NOTES

STANDING TO OBJECT TO AN UNLAWFUL SEARCH AND SEIZURE

Universal application of the exclusionary rule[1] does not necessarily preclude the admission of all unlawfully seized evidence in a criminal trial because to invoke the rule, a defendant must first establish that he has standing. This requires him to show that the search and seizure invaded certain of his interests protected by the fourth amendment. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[2]

Traditionally, a person could establish that he was "aggrieved by an unlawful search and seizure"[3] only if he claimed and showed a possessory

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1. Simply stated, the exclusionary rule prohibits the use of evidence which is the fruit of an unlawful search and seizure. This rule was deemed necessary to enforce the fourth amendment.

Weeks v. United States, 232 U.S. 383 (1914), was the first case to require the suppression of evidence illegally acquired by federal agents. The exclusionary rule, however, was not held to be constitutionally binding upon the states. Wolf v. Colorado, 338 U.S. 25 (1949). Twelve years later this mandate was overruled by Mapp v. Ohio, 367 U.S. 643 (1961). That case stated the rule to be "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655. Thus the federal exclusionary rule was constitutionally applied to the states. The Court's opinion was influenced by the California case of People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), in which the California court adopted the exclusionary rule. In that case Justice Traynor said:

> We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. *Id.* at 445, 282 P.2d at 911.

2. U.S. CONST. amend. IV.

3. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing. FED. R. CRIM. P. 41 (e).

or proprietary interest in the object seized or the premises searched.[4] This requirement of a claim of ownership or possession often unfairly placed the defendant in the dilemma of having to claim facts that would incriminate or possibly even convict him. Also, all temporary guests were unable to satisfy the requisites of the traditional test and were denied standing even though their anticipated privacy on the property of another had been violated by an unlawful search and seizure.[5] Consequently, the effect of the traditional requirements for standing was to allow police—without losing convictions—to seize evidence illegally from those members of the public who could not or did not choose to claim the requisite possessory or proprietary interest in the object seized or the premises searched. Arguably, the traditional requisites for standing contravened the effective enforcement of the safeguards of the fourth amendment. Then, along came Jones.

One year before the exclusionary rule was applied to the states, the Supreme Court examined the traditional standing rules in the federal courts. In *Jones v. United States,*[6] federal agents found narcotics hidden in a bird's nest in a window awning of the apartment they were searching pursuant to a warrant. The defendant was a guest in the apartment that had been leased by a friend who was away for several days. The defendant was charged with having "purchased, sold, dispensed and distributed" narcotics and having "facilitated the concealment and sale of" these narcotics. The Government contended that the defendant lacked standing to challenge the search and seizure because he had not claimed and shown the requisite interest in either the narcotics or the apartment.

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4. *E.g.,* Chicco v. United States, 284 Fed. 434 (4th Cir. 1922); United States v. Silverthorne, 265 Fed. 853 (W.D.N.Y. 1920).

For a general history of the standing rule see Edwards, *Standing to Suppress Unreasonably Seized Evidence,* 47 NW. U.L. REV. 471 (1952); Weeks, *Standing to Object in the Field of Search and Seizure,* 6 ARIZ. L. REV. 65 (1964); 15 WYO. L.J. 218 (1961); Annot., 50 A.L.R.2d 531 (1956).

5. Gaskins v. United States, 218 F.2d 47 (D.C. Cir. 1955); Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945); Daddio v. United States, 125 F.2d 924 (2d Cir. 1942); Mixon v. State, 54 So. 2d 190 (Fla. 1951); Walker v. State, 200 Ind. 303, 163 N.E. 229 (1928); Lambert v. State, 196 Md. 57, 75 A.2d 327 (1950); Polk v. State, 167 Miss. 506, 142 So. 480 (1932); State v. Cantrell, 310 S.W.2d 866 (Mo. 1958); Williams v. State, 35 Okla. Crim. 171, 249 Pac. 433 (1926); Paige v. State, 161 Tex. Crim. 571, 279 S.W.2d 344 (1955). The necessary interest needed to give standing was ownership in or right to possession of the premises. Jeffers v. United States, 187 F.2d 498 (D.C. Cir. 1950). However, the interest of a lessee or licensee was enough. United States v. De Bousi, 32 F.2d 902 (D. Mass. 1929). Also, the rule was satisfied by one who had control or dominion. Steeber v. United States, 198 F.2d 615 (10th Cir. 1952). Employees, though in control of the premises, lacked the necessary possession. United States v. Conoscente, 63 F.2d 811 (2d Cir.), *cert. denied,* 290 U.S. 642 (1933); Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932).

6. 362 U.S. 257 (1960).

Mr. Justice Frankfurter, writing the opinion of the Court, asserted that if Jones had to claim a possessory or proprietary interest in the narcotics in order to obtain standing, he would be enmeshed in the dilemma[7] so vividly described by Judge Learned Hand.

> 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 the bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.[8]

The facts that the defendant had to claim and prove to obtain standing were sufficient to convict him of the crime charged. The unfairness of this dilemma motivated the Court to grant the defendant automatic standing by exempting him from making the traditional claim.[9] Thus the first rationale of *Jones* predicated standing upon the dilemma.

But the eradication of the dilemma was not the only malady in the standing rules that was to be cured by the Court. A second innovation in the law of standing, separate and distinct from the first, was also established. The subtle historical distinctions between a lessee, licensee, invitee, and guest were eliminated as bases for depriving a person of standing. To obtain standing a defendant now only has to show that he was legitimately on the premises searched and that he can invoke the privacy of the premises. No longer is it necessary to claim and prove ownership, possession, or dominion of a premises to obtain standing; mere presence with the consent of the owner is established as a new basis for standing to challenge the

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7. If the defendant disclaims any interest in either the premises searched or the property seized, he would have no standing to object to the evidence offered, even though the evidence was unlawfully obtained. If, on the other hand, at the suppression hearing he admits his interest in the property seized, he will have standing, but this disclosure may very well convict him if it is used against him at the trial. However, the dilemma may not exist at all if the admission of a proprietary or possessory interest is inadmissible. Mr. Justice Frankfurter noted that these admissions may be excluded from the trial in the future.

