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STANDING TO OBJECT TO SEARCH AND SEIZURE

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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 order to implement this protection, the Supreme Court adopted a rule excluding from trial evidence obtained in violation of this constitutional provision.¹ However, the Court has traditionally held that a defendant who wishes to have evidence excluded must first establish standing to object to the unlawful search.²

Several commentators have urged that standing be abolished on the grounds that it is irrational and inconsistent with the avowed intent

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¹ *Weeks v. United States*, 232 U.S. 383 (1914). The Supreme Court applied the exclusionary rule to the states through *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Ker v. California*, 374 U.S. 23 (1963).

² *See, e.g.*, *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Jones v. United States*, 362 U.S. 257 (1960); *FED. R. CRIM. P.* 41(e).

of the exclusionary rule.³ Despite their criticism and predictions of the rule's demise, the Supreme Court recently affirmed the standing requirement in *Alderman v. United States*.⁴

Analysis of recent cases indicates that the law of standing is in transition; new criteria are being employed to determine when a defendant may exclude illegally obtained evidence which, if admitted at trial, would be likely to convict him of a crime. This Article attempts to delineate the present law of standing, to point out its inadequacies and inconsistencies, and to suggest a rule which will better serve the social considerations underlying the doctrine.

I. THEORETICAL CONSIDERATIONS

Judge Cardozo's famous statement, "The criminal is to go free because the constable has blundered,"⁵ does not imply that whenever the constable blunders, the evidence that he obtains must be excluded from trial.⁶ The rule that relevant evidence seized in violation of the fourth amendment may be excluded from a criminal trial was arrived at "only on the nicest balance of competing considerations and in view of the necessity of finding some effective judicial sanction to preserve the Constitution's search and seizure guarantees."⁷

Every time the exclusionary rule is applied there is a social cost directly proportional to the relevance of the excluded evidence. This social cost at some point must limit the scope of the rule. As Professor Amsterdam has said:

[The exclusionary] rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. . . .

As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance.⁸

³ See J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 73-77 (1966); Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on Its Last Leg*, 18 CATHOLIC U. L. REV. 150 (1968); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967); Note, *Search and Seizure: Admissibility of Illegally Acquired Evidence Against Third Parties*, 66 COLUM. L. REV. 400 (1966).

⁴ 394 U.S. 165 (1969).

⁵ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

⁶ *Compare Alderman v. United States*, 394 U.S. 165, 174 (1969).

⁷ Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388 (1964).

⁸ *Id.* 389.

Although it recognized the social cost involved, the Court adopted the exclusionary rule to deter illegal police conduct.⁹ However, in many cases the cost to society of excluding relevant evidence outweighs the deterrent effect on police conduct. When this occurs, there is no reason to allow a defendant to object to the introduction of the evidence. In *Alderman v. United States*,¹⁰ the Court recognized that the standing doctrine is a method of preventing the exclusionary rule from operating beyond the point of "diminishing returns."¹¹

Ascertaining the precise point of optimal deterrence is a difficult process. Two primary questions must be answered—what effect, if any, does the exclusionary rule have on police conduct,¹² and how much is a given amount of deterrence worth to society?

More information about police motivation is needed to answer the first question with precision. If police felt bound to follow the law in all situations, the exclusionary rule would have no deterrent effect, since the police would already be striving to make only reasonable, authorized searches. On the other hand, if police decide to seize evidence solely on the basis of the likelihood of its admissibility at trial, the rule would have a maximum effect.

Yet neither of these behavioral models adequately explains police conduct, for

norms located within police organization are more powerful than court decisions in shaping police behavior, and actually the process of interaction between the two accounts ultimately for how police behave.¹³

⁹ See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Elkins v. United States*, 364 U.S. 206, 217 (1960); Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 579-83 (1955).

Another rationale for the rule is that it is a violation of a defendant's right against self-incrimination to use against him evidence seized in violation of the Constitution. See *Mapp v. Ohio*, 367 U.S. 643, 661-66 (1961) (Black, J., concurring). This rationale is criticized in Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 664-68 (1962).

An earlier rationale for the rule was keeping tainted material out of the courts. See *Olmstead v. United States*, 277 U.S. 438, 471, 485 (1928) (Brandeis, J., dissenting); *id.* at 469-70 (Holmes, J., dissenting). This rationale is criticized in Barrett, *supra* at 582.

¹⁰ 394 U.S. 165 (1969).

¹¹ *Id.* at 175. Another method utilized to accomplish this end is to admit evidence although it stems from an unlawful search if it is purged of the "primary taint of the unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). See generally Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepherded, 56 CALIF. L. REV. 579 (1968); Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P. S. 307 (1964). A third method used to accomplish the same purpose is to deny relief on collateral attack in search and seizure cases. Text accompanying notes 19-26 *infra*.

¹² Compare Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 435 (1954):

Whether rules which prevent the prosecution from using evidence in court effectively deter police lawlessness is one of the most enduring controversies about law. The controversy is fed by many opinions and few facts.

¹³ J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 219 (1966).

In order better to understand police conduct it is important to recognize the goals of the police organization. Most important among the various goals is the compilation of an impressive record of arrests, for this is one measure of a patrolman.¹⁴ With pressure on him to meet his arrest quota, a policeman will often make an illegal search to gather evidence on which to base an arrest, although he is aware that the evidence will be inadmissible at trial.¹⁵

A second goal of the police is to prevent crime; many searches are made for purely preventive reasons, rather than to garner evidence for eventual prosecution.¹⁶ Since prosecution is not contemplated, it is extremely doubtful whether the exclusionary rule can have any deterrent effect in these cases. Thus, it is primarily in those cases where prosecution is contemplated that the exclusionary rule plays a significant role.

Even where the police strive to follow the correct procedures in making a search, it may still be illegal because of the inability of a policeman to understand the rules of search and seizure.¹⁷ Often the police make an improper search where they were actually in possession of sufficient facts to authorize a legal one.¹⁸ Obviously, the exclusionary rule will have more deterrent value in cases where the police intentionally make an unreasonable search than in those cases where the impropriety is due to negligence or ignorance. When negligence or ignorance is involved, the rule can, at best, make a policeman act with greater care, or perhaps encourage him to seek the advice of more learned men.

While the exclusionary rule will deter some improper police conduct, due to the many variables involved its precise effect is not ascertainable. Even if we could more accurately measure its deterrent value, we would still want to know exactly what price (measured in acquitted, but guilty defendants) society is willing to pay for a given amount of deterrence. The exclusionary rule itself is an indication that upon balancing the relative interests, the Court, at least, concludes that society places a higher value in most cases on deterring unreasonable searches than it does on convicting as many criminals as possible. The standing requirement, however, evidences that this is not an absolute, and that in some cases deterrence must give way to society's interests in punishing wrongdoers.

Whether one applies the exclusionary rule broadly or tempers it with the standing requirement depends on the relative value placed on a given amount of deterrence. It depends, for example, on whether

¹⁴ See A. NIEDERHOFFER, *BEHIND THE SHIELD* 53 (1967).

¹⁵ See J. SKOLNICK, *supra* note 13, at 220.

¹⁶ *Id.* 144-45.

¹⁷ *Id.* 214.

¹⁸ See, e.g., *Commonwealth v. Rowe*, 433 Pa. 14, 249 A.2d 911 (1969).

one prefers to free one criminal if the probable effect of the action is to deter ten improper searches, and whether one is prepared to free ten criminals on the chance that one improper search might be deterred.

Among the factors relevant to making these choices are the number of policemen who make unlawful searches and the total number of illegal searches made. It may also be relevant to consider the type of improper search that commonly occurs. One might be more willing to extend the exclusionary rule if the effect were to deter warrantless searches of homes, than if the primary effect were to deter unreasonable searches of garages.

Although the Court is aware of society's conflicting desires both to punish wrongdoers and to deter illegal police conduct, it often decides cases without adequately considering the conflict. For instance, in *Kaufman v. United States*,¹⁹ the Court held that a convicted defendant who failed to raise a search and seizure claim in a federal criminal trial may raise this claim in a federal post-conviction proceeding.²⁰ The Court explicitly rejected the prosecution's argument that the minimal additional deterrence gained by allowing collateral attack was outweighed by the social cost of releasing guilty defendants.²¹

It is arguable that the rule of standing is no longer justifiable after *Kaufman*. Allowing defendants to assert search and seizure claims on collateral attack will have virtually no deterrent effect on law-enforcement officers because the incidence of such cases is relatively rare and "as unforeseeable as the flip of a coin."²² Furthermore, the existence of such a remedy may result in the loss of relevant evidence at criminal trials,²³ and decreases the probability that a criminal judgment will be final.²⁴

On the other hand, just two weeks before deciding *Kaufman*, the Court in *Alderman v. United States*²⁵ reaffirmed the doctrine of stand-

¹⁹ 394 U.S. 217 (1969).

²⁰ 28 U.S.C. § 2255 (1964) gives prisoners convicted under an act of Congress the right to "move the court which imposed the sentence to vacate, set aside or correct the sentence."

²¹ 394 U.S. at 225 (emphasis added):

[W]e have already rejected this approach with respect to the availability of the federal habeas corpus remedy to state prisoners. This rejection was premised in large part on a recognition that *the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake.*

²² Amsterdam, *supra* note 7, at 390.

²³ The loss of evidence will be most significant in this situation because it will result in the retrial of a person who has already been adjudged guilty of criminal conduct.

²⁴ See Amsterdam, *supra* note 7, at 383-84. See generally Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

²⁵ 394 U.S. 165 (1969).

ing and specifically stated that it is premised on the notion that in certain cases the additional deterrent effect gained through exclusion does not outweigh the social cost of excluding relevant evidence at a criminal trial.²⁶ Thus *Kaufman* does not augur the end of standing. Indeed, a social planner could suggest that since *Kaufman* closed one avenue by which courts can prevent the exclusionary rule from operating beyond the point of optimal deterrence, some broadening of the other avenues, of which standing is one, is desirable.

