my experience, very unlikely that a jury will render a plaintiff’s verdict. When juries do give a verdict, the damage award is likely to be very small, for juries do not want to reward criminals. Because damages are hard to quantify in such cases, it is almost always necessary to guess at them. As a result, any jury disinclination to give significant awards is extremely difficult for courts to control.”); William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L. Rev. 881, 901-02 (1991) (“Suppose a police officer illegally searches my house for drugs, and finds none. Suppose further that my wife and I do not feel especially harmed, and would, if we were candid, value the injury we have suffered at one hundred dollars. It does not follow that the officer’s misconduct caused only one hundred dollars worth of harm. Indeed, the real harm such searches cause is the harm that matters most to society as a whole, is the diminished sense of security that neighbors and friends may feel when they learn of the police misconduct.”).
Amendment in the future. Jane, on the other hand – because of her automatic incentive to avoid a criminal conviction – is well situated to do what it takes to suppress the evidence and thereby ensure that police misconduct has painful consequences for its perpetrators.

It may seem intuitively wrong for Jane to benefit from a violation of Jim’s Fourth Amendment rights. If Jane’s windfall in serving as an undeserving private attorney general seems unfair, however, remember that it is most often innocent people who suffer when the police fail to accumulate probable cause before embarking on a search. Innocent people enjoying their privacy are both the intended and the actual beneficiaries of the Fourth Amendment. And the objective of suppression at criminal trials is to prevent police from performing searches of innocent people like Jim Roe in the future.

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

54 See Colb, supra note 3, at 1459 (“People feel differently about guilty versus innocent holders of Fourth Amendment privacy rights. The right is not entirely independent of what a person does with it. All of us begin with an entitlement to privacy, but some seem by their actions to forfeit part of that entitlement. The idea of forfeiture captures the intuition that guilty people really do not deserve the right when its exercise consists of the concealment of incriminating evidence.”); id. at 1525 (“From the perspective of the Fourth Amendment, it is a harm whenever an innocent person is searched, and it is costly whenever a guilty person harboring evidence is not searched. These are the substantive values that animate the Fourth Amendment.”).
It is arguably not only counterproductive but perverse that police can, under existing precedents, escape their rightful discipline in our hypothetical example because they violated the rights of an innocent person, like Jim Roe, rather than the rights of someone guilty of murder, like Jane Doe, who could -- if the weapon were found in her home -- have successfully moved to exclude it from evidence.

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

Moreover, as we saw in our earlier discussion of *Minnesota v. Carter*\(^{56}\), recent developments in standing law bring into sharper relief the deep instability of what amounts to a rigid prudential standing doctrine in the context of Fourth Amendment suppression, an instability that threatens to unravel the exclusionary rule altogether if taken to its logical conclusion.

\(^{55}\) Cf. *Rakas*, 439 U.S., at 168-69 (White, J., dissenting) (criticizing the majority’s denial of standing to “mere passengers” on the ground that “[t]his decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. . . . The suppression remedy for those owners in whose vehicles something is found and who are charged with crime is small consolation for all those owners and occupants whose privacy will be needlessly invaded by officers following mistaken hunches not rising to the level of probable cause but operated on in the knowledge that someone in a crowded car will probably be unprotected if contraband or incriminating evidence happens to be found. After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person.”).

VI. How Fourth Amendment Standing Doctrine Logically Requires the Abolition of Exclusion

As described earlier, the “reasonableness” of police searches and seizures depends entirely on the perspective of a police officer in possession of information that he or she has accumulated at the time of the search (or that a magistrate has before her when issuing a warrant). Objective reality -- whether the evidence is where it is expected to be or whether the suspect truly did commit the crime -- is irrelevant to the reasonableness of an officer’s conduct under the Fourth Amendment, except to the extent that the reality was apparent to the officer prior to the search.

We have also observed that unlike in assessments of the “reasonableness” of a search, what gives a defendant standing to object to a search or seizure is, notably, not what appears to be true, from the perspective of the officer, but what is actually true of the defendant. Whether or not an officer knew or could reasonably have known that it was the defendant’s bedroom he was searching, the reality that it was the defendant’s bedroom, under current doctrine, gives that defendant standing to object to the admission of any evidence found in the course of that illegal search.

This difference in perspective, between the reasonableness of a search and the defendant’s standing to suppress evidence resulting from the search, renders the doctrine internally incoherent and logically entails the demise of the exclusionary rule.