> At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced . . . with the chance that the allegations made on the motion to suppress may be used against him at the trial, *although that they may is by no means an inevitable holding.* . . . Jones v. United States, *supra* note 6, at 262. (Emphasis added.)

Most courts, however, do not consider that the claim may be inadmissible, and as a result, the dilemma is present. This is exemplified by the following statement: "Therefore, if the defendant failed to sustain the motion to suppress he stood convicted by his own admission." Simpson v. United States, 346 F.2d 291, 300 (10th Cir. 1965).

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

9. Jones v. United States, 362 U.S. 257, 262 (1960).

legality of a search of a premises. This second rationale of *Jones* significantly enlarges the class of people who can obtain standing.

The interpretation and scope of the two new rationales for standing and their applicability to cases with subtle variations from the facts of *Jones* have created perplexing problems for the courts. In the *Jones* case, the defendant was in possession of narcotics which were contraband per se; that is, the fact of possession was the only element needed by the prosecution to prove a prima facie case. Thus the first rationale is demonstrably applicable to contraband per se cases, but the opinion left unclear whether or not the rationale should apply to situations in which possession is the central or essential element of the crime charged, but not the sole element which the prosecution must affirmatively prove—derivative contraband cases.[10] Furthermore, in many situations a possessory or a proprietary interest in an object or premises may be seriously incriminating, and an admission by a defendant of his interest may be the basis for his conviction. Whether these defendants should automatically be given standing under the *Jones* rationale is also debatable.

Additional uncertainty, attendant to the second rationale, stems from the necessary line-drawing of the physical areas where a person may claim privacy. Do common hallways, lobbies, or backyards afford privacy to a person? And if so, is the degree of privacy the same for the guest as the owner? Furthermore, it was not made clear whether guests in automobiles would fall within the class of defendants who could obtain standing by showing that their presence was with the consent of the owner.

The full impact of the *Jones* case is also uncertain. The standing rules formulated by the Court were based upon its interpretation of Rule 41(e) of the Federal Rules of Criminal Procedure, and therefore were not binding upon the states. Furthermore, at the time *Jones* was decided, the federal exclusionary rule was not yet binding on the states. *Mapp v. Ohio*[11] subsequently extended the federal exclusionary rule to the states, but the elements of standing to invoke that rule have not been re-examined by the Supreme Court, and therefore, whether the standing rules set forth in *Jones* will be made applicable to the states through the fourteenth amendment remains unresolved.

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10. In derivative contraband crimes, the holding of property, otherwise lawful, is made illegal upon the finding of other elements. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965). For example, the elements of receiving stolen goods are (1) possession of (2) stolen goods plus (3) knowledge that they have been stolen. Thus, if it can be shown that a defendant had knowledge that goods in his possession were stolen, the goods are derivative contraband.

11. 367 U.S. 643 (1961).

I. Standing Predicated upon the Dilemma

The first rationale of *Jones* was founded on the notorious Hand dilemma. A defendant confronted by the dilemma had two choices. On the one hand, he could attempt to gain standing to challenge the introduction of objects seized by an alleged unlawful search. This necessitated making a claim and showing of a possessory or proprietary interest in the objects. Subsequently, these motions, admissions, and proof could be introduced at the trial as a basis for his conviction. On the other hand, such a defendant might choose to forego an attempt to enforce the exclusionary rule, a constitutional guarantee under the fourth amendment, and permit the objects seized to be introduced in the trial as the basis for conviction. Either choice would almost inevitably lead to conviction. The first rationale of the *Jones* opinion automatically confers standing on a defendant confronted by this dilemma.

In the *Jones* case, the defendant was charged with having "purchased, sold, dispensed and distributed" narcotics, and having "facilitated the sale and concealment of" narcotics, in violation of federal statutes. Although this indictment did not explicitly charge the defendant with a crime of possession, the Court reprimanded prosecutors for framing charges generally to conceal the fact that proof of a defendant's possession of contraband per se, alone, is sufficient to convict him.[12] Clearly the same element that conferred standing on the defendant, possession, convicted him. For this reason, restriction of this rationale to contraband per se cases, where possession is the sole element of the crime, is a possible interpretation of the *Jones* opinion.

However, the underlying basis of this rationale, the dilemma, is not confined to contraband per se cases and may also exist in cases where possession is but one element of the crime, derivative contraband cases. The dilemma may also exist in varying degrees in cases in which possession of an

12. "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." Jones v. United States, 362 U.S. 257, 264-65 (1960). The Ninth Circuit pinpointed the crucial issue: "Where a criminal charge against a defendant is based upon possession, the Jones case established that the defendant, is, by that very fact, a 'person aggrieved by an unlawful search and seizure,' . . . ." Contreras v. United States, 291 F.2d 63, 65 (9th Cir. 1961) (smuggling narcotics); *accord*, Plazola v. United States, 291 F.2d 56 (9th Cir. 1961) (unlawfully concealing and importing narcotics into the United States); see United States v. Thomas, 216 F. Supp. 942, 945 (N.D. Cal. 1963).

