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Narrowing California's Vicarious Standing Policy: Fourth Amendment Rights of Criminal Defendants and Their Victims

By Teresa Diane Chuh*

When a motion to suppress illegally seized evidence is presented to a court, the moving party, usually the defendant, initially must establish standing to assert a violation of the fourth amendment right against unreasonable search and seizure by demonstrating "a personal stake in the outcome of the controversy." The United States Supreme Court and the California Supreme Court have developed different standards for determining whether a criminal defendant possesses "a personal stake in the outcome of the controversy" and thus have created different rules defining when a criminal defendant has standing to suppress illegally seized evidence. The federal rule, set forth in Rakas v. Illinois, holds that only a defendant who has a "legitimate expectation of privacy" in the area searched may claim standing to object to the admission of illegally seized evidence. The Court in Rakas


1. This Note will not discuss the elements of illegal searches per se. References to "illegally," "unlawfully," or "unconstitutionally" seized evidence presume that such a determination would be made by the court.

2. The term "standing" is used to include the right of a party already engaged in litigation to raise certain objections as well as a person's right to invoke the judicial process.

3. U.S. Const. amend. IV provides in part. "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 . . . ."


6. Id. at 143. The Supreme Court recently reaffirmed Rakas in United States v. Payner, 100 S. Ct. 2439 (1980), in which defendant Payner was tried for falsifying a federal income tax return by denying that he maintained a foreign bank account. At trial, he moved to suppress a loan guarantee agreement pledging funds in the bank account as security. A copy of the agreement had been seized from a briefcase that he had left in the hotel room of an undercover agent. Id. at 2443. In excluding the evidence, the District Court held that although the search did not impinge on Payner's own fourth amendment rights, the due process clause of the fifth amendment and the inherent supervisory power of the federal court required exclusion of evidence tainted by the government's "knowing and purposeful bad faith hostility to any person's fundamental constitutional rights." Id. (citation omit-
found the defendants had no standing to challenge the use of incriminating evidence seized in violation of a third party's fourth amendment rights.\(^7\) In so ruling, the Court narrowed the former federal standard which provided that anyone "legitimately on the premises" at the time of the illegal search could claim standing.\(^8\) The \textit{Rakas} court nevertheless affirmed the maxim that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."\(^9\)

Although the federal rule prohibits a defendant from claiming third party or vicarious standing to assert the exclusionary rule, California courts hold exactly the opposite.\(^10\) The difference stems in part from the California Supreme Court's analysis of the nature of fourth amendment rights, as evidenced by the landmark case of \textit{People v. Martin}.\(^{11}\) In \textit{Martin}, the court reasoned that the fourth amendment, unlike the fifth,\(^{12}\) is couched in terms of a comprehensive guarantee that the government will not engage in unreasonable search and seizure. Accordingly, all defendants, as members of the general citizenry, fall within the class protected by the constitutional guarantee. \textit{Any} defendant therefore has standing to object to the admission of illegally seized evidence, whether or not his or her personal rights have been violated and whether or not he or she has been directly aggrieved by the search.\(^{13}\)

Reasoning that un-\footnotesize{\textsuperscript{7}}\textsuperscript{7} (per curiam).

Citing \textit{Rakas}, the Supreme Court reversed both lower court holdings, declaring that Payner had no standing to suppress the loan agreement because his own legitimate expectation of privacy had not been invaded. 100 S. Ct. at 2447. Furthermore, it held that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. \textit{Id}. \footnotesize{\textsuperscript{7}}\textsuperscript{7}.

\footnotesize{\textsuperscript{7}} 439 U.S. at 130-31. In so holding, the Court reaffirmed its earlier ruling in \textit{Alderman} v. United States, 394 U.S. 165 (1969).


\footnotesize{\textsuperscript{10}} See notes 11-14 & accompanying text \textit{infra}.

\footnotesize{\textsuperscript{11}} 45 Cal. 2d 755, 290 P.2d 855 (1955).

\footnotesize{\textsuperscript{12}} \textit{U.S. CONST. amend. V} provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . ." 

\footnotesize{\textsuperscript{13}} In contrast, "[t]he exclusion in federal trials of evidence other wise competent but
lawful searches more likely would be prevented if all persons had standing to suppress illegally seized evidence, the supreme court promulgated a vicarious standing rule in hopes of effectively deterring illegal police behavior.

Although the California rule is theoretically sound, cases construing Martin suggest that courts have encountered considerable difficulty in applying the rule evenhandedly. This is particularly true in cases where a defendant has attempted to assert vicariously a violation of his or her victim's fourth amendment rights to suppress incriminating evidence. Although technically permissible under the vicarious standing rule, the California Supreme Court has never allowed a defendant to suppress evidence by invoking his or her victim's constitutional rights. In every case in which such a possibility has arisen, the courts have evaded the standing issue by finding the presence of exigent circumstances to justify otherwise illegal searches.

Absent a finding of exigent circumstances, California's unrestricted vicarious standing rule is too broad to allow socially tolerable results. In cases where a defendant attempts to suppress evidence gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy. Jones v. United States, 362 U.S. 257, 261 (1960) overruled on other grounds United States v. Salvucci, 100 S. Ct. 2547 (1980). The Court again confirmed this rationale in Rakas stating: "The necessity for a showing of a violation of personal rights is not obviated by recognizing the deterrent purposes of the exclusionary rule . . ." 439 U.S. at 134 n.3. See also United States v. Payner, 100 S. Ct. 2439 (1980).

14. Justice Traynor convincingly argued that "if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified." 45 Cal. 2d at 760, 290 P.2d at 357. See also Cleaver v. Superior Court, 24 Cal. 3d 297, 594 P.2d 984, 155 Cal. Rptr. 559 (1979); Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 MNN. L. Rev. 1083, 1145-47 (1959).

15. For example, if a defendant burglarizes A's home and police subsequently retrieve evidence against the defendant during an illegal search of A's home, it is A's fourth amendment rights that are violated. Under Martin, however, the defendant can stand as A's vicarious representative and assert standing to object to the admission of evidence obtained by unlawful search and seizure.

16. See notes 103-04 & accompanying text infra.


18. For example, in Cleaver v. Superior Court, 24 Cal. 3d 297, 594 P.2d 984, 155 Cal. Rptr. 559 (1979), the court found that exigent circumstances validated a series of warrantless searches, thus avoiding the question of whether the defendant could assert his victim's right to suppress evidence. The dissent protested this finding, accusing the majority of having "invented" the exigent circumstances. Id. at 316, 594 P.2d at 995, 155 Cal. Rptr. at 570 (Mosk, J., dissenting). See notes 67-84 & accompanying text infra.
idence by asserting the fourth amendment rights of a third party, particularly when that party is a victim of the criminal act, the courts should limit Martin to achieve a more equitable rule of standing. If the court neglects to do so, vicarious standing is likely to operate as an escape hatch for accused criminals rather than as an effective mechanism for preserving the public’s freedom from unreasonable search and seizure.

This Note first discusses the development of standing to assert the exclusionary rule in both the federal and California courts. Second, the theoretical considerations underlying the California rule will be examined. The Note next explores the problems California courts have faced in cases where a defendant has attempted to suppress evidence by asserting the fourth amendment rights of his or her victim. Finally, the Note proposes limitations to the Martin rule that are designed to limit the ability of a criminal defendant to suppress illegally seized evidence when the defendant is not a true vicarious representative of the individual whose fourth amendment rights were violated.

