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Introduction

Recent concern with the impact of police action on individual liberties has prompted re-evaluations of policy and implementation of new rules of law in areas touching on police conduct. One of the developments has been a slow and somewhat erratic mitigation of the standing requirement for suppression of illegally obtained evidence. In what circumstances will a court entertain a defendant's motion to suppress evidence on the basis that it was obtained by a search or seizure violating the fourth amendment or federal statutes? What considerations are important in determining whether in a particular instance a defendant should be able to assert that the evidence being introduced against him was illegally obtained? What constitutional and policy considerations are relevant in assessing whether the present standing requirement is adequate to protect the defendant's rights? This article will discuss the present state of the law and the constitutional, legal and policy considerations which should be determinative of the future growth of the law in this area.

A common issue in every motion to exclude illegally obtained evidence is whether the movant is a proper party to raise the claim of illegality and to seek the remedy of exclusion.[1] This question is generally couched in terms of

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1. Since Weeks v. United States, 232 U.S. 383 (1914), tangible evidence seized in violation of the fourth amendment has been excluded from use in federal criminal trials. The fourth amendment prohibits unreasonable searches and seizures and forbids issuance of warrants without a showing of probable cause.

In Wolf v. Colorado, 338 U.S. 25 (1949), the Court held that the fourth amendment right to be free from unreasonable searches and seizures and warrants issued on less than probable cause applied to state law enforcement officers through the due process clause of the fourteenth amendment. However, the *Wolf* Court refused to apply the

"standing" to raise the issue; standing is one facet of a larger concept, justiciability.[2] Article three of the Constitution, which defines and limits the jurisdiction of federal courts, proscribes adjudication of questions which do not present "cases or controversies."[3] Any question presenting a case or controversy is considered "justiciable" in the constitutional sense.[4] Status as case or controversy is a fundamental prerequisite to establish standing. However, all rules concerning standing are not constitutional in origin; some are court-imposed restrictions on the federal judicial power, based upon policy considerations.[5] Unfortunately, these limitations are "not always clearly distinguished from

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remedy of exclusion, created in *Weeks*, as a necessary part of fourteenth amendment due process. This bifurcated approach was abandoned in Mapp v. Ohio, 367 U.S. 643 (1961), when the Court applied the exclusionary rule to state law enforcement officers and state courts.

The exclusionary principle also applies to oral evidence gained as the result of an illegal search and seizure. *See* Wong Sun v. United States, 371 U.S. 471 (1963). The Court recently held that electronic eavesdropping and wiretapping, even absent technical trespass, may violate the fourth amendment "right to privacy." Katz v. United States, 389 U.S. 347 (1967). Other intangible evidence such as eyewitness identifications may be subject to the exclusionary rule if gained as a result of an illegal arrest or search. *See, e.g.*, People v. Stoner, 65 Cal. 2d 595, 422 P.2d 585, 55 Cal. Rptr. 897 (1967). In this article, "illegal searches and seizures" refers to those violating federal statutes as well as those inconsistent with the dictates of the fourth amendment. The federal courts, in an exercise of their supervisory power, have applied the exclusionary rule as a remedy for violations of certain statutes insuring the right to privacy which, though not constitutional in origin, are relevant to the law of search and seizure.

In addition, violations of a federal statute may form the basis for a motion to suppress evidence in state and federal courts. An example of such a statute is that prohibiting wiretapping. Communications Act of 1934 § 605, 48 Stat. 1064, 47 U.S.C. § 605 (1964); *see* Lee v. Florida, 88 S. Ct. 2096 (1968); Nardone v. United States, 302 U.S. 379 (1937). However, the requirement that an officer announce his authority and purpose before breaking to enter under the Crime and Criminal Procedure Act of 1948 § 3109, 18 U.S.C. § 3109 (1964) is a basis for exclusion only in the federal courts. *Compare* Miller v. United States, 357 U.S. 301 (1958), *with* Ker v. California, 374 U.S. 23 (1963).

2. Flast v. Cohen, 392 U.S. 83, 95 (1968):

> Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. (Footnotes omitted.)

See also Poe v. Ullman, 367 U.S. 497, 508 (1961).

3. U.S. CONST. art. III, § 2.

4. Flast v. Cohen, *supra* note 2, at 94-95:

> Embodied in the words "cases" and "controversies" are two complimentary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

5. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (concurring opinion).

the constitutional limitation[s]."[6] *General standing* to sue requires that each party have an adversary interest in the outcome,[7] and this constitutional limitation must be distinguished from court-imposed limitations which determine whether there is *specific standing* to raise certain issues within a lawsuit. In a criminal case, the requirement of adversary posture is met whenever a criminal charge has been brought, and once this posture is reached specific standing to raise a certain issue becomes relevant.[8]

Standing to suppress illegally obtained evidence is based upon a mixed bag of historical and policy considerations. Basically, to establish specific standing, counsel must show "a logical nexus between the status asserted and the claim sought to be adjudicated."[9] In the context of illegal search and seizure, "status" means defendant's relationship to the illegality claimed—whether he was affected personally, financially or in some other direct manner. Failure to find a direct relationship, however, need not always be fatal since the importance of the "claim sought to be adjudicated" must also be evaluated. When "status" and "claim" are considered together, the nature of the right upon which the claim is based may be deemed important enough to justify standing regardless of defendant's "status."[10]

Instead of separating fourth amendment suppression from federal supervisory suppression based upon statutes relevant to search and seizure, the whole scope of search and seizure suppression, both constitutional and statutory, will be discussed. Electronic eavesdropping and wiretapping present search and seizure problems under the fourth amendment as well as under the federal supervisory power.[11] Insofar as the standing requirements in such cases are analogous to other search and seizure claims, they will be discussed. Standing

6. Barrows v. Jackson, 346 U.S. 249, 255 (1953).

7. *See* Baker v. Carr, 369 U.S. 186 (1962), where the Court stated that the "guts" of the standing requirement depends upon whether the party seeking relief "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 204.

8. For specific standing to raise a particular issue a party must have an adversary posture regarding the issue. Flast v. Cohen, *supra* note 2, at 101. Regardless of the circumstances of the motion to suppress, the nature of the proceedings should satisfy this threshold requirement.

9. *Id.* at 102.

10. *Id.* at 99 n.20: "Thus, a general standing limitation imposed by federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties. [Citations omitted.] However, this rule has not been imposed uniformly as a firm constitutional restriction on federal court jurisdiction."

11. Katz v. United States, *supra* note 1 (eavesdropping); Lee v. Florida, *supra* note 1 (wiretapping). Generally, conversations overheard illegally by police presence within the room are sufficient to give standing. *See* Katz v. United States, *supra* note 1. If the claim relates to "tapping" a phone conversation the general prerequisite to standing is that the objecting party be one of the parties to the telephone connection. Goldstein v. United States, 316 U.S. 114 (1942); Shimon v. United States, 352 F.2d 449 (D.C. Cir. 1965). A person with a possessory interest in a dwelling may always object to the illegal interception of telephone or other conversation emanating from the dwelling

to suppress illegally obtained statements and eyewitness identifications will not be treated, however, except where such evidence might be "tainted" by an illegal search or seizure.[12] Lastly, the future of the standing doctrine will be discussed.

A claimant must establish specific standing in order to invoke exclusionary rules relevant to illegal searches and seizures.[13] The body of law surrounding

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whether or not he is a party to the conversation or present during the interception. *See* Baker v. United States, No. 21,154 (D.C. Cir. Aug. 9, 1968).

Because of the Court's language in *Katz* concerning the "expectation of privacy," persons who do not have a legally enforceable possessory interest in the premises may be granted "special standing" to object to the illegal interception of *any* conversation or telephone connection whether or not he is a party to the conversation or present at the time of the interception. Baker v. United States, *ibid.* A co-defendant can suppress illegally overheard conversations which the other defendant could challenge. Goldstein v. United States, *supra* at 120. For a discussion of derivative standing, *see* pp. 172-76 *infra.*

12. Any defendant who has made self-incriminating statements has standing to object to their admission into evidence if the statements were taken in violation of his fourth, fifth or sixth amendment rights or, in the federal courts, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. If the statement of a co-defendant contains incriminating evidence against the defendant, courts are reluctant to admit the confession against the non-confessing defendant, whether or not the confession was illegally obtained. Bruton v. United States, 391 U.S. 123 (1968). Nevertheless, it is generally held that a defendant has no standing to object to the illegal method of obtaining a confession of another. Anderson v. United States, 318 U.S. 350 (1943); *but see* Malinski v. New York, 324 U.S. 401, 411 (1945).

In certain cases illegally obtained statements may provide "probable cause" for a subsequent search and seizure, but tangible evidence recovered in this manner is considered "tainted" and therefore inadmissible against the person from whom the statement was obtained. *See* Wong Sun v. United States, *supra* note 1. Chief Justice Traynor of the California Supreme Court has indicated that, at least in California where there are no standing requirements for fourth amendment objections, the outcome of a co-defendant's attempt to exclude tangible evidence procured as a result of a statement obtained from another depends upon the "illegality" involved in obtaining the statement. *See* People v. Varnum, 66 Cal. 2d 808, 812-13, 427 P.2d 772, 775-76, 59 Cal. Rptr. 108, 111-12 (1967), where he states:

> The basis for the warnings required by *Miranda* is the privilege against self-incrimination . . . and that privilege is not violated when the information elicited from an unwarned suspect is not used against him . . . . Similarly the right to counsel protected by *Escobedo* . . . is not infringed when the exclusion of any evidence obtained through the violation of the rules of [that case] precludes any interference with the suspect's right to effective representation . . . . 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.

But see id. at 815, 427 P.2d at 777, 59 Cal. Rptr. at 113 (concurring and dissenting opinion of Justice Peters).