One other factor may induce prosecutors not to frame charges generally. Roviaro v. United States, 353 U.S. 53 (1957), compels the Government to charge the defendant with possession if it wishes to keep an informer's identity unknown. Any other charge will necessitate revealing the informer's identity. Therefore, in informant cases prosecutors have another reason not to frame charges generally.

object is not an element of the crime, but either creates damaging inferences as to the existence of the elements of the crime or substantially links the defendant to its commission. Yet, in federal and state cases subsequent to *Jones,* this rationale has been limited, with one exception,[13] to contraband per se cases.[14] Consequently many defendants whose plight seems to place them within the class for whom this rationale was designed are denied its benefit. A possible explanation for the restrictive interpretation of this rationale is that it is a substantial departure from the traditional requirement that a person must claim and show that he has been "aggrieved by an unlawful search and seizure." Furthermore, defendants to whom this rationale would afford standing also usually qualify for standing under either the traditional rule or the second rationale of *Jones.* Therefore courts have had a convenient means of avoiding the complexities of predicating standing upon the dilemma.[15]

A. *Situations in Which the Dilemma Emerges*

1. *Charged with Possession of Contraband Per Se*

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 an invasion of the privacy of the defendant.

Applying the first rationale of *Jones,* one federal court[16] and three state courts[17] have conferred standing on defendants charged with possession of

13. Simpson v. United States, 346 F.2d 291 (10th Cir. 1965) (charged with possession of derivative contraband).

14. *E.g.,* United States v. Konigsberg, 336 F.2d 844 (3d Cir.), *cert. denied,* 379 U.S. 933 (1964); Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961); State v. Pokini, 45 Hawaii 295, 367 P.2d 499 (1961); People v. Kelley, 23 Ill. 2d 193, 177 N.E.2d 830 (1961), *cert. denied,* 370 U.S. 928 (1962); People v. DeFilippis, 54 Ill. App. 2d 137, 203 N.E.2d 627, *rehearing denied,* 54 Ill. App. 2d 145, 203 N.E.2d 631 (1964).

15. United States v. Peisner, 311 F.2d 94 (4th Cir. 1962); People v. Mayo, 19 Ill. 2d 136, 166 N.E.2d 440 (1960) (unlawful possession of papers and documents used in playing policy); Belton v. State, 228 Md. 17, 178 A.2d 407 (1961) (possession of narcotics); State v. Evans, 75 N.J. Super. 319, 183 A.2d 137 (App. Div. 1962) (unlawful possession of narcotics); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964) (possession of obscene material); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962) (illegal possession of gambling devices). *But see* note 129 *infra.*

16. Contreras v. United States, 291 F.2d 63 (9th Cir. 1961).

17. People v. Mayo, 19 Ill. 2d 136, 166 N.E.2d 440 (1960) (search of automobile that defendant had been driving); State v. Evans, 75 N.J. Super. 319, 183 A.2d 137 (App. Div. 1962) (search of apartment in which defendant had been staying); see State v.

contraband per se in situations where the privacy of premises of the defendant had been invaded. More significant are *Plazola v. United States,*[18] in which the basis of the charge was possession of contraband per se and the defendant was given standing even though the objects seized were taken from another person's automobile, and *Thomas v. United States,*[19] where the basis of the charge was also possession of contraband per se and the defendant was given standing even though the search was not in violation of his right to privacy as protected by the fourth amendment. Each of these courts has implicitly recognized that under the first rationale of *Jones,* standing is predicated upon the dilemma alone and does not also require an invasion of the defendant's privacy.

However, the Supreme Court of Washington, while recognizing the first rationale of *Jones,*[20] denied standing to a defendant charged with possessing narcotics because "the evidence seized was not on his person, nor was it in or on property belonging to him; and it was not taken from premises legitimately occupied by him."[21] Similarly, in *State v. Nobles,*[22] the Supreme Court of New Jersey denied standing to a defendant, charged with possessing and dispensing narcotics, when the contraband was found in a search of another person, who was probably the defendant's agent. It is submitted that both of these state courts have erroneously added to the first rationale of the *Jones* opinion the requirement of an invasion of the defendant's privacy.

2. *Charged with Possession of Derivative Contraband*

Extension of the first rationale of *Jones* beyond contraband per se cases depends upon judicial determinations that in other circumstances an admission of possession by the defendant will be so prejudicial to his case that it is justifiable to extricate the defendant from his dilemma. In *Jones,* proof of possession was the sole element of the crime and therefore was sufficient to establish a prima facie case against the defendant. In crimes involving derivative contraband, possession is an essential or central element of the crime, but not the sole element. Still, it seems that for defendants charged

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Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962) (search of defendant's wife's automobile).

18. 291 F.2d 56 (9th Cir. 1961) (charged with unlawfully concealing and importing narcotics).

19. 216 F. Supp. 942 (N.D. Cal. 1963).

20. State v. Loran, 62 Wash. 2d 4, 380 P.2d 733 (1963); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962).

21. State v. Loran, *supra* note 20, at 5, 380 P.2d at 734 (narcotics tossed on premises of a stranger). *But cf.* Williams v. United States, 237 F.2d 789 (D.C. Cir. 1956).

22. 79 N.J. Super. 442, 191 A.2d 793 (App. Div. 1963).

with possession of derivative contraband, the Hand-Frankfurter dilemma looms as fatefully as in cases charging possession of contraband per se.

Two federal courts of appeals have been confronted with cases involving charges of possession of derivative contraband and have reached opposite conclusions as to the applicability of the first rationale of *Jones*. In *United States v. Konigsberg*,[23] the defendant, charged with unlawful possession of goods stolen from interstate commerce, attempted to challenge the introduction of the goods allegedly stolen. In denying the defendant standing, the court stressed that possession was "only one element of the crime charged,"[24] and thus limited the first rationale of Jones to contraband per se cases. However, in *Simpson v. United States*,[25] the defendant, charged with unlawful possession of an automobile transported in interstate commerce, was given standing under the first rationale of *Jones*. That the charge was one of possessing derivative contraband and not of possessing contraband per se did not cloud the fact that "possession was the basis for conviction"[26] and that the dilemma was therefore ominously present.

