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MITIGATING MISCONDUCT THROUGH THIRD-PARTY STANDING

Julian A. Cook III†

INTRODUCTION

On April 4, 2015, Walter L. Scott was driving his vehicle when he was stopped by Officer Michael T. Slager of the North Charleston, South Carolina, police department for a broken taillight.[1] A dash cam video from the officer's vehicle showed the two men engaged in what appeared to be a rather routine verbal exchange.[2] Sometime after Slager returned to his vehicle, Scott exited his car and ran away from Slager, prompting the officer to pursue him on foot.[3] After he caught up with Scott in a grassy field near a muffler establishment, a scuffle between the men ensued, purportedly over a Taser in Slager's possession.[4] A bystander began filming the confrontation at this point, capturing Slager firing his Taser at Scott, the two men tussling, something

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1 Alan Blinder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html [http://perma.cc/W652-Q4EC] (containing video footage of the fatal shooting).

2 *Id.*

3 *Id.*

4 *Id.*; Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html [http://perma.cc/LZ84-LB56].

falling to the ground, and Scott subsequently attempting to flee.[5] With Scott's back to the officer, Slager, while in an upright, stationary position, fired eight shots in Scott's direction, striking him several times and causing him to fall face down to the ground.[6] After approaching Scott, Slager placed him in handcuffs before calling and reporting to dispatch that Scott was "down" and that "[h]e took my Taser."[7] About 90 seconds later, Slager contacted dispatch for a second time.[8] This time, he reported that Scott was unresponsive and had suffered wounds to various parts of his body.[9] Scott, who was African-American, died at the scene.[10] He was 50 years old.[11] On June 8, 2015, Slager, who is white, was indicted for first-degree murder.[12]

The Walter Scott shooting is but one of a steady stream of police misconduct cases of late involving white officers and black individuals that have generated significant media coverage and public conversation. The Staten Island, New York, chokehold case involving Eric Garner,[13] the Cleveland, Ohio, death of Tamir Rice, who was 12 years old and was carrying a fake gun in a public park when he was shot by a police officer,[14] the shooting death of Michael Brown at the hands of a police officer after a confrontation in Ferguson, Missouri,[15] and the Sandra Bland incident in Hempstead, Texas, where she was stopped for a traffic violation, threatened by an officer with a Taser, and later found dead in her

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[5] Blinder & Williams, *supra* note 1.

[6] *Id.*

[7] Schmidt & Apuzzo, *supra* note 4.

[8] Michael Martinez, *South Carolina Cop Shoots Unarmed Man: A Timeline*, CNN (Apr. 9, 2015, 10:40 AM), http://www.cnn.com/2015/04/08/us/south-carolina-cop-shoots-black-man-timeline [http://perma.cc/LA48-WLJP].

[9] *Id.* The bystander's video shows that after calling in the incident, Slager picked something up from the ground near where the men had tussled—possibly the Taser—and then dropped it next to Scott's body. Schmidt & Apuzzo, *supra* note 4.

[10] Schmidt & Apuzzo, *supra* note 4.

[11] *Id.*

[12] Blinder & Williams, *supra* note 1.

[13] Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), http://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html [http://perma.cc/W8U3-SGRR].

[14] Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html [http://perma.cc/GNG4-KM9F].

[15] Larry Buchanan et al., *What Happened in Ferguson*?, N.Y. TIMES, http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html [http://perma.cc/HT6K-38SP] (last updated Aug. 10, 2015).

jail cell,[16] are among the notable events that have thrust the issue of police misconduct back into the national spotlight.

In her bestselling book, *The New Jim Crow*, Professor Michelle Alexander argues that the mass incarceration of blacks has, in essence, become America's new racial caste system.[17] What society once achieved through the establishment of Jim Crow laws, Alexander argues, America now achieves through mass incarceration. In making her claim, Alexander made the following declaration with respect to the latitude afforded law enforcement:

> The U.S. Supreme Court, for its part, has mostly turned a blind eye to race discrimination in the criminal justice system. The Court has closed the courthouse doors to claims of racial bias at every stage of the criminal justice process from stops and searches to plea bargaining and sentencing. Law enforcement officials are largely free to discriminate on the basis of race today, so long as no one admits it. That's the key. In *McCleskey v. Kemp* and *United States v. Armstrong*, the Supreme Court made clear that only evidence of conscious, intentional racial bias—the sort of bias that is nearly impossible to prove these days in the absence of an admission—is deemed sufficient. No matter how impressive the statistical evidence, no matter how severe the racial disparities and racial impacts might be, the Supreme Court is not interested. The Court has, as a practical matter, closed the door to claims of racial bias in the criminal justice system.[18]

Though Alexander's comments are tailored to the issue of racially discriminatory law enforcement practices, her comments highlight an undeniable broader reality: namely, that Supreme Court jurisprudence has produced a climate highly favorable to governmental prosecution and investigative interests.

Whereas the Warren Court era was characterized, in part, by its expansive protections of individual constitutional liberties, the Supreme Court in the years since has steadily—and significantly—undermined many of these outcomes. With the weakening of constitutional safeguards has come an expansion of law enforcement's authority to perform their investigative functions and a corrosive influence on police organizational culture. This article argues that the Court's post-Warren era of investigative permissiveness has contributed to

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[16] David Montgomery, *Sandra Bland Was Threatened with Taser, Police Video Shows*, N.Y. TIMES (July 21, 2015), http://www.nytimes.com/2015/07/22/us/sandra-bland-was-combative-texas-arrest-report-says.html [http://perma.cc/NT4S-CWZ3]; David Montgomery, *Sandra Bland Death May Lead to Disciplinary Action, Sheriff Says*, N.Y. TIMES (July 25, 2015), http://www.nytimes.com/2015/07/26/us/sandra-bland-death-may-lead-to-disciplinary-action-sheriff-says.html [http://perma.cc/65TM-6XHL].

[17] MICHELLE ALEXANDER, THE NEW JIM CROW 2 (rev. ed. 2012).

[18] Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 18-19 (2011) (footnotes omitted).

what Professor Barbara Armacost describes as "an overly aggressive police culture"[19] that is increasingly emboldened by highly favorable search and seizure, interrogation, and identification laws[20] and extremely limited—and forgiving—exclusionary rule jurisprudence.

The goal of this article is to build upon the academic literature relevant to the issue of policing and offer a pragmatic, remedial measure that provides incentives to police agencies to improve their institutional culture and become more constitutionally compliant. By focusing on the Supreme Court's jurisprudence in the Fourth Amendment exclusionary rule and standing contexts,[21] this article demonstrates how the Court, over the course of many years, has contributed to this problematic police culture and thus to the associated problems of police malfeasance. In the end, the article proposes an unprecedented expansion of the standing doctrine. It argues that as more aggrieved individuals are empowered to challenge constitutionally

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[19] Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455 (2004).

[20] Professor Alexander contends that the liberal discretion extended to the police regarding whom to search, arrest, and charge for narcotics crimes has given them "free rein" to act upon their "conscious and unconscious" racial attitudes. ALEXANDER, *supra* note 17, at 103. Specifically, Alexander commented,

> The central question, then, is *how* exactly does a formally colorblind criminal justice system achieve such racially discriminatory results? . . . The process occurs in two stages. The first step is to grant law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses, thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free rein. Unbridled discretion inevitably creates huge racial disparities. Then, the damning step: Close the courthouse doors to all claims by defendants and private litigants that the criminal justice system operates in racially discriminatory fashion. Demand that anyone who wants to challenge racial bias in the system offer, in advance, clear proof that the racial disparities are the product of intentional racial discrimination—i.e., the work of a bigot. This evidence will almost never be available in the era of colorblindness, because everyone knows—but does not say—that the enemy in the War on Drugs can be identified by race.

Id.

[21] Standing questions are of rare occurrence in the Fifth and Sixth Amendment contexts. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2523, 2526 (1996) ("Standing rarely comes up as an issue in the Fifth Amendment context because a defendant usually has standing to contest the use of his or her own statements or their fruits, and the government generally is precluded from using the out-of-court statements of others as evidence against a defendant by the defendant's Sixth Amendment right to confront the witnesses against him. . . . For reasons identical to those in the *Miranda* context, standing to challenge *Massiah* violations is rarely an issue because a defendant always will have standing to object to the admission of his own statements, and the government rarely will seek to admit the out-of-court statements of others against the defendant because of separate Confrontation Clause concerns.").

questionable police conduct, institutional cultures will, in turn, adapt to this new reality, thereby producing a climate that fosters greater respect for constitutional liberties, discourages unnecessarily aggressive police behaviors, and improves relations between law enforcement and the majority and minority communities they serve.

Part I recounts some of the prominent cases decided during the Supreme Court's Warren Court years. It was during this era that individual constitutional safeguards were interpreted expansively, at least as compared to more recent Supreme Court jurisprudence. This part will focus primarily on the Court's exclusionary rule and standing jurisprudence, with particular attention devoted to *Mapp v. Ohio*,[22] an infamous decision that expanded the reach of the exclusionary rule to the states, *Jones v. United States*,[23] a lesser-known case that adopted an expansive interpretation of the standing doctrine in the context of a Fourth Amendment claim, and *Alderman v. United States*,[24] which rejected the concept of third-party standing in criminal cases.

Part II discusses the Supreme Court's era of investigative permissiveness. Specifically, this part reviews how individual constitutional protections have been scaled back and law enforcement investigative liberties expanded in the post–Warren Court years.[25] It also devotes significant attention to the "good faith" exception to the exclusionary rule and explains how the Court, in a series of cases, severely constricted the field of challengers eligible to contest allegedly unconstitutional government conduct.

Part III sets forth a proposal for reform. It discusses the influence of police organizational culture on individual officer behavior and explains how the waning influence of the exclusionary rule and the severely contracted standing doctrine have helped promote an institutional culture that often cultivates police misconduct. To ameliorate this problem, the proposal calls for the establishment of a standing doctrine even more robust than that advanced in *Jones*. Specifically, the article advocates for an expansive third-party standing approach

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

[23] Jones v. United States, 362 U.S. 257, 263-64 (1960).

[24] Alderman v. United States, 394 U.S. 165, 171-72, 174 (1969).

[25] As in Part I, Part II will briefly discuss the Court's non-exclusionary-rule jurisprudence but will focus on those cases that pertain more directly to the exclusionary rule and the issue of standing.

rooted in the Due Process Clause[26] that allows claimants to assert Fourth Amendment challenges, irrespective of a defendant's personal privacy or possessory interests or his location at the time of the search.

The origins of this proposal are found in two key Supreme Court cases: *Batson v. Kentucky*,[27] which held that the government violated the equal protection rights of an African-American defendant and prospective black jurors when it used its peremptory challenges to exclude the jurors on account of their race, and *Powers v. Ohio*,[28] which held that a white criminal defendant had third-party standing to assert equal protection claims on behalf of prospective black jurors who, as in *Batson*, were stricken solely on account of their race.[29] As Part III will explain in depth, the justifications that underlie the expanded concept of standing in *Powers* and its progeny apply with equal—if not greater—force in the exclusionary rule context.