13. Exclusionary rules may be invoked when searches and seizures violate the Crime and Criminal Procedure Act of 1948 § 3109, 18 U.S.C. § 3109 (1964) (failure to announce authority and purpose before entering) and when there is a violation of fourth amendment rights. The considerations relevant to standing to invoke these rules are the same in constitutional and federal supervisory cases. *See* Goldstein v. United States, *supra* note 11.

this requirement is complex[14] and, with the law of standing in such a state of flux,[15] this discussion must necessarily concern itself with a morass of conflicting opinions.[16]

In its relation to the law of search and seizure, the standing requirement is undesirable in several aspects: first, its genesis in the common law of property; second, its misuse by many courts; and third, its prophylactic effect upon the assertion of a basic constitutional right. Though the Supreme Court has attempted to divorce standing from the illogic of property law,[17] many lower courts have been slow to grasp and follow the evolution. Part of the blame for the continued reliance upon irrelevant property law concepts must be laid to the Supreme Court because of its failure to clearly set forth its view. Even if a liberal interpretation of the Court's pronouncements on standing is accepted, the requirement of standing often poses significant barriers to those who challenge police disregard for the right to privacy. Since it is argued that standing to suppress is not limited by any constitutional requirement,[18] to place standing in the way of the vital and basic right to privacy is to place the cart before the horse.

In federal and many state criminal cases, standing is premised upon the judicial interpretation of Rule 41(e) of the Federal Rules of Criminal Procedure, the "statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search."[19] Rule 41(e) states: "A person aggrieved by an unlawful search and seizure may move the district court

14. The confusion stems from the historical fact that the fourth amendment was first interpreted as conferring a personal right springing from an interest in property. Although that concept has been eroded in favor of the right to privacy, many ancient real and personal property rules remain embedded in the decisional history of the fourth amendment. *See* Warden v. Hayden, 387 U.S. 294, 303-06 (1967).

15. *See* Simmons v. United States, 390 U.S. 377, 389-92 (1968).

16. For further discussion of this conflict, see Weeks, *Standing to Object in the Field of Search and Seizure,* 6 ARIZ. L. REV. 65 (1964); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962); Traynor, *Mapp v. Ohio At Large in the Fifty States,* 1962 DUKE L.J. 319; Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1 (1950); Grant, *Circumventing the Fourth Amendment,* 14 S. CAL. L. REV. 359 (1941); Comment, *Standing to Object to an Unreasonable Search and Seizure,* 34 U. CHI. L. REV. 342 (1967); Note, *Standing to Object to an Unlawful Search and Seizure,* 1965 WASH. U.L.Q. 488; Note, *The Exclusionary Rule and the Question of Standing,* 50 GEO. L.J. 585 (1962); Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy,* 47 NW. U.L. REV. 493 (1952).

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

18. *See* discussion pp. 162-63 *infra.*

19. Jones v. United States, *supra* note 17, at 260. The *Jones* Court did not specifically mention the relationship between Rule 41(e) and the potential scope of standing allowable under Article three of the Constitution. It is conceivable that the language of Rule 41(e), which grants only "aggrieved persons" standing, has restricted the Court from exercising the full scope of its power to grant relief. However, it seems more likely that the Court, rather than being restrained by the language of Rule 41(e), will interpret "aggrieved persons" to include anyone who would, under present constitutional doctrine, be permitted to raise the issue consistent with Article three. *See* Mancusi v. DeForte, 392 U.S. 364 (1968), where the Court applied *Jones,* and held that a state

for the district in which the property was seized for the return of the property and to suppress for use as evidence . . . ." For purposes of this discussion, the definition of a "person aggrieved by an unlawful search and seizure" is the crucial issue. Where the claimant can show he is such person, he has established a logical nexus between his status and the alleged illegality of the search and seizure. Except for a limited number of exceptions noted later,[20] only a "person aggrieved" has standing to invoke and benefit from the exclusionary rule.

Mr. Justice Frankfurter set forth a definition of a person aggrieved when he stated in *Jones v. United States*:[21]

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of 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.[22]

Some courts, taking this statement out of context, have applied it literally[23] and denied standing to persons who, though not direct "victims of search," should have qualified as "victims" in the context of the whole opinion and decision in *Jones*.

The defendant has the burden of proving standing on a motion to suppress,[24] and there are four basic theories by which this standing may be established. Although in a given case two or more theories might apply to the defendant, only one theory need be relied upon and proved.[25] Counsel should delineate

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prisoner bringing a federal habeas corpus petition had standing to challenge an illegal state search. Under the *Mapp* doctrine, the Court applied the standing requirement set forth in *Jones* (and Rule 41(e)) as a minimum standing rule applicable in state courts. Of course, some states have broadened the standing definition to a point not yet recognized by the Court as permissible. *See, e.g.*, People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

20. *See* pp. 172-76 *infra*.

21. *Supra* note 17.

22. *Id.* at 261.

23. Seay v. United States, 380 F.2d 358 (5th Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968); Stewart v. State, 1 Md. App. 309, 229 A.2d 727 (Ct. Spec. App. 1967); Ball v. State, 194 So. 2d 502 (1967); State v. Nobles, 79 N.J. Super. 442, 191 A.2d 793 (App. Div. 1963); State v. Loran, 62 Wash. 2d 4, 380 P.2d 733 (1963).

24. Jones v. United States, *supra* note 17, at 261.

25. In *Jones*, the theories of standing, though not mutually exclusive, were independent. "Two separate lines of thought effectively sustain defendant's standing in this case." *Id.* at 263. One commentary has explained it as follows:

> In the *Jones* case the defendant's privacy had been invaded by the federal officers' search of the apartment in which he was staying. In addition, he was charged with a crime of possession. However, the first rationale that afforded standing to the defendant was dependent solely upon the charge of possession and the existence of the dilemma, and in no way rested upon a finding of invasion of privacy of the defendant.

Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488, 493.

and establish standing under all theories available to him in a given case, however, since the law is unsettled and necessary facts might be difficult to prove. The four viable theories of standing are: (a) automatic standing;[26] (b) standing based on interest in the premises searched;[27] (c) standing based on interest in the property seized;[28] and (d) derivative standing.[29] Derivative standing is a step-child of the other three categories to the extent that it partially relies upon the breach of another person's privacy.

A. Automatic Standing

Prior to *Jones* a person established standing to object to an unlawful search and seizure only if he showed a possessory or proprietary interest in the property seized or the premises searched.[30] As Judge Learned Hand noted, this rule forced many defendants to prove the government's case in order to make a preliminary showing of standing.[31] Furthermore, the government was allowed to adopt the contradictory positions of both challenging standing based on a possessory interest at a motion to suppress and then proving possession at trial.[32] Until recently, it was possible for the government to use defendant's statements, made in his attempt to establish standing, against him at trial.[33]

The *Jones* decision partially eliminated this dilemma by creating the concept of automatic standing. In *Jones,* the defendant was charged with violating two narcotic laws.[34] The first count allowed conviction upon a showing that the defendant possessed narcotics not bearing appropriate tax stamps; the second count required only proof of unexplained possession of narcotics. As Mr. Justice Frankfurter noted, "[p]ossession was the basis of the Government's

26. This theory requires no invasion of the defendant's privacy. Jones v. United States, *supra* note 17, at 263-65.

27. This theory requires that the defendant be legally on the property searched or that he have some other legal claim in the property. *Id.* at 265-67.

28. This theory requires only that the property seized be the defendant's and that it be seized from a place to which he has legal access. United States v. Jeffers, 342 U.S. 48, 51-52 (1951).

29. This theory in effect relies on the violation of another's right to privacy which, under certain cases, can be asserted by a third party prejudiced by the illegal police conduct. McDonald v. United States, 335 U.S. 451, 456 (1948).

30. Jones v. United States, *supra* note 17, at 261.

31. Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932):

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.

32. Jones v. United States, *supra* note 17, at 263-64.

33. *Ibid.* This, of course, is no longer true. Simmons v. United States, *supra* note 15.

34. INT. REV. CODE of 1954, § 4704(a) (purchasing, selling, or distributing narcotics not from original stamped package); Narcotic Drugs Import and Export Act of 1956 § 105, 70 Stat. 570, 21 U.S.C. § 174 (1964) (facilitating concealment and sale of narcotics).

case against [Jones]."[35] Because the defendant failed to allege either ownership or possession of the narcotics seized, the lower courts denied him standing to challenge the search.[36] The Court agreed that "[o]rdinarily . . . it is entirely proper to require of one who seeks to challenge the legality of a search . . . that he allege, and if [necessary] . . . establish, that he himself was the victim of an invasion of privacy."[37] However, the Court noted the "special problem" of such a requirement in cases where the prosecution is based on the fact of possession. Prior to *Jones,* the defendant would have been required to admit either ownership or possession of the narcotics in order to challenge the search.[38] To eliminate the dilemma inherent in a possession charge, the Court held that: "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."[39]

The Court proceeded to explain the rationale of automatic standing, a doctrine preventing the "[g]overnment [from having] the advantage of contradictory positions as a basis for conviction."[40] Mr. Justice Frankfurter reasoned that the prosecution's reliance on the benefits of the dilemma allowed the defendant to be "subjected . . . to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation."[41] Since such a contradiction was "not consonant with the amenities . . . of the administration of criminal justice"[42] the Court held that: "[i]n cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' . . . ."[43] As clear as this admonition appears, some lower courts have had difficulty in interpreting and implementing it. Cases arising under this doctrine can be broken into four categories based on the relationship of the property seized to the crime charged: first, crimes of possession of contraband per se; second, crimes of possession of derivative contraband; third, theft crimes in which stolen objects are seized; and fourth, crimes in which the items seized are of less evidential value.[44]

35. Jones v. United States, *supra* note 17, at 258.
36. Jones v. United States, 262 F.2d 234 (D.C. Cir. 1958).
37. Jones v. United States, *supra* note 17, at 261.
38. *Ibid.*
39. *Id.* at 263.
40. *Ibid.*
41. *Ibid.*
42. *Ibid.*
43. *Id.* at 264.
44. This breakdown is found in Note, *Standing to Object to an Unlawful Search and Seizure,* 1965 WASH. U.L.Q. 488, 493-97.

