

Winter 1975

## Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures

William A. Knox

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

William A. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. REV. (1975)

Available at: <https://scholarship.law.missouri.edu/mlr/vol40/iss1/10>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# MISSOURI LAW REVIEW



---

Volume 40

Winter 1975

Number 1

---

## **SOME THOUGHTS ON THE SCOPE OF THE FOURTH AMENDMENT AND STANDING TO CHALLENGE SEARCHES AND SEIZURES**

WILLIAM A. KNOX\*

### **I. INTRODUCTION**

The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the past, the Court has often used language which refers to standing to challenge or the scope of the amendment when it is really deciding whether a specific remedy—the exclusionary rule—should be available.<sup>1</sup> The Court has used language which suggests that the defendant's rights were not involved when it is actually denying the defendant the benefits of the exclusionary rule irrespective of whether his fourth amendment rights were violated. Such cases misstate the true reason for denying relief and tend to confuse and complicate civil causes of action for fourth amendment violations. These issues are becoming particularly relevant with the increase in civil litigation alleging fourth amendment violations as a ground for relief.<sup>2</sup> It is essential to understand the history and mean-

---

\* Assistant Professor of Law, University of Missouri-Columbia, B.S., North Dakota State University, 1966; J.D., University of Minnesota, 1968.

1. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974) (hereinafter cited as Amsterdam); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970). See, e.g., *Couch v. United States*, 409 U.S. 322 (1972).

2. See *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). See also Civil Rights Acts,

ing of the fourth amendment in order to evaluate intelligently the possibilities of a successful law suit based upon fourth amendment violations. This article will suggest that, at a minimum, the fourth amendment was intended to protect an individual's property and privacy interests in his person, houses, papers, and effects against unreasonable searches *and* unreasonable seizures, that the scope of the amendment should be consistent with that interpretation and that standing should be granted whenever there is an *arguable* violation of the fourth amendment rights of the individual who is seeking to challenge.

The proposals herein are not difficult to apply or understand if the following framework of analysis is kept in mind.

1. The proposed standing rule is directly related to, but broader than, the scope of the fourth amendment. It is consistent with the general law of standing, and is not dependent upon any specific interpretation being given to the exclusionary rule. However, the scope of the amendment must first be reevaluated to eliminate any dependence on the exclusionary rule.

2. The present scope will first be ascertained, then the various remedies for violation of the amendment will be examined to determine the extent to which they have affected the interpretation of the scope of the amendment. The scope of the amendment should be given a reasonable interpretation consistent with the amendment's history and purpose, not an interpretation that is primarily concerned with and affected by the exclusionary rule. A person should then be granted standing to litigate if there is an arguable violation of his fourth amendment rights. This article will propose some guidelines for determining when these rights should be deemed to have "arguably" been violated for purposes of granting standing.

3. The general rule of standing most frequently used by the Court in other constitutional law cases will be compared to the present fourth amendment standing rule. Where discrepancies are found, it will be essential to determine whether there are good reasons for the difference. It is suggested that there are differences, that no good reason exists for these differences, and that the standing rule announced in *Association of Data Processing Service Org. v. Camp*<sup>2.1</sup> (hereinafter referred to as the *Data Processing* rule), with

---

42 U.S.C. § 1983 (1970); Chief Justice Burger's dissenting opinion in *Bivens*; Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968); pt. IV of this article.

2.1. *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150 (1970). See part V *infra*, for a full discussion of the rule.

minimal modifications, is basically sound and will work admirably in fourth amendment cases if a reasonable scope is given to the amendment.

No attempt will be made to deal with whether the basic standard under the fourth amendment is one of reasonableness or one of probable cause, the technicalities involved in the application of those various doctrines, or the extent to which warrants are required for searches or seizures. Those topics are the subject of numerous judicial opinions<sup>3</sup> and have been substantially commented upon.<sup>4</sup> The primary purpose of this article will be to suggest an appropriate scope for the amendment and to suggest when an individual should have standing to litigate the issue of a violation of fourth amendment rights.

## II. HISTORICAL DEVELOPMENT OF THE FOURTH AMENDMENT

### A. *English Precedents*<sup>5</sup>

The history of searches and seizures most relevant to the fourth amendment had its origin in England and perhaps dates back to the early 1200's.<sup>6</sup> It is difficult to know the scope of the power to search

---

3. See, e.g., *Cardwell v. Lewis*, \_\_\_ U.S. \_\_\_, 94 S. Ct. 2464 (1974); *United States v. Edwards*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 1234 (1974); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Biswell*, 406 U.S. 311 (1972); *Chimel v. California*, 395 U.S. 752 (1969); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Warden v. Hayden*, 387 U.S. 294 (1967).

4. See, e.g., J. ISRAEL & W. LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL* (1971); Amsterdam, *supra* note 1.

5. The idea that a man's house is his castle subject to invasion by the state for only certain prescribed reasons was not an invention of English jurisprudence. The concept has been found expressed in the Biblical literature and in early Roman history. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-15, in 55 JOHN HOPKINS U. STUDIES IN HIST. & POL. SCI. Number 2 (1937) (hereinafter cited Lasson). The fourth amendment did, however, develop more specifically in relation to the English precedents, so they will be the primary focus of consideration in this article. There are numerous sources of information concerning the history of the fourth amendment, all finding a direct causal link with English precedent. See, e.g., E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* (1957); J. LANDYNSKI, *SEARCHES AND SEIZURES AND THE SUPREME COURT* (1966) (hereinafter cited LANDYNSKI); R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* (1955); T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969); Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* (1939).

6. Article 39 of the Magna Charta (1215) provided:

No freeman shall be taken or imprisoned or seized or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon them, except by the lawful judgment of his peers or by the law of the land.

This was an early due process clause, but it has perhaps been interpreted more broadly than is justified by its history. It is, however, some precedent for recognizing a need to balance

and seize in the 13th and 14th centuries because evidence was rarely presented in a criminal case. The jury was merely informed of the crime and given a specified amount of time to investigate the case using the methods they deemed appropriate.<sup>7</sup> As the jury became less independent, searches took on more importance as a means of gathering the evidence needed for presentation in court.<sup>8</sup> The increasing number of types of crimes also contributed to the expansion of the power to search.<sup>9</sup> The power to search and seize expanded substantially as the powers of the ruling class generally increased.<sup>10</sup> During the 16th and 17th centuries, general warrants,<sup>11</sup> which neither described nor limited the objects of the search or seizure or its manner and time of execution, were widely used by the King and Parliament. Writs of assistance<sup>12</sup> appear to have come into use later than general warrants, but involved many of the same abuses.<sup>13</sup>

---

individual liberties against the ruling class' desire for law enforcement. Lasson, *supra* note 5, at 20.

7. 9 HOLDSWORTH'S HISTORY OF ENGLISH LAW 222 (1926); 1 HOLDSWORTH'S HISTORY OF ENGLISH LAW 332-37 (4th ed. 1931) (hereinafter cited HOLDSWORTH).

8. The evolution of the jury system in England is detailed in 9 HOLDSWORTH, *supra* note 7, at 222 et seq.

9. During the latter half of the 16th century, many orders were given for the purpose of detection and punishment of nonconformism, seditious libel and related offenses. Lasson, *supra* note 5, at 25-26. The orders issued for the detection of such offending publications and practices seem to have been generally unlimited and messengers were given extremely broad powers of search and arrest. Persons and places were not necessarily specified, seizures were indiscriminate and virtually everything was left to the discretion of the bearer of the warrant. *Id.* at 26.

10. In 1335, for example, an act of Parliament provided that "innkeepers in passage ports were to search guests for false money imported and were to be rewarded with one-fourth of any resulting forfeitures." Lasson, *supra* note 5, at 23. During the reign of Henry VI (1422-61), the King granted a private company the privilege of searching for and seizing cloth dyed with logwood. The practice of giving general search powers to certain organized trades for enforcement of regulations was subsequently adopted by Parliament and the Court of Star Chamber. *Id.* at 24.

11. A good example of a general warrant was issued in 1762 by Lord Halifax, the Secretary of State, to four messengers ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, the *North Briton*, No. 45 . . . [and to arrest and seize] them or any of them . . . Together with their papers." Lasson, *supra* note 5, at 43. No limits were placed on where to search or what evidence to seize (merely all their papers). The only restrictions were an express statement of the offense and the implicit limitation that the authority would terminate when that crime was solved.

12. Writs of assistance were usually issued by a court and directed to an individual, such as a messenger of the Secretary of State, authorizing that individual to summon a sheriff or constable for assistance to prevent any interference with the search. It is not clear whether certain officials had a general search power without a writ of assistance or whether the writ conferred the power to search. The writs were unlimited in time, place, manner, and object. See LANDYNSKI, *supra* note 5, at 32; Lasson, *supra* note 5, at 55.

13. The development of writs of assistance is thought to have become prominent either during the reign of James I (about 1634) or by statute in 1662, although it is unclear when

It was not until the latter part of the 17th century that public opinion began to impose substantial restrictions on the power to search. The first real limitations on the very broad and far-reaching writs of assistance and general warrants occurred during the mid-1600's shortly after the search and seizure of Sir Edward Coke's papers and effects. In 1641 the Long Parliament resolved that searching for and seizing the studies and papers of members of Parliament and the issuance of warrants for that purpose were breaches of privilege and illegal.<sup>14</sup> Although Parliament failed to take any decisive action as to other warrants, searches, or seizures, it did set some precedent for recognizing that the need for the administration of justice should be balanced against the rights of individual freedom.<sup>15</sup> After the revolution of 1688, assertions of privilege against general warrants and writs of assistance became more widespread in England and general searches were less frequently authorized by statute.<sup>16</sup> In 1733, opponents to broad search powers defeated Walpole's plan to authorize general inspections of warehouses in order to enforce the wine and tobacco tax.<sup>17</sup>

The extent of the authority to search and seize without a warrant during the 1700's is not clear. Writers have found strong evidence of a right to arrest without a warrant for any felony or for a misdemeanor committed in the officer's presence, and to search incident to a valid arrest.<sup>18</sup> There is a distinct lack of evidence, however, of a general authority to search without a warrant absent an arrest. In some cases there were statutes authorizing special officers to search without warrants as an aid in enforcing customs and

---

writs of assistance were initially issued. By 1621, members of Parliament were already recommending that such warrants be issued less frequently. Lasson, *supra* note 5, at 27-29. They were more widely used in America. LANDYNSKI, *supra* note 5, at 31.

14. Lasson, *supra* note 5, at 34.

15. *Id.*

16. *Id.* at 39-40. See also Lasson, *supra* note 5, at 38-50 for other situations in which general warrants came under attack in the later 1600's. In 1680, the articles of impeachment against Lord Chief Justice Scroggs charged illegality in the issuance of "general warrants for attaching the persons and seizing the goods of his majesty's subjects, not named or described particularly, in said warrants; by means whereof many . . . have been vexed, their houses entered into, and they themselves grievously oppressed contrary to law." The trial and conviction of Algernon Sidney for treason in 1683 based upon papers seized under a general warrant has also been deemed an important event in the fourth amendment history. The evidence consisted largely of papers which had been gathered in response to a general warrant issued by the Privy Council. The court admitted the papers into evidence and deemed them sufficient to make up for the absence of eye witnesses. *Id.* at 39 n.96.

17. *Id.* at 40.

18. II M. HALE, PLEAS OF THE CROWN 363-66, 575-90 (1736) (hereinafter cited as HALE).

tax laws.<sup>19</sup> Those opposing the writs of assistance in the colonies did not recognize the validity of such a broad power of warrantless search. They viewed writs of assistance as being warrants conferring the search power.<sup>20</sup> Chief Justice Hale, in writing the *History of the Pleas of the Crown*, stated that a general warrant to apprehend all persons suspected of having committed a given crime was void and no defense to a suit for false imprisonment.<sup>21</sup> Hale proposed that warrants for searches and seizures should specify the individual to be seized and the place to be searched, both with particularity, and that the warrants must at least be based upon some suspicion.<sup>22</sup> He contended that search warrants are judicial acts and must be granted only upon an examination of the facts by a magistrate, an individual separate and apart from the individual performing the search. He also suggested that the searches must be reasonable, that they should be made in the daytime, that the owner of the premises should be present to give the officer information, that doors should not be broken open, and that in larceny cases the goods should not be delivered to the complainant until so ordered by the court.<sup>23</sup>

Major confrontations arising in England in the 1760's produced the most substantial limitations on the search powers. In 1763, William Pitt objected to the provision of the cider tax act<sup>24</sup> which would have allowed the inspection of private homes for purposes of enforcing the cider tax. Pitt thought such an invasion would be intolerable, apparently because of an interest in the privacy of the home. Strong opposition also developed against general warrants

---

19. See note 12 *supra* and note 44 *infra*.

20. See LANDYNSKI, *supra* note 5, at 32 n.53. See also text accompanying notes 40-44 *infra*.

21. See I HALE, *supra* note 18, at 580; II HALE, *supra* note 18, at 112. Sir Matthew Hale wrote the *History of the Pleas of the Crown* during the 17th Century, but it was not published until after his death.

22. II HALE, *supra* note 18, at 149-52. Hale's explanation of the requirements for seizing stolen property gives an insight to the thinking of the times. He suggested that the following were required for a valid search for stolen property. The warrant should: 1. Not be "granted without oath made before the justice of a felony committed, and that the party complaining has probable cause to suspect they are in such a house or place, and do show his reasons for such suspicion; 2. Be directed to constables or other public officers, and not to private persons; 3. Command that the goods found be brought before a justice of the peace." He further stated that in executing the warrant the officer and the affiant may "break in if entry is refused, but the affiant (whose goods are being searched for) would be liable for damages for trespass if the goods are not there" (spelling modernized). See also II HALE, *supra* note 18, at 582-85 (arrests).

23. I HALE, *supra* note 18, at 150-52. See also note 16 *supra*.

24. Lasson, *supra* note 5, at 41. The cider tax was passed, but was repealed a few years later at the same time that the House of Commons passed a resolution dealing with general warrants.

issued for search and arrest in seditious libel cases.<sup>25</sup>

Perhaps the most notorious and significant case during this period involved the 1762 arrest of John Wilkes and the seizure of all his papers and personal effects. Wilkes authored the pamphlet *The North Briton*, which criticized the English government. Lord Halifax, Secretary of State, issued a general warrant ordering messengers to "make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, *The North Briton No. 45* . . . and them, or any of them, having found, to apprehend and seize, together with their papers."<sup>26</sup> In three days the messengers arrested 49 people.<sup>27</sup> Wilkes resisted peacefully, but was carried off and committed to the tower after refusing to answer questions. He was subsequently released on a writ of habeas corpus because he was a member of Parliament.<sup>28</sup> Wilkes and the printers brought suit against the government. Chief Justice Pratt, in the case of *Huckle v. Money*,<sup>29</sup> held the warrants to be illegal stating: "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live for an hour."<sup>30</sup> The jury awarded the plaintiff in the case damages of 300 pounds and the court allowed the award to stand.<sup>31</sup> Subsequent suits based on that precedent also had substantial success.<sup>32</sup> These cases which awarded damages or returned the seized property have a direct bearing on the present-day standing issue. In allowing trespass, false imprisonment, replevin, and trover causes of action, the cases demonstrate that an unreasonable search or seizure by the state may constitute an injury for which there is a corresponding judicial remedy.

---

25. See *Rex v. Earbury*, 94 Eng. Rep. 544 (K.B. 1733). This case involved a general warrant issued by the Secretary of State. The court condemned the warrant and the manner of executing the warrant, but decided it lacked jurisdiction over the defendant and therefore could not order a return of the papers. See also Lasson, *supra* note 5, at 43.

26. Lasson, *supra* note 5, at 43. Wilkes was a member of Parliament at the time.

27. *Id.* at 43. Some were taken from their beds in the middle of the night.

28. *Id.* at 44. See the case of John Wilkes, on Habeas Corpus, 19 Howell's State Trials 981 (1763).

29. 95 Eng. Rep. 768 (K.B. 1763). The plaintiff, a printer of the *North Briton*, alleged trespass, assault, and false imprisonment. Wilkes was not a party to the suit.

30. *Id.* at 769.

31. Lasson, *supra* note 5, at 43-44. Huckle had been imprisoned for only six hours during which time he was treated to beefsteaks and beer. The case has been considered one of the earliest allowing punitive damages.

32. See, e.g., *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.B. 1763). In *Wilkes*, the court upheld an award of 1000 pounds against Wood, who supervised the execution of the general warrant. It has been estimated that the *North Briton* warrant cost the Crown a total of 100,000 pounds in litigation expenses and damages. Lasson, *supra* note 5, at 45.



Wilkes received widespread recognition both in England and America for his stand against general warrants, and engaged in considerable communication with some leading Americans in the 1760's.<sup>33</sup> Wilkes' success apparently prompted John Entick to commence a civil suit challenging his arrest and the seizure of his papers under a general warrant.<sup>34</sup> The resulting case, *Entick v. Carrington*,<sup>35</sup> has been regularly cited by the United States Supreme Court as a historical precedent for the fourth amendment.<sup>36</sup>

The English cases subsequently led the House of Commons in 1766 to declare that general warrants in libel cases were illegal.<sup>37</sup> Shortly thereafter William Pitt also persuaded the House to declare illegal all general warrants not specifically authorized by an act of Parliament.<sup>38</sup> It was during this period that Pitt made his famous comment:

The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the sun may enter; the rain may enter; but the King of England may not enter; all his forces dare not cross the threshold of that ruined tenement.<sup>39</sup>

English history indicates that the objection to searches and seizures was not merely to the entering of the man's house, the seizure of certain very limited items of evidence, or the arrest of particular individuals. Much of the objection was aimed at the extent and nature of the seizures, the arrests of individuals on mere suspicion, the nature and timing of such arrests, and also the general nature of the warrants. The concern with searching houses as opposed to businesses, and the importance placed on papers seems strong evidence of a consideration for privacy in determining when searches are improper.