Pending the availability of the data necessary to locate the point of "optimal deterrence," some working assumptions are necessary. Our first premise is that the exclusionary rule significantly deters the police in certain situations.²⁷ It is only reasonable that the police are generally deterred from making an unlawful search when their primary incentive for making the search is removed.²⁸ Given both the Court's commitment to the exclusionary rule²⁹ and its acknowledgment that the rule does not operate when only marginal deterrence is gained,³⁰ our second assumption is that, ordinarily, the social cost of excluding relevant evidence should be incurred only when it is likely to deter unreasonable searches. Working on these assumptions, the remainder of this Article will show that the present rules of standing do not strike a proper balance between effective deterrence of unreasonable searches and admission of relevant evidence, and that there are more appropriate means to achieve this end.

II. THE PRESENT LAW OF STANDING

A. *Jones v. United States*

Derived from the common law rules of trespass to real property,³¹ the law of standing originally applied to only a narrow class of per-

²⁶ *Id.* at 175.

²⁷ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁸ For instance, in *People v. Cahan*, 44 Cal. 2d 434, 448, 282 P.2d 905, 913 (1955), it was stated:

Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives.

²⁹ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁰ See *Alderman v. United States*, 394 U.S. 165, 175 (1969).

³¹ See *Edwards, Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471 (1952).

sons,³² presented subtle technical questions concerning property interests, and resulted in confusing and contradictory decisions.³³

In the landmark case of *Jones v. United States*,³⁴ the Supreme Court declared:

[I]t is unnecessary and 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 law³⁵

Justice Frankfurter wrote for the Court:

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.³⁶

Frankfurter defined "directed at" by stating that one will only have standing if he establishes "that he himself was the victim of an invasion of privacy."³⁷ While this basic requirement did not deviate from the rule prior to *Jones*,³⁸ the decision redefined the law of standing in two ways. First, the Court removed the dilemma that had previously confronted defendants who, in order to establish standing, were forced to claim that they either owned or had a possessory interest in the property searched, although this admission could be later used in a criminal prosecution against them. For example, if to establish standing, Jones claimed that he was in possession of narcotics that had been illegally seized by the police, this testimony could be used against him at his

³² If the defendant was the owner, but not the occupant, he was denied standing to exclude evidence obtained by means of the illegal search and seizure. *See id.* 472-76. Application of these property rules resulted in a denial of standing to guests, *Gaskins v. United States*, 218 F.2d 47 (D.C. Cir. 1955); *In re Nassetta*, 125 F.2d 924 (2d Cir. 1942), to employees, *Kelly v. United States*, 61 F.2d 843 (8th Cir. 1932); and to other individuals whose possessory interest in the seized property was slight and temporary, *e.g.*, *Lewis v. United States*, 92 F.2d 952 (10th Cir. 1937).

³³ Ascertaining whether the defendant had "possession" of the article involved was a complex task. *Compare* *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951), *with* *United States v. Ebeling*, 146 F.2d 254 (2d Cir. 1944).

³⁴ 362 U.S. 257 (1960). Jones was a guest in the apartment of a friend, which he was allowed to use at will. He kept a suit and shirt at the apartment, although his home was elsewhere. Prior to his arrest, he had slept there "maybe a night." Pursuant to a search warrant naming Jones and another woman as occupants of the apartment, police searched the premises for narcotics. Jones was the only person present.

³⁵ *Id.* at 266.

³⁶ *Id.* at 261.

³⁷ *Id.*

³⁸ *See* text accompanying notes 31-33 *supra*.

trial for illegal possession of narcotics.³⁹ To resolve the dilemma, the Court held that when a defendant faced such a choice, he had standing, and the Court would not look to see if there was an interest in the premises searched or the property seized.⁴⁰

Second, while it emphasized that in other cases the defendant would have to satisfy the traditional requirement of showing the requisite interest in the premises searched or the property seized, the Court enlarged the definition of that interest to include anyone legitimately on the premises at the time of an unlawful search.⁴¹

B. *Later Interpretations of Jones*

While *Jones* established basic guidelines to use in determining standing, state and lower federal courts were left with the problem of giving more precise definition to the articulated criteria. Recent decisions of the Supreme Court make this task more difficult by questioning, both explicitly and implicitly, the viability of the *Jones* tests. The present status of standing is best understood by examining separately the development of the two basic refinements of *Jones*.

1. Standing to Avoid the Dilemma

To resolve the dilemma posed for defendants prior to *Jones* the Court held that when one is faced with a situation in which objecting to the introduction of evidence by admitting to ownership or possession would also be admitting commission of a crime, the defendant automatically has standing.⁴² In general, the lower courts have limited application of this doctrine to cases in which the government is seeking to obtain a conviction for a possessory crime on the basis of the defendant's possession of the evidence at the time of the search.⁴³ The

³⁹ *Fowler v. United States*, 239 F.2d 93 (10th Cir. 1956); *Heller v. United States*, 57 F.2d 627 (7th Cir.), cert. denied, 286 U.S. 567 (1932).

⁴⁰

The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged.

362 U.S. at 263.

⁴¹

No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him.

Id. at 267.

⁴² *Id.* at 263.

⁴³ *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968); *Banks v. Peppersack*, 244 F. Supp. 675 (D. Md. 1965); *United States v. Thomas*, 216 F. Supp. 942 (N.D. Cal. 1963); *People v. Vaglica*, 99 Ill. App. 2d 194, 240 N.E.2d 271 (1968); *State v. Cadigan*, — Me. —, 249 A.2d 750 (1969). *But see Stewart v. State*, 1 Md. App. 309, 229 A.2d 727 (1967).

Third Circuit, however, has held that even in this situation, the defendant is not entitled to standing where "possession is only one element of the crime charged."⁴⁴

In cases where the government seeks to establish a prima facie case based on the defendant's possession of the evidence at the time of the search, courts generally allow the accused standing.⁴⁵ However, in cases where "conviction [does] not flow from the [defendant's] possession . . . [of the evidence] at the time of search,"⁴⁶ a majority of courts refuse to extend the "standing to avoid the dilemma" principle to situations where possession of the goods in question is either an element⁴⁷ or prima facie evidence⁴⁸ of the crime charged. No court allows a defendant standing on the theory that an admission of possession or ownership would tend to convict him of a crime.⁴⁹

If statements made by the defendant at a preliminary motion to suppress evidence can be used against him at trial,⁵⁰ the cases narrowly limiting the operation of the "dilemma" principle are improper. A defendant charged with unlawful possession of goods stolen in interstate commerce who must admit possession of the stolen goods to establish standing⁵¹ is faced with a choice no less gruesome than the one

⁴⁴ *United States v. Konigsberg*, 336 F.2d 844, 847 (3d Cir.), *cert. denied*, 379 U.S. 933 (1964). Since possession of narcotics was not the sole element of the crimes charged in *Jones, Konigsberg* is directly in conflict with the Supreme Court holding. *See also United States v. Wood*, 270 F. Supp. 963 (S.D.N.Y. 1967) (applying the *Konigsberg* rationale in a situation in which the defendant was not in possession of the evidence seized at the time of the search).

⁴⁵ *Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965); *Plazola v. United States*, 291 F.2d 56 (9th Cir. 1961); *United States v. Festa*, 192 F. Supp. 160 (D. Mass. 1960). *But see Williams v. United States*, 323 F.2d 90 (10th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964); *Harper v. State*, — Nev. —, 440 P.2d 893 (1968).

⁴⁶ *E.g.*, *United States v. Beigel*, 370 F.2d 751, 756 (2d Cir.), *cert. denied*, 387 U.S. 930 (1967).

⁴⁷ *See Seay v. United States*, 380 F.2d 358 (5th Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968); *United States v. Coots*, 196 F. Supp. 775 (E.D. Tenn. 1961); *Ball v. State*, — Miss. —, 194 So. 2d 502 (1967); *People v. Estrada*, 23 N.Y.2d 719, 244 N.E.2d 57, 296 N.Y.S.2d 364 (1968), *cert. denied*, — U.S. — (1969). *But see Velasquez v. Rhay*, 408 F.2d 9 (9th Cir. 1969); *United States v. Lewis*, 270 F. Supp. 807 (S.D.N.Y. 1967), *aff'd*, 392 F.2d 377 (2d Cir.), *cert. denied*, 393 U.S. 891 (1968).

⁴⁸ *United States v. Cowan*, 396 F.2d 83 (2d Cir. 1968); *Woodring v. United States*, 367 F.2d 968 (10th Cir. 1966); *People v. Cefaro*, 21 N.Y.2d 252, 234 N.E.2d 423, 287 N.Y.S.2d 371 (1967). *But see United States ex rel. Coffey v. Fay*, 344 F.2d 625 (2d Cir. 1965).

⁴⁹ *See United States v. Grosso*, 358 F.2d 154 (3d Cir. 1965), *rev'd on other grounds*, 390 U.S. 62 (1968); *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961); *United States ex rel. Smith v. Reincke*, 239 F. Supp. 887 (D. Conn.), *aff'd on other grounds*, 354 F.2d 418 (2d Cir. 1965), *cert. denied*, 384 U.S. 993 (1966).

⁵⁰ Justice Frankfurter commented only briefly on this point in *Jones*: [The defendant] has been faced . . . with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may be by no means an inevitable holding
362 U.S. at 262.

⁵¹ *United States v. Konigsberg*, 336 F.2d 844 (3d Cir.), *cert. denied*, 379 U.S. 933 (1964).

which confronted Cecil Jones. Similarly, a defendant who must admit ownership or possession of marked money used for the purpose of purchasing narcotics to secure standing finds himself in an equally unenviable position.⁵²

However, in *Murphy v. Waterfront Commission*⁵³ the Court protected the defendants' fifth amendment rights by holding that while they could be required to answer questions put by a two-state investigating commission which had granted them immunity from state prosecution, their testimony could not be used against them in any subsequent federal prosecution. This suggests that the "dilemma" problem might be solved by restricting the prosecution's subsequent use of defendant's pretrial testimony rather than by automatically granting standing. This approach would protect fifth amendment rights while keeping the standing doctrine faithful to the purposes of the exclusionary rule.