1. Contraband Per Se

Where the charge against the defendant is possession of contraband per se[45] *Jones* clearly held that standing is automatically established and the Court recently reaffirmed that holding in dicta.[46] Nevertheless, there are few decisions granting standing automatically in such cases,[47] and several cases have denied it to defendants charged with crimes of possession.[48] Many cases grant automatic standing as an alternate holding where another theory of standing is found,[49] while a number of decisions acknowledge the automatic standing rule in dicta.[50]

The Ninth Circuit's decision in *Plazola v. United States*[51] perhaps adhered the most faithfully to the doctrine of automatic standing in contraband per se cases. In *Plazola,* defendant was charged with importing and concealing narcotics. The prosecution based its case on 58 pounds of marijuana found in a car driven by Singh and one seed of marijuana found in the defendant's car. When the Singh car was searched the defendant was at least two miles away, but the court granted Plazola standing to attack the search of Singh's car even though there was no showing that Plazola's privacy had been invaded. The basis for the holding, although not clearly articulated by the court, seems to

45. "Contraband per se" means any object which by its nature may not be possessed legally without special permission. Generally, narcotics and certain dangerous weapons fall into this category.

46. Simmons v. United States, *supra* note 15.

47. *See* United States v. Lewis, 227 F. Supp. (S.D.N.Y. 1964); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963). Neither case offers much in the way of substantial precedent. In *Lewis* the defendant was charged with possession of heroin. The court held that she had automatic standing to suppress because the charge was a crime of possession. Nevertheless, her motion to suppress was denied on an abandonment theory since the facts showed she had thrown the heroin out of an apartment window. In *Thomas,* the defendant was arrested near a still in an old house. There was no showing that the house was on the property owned by co-defendant Becker nor that any of the seized property belonged to any of the co-defendants. Defendant Becker was charged with illegal possession of a still and automatic standing was granted to challenge the search of the house. The court partially based its holding on Plazola v. United States, 291 F.2d 56 (9th Cir. 1961) and Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir.) (en banc), *cert. denied,* 385 U.S. 856 (1966).

48. *See* cases cited note 23 *supra.*

49. Rosencranz v. United States, 334 F.2d 738 (1st Cir. 1964) (concurring opinion); United States v. Holt, 306 F.2d 198 (6th Cir. 1962); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961) (defendant found in car with contraband); People v. Rowland, 36 Ill. 2d 311, 223 N.E.2d 113 (1967); People v. Mayo, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962); State v. Evans, 75 N.J. Super. 319, 183 A.2d 137 (App. Div. 1962).

50. *E.g.,* United States v. Beigel, 370 F.2d 751 (2d Cir.), *cert. denied,* 387 U.S. 930 (1967); United States v. Konigsberg, 336 F.2d 844 (3d Cir.), *cert. denied,* 379 U.S. 933 (1964); United States v. Wood, 270 F. Supp. 963 (S.D.N.Y. 1967); State v. Pokini, 45 Hawaii 295, 367 P.2d 499 (1961).

51. 291 F.2d 56 (9th Cir. 1961).

be the automatic standing rule in *Jones*.[52] The court footnoted the *Jones* language on automatic standing and later stated that the defendant had standing to challenge the search and seizure as the person aggrieved by it. It seems that the court believed that automatic standing is established where the charge is contraband per se, regardless of whether the government's theory is possession.

In *Diaz-Rosendo v. United States*,[53] the Ninth Circuit repudiated the *Plazola* reasoning. The defendants in *Diaz-Rosendo* were charged with conspiracy to illegally import marijuana. A co-conspirator, Contreras, was stopped by immigration authorities who searched his automobile and uncovered a large amount of marijuana. The defendants had been following Contreras' car in another automobile and were later arrested, no narcotics being found in their possession. Neither defendants' conviction was based on possession of marijuana,[54] and the court of appeals held that neither defendant had standing to object to the search of the Contreras car.[55] The court, although not agreeing with the *Plazola* reasoning, stated that the decision itself was correct and consonant with *Jones* since the trial court record disclosed a fact not stated or relied upon by the circuit court—that the government relied upon a theory of constructive possession.

The decisions which limit the applicability of the automatic standing rule make one basic mistake. Almost uniformly they read Mr. Justice Frankfurter's "victim of the search" language as a simplistic requirement for standing.[56] A proper reading of *Jones* clearly reveals that a "victim" of a search includes not only those against whom the search was directed in a physical sense but also in a litigational sense.

2. *Derivative Contraband*

Automatic standing has not been confined to charges of contraband per se. Logically, the same rule should cover the class of cases involving possession

52. The marijuana seized from Singh's car was introduced to show that Plazola and his co-defendant were privy to the smuggling scheme as aiders and abettors. Proof of the crime hinged mainly upon a showing of constructive "possession" which was imputed to Plazola and his co-defendant.

53. 357 F.2d 124 (9th Cir.), *cert. denied*, 385 U.S. 856 (1966).

54. *Id.* at 132.

55. *Id.* at 133:

> We believe, in light of the facts stated in the opinion, the holding of this court in *Plazola* with respect to the issue of "standing" as it relates to the marijuana seized in the search of the automobile of Singh is not consonant with the teachings in *Jones* and *Wong Sun*. However, facts not stated in the opinion, but disclosed by the record, reveal that the holding in *Plazola* is correct and is consonant with the teachings in *Jones* and *Wong Sun*. The record discloses that in obtaining Plazola's conviction the Government relied upon the theory that Plazola had constructive possession of the marijuana in Singh's car. . . . To the extent that the language in *Plazola* is inconsistent with the present holding it is disapproved.

56. *See, e.g.*, Diaz-Rosendo v. United States, *supra* note 53.

of derivative contraband.[57] In these cases the items seized are not intrinsically contraband but proof of possession of the items is sufficient to obtain a conviction. Two federal courts have applied automatic standing to derivative contraband charges,[58] but there is authority denying such standing[59] on the ground that possession was only one element of the crime charged. These latter cases limit *Jones* to its facts; however, it should be recalled that at least one of the charges in *Jones* required a showing of something more than possession.[60] When the main issue in the prosecution's case is possession, the spirit of *Jones* compels application of the automatic standing rule.[61]

3. *Fruits of a Theft*

A somewhat more attenuated class of cases consists of theft crimes such as robbery, larceny and burglary, which may require proof of the defendant's possession of the stolen goods.[62] Possession of the stolen goods is often the most crucial evidence against the defendant, and at least two courts have extended the concept of automatic standing to cover such situations.[63]

In both cases, the theory of the prosecution was based upon possession of either contraband or the fruit of a crime.[64] In *United States* ex rel. *Coffey v. Fay*,[65] the court was most concerned with the fact that a denial of standing would allow the prosecution to benefit from inconsistent positions taken at the motion to suppress and at trial.[66] Despite the logic of the position adopted in

57. For example, the fruits of a theft from interstate commerce would fall in this category when the defendant is charged with unlawful possession of goods stolen from interstate commerce.

58. Simpson v. United States, 346 F.2d 291 (10th Cir. 1965); Bourg v. United States, 286 F.2d 124 (5th Cir. 1960).

59. *E.g.*, United States v. Konigsberg, *supra* note 50.

60. INT. REV. CODE of 1954, § 4704(a). An added element is proof that the narcotics did not bear the appropriate taxpaid stamps. *See* CRIMINAL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA § 93 (1966).

61. In *Jones* the Court noted that "Rule 41(e) should not be applied to allow the Government to deprive the defendant of standing to bring a motion to suppress by framing the indictment in general terms, while prosecuting for possession." (footnote omitted.) Jones v. United States, *supra* note 17, at 264-65.

62. *See, e.g.*, Simmons v. United States, *supra* note 15.

63. United States *ex rel.* Coffey v. Fay, 344 F.2d 625 (2d Cir. 1965); Lanier v. State, 219 Tenn. 417, 410 S.W.2d 411 (1966).

64. In *Coffey* two defendants were arrested while in a car. They were searched outside of the car and stolen jewels were found on one of them. The Second Circuit held that the defendant who did not have any fruits of the crime on his person had standing to suppress the fruits found on his partner when the charge was burglary.

65. *Supra* note 63.

66. *Id.* at 628-29:

> We hold that under these circumstances the search which brought the stolen jewels to light was "directed against" Coffey as well as DeNormand. More precisely, we hold that the State may not arrest, search, and prosecute a defendant on the theory that he is in possession of stolen property, and then object that the property was actually found on the person of a companion when the defendant moves to prevent use of the property as evidence against him.

Coffey, several courts have refused to extend *Jones* to cases not involving charges of possession of contraband.[67] If procedure is not to be exhalted over substance, the government's theory of the case, rather than the form of the charge, should be controlling.

4. Evidentiary Items

The last category of cases in which automatic standing is relevant involves standing to suppress introduction of objects which tend to establish one or more elements of the crime but which are neither contraband nor fruits of the crime. These items may be classified as "merely evidentiary" and could include marked money used in the sale of narcotics,[68] clothing worn during the commission of a crime or any other object which provides a damaging evidentiary link between defendant and the crime. Thus far, courts have been reluctant to extend the automatic standing rule to such cases,[69] and even those commentators in favor of extending *Jones* beyond its facts admit that application of the automatic standing rule to these cases would be a "substantial extension" of the rule.[70] Since recent Supreme Court cases indicate that the standing requirement has not yet been abrogated,[71] it seems that where merely evidentiary items are seized, the defendant does not have the benefit of the automatic standing rule.