While this curative proposal is admittedly only a first step, it is one that is necessary for meaningful institutional change. As explored more fully in Part III, a broad field of eligible challengers to government investigative conduct, and a judiciary possessed with liberal authority to suppress unconstitutionally seized evidence, will incentivize police organizations to effectuate institutional cultural change, and enact, implement, and sustain positive remedial measures and practices. Without these measures, police reform becomes overly reliant on the good faith intentions of law enforcement. The problem of policing is too complex—and too important—to expect positive change in the absence of extensive and sustained judicial oversight. It is this reality that underlies the standing proposal set forth in this article.

I. THE WARREN COURT YEARS: THE EXPANSION OF INDIVIDUAL LIBERTIES

In describing the common thread that runs through the Warren Court's criminal procedure jurisprudence, Professor Jerold Israel stated that "[t]he Court's general premise seemed to be that an expansive interpretation of individual rights should be

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[26] *See* Nadia B. Soree, *Whose Fourth Amendment and Does It Matter? A Due Process Approach to Fourth Amendment Standing*, 46 IND. L. REV. 753 (2013) (arguing that individuals have a Due Process Clause right to raise Fourth Amendment challenges to police investigative conduct irrespective of whether a personal Fourth Amendment interest has been infringed).

[27] Batson v. Kentucky, 476 U.S. 79, 96 (1986).

[28] Powers v. Ohio, 499 U.S. 400, 402 (1991).

[29] For a more in-depth discussion of *Batson* and *Powers*, see *infra* Section III.B.

taken unless adoption of such an interpretation presented exceptional difficulties."[30]

Consistent with Israel's comment, the Court's decisions during this era generally expanded individual constitutional safeguards. Nevertheless, as Israel observed, the Court rendered decisions favorable to the government in the Fourth Amendment context when such "difficulties" presented themselves. Cases such as *Terry v. Ohio*, which authorized government stops and frisks on the basis of reasonable suspicion,[31] and *Warden v. Hayden*, where the Court expanded the evidence-gathering authority of the government during the execution of a search,[32] are just a sampling. A third such case, *Alderman v. United States*, where the Court declined to extend the standing concept,[33] also arguably fits this paradigm. Similarly, in the Fifth Amendment context, the Court found in a series of cases that the government can compel nontestimonial information from an individual without violating that individual's privilege against self-incrimination. Drawing a distinction between compelled knowledge (constitutionally protected) and compelled physical evidence (not protected), the Court upheld government-compelled writing exemplars,[34] blood tests,[35] and lineup identification procedures.[36]

A. Expansion of Rights Under the Fourth, Fifth, and Sixth Amendments

Despite the line of decisions that were favorable to government interests, the Warren Court, more frequently than not, acted to expand constitutional liberties under the Bill of Rights. In the Fifth Amendment context, the Court issued the infamous *Miranda v. Arizona* decision.[37] There, the Court held that the amendment's privilege against self-incrimination clause granted defendants in custody the right to be advised of certain warnings prior to the commencement of interrogation.[38] In the Sixth Amendment sphere, the Court held in *Massiah v.*

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[30] Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1340 (1977).

[31] Terry v. Ohio, 392 U.S. 1, 20-30 (1968).

[32] Warden v. Hayden, 387 U.S. 294, 301-02 (1967).

[33] Alderman v. United States, 394 U.S. 165, 174 (1969).

[34] Gilbert v. California, 388 U.S. 263 (1967).

[35] Schmerber v. California, 384 U.S. 757 (1966).

[36] United States v. Wade, 388 U.S. 218 (1967); Israel, *supra* note 30, at 1345.

[37] Miranda v. Arizona, 384 U.S. 436 (1966).

[38] The Court found that individuals who were interrogated while in police custody must first be advised of their right to remain silent and of their right to have counsel present during such questioning. *Id.* at 444-45.

United States that statements obtained from an undercover informant from a defendant post-indictment violated the defendant's Sixth Amendment right to counsel.[39] And in *Gideon v. Wainwright*, the Court found that the Sixth Amendment right to counsel was a fundamental right, thus entitling indigent state court defendants who were charged with a felony to the assistance of counsel.[40]

The Warren Court also expanded individual safeguards in several cases presenting Fourth Amendment claims, often overruling precedent in the process.[41] For instance, in *Katz v. United States*,[42] the Court overruled *Olmstead v. United States*,[43] rejecting the government's contention that its electronic eavesdropping on the defendant's telephone conversations in a public telephone booth was not a Fourth Amendment search because it did not involve a physical trespass.[44] Instead, the Court held that the amendment's protections extended to such conversations.[45] And in *Camara v. Municipal Court*,[46] the Court held that administrative inspections of homes could not be performed in the absence of a warrant.[47] In concluding that such inspections were governed by the Fourth Amendment, the Court overruled *Frank v. Maryland*,[48] which upheld a Baltimore city code that authorized warrantless entries into an individual's residence when there was "cause" to believe that a nuisance existed within that dwelling.[49]

B. The Exclusionary Rule

In the exclusionary rule context, certainly no Warren Court decision was more significant than *Mapp v. Ohio*, the case that extended the exclusionary rule to state court actions.[50] In so doing, the Court overruled *Wolf v. Colorado*, in which the Court had held that in state court actions involving the prosecution of

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[39] Massiah v. United States, 377 U.S. 201, 201, 206 (1964).

[40] Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963).

[41] THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 169, 225, 284 (2009); *see* Michael Anthony Lawrence, *Justice-as-Fairness as Judicial Guiding Principal: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673, 689-90 (2016).

[42] Katz v. United States, 389 U.S. 347 (1967).

[43] Olmstead v. United States, 277 U.S. 438 (1928).

[44] *Katz*, 389 U.S. at 350-53.

[45] *Id.*

[46] Camara v. Mun. Court of S.F., 387 U.S. 523 (1967).

[47] *Id.* at 534.

[48] Frank v. Maryland, 359 U.S. 360 (1959).

[49] *Camara*, 387 U.S. at 534.

[50] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

state criminal offenses, the Fourteenth Amendment did not proscribe the admission of evidence obtained by virtue of an unreasonable search or seizure.[51]

In *Mapp*, police officers went to defendant Mapp's residence based on their suspicion that an individual connected with a recent bombing was "hiding out" there.[52] The officers, who did not have a search warrant for the home, "knocked on the door and demanded entrance" but were denied admittance by the defendant's wife.[53] A few hours later, they again sought entry, but when Mapp did not promptly answer the door, the police forcibly entered the residence.[54] Thereafter, the officers proceeded to conduct a "widespread search" of the home, finding incriminating evidence in the process.[55] Mapp was tried, and ultimately convicted, pursuant to an Ohio law prohibiting the possession and control of "certain lewd and lascivious books, pictures, and photographs."[56] The government did not introduce a search warrant at the trial and no explanation was given for this failure to produce.[57]

In extending the reach of the exclusionary rule to state court prosecutions, the Court set forth several rationales. First, it noted that the exclusionary rule had been firmly entrenched in the federal system since the Court's 1914 decision in *Weeks v. United States*.[58] As stated in *Wolf, Weeks* held "for the first time" that in the federal system, "the Fourth Amendment barred the use of evidence secured through an illegal search and seizure."[59] *Mapp* added that in the years since *Weeks,* the Court had "strict[ly] adhere[d]" to this constitutional mandate.[60] And the Court vigorously emphasized that a failure on the part of the

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[51] Wolf v. Colorado, 338 U.S. 25, 33 (1949); *Mapp*, 367 U.S. at 645-46. The *Mapp* Court noted that in the aftermath of *Weeks v. United States*, 232 U.S. 383 (1914),

> [t]his Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ."

Mapp, 367 U.S. at 648 (citations omitted) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.); *Weeks*, 232 U.S. at 392)).

[52] *Mapp*, 367 U.S. at 644.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 645.

[56] *Id.* at 643.

[57] *Id.* at 645.

[58] *Id.* at 647-49.

[59] Wolf v. Colorado, 338 U.S. 25, 28 (1949).

[60] *Mapp*, 367 U.S. at 648.

state courts to enforce *Weeks* would nullify the Fourth Amendment's guarantees.[61]

The *Mapp* Court then turned its attention to *Wolf*. In overturning *Wolf*, the Court stated that it was "clos[ing] the only courtroom door remaining" that failed to adhere to the *Weeks* principle.[62] In so doing, the Court firmly declared "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[63]

The Court's most pointed language was arguably employed during its discussion of the exclusionary rule's deterrence rationale. It vigorously stressed that the threat of exclusion was essential to ensure government respect for individuals' Fourth Amendment rights. It emphasized that, absent this threat, the constitutional guarantee against unreasonable government interference would be merely "a form of words," and the sanction of exclusion was necessary to deter police misconduct and "compel respect for the constitutional guaranty in the only effective available way."[64] *Mapp* was direct in its language, consistent in its tone, and unambiguous in its message. The exclusionary rule was an inherent aspect of the Fourth Amendment, and without it, the constitutional guarantee would be an "empty promise."[65]

C. The Exclusionary Rule and Standing

A year before *Mapp*, the Court decided *Jones v. United States*, a case that presented a standing issue.[66] *Jones* is far less celebrated than *Mapp* and receives, at best, only a passing reference in a great many law school criminal procedure courses. Perhaps this is due to its somewhat limited shelf life—the Court overturned it 20 years later in *United States v. Salvucci*[67]—and the fact the Court began to dismantle *Jones* prior to its official demise.[68] Yet *Jones* is important for at least two reasons. Not only did the case establish a wider avenue through which standing could be established, but when *Jones* is viewed in conjunction with *Mapp*, it becomes apparent how vastly different the exclusionary rule landscape was in the 1960s.

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[61] *Id.*
[62] *Id.* at 654-55.
[63] *Id.* at 655.
[64] *Id.* at 648, 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).
[65] *Id.* at 660.
[66] Jones v. United States, 362 U.S. 257 (1960).
[67] Unites States v. Salvucci, 448 U.S. 83 (1980).
[68] *See infra* Section II.C.2.

Jones was a federal narcotics case where the Court addressed whether the defendant, who was present in an apartment where he did not reside during the execution of a search warrant, had standing to contest the search of that residence.[69] In challenging the search, the defendant argued that the warrant was not supported by probable cause.[70] The government countered that the defendant lacked standing to contest the search, given that he made no ownership claim in regards to the items taken, and his relationship to the apartment was nothing more than that of a guest or invitee.[71] At the suppression hearing, the defendant testified that he did not reside at the apartment, that the owner of the apartment had given him a key to the residence, that the defendant used the key to enter the premises on the day of the search, that he had spent perhaps one night at the apartment, that he had only a few articles of clothing there, and that he did not pay any money for use of the apartment.[72] The district court found that the defendant did not have standing to contest the search.[73] This decision was affirmed on appeal.[74]

The Supreme Court vacated the circuit court opinion on other grounds but found that the defendant had standing to contest the search.[75] The *Jones* Court provided two distinct bases

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[69] *Jones*, 362 U.S. at 258-59.

[70] *Id.* at 259.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Jones v. United States, 262 F.2d 234 (D.C. Cir. 1958), *vacated*, 362 U.S. 257 (1960).