In *Simmons v. United States*,⁵⁴ the Court used the *Murphy* doctrine to hold that testimony given by a defendant at a pre-trial motion to suppress evidence cannot be used as part of the Government's case in chief against the defendant. On the basis of this holding, a defendant caught in the *Jones* dilemma could establish the interest necessary for standing without fear that his words would be used against him at trial. In fact, there is language in *Miranda v. Arizona*⁵⁵ which, if read in light of *Simmons*, suggests that such testimony could not even be used for impeachment. *Miranda* says that impeaching statements are incriminating and are, therefore, admissible only if the defendant makes them after effective waiver of his privilege against self-incrimination.⁵⁶ *Simmons* holds that a defendant testifying at a hearing on a fourth amendment claim does not waive his privilege.⁵⁷ It seems, therefore, that the defendant is protected against any use of this testimony at his trial.⁵⁸

⁵² *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961).

⁵³ 378 U.S. 52 (1964).

⁵⁴ 390 U.S. 377 (1968).

⁵⁵ 384 U.S. 436 (1966).

⁵⁶ *Id.* at 477. *But cf.* *Walder v. United States*, 347 U.S. 62 (1954) (holding that where a defendant testified on direct examination that he had never possessed any heroin, the prosecution could introduce evidence of heroin unlawfully seized in connection with an earlier proceeding for the purpose of impeaching his credibility).

⁵⁷ 390 U.S. at 394.

⁵⁸ The dilemma is not entirely eliminated because there still exists the possibility of a subsequent perjury prosecution if trial and pretrial statements are inconsistent. However, in a conversation on June 23, 1969, Paul Michel, Assistant District Attorney in charge of the Miscellaneous Court Bureau in Philadelphia, stated that there is a general feeling among American prosecutors that this type of action should not be brought, and that in the past 10 years there have been none in Philadelphia. Thus, this danger seems quite small.

If *Simmons* adequately protects the fifth amendment right of defendants who wish to establish standing, is there any basis for continued application of the "standing to avoid the dilemma" rule? Justice Frankfurter suggested an alternative basis for the rule in the following language from *Jones*:

The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.⁵⁹

This statement articulates a principle of estoppel based on the belief that the Government's high standard of responsibility in the administration of the criminal law should preclude it from profiting from conspicuous and unseemly inconsistencies.⁶⁰ While this principle can properly be applied in a case like *Jones* in which the Court exercises its supervisory power over lower federal courts, its application to state courts as a matter of federal constitutional law is questionable. While minimum constitutional standards of propriety are imposed on state prosecutors,⁶¹ no Supreme Court case has ever suggested that the state government may not attempt to gain a conviction by asserting inconsistent positions at two separate stages in the criminal process. Thus, Frankfurter's rationale would probably support the retention of the "standing to avoid the dilemma" principle only in federal cases.⁶²

Despite *Simmons*' apparent undermining of the "dilemma" portion of *Jones*, no court has indicated a willingness to discard or alter the principle of conferring standing to avoid the dilemma. In fact, one federal court has given an unusually broad interpretation to the principle by granting standing to a defendant in a case where the Government was not claiming that he had possession at the time of the search

⁵⁹ 362 U.S. at 263-64.

⁶⁰ The inconsistency results from the government first taking the position on a motion to suppress that defendant did not own or possess certain evidence at the time of a search, only to later claim at trial that he did.

⁶¹ See *Miller v. Pate*, 386 U.S. 1 (1967) (knowing use by the prosecution of false evidence is a denial of due process); *Napue v. Illinois*, 360 U.S. 264 (1959) (due process was violated at defendant's murder trial when the prosecution did nothing to correct the false statement of the state's principal witness that he received no consideration in return for his testimony).

⁶² In cases where the government is seeking to obtain a conviction on the theory that the defendant possessed the evidence in question at a time prior to the search, see, e.g., *United States v. Cowan*, 396 F.2d 83 (2d Cir. 1968), Justice Frankfurter's rationale would not apply, because the government could consistently take the position that at the time of the search the defendant did not have sufficient possessory interest in the items seized to be entitled to standing.

and was not, therefore, taking inconsistent positions.⁶³ Yet it is certainly apparent that *Murphy* and *Simmons*⁶⁴ make the rule less necessary. Courts that continue blindly to allow standing to avoid a theoretical dilemma may find that they are applying a rule without a reason. If that is true, the rule ought to be scrapped.

2. The Requisite Interest in the Premises Searched or Property Seized

Jones did not purport to discard the notion that standing could be established by showing a possessory or proprietary interest in either the premises searched or the property seized.⁶⁵ The case merely added an additional interest to the interests protected by the fourth amendment—an interest established by being “legitimately on [the] premises” at the time of the search.⁶⁶

Justice Frankfurter’s recognition of this new protected interest has had a major impact. With few exceptions,⁶⁷ courts have literally applied this language and held that standing will automatically be conferred on anyone legitimately on the premises at the time of a search.⁶⁸

⁶³ *Glisson v. United States*, 406 F.2d 423, 427 (5th Cir. 1969). If the defendant’s motion to suppress was heard before *Simmons* was decided (March 18, 1968), the defendant could claim that *Simmons* is inapplicable because at the time of the hearing, he was inhibited from testifying by his fear that any testimony given would be used against him at his trial. In view of *Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964), a defendant making this claim should only be entitled to a new hearing on the motion to suppress. At the new hearing, he could testify without fear that his testimony could later be used against him.

⁶⁴ At least one court has noted that *Simmons* may have the effect of undermining the standing to avoid the dilemma principle established in *Jones*. *Commonwealth v. Rowe*, 433 Pa. 14, 17 n.3, 249 A.2d 911, 912 n.3 (1969).

⁶⁵ For a discussion of the derivation of the law of standing from ancient property concepts, see notes 31-33 *supra* & accompanying text. Even after *Jones*, the vestiges of property law have not been entirely divorced from the application of the fourth amendment. For instance, authorities have split on whether to grant standing to a defendant who is in unlawful possession of the premises searched or the property seized. Cases have held that a driver of a stolen car does not have standing to object to a search, because he has no lawful property interest in the car. *E.g.*, *Harper v. State*, — Nev. —, 440 P.2d 893 (1968). *Contra*, *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967).

⁶⁶ See 362 U.S. at 267.

⁶⁷ See *Thomas v. United States*, 394 F.2d 247 (10th Cir. 1968), *cert. denied*, 394 U.S. 931 (1969) (defendant who agreed to take police to the searched premises held not to have standing); *Ramirez v. United States*, 294 F.2d 277 (9th Cir. 1961) (defendant who was in a narcotics agent’s room at the time his wife’s purse was searched held not to have standing).

⁶⁸ See, *e.g.*, *Garza-Fuentes v. United States*, 400 F.2d 219 (5th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969) (defendants had arrived a few minutes before the police); *Montoya v. United States*, 392 F.2d 731 (5th Cir. 1968) (defendant was a guest in a hotel room she did not sign for); *United States v. Pisano*, 191 F. Supp. 861 (S.D.N.Y. 1961) (defendant was an employee in a store). A defendant who has at least as much access to the premises searched as *Jones* had to his friend’s apartment is generally granted standing. *Villano v. United States*, 310 F.2d 680 (10th Cir. 1962) (employee has standing to object to search of the desk where he worked); *Burge v. United States*, 333 F.2d 210 (9th Cir. 1964), *cert. denied*, 382 U.S. 829 (1965) (house guest has standing to object to a search of a bathroom which he shared with the lessee of the apartment).

In some cases, application of this rule seems unduly rigid. For example, if a casual visitor happens to be on the premises at the time the police arrive, he will have standing;⁶⁹ yet, if he leaves the premises one minute before the police arrive or delays his visit until after the police have made their search, he will not.⁷⁰

*Mancusi v. DeForte*⁷¹ may signal a shift from a rigid application of the "legitimately on the premises" test. State officials, acting without a warrant, seized union records from an office shared by DeForte and several other union officials. DeForte, who was present at the time of the search, objected. Although the Court recognized that DeForte clearly had standing under the "legitimately on the premises" test,⁷² it went on to state:

The Court's recent decision in *Katz v. United States*, also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. The crucial issue, therefore, is whether, in light of all the circumstances, DeForte's office was such a place.⁷³

The Court held that under this rationale DeForte should have standing because

DeForte . . . could reasonably have expected that only [the union officials sharing the office] and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups.⁷⁴

To strengthen its conclusion, the Court compared DeForte's expectation of privacy with that of Cecil Jones, and concluded that under the specific holding of *Jones*, DeForte should be granted standing.⁷⁵ Rather than serving to support the holding, emphasis on the facts in *Jones* only makes the decision confusing. As Justice Black correctly pointed out in his dissent, if the majority was relying on the "legitimately on the premises" test, there was no need for any analysis of "reasonable expectations."⁷⁶

⁶⁹ See, e.g., *State v. Cadigan*, — Me. —, 249 A.2d 750 (1969).

⁷⁰ But see *Spinelli v. United States*, 393 U.S. 410 (1969) (defendant is treated as though he were on premises at the time of a search when police delay search until he leaves those premises).

⁷¹ 392 U.S. 364 (1968).

⁷² *Id.* at 368-69.

⁷³ *Id.* at 368 (citations omitted).

⁷⁴ *Id.* at 369.

⁷⁵ *Id.* at 370.

⁷⁶ *Id.* at 376.

In his concurring opinion in *Katz v. United States*,⁷⁷ Justice Harlan emphasized that the reason the fourth amendment is violated when federal officers use electronic listening devices to overhear statements made by a defendant in a public phone booth is that the booth is a temporarily private place, and its occupants are reasonably entitled to rely on freedom from intrusion. Similarly, Justice Harlan, writing for the majority in *Mancusi*, states that the defendants in both *Jones* and *Mancusi* are entitled to standing because they had "reasonable expectations" of privacy.⁷⁸

The concept of "reasonable expectations" is difficult to apply.⁷⁹ Its probable focus is on the extent of one's interest in the area searched. At some point, the individual has a sufficient interest in an area to "reasonably expect" that his privacy will not be unlawfully invaded. Justice Harlan's citation in *Mancusi* of the "legitimately on the premises" language from *Jones* may indicate that the *Jones* test has not been altered—anyone legitimately on the premises at the time of the search may have the requisite interest. On the other hand, his emphasis on the specific facts of the two cases may indicate that a defendant will not have standing unless he has as much interest in the area searched as *Jones* and DeForte. If the latter reading of the Court's intent is correct, *Mancusi* would severely reduce the number of cases in which defendants can object to illegal searches.⁸⁰

III. TOWARD A RATIONAL RULE OF STANDING

A. *Problems With the Present Law*

Under present tests for determining standing, the defendant must have been a "victim" of the illegal search, in the sense that he suffered

⁷⁷ 389 U.S. 347, 361 (1967).