In sum, the concept of automatic standing has not been well received by the majority of courts. The reticence of courts to implement the automatic standing rule in situations where the prosecution's case is based on possession of contraband per se or derivative contraband seems unjustifiable. Extension of the automatic standing concept to cases involving the seizure of fruits of a theft or merely evidentiary items presents a more difficult problem. Although *Simmons v. United States*[72] reaffirmed the automatic standing concept in dicta, the decision signaled no extension of the rule. *Simmons* did, however, excise one bad effect of the dilemma by holding that statements made by the defendant to establish standing were inadmissible against the defendant at trial.[73]

67. *See, e.g.,* People v. Kelley, 23 Ill. 2d 193, 177 N.E.2d 830 (1961); People v. DeFilippis, 54 Ill. App. 2d 137, 203 N.E.2d 627 (1964).

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

69. *See* State v. Pokini, *supra* note 50.

70. See, *e.g.,* Note, *Standing to Object to an Unlawful Search and Seizure,* 1965 WASH. U.L.Q. 488.

71. Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960).

72. 390 U.S. 377, 390 (1968).

73. *Id.* at 394. It is possible that such testimony may not even be admissible for purposes of impeachment. Justice Black, dissenting in Simmons v. United States, *id.* at 398, stated:

> The consequence of the Court's holding, it seems to me, is that defendants are encouraged to come into court, either in person or through other witnesses, and swear falsely that they do not own property, knowing at the very moment

The unsettled state of the law in this area provides an opportunity for imaginative defense counsel to claim applicability of the automatic standing doctrine. Regardless of cases to the contrary, the validity of the rule cannot be disputed. Once a court is forced to recognize the principle, counsel should argue the importance to the prosecution's case of either actual or constructive possession of the seized item, relying on the elements of the offense and the inferences that a jury could draw from possession. By requesting a bill of particulars counsel can force the prosecution to admit that reliance will be placed on possession of the seized item. Even where these tactics are unsuccessful, if during the trial the government emphasizes defendant's possession of the seized article, counsel could request the court to reconsider an earlier ruling denying automatic standing.

B. Standing Based Upon Relationship to the Situs of the Search

Since the defendant's relationship to the situs of the search is often the basis for his standing to object to the search,[74] courts must be concerned with two issues: whether the search and seizure was directed at a "constitutionally protected area," and whether the defendant's presence at the situs or his interest in the area searched is sufficient. The case law surrounding both concepts was hopelessly confused and burdened by irrelevant and ancient property law rules,[75] but several recent cases have done much toward promoting a definable test for standing based on defendant's relationship to the situs of the search.

Grave doubts have been cast on the requirement that the defendant show that the area searched was "constitutionally protected." Although the fourth amendment purports to protect only "persons, houses, papers and effects," courts have liberally applied the prohibition against unreasonable searches and seizures to insure against the invasion of personal privacy, regardless of the physical surroundings of the searched area.[76] Recently in *Katz v. United*

> that they do so they have already sworn precisely the opposite in a prior court proceeding. This is but to permit lawless people to play ducks and drakes with the basic principles of the administration of criminal law.

But see Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968); Bailey v. United States, 389 F.2d 305, 311 (D.C. Cir. 1967); Comment, *Standing to Object to an Unreasonable Search and Seizure,* 34 U. CHI. L. REV. 342 (1967).

74. This concept flows from common law property rules based upon trespass to real property. See general discussion in Edwards, *Standing to Suppress Unreasonably Seized Evidence,* 47 NW. U.L. REV. 471 (1952).

75. See Weeks, *Standing to Object in the Field of Search and Seizure,* 6 ARIZ. L. REV. 65, 67-70 (1964).

76. See G. SHADOAN, LAW AND TACTICS IN FEDERAL CRIMINAL CASES 31 (1964) where the author notes: "the courts have applied the protection well beyond the literal meaning of the Amendment and have included, among other things, business offices, hotel rooms, and automobiles." *See* Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) (trash can); *see generally* Lanza v. New York, 370 U.S. 139, 143-44 (1962).

States,[77] government agents attached an electronic listening device to the outside of a public telephone booth and recorded defendant's conversations. On appeal, counsel questioned whether a telephone booth was a constitutionally protected area[78] but the Court rejected the formulation of the issue in those terms, stating that, "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' "[79] Mr. Justice Holmes' exclusion of an open field beyond the curtilage of the dwelling[80] from the scope of the fourth amendment on the ground that it is not a constitutionally protected area has never been overruled; however, lower court opinions as well as decisions by the Supreme Court have greatly eroded the viability of this limitation.[81]

Until *Jones* it was generally accepted that the defendant must have a possessory or proprietary interest in the premises searched to challenge the search. This rule precluded guests, invitees, licensees, employees and others legally on the premises from objecting to flagrant illegality.[82] *Jones* abrogated this requirement as the test for a "person aggrieved" by the search. In *Jones*, the defendant was found in an apartment leased by Evans, who was not there at the time of the search. Jones testified that he was a friend of Evans and was on the premises with Evans' permission. He also stated that his home was elsewhere, that he paid no rent for the apartment, that he kept a shirt and suit at the apartment and that he had slept there "maybe a night."[83] On the basis of this testimony, the trial court held that Jones had an insufficient interest in

77. 389 U.S. 347 (1967).

78. *Id.* at 349.

79. *Id.* at 350. *See* Mancusi v. De Forte, 392 U.S. 364 (1968).

80. In Hester v. United States, 265 U.S. 57 (1924), revenue agents trespassed on the defendant's land, hid within one hundred yards of the house, and observed defendant, standing outside the house, handing a bottle of whiskey to another. When the two men saw the agents, they ran, dropping the bottle while fleeing. The Court, through Mr. Justice Holmes, held that the special protection of the fourth amendment did not extend to "the open fields" and accordingly admitted the bottle into evidence. *Id.* at 59.

81. *See* Katz v. United States, *supra* note 77, at 353: "[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." See G. SHADOAN, *supra* note 76, at 32-33.

82. Edwards, *supra* note 74, at 476-77:

> Where the defendant is neither the owner nor the lessee of the premises searched, but is indicted for illegal activity conducted upon the searched premises, his standing to challenge the search is uniformly denied. Within this category, three variations of interests have been presented for adjudication [trespassers, trespasser with interest, and invitee], and in all three the courts have denied defendants' standing.
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> * * *
>
> Only upon very rare occasions will the federal courts permit an employee to suppress evidence resulting from an unreasonable search and seizure of the employer's property. [Footnote omitted.]

83. Jones v. United States, *supra* note 71, at 259.

the searched premises to object to the seizure of the narcotics found on an awning outside the window.

The Court, recognizing that the trial court's decision closely followed "the prevailing view in the lower courts," rejected that rule because of misplaced reliance on "subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of the law, has been shaped by distinctions whose validity is largely historical."[84] The Court then set forth a new test for standing: "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. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."[85]

Accordingly, the Court held that Jones had standing to challenge the search of Evans' apartment because he was legitimately on the premises at the time of the search. The ruling recognized that privacy is a right of the lawful occupier of the situs and, as such, should be afforded to those the owner sees fit to permit on the premises.[86] All, save trespassers, seem to fall within this broad protection.[87] Insofar as this rule applies to fixed premises such as houses and outbuildings, the courts have uniformly followed *Jones*.[88] Since *Jones*, defendants have been able to establish standing based on relationship to situs of the search by proving either a present possessory interest in the property searched, or legitimate presence on the property at the time of the alleged search.

1. Present Possessory Interest in the Property Searched

> [T]he Amendment does not shield only those who have title to the searched premises. It was settled even before our decision in *Jones v. United States*, that one with a possessory interest in the premises might have standing.[89]

Although *Jones* did not deal with the issue, it is clear that one with a present possessory interest, whether owner, occupant or lessee of a house or

84. *Id.* at 266.
85. *Id.* at 267.
86. In Mancusi v. De Forte, *supra* note 79, at 368 the Court stated: "[C]apacity 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."
87. To this extent the former rule seems unchanged. *See* United States v. Friedman, 166 F. Supp. 786 (D.N.J. 1958); United States v. Pete, 111 F. Supp. 292 (D.D.C. 1953). See also Edwards, *supra* note 74, at 476.
88. *See, e.g.*, Belton v. State, 228 Md. 17, 178 A.2d 409 (1962).
89. Mancusi v. De Forte, *supra* note 79, at 367-68 (Citation omitted.)

apartment, need not be present at the time of the search in order to challenge its validity.[90] This same rule applies to occupants of hotel rooms,[91] where standing is based upon property interest and as such does not depart from the rule in existence prior to *Jones*.[92] However, a person may have a proprietary interest in property without having standing to object to a search. The cases import a concept of privacy accruing to the person entitled to be free from trespass, and therefore deny an absent landlord standing to object to a search of a lessee's house.[93] This rule is appropriate except in cases where the charge is one such as maintaining a nuisance or running a bawdy house. Here, an absent landlord could raise an objection to an illegal search under the automatic standing provision of *Jones*[94] and should be allowed to establish standing on the basis of his proprietary interest.

The precise meaning of a present possessory interest is not as clear as some cases seem to indicate.[95] Consistent with the Supreme Court's rejection of property law concepts, some courts have rejected a strict interpretation of this requirement in an attempt to vindicate the right to privacy.[96] Thus,

90. Chapman v. United States, 365 U.S. 610 (1961); Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958). *See* Henzel v. United States, 296 F.2d 650 (5th Cir. 1961). Henzel was the president and sole stockholder of a corporation. The books and records of the company were illegally seized from his office, which was owned by the corporation. At the time of the search the defendant was not in the building. The Fifth Circuit held that he had standing to suppress the records even though he was not on the premises, reasoning that "legitimately on the premises" was not an all-inclusive formula because it would deny an absent home owner the right to object to a search of his house when he was not present. *See* Foster v. United States, 281 F.2d 310 (8th Cir. 1960).