3. *Theft Crimes in Which the Defendant Attempts to Suppress the Stolen Objects*

Larceny, robbery, and related crimes always require proof of the defendant's taking possession of the stolen objects at some time.[27] Therefore, an admission by the defendant of his possession of the stolen objects will relieve the prosecutor of proving one critical fact and, at the same time, will create damaging inferences as to the defendant's guilt. Again the dilemma appears, although admittedly the alternatives are less damaging to the defendant than in cases where he is charged with a crime of possession. Yet this dilemma may still induce a defendant to forego an attempt to challenge the legality of a search.[28]

Arguments have been made that the first rationale of *Jones* covers these situations and eliminates the need for claiming a possessory interest in the objects seized, but so far this reasoning has been rejected.[29] In *People v. Kelley*,[30] the defendant, charged with armed robbery, had been observed by the police, immediately after a robbery, running down an alley. He was

23. 336 F.2d 844 (3d Cir.), *cert. denied*, 379 U.S. 930 (1964).
24. *Id.* at 847.
25. 346 F.2d 291 (10th Cir. 1965).
26. *Id.* at 295.
27. PERKINS, CRIMINAL LAW 201 (1957).
28. Accardo v. United States, 347 F.2d 568 (D.C. Cir. 1965).
29. People v. Kelley, 23 Ill. 2d 193, 177 N.E.2d 830 (1961), *cert. denied*, 370 U.S. 928 (1962); People v. DeFilippis, 54 Ill. App. 2d 137, 203 N.E.2d 627 (1964).
30. *Supra* note 29.

stopped, searched, and the watch and the wallet of the victim were seized. However, in his motion to suppress the objects, the defendant refused to claim a possessory interest in the objects, obviously because of the nexus that the claim would have established between himself and the crime. Because of his refusal to make the claim, the defendant was denied standing; the *Jones* case was distinguished on the ground that the defendant was not charged with possession of the articles.

4. *Other Cases in Which the Fact of Possession May be Incriminating*

In many criminal cases, an admission by the defendant of possession of certain objects may establish a damaging evidentiary link between the defendant and the commission of the crime charged, or may tend to establish elements of the crime charged. For these reasons, in a motion to suppress, a defendant may be reluctant to claim a possessory interest in the objects in order to obtain standing—again the dilemma. However, in these situations the admissions by the defendant will be less damaging to his case than the admissions required in any of the above-mentioned three categories. To extend the first rationale of *Jones* to confer automatic standing on a defendant confronted by a dilemma of this nature would not appear to be an unwarranted application of the rationale, but it is clearly a substantial extension. No court to date has been willing to accept this expansive interpretation.[31] For example, in *State v. Pokini,*[32] an armed robbery case, evidentiary materials—guns, cartridges, and clips—were seized from a stolen automobile which the defendants had occupied. Even though an admission of possession of these articles would have been substantially incriminating on the issue of whether force had been used, the court was unwilling to grant standing to the defendants under the first rationale of *Jones,* limiting

31. State v. Pokini, 45 Hawaii 295, 367 P.2d 499 (1961); see Taylor v. United States, 326 F.2d 277 (4th Cir.), *cert. denied,* 377 U.S. 931 (1964); Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961); United States v. Thomas, 216 F. Supp. 942, 945 (N.D. Cal. 1963). In *Ramirez,* the defendant was convicted of unlawfully selling, concealing, receiving and facilitating the transportation of heroin. He attempted to suppress money, identifiable by serial number, which had been used by authorities to purchase narcotics from him and which had been seized from the defendant's wife at the time they were both arrested. The Ninth Circuit denied standing to the defendant because he refused, understandably, to claim a possessory or proprietary interest in the money. Had he admitted a proprietary interest in the money, it would not have been difficult for the jury to infer that the defendant at one time possessed the narcotics and was guilty of the crime charged. Obviously, the defendant was enmeshed in a dilemma, and it would not have been unreasonable to afford the defendant standing under these circumstances, applying the first rationale of *Jones.*

32. *Supra* note 31.

its application to crimes in which the defendant had been charged with possession of contraband per se.[33]

B. *Existence of the Dilemma*

Assuming that the possessory or proprietary interest which the defendant must claim and show to challenge the legality of a search and seizure is incriminating, a dilemma does not exist unless the prosecutor may use the claim and supporting admissions at the trial. Mr. Justice Frankfurter assumed in the *Jones* case that these admissions were admissible at the trial.[34] The validity of this foundation assumption is weakened by significant case law and legal theory that support the proposition that the claim required cannot be admitted as evidence at the trial. However, uncertainty in the law could easily give rise to a fear in the minds of a defendant and his counsel that the admissions made in a suppression hearing would be admitted.

There are three ways that a damaging admission can be made at a suppression hearing: (1) in the motion to suppress or to return evidence; (2) in an affidavit supporting this motion; or (3) in testimony given by the defendant either to prove his claim or to describe the conduct of the search. A motion to suppress is required to initiate the procedure for enforcing the fourth amendment.[35] In essence, this is a pleading in which

33. *Id.* at 315, 367 P.2d at 509.