The Development of Standing Rules

The Federal Rule

The exclusionary rule, first articulated in Weeks v. United States,19 provides that evidence seized in violation of fourth amendment rights protecting against unreasonable search and seizure must be excluded from use at trial.20 Nearly fifty years after Weeks, Mapp v. Ohio21 made the exclusionary rule applicable to state court proceedings22 through the fourteenth amendment.23

Prior to Mapp, standing to invoke fourth amendment rights had been strictly based on common law property principles. In essence, a defendant could not claim standing to object to the use of

22. Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342, 343 (1967) [hereinafter cited as Standing Comment].
23. U.S. Const. amend. XIV provides in part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
illegally seized evidence unless he or she claimed a "proprietary or possessory interest in the premises" searched,\textsuperscript{24} or a "property interest" in the item seized.\textsuperscript{25} This rule created an obvious dilemma for defendants charged with possession of contraband, for example, because "a defendant seeking to comply with . . . the conventional standing requirement [would be] forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him."\textsuperscript{26} In Jones v. United States,\textsuperscript{27} the Supreme Court's first full discussion of standing in search and seizure cases, traditional standing rules were broadened to avoid such dilemmas.\textsuperscript{28} In Jones, the Court affirmed the trial court's application of the personal interest requirement holding that a defendant could not claim standing merely by "[asserting] prejudice . . . through the use of evidence gathered as a consequence of a search or seizure directed at someone else."\textsuperscript{29} The Court ruled that Jones had established a sufficient interest in the place searched to assert standing, however, because he was "legitimately on [the] premises"\textsuperscript{30} at the time of the illegal intrusion.\textsuperscript{31} Moreover, the Court held that in a case such as Jones, where possession both convicts and confers standing, the necessity for a preliminary showing of an interest in the property seized is eliminated.\textsuperscript{32}

\textsuperscript{25} United States v. Jeffers, 342 U.S. 48, 52 (1951).
\textsuperscript{27} 362 U.S. 257 (1960), overruled on other grounds, United States v. Salvucci, 100 S. Ct. 2547 (1980).
\textsuperscript{28} In Jones, narcotics were found in an apartment where defendant Jones and others were staying. A friend had provided Jones with a key and had given him permission to occupy the apartment for a few days. Upon discovery of the contraband, Jones admitted some of it was his and that he was living in the apartment. He later denied the truth of that statement. The trial court denied Jones' motion to suppress the evidence because he had alleged neither sufficient ownership of the seized articles nor an interest in the apartment greater than that of an "invitee or guest." 362 U.S. at 259.
\textsuperscript{29} \textit{Id.} at 261.
\textsuperscript{30} \textit{Id.} at 267.
\textsuperscript{31} In extracting common law notions from the rules of standing, the Court stated: "We are persuaded . . . that it is . . . ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which . . . has been shaped by distinctions whose validity is largely historical . . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 362 U.S. at 266.
\textsuperscript{32} \textit{Id.} at 263. See also United States v. Payner, 100 S. Ct. 2439 (1980). The rule of
Despite liberalization of the standing rule in Jones, the Supreme Court did not abandon the principle that fourth amendment rights are personal rights. In Alderman v. United States, the Court expressly barred a defendant from claiming standing to object to evidence seized in violation of a co-defendant’s fourth amendment rights, ruling that a person is not “aggrieved” by an illegal search and seizure merely through the introduction of damaging evidence seized in violation of a third party’s fourth amendment rights.

In Rakas v. Illinois, the Court reaffirmed Alderman’s interpretation of the personal nature of fourth amendment rights, but limited the rule previously enunciated in Jones. In Rakas, the Court held that passengers in a lawfully stopped car did not have standing to object to a search beneath the seats and into the glove compartment of the car solely because they were “legitimately on [the] premises.” In declaring the “legitimately on the premises” test of Jones “too broad a gauge for measurement of Fourth Amendment rights” in cases involving crimes of possession was discarded in United States v. Salvucci, 100 S. Ct. 2547 (1980). In overruling this aspect of Jones, the Court noted the intervening decision in Simmons v. United States, 390 U.S. 377 (1968), which held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of guilt at trial. 100 S. Ct. at 2551. The Court then reasoned that defendants were no longer placed in jeopardy of conviction by asserting a possessory interest in a seized item in order to invoke fourth amendment rights. Standing to assert the exclusionary rule therefore was limited to those who could demonstrate that their own fourth amendment rights were violated. Id. at 2554.


34. In Alderman, the petitioners were convicted of conspiracy to threaten murder by telephone based on evidence obtained through an illegal government wiretap of one conspirator’s phone. Each petitioner demanded retrial if any evidence used to convict him was the product of the unauthorized surveillance. The Court denied the request stating: “[T]he established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence . . . . Coconspirators and codefendants have been accorded no special standing.” Id. at 171-72. But see Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953). These cases indicate that where the nature of the civil right involved is of great importance, traditional standing rules should not be interjected to defeat a decision on the merits, particularly where it is difficult for the person primarily protected by the right to assert it. See also Binkiewicz v. Scafati, 281 F. Supp. 233 (D. Mass. 1968); United States v. Birrell, 242 F. Supp. 191 (S.D.N.Y. 1965).


37. Id. at 133-34.

38. See notes 27-31 & accompanying text supra.
Amendment rights,\textsuperscript{39} the Court limited the federal rule of standing to conform to the rationale of \textit{Katz v. United States}.\textsuperscript{40} \textit{Katz} held that capacity to claim fourth amendment protection depends not upon a property right in the invaded area, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the area searched.\textsuperscript{41} The auto passengers in \textit{Rakas} thus did not have standing to suppress the evidence seized because they had not demonstrated a "legitimate expectation of privacy" in the car's glove compartment or the area under the seats.\textsuperscript{42}

\textit{Rakas} thus focused on "the extent of a particular defendant's rights under the Fourth Amendment, rather than on the theoretically separate, but invariably intertwined concept of standing."\textsuperscript{43} Nonetheless, it reaffirmed the underlying principle that fourth amendment rights are personal rights which may not be vicariously asserted.\textsuperscript{44}

\textsuperscript{39} 439 U.S. at 142. The Court noted that applied literally, the statement that anyone legitimately on the premises could claim standing to suppress "would permit a casual visitor who has never seen, or been permitted to visit the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. The first visitor would have absolutely no interest or legitimate expectation of privacy in the basement, the second would have none in the house, and it advances no purpose served by the Fourth Amendment to permit either of them to object to the lawfulness of the search." \textit{Id.} (footnote omitted).

\textsuperscript{40} 389 U.S. 347 (1967).