[75] *Jones*, 362 U.S. at 263-64. The Court referenced Federal Rule of Criminal Procedure 41(e) in deciding the standing issue presented in *Jones*. That rule provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Id. at 260-61 (quoting FED. R. CRIM. P. 41(e)).

for its conclusion: automatic standing[76] and the defendant's legitimate presence on the property.[77]

The Court's finding that the defendant had automatic standing addressed a "special problem" presented in *Jones*. Prior to *Jones*, a defendant who was charged with a possessory offense and sought to challenge the constitutionality of the government's search and seizure of that item (and associated evidence) had a dilemma. If the defendant admitted possession of the item, he would have standing to challenge the government's conduct,[78] but his admission could be used against him at his trial.[79] *Jones* solved this problem by holding that a defendant faced with this predicament had automatic standing to contest the government's conduct.[80]

The Court reasoned that a contrary holding would allow the government to reap the benefit of what the Court deemed to be "contradictory positions."[81] On the one hand, the defendant's conviction rested upon the government's proof that he possessed the narcotics alleged in the indictment.[82] On the other hand, the fruits of the government's search were admitted pursuant to the government's pretrial claim that he was not in possession of the narcotics.[83] As the Court stated, "It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing . . . ."[84]

Regarding the second basis for standing cited by the Court—the defendant's legitimate presence in the apartment[85]—the record established that he was present in the apartment with the owner's permission.[86] The Court acknowledged that the government's position with respect to the standing question—that those with tenuous connections to the home do not have standing, while those with more sustained or "domiciled"

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[76] *Id.* at 263-64.

[77] *Id.* at 265-67.

[78] The Court stated that generally, Courts of Appeals have required that movants, in order to establish standing, assert ownership or a possessory interest in the item seized or "a substantial possessory interest in the premises searched." *Id.* at 261.

[79] *Id.* at 262.

[80] *Id.* at 264.

[81] *Id.* at 263-64.

[82] *Id.* at 263.

[83] *Id.*

[84] *Id.* at 263-64.

[85] *Id.* at 265-67.

[86] *Id.* at 265.

relationships have standing—was consistent with the approach followed by the majority of lower courts.[87] The Court in *Jones*, however, found it "unnecessary and ill-advised" to engage in such an exercise involving "subtle distinctions."[88] As the Court stated, "Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."[89]

An additional avenue for standing was also discussed in *Jones*. The Court declared that standing can exist when an individual is "a victim of a search or seizure, one against whom the search was directed."[90] Thus, this theory of standing suggests that a claimant can mount a Fourth Amendment challenge in instances where he had no connection whatsoever with the searched premises, provided that he was an intended target of the search.[91]

Notably, the Court identified a basis upon which standing could not be established—that is, in instances when an individual "claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[92] Thus, an individual whose basis for standing rests on the assertion that the evidence the government intends to introduce against him is the product of an unconstitutional search or seizure that was directed at another individual will not have his claim entertained by the court. This statement of limitation would be relied upon by the Supreme Court a few years later in *Alderman v. United States*, when it decided another important standing question in the context of the exclusionary rule.[93]

In *Alderman*, the Court considered whether the petitioners had standing to urge a Fourth Amendment violation when their personal constitutional rights had not been

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[87] *Id.* Individuals deemed to be mere "guests" and "invitees" to a home were typically denied standing, while others with more substantial connections to the premises, such as "owners[]," satisfied the standing threshold. *Id.* at 265-66.

[88] *Id.* at 266.

[89] *Id.*

[90] *Id.* at 261.

[91] *Id.* The Court in *Rakas* referred to this approach to standing as the "target theory." Rakas v. Illinois, 439 U.S. 128, 134-35 (1978).

[92] *Jones*, 362 U.S. at 261.

[93] Alderman v. United States, 394 U.S. 165 (1969). In *Alderman*, three defendants "were convicted of conspiring to transmit murderous threats in interstate commerce." *Id.* at 167. In a petition for rehearing, it was alleged (and seemingly conceded by the government) that the government unconstitutionally eavesdropped upon conversations with one of the defendants in his place of business. *Id.* at 167-68.

infringed.[94] The Warren Court said no. Finding that there is a "substantial difference" between asserting constitutional rights that are personal from those that are not, the Court reasoned that "the deterrent aim of the rule" provides an insufficient basis to extend standing to third-party claims.[95] The Court explained that exclusion was unnecessary "in order to protect the rights of another," given that "[n]o rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and very probably will object for himself when and if it becomes important for him to do so."[96] And though the Court acknowledged that "additional benefits" (deterrence) would attend to the adoption of the proffered third-party standing rule, the Court found that this fact did not "justify further encroachment" upon the prosecutorial truth-seeking function.[97]

Despite the holding in *Alderman*, the Warren Court's exclusionary rule jurisprudence was progressive. During that era, the exclusionary rule had been extended to the states, was considered a constitutional mandate, and had provided a broad base of individuals with standing to contest unconstitutional government conduct. This period of expansion soon gave way to an extended period of contraction, however, which severely undercut the promising attributes of *Mapp* and *Jones*. This era of investigative permissiveness will be discussed in Part II.

II. THE POST–WARREN COURT YEARS: THE ERA OF PERMISSIVENESS AND THE WHITTLING DOWN OF INDIVIDUAL LIBERTIES

Professor Francis Allen suggested that by the late 1960s, the Warren Court's criminal procedure jurisprudence may have become more "mainstream" given American society's increasing concern with violent crime.[98] He posited that the Court might

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[94] *Id.* at 171-76.

[95] *Id.* at 174.

[96] *Id.*

[97] *Id.* at 174-75.

[98] As noted earlier, the decisions of the Warren Court were not uniformly expansive of individual liberties. Fourth Amendment cases such as *Terry v. Ohio*, 392 U.S. 1 (1968), *Warden v. Hayden*, 387 U.S. 294 (1967), and *Alderman v. United States*, 394 U.S. 165 (1969), and Fifth Amendment cases such as *United State v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Schmerber v. California*, 384 U.S. 757 (1966), attest to this fact. And there were more. For example, in *Hoffa v. United States*, 385 U.S. 293 (1966), the Court held that the defendant's incriminating comments made in various locations, including his hotel room in the presence of a cooperating government agent, violated neither the Fourth nor Fifth Amendments, given Hoffa's misplaced confidence in the undercover agent and the voluntariness of his statements. *Id.* at 300-04. Also, in *Harrington v. California*, 395 U.S. 250, 251 (1969), and *Chapman v.*

have "lost its 'impetus' for imposing new constitutional standards"[99] and that cases such as *Terry v. Ohio*, decided in 1968, are an exemplar of this shift.[100] Whatever the merits of this claim, it is clear that many significant cases and the individual rights that were founded and expanded during the Warren Court years were scaled back in the years that followed.

A. Identification Procedures

One such area of contraction was the Sixth Amendment right to counsel. In *United States v. Wade*, the Court held that the defendant, who had been indicted at the time of his lineup identification procedure, was entitled to have counsel present at his lineup identification pursuant to the Sixth Amendment.[101] Within six years of *Wade*, the Court decided *Kirby v. Illinois*[102] and *United States v. Ash*,[103] which limited *Wade*'s scope. In *Kirby*, the Court did not extend the Sixth Amendment right to counsel to an unindicted individual who had been subjected to a lineup identification procedure.[104] And in *Ash*, the Court held that the Sixth Amendment right to counsel did not extend to an indicted defendant who challenged the constitutionality of a photo-identification procedure.[105] As noted by Professor Israel, "the *Wade* ruling now stands as a narrow exception to the general rules governing identification procedures," given "that the effect of *Kirby* is to restrict sharply the practical application of the *Wade*

California, 386 U.S. 18 (1967), the Court held that violations of a defendant's constitutional rights (except those considered "basic to a fair trial") are subject to a harmless error analysis and do not require automatic reversal. *Harrington*, 395 U.S. at 251-52; *Chapman*, 386 U.S. at 23-24.

[99] Israel, *supra* note 30, at 1346.

[100] *Id.* at 1346-47. Israel referenced his former colleague at the University of Michigan Law School, the late Francis Allen, who cited *Terry* as such an example. Israel writes:

> Professor Allen suggests that *Terry* and other Court decisions in the late 1960s may indicate that the Court was being forced back into the mainstream of a community consensus primarily concerned with effective law enforcement. Such a shift would have been quite understandable in light of the intense reactions to violent crime and riots during the late 1960s. If the Warren Court had indeed started such a shift, then the Burger Court might be viewed in a quite different light when compared with its predecessor.

Id. at 1347 (footnote omitted).

[101] *Wade*, 388 U.S. at 226-27.

[102] Kirby v. Illinois, 406 U.S. 682 (1972).

[103] United States v. Ash, 413 U.S. 300 (1973).

[104] *Kirby*, 406 U.S. at 689-90.

[105] *Ash*, 413 U.S. at 321.

ruling, since police ordinarily can arrange for pre-charge lineups and thus bypass *Wade*."[106]

B. The Miranda *Rule*

In *Miranda*, the Court held that the Fifth Amendment requires that a defendant who is in custody be informed of his right to remain silent and his right to counsel prior to the commencement of police interrogation.[107] But the Court has steadily chipped away at these protections. For instance, the Court has held that statements obtained in violation of *Miranda* can be used for impeachment purposes;[108] the *Miranda* rule does not apply to undercover police interrogation;[109] to invoke the right to remain silent or the right to counsel, an individual must affirmatively and unambiguously invoke the asserted right;[110] absent a clear invocation of either his right to remain silent or his right to counsel, officers may commence questioning immediately following the provision of *Miranda* warnings;[111] an individual who invokes his right to remain silent can be re-Mirandized at a later time;[112] and the exclusionary rule extends neither to the physical fruits obtained by virtue of a *Miranda*-defective statement,[113] nor to statements that are obtained after a defective provision of the *Miranda* warnings, provided that the suspect was properly re-Mirandized.[114]

By any measure, in the post-Warren era, the Court strengthened the government's hand while weakening the individual's. The Court significantly facilitated the police's ability to obtain out-of-court identifications and confessions, and it made it more difficult for individuals to avail themselves of *Miranda*'s safeguards. This same erosive trend is equally evident in the context of the exclusionary rule.

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[106] Israel, *supra* note 30, at 1366, 1368.

[107] Miranda v. Arizona, 384 U.S. 436 (1966).

[108] Kansas v. Ventris, 556 U.S. 586 (2009).

[109] Illinois v. Perkins, 496 U.S. 292 (1990).

[110] Berghuis v. Thompkins, 560 U.S. 370, 381 (2010); Davis v. United States, 512 U.S. 452, 458-59 (1994).

[111] *Berghuis*, 560 U.S. at 381.

[112] Michigan v. Mosley, 423 U.S. 96 (1975).

[113] United States v. Patane, 542 U.S. 630 (2004).

[114] Oregon v. Elstad, 470 U.S. 298 (1985).