⁷⁸ 392 U.S. at 370.

⁷⁹ For example, it would be absurd to deny *Katz* standing merely because, as a professional gambler, he would reasonably expect federal agents to monitor his calls. Compare, Bishop, *Privacy v. Protection—The Bugged Society*, N.Y. Times, June 8, 1969, § 6 (Magazine), at 30.

⁸⁰ Later decisions have done little to clarify the meaning of *Mancusi*. In *Alderman v. United States*, 394 U.S. 165 (1969), the Court held that a defendant would have standing to object to evidence obtained by unlawful electronic surveillance if the government unlawfully overheard his conversations or those of others occurring on his premises, whether or not he was present. *Id.* at 176. The Court's apparent failure to protect people "legitimately on the premises" at the time of the wiretap may indicate that it accepts a restrictive reading of *Mancusi*. On the other hand, since special factors must be taken into account in formulating rules of standing in wiretapping cases, the Court's holding may have no application to rules of standing in other areas of search and seizure. See text accompanying notes 145-71 *infra*.

Two recent state cases have broadly construed Justice Harlan's language in *Mancusi*. See *State v. Matias*, — Hawaii —, 451 P.2d 257 (1969); *Commonwealth v. Rowe*, 433 Pa. 14, 249 A.2d 911 (1969).

an invasion of privacy, before he will be afforded standing to exclude the illegally obtained evidence. He will not have standing to complain that an illegal search of a third party was in reality directed at him.⁸¹

Three examples will serve to illustrate the application of this principle. First, in *United States v. Konigsberg*,⁸² investigation by federal agents led them to believe that a certain garage was being used by defendant Zax and others temporarily to store stolen clothes. During their surveillance of the garage, the agents observed piles of suits on the garage floor and in a nearby automobile. They immediately arrested the four men on the scene. Zax was arrested the following day. When the five men were tried for unlawful possession of stolen goods, the court held that none of the defendants had standing to object to the search.⁸³

The second example is *Ramirez v. United States*,⁸⁴ involving a special employee of the Bureau of Narcotics who twice purchased narcotics from the defendant with marked money. Although he principally conducted business with the defendant, the agent also spoke to the defendant's wife over the phone concerning future narcotics transactions. When the defendant and his wife were arrested, a search of the wife's purse disclosed some of the marked money. Since the defendant and his wife both claimed that the money belonged to her, the court held that the defendant had no standing to challenge the search of his wife's purse.

In *Parker v. United States*,⁸⁵ the third illustration, pursuant to a search warrant issued on August 19, federal agents searched suspect

⁸¹ See, e.g., *Parker v. United States*, 407 F.2d 540 (9th Cir. 1969); *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858 (1968); *United States v. Cowan*, 396 F.2d 83 (2d Cir. 1968); *Sumrall v. United States*, 382 F.2d 651 (10th Cir. 1967), cert. denied, 389 U.S. 1055 (1968); *Seay v. United States*, 380 F.2d 358 (5th Cir. 1967), cert. denied, 389 U.S. 1047 (1968); *United States v. Konigsberg*, 336 F.2d 844 (3d Cir.), cert. denied, 379 U.S. 933 (1964); *United States v. Hopps*, 331 F.2d 332 (4th Cir.), cert. denied, 379 U.S. 820 (1964).

⁸² 336 F.2d 844 (3d Cir.), cert. denied, 379 U.S. 933 (1964).

⁸³ The court held that the defendants had not established that they were legitimately on the premises because Zax testified that he had leased the garage to a Mr. Pope. *Id.* at 846. The court also rejected the defendants' argument that standing should be conferred because conviction of the crime charged flowed from their possession of the evidence seized. *Id.* at 847. See notes 43-45 *supra*.

⁸⁴ 294 F.2d 277 (9th Cir. 1961).

⁸⁵ 407 F.2d 540 (9th Cir. 1969). In *Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965), the court recognized the problems caused by denying standing to a defendant who is the target of police investigation. In *Simpson*, officers suspected that the defendant was in possession of a stolen car. Incident to an unlawful arrest they made an unlawful search of the car. In rejecting the government's argument that the defendant should be denied standing to object to the search of the car because he had no right of ownership in it, the court said:

Such a construction of the Fourth Amendment would totally negate the effect of the Weeks-McNabb exclusionary rule in regard to automobiles. Federal officers could search cars at will and, of all defendants prosecuted for automobile theft, only those who actually owned the automobile could raise Fourth Amendment objections successfully. Moreover, the proof of ownership would

Parker's house and found \$18,000 in counterfeit money. Pursuant to a second search warrant issued on August 20, they searched the house of suspect Slaney and found a small printing press. The court held that Parker could not object to introduction into evidence of the printing press because he had no standing to object to a search of Slaney's house.

Since the officers in all three cases apparently made the searches in question primarily for the purpose of obtaining evidence against the people who were later tried, knowledge on their part that these people did not have standing to challenge the search might have influenced their decision whether or not to make the search. For example, if the agents in *Parker* only desired to obtain evidence for use against Parker, they might have said to themselves: "If we search Slaney's house, Parker will have no standing to object. Since we are only interested in obtaining evidence against Parker, we will proceed with the search without regard to whether it is reasonable under the fourth amendment." Thus, in a significant number of cases,⁸⁶ the present rule of standing has the potential not only to dissipate the deterrent effect of the exclusionary rule, but also to foster cynicism in law enforcement officers by providing them with an opportunity readily to circumvent its operation. If standing is to be retained, the reason for retention will be that the rule bears a reasonable relation to the deterrent objective of the exclusionary rule. In its present form it merely encourages the police to search the homes of people they believe to be innocent, leaving the privacy of those they believe to be guilty undisturbed. This encouragement is certainly not consistent with the purpose underlying exclusion. Therefore, a refurbished rule of standing must be introduced to eliminate these anomalies.⁸⁷

be sufficient to quash the prosecution for theft of the automobile. These constitutional rights belong to the guilty as well as the innocent.

Id. at 294. The court held that on the basis of his possessory interest in the automobile the defendant must be granted standing. On rehearing, it added that the defendant should also be granted standing so that he would not have to testify on a motion to suppress that he was in possession of a stolen car. *Id.* at 295.

⁸⁶ Cases cited note 81 *supra*. The precise frequency with which the present rules deny standing to a defendant who was the target of the officer's investigation is not easily determined. Since most cases do not consider the officer's subjective intent in resolving issues of standing, a court's statement of facts will often leave no real indication of the extent to which the police were investigating the defendant on trial at the time of the search. Nothing in the recited facts gives any indication why the search was made. *See, e.g.,* *Elbel v. United States*, 364 F.2d 127 (10th Cir. 1966), *cert. denied*, 385 U.S. 1014 (1967). *See also* *United States v. Reyes*, 280 F. Supp. 267 (S.D.N.Y. 1968); *United States v. Wood*, 270 F. Supp. 963 (S.D.N.Y. 1967); *Schepps v. State*, 432 S.W.2d 926 (Tex. Crim. App. 1968).

⁸⁷ Some commentators assert that there is no significant danger that the police will intentionally violate fourth amendment rights. *See, e.g.,* *Weeks, Standing to Object in the Field of Search and Seizure*, 6 ARIZ. L. REV. 65, 79 (1964). However, recent studies indicate that the police do not perceive themselves as violating the law when they infringe upon the constitutional rights of a criminal defendant. *See* J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966); *cf.* A. NIEDERHOFER, *BEHIND THE SHIELD* (1967).

B. *A Proposed Rule*

To achieve maximum deterrent impact while eliminating the problems in cases like *Konigsberg*, *Ramirez*, and *Parker*, courts should attempt to assess the effect which admitting illegally obtained evidence in one case will have on law enforcement officers in future cases. This policy can best be implemented by focusing on the extent to which the officer intended at the time of the search to find evidence relating to the defendant. If an officer sought to obtain evidence against *A* and had no interest whatsoever in finding evidence against *B*, information concerning the probable admissibility of the evidence against *A* would have a major impact on the officer's conduct. On the other hand, knowledge of the probable admissibility of the evidence against *B* would not influence the officer, since by hypothesis he had no reason to believe that *B* had committed an offense. If this analysis is adopted, standing will not turn on the extent to which the defendant's privacy was invaded, but rather on the extent to which the officer intended to find evidence against the defendant when he searched.⁸⁸

Such an approach is not without judicial support. In *Rosencranz v. United States*⁸⁹ the majority held that Rosencranz should have standing because he was a codefendant of the victim of an unlawful invasion of privacy.⁹⁰ In a concurring opinion, Judge Aldrich suggested his notion of a proper basis for granting standing:

[T]he real basis of the exclusionary rule is its effect as a police deterrent, and . . . the rule should be fashioned to deter the accomplishment of whatever purpose the police were improperly attempting to further. I believe, accordingly, that the present defendants' rights . . . stem from their own status as parties against whom the search was directed.⁹¹

⁸⁸ Adopting a rule which grants standing to an individual solely on the basis of whether prosecution against him was intended in some cases arguably discards a notion that standing should not be given to *A* to assert the constitutional rights of *B*. If only *B*'s house is searched to obtain evidence against *A*, if *A* can invoke the exclusionary rule he is asserting the rights of *B* to be secure in his person, houses, papers, and effects. One could try to get around this analysis by saying that in fact what is happening is that the rights of *A* are being expanded: that he now has the right to be proceeded against legally by the police. But to find that right in the fourth amendment is a fiction. It is better to recognize the departure from a previous notion of standing, and to state simply that to effect the objectives of *Mapp* such a departure is necessary.

⁸⁹ 334 F.2d 738 (1st Cir. 1964).

⁹⁰ *Id.* at 740-41.

⁹¹ *Id.* at 742. The majority refused to accept this reasoning and based its decision on *McDonald v. United States*, 335 U.S. 451 (1948). In *Alderman v. United States*, 394 U.S. 165, 173 n.7 (1969), the Court expressly repudiated this reading of *McDonald* and held that a defendant does not have standing to object to evidence tainted by illegal electronic surveillance merely because it would be inadmissible against a codefendant.