---

33. Lasson, *supra* note 5, at 46. He is known to have communicated with James Otis, Samuel Adams, John Hancock, John Adams, and Josiah Quincy.

34. *Id.* at 47. Entick's arrest occurred about six months before Wilkes' arrest.

35. 95 Eng. Rep. 807 (K.B. 1765). This was a trespass action against messengers of the King alleging that their entry and seizure of papers on a charge of seditious libel was illegal.

36. See *Boyd v. United States*, 116 U.S. 617 (1886), citing the cases involving John Wilkes and the *North Briton* and *Entick v. Carrington*, *supra* note 35, as having a direct bearing on the meaning and purpose of the fourth amendment.

37. Lasson, *supra* note 5, at 49. At the time these cases were being decided, the challenges primarily involved the libel laws and probably also contributed to the first amendment to the United States Constitution. See LANDYNSKI, *supra* note 5, at 27-28.

38. William Pitt was not successful in getting a condemnation of general warrants for arrests, however, nor a prohibition on warrants to seize papers. See Lasson, *supra* note 5, at 49.

39. *Id.* at 49-50. The objection was probably not aimed at the *total security* of the home. The objections were to indiscriminate and open-ended warrants and searches.

### B. Colonial Precedents

The historical background in the United States is not substantially different from that in England except that writs of assistance were perhaps more widely used.<sup>40</sup> The writs of assistance, used in America to combat smuggling, were not even particular as to a specific violation of the law.<sup>41</sup> They were, in effect, permanent search warrants giving customs officials unlimited discretion to search wherever and whenever they pleased. These writs were first granted by the courts in 1755 after protests against searches made without them.<sup>42</sup> They were valid as long as the sovereign lived.<sup>43</sup> When George II died in 1760, opponents to the writs of assistance prepared to challenge the issuance of new writs.<sup>44</sup>

When application was made in 1761 to the Superior Court of Massachusetts for a new writ of assistance, sixty-three Massachusetts businessmen hired James Otis, Jr. and Oxenbridge Thatcher to oppose the issuance.<sup>45</sup> Attorney General Gridley, representing the provincial government, argued that there was no right of privacy as against the King.<sup>46</sup> Otis<sup>47</sup> argued that the writs violated liberty, fundamental principles of law, and the privilege of an individual's house. He contended that only specific warrants could be issued under the statutes and that "an act against natural equity is void."<sup>48</sup> Otis, specifically citing *Dr. Bonham's Case*,<sup>49</sup> contended that there

40. *Id.* at 51. The technical difference between general warrants and writs of assistance is discussed in notes 11 and 12 and accompanying text *supra*.

41. *Id.* at 43-44. General warrants at least mentioned a specific crime, often committed at a specific time. Writs of assistance, on the other hand, were general powers to search whenever or wherever necessary for forcing compliance with the law.

42. The first writ of assistance was issued to Charles Paxton, who held the title "Surveyor and Searcher of the Port of Boston." LANDYNSKI, *supra* note 5, at 32.

43. *Id.* at 31. Actually custom recognized their validity for six months after the death of the sovereign.

44. *Id.* at 33. It is not clear that the writs of assistance were the source of the power to search. Some historians believe the power to search was inherent in the office of the customs inspectors. The challenge to the writs was ultimately successful on the theory that the writs were the source of power, so that assumption must carry through in evaluating the historical message.

45. LANDYNSKI, *supra* note 5, at 33.

46. *Id.* at 34. Gridley also argued that the writs were actually a limitation on the unlimited search power which he said was inherent in the customs official's position.

47. During the 1760's, Otis had communicated with Wilkes in England and may have been aware of Wilkes' activities with respect to general warrants. Lasson, *supra* note 5, at 46 n.114.

48. LANDYNSKI, *supra* note 5, at 34. Thatcher confined his arguments to the applicability of the English statutes in the colonies.

49. 77 Eng. Rep. 638 (C.P. 1669). In *Dr. Bonham's Case*, Coke asserted in dictum that an individual could not be the judge of a situation if he had an interest in the outcome. He

was a need for judicial review of warrants<sup>50</sup> and suggested that the customs officials were not the appropriate officials to determine the need for the search.<sup>51</sup> The court, however, granted the writ of assistance after a reargument.<sup>52</sup> The following day, November 23, 1761, the Boston Gazette wrote in reference to Otis' argument that,

The arguments . . . were enforced with such strength of reason, as did great honor to the gentleman concerned; and nothing could have induced one to believe they were not conclusive, but the Judgment of the Court [was] *immediately* given in favor of the Petition.<sup>53</sup>

In 1761, the Massachusetts Legislature passed a bill outlawing general warrants and writs of assistance, but it was vetoed by the Governor.<sup>54</sup> The language of the act is significant in that it did not assert a standard of reasonableness but rather required that the warrant be specific.<sup>55</sup> Active opposition to writs of assistance waned during the next three years,<sup>56</sup> but in 1765 the writs again came under vigorous attack in response to the passage of the Stamp Act.<sup>57</sup>

Massachusetts was not the only colony engaged in opposition to writs of assistance, although reaction there was the most vocal, open, and notorious.<sup>58</sup> Except for Massachusetts and New Hampshire, the colonies generally refused to issue new writs of assistance

---

spoke of natural law and equity and asserted that acts of Parliament inconsistent with natural law were void.

50. Although Coke had admitted that his assertions in *Dr. Bonham's Case* were not an accurate statement of the law, they were significant in the formulation of the concept of judicial review. LANDYNSKI, *supra* note 5, at 35 n.72.

51. *Id.* See also note 47 *supra*.

52. LANDYNSKI, *supra* note 5, at 35.

53. QUINCY'S MASS. REPORTS, 1761-1772, at 486 (hereinafter cited as QUINCY). In December 1761, the Gazette called for all people to apply for writs of assistance, suggesting the language of the statutes was so broad that the writs were available for the asking. *Id.* at 487-88.

54. LANDYNSKI, *supra* note 5, at 35.

55. An act for the better enabling the Officers of his Majesty's Customs to carry the Acts of Trade into Execution . . . and for the preventing of fraud: [authorizes the courts to issue writs of assistance if presented upon oath] that he has had information of the Breach of any of the Acts of Trade; and that he verily believes or knows such Information to be true; . . . which Writ or Warrant of Assistance shall be in the form following and no other . . .

The act also provided that the Court must name the individual suspected, and that the search must be carried out in the daytime. QUINCY, *supra* note 53, at 495.

56. LANDYNSKI, *supra* note 5, at 36. From 1762 to 1765, apparently 14 other writs of assistance were issued. A committee appointed by the Governor to review the legality of the writs found them to be legal.

57. *Id.* at 36.

58. See QUINCY, *supra* note 53, at 442; LANDYNSKI, *supra* note 5, at 36.

after the death of George II.<sup>59</sup> This opposition continued until the Revolutionary War. The petition for a redress of grievances submitted to the King in October of 1774 by the Continental Congress complained that "[t]he officers of the Customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information."<sup>60</sup> This objection may also have been contained in spirit in the Declaration of Independence, where objection was made to the Crown having sent "hither swarms of officers to harass our people." The objections were consistent with those raised in England: privacy, property and arbitrariness.

Prior to the meeting of the constitutional convention in 1787, most of the colonies had adopted specific limitations on the use of general warrants and writs of assistance.<sup>61</sup> When the constitutional

---

59. LANDYNSKI, *supra* note 5, at 36-37. In Connecticut, Delaware, Georgia, Maryland, Pennsylvania, and Rhode Island, no writs were granted by the courts during this period. The requests for the writs were often denied or merely ignored. The South Carolina courts refused the writs until 1773.

60. Lasson, *supra* note 5, at 75; LANDYNSKI, *supra* note 5, at 38. For a more complete discussion see QUINCY, *supra* note 53, at 466-67.

61. B. SCHWARTZ, *THE BILL OF RIGHTS, A DOCUMENTARY HISTORY* (1971), contains many of the more important documents. Article X of the Virginia Declaration of Rights of 1776 provided:

[t]hat general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

*Id.* at 235. The Pennsylvania Declaration of Rights of 1776 provided in Article X:

that the people have a right to hold themselves, their houses, papers and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not be granted.

*Id.* at 265. The North Carolina Declaration of Rights of 1776 provided in Article XI:

that general warrants—whereby an officer or messenger may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons, not named, whose offenses are not particularly described, and supported by evidence—are dangerous to liberty, and ought not be granted.

*Id.* at 287. The Massachusetts Declaration of Rights of 1780 provided in Article XIV:

Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.

*Id.* at 342.

convention met, its members did not consider a bill of rights until five days before the convention adjourned. They then decided against it without substantial consideration.<sup>62</sup> The states, of course, ratified the Constitution without a bill of rights. In recommending that the Constitution be amended to include a bill of rights, James Madison specifically argued that because Congress was empowered to do everything necessary and proper with regard to imposing certain kinds of taxes, it was at least foreseeable that Congress might deem it necessary and proper to use general warrants or writs of assistance in enforcing the tax laws.<sup>63</sup> Madison's solution to the problem of searches and seizures was the following clause:

the right of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>64</sup>

The draft proposal was referred to the congressional committee responsible for drafting a bill of rights and was altered to read as follows:

the right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.<sup>65</sup>

The word "secured" was subsequently altered to read "secure" and the phrase "unreasonable searches and seizures" which was omitted from the committee's draft was reinserted.<sup>66</sup> The only major change was insertion of the word "effects" for the words "other property."<sup>67</sup>

62. LANDYNSKI, *supra* note 5, at 39.

63. Lasson, *supra* note 5, at 99. See also Lasson at 91-100 for an excellent discussion of some of the arguments relating to the need to limit governmental power to search. Jefferson was in France at the time, and was one of the vigorous proponents of the Bill of Rights, as were Elbridge Gerry of Massachusetts, Robert Yates of New York, and Luther Martin of Maryland. *Id.* at 85-90. Opponents of a bill of rights argued that the listing of restrictions upon government action implied that the central government was not one of limited power. This approach was taken by Sherman during the constitutional convention, and was also argued by James Wilson and other Federalists in supporting the adoption of the Constitution without the Bill of Rights. *Id.* at 85-90.

64. LANDYNSKI, *supra* note 5, at 41; Lasson, *supra* note 5, at 97.

65. Lasson, *supra* note 5, at 100.

66. LANDYNSKI, *supra* note 5, at 41; Lasson, *supra* note 5, at 101.

67. The reason for the change is not clear. "Other property" is probably broad enough

Benson objected to the words "shall not be violated by warrants issuing" as not being strong enough language and recommended to the committee that the words "shall not be violated and no warrant shall issue" be inserted in lieu thereof.<sup>68</sup> Although this version was initially rejected by the House, it was subsequently reinserted in the draft by Benson, who was a member of the subcommittee which was in charge of putting the Bill of Rights in final form for House and Senate consideration.<sup>69</sup> The bill as then submitted by Benson was approved by both Houses of Congress and ratified by the states.<sup>70</sup>

The choice of words in the fourth amendment is particularly significant. It is not limited to general warrants or writs of assistance as were the Virginia, Pennsylvania and many other state declarations of rights.<sup>71</sup> In fact, both drafts of the fourth amendment that were considered dealt with unreasonable searches and seizures.<sup>72</sup> The final draft follows the Massachusetts pattern<sup>73</sup> of recognizing a general right of freedom from unreasonable searches and seizures and is consistent with Otis' argument concerning general principles of liberty.<sup>74</sup> It would be a mistake to assume that merely because the most serious abuses resulted from the writs of assistance and general warrants that the only purpose of the fourth amendment was to prohibit those abuses.<sup>75</sup>

---

to cover both real and personal property, which would have a definite bearing on the scope of the amendment. If "other property" had been retained, no difficulty would have been encountered in bringing "open fields," buildings, etc., within the scope of the amendment. The word effects, however, is probably not broad enough to include real property, although it clearly includes intangibles. See BLACK'S LAW DICTIONARY 605 (Rev. 4th ed. 1968). I have been unable to find any definition of effects which includes real property.

68. LANDYNSKI, *supra* note 5, at 41; Lasson, *supra* note 5, at 101-02. Benson (a United States Representative from New York) was a member of the house committee charged with drafting a bill of rights.

69. Lasson, *supra* note 5, at 101-03; LANDYNSKI, *supra* note 5, at 42.

70. LANDYNSKI, *supra* note 5, at 42; Lasson, *supra* note 5, at 102-07.

71. See note 61 *supra*.

72. See Lasson, *supra* note 5, at 98-103. The records seem to indicate that the omission of "unreasonable searches and seizures" from the second draft was treated as an oversight and promptly corrected. See text accompanying note 66 *supra*.

73. See note 61 *supra*.

74. See text accompanying notes 47-50 *supra*.

75. LANDYNSKI, *supra* note 5, at 45. Another important consideration not particularly relevant to the standing issue is the relationship between the reasonableness clause and the warrant clause of the fourth amendment. There are three possible interpretations of the relationship between the two clauses: 1) only reasonable searches are permissible, and if a proper warrant has been issued it is per se reasonable; 2) that the warrant requirement must be complied with and the search or seizure must also be reasonable; 3) that the reasonableness clause grants a power to conduct reasonable searches and seizures, and some searches may be reasonable even though no warrant is secured. History is not conclusive on which alternative is correct, but it is clear that there was no intention of granting an unlimited power

Reading the fourth amendment in a fair manner and giving reasonable weight to its history would provide at least the following guidelines: 1) the amendment applies a standard of reasonableness to all searches of persons, houses, papers, and effects and all seizures of persons, houses, papers and effects.<sup>76</sup> It is not limited to situations where both a search and a seizure occur;<sup>77</sup> 2) warrants, when required, must meet the requirements of clause two of the amendment;<sup>78</sup> and 3) the amendment was intended to protect both property interests and some privacy interests against arbitrary and unreasonable infringement by the federal government.<sup>79</sup> Thus, while the fourth amendment recognizes that the government has more power than private citizens, it also limits the scope of that power.

---

to search. It is also unlikely that there was an intention to change the common law authorizing searches without any warrant if incident to a valid arrest.

76. Warrantless arrests were permitted for felonies and misdemeanors committed in the presence of law enforcement officials. See note 18 and accompanying text *supra*. It is doubtful that Congress or the people intended to require a warrant in situations where it is clearly impractical to obtain one, such as a search incident to an arrest. See *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969). However, it is also fair to assume that the warrantless search or seizure must still be reasonable. Also the warrant requirements of the fourth amendment clearly relate to the issue of the validity of general warrants and writs of assistance which were, without question, intended to be invalidated by the fourth amendment. But see *Almeida-Sanchez v. United States*, 413 U.S. 266, (1973) (Powell, J. concurring); *United States v. Biswell*, 406 U.S. 311, (1972); *Camara v. Municipal Court*, 387 U.S. 523 (1967); which all authorize general warrants on a variety of theories, basically because the purpose of the search was not to acquire evidence for a criminal prosecution.

77. A seizure is not always preceded by a search. For example, the seizure of a car is not exempt from the fourth amendment merely because a search does not have to be conducted to locate it. There must be at least some evidence to justify the seizure (*i.e.* probable cause to believe it is evidence of a crime or contraband. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. Elkins*, 245 Ore. 279, 422 P.2d 250 (1966). But see *Cady v. Dombrowski*, 413 U.S. 433 (1973). So also a person may not be seized merely because he is in plain view. There must be sufficient cause under the fourth amendment. See *Terry v. Ohio*, 392 U.S. 1 (1968) (Harlan, J., concurring). The same is true of searches. An officer may not search your house without probable cause merely because he seizes nothing.

78. See note 76 *supra*.

79. Historians have not seriously questioned the intention of protecting property rights. Many of the remedies in the 1700's were property related causes of action, such as trespass and replevin. A more substantial question is the desire to protect an interest in privacy. Many of the earliest United States Supreme Court cases recognized this interest. See *Boyd v. United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727 (1877). The court has consistently recognized this right. Many of the historical statements by opponents to general warrants also suggest, at least, an interest in privacy of the home. See text accompanying note 38 *supra*. See also *Cardwell v. Lewis*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2464 (1974). To be consistent with the history, both property and privacy rights must be protected.

### III. THE PRESENT SCOPE OF THE FOURTH AMENDMENT IN CRIMINAL CASES<sup>80</sup>

The basic questions in defining scope are whether a particular activity constitutes a search or a seizure and what fits within the fourth amendment categories: person, house, paper, and effect. The question of whether the search or seizure is reasonable<sup>81</sup> arises only after it is determined that a search or seizure of a person, house, paper, or effect took place. Nevertheless, a few additional considerations should be kept in mind. First, the fourth amendment was never intended to be, and probably should not be deemed to be, the cure-all which prohibits all possible abuses by the police in gathering evidence.<sup>82</sup> Second, the available historical material does not clearly answer all the questions concerning the scope of the fourth amendment. This is understandable, since those who drafted the Bill of Rights were not necessarily all of one mind, and there were disputes as to the protections to be afforded as well as the language to be employed.<sup>83</sup> The third consideration is that the fourth amendment does not prohibit governmental searches and seizures or invasions of privacy, it merely requires a certain amount of justification

---

80. Civil causes of action for fourth amendment violations are not very helpful in defining the scope of the amendment because they have not yet become substantial in number and those that are brought tend to involve individuals who are totally innocent of any crime and who clearly come within the protection of the fourth amendment. *See, e.g., Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). Cases are starting to arise, however. *See California Banker's Ass'n v. Shultz*, note 263 *infra* and *O'Shea v. Littleton*, note 264 *infra*. Other cases, such as those concerned with the constitutional right of privacy, are excluded from this analysis because they generally involve constitutional provisions other than the fourth amendment. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *See also* 40 BROOKLYN L. REV. 460 (1973); 11 DUQUESNE L. REV. 165 (1972); 51 N.C.L. REV. 1530 (1973) (dealing with Title VIII of the Civil Rights Act); Note, 69 NW. U.L. REV. 263 (1974); 51 TEXAS L. REV. 602 (1973); Annot., 57 A.L.R. 3rd 16 (1974).