\textsuperscript{41} \textit{Id.} at 353. The Court held that the government by electronically listening to and recording defendant Katz's conversations in a telephone booth had "violated the privacy upon which he justifiably relied . . . and constituted [an unreasonable] 'search and seizure' within the meaning of the Fourth Amendment." \textit{Id.}

In \textit{Rakas}, the Court pointed out that "a 'legitimate' expectation of privacy . . . means more than a subjective expectation of not being discovered. . . . [A burglar's] presence, in the words of \textit{Jones}, is 'wrongful'; his expectation [of privacy] is not 'one that society is prepared to recognize as 'reasonable.'" \textit{Id.} at 143 n.12 (quoting \textit{Katz v. United States}, 389 U.S. 347, 361 (1967) (citation omitted)). Despite rejection of the \textit{Jones} "legitimately on the premises" standard, the Court in \textit{Rakas} noted that the result in \textit{Jones} would remain the same under the new "legitimate expectation of privacy" test. Writing for the majority, Justice Rehnquist stated: "The holding in \textit{Jones} can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his 'interest' in those premises might not have been a recognized property interest at common law." 439 U.S. at 143 (footnote omitted).

\textsuperscript{42} 439 U.S. at 148.

\textsuperscript{43} \textit{Id.} at 139.

\textsuperscript{44} \textit{Id.} at 138.
The California Rule

In contrast to the federal rule, which allows only those individuals whose personal rights have been violated by an illegal search or seizure to assert standing to invoke the exclusionary rule, California allows any member of the general citizenry to assert standing to object vicariously to illegally seized evidence.\textsuperscript{45} The rationale underlying this radical departure from the federal rule is largely attributable to the unique development of the exclusionary rule in the California courts.

Six years before the United States Supreme Court decided \textit{Mapp v. Ohio},\textsuperscript{46} the California Supreme Court voluntarily adopted the exclusionary rule in \textit{People v. Cahan}.\textsuperscript{47} Cahan and fifteen other defendants had been convicted of conspiracy to engage in bookmaking. On appeal, Cahan argued that his conviction should be overturned because it was based on evidence obtained from illegally planted microphones and from multiple warrantless searches. In a four to three decision, the court reversed Cahan's conviction, concluding that the evidence had been obtained in flagrant violation of the fourth and fourteenth amendments, the California con-

\textsuperscript{45} Despite the number of commentators calling for the suppression of all evidence obtained by illegal searches and seizures, the Supreme Court of California has been the only court to accept a rule of standing to invoke the exclusionary rule that is not dependent on whether the defendant's personal privacy was invaded. See generally Allen, \textit{The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties}, 45 ILL. L. REV. 1, 22 (1950); Broder, \textit{Wong Sun v. United States: A Study in Faith and Hope}, 42 NER. L. REV. 483, 540 (1963); Grant, \textit{Circumventing the Fourth Amendment}, 14 SO. CAL. L. REV. 359, 368 (1941); Traynor, \textit{Mapp v. Ohio at Large in the Fifty States}, 1962 DUKE L. J. 219, 335 (1962); Comment, \textit{Standing to Object to an Unlawful Search and Seizure}, 1965 WASH. U.L.Q. 488 (1965); Comment, \textit{Judicial Control of Illegal Search and Seizure}, 58 YALE L. J. 144 (1948). Notwithstanding the observation in \textit{Rakas} that "cars are not treated identically with houses or apartments for Fourth Amendment purposes," 439 U.S. at 148, it is evident that the Court's ruling applies to house searches as well. Justice Rehnquist asserted that "petitioners' claim is one which would fail even in an analogous situation in a dwelling," because they made no showing of a "legitimate" expectation of privacy in the area searched. \textit{Id.} at 148-49.

\textsuperscript{46} See notes 21-23 & accompanying text \textit{supra}.

\textsuperscript{47} 44 Cal. 2d 434, 282 P.2d 905 (1955). See Barrett, \textit{Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan}, 43 CALIF. L. REV. 565 (1955). It has been suggested that the decision in \textit{Cahan} was motivated by a desire to overcome the stigma connected with two extreme examples of misconduct by California police that had been brought before the United States Supreme Court in the cases of \textit{Rochin v. California}, 342 U.S. 165 (1952) (reversing a conviction for possession of narcotics where evidence was obtained by stomach-pumping the defendant), and \textit{Irvine v. California}, 347 U.S. 128 (1954) (criticizing the police tactics which obtained evidence by placing a wiretap in defendant's bedroom). See Comment, \textit{Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure}, 55 Mich. L. Rev. 567, 568 n.5. (1956).
stition, and state and federal statutes. The court thus overturned nearly half a century of California precedent by adopting the exclusionary rule in California as a “judicially created rule of evidence.”

In People v. Martin, decided only a few months after Cahan, the supreme court allowed fourth amendment rights to be asserted vicariously to establish standing to object to the admission of evidence obtained through illegal search and seizure. Defendant Martin had been arrested on the premises of an illegal bookmaking operation. In challenging the validity of his arrest, claiming it arose from an illegal search, Martin simultaneously disclaimed any interest in the premises searched. Subsequently, the prosecutor contended that Martin lacked standing to object to admission of the evidence because his own constitutional rights had not been violated by the search. However, the argument was rejected. Writing for a unanimous court, Justice Traynor concluded:

[I]f law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified.... Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant’s constitutional rights.

When the United States Supreme Court made the exclusionary rule binding upon the states through the fourteenth amendment in Mapp, the Cahan exclusionary rule became a constitutional requirement. California’s vicarious standing rule was unaffected, however, and remained in force as a judicially created rule of evidence. The continued vitality of Martin is attributable to the United States Supreme Court holding in Ker v. California which gives the states freedom to contour their own search and

48. Cal. Const. art. I, § 19 mirrors U.S. Const. amend. IV and provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated....”
49. 44 Cal. 2d at 445, 282 P.2d at 911.
50. Id. at 442, 282 P.2d at 911.
52. Id. at 760-61, 290 P.2d at 857.
53. See note 20 & accompanying text supra.
seizure rules as long as they remain within the minimum standards mandated by the fourth amendment.\textsuperscript{66}

**Rakas v. Illinois and People v. Martin: A Comparison**

The process of developing standards for the admissibility of evidence obtained through illegal search and seizure in a criminal trial embodies a tension between competing social interests: deterrence of police misconduct on one hand, and admissibility of probative evidence on the other. As the exclusionary rule was adopted to deter illegal police conduct, standing requirements were created to limit the scope of the exclusionary rule’s operation,\textsuperscript{57} thus striking a necessary balance between the two competing social interests. Standing rules purport to establish a point at which the deterrent effect of suppressing illegally seized evidence is exceeded by the danger of freeing criminal suspects by the exclusion of probative evidence from trial.\textsuperscript{58}

Federal and California courts have reached different conclusions as to the point at which the interest in deterring police misconduct is outweighed by the societal interest in admission of probative evidence in criminal trials. This difference is most clearly manifest in the requirements each have set forth to establish standing to invoke the exclusionary rule. A strict standing requirement such as the *Rakas* rule reduces the number of defendants able to challenge the admissibility of unlawfully seized evidence, theoretically undercutting the objective of deterring illegal searches.\textsuperscript{59} The rule yields this result because it permits only those defendants whose fourth amendment rights have been violated to benefit from the exclusionary rule’s protection.\textsuperscript{60} Nonetheless, the

\begin{itemize}
  \item [56.] 374 U.S. at 34.
  \item [57.] Of all the limitations imposed upon the application of the exclusionary rule, standing requirements have been characterized as “the most devitalizing force.” Grant, *Circumventing the Fourth Amendment*, 14 S. CAL. L. Rev. 359, 368 (1941).
  \item [59.] In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court reaffirmed that the exclusionary “has been recognized as a principal mode of discouraging lawless police conduct.” Id. at 2. Hence, the argument follows that if the number of persons able to invoke the exclusionary rule is reduced the number of undeterred illegal police searches will increase.
  \item [60.] See note 59 supra. See also *Simmons v. United States*, 390 U.S. 377, 389 (1968).
\end{itemize}
federal rule is justified by strong societal concerns. As the Court in Rakas noted: “Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.”