91. Stoner v. California, 376 U.S. 483 (1964). *See* Mancusi v. De Forte, *supra* note 79, at 367, where the Court stated, "the word 'houses,' as it appears in the Amendment, is not to be taken literally, and . . . the protection of the Amendment may extend to commercial premises."

92. See Weeks, *Standing to Object in the Field of Search and Seizure,* 6 ARIZ. L. REV. 65 (1964); Edwards, *supra* note 74.

93. *See* People v. DeFilippis, 54 Ill. App. 2d 137, 203 N.E.2d 627 (1964). *See also* United States v. Konigsberg, *supra* note 59. This concept is best explained by Mr. Justice Harlan in Mancusi v. DeForte, *supra* note 79, at 368:

> 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.

94. The theory that the prosecution can charge sufficient ties to the house to make out a case of maintaining such an establishment and at the same time deny that the defendant has standing to challenge the search of the house is as inconsistent with the amenities of justice as the dilemma Jones faced. Moreover, it would seem that occupants visiting such an establishment and charged with presence would likewise have automatic standing without claiming to be legitimately on the premises. *See* Jones v. United States, *supra* note 71.

95. *E.g.,* United States v. Konigsberg, *supra* note 59 (sublessor of garage had no standing).

96. *See* Baker v. United States, No. 21,154 (D.C. Cir. Aug. 9, 1968); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962).

though a lessee's possessory interest ceases to exist when the lease is terminated,[97] a search subsequent to the expiration of a lease has been successfully challenged by a former lessee.[98] Moreover, the District of Columbia Circuit found "special standing" to suppress all conversations (even those to which the defendant was not a party and which occurred when he was not present) illegally overheard in a hotel suite which was neither paid for by the defendant nor rented in his name. The court held that defendant's interest in the suite reasonably warranted his expectation of freedom from governmental intrusion.[99]

Defendant's abandonment of premises is a problem frequently encountered when defining a present possessory interest. At least two courts, specifically citing abandonment as the controlling factor, held that a lessee had no present possessory interest and thus no standing to assert illegality, even though the lease had not expired and the rent was paid.[100] In these two cases police did not know that abandonment had occurred until after the search was made. Abandonment of premises, if known to the police before the search, may be grounds for finding the search reasonable under the fourth amendment.[101] Recognition of the distinction between knowledge and ignorance of abandonment at the time of the search is crucial, however, if courts are to give any meaning to the policy of deterring illegal police conduct which underlies the exclusionary rule.[102]

A court's characterization of abandonment is important. If abandonment is relevant to standing, then the court is free to inquire into all facts which demonstrate the defendant's intention to abandon the dwelling. Naturally,

97. *See* Fisher v. United States, 324 F.2d 775 (8th Cir. 1963), *cert. denied,* 377 U.S. 999 (1964).

98. United States v. Paroutian, *supra* note 96. Here, though the police twice entered the defendant's apartment without a warrant, no physical evidence was seized during either search. The police, however, did observe what appeared to be a wall panel in a closet. After the defendant was dispossessed of his apartment for failure to pay rent, the police again entered the apartment and discovered incriminating evidence behind the false panel. The court held that the defendant was "legitimately on the premises" though not actually present during the first two searches. Therefore, the court found that the seizure of the evidence was tainted by the first two illegal searches. Though this case is more properly dismissed under the category of "legitimately on the premises," it also shows the court's willingness to invoke a relation back theory to define a present possessory interest.

99. Baker v. United States, *supra* note 96. The defendant had a key to Black's hotel suite and was "welcome" to use it. Baker used the suite for meetings and to make telephone calls.

100. Parman v. United States, 399 F.2d 559 (D.C. Cir. 1968), *cert. denied,* 37 U.S.L.W. 3135 (U.S. Oct. 14, 1968); Feguer v. United States, 302 F.2d 214 (8th Cir. 1962). Generally there are two types of abandonment, abandonment of premises and abandonment of personal property. In cases dealing with the latter, the fact that items are abandoned makes police conduct reasonable and vitiates the finding of a seizure in the constitutional sense. *See* Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964).

101. Abel v. United States, 362 U.S. 217 (1960).

102. Linkletter v. Walker, 381 U.S. 618, 629-35 (1965).

these facts may include actions not known to the police at the time of the search.[103] If, on the other hand, the court characterizes abandonment as a factor in determining reasonableness of a search, the judge is restricted to considering only those facts known to the police at the time of the search. With the recent emphasis on the irrelevance of property concepts and the importance of deterring illegal police action, an ex post facto approach certainly ignores the thrust of exclusionary rules and encourages the police to act lawlessly on the chance that they later might be able to show an abandonment.[104] Because the doctrine of abandonment is not firmly rooted in any immutable principle, its use should be consistent with the basic policy underlying enforcement of the fourth amendment, and abandonment should thus be considered as relevant only to the reasonableness of police conduct.[105]

2. *Persons Legitimately on the Premises*

Although the courts have been faithful to the "legitimate presence" rule in *Jones,* they have been reluctant to extend it. Cases following *Jones* require that the defendant bear the burden of proving his legitimate presence,[106] and usually require presence at the time of the search in order to grant a "guest" standing to object.[107] Employees, mere invitees, guests and licensees have no difficulty establishing standing if they were present at the time of the search and the items seized are offered against them as evidence in a criminal case.[108]

103. "The defense suggests that a search which is illegal is not made justifiable by what the search discloses and the question of legality is to be determined only by the circumstances which exist at the time of the search." Feguer v. United States, *supra* note 100, at 248.

104. The burden is on the government to show the abandonment and the courts will not presume abandonment. *See* Friedman v. United States, 347 F.2d 697, 701 (8th Cir. 1965).

105. *E.g.,* United States v. Lewis, 227 F. Supp. 433 (S.D.N.Y. 1964); People v. James, 46 Misc. 2d 138, 259 N.Y.S. 2d 241 (Sup. Ct. 1965).

106. *See* United States v. Konigsberg, *supra* note 50, at 847.

107. Persons who were transient guests and left the premises prior to the search have been denied standing. Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963), *cert. denied,* 377 U.S. 999 (1964); United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963). It is submitted that these cases do not actually turn on standing. In *Raymond* the defendant, who infrequently visited his cousin's apartment, left the fruits of a robbery there. The court held that at the time of the search the defendant had "vacated" the apartment and "abandoned" the evidence, stating that Abel v. United States, *supra* note 101, controlled. "This room, therefore, was not a place where he can claim the constitutional immunity from search and seizure . . . ." Commonwealth v. Raymond, *supra* at 201, 194 A.2d at 153.

In *Puntari,* defendant visited his parents' home at Christmas and left for good on February 1, 1960. Later the police, obtaining his parents' permission to search the house, uncovered evidence of a robbery. The defendant did not claim that the evidence belonged to him. The court held that he "had no possessory interest in the premises either as a guest or invitee." United States *ex rel.* Puntari v. Maroney, *supra* at 806.

108. *See* Mancusi v. De Forte, supra note 79. As Mr. Justice Harlan pointed out, this principle is based upon the expectation of privacy from legitimate presence on the premises. In *Mancusi,* defendant De Forte was a union official present in the union

Several courts have interpreted "legitimately on the premises" in such a manner as to insure the right to privacy. In *Garza-Fuentes v. United States*,[109] a federal customs agent, prior to the search, consented to the breaking into his room by police. The defendants were lured to the customs agent's room with incriminating evidence and then the police broke into the room and seized the defendant's heroin. Defendants were granted standing to challenge the manner of entry and the reasonableness of the search.

A more difficult question arises when the search is directed at an automobile. Prior to *Jones*, many courts held that passengers and bailees at the time of the search did not have sufficient interest in the vehicle to object to the search.[110] With few exceptions standing is now granted to passengers and to persons driving a car with the owner's permission, whether or not the owner is present.[111] This is a logical application of *Jones*. Standing is also granted to owners not present at the time of search or seizure.[112] A strict application of *Jones* would seem to deny standing to drivers and passengers of a stolen car. At least two courts have held such persons akin to trespassers and specifically excluded by *Jones*.[113] The proper view seems to be that expressed in *Cotton v.*

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offices when the police entered and illegally seized union files in the office. The Court said that had the records been taken from De Forte's private office he would have standing to suppress because "[he] would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors." *Id.* at 369.

The Court held that De Forte had standing to suppress and went on to point out that the necessary expectation of privacy need not be absolute:

> Like De Forte, [the defendant in Jones v. United States, 362 U.S. 257 (1960)] had little expectation of absolute privacy, since the owner and those authorized by him were free to enter. There was no indication that the area of the apartment near the bird's nest had been set off for Jones' personal use, so that he might have expected more privacy there than in the rest of the apartment; in this, it was like the part of De Forte's office where the union records were kept.

Id. at 370.

109. 400 F.2d 219 (5th Cir. 1968); *see also* United States v. Partoutian, *supra* note 96, at 488.

110. *See* Shurman v. United States, 219 F.2d 282, 288 (5th Cir. 1955); Mabee v. United States, 60 F.2d 209, 212 (3d Cir. 1932). *But see* United States v. Chieppa, 241 F.2d 635, 637-38 (2d Cir. 1957).

111. *E.g.*, United States v. Peisner, 311 F.2d 94, 105 (4th Cir. 1962) (passenger); United States v. Festa, 192 F. Supp. 160, 164 (D. Mass. 1960) (bailee).

112. *E.g.*, United States v. Eldridge, 302 F.2d 463, 464-65 (4th Cir. 1962):

> On the . . . question of Eldridge's standing to seek suppression of the evidence, we have no doubt. Although he was temporarily out of possession of the car at the time of the search, the bailment was to be of short duration. It would be hyper-technical to say that he lacked a sufficient interest in his own car to challenge the manner in which the radios he has been found guilty of stealing were taken from it.