81. The reasonableness, warrant, and probable cause requirements, while always relevant in the fourth amendment cases, apply only if a search or seizure takes place. If there is no search or seizure, there is no need to comply with the fourth amendment requirements of reasonableness or probable cause. *See Amsterdam*, note 1 *supra*.

82. The fourth amendment is aimed at certain types of conduct and activities and to the extent the government engages in activities reasonably within the framework of the fourth amendment, it is not an abuse of judicial power to so construe it. It should also be remembered that other constitutional provisions protect against certain objectionable activities, for example, fifth amendment protection against compulsory self-incrimination; first amendment protection of speech, association and religion; sixth amendment right of counsel, etc. I do not overlook the point of view that the Constitution is a "living instrument" which must be interpreted to be consistent with the modern world.

83. *See* text accompanying notes 63-70 *supra*; *Amsterdam*, *supra* note 1, at 395-96. The language of the amendment, however, must be the guide which is followed.



for the activities.<sup>84</sup> Finally, due to the broad applicability of the exclusionary rule, the Court has tended to restrict its definitions of “search” and “seizure” because it does not believe that exclusion is an appropriate remedy for a minor infringement of rights.<sup>85</sup>

The Supreme Court, very early, began giving the fourth amendment what might be called an expansive reading. In *Ex parte Jackson*,<sup>86</sup> for example, dictum suggested that the search of a closed envelope in the possession of the post office would arguably constitute a violation of the addressee’s fourth amendment rights where there was no warrant or probable cause for the search.<sup>87</sup> The Court did not limit its language to searches for evidence of criminal activities, but included inspections for the purpose of enforcing post office regulations dealing with what constitutes mailable material. In *Boyd v. United States*,<sup>88</sup> a noncriminal case, the Court held that a subpoena duces tecum to deliver a party’s documents to be used against him in a forfeiture of property proceeding was an infringement on the individual’s right of privacy and violated the fourth amendment.<sup>89</sup> The Court recognized that an order to produce evidence involves basically the same objections as would be involved if the police performed the search. These decisions are consistent with the historical concept that the people have a right to be free from unreasonable searches and seizures of their “papers”; they have a right of privacy.<sup>90</sup>

---

84. The fourth amendment prohibits only *unreasonable* searches and seizures.

85. See Amsterdam, *supra* note 1, at 381. The primary problem is that the Court often uses standing in the context of whether the individual is entitled to the benefits of the exclusionary rule. See White & Greenspan, *supra* note 1. As a result, if the Court does not contemplate allowing the exclusionary rule as a remedy, it will often not seriously consider whether the fourth amendment was actually violated. See also Kaplan, *The Limits of the Exclusionary Rule*, 26 STANFORD L. REV. 1027 (1974), for an excellent discussion of the problem.

86. 96 U.S. 727 (1877). See also *United States v. Van Leeuwen*, 397 U.S. 249 (1970), citing *Jackson* with approval.

87. See *United States v. Van Leeuwen*, *supra* note 86, stating that papers are protected “wherever they may be.” 397 U.S. at 251. The package had been detained by the post office for about 29 hours. The Court held that to be a seizure.

88. 116 U.S. 616 (1886). This was only the fifth time that the Court considered the fourth amendment. The four earlier cases were: *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806) (arrest comes within fourth amendment); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855) (fourth amendment not applicable to the states); *Murray v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (fourth amendment not applicable to purely civil proceedings); and *Ex parte Jackson*, 96 U.S. 727 (1878) (dealing with opening envelopes by the Post Office Department.)

89. *Id.* For example, if the fourth amendment could be avoided by merely ordering the defendant to empty out his pockets or his house, little protection would remain.

90. Otis and others recognized an individual’s need for privacy at least in the home. History does not suggest that it was necessarily limited to the home. See *Entick v. Carrington*,

The expansive interpretation of the scope of the fourth amendment, although somewhat slowed after *Boyd*,<sup>91</sup> usually resulted in finding a "search" whenever there was an attempt to discover evidence that was not in "plain view."<sup>92</sup> Subsequent cases held that a search could be committed not only by physical entry or trespass,<sup>93</sup> but also by the senses of sight,<sup>94</sup> and hearing<sup>95</sup> if there was an invasion of privacy in person, houses, papers, or effects. The courts, for example, have held that searches occurred when chairs were used to get a better view into a window,<sup>96</sup> or sound amplification devices were used to enable a person to hear better.<sup>97</sup> It would also be a search to take blood samples from the body,<sup>98</sup> remove bullets,<sup>99</sup> or subject the body or baggage to x-ray instruments to peer inside.<sup>100</sup>

---

95 Eng. Rep. 807 (1765); *Huckle v. Money*, 95 Eng. Rep. 768 (1763). It is important to note, however, that much of the early English and American search law developed with respect to property interests with privacy consideration being largely a matter of aggravation of the wrong. See note 79 *supra*, and *Huckle v. Money*, 95 Eng. Rep. 768 (1763); *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763). In later cases the courts clearly recognized that the protection to be afforded papers by the fourth amendment involved interests in privacy. See cases cited in note 86 *supra*. A good summary to privacy as a separate ground for relief can be found in Annot., 57 A.L.R.3d 16 (1974). See also articles cited note 80 *supra*. Perhaps the most significant single article which led to the development of a body of law dealing with privacy in the United States is Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

91. See, e.g., *Olmstead v. U.S.*, 277 U.S. 438 (1928).

92. See note 106 *infra*. Early cases took the position that the "eye could not commit a search." See *Entick v. Carrington*, 95 Eng. Rep. 807 (1765). They did recognize, however, that the taking and carrying away of property or papers constituted a seizure of those papers. See, e.g., *Wilkes v. Woods*, 98 Eng. Rep. 489 (1763); *Huckle v. Money*, 95 Eng. Rep. 768 (1763).

93. The early requirement for a search was finding an infringement on property rights. There was no specific consideration of privacy. See *Texas v. Gonzales*, 388 F.2d 145 (5th Cir. 1968). The requirement of a physical entry or trespass caused the Court to interpret the terms "houses, papers, and effects" very broadly. The fourth amendment was held to protect places of business, apartments, garages, automobiles, clothing, cabinets, envelopes, etc. See *Amsterdam*, *supra* note 1, at 357; text accompanying notes 124-129 *infra*.

94. See *McDonald v. United States*, 335 U.S. 451 (1948); *Anspach v. United States*, 305 F.2d 48 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962).

95. See *Katz v. United States*, 389 U.S. 347 (1967).

96. See *McDonald v. United States*, 335 U.S. 451 (1948).

97. *Katz v. United States*, *supra* note 95. See also, Note *Minimization of the Fourth Amendment*, 19 N.Y.L. FORUM 861 (1974) for a general discussion of the law of electronic eavesdropping.

98. *Schmerber v. California*, 384 U.S. 757 (1966).

99. See generally *Schmerber v. California*, 384 U.S. 757 (1966), which suggests that any intrusion into the body causing hidden objects to be revealed is a search. This would likely encompass at least the extraction of bullets.

100. See, e.g., *United States v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971), dealing with the FAA profile and electronic check for metal. If the rationale dealing with airport searches of baggage also applies to the body, it would seem that subjecting a person to x-rays would be a search. These airport searches have been the subject of numerous comments. See, e.g., 26 U. FLA. L. REV. 329 (1974); 34 LA. L. REV. 860 (1974); 6 ST. MARY'S L.J. 258 (1974).

In each instance above, designating the activity a search is consistent with the historical purpose of the fourth amendment even though some of the activities, such as electronic surveillance, were not contemplated by the drafters of the amendment. In each case there is an invasion of a property or privacy interest.

In deciding whether an activity constitutes a search, the Court now frequently places emphasis on whether there was an invasion of a reasonable expectation of privacy.<sup>101</sup> Courts have been reluctant to consider the unaided<sup>102</sup> use of the senses of sight, hearing, or smell to be a search in cases where the law enforcement officer did not engage in any trespass or physical invasion of the area occupied by defendants. The use of flashlights<sup>103</sup> or binoculars<sup>104</sup> is also not normally deemed an invasion of privacy.<sup>105</sup> The Court has consistently taken the position that the discovery of items in plain view does not constitute a search.<sup>106</sup>

In defining seizure, the litigation has frequently been concerned with what constitutes the seizure of a person.<sup>107</sup> The courts have generally taken the view that any detention of a person against his will is a seizure.<sup>108</sup> The word seizure, however, refers to the acquisition of control over any tangible<sup>109</sup> or intangible<sup>110</sup> property including

101. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 8, 14-15 (1973); *Terry v. Ohio*, 392 U.S. 1, 9 (1968). See also *Cardwell v. Lewis*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464, 2468, 2470 (1974). In *Cardwell*, the plurality speaks of a "right of privacy" and later of the defendant's expectation of privacy.

102. See, e.g., *Draper v. United States*, 358 U.S. 307 (1959).

103. *United States v. Lee*, 274 U.S. 559 (1927); *United States v. Callahan*, 256 F. Supp. 739 (D. Minn. 1964).

104. *State v. Hawkins*, 482 S.W.2d 477 (Mo. 1972). See 27 OKLA. L. REV. 243 (1974).

105. *Katz v. United States*, *supra* note 95. The exemptions for binoculars and flashlights was a recognition that the police must be able to use reasonable means of discovery. Use of such instruments should, however, be deemed a search. But see *Goldman v. United States*, 316 U.S. 129 (1942).

106. Defining plain view is itself a problem. Recently the Court has not been able to muster a majority opinion in the difficult "plain view" cases. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Cardwell v. Lewis*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464 (1974). The open fields doctrine, although technically not "persons, houses, papers or effects," also appears to be potentially a "plain view" approach. See *Hester v. United States*, 265 U.S. 57 (1924). "View" probably is not limited to sight, but would include hearing, smell, and perhaps touch.

107. See *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968). Most criminal litigation in this area involves the legality of the search, not the seizure. However, there are exceptions. See *Roaden v. Kentucky*, 413 U.S. 496 (1973); *United States v. Van Leeuwen*, 397 U.S. 249 (1970); *Sibron v. New York*, 392 U.S. 40 (1968).

108. *Cupp v. Murphy*, 412 U.S. 291 (1973). Cases are rare where an individual other than a suspect has his liberty restrained against his will and brings an action to challenge the detention. Cf. *Hurtado v. United States*, 410 U.S. 578 (1973) (incarceration of a witness).

109. See *Sibron v. New York*, *supra* note 107.

110. See *Katz v. United States*, *supra* note 95.

guns,<sup>111</sup> clothes,<sup>112</sup> papers,<sup>113</sup> hair samples,<sup>114</sup> voice exemplars,<sup>115</sup> words in communication,<sup>116</sup> and other information whether acquired by photograph,<sup>117</sup> other duplication,<sup>118</sup> or even perhaps by memorization of the contents.<sup>119</sup> These decisions are at least not inconsistent with the historical meaning of the term "seizure" in that they involve the assertion of control over something.<sup>120</sup> To consider wire-tapping to be a seizure subject to the fourth amendment<sup>121</sup> protection is also consistent with the fourth amendment's historical purpose to protect communications (papers), the telephone merely being a more modern method of communication.<sup>122</sup> Expanding the definition to include memorization of the contents of letters or the recording of communications would be proper since memorization involves the same type of privacy invasion as would taking possession of the item. In practice, however, the seizure of intangibles will be of less importance because the means of discovery (search) will be the primary subject of litigation.

---

111. *Adams v. Williams*, 407 U.S. 143 (1972).

112. *Warden v. Hayden*, 387 U.S. 294 (1967).

113. *Boyd v. United States*, *supra* note 88.

114. Taking a hair or skin sample should be deemed a seizure and treated like the seizure of any other tangible item. *See, e.g., Cupp v. Murphy*, 412 U.S. 291 (1973), suggesting that taking scrapings from under the fingernails is a search and seizure.

115. The voice exemplar cases have primarily dealt with grand jury subpoenas. The rationale of *Davis v. Mississippi*, 394 U.S. 721 (1969) (police dragnet), however, should be applicable. *See also United States v. Harris*, 453 F.2d 1317 (8th Cir. 1972). *But see United States v. Dionisio*, 410 U.S. 1, 13-16 (1973); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting samples). It is not clear how far the Court will go in this area. *Davis* can be distinguished as a seizure of the individual. *See 57 MINN. L. REV.* 1157 (1973).

116. *Katz v. United States*, *supra* note 95. It is not clear whether the Court considered this a seizure.

117. *See Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920).

118. *Id.*

119. This involves the fruit of the poisonous tree doctrine as well as the legality of any search or seizure. In *Katz v. United States*, *supra* note 95, the acquisition of the communication could nevertheless be viewed as a seizure although the primary ground for relief was that the method of discovery was an illegal search.

120. It is also conceivable that ordering an individual not to leave a given area or not to dispose of a particular piece of property could be deemed a seizure, although the interference with individual freedom and property rights may be much less. *See United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). This issue came close to being resolved in *Hurtado v. United States*, 410 U.S. 578 (1973) (incarceration of material witness prior to trial), but the issue was not reached.

121. *Katz v. United States*, *supra* note 95.

122. A liberal interpretation of the words "search and seizure" does no real violence to the historical meaning of the fourth amendment. Where the activity is essentially the same as that controlled by the amendment, there is no reason not to allow a liberal interpretation. Expansion has taken place primarily in the context of invasions of privacy rights, which the amendment was intended to protect.

Although virtually anything can be searched and/or seized,<sup>123</sup> in order for the fourth amendment to be controlling, the search or seizure must be of a person, house, paper or effect. The term "person" has been interpreted to mean the person and the apparel<sup>124</sup> that he is wearing. "Houses" include structures<sup>125</sup> where people live, work, and play, and may include other containers<sup>126</sup> such as automobiles, boats, and telephone booths when occupied. "Papers and effects" include all personal property,<sup>127</sup> both tangible and intangible. The only real expansion in these definitions which may be inconsistent with history is the definition of houses to include virtually all buildings and the curtilage.<sup>128</sup> This expansion, however, to the extent limited to recent developments not foreseen by those who drafted the Constitution is not necessarily improper if consistent with the theory of the amendment.<sup>129</sup>

It must always be remembered that the fourth amendment applies only to governmental searches and seizures of persons, houses, papers, and effects.<sup>130</sup> The amendment is not a limitation on private persons unless they act as agents<sup>131</sup> of the government. The reader is asked to assume, hereafter, that references to searches and seizures mean searches or seizures by government officials of persons, houses, papers, or effects.

123. Since the "mere evidence rule" was eliminated by *Warden v. Hayden*, 387 U.S. 294 (1967), all evidence of crime, as well as fruits, instrumentalities, and contraband could be searched for and seized. *Katz v. United States*, *supra* note 95, recognized that an intangible such as a conversation could be searched for and implicitly recognized that acquisition of the conversations was a seizure. See also note 183 *infra* for a discussion of the "mere evidence rule."

124. *Terry v. Ohio*, 392 U.S. 1 (1968); *Beck v. Ohio*, 379 U.S. 89 (1964).

125. Recent cases such as *Brown v. United States*, 411 U.S. 223 (1973), make reference to "premises" rather than to "houses." See *Stover v. California*, 376 U.S. 483 (1964) (hotel rooms); *Taylor v. United States*, 286 U.S. 1 (1932) (garage); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (place of business).

126. All personal property comes within the term "effects." Personal property that contains people may also be deemed "houses." See, e.g., *Preston v. United States*, 376 U.S. 364 (1964); *Lanza v. New York*, 370 U.S. 139 (1962) (occupied car referred to as though it is treated the same as a house); *United States v. Coppola*, 2 F. Supp. 115 (D.C.N.J. 1932).

127. See, e.g., *Adams v. Williams*, 407 U.S. 143 (1972); cases cited notes 109-119 *supra*. It is interesting to speculate on the reasons Madison's proposed wording "and their other property" was changed to "effects." See note 65 *supra*. Interpreting "effects" to include all items of personal property is consistent with the amendment.

128. See, e.g., *Care v. United States*, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 432 (1956). Open fields are not protected. See *Hester v. United States*, 265 U.S. 57 (1924).

129. See note 122 *supra*.

130. The federal government is limited because that was the clear intention of the Bill of Rights. The expansion to include the states in *Ker v. California*, 374 U.S. 23 (1963), is not consistent with the history of the amendment, but is not particularly important to the issues discussed herein, other than that a change in the law will have an effect on the states.

131. *United States v. White*, 401 U.S. 745 (1971).