Conversely, a lenient standing requirement such as the Martin rule increases the number of defendants able to object to the admission of illegally seized evidence, theoretically deterring the frequency of improper police intrusions. California’s adoption of a vicarious standing rule reflects the belief of the state supreme court that deterring police misconduct is more important than finding the “truth” through the admission of illegally seized evidence. In sum, the California Supreme Court strictly excludes the fruits of illegal police conduct from trial because such conduct serves to “encourage the kind of society that is obnoxious to free men.”

61. 439 U.S. at 137.
62. Exclusionary Rule, supra note 54, at 958. The argument against this assumption is discussed in Terry v. Ohio, 392 U.S. 1 (1968), where the Court noted that a court’s refusal to condone illegal police activity by excluding evidence does not bear a direct relationship to deterrence. “Regardless of how effective the [exclusionary] rule may be, where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.” Id. at 14 (footnote omitted).
64. Id. (quoting Walder v. United States, 347 U.S. 62, 64-65 (1954)). In contrast, the United States Supreme Court held in Rakas that “[t]he necessity for a showing of a violation of personal rights is not obviated by recognizing the deterrent purpose of the exclusionary rule. Despite the deterrent aim of the exclusionary rule, we never have held that unlawfully seized evidence is inadmissable in all proceedings or against all persons.” 439 U.S. at 134 n.3 (citations omitted).

Proponents of the Martin rule contend that strict standing rules like the one embodied in Rakas have nothing to do with the concept of deterrence. See Amsterdam, Search, Seizure & Section 2255: A Comment, 112 U. Pa. L. Rsv. 378, 390-91 (1964); Standing Comment, supra note 22, at 357-58; Exclusionary Rule, supra note 54, at 961. Because standing rules determine the suppression of evidence solely on the basis of a defendant’s relationship to a person or place, or to an item seized, they betray the overriding policy that “the government must not be allowed to profit by its own wrong. . . .” People v. Martin, 45 Cal. 2d 755, 761, 290 P. 2d 855, 857 (1955). Furthermore, at least one commentator has theorized that “[a] strict standing rule allows sophisticated law enforcers or their advisors to assess in advance the likelihood of their search being invalidated by the exclusionary rule. This advanced warning thereby furnished them with relatively clear legal advice with which to plan unlawful searches calculated to yield a maximum amount of useful evidence and a minimum number of defendants with standing to object.” Exclusionary Rule, supra note 54, at 959-61. See Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599, 656-58 (1962); Weeks, Standing to Object in the Field of Search and
The Martin Rule: Reconciling Theory and Practice

Martin presumably furthers the goal of deterring illegal police conduct more effectively than Rakas because it enlarges the class of individuals able to object to the admission of evidence obtained by illegal search and seizure. In practice, however, the rule of absolute vicarious standing enunciated in Martin has not been applied by the California courts without difficulty. Although a defendant may theoretically suppress evidence by asserting the fourth amendment rights of his or her victim, cases construing Martin have been unwilling to allow the vicarious assertion of fourth amendment rights in such instances.65

To avoid the unjust result of allowing a defendant to assert his or her victim's fourth amendment rights to suppress evidence, yet still retain the Martin standard, California courts have relied on finding exigent circumstances which serve to validate otherwise unlawful searches.66 A defendant implicated by evidence seized under circumstances subsequently determined to be exigent therefore is denied the opportunity to object to admission of evidence because the search is not illegal.

The concept of exigent circumstances is a flexible one.67 In People v. Ramey,68 the California Supreme Court held that while information received from a reliable informant was sufficient to create probable cause to believe the defendant had knowingly received stolen property, there were no exigent circumstances justifying the defendant's arrest in his home without a warrant. Writing for a four to three majority, Justice Mosk noted: "'[e]xigent circumstances' means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. There is no ready litmus test for determining whether

68. 16 Cal. 3d 283, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976).
such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.\textsuperscript{69}

In \textit{People v. Solario},\textsuperscript{70} the California Supreme Court extended the concept of exigent circumstances, holding that a police officer having probable cause to believe a burglary was in progress inside an apartment need not comply with the “knock and announce” requirement of Penal Code section 844\textsuperscript{71} before entering to make an arrest. Although an officer's unexcused failure to comply with the statute generally renders a subsequent search unlawful,\textsuperscript{72} the court in \textit{Solario} stated that the applicability of section 844 necessarily was dependent upon the existence of circumstances which further the statute’s underlying purposes. The court reasoned that if none of the statutory purposes could be served by requiring an officer to knock and announce, and exigent circumstances were present, then noncompliance with section 844 was permissible.\textsuperscript{73} It interpreted the purposes of section 844 to be: “1) the protection of the privacy of the individual in his home; 2) the protection of innocent persons who may also be present on the premises where an arrest is made; 3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice; and 4) the protection of police who might be injured by a startled and fearful householder.”\textsuperscript{74} The majority concluded that under the facts of \textit{Solario}, none of the policies underlying section 844 would be served by requiring compliance when an officer has probable cause to believe a burglary is in progress.\textsuperscript{75} The court therefore held that the police officer’s entry was justified.\textsuperscript{76} The defendant’s reliance on vicarious assertion of his victim’s rights to invoke the exclusionary rule was ruled to be

\textsuperscript{69} Id. at 276, 545 P.2d at 1341, 127 Cal. Rptr. at 637.
\textsuperscript{70} 19 Cal. 3d 760, 566 P.2d 627, 139 Cal. Rptr. 725 (1977).
\textsuperscript{71} CAL. PENAL CODE § 844 (West 1970) provides in part: “[T]o make an arrest . . . a peace officer, may break open the door or window of the house in which the person to be arrested is . . . after having demanded admittance and explained the purpose for which admittance is desired.”
\textsuperscript{73} 19 Cal. 3d at 763, 566 P.2d at 629, 139 Cal. Rptr. at 727.
\textsuperscript{74} Id. (quoting \textit{Duke v. Superior Court}, 1 Cal. 3d 314, 321, 461 P. 2d 628, 632, 82 Cal. Rptr. 348, 352 (1969)).
\textsuperscript{75} 19 Cal. 3d at 763, 566 P.2d at 629, 139 Cal. Rptr. at 727.
\textsuperscript{76} Id. at 762, 566 P.2d at 628, 139 Cal. Rptr. at 726.
“misplaced” because the intrusion was justified on the basis of the exigency of the burglary in process. Writing for the majority, Justice Clark conceded that the Martin rule entitles a criminal defendant to object to the introduction of evidence illegally seized from a third person, but he concluded:

[T]he evidence introduced against the defendant was not illegally seized from a third person. The ‘third person’ would be the defendant’s victim, the householder. Officer Freet did not violate the householder’s right to privacy by entering his residence to arrest the defendant, he protected it. Therefore, there is no illegal seizure of which the defendant may vicariously complain.