113. Williams v. United States, 323 F.2d 90 (10th Cir. 1963); State v. Pokini, 45 Hawaii 295, 367 P.2d 499 (1961). In *Williams, supra* at 94-95, the court stated:

> It is well established in this circuit, and elsewhere, that the right to protection against unreasonable search and seizure is personal, and a defendant in a criminal case who claims no proprietary or possessory interest in the seized

United States,[114] where the court granted standing to the driver of a stolen car, stating:

> [E]ven a trespasser, if he has also taken actual possession of premises, acquires possessory rights against all the world except the true owner. Thus a squatter upon the property of another, who builds a house there and lives there, has such rights, and we think that the Supreme Court would not deny them as against the lawless officer who breaks, enters and searches without a warrant.[115]

C. Standing Based Upon Relationship to the Property Seized

Prior to the *Jones* decision, opinions and scholarly commentary conceded that standing could be grounded upon a showing of a possessory or proprietary interest in the property seized.[116] However, many subtle distinctions which the *Jones* opinion did not fully obviate have arisen out of this general principle. In cases where the automatic standing rule is deemed inapplicable and defendant cannot show a sufficient interest in the premises searched, he may be forced to rely upon his interest in the seized property to establish standing. Unfortunately, the decisions involving this principle are hopelessly confused because of a failure to distinguish between interest in the property seized and interest in the premises searched.[117]

Generally, the types of interest in the property seized are possession on the person, custody and ownership. If the defendant can show by some credible evidence that the goods in question were seized from his person, there seems to be no question that he may claim standing to object to the seizure, without alleging or proving anything more.[118]

Custody of the goods, without the fact of ownership or possession on the person, produced contradictory results prior to *Jones*.[119] *Jones* would now

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> property has no standing to object to the method of seizure . . . . [Citations omitted.] This rule is particularly applicable where the property seized was taken from a stolen automobile to which the defendants had no title or legal right to possession.

114. 371 F.2d 385 (9th Cir. 1967).

115. *Id.* at 391.

116. See Weeks, *supra* note 92, at 66-71.

117. *Id.* at 65-66.

118. In Wyche v. United States, 193 F.2d 703, 705 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 943 (1952) it was noted that "Wyche was aggrieved . . . because the search was of his person. He therefore had standing to object to its admission without asserting ownership of the property seized." *See* United States v. Fowler, 17 F.R.D. 499 (S.D. Cal. 1955).

119. *Compare In re* No. 32 East Sixty-Seventh Street, 96 F.2d 153 (2d Cir. 1938), *with* Lewis v. United States, 92 F.2d 952 (10th Cir. 1937). In the former case a bailee because he had mere custody.
of merchandise was granted standing. In the latter case the bailee was denied standing

require a finding of standing in such a case.[120] Physical proximity to the item seized does not seem to be enough to meet the rule of law requiring possessory interest; one must also show either custody or ownership.[121] However, if the party seizing the goods is able to assert a superior property interest, an otherwise valid possessory interest is insufficient.[122] It has been argued that a defendant has no right to base standing on possession or ownership of items seized where the goods are stolen.[123] The implications of *Jones,* however, seem to require a contrary result under either of two arguments. First, the thief, under common law property rules, has an interest superior to all but the true owner. Therefore, unless the courts employ an agency theory to put the police in the shoes of the true owner, the defendant's superior right gives him standing to object.[124] Second, since *Jones* and later cases do away with property law concepts when the right to privacy is involved, it would seem unfair to import the superior title argument into a case involving the constitutional right to be free from police intrusion.[125] The Supreme Court recently pointed out that the fact that goods were illegally possessed cannot alone be a basis for denial of standing:

> [W]e have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at common law could be seized with impunity: stolen goods,

120. The rule that a bailee's possession is not sufficient to confer standing would certainly be overruled by the *Jones* decision, since the distinction between "physical custody" and "possession" would clearly fall within the "subtle distinctions" rejected by the *Jones* case. See Weeks, *supra* note 92, at 74.

121. United States v. Konigsberg, *supra* note 50, where the court held that presence was not enough to show possession for purposes of standing.

122. United States v. Masterson, 383 F.2d 610 (2d Cir. 1967), *cert. denied,* 390 U.S. 954 (1968).

123. There is no question that stolen goods can be suppressed if automatic standing is found or if the illegal search is of the defendant's person or of a premises upon which he is legitimately present. If none of those bases for standing exist, however, the theory is that there is not sufficient possession to support standing. For instance, in Simmons v. United States, 390 U.S. 377 (1968), defendant objected to the search of his suitcase which was in a house in which he did not live, and he was not present during the search. Inside the suitcase were stolen money wrappers which he sought to suppress on the theory that the suitcase belonged to him. The trial court denied the defendant's motion to suppress and the only issue before the Supreme Court was whether the defendant's testimony in support of such motion could be used as evidence against him. *See also* United States v. Lester, 21 F.R.D. 376 (W.D. Pa. 1957), *aff'd,* 282 F.2d 750 (3d Cir. 1960), *cert. denied,* 364 U.S. 937 (1961).

124. Cotton v. United States, 371 F.2d 385 (9th Cir. 1967). In United States v. Masterson, *supra* note 122, the person seizing the property, by virtue of being a trustee in bankruptcy, had superior title to the corporate records.

125. *See* United States v. Jeffers, 342 U.S. 48 (1951). There the government argued that since heroin could not be legally possessed for any purpose, the defendant could not object to the seizure. The Court rejected the argument, stating: "We are of the opinion that Congress, in abrogating property rights in such goods, merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment." *Id.* at 53-54.

Henry v. United States, 361 U.S. 98; instrumentalities, *Beck v. Ohio,* 379 U.S. 89; *McDonald v. United States,* [335 U.S. 451]; and contraband, *Trupiano v. United States,* 334 U.S. 699; *Aguilar v. Texas,* 378 U.S. 108.[126]

Ownership of the items seized, without possession, is another valid basis for standing. Cases involving ownership arise when defendant leaves property with another and the property is seized when defendant is not present. In the leading case of *United States v. Jeffers,*[127] the police, while conducting an illegal search of a hotel room rented by the defendant's aunts, uncovered heroin stored there by Jeffers. On a motion to suppress, Jeffers, admitting ownership of the heroin, showed that although he paid no rent for the hotel room, "the Misses Jeffries had given respondent a key to their room, [and] that he had their permission to use the room at will . . . ."[128] The aunts did not know that he was storing narcotics there. The Court, in rejecting the government's argument that Jeffers had no standing to object to the search, stated: "[t]o hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."[129] Although *Jeffers* could now be decided on an automatic standing theory or legitimate presence theory, ownership of the property seized is also a valid basis for establishing standing. Some courts[130] have ignored the rule[131] while others have required technical adherence to the facts in *Jeffers* before granting standing.[132] Nevertheless, standing can be based on ownership by showing ownership and legal access to the seized goods, both "ownership" and "legal access" being relative terms.[133] *Jeffers* seems to make it clear that ownership does not have to be absolute.[134] Legal access, moreover,

126. Warden v. Hayden, 387 U.S. 294, 305-06 (1967).
127. *Supra* note 125.
128. *Id.* at 50.
129. *Id.* at 52.
130. Since the charge amounted to possession of heroin, Jeffers would have had automatic standing under *Jones. Jeffers* has never been expressly or impliedly overruled. Although it relies to some extent on property law concepts, it also rejects subtle distinctions urged by the government concerning lack of right of ownership and lack of trespass towards Jeffers. *See* United States v. Bozza, 365 F.2d 206, 222-24 (2d Cir. 1966).
131. *See, e.g.,* Fondren v. State, 253 Miss. 241, 175 So. 2d 628 (1965); Sanders v. State, 351 P.2d 1079 (Okla. Crim. 1960).
132. Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963), *cert. denied,* 377 U.S. 999 (1964) (no showing that defendant had right to use room at will); United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963) (no claim of ownership of goods); Huffmeister v. State, 170 Tex. Crim. 460, 341 S.W.2d 928 (1960); Combs v. Commonwealth, 341 S.W.2d 774 (Ky. 1960).
133. *Compare* United States v. Jeffers, *supra* note 125, *with* Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956). *See also* Villano v. United States, 310 F.2d 680 (10th Cir. 1962).
134. Although, by statute, Jeffers could not "own" the heroin, this did not deter the Court from suppressing it. United States v. Jeffers, *supra* note 125.

could mean anything short of trespass[135] and prior to *Jeffers,* some courts used a theory of "constructive possession" to come to the same conclusion.[136]

The "ownership" requirement, however, does have certain limits.[137] Where corporate records are seized for use in prosecution of corporate officers, the corporate entity has standing to raise a fourth amendment claim.[138] However, prior to *Jones,* many courts had refused to extend that right to corporate officers or employees.[139] Since that decision, courts have been inconsistent in deciding the question. The majority of cases deny standing to the officers as employees,[140] but several cases indicate that the correct approach is to grant standing to the party against whom the search is directed.[141] In cases in which corporate records do not technically belong to the defendant but are in fact his work product and the search is made to uncover evidence against him, standing should not be denied the defendant.[142]

D. Derivative Standing

Although appellate decisions often state that the rights guaranteed by the fourth amendment are "personal," a line of cases stemming from *McDonald v. United States*[143] grant a defendant standing to object to fourth amendment

135. "One does not have to maintain his grip on his effects when he has a lawful right to have those effects rest undisturbed in the place where he has put them. On the other hand, a trespasser who places his property where it has no right to be has no right of privacy . . . to that property." State v. Pokini, 45 Hawaii 295, 315, 367 P.2d 499, 509 (1961).