Two lower federal courts have explicitly granted a defendant standing on the ground that at the time of the search he was the target of the investigation.⁹² In both cases illegal searches of the property of third parties led to evidence which was used against the defendants. The reasoning used by the courts to grant standing is illustrated by the language in *Binkiewicz v. United States*:⁹³

The search here involved was directed not just at Painten [actual victim of the search] but also "against all those, whether their identities were known or not," who might be engaged in the commission of the crime.

Both cases interpret *Jones* in a manner consistent with the proposed approach.

In *Alderman v. United States*,⁹⁴ however, the Supreme Court made it clear that it is not yet prepared to alter its interpretation of *Jones*:

Ordinarily . . . it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.⁹⁵

But in a dissenting opinion Mr. Justice Fortas urged the Court to read *Jones* as holding that:

The Government violates [a defendant's] rights when it seeks to deprive him of his liberty by unlawfully *seizing evidence in the course of an investigation of him* and using it against him at trial.⁹⁶

If the proposed analysis suggested in this Article and in Justice Fortas's dissent in *Alderman* is adopted, different outcomes would result in cases similar to *Konigsberg*, *Ramirez*, and *Parker*, and a major defect in the present operation of the exclusionary rule would be remedied. Nevertheless, the formulation of a rule which will function in

⁹² *Binkiewicz v. United States*, 281 F. Supp. 233 (D. Mass. 1968) (alternative holding) (defendant granted standing to object to introduction of evidence seized illegally from apartment of codefendant); *United States v. Birrell*, 242 F. Supp. 191 (S.D.N.Y. 1965) (alternative holding), *rev'd on other grounds*, 400 F.2d 93 (2d Cir. 1968) (defendant granted standing to object to introduction of documents seized illegally from his attorney); *cf. Baker v. United States*, 401 F.2d 958, 983 (D.C. Cir. 1968). *Baker* is discussed in the text accompanying notes 151-54 *infra*. See also *United States v. Masterson*, 383 F.2d 610, 613 (2d Cir. 1967) (dictum), *cert. denied*, 390 U.S. 954 (1968).

⁹³ 281 F. Supp. 233, 237 (D. Mass. 1968).

⁹⁴ 394 U.S. 165 (1969).

⁹⁵ *Id.* at 173 (quoting *Jones v. United States*, 362 U.S. 257, 261 (1960)). For a more thorough discussion of *Alderman*, see text accompanying notes 158-64 *infra*.

⁹⁶ 394 U.S. at 209 (emphasis added).

all possible situations remains a complex task. An examination of four general factual situations will illustrate the spectrum within which the courts must operate when applying the proposed standard.

Police are often tempted to make illegal searches during the investigation of a large conspiracy.⁹⁷ Once the police have established that several individuals are involved, they may deem it worthwhile to violate the constitutional rights of one member of the conspiracy (particularly a minor member) in order to obtain evidence for use against others.⁹⁸ The present rule of standing encourages such an approach because the police know that the evidence which they seize in an unlawful search will be suppressed only in the trial of the victim of the search.⁹⁹ However, if all members of the conspiracy were guaranteed standing, the illegal search would be valueless to the police. In fact, it would cripple their efforts to secure convictions.

A second common situation arises when officials conduct an illegal search to obtain evidence related to both the suspect who is the immediate subject of the search and the class of individuals who may be connected with the criminal venture in some unknown way. A narcotics investigation is an apt example.¹⁰⁰ To law enforcement officers, "narcotics arrests are seen as a series of increasingly larger steps up a ladder, at the top of which is the narcotics officer's prize: the 'source.'" ¹⁰¹ As in the first example, the loss caused by the suppression of evidence at the trial of the victim of the search is insignificant when compared to the more important convictions which the search may make possible. Granting standing to the entire class of unidentified suspects would have a significant deterrent effect.

A third type of case develops when the police have only one suspect for a certain crime, but in an illegal search aimed at him uncover evidence which implicates others in the same crime.¹⁰² In this situation,

⁹⁷ See, e.g., *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966).

⁹⁸ Where the police invade the privacy of an individual whom they believe to be the ringleader of a conspiracy, granting standing to a codefendant of this individual will have only a slight deterrent effect. The police would probably not have made the search if they had known that the evidence would not be admissible against the ringleader. *But see Note, Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1141 (1967).

⁹⁹ For other cases in which coconspirators were denied standing to object to a search which invaded the privacy of one member of the conspiracy, see *Matthews v. United States*, 407 F.2d 1371, 1383 (5th Cir. 1969) (appeal of Raymond Cook); *Sumrall v. United States*, 382 F.2d 651 (10th Cir. 1967), *cert. denied*, 389 U.S. 1055 (1968); *Granza v. United States*, 377 F.2d 746 (5th Cir.), *cert. denied*, 389 U.S. 939 (1967); *Diaz-Rosendo v. United States*, 357 F.2d 124 (9th Cir.), *cert. denied*, 385 U.S. 856 (1966); *United States v. Reyes*, 280 F. Supp. 267 (S.D.N.Y. 1968); *Robinson v. State*, — Miss. —, 219 So. 2d 916 (1969).

¹⁰⁰ See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963).

¹⁰¹ J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 143 (1966).

¹⁰² See, e.g., *Commonwealth v. Rowe*, 433 Pa. 14, 249 A.2d 911 (1969).

the decision to conduct the illegal search is made with only the one suspect in mind; the knowledge that any prospective defendants revealed by the search would have standing would have little influence on police action, since it is the identified suspect who is the primary concern of the police. Granting standing to such unknown defendants would therefore have little deterrent effect.

The fourth example is a variation of the preceding one. When the police conduct an illegal search against one suspect, they occasionally discover evidence leading to the indictment of another individual for a different crime.¹⁰³ In this case the police are solely interested in solving one crime; the existence of the other is not a consideration in police action relating to the first.¹⁰⁴ Here again, granting standing to the new defendant would have little or no impact on police conduct, because both his existence and the crime were unforeseen at the time the decision to search was made.

While the deterrence rationale may indicate that the defendant in each succeeding example is less entitled to standing than the defendant in the preceding one, no precise rule of standing can be formulated without more knowledge concerning the way in which the exclusionary rule operates and the value which society places on protecting fourth amendment rights.¹⁰⁵ In attempting to formulate a rule to cover these various situations, the assumptions on which the proposed approach is premised must be kept in mind. First, the exclusionary rule should not operate unless there is substantial likelihood that its operation will have a significant deterrent effect on law enforcement officers. Second, the police generally refrain from making an illegal search if they believe evidence obtained thereby may not be introduced against the primary target of their investigation.¹⁰⁶ Given these premises, which of the defendants in the four situations discussed should be granted standing?

At the time the searches are made in either of the first two situations, the police are primarily interested in obtaining evidence against either one or more of the actual defendants or at least the class of people to which the defendant belonged. Thus, in both cases, there is substantial risk that officers would make an unlawful search if they thought evidence thus obtained would be used against those who subsequently become defendants. Accordingly, the defendants in such situa-

¹⁰³ See, e.g., *Commonwealth v. Durring*, — Mass. —, 238 N.E.2d 508 (1968).

¹⁰⁴ For cases which are similar in this respect see *Boyle v. United States*, 395 F.2d 413 (9th Cir. 1968), *cert. denied*, 393 U.S. 1089 (1969); *United States v. Grosso*, 358 F.2d 154 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968); *United States v. Coots*, 196 F. Supp. 775 (E.D. Tenn. 1961).

¹⁰⁵ See text accompanying notes 5-26 *supra*.

¹⁰⁶ See text accompanying notes 28-30 *supra*.

tions should be granted standing¹⁰⁷ to maximize the deterrent potential of the exclusionary rule.

At the time of the search in situations three and four, the primary targets of the investigation are not the individuals who eventually become defendants. Police officers are not likely to make an unlawful search and seizure merely in the hope that evidence thus obtained could be used against people who were not their targets at the time of the search. Accordingly, the defendants in these cases should not be allowed standing.

In determining the officer's target at the time of the search, the focus should not be on the officer's statement of his intentions. To resolve the question whether evidence illegally obtained should be excluded on the basis of such a statement is to allow the officer to make the final determination on exclusion without proper judicial supervision. Such a rule would be completely contrary to the spirit of the fourth amendment.¹⁰⁸ Instead, the use of an objective standard is recommended.¹⁰⁹ The relevant question should be: against whom would a reasonable man in the position of this officer primarily want to obtain evidence? In many cases, the information the officer possessed at the time of the search will indicate the target of the search.¹¹⁰

From this analysis, then, the following rule of standing is recommended: if a reasonable man in the officer's position at the time of the search would seek to obtain evidence against either the defendant or the class of people to which the defendant belongs, the defendant has standing.

¹⁰⁷ One could argue that in the first situation sufficient deterrence would be achieved by granting standing to perhaps half or three-quarters of the conspirators. However, since there is no rational way for a court to determine which members of the conspiracy should be denied standing, the courts should grant all coconspirators standing. In this way, sufficient deterrence is achieved and the court avoids appearing capricious.

¹⁰⁸ Cf. *Johnson v. United States*, 333 U.S. 10, 13-15 (1947):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

¹⁰⁹ *But cf. Robbins v. MacKenzie*, 364 F.2d 45 (1st Cir.), *cert. denied*, 385 U.S. 913 (1966); *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964). In each of these cases an officer's statement describing his intent at the time of the search was used by the court to determine the reasonableness of the search.

¹¹⁰ *E.g., Commonwealth v. Rowe*, 433 Pa. 14, 249 A.2d 911 (1969). The officers made the search of Bailey's home after receiving a description which matched Bailey's and learning that Bailey had recently purchased ammunition the same as that used in the shooting. It is obvious that Bailey was the target of the search.

Granting standing to an individual against whom, either as an individual or as a member of a class, there was an intention to prosecute should suffice to deter most unlawful searches. The only case not covered by such a rule is, of course, an individual not in the minds of the police at the time of the search.¹¹¹ Since no deterrent purpose would be served by exclusion of evidence against that person and since deterrence will be served by granting standing to the objects of the search, the rule is justified.