The fourth amendment clearly applies to criminal investigations and is also considered important in what might be termed quasi-criminal matters,<sup>132</sup> but the Court has generally taken the position that the amendment is not applicable to purely civil matters.<sup>133</sup> The extent to which the government is limited by the fourth amendment may depend on the purpose of the search and seizure. The amount of justification needed to make a search reasonable varies with the type of crime<sup>134</sup> and search involved,<sup>135</sup> such as a broader search,<sup>136</sup> inventory search,<sup>137</sup> inspection,<sup>138</sup> or a search to enforce business,<sup>139</sup> safety,<sup>140</sup> or traffic<sup>141</sup> regulations. In quasi-criminal matters, a lesser standard of justification may be sufficient to make the search reasonable.<sup>142</sup>

Not all discovery of evidence by the government, however, is subject to fourth amendment control. Under the present law, corporations may have limited fourth amendment rights.<sup>143</sup> A grand

132. Historically, there is no requirement that it be so limited. *See* *See v. City of Seattle*, 387 U.S. 541 (1967) (fire hazard inspection of commercial warehouses); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) (reports in compliance with Federal Trade Commission order); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (subpoena duces tecum issued in the course of investigation pursuant to Fair Labor Standards Act).

133. *See Murray v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 227 (1855), in which the Court held that the fourth amendment was not applicable to summary seizures to satisfy debts to the United States since there was no search warrant involved. The Court recognized a long history of summary methods for satisfaction of debts, and treated the case primarily as raising due process issues. *See In re Horowitz*, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

134. *See United States v. Biswell*, 406 U.S. 311 (1972).

135. *See Cady v. Dombrowski*, 413 U.S. 433 (1973). Interestingly, one of the reasons the fourth amendment was included in the Constitution was the fear of the use of general warrants to aid in the collection of taxes. This could well be some evidence that the fourth amendment was not intended merely to limit the acquisition of evidence of crime.

136. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). Justice Powell's concurring opinion is interesting in that he would appear to be willing to find that a "general warrant" is valid. *See also United States v. Cristancho-Puerto*, 475 F.2d 1025 (5th Cir.), *cert. denied*, 414 U.S. 869 (1973).

137. *United States v. Edwards*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 1234 (1974).

138. *See* note 134 *supra*; *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

139. *See* note 134 *supra*.

140. *Camara v. Municipal Court*, 387 U.S. 523 (1967). This appears to be a "general warrant."

141. *See, e.g., Rodgers v. United States*, 362 F.2d 358 (8th Cir.), *cert. denied*, 385 U.S. 993 (1966); *Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964).

142. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523 (1967).

143. *See California Bankers Ass'n v. Shultz*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 1494 (1974), where the Court states:

. . . corporations can claim no equity with the individuals in the enjoyment of a right of privacy. . . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is

jury<sup>144</sup> does not need any cause to subpoena people,<sup>145</sup> or handwriting exemplars.<sup>146</sup> The Internal Revenue Service needs no justification to summon tax records,<sup>147</sup> and tax reporting requirements are not per se violations of the fourth amendment.<sup>148</sup> Open fields are unprotected,<sup>149</sup> the exercise of "plain view"<sup>150</sup> is not a search at all, nor is simple trickery in obtaining information or property through an informer or undercover police officer.<sup>151</sup> The fourth amendment provides little, if any protection against stops of automobiles for the purpose of driver's license and safety checks,<sup>152</sup> or the search of

---

consistent with the law and the public interest.

94 S.Ct. at 1519-20. *But see* Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385 (1920). One might ask whether the same can be said with respect to individual rights. In *California Bankers Ass'n* the Court viewed the reporting requirements as reasonable. 94 S.Ct. at 1520. The Court also denied the individual plaintiffs standing since there was no showing that any of their transactions had to be reported and they, therefore, could show no injury.

144. Grand juries are entitled to special privileges. *See* United States v. Calandra, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 613 (1974) (fruit of the poisonous tree doctrine not applicable). *See also* Couch v. United States, 409 U.S. 322 (1973) (subpoena of tax records not a seizure invading privacy); *In re Horowitz*, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973) (not a search or seizure). *But see* Boyd v. United States, 116 U.S. 616 (1886).

145. United States v. Dionisio, 410 U.S. 1 (1973).

146. United States v. Mara, 410 U.S. 19 (1973) (either no invasion of privacy or not a search).

147. *Donaldson v. United States*, 400 U.S. 517, 522 (1971), cited with approval in *California Bankers Ass'n v. Shultz*, *supra* note 143, at 94 S.Ct. 1513.

148. *Helvering v. Mitchell*, 303 U.S. 391 (1938), cited with approval in *California Bankers Ass'n v. Shultz*, *supra* note 143, at 94 S.Ct. 1517; *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911). Such reporting requirements are generally justified by the need to acquire information in order to have effective tax laws.

149. *Hester v. United States*, 265 U.S. 57 (1924). It appears as though the Court's rationale was that this was not a house or effect. *See also* *Marullo v. United States*, 328 F.2d 361, 363 (5th Cir.), *reh. denied*, 330 F.2d 609 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964), for an application of the open fields doctrine, allowing the police to crawl under a cabin without the fourth amendment being applicable since the area was under a rented motel cabin and was so close to the open fields.

150. *Cardwell v. Lewis*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The plain view doctrine basically states that what the police observe through the exercise of their senses of sight, hearing, and smell does not constitute a search. The major problem in applying the doctrine is whether the officer was occupying a proper observation point, or whether his presence itself invaded the defendant's rights. In *McDonald*, *supra* note 94, the Court seemed to take the position that standing on a chair to get a better view of the interior of an apartment was a fourth amendment violation and not consistent with plain view. For a good discussion see Note, *Plain View—Anything But Plain*, 7 LOYOLA U. OF LA. L. REV. 489 (1974).

151. United States v. White, 401 U.S. 745 (1971) (privacy interest waived by voluntarily providing the information). The police, for example, might purchase an item with the intention to use it as evidence, such as a drug purchase.

152. *See, e.g.,* *Rodgers v. United States*, 362 F.2d 358 (8th Cir.), *cert. denied*, 385 U.S. 993 (1966). It is not clear whether this is an area where the fourth amendment is inapplicable or whether a lesser standard of justification is required as in *Biswell*, *Camara*, and *Almeida-Sanchez*, *supra* notes 134, 136, 140. The stopping of an automobile would seem to constitute

people, homes, papers, or effects if the individual has no "reasonable expectation of privacy" with respect thereto.<sup>153</sup> The "reasonable expectation of privacy" rationale has been used, for example, when dealing with the subpoena of tax records in the accountant's possession<sup>154</sup> and compelling production of voice and handwriting exemplars.<sup>155</sup> In some cases, the fourth amendment has also been deemed inapplicable where the search or seizure involved acquisition of evidence for use in noncriminal proceedings.<sup>156</sup> Exempt also is the seizure of abandoned property.<sup>157</sup> In *Cardwell v. Lewis*,<sup>158</sup> four members of the Court have also apparently concluded that the chemical analysis of paint taken from the defendant's automobile

---

a seizure of the person and the vehicle (effects). For a discussion of the issue see Note, *Automobile Spot Checks and the Fourth Amendment*, 6 RUTGERS-CAMDEN L.J. 85 (1974).

153. See, e.g., *Cardwell v. Lewis*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2464 (1974) (paint from automobile); *United States v. Dionisio*, 410 U.S. 1, 8 (1973) (person); *Couch v. United States*, 409 U.S. 322 (1973) (papers); *Combs v. United States*, 408 U.S. 224, 227 (1972) (liquor).

154. *Couch v. United States*, 409 U.S. 322 (1972). *In re Horowitz*, 482 F.2d 73 (2nd Cir.), cert. denied, 414 U.S. 867.

155. *United States v. Dionisio*, 410 U.S. 1 (1973) (grand jury subpoena); *United States v. Mara*, 410 U.S. 19 (1973). But see *Davis v. Mississippi*, 394 U.S. 721 (1969).

156. See note 133 *supra*. See also *Cady v. Dombrowski*, 413 U.S. 433 (1973); *United States v. Biswell*, 406 U.S. 311 (1972); *Helvering v. Mitchell*, 303 U.S. 391 (1938).

157. See *Parman v. United States*, 399 F.2d 559 (D.C. Cir. 1968); *United States v. Bozza*, 365 F.2d 206 (2nd Cir. 1966). This view is very much consistent with history since, once property is in fact abandoned, no one has a property or privacy right in it until some person reacquired possession. See also *People v. Krivda*, 486 P.2d 1262 (1971), vacated, 409 U.S. 33 (1972), noted 1974 Wisc. L. Rev. 212. Cases like *State v. Browner*, 514 S.W.2d 355 (Mo. App., D. St. L. 1974), are good examples of the confusion that results from a failure to comprehend the basic nature of standing. The defendant was a guest in an automobile, and had a briefcase on his lap. He fled the vehicle and left the briefcase behind when the police stopped the car. The court held that he had no standing to challenge the search of the vehicle because he was only a passenger. He had no reasonable expectation of privacy and no possessory interest in the automobile. The court also said the defendant abandoned the briefcase. Although the abandonment theory makes more sense, both are questionable. The dissent properly recognizes that presence in the vehicle should be a sufficient basis for granting standing under *Jones v. United States*, 362 U.S. 257 (1960). See text accompanying note 239 *infra*. The abandonment theory depends upon finding a giving up of possession and control. It is questionable whether items discarded or left behind by individuals when they are being chased by the police are given up in a manner which would justify not applying the amendment. Normally there will be no search since the item will be in plain view when discarded.

158. *Supra* note 150. The plurality in *Cardwell* used extreme language in precluding fourth amendment protection. Although the plurality stated that there was probable cause, it also suggested that since the defendant had no reasonable expectation of privacy in the paint on his car (perhaps because it is in plain view), there is no fourth amendment right of the defendant involved. The plurality seems to ignore any notions of property interests being protected by the fourth amendment. See Stewart dissenting, 94 S.Ct. at 2473. See text accompanying notes 266-270 *infra*. It is also questionable whether the chemical analysis of the paint is any less a search than is an ex-ray of the body or of luggage. See also *Mancusi v. DeForte*, 392 U.S. 364 (1968) (papers); *Alderman v. United States*, 394 U.S. 165 (1969) (communications).



is not a search, that the taking of the paint was not a seizure, and therefore that neither was subject to the fourth amendment.

Defining the exact limits of the terms "search" and "seizure" is exceptionally difficult. It is especially complicated because the Court must keep in mind the effect of calling a particular activity a search. Until recently, if the government sought to use evidence obtained by search or seizure in a criminal case, the search or seizure had to be justified by probable cause.<sup>159</sup> If there was no probable cause, the search or seizure was invalid and in most cases, the evidence could not be used at trial if the defendant's rights had been violated.<sup>160</sup> Holding that a search or seizure occurred was, therefore, significant because substantial justification was required and even slight violations resulted in exclusion of evidence.<sup>161</sup> Such severe consequences probably prompted the Court to be very careful in finding that a search or seizure occurred. As will be observed later, however, the Court is now allowing more flexibility in the justification required for a search or seizure and is limiting the scope of the exclusionary rule.<sup>162</sup> These changes will make consideration of the

---

159. *Terry v. Ohio*, *supra* note 124, was perhaps the first major inroad on the probable cause requirement. In *Cady v. Dombrowski*, *supra* note 135, one becomes aware of a shift in emphasis when reading the Court's opinion. The opinion speaks of probable cause only when quoting the fourth amendment. All other references to the required amount of justification are to the word "reasonable."

160. See *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385, 392 (1920) where Justice Holmes stated that the prohibition was not merely on the use of the evidence in a criminal trial, but that it should not be used at all. The only major exceptions to this were the doctrines of collateral use for impeachment, *Walder v. United States*, 347 U.S. 62 (1954), and evidence acquired which was not "tainted" by the illegal search. See *Alderman v. United States*, 394 U.S. 165, 183 (1969); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963). *Harris v. New York*, 401 U.S. 222 (1971) suggests that the exclusionary rule is being substantially limited.

161. Exclusion is a severe penalty because it may result in a criminal going free in many cases. Exclusion does not require that the individual conducting the search have bad motives. For a strong criticism of the exclusionary rule, see VIII J. WIGMORE, *EVIDENCE* §2184a (3rd ed. 1940). But see Comment, *Judicial Integrity and Judicial Review, An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973) (where the author suggests that judicial integrity rather than deterrence is the main justification for the rule). See also Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974) for an interesting compromise approach.

162. See, e.g., *Neil v. Biggers*, 409 U.S. 188 (1973); *United States v. Ash*, 413 U.S. 300 (1973); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Harris v. New York*, 410 U.S. 222 (1971). Although these cases do not involve the fourth amendment, they indicate a growing dissatisfaction with the exclusionary rule. It is expected that these limitations, especially the impeachment rationale of *Harris*, will be applied in fourth amendment cases. See Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). If the exclusionary rule is eliminated, some other remedy must be found to insure that the fourth amendment cannot be violated with impunity. See Justice Burger's dissent in *Bivins v. Six Unknown Agents*, 403 U.S. 388, 411 (1971).

underlying scope of the fourth amendment less difficult.

#### IV. REMEDIES

The preceding discussion of the scope of the amendment provides a basis for determining when a defendant's rights have arguably been violated, but the availability of a remedy is one of the most important considerations since rights without remedies are illusory.

In the 1700's, common law causes of action would lie for activities of the Crown which the courts deemed to be illegal invasions of property rights<sup>163</sup> and privacy rights.<sup>164</sup> If an individual were arrested without proper justification, he had a valid cause of action for false imprisonment.<sup>165</sup> For a breach of the security of his home, he could maintain trespass.<sup>166</sup> For improper seizure of his goods, he could maintain an action of replevin.<sup>167</sup> These causes of action were allowed against officials who attempted to justify their activities by showing that they had warrants for arrest or search.<sup>168</sup> Additional modern remedies have been developed which may also prove useful in cases involving violations of the fourth amendment. The Court has allowed civil actions seeking damages<sup>169</sup> and suits for injunctions<sup>170</sup> against federal officials for fourth amendment violations. 42 U.S.C.A. section 1983 provides for remedies against individuals who, acting under color of state law, violate an individual's fourth amendment rights.<sup>171</sup> These newer remedies are not limited to prop-

---

163. See *Huckle v. Money*, *supra* note 29.

164. *Entick v. Carrington*, *supra* note 35. Privacy considerations were primarily related to aggravation of the damages. For an interesting discussion of the civil law of privacy and its early development, see Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See also Annot., 57 A.L.R.3d 16 (1974).

165. *Entick v. Carrington*, *supra* note 35.

166. *Huckle v. Money*, *supra* note 29.

167. See text accompanying notes 170-180 *infra*. Replevin was not the only remedy, however, as conversion was also available for damages. For modern equivalents see D. DOBBS, REMEDIES § 5.14 (1973). See also ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 280.3 (Official Draft #1), dealing with motions for return of seized property.

168. This is exactly the situation presented in both *Entick v. Carrington* and *Huckle v. Money*, *supra* notes 29, 35.

169. *Bivins v. Six Unknown Agents*, 403 U.S. 388 (1971), and Justice Harlan's concurring opinion; *Jennings v. Nexter*, 217 F.2d 153 (7th Cir. 1954), *cert. denied*, 349 U.S. 958 (1955).

170. See *California Bankers Ass'n v. Shultz*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 1494 (1974). Justice Harlan's concurring opinion in *Bivins*, *supra* note 169, at 402, provides an excellent analysis of the Court's power to grant appropriate equitable relief for constitutional infringements. See also *Fifth Ave. Peace Parade Comm. v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971).

171. See *Monroe v. Pape*, 365 U.S. 167 (1961). In *Madison v. Manter*, 441 F.2d 537 (1st Cir. 1971), the court, although finding § 1983 applicable to redress violations of the fourth amendment, held that negligence was not sufficient if good faith is established. See also *Lanhford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (injunction under § 1983).

erty rights as were many of the common law causes of action.

The remedies for illegal searches and seizures have undergone continual change. The common law suit in replevin gave rise to the present-day requirement for a motion to suppress in fourth amendment cases.<sup>172</sup> Replevin is an action for the return of goods.<sup>173</sup> In replevin, the plaintiff must show that his right to present possession of the goods is superior to the defendant's.<sup>174</sup> If the police acquire goods illegally, the prior possessor has the superior right of possession<sup>175</sup> unless the goods are contraband.<sup>176</sup> If the goods are not contraband or something in which there is no right to possession,<sup>177</sup> they must be returned despite the fact that they are evidence, an instrumentality, or fruit of the crime.<sup>178</sup> Even as to stolen goods, the police are generally not allowed to retain them on the basis of some third person's right of possession.<sup>179</sup> Good faith is no defense.<sup>180</sup>

---

172. Some authors suggest that the exclusionary rule is a limited remedy and actually promotes police perjury. See Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974).

173. Replevin is a legal, as opposed to an equitable remedy, and is "a personal action *ex delicto* brought to recover possession of goods unlawfully taken . . . the validity of which taking is the mode of contesting, if the party from whom the goods were taken wishes to have them back in specie. . . ." BLACK'S LAW DICTIONARY 1463-64 (Rev. 4th ed. 1968). Replevin includes a right to damages. See 77 C.J.S. *Replevin* § 1. See also E. WELLS, *REPLEVIN* (2d ed. 1907) (hereinafter cited as WELLS). "Goods" are personal property but generally do not include intangibles, animals, or interests in land. See BLACK'S LAW DICTIONARY 823 (Rev. 4th ed. 1968).

174. The theory of relativity of title is important in replevin. See WELLS, note 173 *supra*, at 55-56. See also *Bank de France v. Chase Nat'l Bank*, 60 F.2d 703 (2d Cir. 1932); *King v. McCrory*, 175 So. 193 (Miss. 1937); *Robinson v. Poole*, 232 S.W.2d 807 (Mo. 1959); *Smith v. Barrick*, 85 N.E.2d 101 (Ohio 1949); WELLS, *supra* note 173, at 56.