136. United States v. Stappenback, 61 F.2d 955 (2d Cir. 1932). Here the defendant's coat, with a slip of incriminating paper in the pocket, was found by police in another's apartment while the defendant was not present. The court held that "although hanging within another's building, the suit remained in his possession." *Id.* at 957. *See* United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951); *but see* Perlman v. United States, 247 U.S. 7 (1918).

137. Granza v. United States, 377 F.2d 746 (5th Cir.), *cert. denied,* 389 U.S. 939 (1967) draws a line insofar as it holds that the interest in the future profit derived from the sale of the item is not sufficient.

138. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

139. Lagow v. United States, 159 F.2d 245 (2d Cir. 1946), *cert. denied,* 331 U.S. 858 (1947); United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir.), *cert. denied,* 329 U.S. 742 (1946); United States v De Vasto, 52 F.2d 26 (2d Cir.), *cert. denied,* 284 U.S. 678 (1931); Bilodeau v. United States, 14 F.2d 582 (9th Cir.), *cert. denied,* 273 U.S. 737 (1926); A. Guckenheimer & Bros. v. United States, 3 F.2d 786 (3d Cir.), *cert. denied,* 268 U.S. 688 (1925).

140. *E.g.,* Hill v. United States, 374 F.2d 871 (9th Cir.), *cert. denied,* 389 U.S. 842 (1967); United States v. Fago 319 F.2d 791 (2d Cir.), *cert. denied,* 375 U.S. 906 (1963).

141. *See* United States v. Masterson, *supra* note 122; Rosencranz v. United States, 334 F.2d 738, 741 (1st Cir. 1964) (Aldrich, J. concurring); Henzel v. United States, 296 F.2d 650 (5th Cir. 1961).

142. Henzel v. United States, *supra* note 141; *cf.* Villano v. United States, *supra* note 133.

143. 335 U.S. 451 (1948).

violations against a co-defendant. Standing gained under this doctrine is often called "derivative standing."[144]

In *McDonald,* police entered defendant's room without a warrant, arrested McDonald and a co-defendant, Washington, and seized "numbers" paraphernalia. The two were jointly tried and convicted on the gambling charges. The Court held that the search was illegal as to McDonald, who rented the room, and reversed Washington's conviction on the same grounds, stating:

> Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case . . . the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial.[145]

Unfortunately, the Court did not elaborate upon its extension of the exclusionary rule, and only three justices completely endorsed this opinion. Mr. Justice Rutledge concurred but suggested that the rule should be broader;[146] Mr. Justice Jackson indicated that he would grant Washington standing under the theory later adopted in *Jones,*[147] while Mr. Justice Frankfurter joined in the Court's opinion and in Mr. Justice Jackson's concurrence.[148] Under *Jones,* Washington would be granted standing because he was "legitimately on the premises." Moreover, the *Jones* Court, in dicta, suggested that it might be ready to reconsider the rule in *McDonald,*[149] but in *Wong Sun v. United States,*[150] the Court, without citing *McDonald,* refused to extend the rule. In *Wong Sun,* police illegally arrested Toy who then told them that Yee sold narcotics. The police went to Yee's home, questioned him, and obtained an ounce of heroin he said "Sea Dog" had given him. Toy then told police that Wong Sun was "Sea Dog" and showed the officers where Wong Sun lived. They were admitted to the house by Wong Sun's wife, but a search yielded no narcotics. Yee, Toy and Wong Sun were all charged with federal narcotics violations. Toy and Wong Sun were tried together. The Court held that the heroin obtained from Yee was the fruit of Toy's illegally obtained statement and suppressible as to Toy. The Court refused to extend this ruling

144. See G. SHADOAN, *supra* note 76, at 38. Other terms are "umbrella defense" and third party standing.

145. McDonald v. United States, *supra* note 143, at 456.

146. *Id.* at 457.

147. "[E]ven a guest may expect the shelter of the rooftree he is under against criminal intrusion. I should reverse as to both defendants." *Id.* at 261.

148. *Ibid.*

149. *See* Jones v. United States, *supra* note 71, at 461.

150. 371 U.S. 471 (1963).

to Wong Sun because the heroin was not obtained illegally from Yee but was obtained as a result of the statement illegally obtained from Toy.[151]

Although it could be argued that *Wong Sun* sub silentio overruled *McDonald,* most courts and commentators feel that *McDonald* is still viable.[152] The nature of the right, however, is not wholly apparent. Clearly the right is not one which allows a defendant to object to any police illegality employed in obtaining evidence against him. Such a rule would completely obviate the standing requirement; the Court has not yet gone that far. As a recent commentator pointed out, all the implications of this concept of derivative standing are not yet clear,[153] but courts have limited their holdings to situations in which the illegal search invaded a co-defendant's right to privacy.[154] The rationale of this limitation has been stated as follows:

> The government's confusion stems from the fact that it misconstrues appellants' argument. Appellants do not claim *McDonald* to hold that a defendant has standing to complain of a violation of someone else's constitutional right. To repeat, all appellants claim is that under *McDonald,* where the person whose constitutional right has been violated has properly complained thereof and his motion to suppress has been wrongfully denied, the right not to be convicted upon the basis of such evidence extends to the co-defendants as well as the movant.[155]

151. *Id.* at 491-92:

> Our holding . . . that this ounce of heroin was inadmissible against Toy does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.

152. G. SHADOAN, LAW AND TACTICS IN FEDERAL CRIMINAL CASES 40 (1964) notes: "[i]n Wong Sun, however, the derivative standing point was not raised or discussed in either brief. The brief consideration by the Supreme Court under these circumstances leaves the law in considerable doubt." The majority in Rosencranz v. United States, *supra* note 141, at 741, distinguished *Wong Sun* from *McDonald* by stating:

> In Wong Sun, this evidence in issue [narcotics] was not illegally seized from Yee but had been voluntarily given by him to the police. If Yee had moved to suppress this evidence prior to trial, which he did not, the motion would have been denied. Wong Sun, therefore, could certainly have no greater rights than Yee in the seized evidence. The evidence was inadmissible as to Toy because it was discovered as a result of statements made by Toy while under an illegal arrest. The Court did not feel that this taint carried over to Wong Sun and allowed introduction of the evidence against him.

But see Bozza v. United States, *supra* note 130, at 223.

153. G. SHADOAN, *supra* note 152, at 41.

154. *See* Barnett v. United States, 384 F.2d 848 (5th Cir. 1967); Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966); Rosencranz v. United States, *supra* note 141; Schoeneman v. United States, 317 F.2d 173 (D.C. Cir. 1963); Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961); Nelson v. United States, 208 F.2d 505 (D.C. Cir.), *cert. denied,* 346 U.S. 827 (1953).

155. Rosencranz v. United States, *supra* note 141, at 741 n.4.

The derivative nature of the right is limited to co-defendants, but there is some confusion as to the type of co-defendant that can avail himself of the right. In *United States v. Serrano*,[156] narcotics were seized from Serrano's confederate. The two were jointly indicted but the cases were severed prior to trial. Serrano attempted to suppress the evidence but was denied standing. In *United States* v. *Lee Wan Nam*,[157] three defendants were tried jointly. Co-defendant May Moy's motion to suppress was granted on the ground that the police had illegally entered his apartment. The government did not introduce the ill-gotten evidence during the case in chief; however, when a motion for judgment of acquittal was granted as to May Moy, the government succeeded in introducing the evidence in rebuttal.

In *United States v. Bozza*,[158] the defendant against whom the search was directed moved to suppress the items and failed. Thereafter he pleaded guilty, and when his co-defendants went to trial the evidence was also admitted against them. On appeal the Second Circuit held that the appellants had no standing to object to the search.[159] The First Circuit, in *Rosencranz v. United States*,[160] took a more liberal view of the rule. In that case the police had illegally searched one Amorello's truck. He and two others were indicted on the basis of evidence found in the truck. Amorello moved to suppress, but the other defendants did not. Amorello lost the motion and pleaded guilty. The other defendants went to trial and objected to the introduction of the evidence at trial on the basis of *McDonald*. On appeal they prevailed, even though, as Judge Aldrich noted, any derivative rights they had were lost when Amorello pleaded.[161] The court felt that limiting the right to object would be unfair, especially when the offended party did not appeal.[162]

Some courts have indicated that the crucial question is whether the seized items would be available at trial.[163] This argument focuses on two considerations. First, some courts argue that no matter what the nature of the seized

156. 317 F.2d 356 (2d Cir. 1963).
157. 274 F.2d 863 (2d Cir.), *cert. denied*, 363 U.S. 803 (1960).
158. *Supra* note 130.
159. *Id.* at 223:

> The values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of "victims" in the broad sense the Supreme Court has given that term; we see no important purpose to be served by holding that a thief who has left evidence of his crime on the premises of a confederate is subrogated to the latter's right to complain of a search and seizure, so that he may exercise this although the confederate has not elected to do so or to pursue an election once made.