However, in a case of flagrant abuse in which there is no particular individual or class in mind—that presented, for instance, by a random or area search—standing ought to be granted to all against whom evidence is obtained. This should be done both because there is otherwise no individual or class with standing and thus no deterrence at all, and because that kind of search is particularly offensive to the values protected by the fourth amendment.¹¹²

C. Possible Objections to the Proposed Rule

Several courts have either expressly¹¹³ or impliedly¹¹⁴ rejected this Article's approach.¹¹⁵ One basis for these rejections was articulated by Mr. Justice Harlan:

[T]he rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads as to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was planted and whether the police decision to plant a bug was motivated by an effort to obtain information against the accused or some other individual. I do not believe that this administrative burden is justified in any substantial degree by the hypothesized marginal increase in Fourth Amendment protection.¹¹⁶

¹¹¹ There is some danger that an officer knowing that illegally obtained evidence would be suppressed might intentionally make an illegal search hoping that the evidence seized would eventually lead to other evidence. However, in such a situation the doctrine of the scope of the taint might be available to deter such activity. See generally Pitler, *supra* note 11.

¹¹² Such a search is not likely to be made very frequently by police. However, with the aid of electronic techniques a random search is a real possibility. This special kind of problem is treated at text accompanying notes 145-71 *infra*.

Another case which should be treated separately—coerced confessions—is discussed at text accompanying notes 123-44 *infra*.

¹¹³ *E.g.*, *Baker v. United States*, 401 F.2d 958, 983 n.115 (D.C. Cir. 1968). *Baker* is discussed in the text accompanying notes 151-54 *supra*.

¹¹⁴ Cases cited note 81 *supra*.

¹¹⁵ The approach, that is, of having a rule of standing turn on the officer's probable intent at the time of the search. Naturally, the feasibility of the specific rule which the authors have advanced for consideration has not been discussed by the courts.

¹¹⁶ *Alderman v. United States*, 394 U.S. 165, 188 n.1 (1969) (Harlan, J., concurring in part and dissenting in part).

Probing the officer's intent at the time of an illegal search might lengthen hearings on motions to suppress in some cases, but in light of the broad examination of officers allowed by the courts on a motion to suppress, examination on this additional issue would not appreciably prolong the hearings, especially since no new witnesses would normally be called. In any event, Justice Harlan's assumption that the new rule would only "marginally" increase the fourth amendment protection is not justified. There are already a relatively large number of reported cases in which a defendant has been unable to challenge a search of a third person although it was directed at the defendant.¹¹⁷ The proposed rule would plug a gaping hole in the present law of standing while being true to the spirit of the exclusionary rule. This more than counterbalances the social cost of minimally increased litigation.¹¹⁸

A more significant problem with the proposal lies in its ambiguity, which gives unsympathetic trial judges an opportunity to draw inferences in applying the proposed rule that would make it difficult for a defendant to establish standing. Rather than allow the difficulty in applying the test to encourage unlawful searches, the state should bear the burden of proving that a reasonable man in the officer's position would not have primarily intended to obtain evidence against the defendant or the class of persons to which he belonged.¹¹⁹ A further safeguard could be added in the form of an irrebuttable presumption that police intend to obtain evidence against people whom they search and against those who own or possess property that is searched.¹²⁰ This in effect preserves the present law granting standing to individuals, the sanctity of whose persons or houses has been violated by the police.

Another objection surely to be raised is that the proposed test necessarily leads to uncertainty in the law of standing because courts are denied clear guidelines. This objection is the result of a misapprehension of the function of the standing requirement. Although clear and predictable rules of search and seizure are essential, similar

¹¹⁷ Cases cited note 81 *supra*.

¹¹⁸ An unarticulated basis for Justice Harlan's objection may be a belief that the new approach would exclude additional evidence from criminal trials. However, the new method could easily be adjusted to accommodate a judgment that too much evidence is being excluded from criminal trials. For example, the rule could be formulated to deny a defendant standing unless he was the only person under investigation at the time of the search. *See, e.g.,* *Bumper v. North Carolina*, 391 U.S. 543 (1968). Applied in place of the present rules, a rule of this type would decrease significantly the number of defendants granted standing.

¹¹⁹ Presently the defendant has the burden of establishing standing to object to a search and seizure. *E.g.,* *Murray v. United States*, 333 F.2d 409 (10th Cir. 1964), *vacated on other grounds*, 380 U.S. 527 (1965).

¹²⁰ *See Baker v. United States*, 401 F.2d 958, 983 n.115 (D.C. Cir. 1968). This comports with the present law of standing, if there is such a creature. *Cf.* text accompanying notes 71-80 *supra*. However, it is inappropriate to presume as the court does in *Baker* that anyone legitimately on the premises at the time of a search is a target of the law enforcement officers' investigation. In many situations, the police would have no interest in investigating all persons legitimately on searched premises.

rules of standing are undesirable. If a policeman has no firm guidelines defining legal searches, he will be more likely either to indulge in undesirable conduct or to refrain from that which is desirable.¹²¹ A rule of standing, on the other hand, is solely for the purpose of determining whether evidence unlawfully obtained should be excluded at trial. While the proposed standing rule should induce police officers to believe that evidence unlawfully obtained will probably be excluded, it should not enable an officer to determine the exact circumstances under which such evidence may be admitted. In fact, under present law, there is too much danger that the officer will make this determination and then decide that he will make an illegal search because the evidence thus obtained will not be excluded from trial.

Thus, the law of standing should be formulated so that a knowledgeable officer will be aware that evidence unlawfully obtained will be admissible only when "a thin chain of unusual circumstances"¹²² allows for an exception. The suggested rule attempts to achieve this end. The absence of predictability would not detract in any way from its effectiveness, but would insure that a police officer is constantly conscious of the need for a legal search.

Pending more information concerning the way in which the exclusionary rule works and the value which society places on a given amount of additional deterrence, any rule can only be tentative. Some people probably believe that if relatively few defendants are denied standing, the doctrine ought to be abolished, rather than replaced with complicated rules. However, it is the thesis of this Article that the work involved in administering the standard is partially compensated every time the denial of standing aids in convicting the perpetrator of a serious crime. Whenever standing is denied, the operation of the criminal law is improved. If only ten per cent of illegally obtained evidence is admissible, the favorable impact on the operation of the criminal law may be more than negligible. Without the exclusionary rule, fourth amendment protections would be less precious. Without standing, the purpose of exclusion is not served. With the standard proposed herein, the fundamental principle of deterrence is preserved, and standing becomes more meaningful.

IV. SPECIAL PROBLEMS OF STANDING

A. *Problems of Standing Raised by Fifth Amendment Violations*

Two variations of one hypothetical situation illustrate the special problems of standing which arise when the violation of an individual's

¹²¹ Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 552 n.379 (1964).

¹²² Davis v. United States, 327 F.2d 301, 306 (9th Cir. 1964).

fifth amendment rights leads to the seizure of evidence. In the basic hypothetical, police officers attempting to apprehend a gang of robbers arrest *A*, a member of the gang, and take him to police headquarters.

Variation 1: Without advising *A* of his constitutional rights as required by *Miranda v. Arizona*,¹²³ the police ask *A* where the stolen money is hidden. *A* tells the officers that it is hidden in the cellar of *B*'s house. A valid search warrant is obtained, the money is recovered, and the state seeks to introduce it into evidence at *B*'s trial for robbery.¹²⁴

Variation 2: When the police question *A* concerning the location of the money, he refuses to answer their questions. Thereupon, the police beat *A* until he finally submits and reveals the location of the money. Again a valid search warrant is obtained, the money is recovered, and the police seek to introduce it into evidence at *B*'s trial for robbery.

Two state cases¹²⁵ support the proposition that *B* has no standing in variation 1 to object to the evidence. In *People v. Varnum*,¹²⁶ police officers had in custody two murder suspects, a husband and wife. Although he had not been warned of his constitutional rights, the husband confessed to his participation in the killing. The police then asked him to telephone his wife, who was confined in the women's jail, to ascertain from her the location of the murder weapon. He complied with this request and his wife divulged information which enabled the police to find the gun. Although California has rejected the rule that a defendant must have standing to object to an unlawful search and seizure,¹²⁷ the California Supreme Court held that the codefendant Varnum could not object to the introduction of the revolver against him. Chief Justice Traynor articulated the basis of this holding:

Unlike unreasonable searches and seizures, which always violate the Constitution, there is nothing unlawful in questioning an unwarned suspect so long as the police refrain from physically and psychologically coercive tactics condemned by due process and do not use against the suspect any evidence obtained. Accordingly, in the absence of such coercive tactics, there is no basis for excluding physical or other non-hearsay evidence acquired as a result of questioning a suspect in dis-

¹²³ 384 U.S. 436 (1966).

¹²⁴ Since *A* was not warned of his constitutional rights at the time he made the statement, any evidence obtained as a result of the statement should not be admissible against *A* unless the authorities prove they had an independent legitimate source for the disputed evidence. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 & n.18 (1964); text accompanying notes 53-54 *supra*.

¹²⁵ *People v. Varnum*, 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967), *appeal dismissed & cert. denied*, 390 U.S. 529 (1968); *People v. Denham*, 41 Ill. 2d 1, 241 N.E.2d 415 (1968), *cert. denied*, 394 U.S. 1006 (1969).

¹²⁶ 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967), *appeal dismissed & cert. denied*, 390 U.S. 529 (1968).

¹²⁷ *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).

regard of his Fifth and Sixth Amendment rights when such evidence is offered at the trial of another person.¹²⁸

Despite the force of Justice Peters' dissent,¹²⁹ the holding in *Varnum* is proper. Although there is some danger that anyone questioned by the police will be coerced into making a statement, *Miranda* specifically reaffirmed the right of the police to question witnesses without warning them of their rights.¹³⁰ While there is a greater danger of coercion when the investigation focuses on a particular suspect,¹³¹ *Miranda* does not compel exclusion of evidence obtained by questioning a suspect not warned of his constitutional rights, regardless of against whom the evidence was to be used. Designed in part to reduce the possibility of police coercion at the station-house,¹³² the case also rested on the principle that certain rules are necessary to safeguard a defendant's privilege not to incriminate himself.¹³³ A defendant cannot incriminate himself in any meaningful sense unless his statements are used against him. Unless the Court should clarify the scope of *Miranda*, the decision ought to be interpreted to mean that when the police question a suspect in their custody without warning him of his rights, they are in effect giving him a chance to act as a witness without incriminating himself. Under this interpretation, statements made by *A* in variation 1 could be used against anyone but *A*, including *B*.