C. *The Exclusionary Rule*

As noted, the Court in *Mapp* held that the exclusionary rule was a constitutionally mandated remedy that applied to the states.[115] But since *Mapp*, the Court has significantly backpedaled. In a series of cases, the Court has consistently recast the exclusionary rule as a nonconstitutional remedy that should be applied only when sufficient deterrence can be achieved.[116]

1. Good Faith Exception

The emphasis on deterrence has been particularly notable in a litany of cases pertaining to what has been commonly referred to as the "good faith" exception to the exclusionary rule. The Court established this principle in *United States v. Leon*.[117] In *Leon*, at issue was whether the exclusionary rule should apply when a search warrant is issued and reasonably relied upon by the executing officer but where it is later determined that there was no probable cause to issue the warrant.[118] The Court held that the exclusionary rule is inapplicable in situations where, as in *Leon*, the officer reasonably relied upon the warrant.[119] In reaching this decision, the Court focused on the deterrent rationale underlying the exclusionary rule and asked whether application of the rule would further this objective.[120] It concluded that the magistrate judges who assess warrant applications and issue warrants would not be deterred given that they do not have any stake in the outcome of a particular case.[121] And it similarly found that the police would not be substantially deterred when the fault rested with the judiciary.[122]

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[115] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[116] Stone v. Powell, 428 U.S. 465, 486 (1976); *see* Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425 (1997) (referencing various Supreme Court cases interpreting the exclusionary rule as a nonconstitutional remedy).

[116] *Stone*, 428 U.S. at 486 ("Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.' Instead, 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .'" (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965); United States v. Calandra, 414 U.S. 338, 348 (1974) (citation omitted))).

[117] United States v. Leon, 468 U.S. 897 (1984).

[118] *Id.* at 900.

[119] *Id.* at 926.

[120] *Id.* at 916-22.

[121] *Id.* at 917.

[122] *Id.* at 918-21; Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1084-85 (2011) (discussing *Leon* and the Court's assessment of deterrence upon officers and the judiciary).

As a prelude to its deterrence assessment, *Leon* stressed the nonconstitutional nature of the exclusionary rule. In support, the Court stated that *Mapp* only "implied" that exclusion was a constitutional mandate.[123] The Court in *Leon* added that there is nothing in the Fourth Amendment text that "expressly preclud[es] the use of evidence obtained in violation of its commands," and it is "clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'"[124] Thus, according to *Leon*, the exclusionary rule "operates as '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.'"[125]

The rationales expressed in *Leon*, particularly the Court's emphasis on deterrence, have been extended to other "good faith" contexts. In *Illinois v. Krull*, the Court considered whether the exclusionary rule should apply when an officer reasonably relies upon the validity of a state statute that authorizes a warrantless administrative search when that statute is later found to be unconstitutional.[126] In *Krull*, a police detective searched an automobile wrecking yard pursuant to an Illinois statute that authorized such an entry.[127] During this inspection, the detective discovered evidence suggesting that some of the automobiles in the yard had been stolen.[128] Subsequent to the search, a federal court found the statute to be unconstitutional.[129]

As in *Leon*, the Court in *Krull* concluded that the evidence should not be excluded.[130] In so doing, it examined the deterrent effect that exclusion would have on the police and the state legislature. With respect to law enforcement, the Court found that there would be "little deterrent effect" to suppress the evidence, given the officer's reasonable reliance on the validity of

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[123] *Leon*, 468 U.S. at 905-06 ("Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment, or that the rule is required by the conjunction of the Fourth and Fifth Amendments. These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time, and the Fourth Amendment 'has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.'" (citations omitted) (quoting Stone v. Powell, 428 U.S. 465, 486 (1976))).

[124] *Id.* at 906 (second alteration in original) (quoting United States v. Calandra, 414 U.S. 338, 354 (1974)).

[125] *Id.* (quoting *Calandra*, 414 U.S. at 348).

[126] Illinois v. Krull, 480 U.S. 340, 342 (1987).

[127] *Id.* at 342-43.

[128] *Id.* at 343. The defendant was later criminally charged with various associated offenses. *Id.* at 343-44.

[129] *Id.* at 344.

[130] *Id.* at 349.

the statute.[131] Because the fault rested with the legislature, the Court reasoned that penalizing law enforcement would not further the deterrence rationale that underlies the exclusionary rule.[132] The Court also found that legislatures are not the focus of the exclusionary rule, that there is little reason to believe that exclusion would somehow influence the legislature's future conduct, and that the social costs of exclusion outweigh any benefits that may accrue through application of the exclusionary rule in this context.[133]

Arizona v. Evans was another case that involved a Fourth Amendment breach stemming from a judicial error.[134] This time, an officer, after stopping the defendant in his automobile, entered the defendant's name on his patrol car's computer and learned that the defendant had an outstanding arrest warrant.[135] Thereafter, the defendant was arrested, and the officer discovered marijuana on the defendant's person and in his vehicle.[136] After the police informed the court that the defendant had been arrested, the "[c]ourt discovered that the arrest warrant previously had been quashed and so advised the police."[137] At a suppression hearing, the chief clerk testified that when a warrant is quashed, it is the responsibility of the court clerk to "call[] and inform[] the warrant section of the Sheriff's Office" of this fact.[138] Testimony from the chief clerk and a records clerk indicated that there was nothing to suggest that the Sheriff's Office had been informed that the defendant's arrest warrant had been quashed.[139] In refusing to exclude the evidence, the Court reasoned, in part, that the exclusionary rule is designed to influence the conduct of law enforcement, and not the judicial staff, and that "there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed."[140]

Arguably, *Herring v. United States* is the most significant Supreme Court case to address the good faith exception since

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131 *Id.*

132 *Id.* at 349-50.

133 *Id.* at 350-53; Kerr, *supra* note 122, at 1085 (discussing *Krull* and the Court's deterrence rationale).

134 Arizona v. Evans, 514 U.S. 1 (1995).

135 *Id.* at 4.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 5.

140 *Id.* at 10-15; Kerr, *supra* note 122, at 1085-86 (reviewing *Evans* and the Court's deterrence-based reasoning).

Leon.[141] At issue in *Herring* was whether exclusion was required when the fault is attributable to a police department different from the one that effectuated the arrest.[142] As more precisely stated by the Court, "What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?"[143]

The Court refused to apply the exclusionary rule in this context.[144] It found that because "the error was the result of isolated negligence attenuated from the arrest," suppression was not warranted.[145] To this point, the Court added that the exclusionary rule is designed to punish officers who exhibit mindsets more culpable than mere negligence.

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.[146]

In language that stands in stark contrast to that in *Mapp*,[147] the Court stated that application of the exclusionary rule in any context was a "last resort," that it should not apply unless "appreciable deterrence" can be achieved, that the rule has "substantial social costs," and that a "high obstacle" must be overcome prior to its imposition.[148]

After the decision in *Herring*, there was meaningful debate regarding how broadly or narrowly the opinion should be construed. The negligence at issue in *Herring* was attributable to a law enforcement employee in a separate police department,[149] and the debate over *Herring*'s reach centered largely on the term

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[141] Herring v. United States, 555 U.S. 135 (2009).

[142] *Id.* at 136-37.

[143] *Id.*

[144] *Id.* at 137.

[145] *Id.*

[146] *Id.* at 144; *see* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 339 (2012). Professor Maclin noted, "First, these assertions in *Herring* . . . were unprecedented and controversial. No decision prior to *Herring* had asserted or even implied that suppression turns on deliberate or grossly negligent police conduct." MACLIN, *supra*, at 339.

[147] Mapp v. Ohio, 367 U.S. 643, 648, 654-56 (1961).

[148] *Herring*, 555 U.S. at 140-41 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (1983); United States v. Leon, 468 U.S. 897, 909 (1984); Illinois v. Krull, 480 U.S. 340, 352-53 (1987); Pa. Bd. of Parole v. Scott, 524 U.S. 357, 364 (1998)).

[149] *Id.* at 137-38.

"attenuated." The question was whether *Herring* would be narrowly construed, thereby allowing the admission of evidence only in situations where the negligence was attenuated, or broadly interpreted, so as to potentially encompass scenarios where the mistake was attributable to the law enforcement agency who effectuated the search or seizure.[150]

Two years later, the Court in *Davis v. United States* may have provided an answer.[151] In *Davis,* the defendant was a passenger in a vehicle that was stopped for a motor vehicle violation.[152] Davis was arrested for providing a false name.[153] After he was handcuffed and the scene secured, the officers searched the vehicle and found a revolver.[154] Davis, a felon, was indicted for being a felon in possession of a firearm and was ultimately convicted.[155]

At issue was "whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent."[156] The parties agreed that the search of the vehicle was valid under the existing law at the time of the search.[157] During the pendency of the appeal, however, the Supreme Court issued a decision, *Arizona v. Gant*,[158] which altered the landscape for postarrest vehicle searches.[159] The Eleventh Circuit found that, in light of *Gant*, the defendant's Fourth Amendment rights were violated, but the court declined to impose the exclusionary rule.[160] It concluded that the deterrence rationale would not be furthered by penalizing officers who followed the law in existence at the time of their conduct.[161]

The Supreme Court affirmed.[162] In so holding, the Court reiterated *Herring*'s limitation of the exclusionary penalty to

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150 Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009) (examining competing arguments regarding the exclusionary rule's future in light of *Herring*, and offering his own viewpoints).

151 Davis v. United States, 564 U.S. 229 (2011).

152 *Id.* at 235-36.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 236.

157 *Id.*

158 Arizona v. Gant, 556 U.S. 332 (2009).

159 Prior to *Gant*, it was widely accepted that *New York v. Belton*, 453 U.S. 454 (1981), authorized an automatic search of a vehicle's passenger compartment incident to an arrest. *Davis*, 564 U.S. 239. *Gant* narrowed significantly the ability of an officer to perform such a search and rendered unconstitutional the officer's search in *Davis*. *Id.* at 239-40.

160 *Davis*, 564 U.S. at 239-40.

161 *Id.*

162 *Id.* at 249.

instances of deliberate, reckless, or grossly negligent police conduct, and to situations where significant deterrence can be achieved.[163] According to Professor Tracey Maclin, *Herring* has effectively gutted the exclusionary rule because the majority of search and seizure violations involve police conduct that does not rise to this level of culpability.[164]

2. Standing

Mapp's construction of the exclusionary rule as a constitutional remedy has since been recast by the Supreme Court as a nonconstitutional, judicially created remedy that can be applied in limited circumstances. What was once a required constitutional sanction of exclusion is now a remedy of last resort. And with this recasting has come a shift in emphasis away from a judicial integrity rationale toward a focus on deterrence. This section now turns its attention to an inextricably related concept—the standing doctrine—that has also been meaningfully contracted in the post–Warren Court years.

The Court in *Jones v. United States* identified four means by which a person could establish standing to raise a Fourth Amendment claim: by demonstrating (1) a personal privacy interest, (2) that he was legitimately on the premises, (3) that he had a possessory interest in the evidence seized, and (4) that he was an intended target of a government search.[165] In a series of cases, however, the Court not only overruled *Jones* but also substantially diminished the field of individuals eligible to contest the constitutionality of governmental investigative practices.[166]

Eighteen years after *Jones*, the Court decided *Rakas v. Illinois*, which enunciates the predominant threshold for raising Fourth Amendment challenges.[167] The case involved a vehicular stop of a getaway car after a report of a robbery.[168] An ensuing search of the passenger compartment led to the recovery of a box containing rifle shells and a sawed-off rifle.[169] The items were admitted into evidence against the defendants, who were

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[163] *Id.* at 240-41.

[164] MACLIN, *supra* note 146, at 343.

[165] Jones v. United States, 362 U.S. 257, 261-65 (1960).