160. *Supra* note 141.
161. *Id.* at 742.
162. "[T]he trial court's erroneous denial of that motion severely prejudiced appellants since the seized materials formed a substantial part of the evidence used to convict them." *Id.* at 740. *See* Binkiewicz v. Scafati, 281 F. Supp. 233 (D. Mass. 1968).
163. For a general discussion, see Note, *Search and Seizure: Admissibility of Illegally Acquired Evidence Against Third Parties*, 66 COLUM. L. REV. 400, 403 (1966).

evidence, the government could produce it at trial by subpoena duces tecum even if a motion to suppress and return has been granted.[164] This argument necessarily requires that the victim of the search is not a defendant in the trial.[165] In opposition to this theory is Mr. Justice Holmes' belief that such evidence "shall not be used at all."[166] Second, it is argued that because a successful motion to suppress does not entitle the moving party to the return of the evidence if it is contraband per se, the derivative standing rule does not apply to cases involving such evidence.[167] This theory is based upon the different results in *Wong Sun* and *McDonald*. It is submitted that the "availability" theory should never be determinative of the standing issue. As a practical matter, evidence seized illegally from A cannot be introduced against defendant B when the two are being tried jointly.[168] Admission of the evidence would allow cross-examination as to its source, a possibility that would automatically prejudice defendant A. This is true whether the government could subpoena the goods for use against defendant B, or would have the goods available because of their contraband nature. The main issue in every case, then, is whether the aggrieved party is a co-defendant. Given his status as a co-defendant, the traditional view has been to determine whether he has asserted his rights to suppress.[169] If he has moved to suppress, then other co-defendants should have derivative standing. Since most aggrieved parties with the right to suppress damaging evidence will exercise that right, the inquiry then should shift to cases in which the government frustrates the normal process by failing to indict the aggrieved party, dropping the charges against him or severing the cases.[170] In many instances the government has been allowed to avoid the full consequence of the motion to suppress by initiating such action. Such a use of discretion or procedural devices does little to further the discouragement of illegal police conduct, the very purpose of the exclusionary rule.[171] The "amenities of justice" are not realized when courts allow anomalous results in this class of cases.

Conclusion

The erosion of the strict standing requirements relevant to police illegality has been evident ever since *McDonald v. United States*.[172] This development is con-

164. *E.g.*, United States v. Granello, 365 F.2d 990 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967); United States v. Bozza, *supra* note 130.

165. Silverthorne Lumber Co. v. United States, *supra* note 138.

166. *Id.* at 392; *See* McDonald v. United States, *supra* note 143, at 456; Malinski v. New York, 324 U.S. 401, 411 (1945). See also G. SHADOAN, *supra* note 152.

167. *See* Gillespie v. United States, *supra* note 154, at 6.

168. See Note, *Search and Seizure: Admissibility of Illegally Acquired Evidence Against Third Parties*, 66 COLUM. L. REV. 400 (1966).

169. *See, e.g.*, McDonald v. United States, *supra* note 143.

170. *E.g.*, Serrano v. United States, *supra* note 156.

171. Linkletter v. Walker, 381 U.S. 618, 629-35 (1965).

172. *Supra* note 143.

sistent with recent judicial concern for the proper administration of criminal justice. Stripped to its essentials, the standing requirement is a device which frustrates the implementation of the exclusionary rule in situations where the police have acted illegally. It is clear that Article three of the Constitution does not dictate but rather permits the standing requirements.[173]

In certain cases, the Supreme Court has permitted the assertion of another's constitutional rights.[174] These cases indicate that where the nature of the right involved is of great importance, traditional standing rules should not be interjected to defeat a decision on the merits, particularly where it is difficult for the person primarily protected by the right to assert it.[175] In determining whether a particular rule of law should be capable of assertion by third parties, the nature of the right must be assayed. If the right is one which the public at large has a great interest in seeing observed, it can be held that the right is not personal and that therefore a rule requiring a personal interest for standing is inapplicable.[176]

Under this reasoning the basic question is whether a defendant, whose personal rights have not been breached, " 'belongs to the class for whose sake the constitutional protection is given . . . .' "[177] One must turn to the rationale behind the exclusionary rule to determine whom it seeks to protect. The underlying rationale of the exclusionary rules is protection of the general public from police misconduct.[178] If the rights guarded by the exclusionary rules are

173. See in general C. WRIGHT, FEDERAL COURTS 36-40 (1963); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

174. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953); *see* Pierce v. Society of Sisters, 268 U.S. 510 (1925). *Cf.* Flast v. Cohen, 392 U.S. 83 (1968).

175. See Sedler, *supra* note 173, at 646-48 (1962). Sedler suggests a fourfold test to determine if the right can be asserted by another. This test considers: (1) the interest of the party attempting to assert the right; (2) the nature of the right to be asserted; (3) the relationship between the person seeking to assert the right and the third party; and (4) the practicability of assertion of such rights by third parties in an independent action.

176. For example, in Barrows v. Jackson, *supra* note 174, at 257, the Court pointed out:

> Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.

The Court felt that since it was almost impossible for the Negroes harmed by the restrictive covenant to litigate the issue, a white person who was a party to the contract could assert the right. *Cf.* Flast v. Cohen, *supra* note 174.

177. Jones v. United States, 362 U.S. 257, 261 (1960) quoting from Hatch v. Reardon, 204 U.S. 152, 160 (1907).

178. Terry v. Ohio, 392 U.S. 1, 12 (1968):

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. Thus, its major thrust is a deterrent one, and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against un-

general constitutional rights belonging to every citizen,[179] then every person who has general standing by the fact that he has been charged with a crime could be prejudiced by the introduction of illegally obtained evidence and should be allowed to challenge the police misconduct. California, by adopting this theory, has entirely abandoned the standing requirement in the fourth amendment area.[180]

It is submitted that the California approach to the problem is correct. The Supreme Court has already pointed out that the exclusionary rule is the only effective means of condemning illegal police conduct.[181] Moreover, to allow only those persons directly affected either physically or financially by police misconduct to establish standing, would permit some police wrongdoings to go unchecked.[182] As Justice Traynor has pointed out, the reasonableness of police conduct is the main issue in every motion to suppress, and limiting requirements such as standing are irrelevant to this inquiry.[183] The California rule is not inconsistent with standing requirements in other areas of the law relevant to rights possessed by the entire citizenry.[184] If deterrence is the reason for the exclusionary rule, the standing requirement, hinders rather than furthers the goals of the rule.[185] Since traditional standing requirements are no longer sup-

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reasonable searches and seizures would be a mere "form of words." The rule also serves another vital function—"the imperative of judicial integrity." (Citations omitted.)

See Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, *supra* note 171.

179. Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 362 (1967).

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

181. Mapp v. Ohio, 367 U.S. 643 (1961).

182. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335:

> [*Jones*] . . . indicates a continuing tendency to focus on a relation between the defendant and the property involved. Such a focus to ferret out some violated right of the defendant suggests, though perhaps unintentionally, that the objective of the exclusionary rule is to make amends to the defendant. What should be of primary concern is not the grievances of selected guilty defendants such as land-owners or the gentry of invitees, but the greviousness of official lawlessness.

183. *Ibid.*:

> The defendant's standing to object does not depend on his showing that the evidence was illegally obtained in violation of some right of his, substantial or tenuous. He need only show that the state obtained the evidence illegally, whether in violation of his rights or those of third parties, which is to say that he must show that the state obtained the evidence in the course of a search and seizure that was unreasonable.

184. See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Sedler, *supra* note 175.

185. People v. Martin, 45 Cal. 2d 755, 760, 290 P.2d 855, 857 (1955):

> [I]f law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them.

ported by the rationale of the exclusionary rule and because it is clear that Article three of the Constitution permits the vicarious assertion of certain constitutional rights once the parties are otherwise placed in an adversary posture, there seems to be no real justification for a continuation of the requirement.[186] Indeed, it has been hypothesized that *Jones* may lead toward ultimate rejection of the standing requirement.[187] Mr. Justice Harlan has also recognized that abandonment of the standing requirement is a possibility.[188]

Commentators on the subject are generally not in accord;[189] however, the most persuasive analysis of the law concludes, with one possible exception,[190] that standing is no longer relevant to the exclusionary rule because:

> The general deterrence rationale . . . implies that there are two separate rights contained in the fourth amendment: (1) the personal right to be free from unreasonable searches and seizures; and (2) the right of the general citizenry that unreasonably seized evidence not be used in courts so that the police will be deterred from invading their privacy in the future.[191]

The Court's recent willingness to strike down those evidentiary rules which are without reason[192] might well indicate that the standing doctrine is on its last leg.[193]

186. Indeed, abandonment of a standing requirement apparently has not hampered law enforcement efficiency in California. See Note, *Two Years with the* Cahan *Rule,* 9 STAN. L. REV. 515, 538 (1957).

187. Note, *The Exclusionary Rule and Question of Standing,* 50 GEO. L.J. 585, 586 (1962).

188. Simmons v. United States, 390 U.S. 377, 390 n.12 (1968).

189. See Traynor, *supra* note 182; Sedler, *supra* note 173; Comment, *supra* note 179; Note, *Standing to Object to an Unlawful Search and Seizure,* 1965 WASH. U.L.Q. 488. But see Note, *Standing to Object to an Unlawful Search and Seizure,* 15 WYO. L.J. 218 (1961).

190. It is theorized that since the right to object to an invasion of privacy belongs in the first instance to the person whose privacy is actually invaded, an objection to the invasion of privacy could be waived. *See* Henry v. Mississippi, 379 U.S. 443 (1965). Since this is so, it has been suggested that an *in camera* hearing be held to determine whether the actual victim wishes to waive the objection. Comment, *supra* note 179, at 361. It is submitted that this analysis is inconsistent with the deterrence rationale. Moreover, it would seem that this theory resurrects the very problems sought to be done away with by abolishing standing.

191. Comment, *supra* note 179, at 365.

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

193. The Supreme Court's recent grant of certiorari in Butenko v. United States, 384 F.2d 554 (3d Cir. 1967), *cert. granted,* 88 S. Ct. 2293 (1968) (No. 1007, 1967 Term; renumbered No. 197, 1968 Term); Ivanov v. United States, 384 F.2d 554 (3d Cir. 1967), *cert. granted,* 88 S. Ct. 2273 (1968) (No. 885, 1967 Term; renumbered No. 11, 1968 Term); and Kolod v. United States, 371 F.2d 983 (10th Cir. 1967), *cert. granted,* 390 U.S. 136 (1968) (No. 133, 1967 Term; *sub nom.* Alderman v. United States, 1968 Term) may enable it to redefine the standing requirement in cases involving illegal electronic surveillance. Questions presented include whether a defendant or co-defendant has standing to suppress even if he was not present on the premises or a party to the overheard conversation. Oral arguments on the three cases were heard on October 14, 1968.