Chief Justice Traynor's language in *Varnum* implies that in variation 2, evidence obtained pursuant to a coerced confession will be inadmissible against anyone.¹³⁴ Nevertheless, the court in *People v. Portelli*¹³⁵ reached the opposite conclusion when a "small-time hood"

¹²⁸ 66 Cal. 2d at 812-13, 427 P.2d at 776, 59 Cal. Rptr. at 112 (footnotes & citations omitted).

¹²⁹ Justice Peters argued that a constitutional violation occurs when a suspect is questioned without being properly advised of his constitutional rights. *Id.* at 816-17, 427 P.2d at 778, 59 Cal. Rptr. at 114.

Judge Friendly has expressed a similar view:

It is not a satisfactory answer to say that . . . [in cases involving suspects] the police may interrogate if they are willing to forego use at trial of admissions or physical evidence thereby obtained. If the sixth amendment is applicable, the right it confers is a right not to be questioned in the absence of counsel unless the protection be waived—not simply to have answers excluded in a subsequent trial; such a right should be respected, and state officers disregarding it would be subject to civil and criminal sanctions. Here, as in the case of the fourth amendment, exclusion is only a remedy in aid of a right; no one would suggest that the police may engage in unbridled searches if they will dispense with the use of the provable fruits.

Friendly, *The Bill of Rights As a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 949 (1965) (footnotes omitted).

¹³⁰ See 384 U.S. 436, 481 (1966).

¹³¹ See *id.* at 478.

¹³² See *id.* at 446-47.

¹³³ See *id.* at 478-79.

¹³⁴ 66 Cal. 2d at 812-13, 427 P.2d at 776, 59 Cal. Rptr. at 112.

¹³⁵ 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965), *cert. denied*, 382 U.S. 1009 (1966).

named Richard Melville testified that Portelli told him that he had shot two police officers in the course of a holdup. On cross-examination, Melville testified that he had been picked up for questioning by police who were investigating the murder case. When Melville denied knowing anything about the murder, the police tortured him until he finally disclosed the statement Portelli made to him. Emphasizing that his testimony implicating Portelli was true, Melville testified that he would not have given this testimony had it not been for the police coercion. Yet the court held that Melville's testimony was admissible against Portelli. *Portelli* is perhaps distinguishable from variation 2 in that Melville's trial testimony, which occurred eight months after the beating, could be considered a sufficiently independent act to purge the illegality of the police coercion, whereas in variation 2 the search stemmed directly from the coerced confession.¹³⁶ However, there is no evidence in *Portelli* that the court based its decision on the fact that Melville's testimony was an independent act. The opinion merely stressed that Melville's testimony was trustworthy and that he could bring "charges of misconduct" against the police in another forum.¹³⁷

If *Portelli* stands for the proposition that a defendant will never have standing to object to evidence obtained through coercion of another, it is wrong. In a line of cases extending from *Brown v. Mississippi*¹³⁸ to *Miranda v. Arizona*¹³⁹ and beyond, the Supreme Court has shown that it abhors confessions obtained through police brutality. The late Justice Frankfurter enumerated some of the basic tenets of our system of justice underlying this abhorrence:

Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, *nor subjected to physical brutality by officials charged with the investigation of crime*. Cardinal among them, also, is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law¹⁴⁰

In *Miranda*, the Court cited *Portelli* as an example of the atrocities which still occur.¹⁴¹ The atrocity was not the introduction of evidence

¹³⁶ Cf. *United States v. Bayer*, 331 U.S. 532 (1947) (holding that a defendant's invalid confession did not bar the admissibility of a confession made voluntarily by the same defendant after he was given warning that what he said could be used against him). See generally Hirtle, *Inadmissible Confessions and Their Fruits: A Comment on Harrison v. United States*, 60 J. CRIM. L.C. & P.S. 58 (1969); Pitler, *supra* note 11.

¹³⁷ 15 N.Y.2d at 239, 205 N.E.2d at 858, 257 N.Y.S.2d at 933.

¹³⁸ 297 U.S. 278 (1936).

¹³⁹ 384 U.S. 436 (1966).

¹⁴⁰ *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961) (emphasis added).

¹⁴¹ 384 U.S. at 446.

against Melville; this never occurred. The atrocity lay in the brutal extraction of information. A basic purpose of *Miranda* was to provide safeguards to prevent the reoccurrence of such conduct.¹⁴² To strengthen these safeguards, a state should be prohibited from introducing evidence against any defendant when the police have obtained that evidence by coercion of another individual.¹⁴³ Thus, in variation 2, *B* should have standing to object to the introduction of the evidence seized.¹⁴⁴

B. Problems of Standing in Electronic Surveillance Cases

Electronic surveillance¹⁴⁵ presents an unusual context for the application of rules of standing. When governmental authorities conduct an investigation by means of electronic surveillance, the extent of their "search" is limited to conversations which they manage to overhear. In many cases, there is no physical entry upon premises, and even where entry occurs, the occupants are not disturbed. Difficulties arise, therefore, in applying the *Jones*¹⁴⁶ and *Mancusi*¹⁴⁷ rules of standing.

¹⁴² To deny safeguards to an individual in Melville's position would in effect provide lesser protection to an innocent victim of coercion than it would to one who was guilty. Since the fifth amendment would require exclusion of incriminating statements made by a defendant under torture, the police are unlikely to resort to coercion unless all lawful means of apprehending him prove futile. But if there is no similar deterrent available to restrain the police from abusing an innocent person, the probability that they will do so is much enhanced.

¹⁴³ A narrower rule might exclude evidence obtained from suspect *A* from the trial of suspect *B* only when the police coerced the confession primarily for the purpose of obtaining evidence against suspect *B*. However, since there is a special need to deter physical brutality, a broader rule excluding all evidence obtained from a coerced confession is preferable.

¹⁴⁴ A third variation on the hypothetical case is presented in *Long v. United States*, 360 F.2d 829 (D.C. Cir. 1966). In *Long* the state introduced a .38 calibre revolver into evidence at the murder trial of 2 defendants. The defendants objected to the evidence on the ground that the police had learned of the revolver's location after questioning a juvenile in violation of the *McNabb-Mallory* rule. See *Mallory v. United States*, 354 U.S. 449, 453 (1957); *McNabb v. United States*, 318 U.S. 342 (1942). In an opinion by Judge Burger, the Court held that even if the juvenile had been questioned in violation of *Mallory*, the defendants "could not raise the issue since no right of theirs was violated."

The result in *Long* is questionable. Like the *Miranda* warnings, the *McNabb-Mallory* rule is designed to reduce the possibility of coerced confessions. However, the rule differs from *Miranda* in that it requires that the police "with reasonable promptness show legal cause for detaining arrested persons." 354 U.S. at 452; 318 U.S. at 344. In effect, the rule decrees that federal officers may have lawful custody of a suspect only for a limited time. If an arrested suspect is not brought before a United States Commissioner within a reasonable period, the federal officers are guilty of "willful disobedience of law." 354 U.S. at 453; 318 U.S. at 345. Thus, the *McNabb-Mallory* rule sets forth a procedure which federal officers are required to follow. When federal officers question suspect *A* in violation of *Mallory* primarily for the purpose of obtaining evidence for use against suspect *B*, the evidence thus obtained should not be admissible against either *A* or *B*, if the deterrent is to be effective.

¹⁴⁵ In this discussion, electronic surveillance includes both wiretapping and eavesdropping unless otherwise specified.

¹⁴⁶ *Jones v. United States*, 362 U.S. 257 (1960).

¹⁴⁷ *Mancusi v. Deforte*, 392 U.S. 364 (1968).

In *Katz v. United States*,¹⁴⁸ federal agents, without a search warrant, monitored phone calls made by the defendant from a public phone booth. The Court held that the defendant had reasonably relied on the privacy of the phone booth, making the eavesdropping an invasion of his fourth amendment rights. The Court reversed its previous holding that an electronic device does not invade an individual's privacy unless the police physically trespass on his property.¹⁴⁹

Since the defendant in *Katz* had placed the monitored phone calls, the Court was not asked to consider the standing issue. *Katz*, therefore, left undecided whether an owner of premises in which monitored phones were located, or in which an eavesdropping device was hidden, has standing to object to the eavesdropping if he was not a party to the conversation overheard by police officers. Moreover, if a guest who was not a party to the conversation had been present during the wiretap, it is unclear whether he would be entitled to standing. If *Jones* is read literally, both the owner and the guest, being lawfully on the premises, would appear to have standing to exclude the illegally-obtained evidence. However, a restrictive reading of *Mancusi* might result in denial of standing to a guest unless he had significant control over the area where the wiretap occurred.¹⁵⁰

Several courts have already employed the *Jones* and *Mancusi* doctrines to decide cases involving unlawful wiretapping. In *Baker v. United States*,¹⁵¹ for example, the defendant was convicted of wilfully attempting to evade payment of income taxes. In a pretrial motion to suppress, the defendant claimed that the Government had obtained much of its evidence by illegal electronic surveillance. The government conceded that FBI agents conducted an illegal wiretap but denied that the defendant had standing to suppress the records of the conversation. Wiretapping was used at the offices of the defendant's business associates and at a hotel suite to which the defendant had access at all times. Monitored conversations in which the defendant had participated were suppressed by the district court.

The defendant claimed on appeal that he possessed standing to object to all monitored conversations. Reversing the district court, the District of Columbia Circuit held that since the defendant had constant access to the hotel suite, *Jones* and *Mancusi* required suppression of all conversations monitored in the suite "whether or not [the defendant] was a participant in, or present at, particular overheard conversations."¹⁵² The court found that the defendant's relationship to, and

¹⁴⁸ 389 U.S. 347 (1967).

¹⁴⁹ *Id.* at 353. See *Silverman v. United States*, 365 U.S. 505 (1961).

¹⁵⁰ See text accompanying notes 71-80 *supra*.

¹⁵¹ 401 F.2d 958 (D.C. Cir. 1968).