The majority’s conclusion that “requiring the officer to identify himself, announce his purpose and demand entry in such circumstances would impede the officer in protecting the householder’s privacy and property from the thief [and] . . . would jeopardize the officer’s safety . . . by giving the burglar the opportunity to fortify his position and to take hostages” is unconvincing. It is difficult to distinguish the situation in Solario from any other situation in which section 844 would apply. The statute is directed only at those cases where arrest is contemplated. Thus, it seems reasonable to assume that any potential arrestee unwilling to be taken into custody would resist, flee or “otherwise fortify his position” against an officer seeking to apprehend him or her. In fact, it is difficult to conceive of a situation where a police officer could not gain an advantage over a potential arrestee by willfully disobeying section 844. The “exigency” of the situation in Solario thus seems manufactured for the purpose of rectifying the officer’s noncompliance with the statute. Moreover, it is evident that “but for” the finding of exigent circumstances to excuse the officer, the court would have been compelled under Martin to allow the defendant to assert his victim’s fourth amendment rights to suppress the evidence against him.

The California Supreme Court’s willingness to allow a defendant to assert his or her victim’s fourth amendment rights in the absence of exigent circumstances has never been clear. However, court of appeal opinions in People v. Cook and People v. Ortiz

77. Id. at 764, 566 P.2d at 629, 139 Cal. Rptr. at 727.
78. Id.
79. Id. (emphasis omitted).
80. Id. at 763-64, 566 P.2d at 629, 139 Cal. Rptr. at 727.
indicate an unwillingness to allow a defendant to vicariously assert the fourth amendment rights of the victim of the crime. In *Cook*, as in *Solario*, a suspected burglar urged that the failure to comply with section 844 by the arresting officer was sufficient grounds upon which to base a motion to suppress evidence. Writing for the majority, Presiding Justice Puglia disagreed, stating:

In this appeal we are called upon to decide whether a residence burglar, whose crime is discovered in progress and interrupted by the police, may assert a violation of the right secured by Penal Code section 844 to the very victim whose property he is pillaging. . . . The law is neither an ass nor an idiot. To ask the question therefore is to answer it.  

In a similar manner, defendant trespassers in *Ortiz* were held not to have standing to object to evidence seized by officers who had failed to comply with section 844. In denying defendant's motion to suppress, the court stated: "Penal Code section 844 is not to be used to protect a trespasser's right to privacy in someone else's home. A trespasser—or a burglar—cannot make another man's home his castle." Thus, despite the *Martin* rule's sanction of vicarious standing, the court of appeal has summarily denied defendants standing to assert their victims' fourth amendment rights to suppress evidence.

The California Supreme Court recently declined the opportunity to decide the issue in *Cleaver v. Superior Court*. Defendant Eldridge Cleaver and his accomplice Bobby Hutton had engaged in a gun battle with police while hiding in the basement of a stranger's home. The confrontation ended when a tear gas cannister thrown by police ignited the basement. After firefighters extinguished the blaze, police officers entered the basement without a search warrant. They left a short time later because the tear gas severely impaired their vision. Two and one-half hours later, when the gas had partially dissipated, the officers reentered the basement and again began a warrantless search for physical evidence. They retrieved some items and returned again six hours later for a

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82. 276 Cal. App. 2d 1, 80 Cal. Rptr. 469 (1969).
83. 69 Cal. App. 3d at 688, 138 Cal. Rptr. at 263 (footnote omitted).
84. 276 Cal. App. 2d at 5, 80 Cal. Rptr. at 472.
86. See note 102 *infra*.
87. 24 Cal. 3d at 301-02, 594 P.2d at 985-86, 155 Cal. Rptr. at 560-61.
third search, still without a warrant. At no time did the homeowner consent to the searches. The trial court refused to suppress the evidence found in the basement, holding that exigent circumstances existed to justify all three warrantless searches.

In the court of appeal, Cleaver attempted to assert the fourth amendment right of the homeowner to suppress the evidence seized. Citing Ortiz and Solario, the court held that "a trespasser is not entitled to assert the householder's right to be free from unreasonable searches and seizures." The court therefore reasoned that "[i]nsofar as the defendant was a trespasser, he has no standing to assert any violation of the householder's privacy.

In light of the Martin rule, the court of appeal's analysis of the standing question is erroneous. The court failed to note that standing in California is not based on whether a defendant is "legitimately on the premises," but whether the search and seizure are legal. Despite acknowledging this misstatement of the standing rule, the California Supreme Court in Cleaver affirmed the trial court's suppression of the evidence on the grounds that the circumstances were sufficiently exigent to justify the warrantless searches. The court's comments regarding standing were thus

88. One codefendant was arrested in a house adjacent to the burned house, and after his arrest, the owner of the home found car keys which the codefendant had apparently left behind. Police located the car and towed it to a police parking lot where they used the keys to open the trunk. Several weapons and ammunition were found. Id. at 307-08, 594 P.2d at 989-90, 155 Cal. Rptr. at 564-65. For a more comprehensive discussion of automobile searches, see Wilson, The Warrantless Automobile Search: Exception without Justification, 32 Hastings L.J. 127 (1980).
90. 141 Cal. Rptr. at 570.
91. Id. at 571.
92. This is not to say that the court of appeal's ruling on the standing question was not correct. Like the California Supreme Court, the court of appeal found exigent circumstances to justify the warrantless searches.
93. See notes 27-30 & accompanying text supra.
94. As an appellate court judge pointed out in Shuey v. Superior Court, 30 Cal. App. 3d 535, 106 Cal. Rptr. 452 (1973): "In a jurisdiction, such as ours, where a defendant need not have standing to object to illegally obtained evidence, a seizure is either legal or illegal, regardless of the person against whom the prosecution seeks to introduce the evidence. The identity of the defendant is a neutral factor." Id. at 543, 106 Cal. Rptr. at 457 (quoting People v. Superior Court, 274 Cal. App. 2d 228, 231, 78 Cal. Rptr. 830, 832 (1969)).
95. The court looked to the United States Supreme Court's ruling in Michigan v. Tyler, 436 U.S. 499 (1978), which upheld a warrantless police search of a building conducted seven hours after firefighters had extinguished the flames and a fire chief had entered the premises seeking evidence of arson. The California court concluded that "[t]he Tyler ratio-
confined to a single paragraph:

In this case defendant intruder vicariously asserts the privacy rights of the owner. As we have noted, the police had ample reason to suspect that weapons, ammunition and perhaps other potentially dangerous items ... remained in the fire damaged basement. Under the circumstances it is wholly unrealistic to presume that an absent property owner would either expect, or desire, the police to postpone, until a search warrant was obtained, entry onto the premises whether for a search for evidence or to protect the property.96

The supreme court's argument is unconvincing for two reasons. First, the facts of Cleaver reveal that the exigency of the circumstances was dubious. In a lengthy dissent, Justice Mosk observed that on the face of the record the risks that the majority deemed exigent were, in fact, neither substantial nor imminent.97 Moreover, exigent circumstances can only be recognized "upon 'a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.' "98 The prosecution, Justice Mosk noted, "made no effort whatever to sustain their burden [which] the majority shouldered ... themselves."99 Justice Mosk thus concluded that the majority "invented" exigent circumstances to avoid confronting the standing issue.100