[166] Rebecca J. Lauer, *Fourth Amendment—The Court Further Limits Standing*, 71 J. CRIM. L. & CRIMINOLOGY 567 (1980) (discussing and analyzing *Salvucci*, *Rawlings*, and *Payner*). In *United States v. Jones*, 132 S. Ct. 945 (2012), and *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the Supreme Court added a trespass or physical intrusion upon property rights test.

[167] Rakas v. Illinois, 439 U.S. 128 (1978).

[168] *Id.* at 130.

[169] *Id.*

passengers in the car.[170] The defendants challenged the constitutionality of the search, arguing that the government's conduct violated the Fourth and Fourteenth Amendments.[171] The defendants, however, did not assert ownership of the car or of the evidence admitted against them.[172] The trial court denied their motion, and its decision was affirmed based on the defendants' lack of standing.[173]

The defendants, relying on *Jones*, set forth two bases for standing in their case before the Supreme Court. First, they argued that standing extended to individuals at whom a government search was directed. Second, they submitted that they had standing given their legitimate presence in the vehicle where the search was performed.[174]

Regarding the first asserted basis for standing, the defendants relied upon the following language in *Jones*:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.[175]

The Court rejected this claim, reasoning that Fourth Amendment rights are personal rights that cannot be asserted by third parties.[176] According to the Court, only those defendants who can establish that their own constitutional rights were infringed can pursue a constitutional challenge.[177] It added that the italicized language from *Jones* ("*one against whom the search was directed*") should not be interpreted independent of its surrounding context,[178] and to the extent a more expansive interpretation attached to the italicized phrase, the Court "expressly reject[ed]" it as dictum.[179]

Rakas acknowledged that the adoption of a third-party standing theory "would necessarily mean a more widespread

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[170] *Id.* at 129.
[171] *Id.* at 130.
[172] *Id.*
[173] *Id.* at 131.
[174] *Id.* at 132.
[175] *Id.* at 134-35 (quoting Jones v. United States, 362 U.S. 257, 261 (1960)).
[176] *Id.* at 133.
[177] The Court added that individuals who are parties to a criminal action will have ample motivation to seek constitutional redress for infringements by the police. And, the Court added, individuals who are not parties may pursue a civil damages remedy. *Id.* at 134.
[178] *Id.* at 134-35.
[179] *Id.* at 135.

invocation of the exclusionary rule during criminal trials."[180] But the Court concluded, as it did in *Alderman*,[181] that the additional benefits that would accrue with this expanded base would not outweigh the meaningful societal costs associated with prosecuting individuals accused of criminal acts.[182]

As noted, *Rakas* enunciates the standard customarily employed when determining whether an individual can have a constitutional claim heard and adjudicated. The test is

> whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.[183]

The Court submitted that this standard, by shifting the focus toward the Fourth Amendment and away from the concept of standing, produces a more "logical" approach to resolving this threshold issue.[184]

Next, the Court addressed the defendants' contention that their constitutional challenges should have been heard, given that they were legitimately within the vehicle that was searched. The Court similarly rejected this argument, and in doing so, all but overruled *Jones*.[185] It declared that the "legitimately on the premises" standard "is too broad a gauge for measurement of Fourth Amendment rights," for it would allow individuals to pursue Fourth Amendment challenges who have no interest in the premises that were searched.

> For example, applied literally, this statement would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. The first visitor would have absolutely no interest or legitimate expectation of privacy in the basement, the second would have none in the house, and it advances

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[180] *Id.* at 137.

[181] Alderman v. United States, 394 U.S. 165 (1969).

[182] *Rakas*, 439 U.S. at 137-38.

[183] *Id.* at 140.

[184] *Id.*

[185] The Court did not overrule *Jones* but rather fit *Jones* within the *Rakas* rubric. It said that "*Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." *Id.* at 142.

> no purpose served by the Fourth Amendment to permit either of them to object to the lawfulness of the search.[186]

With *Rakas*'s rejection of the target and "legitimately on the premises" theories as bases for standing, *Rakas* not only reduced the universe of individuals eligible to pursue constitutional challenges but also left *Jones* in tatters. In fact, in *Simmons v. United States*,[187] a Warren Court case decided a mere eight years after *Jones,* the Court effectively undermined the automatic standing holding in *Jones*. In *Simmons*, the Court held that an accused's testimony given at a pretrial hearing could not be used against him at his subsequent trial.[188] This holding squarely addressed and resolved the self-incrimination conundrum presented in cited by *Jones*.[189]

Two years after *Rakas*, *Jones* was finally overruled in *United States v. Salvucci*.[190] In *Salvucci*, the defendants were indicted on charges related to the unlawful possession of stolen mail.[191] Central to the government's case were 12 checks that the police recovered pursuant to a search warrant that was executed upon a residence belonging to the mother of one of the defendants.[192] The defendants challenged the admissibility of the checks, arguing that the affidavit submitted in support of the search warrant failed to establish probable cause.[193] The district court agreed and suppressed the evidence.[194] The First Circuit affirmed, concluding that the defendants had automatic standing to challenge the constitutionality of the search[195] and that the warrant was not supported by probable cause.[196]

The Supreme Court reversed, overruling *Jones* in the process.[197] Citing *Simmons*, the Court reasoned that the self-incrimination quandary that is the "cornerstone" of the automatic standing principle had been resolved[198] and that *Rakas* addressed *Jones*'s concern regarding "the 'vice' of

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186 *Id.*

187 Simmons v. United States, 390 U.S. 377 (1968).

188 *Id.* at 394.

189 *Id.*

190 United States v. Salvucci, 448 U.S. 83 (1980).

191 *Id.* at 85.

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.* at 85-86. The appellate court relied on *Jones* in reaching its decision regarding standing. United States v. Salvucci, 599 F.2d 1094, 1097-98 (1st Cir. 1979) (citing Jones v. United States, 362 U.S. 257 (1960)).

196 *Salvucci*, 599 F.2d at 1096.

197 *Salvucci*, 448 U.S. at 89, 95.

198 *Id.* at 88-90.

prosecutorial [self-]contradiction."[199] Given *Rakas*'s holding that a claimant must demonstrate that he had a reasonable expectation of privacy in the area of the search before his claim for exclusion can be heard, the Court concluded that the issues of criminal possession and Fourth Amendment privacy are distinct interests. The Court stated that *Rakas* plainly "establish[es] that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good," yet not deprive a defendant of his Fourth Amendment protections.[200]

In another possession of property case decided the same day as *Salvucci*, the Court in *Rawlings v. Kentucky* addressed whether the ownership of property (illegal narcotics) seized pursuant to a government search of a purse that belonged to another individual was sufficient to establish standing.[201] Specifically, the defendant argued "that, because he claimed ownership of the drugs in [another person]'s purse, he should be entitled to challenge the search regardless of his expectation of privacy."[202]

In rejecting the defendant's claim, the Court acknowledged that ownership is a factor to be considered under *Rakas* and admitted that had his standing claim been heard prior to the *Rakas* decision, it would have likely been meritorious.[203] The Court concluded, however, that the defendant had failed to demonstrate that he had a reasonable expectation of privacy in the search area, which was the purse.[204] As noted by the Court, "While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment."[205] Furthermore, the Court reasoned, the record was devoid of any indication that the defendant had an association with the purse "prior to that sudden bailment," that he had any authority to exclude others from accessing the purse, or that he took "normal precautions to maintain his privacy."[206]

Thus, *Rawlings* established that mere ownership of an effect, without more, is insufficient to establish standing. Even if the defendant in *Rawlings* had placed his narcotics on a table

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[199] *Id.* at 90.
[200] *Id.* at 90-91.
[201] Rawlings v. Kentucky, 448 U.S. 98, 103 (1980).
[202] *Id.* at 105.
[203] *Id.* at 105-06.
[204] *Id.* at 104-05.
[205] *Id.* at 105 (quoting Rakas v. Illinois, 439 U.S. 128, 149-50 n.17 (1978)).
[206] *Id.*

inside the home where the search was performed, as opposed to the purse, he would not have been able to establish standing pursuant to a privacy-based rationale.[207] He was in a house that was not his own and where he had only been for a short period of time.[208] Though he was legitimately on the premises, the Court had previously rejected that theory of standing in *Rakas*. His ownership of the narcotics would have been nondeterminative, even in this circumstance. *Rakas* places the emphasis on the location of the search, and it is the claimant's burden to demonstrate that he has a reasonable expectation of privacy in that particular space.

United States v. Payner is a prototypical example of a case involving flagrant police misconduct that goes unpunished in the post-*Rakas* world.[209] In *Payner*, the defendant was convicted of falsifying his tax return due to his knowing failure to state that he had a foreign bank account.[210] Central to the government's case was a loan guarantee agreement, which pledged funds in the defendant's foreign account as security for a $100,000 loan.[211] Though the defendant was convicted in federal court after a bench trial, his conviction was set aside by the district court on account of "a flagrantly illegal search" by the government.[212]

The probe began in 1965 when the Internal Revenue Service (IRS) investigated the Castle Bank & Trust Company of Nassau, Bahama Islands, after the IRS received information regarding a suspicious account holder at the bank.[213] The IRS arranged for a private investigator, Norman Casper, to investigate the bank and its depositors.[214] Casper in turn "cultivated his friendship" with a vice-president at the bank, Michael Wolstencroft, and eventually introduced him to an individual named Sybol Kennedy, who, like Casper, was a private investigator.[215] Casper, with the approval of an IRS agent, "devised a scheme to gain access to the bank records he knew Wolstencroft would be carrying in his briefcase" during his

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[207] As stated in *Rawlings*, "Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy." *Id.* at 106.

[208] *Id.* at 101.

[209] United States v. Payner, 447 U.S. 727 (1980).

[210] *Id.* at 728.

[211] *Id.* at 728-29.

[212] *Id.* at 729.

[213] *Id.*

[214] *Id.*

[215] *Id.* at 729-30.

upcoming trip to Miami.[216] This plan was approved by an agent at the IRS.[217]

After Wolstencroft arrived in Miami, he "went directly to Kennedy's apartment" before they left to go to dinner. Moments later, Casper entered Kennedy's apartment with a key previously provided by Kennedy, removed Wolstencroft's suitcase, and delivered it to another IRS agent who photocopied several hundred pages of incriminating documents that were found therein.[218]

The district court suppressed the documents found during the government's search.[219] Though the search did not violate the defendant's Fourth Amendment privacy interest, the court nevertheless excluded the evidence, relying instead upon the Fifth Amendment's Due Process Clause, as well as the federal court's inherent supervisory authority.[220] The district court reasoned, in part, that it was "required" to impose an exclusionary remedy in this third-party context given the government's "knowing and purposeful *bad faith hostility* to any person's fundamental constitutional rights."[221] It also noted that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties."[222] The Sixth Circuit affirmed.[223]

The Supreme Court, however, reversed.[224] Though the Court stated that the behavior exhibited by the IRS in *Payner* should not be condoned, it added that "every case of illegality" does not mandate the exclusion of evidence.[225] The Court referenced the "considerable harm" attendant with exclusion, as well as the "costly toll" that exclusion has on the truth-seeking function of criminal trials.[226] Citing *Rakas* and *Alderman*, the Court also noted that the rights offended by the

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[216] *Id.* at 730.