34. Apparently this assumption resulted from several views that had recently appeared in the District of Columbia, where the *Jones* case originated. Judge Bazelon noted the basic assumption needed for the existence of the dilemma—that the claim could be used as evidence at the trial. Christensen v. United States, 259 F.2d 192, 197 (D.C. Cir. 1958) (dissenting opinion). Another judge of that court, Judge Fahy, also assumed that the claim could be used as evidence at the trial and agreed with Judge Bazelon that a defendant, seeking to acquire the protection of the fourth amendment, should not be required to admit possession when the Government has proved this at the trial. Brandon v. United States, 270 F.2d 311 (D.C. Cir. 1959) (concurring opinion), *cert. denied,* 362 U.S. 943 (1960). Although the court did not allow the use of the claim in these cases, these judges assumed that the present law might allow admissions against interest made at the suppression hearing to be used as evidence at the trial. With this assumption the dilemma became real to them. Their solution was that when the prosecution proved the fact of possession at the trial, the defendant could then raise the motion to suppress and acquire standing by using the prosecutor's own proof. Brandon v. United States, *supra* at 317 (concurring opinion); Christensen v. United States, *supra* at 199 (dissenting opinion); Williams v. United States, 237 F.2d 789 (D.C. Cir. 1956); see Wyche v. United States, 193 F.2d 703, 705 (D.C. Cir. 1951) (concurring opinion), *cert. denied,* 342 U.S. 943 (1952). On the other hand, Chief Judge Edgerton of that court did not believe that a dilemma existed because the claim could not be admitted at the trial. Wilkins v. United States, 258 F.2d 416 (D.C. Cir.) (dissenting opinion), *cert. denied,* 357 U.S. 942 (1958). It is possible that this conflict in the District of Columbia Circuit, from which the *Jones* case arose, prompted the Supreme Court to assume the possibility of the dilemma and establish the first rationale of *Jones.*

35. FED. R. CRIM. P. 41(e).

the defendant alleges that he has the requisite interest for standing and that the conduct of the police has been unlawful. As with any other motion, the burden of producing evidence to substantiate the averments is on the moving party.[36] The defendant may do this by submitting an affidavit,[37] by testifying, or by producing evidence obtained from independent sources, such as affidavits of the police officers who conducted the search.[38] Of course, the defendant will choose, if possible, to support his allegations with independent evidence to avoid making damaging admissions. However, in some circumstances he is unable to do so, and is therefore required to testify in his own behalf that he had the requisite interest to establish standing.[39] Since all three types of admissions are actual prerequisites for invoking the fourth amendment, they will be treated alike in this analysis.

1. *Legal Doctrines that Preclude the Use of Admissions Made at a Suppression Hearing*

a. subsequent use violates the fifth amendment. If admissions made in the suppression hearing cannot subsequently be used as evidence, the dilemma does not exist. In *Safarik v. United States,*[40] the defendants had leased a garage and chicken coop. After receiving several tips from anonymous telephone callers, federal agents peered through the windows of the garage and observed tin cans of a type regularly used in the local bootleg trade. On the following morning, the agents entered the chicken coop and seized several cans which contained illegal alcohol. They then set up surveillance details both across the street and in an adjacent house. That evening the defendants drove an automobile next to the chicken coop and began loading cans into the car. The agents thereupon arrested the defendants and, incidental to the arrest, seized the remainder of the alcohol.

36. Brandon v. United States, 270 F.2d 311 (D.C. Cir. 1959); United States v. Warrington, 17 F.R.D. 25 (N.D. Cal. 1955).

37. In the past, an affidavit by the defendant has been allowed to support his motion and establish a prima facie case. *E.g., In re* Number 32 E. Sixty-seventh St., 96 F.2d 153 (2d Cir. 1938); United States v. Edelson, 83 F.2d 404 (2d Cir. 1936); Safarik v. United States, 62 F.2d 892 (8th Cir. 1933); Vaught v. United States, 7 F.2d 370 (9th Cir. 1925). Defendants have preferred to use an affidavit because it included essentially the same assertion as in the required claim. However, in United States v. Warrington, 17 F.R.D. 25 (N.D. Cal. 1955), an attempt was made to clarify the role of affidavits supporting the initial motion in suppression hearings. The court ruled that affidavits were not evidence for this purpose and that the motion to suppress must be supported by other evidence. *Id.* at 29.

38. See Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932); United States v. Daniels, 10 F.R.D. 225 (D.N.J. 1950).

39. See note 65 *infra* and accompanying text.

40. 62 F.2d 892 (8th Cir. 1933).

The defendants filed a single set of papers—a motion to suppress and supporting affidavits—to suppress all of the evidence obtained from both searches. The trial court suppressed the four cans obtained during the first search, but decided that the seizures made at the time of the arrest were lawful since there was sufficient evidence, independent of what was learned on the previous unlawful search, to support probable cause. However, the government was allowed to introduce at the trial both the motion to suppress and the supporting affidavits. In these papers, the defendants had alleged both that they owned the liquor seized and that they were lessees of the premises. The Eighth Circuit held that this evidence was not admissible at the trial. The court reasoned that, "the documents were tantamount to a written confession of guilt,"[41] and even though the formal rules of evidence allow admissions against interest to be admitted at the trial, their admission in this situation would make "a rule of evidence, and not the Constitution of the United States, the supreme law of the land. To hold so would render the constitutional guaranties sonorous but impotent phrases."[42] Thus the court destroyed the dilemma by holding that the defendants were entitled to the protection of the fifth amendment as well as the fourth, and that no defendant should have to incriminate himself in order to invoke his fourth amendment rights.