Second, even if exigent circumstances could be presumed, the court failed to consider whether the homeowner might have some reason for asserting the exclusionary rule to bar evidence obtained in the illegal search on his or her property. Instead, the majority speculatively concluded that "[u]nder such circumstances it is wholly unrealistic to presume that an absent property owner would ... desire the police to postpone, until a search warrant was obtained, entry onto the premises ... ."101 If the homeowner in Cleaver, however, had cultivated marijuana plants in the living

96. 24 Cal. 3d at 306, 594 P.2d at 989, 155 Cal. Rptr. at 563.
97. Id. at 314, 594 P.2d at 994, 155 Cal. Rptr. at 569.
98. Id. at 309, 594 P.2d at 990, 155 Cal. Rptr. at 564 (citation omitted) (Mosk, J., dissenting).
100. Id. at 316, 594 P.2d at 995, 155 Cal. Rptr. at 570.
101. Id. at 306, 594 P.2d at 989, 155 Cal. Rptr. at 564.
room, or stored illegal firearms in the basement, it would be equally "unrealistic" for the court to presume the homeowner would not have preferred that the police obtain a search warrant before entering the premises.\textsuperscript{102}

Rather than justifying an otherwise illegal police search through exigent circumstances and speculative presumptions, the Cleaver court could have declared the Martin rule too broad in cases where a defendant seeks to assert vicariously his or her victim's fourth amendment rights, and created an exception to limit the Martin rule in such instances. The final section of this Note will suggest two limitations to Martin designed to preserve the deterrent purposes underlying the exclusionary rule, yet prevent vicarious standing when a defendant is not a true vicarious representative of the subject of the unlawful search.

A Proposed Solution

Under the Martin rule, a defendant may assert vicariously the fourth amendment rights of any subject\textsuperscript{103} of an illegal police

\begin{itemize}
  \item[(1)] The victim of defendant's act. If a defendant breaks into A's home—as in Solario and Cleaver—A becomes the victim of the defendant's act. If police improperly search A's home and retrieve incriminating evidence, the defendant may assert, under Martin, A's fourth amendment rights, and thus may object to the admission of the evidence. In a jurisdiction that follows the federal rule, however, the defendant would be barred from suppressing the evidence because his or her own "legitimate expectation of privacy" had not been violated by the illegal search of A's home.
  \item[(2)] A codefendant whose privacy is invaded. If the government attempts to prosecute both A and the defendant with information obtained from the illegal wiretap of A's phone, the defendant may claim vicarious standing to object to the fruit of the wiretap under Martin. However, he or she could not do so in a jurisdiction following the federal rule. As the Court stated in Alderman v. United States, 394 U.S. 165, 172, 174 (1969), "coconspirators and codefendants have been accorded no special standing.... No rights of the victim of an illegal search are at stake when the evidence is offered against some other party."
  \item[(3)] A third party not involved in defendant's crime. In this category, the subject of the
search, even if that person is the victim of his or her crime. The rule is intended to maximize deterrence of unlawful police conduct by increasing the number of persons able to suppress illegally seized evidence. However, in cases such as Solario and Cleaver, where a defendant attempts to suppress evidence by asserting his or her victim's fourth amendment rights, common sense and fairness have been outweighed by a blind commitment to the theory of deterrence. In such cases, the rule is too broad.

To achieve maximum deterrence of unlawful police conduct, yet eliminate the dilemma in cases such as Solario and Cleaver, the California Supreme Court should limit the Martin rule. Two proposals are considered. The first suggests a broad modification of the rule that would give all subjects of illegal police searches, including the victims of crimes, the option of waiving or asserting their fourth amendment rights, thereby making a defendant's ability to assert vicariously those rights conditional upon the actions of the individual directly aggrieved by the illegal search. The second proposal suggests a narrowly drawn limitation which would automatically preclude a defendant from suppressing evidence by asserting the rights of the victim of the crime. The latter proposal, unlike the first, would not apply to all cases involving unreasonable search. Either proposal adequately fulfills the supreme court's commitment to deter illegal police conduct, yet serves to ensure that those invoking the exclusionary rule are true vicarious representatives of the individual whose fourth amendment rights were violated by the illegal search and seizure.

illegal search differs from the example above, because while he or she is not the "target" or object of the search, his or her privacy nevertheless is invaded. For example, if police arrested a defendant for armed robbery and later conducted an illegal search of his or her parents' home, the defendant might object to the search on the ground that he or she was the "target" of the search, i.e., the person against whom the search was directed. Under Martin, such a defendant can assert vicarious standing to suppress evidence seized. Under the federal rule, however, the concept of "target" standing is expressly rejected unless the defendant can demonstrate a legitimate expectation of privacy in the area searched. Rakas v. Illinois, 439 U.S. 128, 135 (1978).

104. See note 103 supra.

105. "Crimes" as discussed herein will encompass only serious felonies such as homicide, aggravated assault, rape, armed robbery, arson, and burglary; crimes where victims are readily identifiable. Under this definition, "victims" of prostitution, gambling and narcotics violations will be excluded from consideration.

106. If the subject of an illegal search "waives" his or her fourth amendment rights, those rights cannot flow vicariously to the defendant. Conversely, if the subject "asserts" or "invokes" his or her rights, they can flow vicariously to the defendant.
The Waiver Alternative

An intermediate rule of standing that serves the broad deterrent purpose underlying California’s standing rule yet protects the privacy rights of subjects of illegal searches may be developed by permitting vicarious standing, but allowing the subject of an illegal search to waive the right to object to a violation of his or her fourth amendment rights. Waiver could occur through in camera testimony given prior to a pretrial motion to suppress evidence under Penal Code section 1538.5. In camera examination would protect the privacy of the subject of the illegal search yet allow the presence of counsel to present and challenge the waiver.109 A section 1538.5 motion is a defendant’s exclusive means of suppressing

107. An in camera waiver of the fourth amendment rights of the subject of the illegal search would not violate the defendant’s constitutional right to confront adverse witnesses because such testimony only affects the availability of certain evidence and would not tend to incriminate the defendant at trial. In People v. House, 12 Cal. App. 3d 756, 90 Cal. Rptr. 831 (1970), the court of appeal held that “[b]ench and chambers conferences held out of the personal presence of a defendant at which issues of law are mooted . . . are not a basis of error absent a showing that [the defendant’s] absence thwarted a ‘fair and just hearing.’” Id. at 767, 90 Cal. Rptr. at 837 (quoting People v. Teitelbaum, 163 Cal. App. 2d 184, 206, 207-08, 327 P.2d 187, 174 (1958), appeal dismissed, cert. denied, 359 U.S. 206 (1959)). See Snyder v. Massachusetts, 291 U.S. 97, 107 (1934). In cases involving in camera waiver by an illegal search subject, the defendant would be able to make a prima facie showing that his or her absence during the waiver “thwarted a fair and just hearing.” The prosecution would then be required to show that the waiver was given in accordance with established principles of constitutional waiver. See People v. LaVergne, 64 Cal. 2d 265, 411 P.2d 309, 49 Cal. Rptr. 557 (1966); People v. Luker, 63 Cal. 2d 464, 407 P.2d 9, 47 Cal. Rptr. 209 (1965); People v. Garner, 234 Cal. App. 2d 212, 44 Cal. Rptr. 217 (1965); In re Shlette, 232 Cal. App. 2d 407, 42 Cal. Rptr. 708 (1965).