[217] *Id.*

[218] *Id.*

[219] *Id.* at 731.

[220] *Id.* at 730-31.

[221] *Id.* at 731 (quoting United States v. Payner, 434 F. Supp. 113, 129 (N.D. Ohio 1977)).

[222] *Id.* at 730 (quoting *Payner*, 434 F. Supp. at 132-33).

[223] United States v. Payner, 590 F.2d 206, 207 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980).

[224] *Payner*, 447 U.S. at 737.

[225] *Id.* at 734.

[226] *Id.*

government's conduct were those of a third party who was not before the Court.[227]

Thus, the Supreme Court's good faith and standing jurisprudence has plainly and severely winnowed the scope and efficacy of the exclusionary rule. And while the rule's diminished status can be traced primarily to these legal outcomes, there are other contributing factors that should be considered.

3. Attenuated Circumstances Exception

In *Wong Sun v. United States*, the Court adopted what has been commonly referred to as the "attenuated circumstances" doctrine.[228] This doctrine provides that evidence that is the direct product of an unconstitutional search or seizure may nevertheless be admissible if the contested evidence is sufficiently attenuated from the government infraction. In *Wong Sun*, the defendant (Wong Sun) had been unconstitutionally arrested in his residence in the absence of probable cause.[229] Several days after he had been arrested, arraigned, and released on his own recognizance, Wong Sun went to a police station and gave an incriminating statement.[230] The Court acknowledged the link between the unconstitutional actions of law enforcement and Wong Sun's subsequent statement but held that the taint from the illegal arrest had sufficiently dissipated.[231] In reaching this conclusion, the Court largely relied on the passage of time between Wong Sun's release from custody and his subsequent confession.[232]

Like the good faith exception, the attenuated circumstances doctrine recognizes that there is a constitutional infraction, and the incriminating evidence that is found is a

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[227] *Id.* at 735 (citing Rakas v. Illinois, 439 U.S., 128, 137 (1978); Alderman v. United States, 394 U.S. 165, 174-75 (1969)).

[228] Wong Sun v. United States, 371 U.S. 471 (1963).

[229] *Id.* at 491.

[230] *Id.*

[231] The Court held "that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" *Id.* (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

[232] *Id.* Fifteen years after *Wong Sun*, the Court decided *United States v. Ceccolini*, 435 U.S. 268 (1978). There, the Court applied the attenuated circumstances doctrine in a situation involving the fruit (a live witness) stemming from an unconstitutional act by the police (an illegal search of an envelope). *Ceccolini*, 435 U.S. at 270. The Court stated that attenuation is more likely to occur in circumstances where, as in *Ceccolini*, the derivative fruit is testimonial, as opposed to physical, in nature. *Id.* at 276-77. It added that witnesses, unlike physical evidence, have free will that can be exercised with independence. *Id.* As the Court stated: "Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And . . . the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence." *Id.*

byproduct of that breach. In the good faith context, a court forgives the illegality because the officers executed the search or seizure in reasonable reliance that their actions were authorized.[233] In the attenuated circumstances situation, a court, in deciding to bypass the exclusionary rule, reasons that the taint from the unconstitutional conduct has sufficiently dissipated. In *Wong Sun*, it cannot be seriously contended that, absent the defendant's illegal arrest, he would have simply decided to travel to the police station and incriminate himself. Rather, the connection between the unconstitutional arrest and the statements is clear. But the passage of time while out on release is what, in the Court's view, sufficiently lessened the taint from the earlier infraction so as to bypass application of the exclusionary rule.

In *Hudson v. Michigan*, the Court employed the attenuation doctrine to justify its end result and expanded the concept beyond its original construction in *Wong Sun*.[234] *Hudson* involved a violation of the knock-and-announce rule by local police officers.[235] At issue was whether that breach warranted the exclusion of evidence (drugs and firearms) found within a residence.[236] The Court answered this question in the negative.[237] The majority reasoned that "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence."[238] While such causation is a necessary prerequisite for exclusion, the Court found that it is insufficient in and of itself.[239] It determined that this threshold condition was not satisfied in *Hudson*.[240]

In reaching this conclusion, the Court somehow dismissed *Mapp*'s explicit pronouncements regarding the "wide scope" of exclusion as "expansive dicta."[241] And the Court stressed that it has "long since" moved away from the notion that a constitutional violation necessitates exclusion.[242] As the Court explained in *Hudson*, the

> illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not,* the

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[233] United States v. Leon, 468 U.S. 897, 909, 926 (1984).

[234] Hudson v. Michigan, 547 U.S. 586 (2006).

[235] This rule provides that generally, officers must announce their presence prior to entering a residence. *Id.* at 588-89.

[236] *Id.* at 588.

[237] *Id.* at 594.

[238] *Id.* at 592.

[239] *Id.*

[240] *Id.*

[241] *Id.* at 591.

[242] *Id.*

> police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'"[243]

The Court also added a new, expanded dimension with respect to the attenuation doctrine. It stated that "[a]ttenuation can occur . . . when the causal connection is remote."[244] This was the situation in *Wong Sun*.[245] But the Court added that attenuation can also occur in situations involving more direct associations. It explained that attenuation can exist in circumstances where "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[246] It noted that the interests of the knock-and-announce rule are concerned with officer and public safety, the protection of property, and individual privacy and dignity.[247] But the Court declared,

> What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.[248]

The following subsection briefly discusses two additional exceptions to the exclusionary rule—the independent source and inevitable discovery doctrines—that have further contributed to the erosion of individual constitutional safeguards.

4. Independent Source and Inevitable Discovery Doctrines

The independent source doctrine allows for the admissibility of evidence, despite a constitutional breach, if the government can demonstrate that it had a source for the evidence that was independent of the government's tainted conduct. In *Segura v. United States*, the Supreme Court addressed whether the exclusionary rule should apply in a situation where the police had unconstitutionally entered a residence and later seized

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243 *Id.* at 592 (quoting Segura v. United States, 468 U.S. 796, 815 (1984)).
244 *Id.* at 593.
245 Wong Sun v. United States, 371 U.S. 471, 491 (1963).
246 *Hudson*, 547 U.S. at 593.
247 *Id.* at 594.
248 *Id.*

evidence therein pursuant to a search warrant that was based upon information known to the officers prior to the entry.[249]

The Court refused to apply the exclusionary rule in this context, reasoning that the officers had a valid independent source for the evidence that was seized.[250] It explained that the warrant affidavit did not contain any information derived from the initial entry into the apartment but rather contained information "from sources wholly unconnected with the entry and [that] was known to the agents well before the initial entry."[251] Given that the search executed pursuant to the warrant was "wholly unrelated to the prior entry," the Court found that it was "beyond dispute" that the agents had an independent source for the evidence recovered.[252] Thus, in situations where there is a legitimate source for the seized evidence that is truly independent of the unconstitutional conduct, the exclusionary rule is inapplicable.[253]

A related concept involves what is commonly referred to as the inevitable discovery doctrine. In essence, this rule provides that evidence that is initially seized in violation of the Constitution may still be admitted at trial if it would have been inevitably discovered in a lawful fashion.[254] The rule often presents itself in the context of automobile stops, and the following is a common scenario. Assume that an officer conducts a valid vehicle stop and arrest of the driver. Thereafter, the officer performs an unconstitutional search of the car, which reveals incriminating evidence. Rather than suppress the evidence on account of a constitutionally infirm search, a court will often permit the evidence on the theory that it would have inevitably been discovered[255] (e.g., via an inventory search).[256]

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[249] Segura v. United States, 468 U.S. 796, 797-98 (1984).

[250] *Id.* at 814.

[251] *Id.*

[252] *Id.*

[253] The Supreme Court addressed a comparable issue in *Murray v. United States*, 487 U.S. 533 (1988). There, officers unconstitutionally entered a warehouse and saw marijuana. About eight hours later, they secured a search warrant for the premises but made no mention of the earlier entry or of the evidence that they observed. The Court concluded that the independent source doctrine could apply in this circumstance, provided that the subsequent entry was warranted independent of the earlier breach. The case was remanded with instructions to make a determination as to this issue. *Id.* at 535-37.

[254] Nix v. Williams, 467 U.S. 431, 443-44, 443 n.4 (1984).

[255] The constitutionality of inventory searches has been upheld by the Supreme Court. *See* Colorado v. Bertine, 479 U.S. 367 (1987); Illinois v. Lafayette, 462 U.S. 640 (1983); South Dakota v. Opperman, 428 U.S. 364 (1976).

[256] An automobile inventory search is typically performed by the police at a police station (or some alternate location) after a car has been towed. Following their department policy, officers will search those areas of the car allowed under the policy, retrieve the items from those areas, and account in detail for the belongings that are

Parts I and II of this article examined the evolution of Supreme Court criminal procedure jurisprudence from the Warren Court era to the present day, with particular attention devoted to the exclusionary rule and standing. Together, they demonstrated how, since the close of the Warren Court era, individual liberties have been significantly curtailed while law enforcement's investigative authority has greatly expanded. Part III discusses the adverse impact that the era of investigative permissiveness has had on police culture and officer performance and introduces a third-party standing proposal designed to help remedy the problem of police malfeasance.

III. A THIRD-PARTY STANDING PROPOSAL

A. The Influence of Police Organizational Culture

The expansive interpretative approach to individual liberties that characterized the Warren Court has since been replaced with a more conservative construction model. Since the end of this era, police investigative authority has greatly increased, the exclusionary rule—no longer a constitutional mandate—has lost most of its teeth, and the landscape of individuals eligible to present Fourth Amendment challenges has been significantly curtailed.

When the Supreme Court issues a decision, it sends a message not only to the litigants but also to society as a whole. People pay attention, particularly those who are directly or indirectly impacted by the Court's rulings. And this is especially true when the Court issues a series of rulings over the course of many years that are relatively consistent in their messages. In Section II.C.4, this article discussed *Segura v. United States*, where the Court refused to apply the exclusionary rule given the existence of an independent source for the seized evidence.[257]

In his dissent, Justice Stevens expressed his concern regarding the message that the Court's holding conveyed not only to "the leaders of the law enforcement community," but also to investigative agents.

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recovered. The rationale for such searches is that it safeguards the belongings of the arrested individual, protects the police from claims associated with the property, and mitigates the risk of potential safety hazards in the vehicle. *See Opperman*, 428 U.S. at 368-75 (explaining the automobile inventory search and finding that the routine search of defendant's locked car, which had been lawfully impounded, was not unreasonable under the Fourth Amendment, as there were valuable items in plain view and the procedures used were standard across the nation).

[257] *Segura*, 468 U.S. at 814; *see infra* notes 277-79 and accompanying text.