The language in *Safarik* does not support a differentiation in treatment of admissions made in a suppression hearing in which the search was held to be legal from those in which the search was held to be illegal.[43] However, the government filed a motion for rehearing,[44] claiming, among other things, that the court had overlooked a case, *Kaiser v. United States,*[45] which had been decided only a year before. *Kaiser* involved a legal search in which the motion to suppress had been introduced at the trial. In that case, the Eighth Circuit had held that the claim of possession made in the motion was admissible because the record of the admission was public and the admission was voluntarily given.[46] The motion for a rehearing of the *Safarik* case was denied, but, unfortunately, instead of overruling *Kaiser,* the court distinguished that case because it involved a lawful search.[47]

41. *Id.* at 897.
42. *Ibid.*
43. Also, the language of the *Safarik* case does not support a differentiation in the treatment of admissions made in testimony, motions, or affidavits, if they are made to support the claim of interest.
44. Safarik v. United States, 63 F.2d 369 (8th Cir. 1933).
45. 60 F.2d 410 (8th Cir. 1932).
46. *Id.* at 413.
47. Safarik v. United States, 63 F.2d 369, 370 (8th Cir. 1933).

If the legality of the search had made a difference to the court in *Safarik*, it had ample grounds for admitting the motion and affidavit. The defendant had filed only one motion to suppress the evidence obtained in two searches, one legal and the other illegal. Because one of the searches to which the motion and affidavit referred was legal, the court could have admitted these statements as incidents of this lawful search. It is submitted that the court, in its principal opinion,[48] was correctly unconcerned with this distinction. At the time the claim is required the legality of the search will probably be questionable, and the defendant should not be required to risk any detrimental effects of an adverse decision on the legality of the search, even if they are minimal.[49] To say that admissibility does depend upon the outcome of a suppression hearing might induce defendants, against whom a questionable search has been made, to waive their fourth amendment right in order to preserve their fifth amendment right against self-incrimination.[50]

Since the fifth amendment renders the claim and the required support inadmissible, the defendant has no reason to fear its use in subsequent formal proceedings. The only possible incriminating effect that could result from the claim is that it might give the prosecution personal knowledge of the truth of possession which it did not have before the suppression motion and hearing. However, it would be an unusual case if a prosecutor charged a person with a crime which involves possession without substantial evidence that the defendant was actually in possession.

If the legal theory of self-incrimination were universally applied to all admissions made at suppression hearings, the dilemma would be non-existent.

b. subsequent use violates the "fruits-of-the-poisonous-tree" doctrine. If the admissions in a successful suppression hearing cannot be admitted at the trial, the asserted dilemma is illusory. In *Fabri v. United States*,[51] officers, pursuant to a search warrant, searched the residence of the defendant and seized quantities of prohibited intoxicating liquor. Later, the

48. Safarik v. United States, 62 F.2d 892 (8th Cir. 1933).

49. For a complete analysis of this issue see p. 502 *infra*.

50. In Safarik v. United States, 62 F.2d 892 (8th Cir. 1933), the court stated:

> At all stages of the trial defendants were entitled to the protection of both these [fourth and fifth amendment] guaranties. They protect all persons, including the accused, suspected, and guilty, as well as the innocent, and should be liberally construed in favor of the individual. *Id.* at 897.

It is submitted that the fifth amendment right should not depend upon whether the fourth amendment right has been violated. See Agnello v. United States, 269 U.S. 20 (1925). Since Boyd v. United States, 116 U.S. 616 (1886), it has been recognized that these rights complement each other. See Mapp v. Ohio, 367 U.S. 643, 666 (1961) (Douglas, J., concurring).

51. 24 F.2d 185 (9th Cir. 1928).

defendant moved that the search warrant be quashed and the evidence suppressed and returned. The trial court quashed the warrant and suppressed the evidence, but the prosecutor refused to return the seized liquor. The government relied on the averments in the defendant's petition to show that the possession of the material was unlawful and that it should not be returned. Therefore, the government's case rested entirely upon the facts obtained as a result of the unlawful search. The court held that evidence obtained in this manner could not be used as support for the government's contention that possession of the seized objects was inherently unlawful.[52] The legal theory that admissions made at a successful suppression hearing are fruits of an unlawful search was an alternative basis for the decision in the *Safarik* case,[53] and has recently been accepted as valid in *Fowler v. United States.*[54]

The validity of this theory may be weakened by the fact that the claim of possession made in the motion to suppress or at the suppression hearing comes long after the search. In *Wong Sun v. United States,*[55] the Supreme Court allowed the introduction of a confession voluntarily made by the defendant several days after he had been released. The basis for the Court's decision was that even though the police had originally found the defendant through the fruits of their illegal activity, the confession was not tainted because it was obtained "by means sufficiently distinguishable [from the illegal search] to be purged of the primary taint."[56] Possibly, the length of time between a search and admissions made at a suppression hearing has not been considered relevant to the application of the fruits doctrine because these admissions are required for the enforcement of the fourth amendment and, therefore, are not voluntary.

The "fruits" approach has been adopted in the Eighth,[57] Ninth,[58] and Tenth[59] Circuits. If the search is clearly unlawful in these jurisdictions, the dilemma is non-existent, because admissions made at suppression hearings can never be used. But prior to the suppression hearing, the defendant is

52. However, if the search is deemed lawful, an admission by the defendant will be admitted at the trial. Vaught v. United States, 7 F.2d 370 (9th Cir. 1925).

53. Safarik v. United States, 62 F.2d 892 (8th Cir. 1933).

54. 239 F.2d 93 (10th Cir. 1956). The court noted that Safarik v. United States, *supra* note 53, had held that admissions made at the suppression hearing were inadmissible at the trial; however, it attributed this holding to the fruits doctrine only and thus ignored the fifth amendment argument of the case. After accepting the validity of the fruits doctrine, the court stated that it only applied when the evidence was illegally seized but not in the instant case where the search was held legal.