108. CAL. PENAL CODE § 1538.5 (West Supp. 1980) provides in part: “A defendant may move . . . to suppress . . . evidence . . . obtained as a result of a search or seizure on either of the following grounds: (1) The search or seizure without a warrant was unreasonable. (2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violated federal or state constitutional standards.” At a § 1538.5 hearing, the defendant has the burden of producing evidence to establish a prima facie case of fourth amendment illegality. People v. Prewitt, 52 Cal. 2d 330, 341 P.2d 1 (1959); People v. Carson, 4 Cal. App. 3d 782, 84 Cal. Rptr. 699 (1970). Thereafter, the burden of proof rests on the prosecution to show the search was justified. People v. Carson, 4 Cal. App. 3d 782, 84 Cal. Rptr. 699 (1970). See People v. Prewitt, 52 Cal. 2d 330, 341 P.2d 1 (1959).

109. In Camera examination by the judge with both counsel present would be used to protect the privacy of the victim. Presence of both counsel is necessary because the prosecution must be aware of facts surrounding the subject’s waiver to be able to sustain its burden of showing the voluntariness of the waiver. The defense also would need to be present to determine whether a challenge to the waiver should be made.
the fruits of illegal searches and seizures.\textsuperscript{110} If \textit{in camera} testimony is received from the subject of an illegal search and seizure, a decision by the subject to waive his or her fourth amendment rights could reduce, or perhaps eliminate, the time expended on the section 1538.5 hearing because of the preliminary determination of whether a defendant has standing to bring the motion. If a defendant's section 1538.5 motion is denied on grounds that he or she has no standing, this proposed modification to the \textit{Martin} rule would still allow the defendant an opportunity to appeal the ruling under established procedures.\textsuperscript{111}

A search subject's absence or refusal to appear at an \textit{in camera} hearing would create the rebuttable presumption that the subject has \textit{not} waived his or her rights.\textsuperscript{112} This presumption must arise under well-settled principles applicable to waiver of fourth amendment rights \textit{prior} to a search.\textsuperscript{113} In those cases, waiver "must be proven to be unequivocal [and] freely and intelligently given . . . ."\textsuperscript{114} Before a court can hold that a search subject has waived his or her constitutional protection under the fourth amendment, the prosecutor must present clear and convincing evidence to that effect.\textsuperscript{115} Such a requirement would also serve to ensure against the possibility that search subjects might be unduly influenced by law enforcement officials to waive their fourth amendment rights.\textsuperscript{116}

\textsuperscript{110} \textsc{Cal. Penal Code} § 1538.5(m) (West Supp. 1980). A defendant charged with a felony may bring a motion to suppress evidence at the preliminary hearing, in municipal or justice court. \textit{See id.} § 1538.5(f). If the motion is denied, the defendant is given 10 days to request a special hearing in superior court. \textit{Id.} § 1538.5(i). If the superior court also denies the motion, the defendant is given 30 days to seek extraordinary review of the ruling. \textit{Id.}

\textsuperscript{111} A defendant may seek further review of the fourth amendment issues on appeal from a conviction, even though the judgment is predicated on a guilty plea, provided he or she at some point moved for the return of property or suppression of the evidence. \textit{See Knoepp, California's Suppression Statute—An Examination of Penal Code § 1538.5, 10 San Diego L. Rev.} 209, 230 (1973).

\textsuperscript{112} This attitude is consistent with the traditional presumption against waiver of constitutional rights. \textit{See Miranda v. Arizona,} 384 U.S. 436, 475-76 (1961).

\textsuperscript{113} \textsc{J. Varon, Searches, Seizures and Immunities} 289 (2d ed. 1974).


\textsuperscript{115} \textit{See Judd v. United States,} 190 F.2d 649, 651 (D.C. Cir. 1951).

\textsuperscript{116} General principles for determining the voluntariness of a waiver could be applied to avoid this problem. \textit{See notes} 114-15 & accompanying text \textit{supra} and notes 117-19 & accompanying text \textit{infra}. "[A] constitutional right may be waived, but in so doing, the individual must intelligently, specifically and fully give such consent. There must not be any coercion or duress involved, directly or indirectly. Where this issue requires a determination by a court, the burden is upon the prosecutor to unequivocally establish the voluntariness of
cases where the subject of the illegal search does not appear, therefore, defendants would be allowed to assert vicariously a search subject’s fourth amendment rights under Martin.

Deterring unlawful police conduct implicates two separate but intertwined rights contained in the fourth amendment: the personal right to be free from illegal police conduct, and a guarantee to the general citizenry that unlawfully seized evidence will not be used in court so as to deter the police from invading privacy rights in the future. Allowing the subject of an unlawful search the option of waiving his or her fourth amendment rights and thus preventing these rights from flowing automatically to the defendant through vicarious standing makes particular sense in cases where the defendant attempts to assert the rights of the victim of his or her crime. Crimes against specific persons or property, such as homicide, arson, rape, and robbery impact the rights of individuals more immediately than the rights of the general citizenry. Thus, a victim’s right to waive his or her constitutional rights should take precedence over the public’s interest in preventing illegal police conduct. More importantly, the victim’s right should not flow automatically to the defendant when the defendant’s interest is not in preserving his or her victim’s privacy rights but in escaping conviction. In such cases, the defendant is not a true vicarious representative of the victim.

If a search subject is given an opportunity to waive fourth amendment rights under the proposed rule, he or she can decide whether those rights have been invaded to such an extent that he or she desires vindication by permitting a defendant to suppress evidence seized in the process of violation. Subjects thus would be allowed to choose whether vindication of their privacy rights is worth allowing the courts possibly to acquit guilty defendants for lack of evidence. Currently, the courts alone assume the role of making that determination on broad theoretical grounds. As demonstrated by cases like Cleaver and Solario, however, theory cannot always be reconciled with practical needs.

Adopting the proposed modification would neither offend nor undercut the deterrent purposes of the exclusionary rule. If a po-

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117. Standing Comment, supra note 22, at 356-57.
118. See notes 65-102 & accompanying text supra.
lice officer contemplating an illegal search cannot anticipate whether the search subject will assert or waive his or her fourth amendment rights, the officer will be just as likely to refrain from illegal conduct as under the present vicarious standing rule. The proposal, however, creates a rule of standing with sufficient flexibility to prevent its application in situations like Cleaver and Solario where it would otherwise yield unjust results. As the United States Supreme Court noted in United States v. Calandra, there is nothing inherent in the exclusionary rule which requires its application “in all proceedings.” Rather, it should be utilized only when “its broad deterrent purposes” will be served.

It may be argued that giving subjects of illegal searches, particularly crime victims, the power to waive their fourth amendment rights improperly divests the state of its ability to prosecute crimes. However, it is evident that third parties have always had the power to affect substantially every stage of criminal proceedings. One commentator has noted that “[m]any victims of crime, especially crimes involving real or threatened personal injury, seek aggressive prosecution of the wrongdoer. Some victims . . . [however] are ambivalent about formal prosecution, and some actually seek to discourage the prosecutor from pursuing criminal charges.”