Recall the example in which Linda Smith kidnapped a child and hid him inside her house. We earlier addressed the question whether, if police illegally searched Linda’s home and found the child, Linda ought to have standing to object to the admission of incriminating evidence against her. Linda’s putative privacy right to exclude people from
her home, under existing law, turns on the legal entitlement that she has to the property (whether owned or rented) and on the sorts of customary social understandings that are extended to people minding their own business in their own homes. If instead of minding their own business, however, people use their homes as a venue for crime and evidence concealment, I have suggested, most Americans would not view such people as entitled to privacy -- from an omniscient perspective, based on complete, objective information about their behavior and circumstances.

Police, of course, have no right to enter a house until such information – regarding crime and its concealment – becomes known to them. As we have repeatedly seen, however, the standing issue is an objective one that it is not based on what police or a magistrate might have known or had reason to know. And as we saw in our earlier discussion of *Minnesota v. Carter*, 57 the Supreme Court has begun implicitly to recognize and incorporate into its own case law the necessary relevance of a more complete picture to a Fourth Amendment standing inquiry.

So what happens if we consider both property-relationship facts and guilt/innocence facts, as I suggest? Let us concede that in determining whether a defendant had a reasonable expectation of privacy under a particular set of circumstances, a court ought to ask whether or not the defendant was engaged in criminal activity or in the concealment of crimes. What would the effect of such a concession be?

To answer this question, consider Linda Smith (our hypothetical kidnapper) again. We would say, on our above concession, that Linda Smith lacks a reasonable expectation of privacy in her home when she uses it to commit and conceal a kidnapping.

Accordingly, if police happen to search Smith’s house illegally and discover what she has

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done, prosecutors would be free to call the police as witnesses during her criminal trial to
testify about what they found there. Though, on these facts, the police did violate the
Fourth Amendment, the circumstances under which Linda Smith was occupying her
home at the time of the search would deprive her of an individual entitlement to privacy
there. More importantly, for our purposes, any time a person discovered committing a
crime is prosecuted, this will be the case: the very fact that the individual was using his
or her home or other location for criminal acts and/or their concealment divests her of
standing to object to the admission of evidence found in that home, even if the police
have illegally exposed what was previously a private location. On this approach, no
criminal defendant would ever have Fourth Amendment standing to suppress evidence
illegally obtained.

But how can that be? Wouldn’t the universal incapacity of defendants to bring
suppression motions imply that police are in fact free to disregard the Fourth Amendment
in many cases? Yes and no. The position, which the Fourth Amendment holds, that a
home should be free of police intrusion in the absence of probable cause and a warrant
carries no necessary implications for the composition of the class of people entitled to
complain when police have clearly crossed that legal boundary. Nothing about the

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58 I do not here suggest that a guilty person has suffered no constitutional harm at all when a police
officer searches the place of his criminal concealment without a warrant or probable cause. As I proposed
in Colb, supra note 3, a police officer who performa a search without probable cause or a warrant commits
a targeting harm against the person whose home or other private location he has searched. See Colb, supra
note 3 at 1487, 1500 (arguing that a “targeting harm” occurs when a person is “singled out from others
through an exercise of official discretion that is not based on an adequate evidentiary foundation”).
Therefore, in a lawsuit to recover compensatory damages, even a guilty target could prevail on the basis of
the targeting harm. Id. at 1519 (stating that “monetary compensation should be tailored to the
unreasonableness of the decision to search, to the insult to [the suspect] in being targeted in the way that he
was”). Not having suffered a privacy harm, however, the sort of harm that connects with one’s actual (if
undetected) use of one’s space, would deprive the person of standing to object to the admission of evidence
found while violating the privacy to which the individual had no entitlement.

59 If the person is ultimately acquitted, of course, then she can argue that she actually was personally
entitled to privacy from that search after all. But in such a case, by definition, the admission of the illegal
evidence was harmless error, because it did not affect the outcome of the trial.
necessary scope of standing doctrine, in other words, reflects the view that the police
have done nothing wrong when their illegal searches happen to turn up evidence of
crime.

Assume, for example, that police search a home without a warrant or probable
cause and find evidence of crime. If several people share that home, and one of the
occupants – but not the others – engages in criminal acts, the residents who have not
committed any crimes could bring a lawsuit against the police for violating the Fourth
Amendment. They could collect damages, moreover, for both a privacy harm and a
targeting harm. But like someone unlawfully on the premises (and therefore lacking
standing to object to the fruits of an illegal entry), the resident who lawfully occupies the
premises but unlawfully conducts a kidnapping there does not deserve to complain about
invasions of privacy – from an individual entitlement perspective. And the standing
doctrine purports to revolve around what privacy the individual invoking the Fourth
Amendment is personally entitled to have.