175. See *Gumbell v. Pitkin*, 124 U.S. 131 (1888); *Covell v. Heyman*, 111 U.S. 176 (1884); WELLS, *supra* note 173, at 56 and §§ 244-45. See also note 173 *supra*. The action was good against both federal and state officers, but had to be brought in the proper court. See *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1825). The law enforcement official was treated much the same as a private person except that the goods were not returned upon posting of a bond. No return was authorized until the right to replevin was actually litigated. WELLS, *supra* note 173, at §§ 243-45.

176. See, e.g., *Clark v. Holden*, 2 So.2d 570 (Miss. 1941) (gambling equipment); *Zales v. Matowitz*, 8 Ohio Supp. 66, 41 N.E.2d 708 (1942) (pinball machines); 77 C.J.S. *Replevin* §§ 9-18.

177. See, e.g., *Keyes v. Konkel*, 119 Mich. 550, 78 N.W. 649 (1899) (dead body). See also WELLS, *supra* note 173, at 26.

178. See *Gunn v. Williams*, 246 Ill. App. 494 (1972); *Colburn v. Colburn*, 211 S.W. 248 (Texas 1919).

179. This is the doctrine of *Jus Tertii*, which is applicable even to the government. The situations in which the defendant in a replevin action could assert others' rights was extremely limited, and he could never do so if he was a trespassor. *Van Barlin v. Dean*, 27 Mich. 104 (1873); WELLS, *supra* note 173, at 76. It is also unlikely that the true owner could be joined or interpleaded under the present rules of civil procedure. See *McCormick v. Tipton*, 259 F.2d 913 (6th Cir. 1958). See also *Turner v. Pierson-Hollowell Walnut Co.*, 260 Ill. App. 158 (1930); *Raber v. Hyde*, 138 Mich. 101, 101 N.W. 61 (1904); WELLS, *supra* note 173, at § 276.

Historically, the replevin action was kept separate from the criminal prosecution. The return of illegally seized goods was deemed a "collateral issue" which could not be litigated in a criminal action.<sup>181</sup> Courts would not inquire into the source or the means of acquisition of the evidence because it was considered irrelevant to the issue of guilt or innocence.<sup>182</sup> By maintaining replevin, however, a criminal defendant could regain the illegally seized property and, as a consequence, preclude its use as evidence in his criminal trial until such time as the property was legally reacquired by the government.<sup>183</sup>

In *Weeks v. United States*,<sup>184</sup> the Court refused to allow the replevin remedy to be circumvented and ordered the return of goods. The defendant had been denied in a separate civil suit for replevin the return of his goods which had been illegally seized. At the criminal trial, the defendant had renewed his motion for return of the goods. On appeal, the Supreme Court, recognizing that the defendant had done everything he could to obtain civil relief, ordered the goods returned.

In a subsequent case, *Silverthorne Lumber Co., Inc. v. United States*,<sup>185</sup> a replevin action for the return of illegally seized documents had been successful, but the government had retained copies

180. *Caldwell v. Arnold*, 8 Minn. 265 (1862); *Lewis v. Buck*, 7 Minn. 104 (1862). See also WELLS, *supra* note 173, at § 276.

181. See *Cogen v. United States*, 268 U.S. 200 (1929), in which the Court evaluated the history of the collateral issue rule and repudiated it completely in fourth amendment cases.

182. See *Agnello v. United States*, 269 U.S. 20 (1925); *Cogen v. United States*, 278 U.S. 200 (1920); *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920). See also S. GREENLEAF, EVIDENCE § 254a (13th ed. 1876).

183. The practical effect of winning a replevin or other civil action with respect to the illegal police activities appears to have been the dropping of charges. Once the individual had managed to secure a return of the goods, they had to be relocated before the police could reacquire them. After *Boyd v. United States*, 116 U.S. 616 (1886), they probably could not be reacquired by subpoena since that would violate the defendant's fifth amendment rights. Until *Warden v. Hayden*, 387 U.S. 294 (1967), the mere evidence rule was a substantial obstacle in many cases to obtaining a search warrant. The Court had previously held that warrants could issue only "when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken." *Gould v. United States*, 255 U.S. 298, 309 (1921). A warrant would not issue for the purpose of merely searching for evidence which is not contraband, or the fruits or instrumentalities of crimes. *Warden* abolished this mere evidence rule.

184. 232 U.S. 383 (1914). *Weeks* is frequently cited as the case establishing the exclusionary rule. This is accurate to the extent it recognizes that *Weeks* was the first major case to exclude evidence for a violation of the fourth amendment. *Weeks* did not, however, hold that evidence could be excluded for any constitutional violation.

185. 251 U.S. 385 (1920).

and sought to use the information contained therein at the criminal trial. Holmes, writing for the Court, held the copies inadmissible as evidence, using his now famous language that the evidence "shall not be used at all."<sup>186</sup> The Court recognized that the vitality of the fourth amendment would be undermined by too narrow an interpretation of the right to a return of the goods and suggested that to maintain judicial integrity the courts should not overlook the fact that the police have acted in a manner inconsistent with the Constitution.<sup>187</sup> In *Gouled v. United States*,<sup>188</sup> the defendant was unaware of the seizure until the evidence was offered in the criminal trial. He then promptly filed a motion for return of the goods and to prohibit their use. The Court recognized that the defendant had acted as promptly as possible to seek return of the goods and should not be penalized merely because the government's conduct had precluded his knowledge of the illegal search and seizure prior to the criminal trial.

In *Agnello v. United States*,<sup>189</sup> the fourth amendment issue was raised by a motion to suppress the evidence without an accompanying motion for its return. In each of the preceding cases, the defendant raised as soon as he was able a claim for return of the goods on a replevin theory. Relief was granted in *Agnello* because the Court expressly recognized that the primary issue was exclusion and that exclusion should not be denied because no formal request for return of the property had been made. Finally, in *Cogen v. United States*,<sup>190</sup> the Court held that the denial of a motion to suppress is not an appealable order since it is not a collateral issue. The Court thereby completely eliminated the collateral issue doctrine and firmly established the exclusionary rule<sup>191</sup> and the fruit of the poisonous tree doctrine.<sup>192</sup>

The development of the exclusionary rule was instrumental in creating much of the litigation dealing with the issues of the scope of the fourth amendment and standing. Although standing is relevant in any lawsuit dealing with the issue of whether a particular individual's fourth amendment rights have been violated, the exclusionary rule prompted such litigation. Criminal defense lawyers

---

186. *Id.* at 392.

187. This later developed into the fruit of the poisonous tree doctrine. *Harrison v. United States*, 392 U.S. 219 (1968). See *Wong Sun v. United States*, 371 U.S. 471 (1963).

188. 255 U.S. 298 (1921).

189. 269 U.S. 20 (1925).

190. 278 U.S. 221 (1929).

191. See, e.g., *Go Cart Importing Co. v. United States*, 282 U.S. 344 (1931).

192. *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920).

raised the issue when they could see a direct benefit for their clients by excluding damaging evidence from trial. This resulted in a great deal of litigation on the issue of whether a particular defendant's fourth amendment rights had been violated. The Court solved the problem as follows: the amendment refers to the right of the people to be secure in "their" persons, houses, papers, and effects. Although the word "their" is the plural, the Court has not allowed the defendant to raise a third person's fourth amendment rights. He may only assert his rights. "His" is a possessive word, meaning the defendant must have possessed the property being searched or seized before his interests are protected by the amendment. Possession is a property concept, so property law is controlling. The early standing litigation, therefore, involved definitions of property interests as well as the scope of the amendment.<sup>193</sup>

Until recently, if the defendant could show that "his rights were violated by the search or seizure," he was usually entitled to the benefit of the exclusionary rule. The court applied the rule almost as broadly as the scope of the fourth amendment itself.<sup>194</sup> The problem, however, is that the Court has recently tended to limit the scope of the exclusionary rule due to a dissatisfaction with the results. This limitation has taken place in a number of ways: by rejecting the exclusionary rule because it will not have the desired deterrent effect;<sup>195</sup> by deciding that the defendant does not have standing;<sup>196</sup> and through narrowing the scope of the fourth amendment by saying that no fourth amendment rights are involved or have been violated.<sup>197</sup> The danger is that this trend will affect the

193. See Amsterdam, *supra* note 1, at 360-69 for an excellent discussion of the problems with this approach. See also pt. VI of this article *infra*.

194. See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920). While it is recognized that the scope of the exclusionary rule has never been fully coextensive with the scope of the fourth amendment, in recent years the limitations have been more pronounced. See *United States v. Calandra*, 414 U.S. 338 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973); *Harris v. New York*, 401 U.S. 222 (1971); *Bivins v. Six Unknown Agents*, 403 U.S. 688 (1971) (Justice Burger's dissent); *Walder v. United States*, 347 U.S. 62 (1954). See also Kaplan, *The Limits of The Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974) for a good discussion of the issue.

195. See *Harris v. New York*, 401 U.S. 222 (1971).

196. See *Brown v. United States*, 411 U.S. 223, (1973); *Alderman v. United States*, 394 U.S. 165 (1969); *White & Greenspan*, *supra* note 1; *Amsterdam*, *supra* note 1, at 367.

197. See *United States v. Calandra*, 414 U.S. 338 (1974) (fruit of the poisonous tree doctrine not applicable to grand jury); *United States v. Dionisio*, 410 U.S. 1 (1973) (grand jury subpoena for handwriting exemplar not a search); *Couch v. United States*, 409 U.S. 322 (1973); *In re Horowitz*, 482 F.2d 72 (2nd Cir.), *cert. denied*, 414 U.S. 867 (1973). See also *Cardwell v. Lewis*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464 (1974). The plurality's reliance in *Cardwell* on *Warden v. Hayden*, 387 U.S. 294 (1967), to suggest that property rights are not protected, is badly misplaced. The language cited related merely to the question whether warrants could

many other remedies available for violations of the fourth amendment.<sup>198</sup> Artificially restricting the scope of the fourth amendment tends to obscure its purpose and limits its effect on government activities. The exclusionary rule is not an end in itself. Knowing the scope of the fourth amendment and the extent to which it limits governmental action is extremely important to a free society. The standing doctrine is directly related to the scope of the amendment and, therefore, deciding a particular individual does not have standing to challenge is a limit on the scope of the amendment. Also, decisions that a particular activity is not within the scope of the amendment can be used in future cases as a basis for denying standing to challenge the activity. It is therefore important to compare the law of standing as it relates to the fourth amendment with other standing rules and to develop a theory of standing that is consistent with the history and purpose of the fourth amendment. Once the fourth amendment standing rule is brought into line with the general rules of standing to assert constitutional rights, the Court can focus more clearly on the proper scope of the amendment, and develop new rules which are not dependent on the exclusionary rule.

## V. GENERAL LAW OF STANDING

In order to evaluate the current law of standing to challenge the legality of a search or seizure, it is necessary to compare standing under the fourth amendment with the rules governing standing needed to raise other constitutional provisions.

The essential attribute of the standing determination has always been that it was a decision whether to decide—a determination of whether the validity of the challenged government action should be passed on for this [person]. A denial of standing did not mean that the legality of the [government's] action was upheld, that question was not reached. A grant of standing did not mean that [the individual] would prevail on the merits, even if he sustained his factual burden; when the merits were considered, the [government's] legal position might be sustained.<sup>199</sup>

---

be issued for items of merely evidentiary value, and did not concern the basic issue of whether the fourth amendment protected property interests. See *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (clearly recognizing property rights).

198. See text accompanying notes 163-171 *supra*.

199. Scott, *Standing in the Supreme Court, A Functional Analysis*, 86 HARV. L. REV. 645, 669 (1973) (hereinafter cited as Scott). The words "person," "individual" and "government" have been substituted in lieu of Scott's terms "plaintiff" and "defendant" for purposes of clarity. Scott used the term "plaintiff" to indicate the person seeking to challenge, nor-

In civil cases involving governmental activities challenged on constitutional grounds,<sup>200</sup> the Court has primarily considered such things as whether the defendant would have a remedy at common law,<sup>201</sup> whether the complainant merely suffers in some indefinite way in common with people generally,<sup>202</sup> the directness of the effect on the person seeking to challenge,<sup>203</sup> and the extent to which the government activity affects the person seeking standing.<sup>204</sup> Except for the issue of whether a remedy existed at common law, these considerations help resolve the question whether the defendant has a sufficient personal interest in order to ensure that the specific issue will be properly litigated. The Court has proceeded

---

mally a defendant in criminal cases. This article is an excellent presentation of the law of standing generally and is highly recommended for its summary of the present law of standing. No opinion is expressed as to the feasibility of Scott's functional analysis. Scott does exclude, however, fourth amendment standing. Standing has also been defined as follows:

more precisely stated the question of standing in this sense is the question whether the litigant has a sufficient personal interest in getting the relief he seeks or is a sufficiently appropriate representative of other interested persons to warrant giving him the relief if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality.

H. HART & H. WECHSLER, *THE FEDERAL COURT IN THE FEDERAL SYSTEM* 174 (1953).

200. Constitutional grounds must be distinguished from statutory grounds for relief. If the claim is based on statute, Congress can expressly indicate which individuals were intended to be protected. Although Congress cannot confer standing where it would result in the Court being compelled to give advisory opinions, *Muskrat v. United States*, 219 U.S. 346 (1911), it may indicate that, in its view, certain statutes were intended to protect the individual against the particular injury being suffered. If the individual can show the injury, the Court will normally grant standing. See *Alton v. United States*, 315 U.S. 15 (1942); Scott, *supra* note 199, at 655.

201. Scott, *supra* note 199, at 650. The significance of a common law remedy is important because the Court often states that the standing issue involves the question of whether a "case or controversy" is present. If a judicial remedy was historically available, the claim is one that can be resolved by the courts unless review was subsequently precluded by a change in the law.

202. Scott, *supra* note 199, at 652. See *Schlesinger v. Reservists Comm. to Stop the War*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2925 (1974); *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923) (taxpayers). Standing is generally denied in such cases because there would be almost no limit on who could challenge governmental activity. The Court views this as an insufficient injury and does not recognize any basis at common law for such challenges. The primary exception to this rule is *Flast v. Cohen*, 392 U.S. 83 (1968), where the Court allowed standing to challenge expenditures by a taxpayer where there was an arguable violation of a specific constitutional limitation. The Court is apparently refusing to expand *Flast*. *United States v. Richardson*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2940 (1974).

203. Scott, *supra* note 199, at 652. If the individual is directly affected, he is a member of a limited group which is distinguishable from individuals who are only consequentially injured. Therefore the Court is more likely to grant standing. See note 202 *supra*.

204. *Id.* at 652. The extent of the effect is very significant in the context of whether the individual can meet the minimum qualification of having been "injured" by the governmental activity. See *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150 (1970).



on the premise that the constitutional or statutory limitation which [the government] is claimed to have violated should be thought of not as a restraint on the government or its agents but as a benefit bestowed on some definable part of society. Thus, the Court has been able to view [a person] not a member of that favored group as not possessing a sufficient interest to be allowed to enforce the limitation.<sup>205</sup>

In recent civil cases dealing with standing, the Court has shown a distinct tendency to expand the concept of standing to allow more individuals to challenge more kinds of governmental activities.<sup>206</sup> This would appear to be contrary to the manner in which the Court has approached the standing issue in fourth amendment cases.<sup>207</sup>

The net result of the Supreme Court cases on standing, excluding many exceptions,<sup>208</sup> can perhaps be stated as follows: the first consideration is whether the defendant was injured by the governmental action he is seeking to challenge. If there is no injury (economic, social, aesthetic, conservational, recreational, etc., then there is no standing.<sup>209</sup> The extent of the injury required is minimal. Sufficient injury can be found if an individual will no longer be able to use a public recreation area for hiking because of development of the area<sup>210</sup> or because he was refused a drink in a bar.<sup>211</sup> If there is injury, it must be one that is cognizable in the courts arguably entitling the injured individual to recover from the government or to prohibit continuation of the injury. This right to recover from the government or to prohibit the injury may be derived from any of three sources: history,<sup>212</sup> statutes,<sup>213</sup> or the Constitution.<sup>214</sup> Injury alone is not sufficient to grant standing.<sup>215</sup> The person seeking to

205. Scott, *supra* note 199, at 654.

206. *Id.* at 646.

207. Although there has been some expansion of standing in criminal cases in the last 15 years, the more recent approach is to limit it. See pt. VI of this article.

208. Although the Court has recently relied on Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) (hereinafter cited Data Processing) more often, there are still many exceptions. See, e.g., Flast v. Cohen, 392 U.S. 83 (1968); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

209. Schlesinger v. Reservists Comm. to Stop the War, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2925 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Data Processing, *supra* note 208.