Realistically, by reporting or not reporting crimes, third parties often hold the absolute power to influence the state’s ability to prosecute. Additionally, they can direct the fate of criminal cases by deciding whether to press charges, testify at trial, or seek involvement in certain postconviction decisions regarding sentencing, probation, and parole. It thus seems evident that allowing an illegal search subject to waive his or her fourth amendment rights—therby affecting a defendant’s ability to suppress evidence—does not bestow an inordinate amount of prosecutorial

119. See Standing Comment, supra note 22, at 357. If there is any chance the evidence will be suppressed, however, it seems more logical to assume that police officers will opt for a search warrant as a “safety measure” whenever possible.


121. Id. at 348.

122. Id.


124. Id. at 946.

125. Id. at 948.

126. Id. at 956-64.
power in a third party.

Finally, implementing the new rule would impose little additional administrative burden on the courts and, in fact, could shorten the existing procedure. At most, the rule would require subpoena and in camera examination of the subject.\textsuperscript{127} If the subject successfully waives his or her fourth amendment rights, however, the defendant's motion to suppress evidence is automatically denied for lack of standing and the legality of the questioned police activity need not be adjudicated.

If the modified rule had been applied in \textit{Solario} and \textit{Cleaver}, the defendants in both cases could have claimed standing to object to the evidence seized, contingent on testimony from the homeowners whose rights they sought to assert vicariously. Had the homeowners waived their rights, the court could have addressed the issues fairly, in the words of the \textit{Cleaver} dissent, without having to "invent" facts to justify the result.\textsuperscript{128} Moreover, in \textit{Cleaver} the court would not have had to "presume"\textsuperscript{129} that the homeowner would have waived objection to the warrentless police searches of her home, for it actually could have determined the question.

\section*{The Automatic Exception}

At the very least, the California Supreme Court should adopt an automatic exception to the \textit{Martin} rule in cases where a defendant attempts to suppress evidence by asserting the fourth amendment rights of his or her victim. Rather than relying on exigent circumstances to avoid applying \textit{Martin}, the approach taken in \textit{Solario} and \textit{Cleaver}, the court should simply provide that defendants cannot claim vicarious standing based on violations of their victim's fourth amendment rights. Because this exception is based on general principles of fairness rather than on the rights of specific individuals, availability of the victim would be immaterial to its application.

The most compelling justification for the proposed exception is fairness. In \textit{Malinski v. New York},\textsuperscript{130} the United States Supreme

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\textsuperscript{127} See notes 107-16, 122 & accompanying text \textit{supra}.

\textsuperscript{128} Cleaver v. Superior Court, 24 Cal. 3d 297, 316, 694 P.2d 984, 995, 155 Cal. Rptr. 559, 570 (1979) (Moak, J., dissenting).

\textsuperscript{129} \textit{Id.} at 306, 694 P.2d at 989, 155 Cal. Rptr. at 564. See notes 65-102 & accompanying text \textit{supra}.

\textsuperscript{130} 324 U.S. 401 (1945).
Court inextricably linked the concepts of due process and fairness “[imposing] upon this Court an exercise of judgment . . . to ascertain whether [proceedings leading to conviction] offend those canons of decency and fairness which express the notions of justice of English speaking peoples, even toward those charged with the most heinous offenses.”\(^{131}\) In *Rochin v. California*,\(^ {132}\) the Court noted that determinations of fairness “[require] an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order to facts exactly and fairly stated, [and] on the detached consideration of conflicting claims.”\(^ {133}\)

The unfairness of allowing a defendant to suppress evidence by asserting the fourth amendment rights of his or her victim is evident even prior to such “disinterested inquiry.” Crimes against specific persons or their property affect individual rights more immediately than the rights of the general public.\(^ {134}\) In cases of rape or homicide, that impact can be devastating. Nonetheless, under the present *Martin* rule, a female rape victim is powerless to prevent a defendant from asserting her fourth amendment rights to suppress evidence recovered during an improper search of her home. In short, the present rule would allow the rape victim’s own constitutional rights to be used against her. It may be argued that the concept of a single victim is inaccurate because a criminal misconduct wrongs the entire society.\(^ {135}\) Common sense, however, dictates that individual victims of crimes are the parties most directly injured. This fact has been acknowledged by numerous state and local governments which have adopted programs to compensate victims of crime.\(^ {136}\)

Once it has been determined that the present *Martin* rule yields unfair results in cases where a defendant attempts to suppress evidence by asserting vicariously his or her victim’s fourth

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131. Id. at 416-17 (Frankfurter, J., concurring).
133. Id. at 172.
134. See notes 115-22 & accompanying text supra.
amendment rights, it is necessary to determine whether countervailing interests in maximized deterrence of illegal police conduct balance the apparent injustice. A point of diminishing returns exists where the deterrent effect of suppressing evidence is outweighed by the danger of freeing additional criminal suspects. This Note takes the position that the present Martin rule operates far beyond the point of diminishing returns in cases where it sacrifices common sense and fairness in favor of a blind commitment to theory. As the United States Supreme Court noted in Davis v. Mills, laws are "intended to preserve practical and substantial rights, not to maintain theories."

From a practical standpoint, an automatic exception to the Martin rule would create even less of a procedural burden on the courts than the broader waiver alternative. The exception simply would operate whenever a defendant attempted to suppress evidence by asserting the fourth amendment rights of his or her victim. Moreover, there would be no need for the legislature to modify or expand existing procedures in hearings on motions to suppress made pursuant to Penal Code section 1538.5. In addition, courts would not be burdened with the added expenses and delay of entertaining in camera proceedings to adjudicate questions of waiver. In fact, adopting the automatic exception would completely obviate the necessity for section 1538.5 hearings in cases where a victim’s rights were in issue.

Adopting the proposed exception also would assure uniformity of results in cases such as Cleaver and Solario because the subjective desires of individual victims would not affect the rule’s application. In contrast, the victim’s desires could substantially influence application of standing rules under the waiver alternative. Finally, adopting the proposed exception would preclude any possibility of undue influence over the alleged victim from prosecutors or defense attorneys because its application would be automatic.

Conclusion

Application of either proposed modification of the Martin rule

137. See note 58 & accompanying text supra.
139. Id. at 457.
140. See notes 109-15 & accompanying text supra.
141. See notes 108-11 & accompanying text supra.
would avoid the danger that a defendant may assert the fourth amendment rights of the victim of his or her criminal act. More importantly, limitations on Martin would obviate the need to "invent" exigent circumstances on a case by case basis to bar a defendant from claiming vicarious standing to suppress evidence.

Because California's vicarious standing rule is not constitutionally mandated, but rather is a judicially created rule of evidence,142 the state supreme court has full power to modify or eliminate the present rule.143 By adopting either of the recommended limitations, the court could ensure the exclusionary rule will continue to function as a deterrent of illegal police conduct without undermining the personal rights of subjects of illegal searches.

142. See note 13 & accompanying text supra.

143. If the waiver alternative is adopted, however, the legislature would be required to amend Cal. Penal Code § 1538.5 to give the modification procedural substance. See notes 109-11 & accompanying text supra.