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

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60 See Colb, supra note 3, at 1491-95 (explaining the “targeting harm” which occurs when police
target a person for Fourth Amendment invasions without a sufficient basis for doing so).
61 Rakas, 439 U.S. at 133-34; Carter, 525 U.S. at 88.
instead of personal behavior -- then one’s entitlement to complain about police intrusions ought to diminish accordingly.

One could respond here that even if the line is somewhat arbitrary, the drawing of a line between the terms of one’s relationship with a place (such as a home), on the one hand, and the legality of the activity in which one is engaged in that place on the other, is essential. Without that line – as I have suggested above – there will be no one who has both an interest in suppressing evidence in a criminal case (i.e., has Article III standing to bring a suppression motion in the first place) and Fourth Amendment standing to object to the admission of evidence. The class of people who could legitimately complain of the police conduct, in other words, would include only innocent people, and innocent people – not engaged in crime or the concealment of criminal evidence – would not have the opportunity to suppress incriminating evidence because they would not, ordinarily, face a trial (at which suppression would be an option).62

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

This approach may sound sensible on the surface, but it makes no sense. If we are truly concerned about the deterrent value of the exclusionary rule, then we should eliminate the standing doctrine altogether. As discussed above, it is incoherent to have a

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62 As I explained earlier, supra note 59, an innocent person could, of course, find himself on trial for an offense he did not commit. However, such a person should be acquitted (even when the evidence illegally obtained is included). Once acquitted, of course, the outcome of the trial renders the introduction of evidence that, retrospectively, should have been excluded, harmless error. If an innocent person is nonetheless convicted of a crime, the resulting injustice is not a product of unreasonable searches and seizures but a product of human error in assessing admittedly probative evidence. As I have suggested elsewhere, see, e.g., Colb, supra note 3 at 1523, such errors are tragic and, in an important sense, deprive a person of something that truly ought to be his, despite the lack of a procedural harm.
deterrent rule that we enforce only when the police who perform illegal searches happen to find evidence against the particular person who holds a property or property-like interest in the place searched. If police violate the Fourth Amendment, then the sensible and coherent deterrence approach is to permit anyone against whom the illegally obtained evidence is offered to object to its admission.63

CONCLUSION

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

The police officer’s perspective gives us a definition of protected privacy and of the reasonableness of searches that makes actual guilt (as opposed to apparent guilt)

63 This approach might be preferable to the abolition of the exclusionary rule for a second reason as well. In addition to accomplishing deterrence, it would permit the adjudication of targeting harms committed by the police. See Colb, supra note 3, at 1499 (“The value placed on avoiding mistreatment of even the ‘right’ people for the ‘wrong’ reasons is reflected in what this Article has called the targeting harm. We have seen, of course, that the presence of the targeting harm is not contingent upon the nature of the ‘guilty’ person’s conduct. Whether a person is engaged in criticizing the government or in growing marijuana, he has a right not to be singled out without a legitimate basis”). Even when a guilty person is searched by the police without probable cause, she is still harmed by the fact that she was unfairly targeted for the search. Id. The targeting harm, in other words, is a harm defined by the police officer’s perspective and simultaneously experienced by the police target, no matter what the latter’s relationship to the property and without regard to his guilt or innocence. Permitting all criminal defendants to suppress unlawfully obtained evidence would, in a significant number of cases, mean that the person who suffered a targeting harm would have an opportunity – probably the only opportunity he might ever have – to protest the targeting harm and to have a court rule on that protest.
immaterial. If an officer sees a private home and lacks any basis for suspecting the concealment of criminal evidence there, then the officer must stay away. To do otherwise is to perform a search that violates the Fourth Amendment prohibition against unreasonable searches.

The Fourth Amendment standing doctrine, however, with its objective factual perspective, brings reality – rather than its appearance – into the picture. Objective reality is the essence of the Fourth Amendment standing inquiry: it asks whether the particular person against whom evidence was found has an actual, objective relationship to the location that was illegally searched, such that he may complain of the search. Whether the police did or even could have known of that relationship – the appearance of standing – has no bearing on which defendants may bring suppression motions at their criminal trials.

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

The moment that the objective reality which drives Fourth Amendment standing appropriately includes facts about guilt, however, no one will properly have Fourth Amendment standing to suppress evidence in a criminal prosecution.

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

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