> The Court's disposition, I fear, will provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home.
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> . . . [W]e should consider the impact of the Court's holding on the leaders of the law enforcement community . . . . A rule of law that is predicated on the absurd notion that a police officer does not have the skill required to obtain a valid search warrant in less than 18 or 20 hours, or that fails to deter the authorities from delaying unreasonably their attempt to obtain a warrant after they have entered a home, is demeaning to law enforcement and can only encourage sloppy, undisciplined procedures.
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> . . . [T]he Court's rhetoric cannot disguise the fact that when it not only tolerates but also provides an affirmative incentive for warrantless and plainly unreasonable and unnecessary intrusions into the home, the resulting erosion of the sanctity of the home is a "price" paid by the innocent and guilty alike.[258]

Justice Stevens's comments reflect an understanding that the Court's decisions influence law enforcement departments, which in turn influence the conduct of their officers and agents. Prior to and since *Segura*, the Court has steadily sent signals to the law enforcement community that the Court is willing to forgive police misconduct. That same year, for instance, the Court decided *Leon*, which was the first of a series of "good faith" exception rulings that have excused unconstitutional law enforcement conduct in a host of settings.[259]

The introduction to this article noted the tragic case of Walter Scott, who was killed by a police officer in North Charleston, South Carolina.[260] As noted, Officer Slager was relieved of his duties and later indicted for murder.[261] And while disciplinary and legal steps are unquestionably necessary and proper, the powerful influence of organizational culture within police departments should not be overlooked as a possible contributing factor to such unfortunate outcomes.

Professor Armacost discounts the "officer-gone-bad explanation"[262] that is so readily set forth by law enforcement leadership in situations such as the Scott murder.[263] Rather, she

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[258] *Segura*, 468 U.S. at 817, 838-39 (Stevens J., dissenting).

[259] United States v. Leon, 468 U.S. 897 (1984); *see supra* notes 134-68 and accompanying text.

[260] *See* Blinder & Williams, *supra* note 1.

[261] *See id.*; Schmidt & Apuzzo, *supra* note 4.

[262] Armacost, *supra* note 19, at 456.

[263] Alan Blinder & Marc Santora, *Officer Who Killed Walter Scott Is Fired, and Police Chief Denounces Shooting*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/

submits, police organizations are often culpable as well. With this I agree. Police organizations have cultures that positively or negatively influence officer behaviors. Organizations with norms and expectations that encourage constitutional compliance discourage unnecessarily aggressive police conduct. On the other hand, organizations that tolerate, and thus fail to tame, unconstitutional behaviors help foster aggressive police practices. As Professor Armacost stated,

> [T]he impulse to isolate misbehaving officers as "rogue cops" is, essentially, a search for scapegoats. While punishing individual miscreants may satisfy society's thirst for someone to blame, it also causes us to miss important systemic and organizational causes that lie behind individual acts of brutality.[264]

Whether the problems associated with police culture can ever be fully and adequately addressed is highly doubtful. But what can be achieved are more limited successes, which can, hopefully, make meaningful improvements in police culture and in turn produce greater constitutional respect and compliance by police. Toward this end, this article submits that through an unprecedented expansion of the standing doctrine in the exclusionary rule context, this positive change can occur.

B. Third-Party Standing Proposal and the Analogy to Racial Discrimination in Jury Selection

This article advocates for a form of third-party standing that would allow criminal defendants to challenge the constitutionality of government actions to the same extent as a first-party claimant. In other words, a third-party challenger would possess the same right to exclude as the individual whose Fourth Amendment interests had been implicated by the government. There would be no difference in the breadth of the right to exclude, since criminal defendants, as third-party advocates, would in effect be standing in the shoes of the individual who was personally aggrieved by the government's conduct.

This proposed, bright-line measure extends well beyond those bases identified in *Jones*. If, for example, the government performs a search of a residence and seeks to admit at a criminal trial the derivatively seized evidence against a defendant who had no privacy interest in the premises, standing would nevertheless

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2015/04/09/us/walter-scott-shooting-video-stopped-case-from-being-swept-under-rug-family-says.html?smid=pl-share [http://perma.cc/9AAZ-XQ4X].

[264] Armacost, *supra* note 19, at 493.

extend to that defendant. Thus, standing in this setting rests neither upon a demonstration of a personal privacy expectation, as *Rakas* mandates,[265] nor upon proof of legitimate presence, a possessory interest, or identification as a government target, as required in *Jones*.[266]

Ironically, by expanding the field of potential challengers to governmental misconduct, this proposal would further the deterrence rationale that the Court has strenuously emphasized as the principle justification for the exclusionary rule. Police organizations, forced to confront the vast landscape of potential challengers to their conduct, will have little choice but to adjust their internal culture to encourage greater adherence to constitutional limitations.[267]

The foundation for the third-party standing proposal can be directly traced to a series of Supreme Court cases in the context of racial discrimination in jury selection. *Batson v. Kentucky*, the seminal Supreme Court pronouncement on this subject, concerned a black defendant charged with second-degree burglary and receipt of stolen goods.[268] He argued that the government violated, inter alia, his Fourteenth Amendment equal protection rights when it employed its peremptory challenges to strike all four prospective black jurors from the petit jury.[269] The Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[270]

Referencing *Strauder v. West Virginia*,[271] the Court stated that it was well established that a black defendant is denied equal protection when he is subjected to a jury trial where

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[265] Rakas v. Illinois, 439 U.S. 128, 137-38 (1978).

[266] Jones v. United States, 362 U.S. 257, 263-67 (1960).

[267] Steiker, *supra* note 21, at 2505-06 ("[T]he threshold requirement of standing, although not always conceived of as an 'exception' to the exclusionary rule, in fact operates to limit the scope of exclusion in ways that seem to run counter to the deterrence rationale offered for the rule. The standing doctrine holds that only a defendant whose personal Fourth Amendment rights were violated by the government's misconduct can move to exclude the evidence that the government illegally seized. Many have noted that this doctrine is hard to square with the rationale of deterrence, given that the aggrieved or nonaggrieved nature of the defendant has no connection at all to the deterrent effect of a successful motion to suppress. But the Warren Court and the Burger and Rehnquist Courts alike have insisted on a 'personal rights' view of standing to invoke the exclusionary rules, even while acknowledging that the primary rationale for the rule is deterrence of official misconduct." (footnotes omitted)).

[268] Batson v. Kentucky, 476 U.S. 79 (1986).

[269] *Id.* at 82-83.

[270] *Id.* at 89.

[271] Strauder v. West Virginia, 100 U.S. 303 (1879).

"members of his race have been purposefully excluded."[272] It added that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."[273] Though the Constitution does not afford a defendant a right to have members of his race included within the petit jury, the Court noted that the Equal Protection Clause guarantees that the jury selection process will not be discriminatory.[274]

Notably, the Court held that a discriminatory jury selection procedure offends not only the equal protection rights of the criminal defendant but also the constitutional rights of the jurors who were wrongfully excused.[275] The Court declared that "[a]s long ago as *Strauder*, . . . the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror."[276] Given that the defendant and the excluded jurors in *Batson* were of the same race, the Court did not expound much further upon the constitutional interests of the jurors in this context. Obviously, one of the questions unresolved by *Batson* was a third-party standing question—namely, whether an individual could maintain a *Batson* claim when the excluded juror was of a race different than the defendant.

Powers v. Ohio addressed this issue.[277] In *Powers*, the defendant, who was white, objected when the prosecutor used

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[272] *Batson*, 476 U.S. at 85.

[273] *Id.*

[274] *Id.* at 85-87. The Court stated that to make a prima facie showing of purposeful discrimination, the defendant

> must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.
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> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.

Id. at 96-97 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953) (citations omitted)).

[275] *Id.* at 87.

[276] *Id.* The Court added that such discriminatory practices adversely impact the defendant, the excluded jurors, and the community at large, and "undermine public confidence in the fairness of our system of justice." *Id.*

[277] Powers v. Ohio, 499 U.S. 400 (1991).

several of his peremptory challenges to exclude prospective black jurors.[278] His objections were overruled, and he was ultimately convicted.[279] On appeal, he argued that the prosecutor's actions violated, inter alia, his equal protection rights under the Fourteenth Amendment.[280] The sole question before the Court was "whether, based on the Equal Protection Clause, a white defendant may object to the prosecution's peremptory challenges of black venirepersons."[281]

As a preliminary matter, the Court held that when the government strikes prospective jurors solely on account of their race, it violates the stricken jurors' equal protection rights. As stated by the Court,

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.[282]

Given this conclusion, the Court turned its attention to whether the defendant had a right to assert the equal protection claims of the aggrieved jurors.[283] The Court answered in the affirmative.[284] The Court readily acknowledged that typically a party establishes standing when the litigant "assert[s] his or her own legal rights and interests," as opposed to the rights and interests of other individuals.[285] Nevertheless, the majority noted that the Court has recognized an exception to this general principle by allowing for third-party standing in certain situations.

To qualify, the Court identified three preconditions[286]:

> The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.[287]

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[278] *Id.* at 402-03.
[279] *Id.* at 403.
[280] *Id.*
[281] *Id.* at 404.
[282] *Id.* at 409.
[283] *Id.* at 410.
[284] *Id.* at 415.
[285] *Id.* at 410.
[286] *Id.* at 410-11.
[287] *Id.* at 411 (quoting Singleton v. Wulff, 428 U.S. 106, 112-16 (1976)).

The Court found that all three criteria were satisfied in *Powers*. First, the Court found that the defendant sustained a "cognizable injury," which provided him with "a concrete interest in challenging the practice."[288] In reaching this conclusion, the Court relied on rationales premised largely on judicial integrity interests. It reasoned that "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt."[289] According to the Court, when a prosecutor practices racial discrimination during the course of jury selection, it taints both the fact and perception of the fairness of the criminal trial.[290] It added that racial discrimination of this sort is an "overt wrong, often apparent to the entire jury panel" that "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."[291]

Second, the Court concluded that the elimination of courtroom racial discrimination is an objective commonly shared by criminal defendants and those who have been wrongly excused from jury service on account of race.[292] The Court stated that prospective jurors who are subject to racially discriminatory strikes and criminal defendants who are unable to voice complaints about such a process "may lose confidence in the court and its verdicts."[293] Accordingly, the Court concluded that it was "necessary and appropriate" to permit a criminal defendant to advocate for the rights of the excluded jurors in this context.[294] It further found that Powers would be a "motivated, effective advocate," given that a successful demonstration that the government engaged in racially discriminatory practices during jury selection "may lead to the reversal of a conviction."[295]

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[288] *Id.*

[289] *Id.* (citation omitted) (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

[290] *Id.*

[291] *Id.* at 412. The Court found that

> [t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

Id. at 413.

[292] *Id.*

[293] *Id.* at 414.

[294] *Id.*

[295] *Id.*

Third, the Court found that prospective jurors stricken on account of their race would not be sufficiently motivated to pursue their legal interests. The Court noted certain "daunting" procedural and practical hindrances to pursuing litigation.[296] As an example, it cited the improbability of obtaining declaratory or injunctive relief, since "it would be difficult for an individual juror to show a likelihood that discrimination against him at the *voir dire* stage will recur."[297] The Court added that meaningful practical barriers exist as well, such as "the small financial stake involved and the economic burdens of litigation."[298]

Since *Powers*, the Court has extended this third-party standing rationale to racially discriminatory selection cases involving a Louisiana state grand jury,[299] a civil trial jury involving private litigants,[300] and a criminal jury trial involving peremptory strikes exercised by criminal defendants.[301] In these cases, as well as in *Batson* and *Powers*, the Supreme Court found that racial discrimination in jury and grand jury selection procedures impacts fundamental values central to our sense of justice and fairness. And in the Court's view, if such discriminatory practices were allowed to persist without judicial intervention, the actual and perceived fairness of the criminal justice system would be immeasurably harmed.