210. Sierra Club v. Morton, 405 U.S. 727 (1972).

211. Moose Lodge v. Irvis, 407 U.S. 163 (1972).

212. See Flast v. Cohen, 392 U.S. 83 (1968).

213. See Data Processing, *supra* note 208.

214. See Data Processing, *supra* note 208; Flast v. Cohen, *supra* note 212. See also Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

215. See Data Processing, *supra* note 208. Not all injuries entitle an individual to a

challenge, not some third person, must himself have been injured,<sup>216</sup> and the injury must be historically capable of judicial resolution<sup>217</sup> or be related to a constitutional or statutory provision which provides protection against that specific type of injury.<sup>218</sup> These criteria are collectively referred to as the *Data Processing* test.<sup>219</sup>

These requirements take on particular significance in the fourth amendment area because the *use* of the evidence in the criminal trial is not an injury for the purposes of standing. In order to have standing to raise fourth amendment rights the individual must show that he has been injured by the search or seizure (invasion of property or privacy rights), not merely by use of the evidence. The injury must either be one which was recognized as historically capable of judicial resolution and for which there exists a remedy<sup>220</sup> such as a common law action for damages for trespass,<sup>221</sup> replevin, or trover,<sup>222</sup> or there must be some statutory or constitutional provision that was intended to protect the individual from the specific type of injury which was inflicted by the government.<sup>223</sup>

These general standing requirements place some limits on access to the courts and the creation of new theories of recovery.<sup>224</sup> If the cause of action has been litigated in the past, there is some merit to the contention that there is sufficient interest to insure adverseness and substantial reason to entertain the suit.<sup>225</sup> Historically capable of judicial resolution does not mean at common law only, it relates merely to the past. Where there was no cause of action to challenge this specific governmental activity in the past, the courts will not expand the remedies or relief available to individuals who are injured by governmental action unless there is a good reason to

---

remedy. *See, e.g.,* *Miller v. Schoene*, 276 U.S. 272 (1928), where the destruction of an individual's trees without compensation did not constitute a taking because there was a valid regulation permitting it. There are many similar examples of regulations or activities which injure people but for which they are not entitled to any remedy other than the ballot.

216. *See* *Sierra Club v. Morton*, *supra* note 210. There are exceptions to the requirement that the party seeking relief must have been injured. *See* cases cited in note 208 *supra*; Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

217. *See* *Data Processing*, *supra* note 208.

218. *Id.*

219. *Id.*

220. The remedy need not be money damages. It could be equitable relief.

221. *See* *Huckle v. Money*, *supra* note 29, and *Entick v. Carrington*, *supra* note 35.

222. *See* text accompanying notes 163-168 *supra*.

223. *See* *Data Processing*, *supra* note 208.

224. The Court has regularly expressed concern in standing cases over the constitutional requirement of separation of powers and access to the courts. *See* *Schlesinger*, *supra* note 209; Scott, *supra* note 199, at 669.

225. *See* *Flast v. Cohen*, *supra* note 208. A case or controversy is required.

do so.<sup>226</sup> The reasons currently accepted by the Court for expansion are basically two-fold—1) Expand if there is some statute which is intended to prevent *this* injury to the person who is seeking to challenge<sup>227</sup> or 2) Expand if there is a constitutional provision which is intended to prevent *this* injury to the individual.<sup>228</sup> In other words, if there is some specific statutory or constitutional provision which arguably<sup>229</sup> was intended to protect the individual against the type of injury inflicted, a judicial remedy should be available to insure that the statutory or constitutional provision is followed by government and does not become meaningless.<sup>230</sup> The constitutional or statutory provision must, however, be directed toward specific types of injuries and must contemplate rights of individuals before the Court will allow standing on this basis.<sup>231</sup>

The requirement that the rights to individuals be involved is what prevents the Court from granting standing merely because the Congress arguably went beyond the power granted by the Constitution.<sup>232</sup> The powers granted in article I, section 8, for example, are limits on the federal government, but are not aimed at any particular type of injury to an individual nor to specific abuses of individual rights.<sup>233</sup> They are merely declaratory of the source and scope of federal power without regard to any possible abuse as such. Constitutional limitations, however, such as first, fourth, and fourteenth amendments, the limits on suspending the writ of habeas corpus, and the prohibition on ex post facto laws were implemented because

---

226. See note 208 *supra*. Of course, if the issue was subject to litigation in the past only because of a statute or constitutional provision which has been repealed, the precedent will be of little value.

227. This was the issue in *Data Processing*, *supra* note 208. The Court found that a statute was intended to protect individuals in plaintiff's position against the type of injury plaintiff suffered.

228. See *Data Processing*, *supra* note 208. The rationale is the same as in statutory cases, except that the Court may be even more willing to grant standing in constitutional cases.

229. Standing merely gives the individual the right to litigate the issue. The test for standing is, of necessity, whether this individual is "arguably" within the class of people sought to be protected. See *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Scott*, *supra* note 199, at 665-66.

230. Assuming the existence of a right, the courts have generally been inclined to fashion a remedy to prevent the destruction of the right. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

231. See *Data Processing*, *supra* note 208.

232. See *United States v. Richardson*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2940 (1974).

233. The grant of power was intended as a general limitation in response to a concern that the federal government would grow too large or become too powerful. The limitations, while providing benefits to the people, were not directed at specific abuses of individual rights or specific types of injuries. See *Flast v. Cohen*, *supra* note 208.

of the fear of governmental overreaching in specific areas dealing with individual freedoms and are therefore specific limitations on the power of government<sup>234</sup> aimed at protecting individual rights and freedoms against specific types of abuses by government. When these limitations are violated, the Court is more inclined to grant standing since a failure to do so could result in these limitations on governmental action becoming ineffective.<sup>235</sup> Although there is substantial criticism of this approach, it is not unreasonable as it limits the number of cases brought before the Court<sup>236</sup> and limits the ability of dissatisfied citizens to harass the government.<sup>237</sup>

One final point is that the determination of standing should focus on whether a particular party should be allowed to challenge the legality of certain activity, not whether he will prevail on the facts or be entitled to any specific remedy. Standing should not be used as a catch-all for refusing to consider the issue in a particular forum or because the specific relief requested is not appropriate. As will become apparent later, the Court does not follow these general standing rules in deciding fourth amendment standing cases. The Court has interpreted the injury requirement very narrowly and does not recognize as a basis for standing many of the injuries sought to be protected against by the fourth amendment. The Court apparently does not recognize the historical causes of action such as trespass, false imprisonment and replevin in their full context. Once an individual has established that he has suffered an injury by an activity which comes within the scope of the fourth amendment, he should be granted standing to challenge the activity that caused the injury.

## VI. THE PROBLEMS

### A. *Fourth Amendment Standing*

Although earlier cases considered the standing problem,<sup>238</sup> it

---

234. See the discussion of fourth amendment history, text accompanying notes 62-70 *supra*.

235. The ability of the government to avoid the effect of the fourth amendment was, of course, the concern of the Court when it decided *Silverthorne*, *supra* note 185. See also Justice Burger dissenting in *Bivins v. Six Unknown Agents*, *supra* note 169.

236. See Scott, *supra* note 199, at 670.

237. The Court has expressed this concern in many cases. See *Schlesinger v. Reservists Comm. to Stop the War*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2925 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

238. See, e.g., *Lagow v. United States*, 159 F.2d 245 (2nd Cir. 1946), *cert. denied*, 331 U.S. 858 (1947); *White & Greenspan*, *supra* note 1; *Steps, Standing to Object to Unreasonable Search and Seizure*, 34 Mo. L. Rev. 575 (1969); 1965 WASH. U.L.Q. 488 (1965); Annot., 86

was first extensively dealt with in *Jones v. United States*.<sup>239</sup> In *Jones*, the Court recognized that the fourth amendment protected interests in privacy<sup>240</sup> and expanded fourth amendment standing by defining injury to include both invasions of privacy and property interests. Previously, property invasions were required because the Court interpreted the words "secure in *their* persons" to mean a possessory interest in the object of the search or seizure.<sup>241</sup> *Jones* recognized the artificiality of such a rule and held that anyone "legitimately on the premises" had a sufficient interest in that premises, the invasion of which is a sufficient injury to give rise to standing to object to a search of the premises.<sup>242</sup> The Court did not, however, eliminate the older concepts which allowed standing based on violations of property rights. The Court additionally held that a person charged with a crime of possession automatically has standing to challenge the search for and seizure of the prohibited item.<sup>243</sup>

---

A.L.R.2d 984 (1962); Annot., 78 A.L.R.2d 246 (1961). The cases before *Jones* allowed standing only if the defendant could show that he had a possessory or proprietary interest in the property seized or the premises searched. The courts had limited standing to such interests and required that the individual be aggrieved by the search or the seizure, not merely by admission of the evidence. See, e.g., *Schnitzer v. United States*, 77 F.2d 233 (8th Cir. 1935). The latter is still a requirement. See, e.g., *Alderman v. United States*, 394 U.S. 165, 171-72 (1969).

239. 362 U.S. 257 (1960) (search of a premises in which defendant had no property interest). Although *Jones* was an interpretation of FED. R. CRIM. P. 41(e), it is generally treated and accepted as a definition of the constitutional standing requirement in fourth amendment cases. *Jones* involved a definition of the words "person aggrieved." See *Combs v. United States*, 408 U.S. 224, 227 (1972).

240. This interest had previously been recognized as early as *Boyd v. United States*, 116 U.S. 616 (1886), but had not been interpreted to give rise to standing without a showing of a possessory or propriety interest. See note 238 *supra*.

241. The language of the fourth amendment implicitly limits it to property interests, but its history clearly indicates a desire to protect privacy as well. This raises the question of the extent of the property interest necessary to give an individual a privacy interest in property. This was the approach taken in *Jones*. This article will suggest that any minimal property interest should give an individual a right of privacy entitled to fourth amendment protection. This property interest should include any right to possess, use, or receive the benefits of property. It need not be an interest which is protected by the common law or which can be made the basis of licenses or permits. Both *Combs v. United States*, 408 U.S. 224 (1972) and *Mancusi v. Deforte*, 392 U.S. 364 (1968), strongly imply that a right of privacy may exist without any corresponding property interest. While this is not inconsistent with the historical purpose of protecting privacy interests, it does expand the literal interpretation of the words. What is incongruous, however, is the expansion in *Jones*, *Katz*, *Mancusi*, and *Combs* and the limitations in *Couch*, *Dionisio*, *Mara*, *Cardwell*, and *Brown*.

242. 362 U.S. at 267.

243. *Id.* at 264. Automatic standing merely means that the defendant has standing without having to offer proof that his interests were invaded. Without automatic standing, a defendant charged with a possessory crime faced a dilemma. If he claimed possession of the prohibited item in order to gain standing to challenge a search and seizure, he admitted guilt; if the defendant did not claim possession, he could not challenge the search and seizure. This

In *Simmons v. United States*,<sup>244</sup> the Court recognized that ownership of an item offered in evidence was sufficient to confer standing.<sup>245</sup> This view is clearly consistent with history<sup>246</sup> and the *Data Processing* rule. In wiretapping cases the Court has granted standing to all parties to the taped conversation<sup>247</sup> and, it is assumed, to the particular individual whose telephone is tapped<sup>248</sup> on the theory that this is much the same as if his house had been searched. This is also consistent with history and the general standing rule because there is, according to the Court, a right of privacy with respect to telephone calls and invasions of that right involve the fourth amendment. The most recent criminal case involving standing however, has muddled the waters, primarily because the language appears to impose artificial limits on standing.

In *Brown v. United States*,<sup>249</sup> the defendant charged with the transportation of stolen goods claimed automatic standing to challenge the legality of the seizure of those goods.<sup>250</sup> The stolen goods were seized in the warehouse of an accomplice; the defendant claimed no possessory interest in the goods at the time of the seizure.<sup>251</sup> The Court held that the defendant lacked standing to contest the search and seizure,<sup>252</sup> stating that:

in deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants (a) were not on the *premises* at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises, and (c) were not charged with an offense that includes as an *essential element of the offense charged*, pos-

---

problem no longer exists since *Simmons v. United States*, 390 U.S. 377 (1968), which held that testimony given by a defendant at a pretrial hearing to establish standing may not be used against him at trial.

244. 390 U.S. 377 (1968).

245. *Id.* at 391. In *Simmons*, the police searched the house of the defendant's mother and seized therein two suitcases filled with evidence relating to a bank robbery.

246. See text accompanying notes 163-68 *supra*. The fourth amendment was clearly intended to protect property interests.

247. *Katz v. United States*, 389 U.S. 347 (1967). This was the first time the Court purported to grant standing purely on the basis of an invasion of privacy. *Katz* may also be viewed as involving an infringement on privacy in a particular place (container) in which the defendant has a property interest. Prior cases required an infringement on defendant's property interests. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928). See also *Berger v. New York*, 388 U.S. 41, 59 (1967); *Lanza v. New York*, 370 U.S. 139, 143 (1962).

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

249. 411 U.S. 223 (1973).

250. *Id.* at 227.

251. *Id.* at 228.

252. *Id.* at 229.

session of the seized evidence at the time of the contested search and seizure.<sup>253</sup>

This basic three-pronged standard of standing can be described as follows: The Court recognized that the fourth amendment protects both privacy and property rights. With respect to privacy interests, any individual legally present during a search of a *premises* has standing to object to the search and seizure because his right of privacy in the premises is involved.<sup>254</sup> The Court also granted standing to an individual who has a proprietary or possessory interest in the searched *premises*. The Court recognized that an individual has an expectation of privacy in his home when he is not there.<sup>255</sup> Part (c) of the *Brown* rule is the concept of the automatic standing set forth in *Jones*.<sup>256</sup> In *Brown*, however, the Court suggested that the automatic standing rule may be unnecessary<sup>257</sup> in light of *Simmons v. United States*,<sup>258</sup> which held that evidence of possession offered by the defendant to establish standing during a motion to suppress could not be used against him at trial on the issue of guilt.<sup>259</sup> Footnote number four in *Brown* went even further and suggested that the defendant must legitimately possess (whatever that means) the property in order to base standing on property interests. Although the *Brown* decision is correct since the defendants had no possessory interest whatsoever in the evidence seized and no privacy interest in the area searched, the language of the opinion seems to recognize only limited possessory rights and also limits the individual's right to privacy to situations where he is present on or has a possessory interest in a premises<sup>260</sup> searched. The Court's use of the term premises would seem to exclude privacy interests in papers and effects. This perhaps too narrowly defines the expectation of privacy which is protected by the fourth amendment,<sup>261</sup> and is not consistent with

---

253. *Id.* at 229 (emphasis added).

254. The result is correct since a visitor usually expects to have a right of privacy in his host's premises which should not be invaded unreasonably.

255. The result is also correct. The owner of property does not give up privacy interests in the property merely because he is not present.

256. See note 243 and accompanying text *supra*.

257. 411 U.S. 229. The Court reserved decision on that question until the proper case.

258. 390 U.S. 377 (1968).

259. *Id.* at 394.

260. The Court in both *Brown* and *Jones* did not appear to recognize any privacy rights in persons, papers, or effects. The Court has recognized personal privacy in other decisions, so it is not necessary to read the cases that narrowly. However, even in *United States v. Van Leeuwen*, 397 U.S. 249 (1970) the court did not specifically recognize a right of privacy in all containers (a box in the mail).

261. See note 254 *supra*.

the *Data Processing* rule. The courts have held, for example, that an individual whose property is stored at another's house does not have standing<sup>262</sup> even though most would admit that such an individual would reasonably have expected privacy. The requirement in order to have standing after *Brown* would appear to be that the individual be legitimately on the premises (the house?, car?, garage?, boat?, tent?, casket?, or other people container?) searched, or have a legitimate right of possession in the premises searched, or have legitimate possession or ownership of the property seized. But, if possession must be legitimate, may the police, with no fourth amendment restrictions, seize all contraband, stolen goods, or other property which the defendant has no right to possess? Making privacy rights depend on the defendant being legitimately where he is makes some sense, but property rights are not dependent on the legitimacy of the possession except with respect to people with a better right of possession. The fourth amendment would provide little protection to property rights if the government can, after the fact, get around the amendment by showing the defendant's interests were not legitimate. In *California Banker's Association v. Shultz*<sup>263</sup> and *O'Shea v. Littleton*,<sup>264</sup> the Court denied standing based on the absence of an injury, thus implicitly recognizing the viability of the *Data Processing* rule in fourth amendment cases.<sup>265</sup> It is expected that the Court will ultimately adopt that rule. At present, however, the Court does not allow standing to challenge whenever the defendant's fourth amendment rights, as reasonably defined, have arguably been violated. The Court has created artificial rules apparently designed to limit the exclusionary rule.

It might be helpful at this point, before discussing some of the recent cases dealing with the scope of the amendment, to set out precisely the interrelationship between standing and scope. If an individual is denied standing to challenge a search or a seizure, he is excluded from any protection which the amendment provides, and is beyond the scope of the amendment. If an activity is deemed to have been a search or a seizure as to a particular individual, that

---

262. See *United States v. Pepe*, 247 F.2d 838 (2d Cir. 1957); *Gibson v. United States*, 149 F.2d 381 (D.C. Cir. 1945); cf. *Alderman v. United States*, 394 U.S. 165 (1969); *Brown v. United States*, 411 U.S. 223 (1973); *Couch v. United States*, 409 U.S. 322 (1972) (tax records in accountant's office; no privacy right). But see *Simmons v. United States*, 390 U.S. 377 (1968).

263. \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 1494, at 1521-22 (1974).

264. \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 669 (1974).

265. Both cases decided fourth amendment issues by finding there was no injury and, therefore, denied standing to certain parties.



individual must have standing to challenge, otherwise the amendment would be meaningless as to that person. If it is decided that the amendment does not cover a particular activity because that activity is not a search or a seizure, or that it is not a search or seizure of this individual's person, house, papers, or effects because he does not have the requisite interest in those items, that decision can be used in future cases to deny standing to challenge to persons similarly situated. Therefore, decisions on each issue are directly relevant to the other, and the only time the decision on standing does not affect the scope is when standing is granted, since that only means that the defendant is entitled to litigate the issues. The grant of standing does not mean that he will win, or that the activities challenged are searches or seizures, or that he has the requisite relationship to the activity.