¹⁵² *Id.* at 984.

interest in, the suite made the premises "a constitutionally protected area from which he had a right to be free of unlawful governmental intrusion."¹⁵³

But the court denied standing to the defendant to suppress all conversations overheard at the offices of his business associates, since he lacked the requisite "special relationship."¹⁵⁴ On remand, the defendant was entitled to examine conversations of unidentified conversants in order to move for suppression of those in which he could prove he participated.

In *People v. McDonnell*,¹⁵⁵ the New York Court of Appeals went further than the *Baker* court. The defendant, charged with bookmaking and conspiracy, had arranged with a couple for the use of their telephone as an "answering service" for bookmaking and gambling operations. Because the telephone was actually maintained and used for the defendant's benefit, the New York Court of Appeals held that under *Jones* the defendant had standing to exclude the evidence obtained by means of an illegal wiretap of the phone.¹⁵⁶ The court granted standing to the defendant although he had not participated in the tapped conversations, had no possessory interest in the premises, and was not even present at the time of the wiretap. Moreover, as Judge Keating in dissent pointed out, the defendant's "primary concern throughout was to avoid any interest or contact with the phone or premises."¹⁵⁷

The defendant in *McDonnell* had significantly less control of the premises than the defendant in *Baker*. Far from having free access to the home, the defendant's only connection with the premises was that a telephone was maintained there for his use and benefit, although he himself never used it.

In *Alderman v. United States*,¹⁵⁸ the Supreme Court considered whether an owner of premises which was electronically bugged had standing to object to evidence discovered thereby. Although the owner was not a party to the conversations overheard by government agents, he was incriminated by statements made by the persons conversing on his premises. He based his claim of standing solely on his ownership of the place which was the object of government surveillance. Holding that the defendant had standing, the Court reasoned that conversations overheard as a result of an illegal entry were subject to exclusion for the same reason that the seizure of tangible property justifies the exclusionary rule:

¹⁵³ *Id.* at 983-84.

¹⁵⁴ *Id.* at 984.

¹⁵⁵ 18 N.Y.2d 509, 223 N.E.2d 785, 277 N.Y.S.2d 257 (1966).

¹⁵⁶ *Id.* at 510, 223 N.E.2d at 786, 277 N.Y.S.2d at 258.

¹⁵⁷ *Id.* at 512, 223 N.E.2d at 788, 277 N.Y.S.2d at 260 (Keating, J. dissenting).

¹⁵⁸ 394 U.S. 165 (1969).

The rights of the owner of the premises are as clearly invaded when the police enter and install a listening device in his house as they are when the entry is made to undertake a warrantless search for tangible property; and the prosecution as surely employs the fruits of an illegal search of the home when it offers overheard third-party conversations as it does when it introduces tangible evidence belonging not to the homeowner, but to others.¹⁵⁹

The Court emphasized that *Silverman v. United States*, a case in which the Court excluded evidence obtained by an electronic listening device on the ground that there had been illegal physical entry of a person's home, is still valid.¹⁶⁰

It is surprising that the Court did not rely on the more familiar language of *Jones* to decide the case, but chose instead to emphasize physical intrusion. In resting its holding on *Silverman*, the Court raised doubts regarding the standing of an owner to exclude evidence if surveillance is accomplished without a physical entry. If the owner must show that the police committed a trespass before he is granted standing, the technical difficulties inherent in cases decided before *Katz* will emerge again.¹⁶¹ More important, the requirement of a physical trespass is inconsistent with the Court's language in *Katz*:

[o]nce it is recognized that the Fourth Amendment protects people—and not simply “areas”—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.¹⁶²

Therefore, the Court's reversion to property concepts in wiretap cases may signal a retreat from the broad language of that decision, even though it indicated that property concepts would not be determinative.¹⁶³

Alderman certainly insures that an owner of a house receives fourth amendment protection through the exclusionary rule in the event of government eavesdropping accompanied by a trespass, but it may also imply that a guest may be denied standing to exclude evidence of third-party conversations implicating him. *Alderman* raises the possibility that the *Jones* “legitimately on the premises” test will not be applied in cases involving electronic surveillance. If this is truly a departure from *Jones*, the reason may be that, as in *Mancusi*, the Court

¹⁵⁹ *Id.* at 179-80.

¹⁶⁰ 394 U.S. at 180. *Silverman* is reported at 365 U.S. 505 (1961).

¹⁶¹ See, e.g., *On Lee v. United States*, 343 U.S. 747 (1952); *Goldman v. United States*, 316 U.S. 129 (1942); *Olmstead v. United States*, 277 U.S. 438 (1928).

¹⁶² 389 U.S. at 353.

¹⁶³ 394 U.S. at 179 n.11.

is focusing on the actual extent to which the defendant's privacy is invaded. It is difficult to perceive a significant invasion of a guest's privacy when the government does not overhear his conversation, and does not disturb in any way his sitting throughout the evening in his host's living room. The case may mean that a guest will only have standing if the police physically intrude on the premises while he is present.¹⁶⁴

Alderman indicates that the Supreme Court conceives standing in wiretapping cases as a more limited concept than that envisioned by the lower courts in *Baker* and *McDonnell*. In *Alderman*, the defendant's ownership of the bugged premises was the decisive factor in the Court's opinion. It is very doubtful whether *Alderman* will be extended to afford standing to a defendant in the circumstances of *Baker*, where the defendant did not own the suite or live there on a permanent basis. That the Court would have reached the same result as the highest court of New York in *McDonnell* is even more doubtful. The defendant there lacked not only a proprietary interest in the house, but also freedom of access to the premises.

The purpose of the exclusionary rule is to deter unreasonable searches and seizures by the police. This Article proposes that the defendant should not have standing to object to an unlawful search and seizure unless he was the target of the investigation. The authors believe that this rule of standing would strike an optimal balance between deterrence and the social desirability of introducing relevant evidence.

However, the particularly clandestine nature of unlawful electronic surveillance merits an exception to our proposed rule. Since unlawful eavesdropping may jeopardize first amendment rights¹⁶⁵ by inhibiting the free exchange of ideas, a greater degree of deterrence is desirable in electronic surveillance searches than in searches for tangible material.¹⁶⁶ Moreover, unlawful eavesdropping is a great deal less "reasonable" than any other type of illegal search¹⁶⁷ in that the police have difficulty con-

¹⁶⁴ Justice Harlan in dissent took the majority to task for its failure to consider *Jones* and for what he believed to be a return to the pre-*Jones* cases requiring a possessory interest in the premises before standing would be allowed. He urged that under *Katz*, standing should be granted "only to those who actually participated in the conversation that has been illegally overheard." 394 U.S. at 189. Standing would be denied to the owner, who did not participate in the relevant conversation because, far from being a victim of the unlawful wiretap, Justice Harlan said that the owner was seeking to intrude into the private lives of others by demanding to know the contents of the third party's conversation. *Id.* at 193.

¹⁶⁵ See *Lopez v. United States*, 373 U.S. 427, 469-70 (1963) (Brennan, J., dissenting).

¹⁶⁶ See *Alderman v. United States*, 394 U.S. 165, 203 (1969) (Fortas, J., concurring in part and dissenting in part).

¹⁶⁷ For an argument that such a search is so unreasonable as to be unconstitutional at all times, see Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

fining their investigation. Since it is practically impossible to anticipate the exact contents of a bugged conversation,¹⁶⁸ electronic surveillance cases are often "general searches" and the direction of the investigation toward any one suspect becomes an inconsequential factor.¹⁶⁹

With these basic characteristics of unlawful electronic surveillance in mind, it would be desirable to grant standing to any person incriminated by an illegal eavesdropping investigation.¹⁷⁰ Thus, electronic surveillance searches would be treated like area searches which, as mentioned before,¹⁷¹ should be an exception to the general rule of standing. This exception to the general proposals on the standing rule would have two beneficial effects. By further removing the incentive to engage in unlawful electronic surveillance, it will additionally deter a particularly insidious fourth amendment violation. Moreover, it will insure a greater freedom of communication. These gains are sufficient to outweigh the possible loss of relevant evidence which might result.

V. CONCLUSION

Rules of standing will continue to have an important function in the law of search and seizure. The rules proposed in this Article represent a tentative effort to conserve the values of a rule of standing while eliminating some serious shortcomings in the present law.

Given the premise that the sole purpose of the exclusionary rule is to deter unlawful police conduct, the doctrine of standing can only be justified as a vehicle for preventing the operation of the exclusionary rule beyond the point of diminishing returns. Thus, the ideal rule of standing will function to exclude evidence from criminal trials only when the social value of the additional amount of deterrence gained outweighs the cost of excluding relevant evidence.

One is entitled to assume from its purpose that, at the very least, the exclusionary rule would operate to provide substantial protection to the ordinary citizen whose home or effects attract the attention of the police. However, the present form of the rule of standing prevents the exclusionary rule from deterring unlawful searches when, as in many cases, the actual victim of the search is expected to be an innocent man. Under the present rules, the police are not deterred from making an

¹⁶⁸ *But see* *Lopez v. United States*, 373 U.S. 427 (1963).

¹⁶⁹ For a discussion of the indiscriminate nature of all eavesdropping searches, see *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 187 (1961).

¹⁷⁰ Since eavesdropping evidence implicating nonconversants is hearsay to them, the question whether nonconversants have standing will arise only in a "scope of taint" situation, in which the overheard conversation provides the police with information leading to the discovery of competent evidence. See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963). See generally Pitler, *supra* note 11.

¹⁷¹ Text accompanying note 112 *supra*.

unlawful search which will invade an innocent man's privacy. Neither the innocent victim of the search nor the intended target have the standing to object. Present standing rules do, however, deter the police from making an unlawful search of papers of a man suspected of criminal activity. To protect the "guilty" and not the "innocent" is anomalous.

The proposed rule removes this anomaly and protects the innocent to some degree by prohibiting the police from using evidence obtained in these illegal searches. Admittedly, the approach suggested herein is not an easy one to apply. Nevertheless, the difficulty in applying the standard is outweighed by the detrimental effects of the alternatives. Abolishing standing is a simpler answer, but the simplicity has a high price tag—the exclusion of all evidence resulting from an illegal search, regardless of the likelihood of deterrence. If this occurs, society loses the opportunity to convict a suspect and gains nothing in the way of better police conduct. If the focus is placed on the intent of the officer, the deterrent purpose of exclusion is served without allowing application of the rule to become a public nuisance.