55. 371 U.S. 471 (1963).

56. *Id.* at 488.

57. Safarik v. United States, 62 F.2d 892 (8th Cir. 1932).

58. Fabri v. United States, 24 F.2d 185 (9th Cir. 1928).

59. Fowler v. United States, 239 F.2d 93 (10th Cir. 1956).

aware of the possibility that the search may be held lawful and that any admissions made by him at the suppression hearing may be introduced at the trial along with the evidence seized. Even with this possibility in mind, it is submitted that the dilemma exists only in a negligible sense, if at all. The defendant recognizes that if he loses the suppression hearing, the prosecutor's evidence will usually be overwhelming, and the admissions made at the suppression hearing will not be needed. For this reason the defendant need not be apprehensive of the introduction of his admissions at the trial to bolster the already conclusive evidence against him.[60] Only in an unusual case will the admission by the defendant be a crucial factor necessary to convict the defendant.

2. *The Rationale Supporting the Introduction at the Trial of Admissions Made at the Suppression Hearing*

In some jurisdictions the self-incrimination and fruits doctrines have not been recognized, and the claim and supporting admissions have been admitted at the trial.[61] The underlying theory used to support this result is that the admissions were voluntarily made. However, it is not clear whether the courts have accepted the proposition because no person is required to enforce his fourth amendment right,[62] or because the specific defendant supported his claim by his own admission when he could have used independent sources.

In *Heller v. United States,*[63] the defendant was convicted of violating

60. The lack of many reported instances of the introduction of admissions made at unsuccessful suppression hearings leads to a belief that prosecutors do not, in fact, attempt this tactic. One could hypothesize that admissions are not used because of a belief by prosecutors that this practice would be unfair. However, it is more likely that prosecutors are afraid of the consequences of later use because of the fifth amendment logic applied in the *Safarik* case.

61. The following cases allow the motion to suppress evidence to be admitted at trial. United States v. Taylor, 326 F.2d 277 (4th Cir.), *cert. denied,* 377 U.S. 931 (1964) (court cited *Kaiser* but not *Safarik*); Kaiser v. United States, 60 F.2d 410 (8th Cir.), *cert. denied,* 287 U.S. 654 (1932); Vaught v. United States, 7 F.2d 370 (9th Cir. 1925); United States v. Lindsly, 7 F.2d 247 (E.D. La.), *rev'd on other grounds,* 12 F.2d 771 (5th Cir. 1925). The following authorities support the view that testimony given at the hearing on the motion to suppress evidence may be admitted at the trial. Heller v. United States, 57 F.2d 627 (7th Cir.), *cert. denied,* 286 U.S. 567 (1932); 2 VARON, SEARCHES, SEIZURES AND IMMUNITIES 682 (1961). One case has allowed both the motion and testimony to be admitted. State v. Williams, 69 Ohio App. 361, 41 N.E.2d 717 (1941). One case has treated the affidavit and claim as voluntary and admitted them at the trial. Bell v. State, 94 Tex. Crim. 266, 250 S.W. 177 (1923), *writ of error dismissed,* 266 U.S. 640 (1924).

62. See Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932).

63. 57 F.2d 627 (7th Cir.), *cert. denied,* 286 U.S. 507 (1932).

the National Prohibition Act. He testified at the suppression hearing that the house which was searched was his residence. After losing on his motion to suppress, the defendant went on to trial where the testimony he gave at the suppression hearing was admitted into evidence. The Seventh Circuit decided that the admission of this evidence was correct. The court reasoned that if the admission were made out of court it would be admissible, and since it was in a public record, it could even be printed in the newspaper. Furthermore, since the defendant was not obligated to testify upon the motion any more than a defendant is obligated to testify in his defense at the trial, the testimony was voluntary. The dissenting opinion[64] pointed out that it was necessary for the defendant to apply for return or suppression in order to protect himself from illegally seized evidence, and once the motion was made the defendant had the burden of proving the truth of the allegations by testimony. To allow this evidence to be admitted at the trial would vitiate the fourth amendment's exclusionary rule.

If the defendant has testified at the suppression hearing to support the claim made in the motion, a problem always arises, as it did in *Heller,* of whether this testimony was voluntary. The traditional rule requires that the defendant claim and show a proprietary or possessory interest in the object seized or the premises searched, but it does not require that the defendant accuse himself if he can produce independent evidence of his interest. However, the defendant may be forced to testify against himself if he has no other means of proving the validity of the claim.[65] If he must testify, his testimony serves the same purpose as his motion to suppress, *i.e.,* he must testify to preserve his fourth amendment right.[66] Therefore, it seems that there is no reason for different treatment of affidavits, testimony supporting the motion to suppress, and the initial motion to suppress. It is possible that if a defendant needlessly admits his interest when he could have

64. *Id.* at 629-30.

65. Although others may exist, there are two situations which immediately come to mind in which the defendant will have no other means of supporting the claim except by his own testimony. An arresting officer's testimony cannot be used if several defendants were searched simultaneously and the officer does not know who owned, possessed or controlled the premises. See United States v. Daniels, 10 F.R.D. 225 (D.N.J. 1950). Also, if two people are searched and the arresting officer testifies that one had possession, the other can establish his interest only with an independent source, usually his own testimony. A final problem in this area is the suggestion by some courts that standing will not be conferred unless the defendant accepts the truth of the testimony given by the officer to support the claim of interest. United States v. Stein, 53 F. Supp. 911 (W.D.N.Y. 1943); see Harvey v. United States, 193 F.2d 928 (D.C. Cir.), *cert. denied,* 343 U.S. 927 (1952).