### B. *Recent Scope Cases*

In the past few years, the Court has decided some cases dealing with the basic issues underlying the scope of the amendment. They have addressed such questions as "what is a search," "what is a seizure," and the extent to which the amendment protects property and privacy interests. In *Cardwell v. Lewis*,<sup>266</sup> a plurality of the Court held that the warrantless examination upon probable cause of the exterior of the defendant's automobile and the taking of paint samples was reasonable and therefore did not violate the fourth amendment.<sup>267</sup> The plurality opinion suggested, however, that because the defendant had no expectation of privacy in the exterior of his automobile, the police's examination of the exterior of the automobile including the analysis of the paint, was not a "search."<sup>268</sup> The opinion further suggests that the fourth amendment protects only privacy interests and does not protect property interests unless there is an associated expectation of privacy. This proposition runs directly counter to *Simmons v. United States*,<sup>269</sup> in which the Court specifically recognized that the fourth amendment protects property rights as well as privacy rights.<sup>270</sup> If a majority of

266. \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464 (1974).

267. *Id.* at \_\_\_\_, 94 S.Ct. at 2470.

268. *Id.* at \_\_\_\_, 94 S.Ct. at 2468. But see Justice Stewart's dissent, 94 S.Ct. at 2473. The Court said that the fourth amendment protects people, not things, but seemed to overlook the fact that the amendment was clearly intended to protect peoples' interests in things and places.

269. 390 U.S. 377 (1968).

270. *Id.* at 391. *Simmons* did not substantially deal with that issue. The point was argued, but the Court merely stated that testimony of ownership was a good method of

the Court adopts the viewpoint expressed in *Cardwell*, it will have taken a substantial step back from the letter and the spirit of the fourth amendment. In *Cardwell*, there was a seizure of the automobile and paint which clearly should come within the language of the fourth amendment. The plurality seems to confuse searches, which involve the plain view doctrine, with seizures, suggesting that if there was no search there is no fourth amendment issue. The language although dictum, implies that some members of the Court are prepared to make some major changes in the interpretation of the amendment. If their view becomes generally applicable, the police, without justification under the fourth amendment, could seize anything within their sight, an absurd result.

In *Couch v. United States*,<sup>271</sup> the Court held that because the petitioner had no expectation of privacy in the records she delivered to her accountant, she had no fourth amendment protection against an Internal Revenue Service summons directing the accountant to produce the records.<sup>272</sup> The Court distinguished *Boyd v. United States*,<sup>273</sup> because the defendant in *Boyd* had possession of the invoice at the time of the government's subpoena duces tecum, while in *Couch* the defendant had relinquished possession to her accountant. Although actual possession is crucial to the fifth amendment issue of whether one is forced to incriminate himself by his own conduct (personally surrendering his records), the right to immediate possession or ownership should be the touchstone in analyzing fourth amendment rights. The Court, however, did not differentiate between the fourth and fifth amendment claims.<sup>275</sup> The Court appeared to deny fourth amendment protection because the defendant had little expectation of privacy in the records since much of the information contained therein was subject to mandatory disclosure in her income tax return.<sup>276</sup> The Court also seemed to ignore the physical seizure of the records, which involves an infringement on

---

establishing standing. The Court's primary concern was with the self-incrimination dilemma. See also *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (detention of a package by the post office is a seizure subject to fourth amendment control).

271. 409 U.S. 322 (1973).

272. *Id.* at 335-36.

273. 116 U.S. 616 (1886).

274. *Couch v. United States*, 409 U.S. 322, 330 (1973).

275. *Id.* at 325 n.6. "[The fourth amendment] claim is not further articulated and does not appear to be independent of her fifth amendment claim."

276. *Id.* at 335. This is a rather broad statement by the Court. It would seem that there should not be only an expectation of privacy in that case, but also a right of privacy that should not be subject to unreasonable invasion.

possessory and proprietary rights. In *United States v. Dionisio*,<sup>277</sup> the Court held that a subpoena to appear before a grand jury for the purpose of providing a voice exemplar is not a "seizure" of the person in the fourth amendment sense,<sup>278</sup> but admitted that the compelled production of records by a subpoena duces tecum is governed by the fourth amendment requirement that it be reasonable. The Court also held that the fourth amendment does not protect against the government's taking of voice exemplars because an individual has no expectation of privacy in the sound of his voice.<sup>279</sup> Both *Couch* and *Dionisio* restrict the amendment by holding certain conduct which would appear to be within the express language of the amendment is outside its scope. *Cardwell* then further suggests that the amendment does not protect property interests at all.

### C. Summary

The problems with *Brown*, *Couch*, *Dionisio*, and the plurality opinion in *Cardwell* is that they overlook the two most basic fourth amendment concepts: first, that the seizure of an individual's person, house, papers, or effects gives rise to the question whether the seizure was legal (seizures primarily invade property interests);<sup>280</sup> and second, that a search of an individual's person, house, papers, or effects gives rise to an issue of the validity of the search (searches primarily invade privacy interests).<sup>281</sup> The fourth amendment pro-

277. 410 U.S. 1 (1973).

278. *Id.* at 9.

279. *Id.* at 14.

280. Some of the recent cases, such as *Cardwell* and *Couch*, suggest that it is necessary to have an invasion of both property and privacy interests. That is inconsistent with the history of the amendment, which clearly indicates that property interests alone are sufficient. Seizures of persons, houses, papers and effects are interferences with possessory rights (property) and therefore the individual must have a right of possession before the seizure is in violation of his fourth amendment rights. That is the justification for denying standing when the property has been rented, sold, or abandoned. See *Giacona v. United States*, 257 F.2d 450 (5th Cir.), *cert. denied*, 358 U.S. 873 (1958); *Matthews v. Correa*, 135 F.2d 534 (2d Cir. 1943). Although some cases speak of actual possession at the time of the seizure, *Couch v. United States*, 409 U.S. 322 (1973), others recognize that it is a right of possession that is important, *United States v. Van Leeuwen*, 397 U.S. 249 (1970). It appears somewhat artificial to require actual physical possession. The interest protected is the right of possession. The distinction seems to turn on the common law remedy of replevin which required an immediate right of possession. See notes 172-80 *supra*. But that overlooks other property causes of action.

281. The privacy right, though more difficult to deal with, involves basically the same considerations. The Court has recognized that the amendment protects privacy rights, but appears to have limited privacy to persons, premises, and telephone lines. The privacy rights should involve persons, houses (premises), papers, and effects. Therefore, if an individual has a right of privacy in any person, house, paper, or effect, his interest should be protected by the amendment. This privacy interest should be able to be established by showing a posses-

Knock, Knock: Some Thoughts

fects both privacy and property interests. An individual can have a right of privacy in things he does not own or possess.<sup>282</sup> Furthermore, even though the surface examination of an object in plain view may not constitute a "search" under the fourth amendment, the item nevertheless remains protected under the fourth amendment from unreasonable seizures and unreasonable opening and looking into the object. Whenever the defendant's privacy or property interests are interfered with by either a search or a seizure,<sup>283</sup> this should constitute the requisite injury for purposes of standing. The Court should first decide whether there is a fourth amendment issue, and then reach the issue of whether the search or seizure was reasonable.

The Court seems to assume that there can be no invasion of protected privacy unless there is a search of a premises,<sup>284</sup> a person,<sup>285</sup> or a tapping of a telephone line.<sup>286</sup> The *Brown* test, for example, when applied to non-possessory crimes requires that an individual be present on or have a possessory interest in the premises searched before he has standing to invoke the fourth amendment.<sup>287</sup> *Brown* appears to recognize an individual's right of privacy in personal property only when it is associated with a premises. To require the existence of a premises, however, severely limits the scope of the fourth amendment. The fourth amendment also expressly protects against unreasonable searches of papers and ef-

---

sory interest in the thing searched, and should not depend on the individual's presence on the premises at the time of the search, nor should the right depend on common law property concepts. See note 282 *infra*.

282. There were many common law property interests other than actual ownership or possession. Property rights are relative. See notes 172-80 *supra*. If a friend lets me use his garage for my car and I have access, I have a property interest in the garage. That interest can admittedly be terminated at will by my friend, but may not be terminated by others. The fact of my presence, or having a key to the garage seems irrelevant. I would also expect some degree of privacy.

283. The Court should ask, was there arguably a search or a seizure of a person, house, paper, or effect, and did it involve this individual's property or privacy right? See *Mancusi v. Deforte*, 392 U.S. 364 (1968). See also *Brown v. United States*, 411 U.S. 223 (1973).

284. *Brown v. United States*, 411 U.S. 223 (1973). Invasions of property interests in the premise would still be sufficient to give standing. Nevertheless, searches of any container (papers and effects) also invade privacy interests which are protected by the amendment.

285. *Terry v. Ohio*, 392 U.S. 1 (1968).

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

287. See text accompanying note 249 *supra*. Privacy interests are clearly protected by the fourth amendment. There would not normally be a right of privacy, however, unless there is some minimal property interest. If, for example, I steal a car and the police legally seize it, I have no right of privacy in the trunk and therefore cannot object to its seizure. If, however, the police illegally seize the car, my possessory interest has not been overcome and I retain a right of privacy in the trunk. One must wonder why the presence of the body of the defendant establishes a sufficient property interest to confer a privacy right, but not presence of some of his property.

fects.<sup>288</sup> The rationale adopted by the decisions just discussed are causing significant conceptual problems in understanding the fourth amendment.

## VII. SOME PROPOSALS

The Court, as future cases arise, should undertake to clarify two specific areas of fourth amendment law. These are: what is a search or a seizure of a particular individual's person, house, papers and effects, and; when will a particular individual have standing to challenge what he claims to be an illegal search and seizure? Approaching these two problems directly will clarify much of the confusion presently existing in fourth amendment rules.

### A. Searches and Seizures

The amendment should apply at any time the government opens and looks into an individual's container, since such an opening for the purpose of discovering the contents would seemingly constitute a search. The opening need not be done by government if it is compelled by them. The question should then be whether the search was reasonable. Under the present law there is substantial confusion because a container in the post office is protected,<sup>289</sup> but papers in an accountant's office are not.<sup>290</sup> This could be resolved by a clear discussion of the words search and seize.

The Court in determining whether there is a search has spoken in terms of whether a "reasonable expectation of privacy," was invaded,<sup>291</sup> but that practice should be discontinued. Subjective expectations are too easily abused. By giving sufficient advance notice of invasions of privacy, the government could theoretically destroy an individual's expectation that he will be entitled to any privacy. Privacy should be considered a constitutional right subject to inva-

---

288. All articles and containers would seem to come within the historical scope of the amendment. Any container occupied by people seems to fit within the expression "houses." Papers and effects should include all personal property, including many sorts of people containers. If there is an invasion of a right of privacy, persons having some minimal associated possessory interest should be granted standing.

289. *United States v. Van Leeuwen*, 397 U.S. 249 (1970).

290. *Couch v. United States*, 409 U.S. 322 (1972).

291. See cases cited in note 153 *supra*. The Court finds no violation of the fourth amendment when informers are used, since the defendant is deemed to have waived any privacy right by talking to the person in front of him. See *United States v. White*, 401 U.S. 745 (1971). Part of the problem is that both *Katz* and the plurality in *Cardwell* speak of the fourth amendment protecting people, not places. What is not pointed out is that the amendment was clearly intended to protect people and their interests in places and things. *Katz* recognizes this, but *Brown* and *Cardwell* do not seem to.

sion only upon probable cause or reasonableness.<sup>292</sup> It will, of course, be necessary for the Court to define this right, but this should not be too difficult.<sup>293</sup> Initially, such a right of privacy for a given individual should exist whenever that individual has a possessory interest in the item searched or seized. This possessory interest should be defined according to constitutional rather than property concepts and should be recognized as existing any time the individual has the use of an item or container. The interpretation of the term "their" persons, houses, papers, and effects should not be narrowly construed to mean "his possession of houses, papers, and effects" relying solely on property concepts of possession. The approach of *Jones* and *Katz* is more realistic in that it recognizes the interest in privacy that the fourth amendment was intended to protect.

The Court in recent cases also appears to be overlooking the clear purpose of the fourth amendment to protect persons and property from unreasonable seizures. Since unreasonable seizures of an individual's person, houses, papers, and effects are prohibited by the fourth amendment, its protection should be available whenever the defendant has a possessory interest in the item which is interfered with by the government.<sup>294</sup> In *Dionisio*<sup>295</sup> the defendant, a suspect, was held to have no fourth amendment protection against compelled appearance before a grand jury. Yet this does not appear to be any less a seizure of his person than the stop on the street that was subject to the protection of the fourth amendment in *Terry v. Ohio*.<sup>296</sup> Short "stops" of the individual are deemed arrests (seizures), so why not short seizures of houses, papers, and effects? In *Dionisio* would it not be just as easy to say that, based on the facts, the seizure was reasonable? If it was not reasonable, is that any reason to hold the fourth amendment inapplicable? The defendant was seized by an agency of the government which was investigating crime. In *Couch*,<sup>297</sup> the defendant had no fourth amendment protec-

---

292. *Amsterdam*, *supra* note 1, at 383-84. The author suggests, quite convincingly, that expectations have no place in the fourth amendment. In order to be viable, it must envision a right of privacy.

293. The Court has not yet hesitated to define such a right in other constitutional law cases. See Note, *The Constitutional Right of Privacy*, 69 Nw. U.L. REV. 263 (1974).

294. *Cardwell v. Lewis*, — U.S. —, 94 S.Ct. 2464 (1974) and *Couch v. United States*, 409 U.S. 322 (1973), suggest that there must be a violation of privacy as well as property interest before standing can be granted. This is a misinterpretation of the fourth amendment, because it is not necessary that there be both a search and a seizure before the reasonableness requirement comes into play.

295. *United States v. Dionisio*, 410 U.S. 1 (1973).

296. 392 U.S. 1 (1968). The case is best known for permitting what is usually referred to as "Stop and Frisk."

297. *Couch v. United States*, 409 U.S. 322 (1973).

tion against the seizure of his records in the possession of his accountant. The government's acquisition of records which the defendant has a right to possess at any time would seem no less a seizure than the potential loss of records in *Boyd*<sup>298</sup> or the detention of defendant's package while it was in the possession of the post office.<sup>299</sup> Any invasion of a privacy or possessory interest<sup>300</sup> in the defendant's person, house, papers, or effects would seem to come within the scope of the fourth amendment and constitute an injury.<sup>301</sup> This same line of reasoning is applicable to the standing cases. If possession is an element of the alleged crime or is helpful in proving the crime and the government alleges that the defendant had possession, standing should be automatic, not for the reasons stated in *Jones*,<sup>302</sup> but because the government by attempting to prove possession is admitting the defendant's possessory interest. The interference with such a possessory interest should be deemed a seizure, and the defendant should have standing to challenge the seizure. The only exceptions should be where the defendant had given up his possessory interest prior to the time of the seizure as, for example, by abandonment<sup>303</sup> or irrevocable transfer<sup>304</sup> to some third person.

### B. *Standing*

The Court's present approach to standing virtually ignores logical evaluation of the fourth amendment and the concept of stand-

298. *Boyd v. United States*, 116 U.S. 616 (1886). See text accompanying note 88 *supra*.

299. *United States v. Van Leeuwen*, 397 U.S. 249 (1970).

300. Possessory interest is the key. Property rights are basically the rights of people with respect to things, no person's rights being absolute. Even a fee simple title to land is not absolute, it can be adversely possessed or acquired by condemnation. The fourth amendment was an attempt to protect certain interests and a constitutional interpretation of property or possessory interests is needed, not merely an interpretation that follows the law of property. Privacy rights merely arise out of possessory interests in something, at least in the context of searches or seizures. The only exemption would be with respect to such things as voice communications, etc.

301. Assuming the existence of an injury and a right to be free from the injury, a remedy should be available. The United States Supreme Court has taken the position that rights necessarily involve a remedy. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Bivins v. Six Unknown Agents*, 403 U.S. 388 (1971).

302. See text accompanying note 243 *supra*.

303. See note 157 *supra*. The government may seek to prove defendant's possession at some time prior to the government's acquisition of the property. If so, possession would not be important to the standing issue unless the defendant had a possessory interest at the time of the seizure.

304. Transfer by sale to a third party fits this category. Transfer by lease could also be an example. The defendant could be held to have no possessory interest until termination of the lease or loan agreement. A temporary transfer, on the other hand, should not preclude standing if the defendant can reacquire the property at any time. See *United States v. Van Leeuwen*, 397 U.S. 249 (1970). But see *Couch v. United States*, 409 U.S. 322 (1973).

ing. Although the Court could deny an individual standing to seek the benefit of the exclusionary rule,<sup>305</sup> the Court has not dealt with the standing issue in that context. Many times the Court has denied standing and limited the scope of the amendment by saying that the defendant's fourth amendment rights are not involved when it really meant that the exclusionary rule would not be applied<sup>306</sup> or the search or seizure was reasonable.<sup>307</sup> Standing to litigate and the scope of the fourth amendment should be considered independently of the issue of the remedy available. The courts should initially determine whether the defendant has raised an *arguable* fourth amendment violation of his rights, not whether his rights were in fact violated or whether he is entitled to the benefits of the exclusionary rule. The Court may wish to narrow the scope of the exclusionary rule or to eliminate it altogether. But if the exclusionary rule is not applicable,<sup>308</sup> the Court should so state and discontinue its practice of denying the benefits of the exclusionary rule on the theory that the defendant's rights were not in issue. To do so would clarify the scope of the fourth amendment, thereby giving courts and attorneys some guidance in determining whether an individual's civil rights have been violated. This practice would also permit the Court to focus more clearly on the purpose of the exclusionary rule, when it should be applied, and what alternate remedies are appropriate.

The courts ought to apply the standing rule to the fourth amendment in the following manner:<sup>309</sup> An individual should have

305. White & Greenspan, *supra* note 1.

306. See note 196 and accompanying text *supra*.

307. Cardwell v. Lewis, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464 (1974) (plurality opinion); United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973); Couch v. United States, 409 U.S. 322 (1973). See also *In re Horowitz*, 482 F.2d 72 (2nd Cir.), *cert. denied*, 414 U.S. 867 (1973).