As noted by the Court in *Edmonson v. Leesville Concrete Co.*,

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."[302]

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[296] *Id.*

[297] *Id.* at 414-15.

[298] *Id.* at 415.

[299] Campbell v. Louisiana, 523 U.S. 392 (1998). This third-party rationale has also been extended to gender discrimination in the jury selection process. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (holding that gender discrimination in jury selection violates the Equal Protection Clause); Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117, 1127 (2012) ("In the *Batson* line of cases, the Court allows both sides to raise the equal protection rights of potential jurors against the use of peremptory challenges based on race or gender." (footnote omitted)).

[300] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[301] Georgia v. McCollum, 505 U.S. 42 (1992).

[302] *Edmonson*, 500 U.S. at 628 (citations omitted) (quoting Powers v. Ohio, 499 U.S. 400, 402 (1991)).

These same concerns of integrity and fairness arise in the exclusionary rule context. Whereas the jury selection cases address unconstitutional practices that occur in the courtroom, the unconstitutional practices in the exclusionary rule realm pertain to government investigative conduct that leads to the trial. Absent such conduct, there would be neither a trial nor jury selection. Government investigative activity is the heart of *any* criminal case. And when such critical acts involve unconstitutional government activity, the Court's forgiveness of such acts impacts the same notions of real and perceived fairness that exist in the jury selection cases. This truth is all the more evident considering that more than 90% of all federal and state cases are resolved via a negotiated resolution.[303] This means that fewer than 10% of all cases even have the *potential* for *Batson* and *Powers* claims to be raised. Since third-party standing is necessary to combat racial discrimination in the jury selection process, it is axiomatic that third-party standing should be extended to allow litigants to test the constitutionality of government investigative practices that underlie *every* criminal case.

The rationales that justified the extension of third-party standing in the *Powers* line of cases are, at the very least, equally applicable in this context. First, criminal defendants have an "injury-in-fact" that gives them a "concrete interest" in the outcome of the case. Certainly, a criminal defendant is injured whenever evidence seized in contravention of a third party's constitutional rights is potentially admissible against him at his trial. Such evidence could lead to his conviction and loss of liberty. This interest alone is sufficient to give him a "concrete interest" in contesting the constitutional legitimacy of the government's practice. In addition, the same judicial integrity interests identified in *Powers* are germane in this context. The integrity of the criminal justice process is compromised whenever the government disregards constitutional safeguards and escapes sanction. The real and perceived fairness of the criminal justice process is inevitably tainted when the system devalues a defendant's constitutional safeguards and punishes him for his misconduct, yet readily forgives government misconduct.

Second, criminal defendants and individuals who have been subjected to unconstitutional government conduct but have not been charged with a crime have a common interest in promoting constitutional compliance by the police, as each

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[303] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

experiences adversity when constitutionally imposed boundaries are crossed. The criminal defendant has unlawfully obtained evidence admitted against him that can result in his conviction, while humiliation, inconvenience, and stress afflict both the defendant and the aggrieved citizen. Moreover, the criminal defendant is highly motivated to serve as a third-party advocate given that a successful outcome could lead to the dismissal of the charges against him.

Lastly, third parties who are aggrieved by unconstitutional government practices will rarely be motivated to assert their legal interests. There are embedded legal impediments such as the Eleventh Amendment, which provides absolute immunity to the states from civil damages,[304] and qualified immunity, which shields officers in their individual capacity provided that the officers did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[305]

In addition, there are practical barriers to initiating legal action. In commenting on these practical influences, Professor Alexander explains that the disinclination among the innocent to seek legal redress is rooted largely in a fear of law enforcement and a distrust of the legal process.[306] These practical factors are especially ubiquitous in minority communities, particularly in instances where an innocent person has been subjected to an unfortunate police encounter, such as an unconstitutional search or seizure. As noted by Professor Alexander,

> Court cases involving drug-law enforcement almost always involve guilty people. Police usually release the innocent on the street—often without a ticket, citation, or even an apology—so their stories are rarely heard in court. Hardly anyone files a complaint, because the last thing most people want to do after experiencing a frightening and intrusive encounter with the police is show up at the police station where the officer works and attract more attention to themselves. For good reason, many people—especially poor people of color—fear police harassment, retaliation, and abuse. After having your car torn apart by the police in a futile search for drugs, or being forced to lie spread eagled on the pavement while the police search you and interrogate you for no reason at all, how much confidence do you have in law enforcement? Do you expect to get a fair hearing? Those who try to find an attorney to represent them in a lawsuit often learn that unless

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[304] U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); Edelman v. Jordan, 415 U.S. 651, 677 (1974); Hans v. Louisiana, 134 U.S. 1 (1890).

[305] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[306] ALEXANDER, *supra* note 17, at 69-70.

> they have broken bones (and no criminal record), private attorneys are unlikely to be interested in their case.[307]

Professor Alexander's conclusion that the innocent are disinclined to pursue legal remedies is reinforced when one compares the personal characteristics of jury versus nonjury populations. According to Professor Kim Forde-Mazrui, jury venires are typically drawn from voter registration lists, which for a variety of reasons tend to be underinclusive of minority citizens in the community.[308] He observes, for example, that minorities are less likely to receive jury summonses sent to them in the mail, given the greater residential mobility among minority populations.[309] Moreover, he submits that minorities are more likely to be excused from jury service on account of financial hardship, childcare difficulties, and criminal history.[310] These facts are notable given the Court's finding in the *Powers* line of cases that potential trial jury and grand jury members are not likely to assert their equal protection rights against the police.

Certainly the impediments to the pursuit of legal redress apply equally irrespective of the juror/nonjuror classification of the potential claimant. But the practical realities suggest a difference in outcomes. Financial hardships, personal and family structural issues, and police-community relational divisions are identified less with juror populations than with nonjuror communities. Accordingly, such factors strongly insinuate that juror populations would be better positioned to assert legal claims than the broader cross-sections of the communities in which they reside.

Individuals who are serving criminal sentences involving some form of community supervision also have a disincentive to pursue legal claims against law enforcement.[311] This reality becomes clearer when considering the various conditions of release that must be adhered to and the penalties (including incarceration) that can be imposed for noncompliance. Though the probationary conditions imposed by a court are often tailored to

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[307] *Id.*

[308] Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 356 (1999).

[309] *Id.*

[310] *Id.*

[311] Individuals with criminal records tend to be more heavily represented in nonjuror populations. The Department of Justice estimated that by the close of 2012, approximately 1 in 50 adults in the United States were under some form of community supervision, and a majority of these individuals were minorities. LAURA M. MARUSCHAK & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2012, at 1 (2013) (revised Jan. 21, 2015).

the individual defendant, the U.S. Federal Sentencing Guidelines, which provide guidance to federal courts regarding sentencing matters, classifies certain conditions as "mandatory" and others as "standard," or merely recommended. One such "mandatory" requirement is that a probationer must refrain from committing another criminal act.[312] Listed "standard" conditions include that a "defendant . . . refrain from excessive use of alcohol," that he "not purchase, possess, use, distribute, or administer any controlled substance," and that he associate neither with "persons engaged in criminal activity" nor "with any person convicted of a felony."[313] Probationers and parolees, fearful of having their status revoked due to a violation of one or more of their release conditions, would be highly motivated to avoid any situation (including pursuing legal action against the police) that would bring attention to conduct or associations that might be deemed to violate their release obligations.[314]

Another such hindrance impacts individuals who, due to financial hardship, reside in public housing. For example, 42 U.S.C. § 1437d(*l*)(6) provides that a tenant may be evicted for "drug-related criminal activity" on or near his premises when committed by the tenant, a member of his or her household, or even a guest under his or her control.[315] Faced with the prospect of eviction, public housing tenants, including those wholly innocent of criminal activity, will be highly reluctant to engage in any activity, such as the filing of a lawsuit against the police, that will heighten attention to activities within or near their premises that might trigger their eviction.

Thus, the *Powers* rationales apply with equal if not greater force in the exclusionary rule context. The government's investigative conduct is the foundation upon which a criminal case is built. When the evidence gathered by the government to prove a

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[312] U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5B1.3(a)(1) (2014).

[313] *Id.* §§ 5B1.3(c)(7), (9).

[314] Relatedly, individuals might be afraid to file legal actions out of fear that they or someone with whom they are close could be subject to deportation. Section 1227 of Title 8 details a laundry list of deportable acts, including being convicted of certain criminal offenses or being determined to be a drug abuser or an addict (which does not require a conviction). 8 U.S.C. § 1227(A)(2) (2012).

[315] 42 U.S.C. § 1437d (2012). Subsection (*l*)(6) provides

> that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Id. § 1437d(*l*)(6).

defendant's guilt is obtained through unconstitutional methods, the integrity of the justice system suffers and the defendant is personally and adversely impacted. The interests of the criminal defendant and the individuals aggrieved by unconstitutional government conduct are closely aligned. A criminal defendant is a highly motivated advocate to litigate not only his own interests but also those of the third party in whose shoes he stands. This fact is of added significance when considered in the context of the array of legal and practical barriers that render it highly unlikely that a third party will seek legal redress.

CONCLUSION

The post–Warren Court era of the Supreme Court is characterized by a jurisprudence that is highly deferential to law enforcement interests. This is especially true in the exclusionary rule and related standing doctrine contexts. Cognizant of the investigative freedoms that the Court has steadily expanded, as well as the Court's forgiving exclusionary rule and standing jurisprudence, law enforcement officers have too often been influenced to be aggressive in their policing and dismissive of individual constitutional safeguards.

The proposed expansion of the third-party standing doctrine would motivate law enforcement agencies to respond to a vast new landscape. Faced with the prospect of greatly increased challenges to their conduct, organizational leadership would have no other prudent alternative but to adapt and conform to this new reality. Greater respect for constitutionally protected liberties and decreased instances of police misconduct would be the likely byproducts of this cultural shift.

Admittedly, this proposal is only a first step in a much bigger reform process, for there are a multitude of factors that underlie the problem of police misconduct that must be addressed. For example, effectual reform would have to ultimately include a rescission of many of the exclusionary rule exceptions that the Court has carved out since *Mapp*. It would also have to include at least some of the recommendations set forth in the Final Report of the President's Task Force on 21st Century Policing.[316] Expansion of the standing doctrine,

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[316] PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [http://perma.cc/G34V-P2MX]. The report proffered several recommendations designed to help strengthen the trust between law enforcement and the communities they serve. The recommendations include developing and refining

particularly in the manner advocated for in this article, is a prerequisite to generating meaningful, positive, and sustained change both in police organizational culture and in officer behavior on the ground. The ability to exclude ill-gotten evidence always starts with standing. It is the gateway that defendants must pass through in order to voice their complaints. When enough people are afforded consistent and genuine access to the courts, it is then that police organizations will take notice and the wheels of change can begin to roll.

police policies that better reflect community values, strengthening and improving community policing policies and outreach, and enhancing police training and education to assist officers as they confront various challenges in an increasingly pluralistic nation. *Id.* For an in-depth discussion of the Final Report of the President's Task Force on 21st Century Policing, see Julian Cook, *Police Culture in the Twenty-First Century: A Critique of the President's Task Force's Final Report*, 91 NOTRE DAME L. REV. ONLINE 106 (2016).