308. Harris v. New York, 401 U.S. 222 (1971); cases cited note 162 *supra*.

309. Although there is substantial support for the proposition that a criminal defendant should be able to raise "other's fourth amendment rights," that subject will be left for others to argue. See *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955); This concept is in part embodied in the ALI MODEL CODE OF PRE-ARREST PROCEDURE § 290.1 (5) (Official Draft No. 1, 1972).

A motion to suppress may be made by any defendant against whom things seized are to be offered in evidence at a criminal trial, if such things were obtained by a search of or seizure from:

- a. the defendant
- b. a spouse, parent, child, brother, or sister of the defendant, or any member of his household; or
- c. any person with whom the defendant resides or sojourns; or
- d. a co-defendant, co-conspirator, or any person chargeable with the same crime with which the defendant is charged; or



standing to challenge a search or a seizure of his person, house, papers, and effects if he: 1) arguably<sup>310</sup> had a legal right of privacy in the article or container searched (whether it be a house, car, box or envelope) based upon a possessory interest in the container searched; or 2) arguably had a possessory interest in the item seized.<sup>311</sup> In each case the defendant's possessory right must be superior to the rights of the individual who may have consented to the search or seizure.<sup>312</sup> Standing should be considered in the context of whether the defendant has a right to raise the issue, not whether he should win. Standing should be granted unless the defendant's claim is totally without merit. If no possessory or privacy right of the defendant was invaded, standing should be denied because of the lack of injury. Otherwise, standing should be granted. If there was an invasion of a privacy or possessory right in the container or item seized, and that invasion was a search or seizure by government, then the activity should be deemed to be within the scope of the amendment. Only after granting standing should the Court consider whether the invasion was justified under the fourth amendment. If the Court determines that the search or seizure was reasonable or otherwise appropriate, the defendant is denied relief. If it was unreasonable, then the issue of the proper remedy becomes

- 
- e. any person with whom the defendant conducts a business; or
  - f. any other person if, from the circumstances, it appears that the search or seizure was intended to evade the application of this Part II to any of the persons described in paragraphs (a) to (e) inclusive.

See also § 280.3 dealing with motions for return of property seized.

The ALI comments recommend the retention of a standing rule, but apply it in a manner in which exclusion of the evidence is the result. A reading of the rule itself suggests it is not consistent with the basic concept of standing. The rule seems to ignore the fact that standing is the right to argue an issue, and should be granted when, arguably, defendant's fourth amendment rights are involved. Although the proposed rule draws more accurate arbitrary lines, the lines are still arbitrary as they overlook the basic nature of the fourth amendment.

310. The use of the word "arguably" is a modification of the *Data Processing* rule which the Court has approved. See note 229 *supra*.

311. Only a possessory interest should be required. If any such interest arguably exists, the individual should have the right to argue his case. It would be artificial to require actual possession and the Court has not normally imposed such a requirement, but the line presently drawn is very arbitrary. If the defendant's possessory right is not superior to the government's, it means that the governmental legally acquired the property or the property was contraband or something there is no right to possess. The issue should turn only on the question of whether the government legally acquired the property, since the interest is in litigating the legality of the government activity and not merely return of the property.

312. Although the law of who may consent to a search is unclear, see *United States v. Matlock*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 988 (1974), it should be clear that a person with a superior property right can consent, thereby waiving any privacy and property rights of the other possessors. If the government has a possessory interest, it may be able to waive or give up defendant's rights if action is taken by the right person.

important. If the exclusionary rule is held inappropriate in a criminal trial, the Court should base its decision on the grounds that the criminal trial is the wrong forum for this fourth amendment violation, that the manner of obtaining evidence is a collateral issue,<sup>313</sup> or that there is no standing to seek the benefit of the exclusionary rule.<sup>314</sup> The Court should not say there is no standing to litigate fourth amendment rights or that the defendant's rights were not violated when it means that the exclusionary rule is not applicable or that the search or seizure was reasonable. If applied as proposed the standing rule would serve its proper function and be compatible with the scope of the fourth amendment.<sup>315</sup>

Such an approach would be consistent with the general rule of standing<sup>316</sup> and the history of the fourth amendment<sup>317</sup> and would promote a reasonable interpretation of the scope of the amendment. There is an injury, an invasion of property or private interests. The injury was one which, historically, was often capable of judicial resolution. The fourth amendment is a specific limitation on government action intended to protect each individual from unreasonable searches and seizures which are invasions of his property and privacy interests in persons, houses, papers, and effects. There are many possible remedies available for violations of an individual's fourth amendment rights<sup>318</sup> including trespass,<sup>319</sup> false imprison-

---

313. See text accompanying note 181 *supra*.

314. This is suggested with the utmost reluctance, since it relates standing to a specific remedy, which is technically improper. This possibility is mentioned, however, since it would not cause any substantial confusion if limited to the reasons and scope of the exclusionary rule and all reference to fourth amendment rights were omitted.

315. As a practical matter very few of the Court's decisions would need to be reinterpreted. Cases since *Jones* in which the language is questionable are: *Cardwell v. Lewis*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2464 (1974); *California Bankers Ass'n v. Shultz*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 1496 (1974); *Brown v. United States*, 411 U.S. 223 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973); *Couch v. United States*, 409 U.S. 322 (1973); *Combs v. United States*, 408 U.S. 224 (1972); and possibly the line of cases, starting with *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), which suggested that the fourth amendment provided only limited protection against judicial and administrative subpoenas. See *See v. City of Seattle*, 387 U.S. 541 (1967). The outcome of these cases would not necessarily have been different under the proposed standing rule. After granting standing, the Court still could have decided that the search and seizure were reasonable or that the exclusionary rule was inapplicable. The Court could also decide that fourth amendment rights were not in issue and therefore the defendant had no standing, but only based on a reasonable interpretation of the fourth amendment, not merely because it disfavored a possible remedy.

316. See pt. V of this article *supra*.

317. See pt. II of this article *supra*.

318. See pt. IV of this article *supra*.

319. See note 166 *supra*.

ment,<sup>320</sup> replevin,<sup>321</sup> trover,<sup>322</sup> the exclusionary rule,<sup>323</sup> damages,<sup>324</sup> and possibly even a criminal prosecution<sup>325</sup> against an individual who invades those rights. The first four of these remedies have been historically acceptable, involve injury of greater or lesser degree, and in each case, the individual whose interest is invaded is unquestionably within the class of people sought to be protected by the fourth amendment.<sup>326</sup> Standing should not be limited by the historical doctrine of replevin since the only issue was return of the goods. Standing relates to the right to litigate the legality of the search or seizure. It must be considered as at least coextensive with the right and not be limited by the remedies.

### C. *Summary and Application*

A possessory interest in the item seized should give rise to fourth amendment protection and should entitle an individual to challenge the reasonableness of the seizure. Actual possession should not be required so long as there is a right to immediate possession. Nor should standing or the scope of the amendment depend on the location of the item when seized. A mere possessory interest in the item *seized* would not, however, confer standing to challenge the *search* which led to the discovery of that item. Standing to challenge the search would depend on whether the individual has a right of privacy in the area searched. One can have a right of privacy without having possession if he has a possessory interest,<sup>327</sup> but this right is always subject to being waived by one having a superior possessory interest in the area searched. Privacy has become extremely important in today's society,<sup>328</sup> especially with the advent of various electronic and other devices that can penetrate most barriers<sup>329</sup> and even give information concerning our real thoughts.<sup>330</sup> The first question, therefore, is what privacy interests were intended to be protected by the amendment. Clearly the pri-

---

320. See note 165 *supra*.

321. See notes 173-80 *supra*.

322. *Id.*

323. See notes 184-91 *supra*.

324. See note 169 *supra*.

325. See 18 U.S.C. § 242.

326. See parts III and V of this article *supra*.

327. See notes 280 and 281 *supra*.

328. See, e.g., *PRIVACY IN A FREE SOCIETY, FINAL REPORT* (1974), sponsored by the Roscoe Pound-American Trial Lawyers Foundation; A. MILLER, *THE ASSAULT ON PRIVACY, COMPUTERS, DATA BANKS, AND DOSSIERS* (1971); Amsterdam, *supra* note 1, at 384-90.

329. Electronic surveillance, sound amplifying devices, etc.

330. Lie detectors, truth serums, etc.

vacy of the person, the house (premises), papers, and effects (other property) is protected. Privacy is also a relative matter, some things are kept secret from all, from a few, or from many. My wife knows what happens in the bedroom, some friends have free access to and know what happens in the garage, the neighborhood knows what happens in the front yard, and my students know what happens in the classroom. In each case, if a person to whom I have divulged information or given custody of my property, (assuming he is not a government agent acting in that capacity) decided to inform others, or betray that trust, he has invaded my privacy and trust, but the police have not.<sup>331</sup> When I willingly make something known to others I also assume the risk of their telling others.<sup>332</sup> So also if I put my trust in another, and he breaks that trust, there is no violation of the fourth amendment.<sup>333</sup> The problem arises when the police, not occupying a trusted position with respect to my privacy, gain information or evidence through means not readily available to the astute public<sup>334</sup> or by compelling an individual who is protecting my privacy to violate it.<sup>335</sup> Remember, also, that this right is not absolute, privacy can be invaded when it is reasonable to do so. No absolute bar to the discovery of evidence is being proposed.

If, for example, a policeman walking along a sidewalk sees my gun in the front yard and takes it, my interest in the gun should be protected by the fourth amendment and I should have standing to challenge the *seizure* because of my possessory interest in the gun. There would be no search since the gun was in plain view.<sup>336</sup> So also,

---

331. The fourth amendment is only a limitation on governmental activities. See text accompanying note 130 *supra*.

332. See *United States v. White*, 401 U.S. 745 (1971) (plurality opinion); *On Lee v. United States*, 343 U.S. 747 (1952).

333. See cases cited note 332 *supra*. It is not improper to require individuals to take some precautions to protect privacy, but there must be a limit. See *Amsterdam*, *supra* note 1, at 402-04.

334. This is the problem where, for example, the police enter my house, my car, or my neighbor's house or car without consent, or use electronic listening devices, or stand on ladders to look into my windows, etc. These cases must be distinguished from the "plain view" doctrine. It is recognized that the police should be more diligent, but engaging in such activities thought proper only for "peeping toms," etc., is questionable. The police should be required to abide by the law and act consistently with a constitutionally defined right of privacy.

335. Compelling an individual to invade my privacy would seem no different than the police doing it themselves. Is it really any different if the compulsion is by force, money, or subpoena? The issue should be one of reasonableness. In *Couch*, the subpoena compelled the accountant to turn over the defendant's records, clearly a seizure and also an invasion of privacy.

336. The plain view doctrine is not necessarily inconsistent with this approach as there is no right of privacy if the individual gives it up by doing or saying things in areas or ways

if I hid my gun in a neighbor's house without his consent and the police searched his house illegally, I should be able to challenge the seizure of the gun but not the search of the house, because I had no right of privacy in the house. If, on the other hand, my neighbor consented to hide my gun in his house, I would then have a right of privacy and could contest a search which resulted in the seizure of my gun. My neighbor, however, could always waive my right of privacy in his house by consenting to the search.<sup>337</sup>

Should I place a closed container in my neighbor's house or in my front yard, I should have standing to contest a search of its contents. The fact that a container is in plain view should not waive the owner's right of privacy as to its contents.<sup>338</sup> A house is in plain view, but its contents are protected.<sup>339</sup> The same rule should apply to all containers. When the owner of a container consents to allow an individual to store an item in his container, that individual has a possessory interest and a right of privacy in the container which should be protected by the fourth amendment and the individual should be granted standing to contest a search of its contents leading to the seizure of his item. The right of privacy should not be dependent upon the defendant's presence in the container (legitimately on the premises).<sup>340</sup>

Although it is difficult to draw fine lines in this area, the Court should recognize that the attempts made in *Brown*, *Cardwell*, *Couch*, and *Dionisio* are not very helpful. The plurality opinion in

---

that anyone in the area can hear or see. The open fields doctrine is also not inconsistent with this approach since open fields do not come within the definition of "houses" or "effects." The *Katz* decision may be inconsistent since *Katz* says that the constitution protects people, not places. The Court has not, apparently, decided to give *Katz* a broad interpretation. See *United States v. White*, 401 U.S. 745 (1971) (plurality opinion). If limited to communications, it may be consistent as it could be deemed merely to recognize that the drafters of the amendment were very concerned with communications, and telephone wiretapping was not much of a danger in the 1700's.

337. He could waive my privacy right at any time he desired since he had a superior possessory interest in the house. He could throw it out in the street, or turn it over to the police.

338. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion). But see *Cardwell v. Lewis*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464 (1974) (plurality opinion); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

339. See cases cited note 338 *supra*.

340. See *United States v. Koningsberg*, 336 F.2d 844 (3rd Cir.), *cert. denied*, 379 U.S. 933 (1964) (garage-no standing). The requirement that defendant be present is not enlightening. If present in the living room, does he have standing to object to a search of the basement? But see *Spinelli v. United States*, 393 U.S. 410 (1969), where defendant had just left the premises. The Court granted standing since the police intentionally delayed until he left. The issue should be, does he have a legally protected privacy interest, which can turn upon his having a possessory interest, but not upon his presence.

*Cardwell* suggested that an analysis of paint chips taken from the exterior of an automobile did not constitute a "search."<sup>341</sup> The proposals herein would apply to the facts of *Cardwell* in the following manner. The taking of the paint samples would be a seizure. The item seized need not be valuable. It is the invasion of a property right which triggers the fourth amendment. The analysis of the paint would be a search. Had the defendant himself been subjected to x-ray, it would have been a search.<sup>342</sup> Conversations are protected against unreasonable searches by sound amplification devices planted at a distance.<sup>343</sup> A right of privacy should exist whenever an individual's conduct or property is not subject to view by unaided human senses. The naked eye could not perform a chemical analysis. The chemical analysis should therefore be considered a search.<sup>344</sup> If the search and seizure were reasonable, the fourth amendment can be deemed to have been complied with.

In *Couch*, when the government compelled the accountant to produce tax records, it at least seized the records and also invaded an area of taxpayer's privacy, the accountant's office. The accountant did not waive his client's property or privacy rights and therefore the compulsion to produce and the acquisition of the "papers" constituted a search and a seizure. Standing should be granted. Saying there was no "right of privacy" without analysis begs the question. Here, as well as in *Cardwell*, there was a search and seizure, and privacy should have been due. The decision should have been based on the issue of reasonableness.

In the period when the Court considered searches made without probable cause to be unreasonable and applied the exclusionary rule to almost all fourth amendment violations, the Court was reluctant to precisely define the scope of the fourth amendment. The courts were probably adverse to allowing minor infringements by the police to result in the exclusion of evidence. In some recent cases, however, the Court has employed a sliding scale for the cause necessary to make a search reasonable.<sup>345</sup> As the use of a flexible standard of

---

341. *Cardwell v. Lewis*, \_\_\_\_ U.S. \_\_\_\_, 94 S.Ct. 2464, 2468 (1974).

342. See note 100 *supra*.

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

344. See *Cupp v. Murphy*, \_\_\_\_ U.S. \_\_\_\_, 93 S.Ct. 2000 (1973), where the taking of dirt from beneath the defendant's fingernails was deemed a search. This is a difficult area, since the seizure in such cases will be the primary focus of the challenge. If it is reasonable to seize an item which can be tied to the crime only by chemical, electronic, or other evaluation, it would also seem reasonable to allow that evaluation.

345. *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Schmerber v. California*, 384 U.S. 757 (1966). See also *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Biswell*, 406 U.S. 311 (1972).

cause becomes more pronounced, there is less reason to avoid a precise definition of fourth amendment rights and more reason to employ an approach consistent with the history and purpose of the fourth amendment.<sup>346</sup> The Court will have to define reasonable limits on the right of privacy and property. In order to accomplish that goal, the Court should grant standing to anyone whose privacy or property rights under the fourth amendment have arguably been violated, and then decide the scope of the amendment based on historical and sound policy considerations.

### VIII. CONCLUSION

It should be apparent that the Court's present interpretation of the scope of the fourth amendment and the related standing rule is not consistent with the general rule of standing and is more limited than the history and meaning of the amendment would suggest it should be. This has primarily resulted from the Court's attempt to limit the application of the exclusionary rule. When dealing with the exclusionary rule, the courts have failed to distinguish fourth amendment rights from the remedy. This confusion of right and remedy has substantially confused the standing and scope issues because the Court has frequently denied the exclusionary rule remedy on the ground that no rights were in issue, when in fact fourth amendment rights were obviously in question. The advent of additional civil causes of action and federal prosecution for fourth amendment violations makes it imperative to consider fourth amendment rights independently from the exclusionary rule remedy. It is also time to bring the fourth amendment standing rules into harmony with other standing rules. There is no good reason for the difference in treatment given to fourth amendment cases by the Court. Fourth amendment standing should be expanded so that it is at least consistent with the *Data Processing* rule. This change would promote understanding of the scope of the fourth amendment, would lead to more logical and sensible rules, and provide the courts, police, and public with a comprehensible fourth amendment. Understanding the reason, purpose, and scope of the amendment is helpful in building respect for the Constitution, the law, and the courts. The proposals herein should promote these goals, and although they will not solve all problems, should provide some understanding and logic to an area that many are trying to artificially simplify. It would also promote honesty in focusing attention on the real reason for deciding any case, a goal highly beneficial to a free society.

---

346. See pt. II of this article.