66. See Heller v. United States, 57 F.2d 627, 630 (7th Cir.) (dissenting opinion), *cert. denied,* 286 U.S. 567 (1932).

proved it in some other way, a court might view his testimony as voluntary. But this would require factual findings of the evidence available to the defendant at the time of the admission or an evaluation of whether the defendant reasonably believed that his testimony was required. These tasks seem impracticable. Furthermore, if the rationale of the courts in these cases is that the defendant's choice to enforce the fourth amendment is voluntary, they are maintaining the untenable position that to enforce the fourth amendment, the defendant must waive his fifth amendment right.[67]

3. *Specificity of the Claim*

Even assuming that the claim may be admitted as evidence at the trial, the defendant still may not fear the later use of the claim if it may be phrased in such a manner that it does not incriminate the defendant.[68] A claim of this nature could either be non-descriptive, such as, officers took property from me, or be descriptive of only the outside container in which the incriminating evidence was contained, such as, officers took a brown package from my possession.[69] This latter means of avoiding the dilemma

67. Safarik v. United States, 62 F.2d 892 (8th Cir. 1933); Heller v. United States, *supra* note 66, at 630 (dissenting opinion).

68. A related method has been tried by some defense attorneys to avoid the incriminating effect of the claim. The attorney signs the motion to suppress instead of the defendant. In Fowler v. United States, 239 F.2d 93 (10th Cir. 1956), the motion to suppress, alleging that the property seized belonged to the defendant, was signed by the attorney. Later, the defendant disclaimed any interest and asserted that his attorney's claim was untrue. The Tenth Circuit analogized the situation to pleadings in civil actions and stated that "pleadings in former cases or those which have been superseded by other pleadings, not under oath, and signed only by attorneys for the parties, without further proof of authority, are incompetent as admissions of the parties." *Id.* at 95. However, the court decided to admit the motion as an admission against interest, cautioning the jury that Fowler was not otherwise bound by the statement of his attorney.

Professor Wigmore considers a similar situation in criminal cases in which a withdrawn guilty plea is later offered as evidence. Noting that the authorities are divided on its admissibility, he comes to the conclusion that these statements can be introduced like any other evidence so long as they are introduced *"at the proper time,"* giving the defendant a chance to explain them. 4 WIGMORE, EVIDENCE § 1070 (3d ed. 1940).

In jurisdictions where the attorney is allowed to appear and establish standing for a defendant, see *In re* Number 32 E. Sixty-seventh St., 96 F.2d 153 (2d Cir. 1938), it seems likely that the courts will deal strictly with a defendant who attempts to disclaim. Even if the defendant is not held to the truthfulness of the attorney's assertions, the court is likely to declare the suppression hearing invalid and require the defendant himself to make a new motion which specifically states his grounds for standing. It is submitted that this method is based on a highly technical distinction on which defense attorneys should be wary of relying.

69. Fabri v. United States, 24 F.2d 185 (9th Cir. 1928) (defendant described liquor by its containers); United States v. Edelson, 83 F.2d 404 (2d Cir. 1936). In *Edelson* the defendant's petition alleged "only that 'he was in possession under a lease' of the

could be effectively used to suppress narcotics which, in most instances, are carried in containers.[70] Although there is little authority from which to ascertain how many trial courts allow defendants to make either type of inspecific claim, a defendant may avoid the dilemma if he does so. Since little is admitted, the defendant has little to fear. Consequently, in jurisdictions where the inspecific claim is permissible, standing should not be predicated upon an illusory dilemma. In the majority of jurisdictions, however, the specific claim is required[71] and standing may be validly predicated upon the dilemma.

C. *Analysis of the Jones Solution*

The facts of the *Jones* case involved a defendant who was charged with a crime of possessing contraband per se, and since the fact of possession alone would convict, the defendant would confess his guilt if, to obtain standing, he were to claim a possessory interest in the narcotics. Therefore, the case represented the most striking example of the effect of the dilemma. The solution offered by the Court was to exempt the defendant from making the claim traditionally required. However, the solution has been limited, unfortunately, by subsequent decisions[72] to "cases where the indictment

premises," and that an unregistered still was seized. The supporting affidavit referred also to certain papers. The court accepted this as enough even though it cautioned that more of a claim should be alleged and proved. *Id.* at 406. Both these methods were attempted in United States v. Stein, 53 F. Supp. 911 (W.D.N.Y. 1943). The defendant moved for the suppression and return of (1) memoranda, including slips, receipts, and papers, and (2) all other evidence taken from him. *Ibid.* The motion was supported by a rather nebulous affidavit claiming the "search was made of the content of the same and the bag and the entire content was seized from the deponent." Thus both methods of inspecific claiming were attempted. Actually a large quantity of gold bullion was concealed in the bag. The court denied this motion because the allegations were too inspecific to establish standing. Probably the majority of jurisdictions bar inspecific claims.

70. It is possible that even the admission of possession of a container may become incriminating. The claim could be used to fortify the testimony of a witness of questionable credibility who testified that the defendant was in possession of narcotics.

71. Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932) (landmark case); United States v. Daniels, 10 F.R.D. 225 (D.N.J. 1950); United States v. Miller, 36 F. Supp. 391 (W.D.N.Y. 1941); see United States v. Taylor, 326 F.2d 277 (4th Cir.), *cert. denied,* 377 U.S. 931 (1964); United States v. Warrington, 17 F.R.D. 25 (N.D. Cal. 1955).

72. See notes 13-14 *supra* and accompanying text.

Furthermore, the limitation of the first rationale to charges of possessing contraband may allow a prosecutor to avoid application of the *Jones* rule by simply charging offenses that are not founded on possession. For example, the typical armed robbery indictment in New York includes charges for: (1) robbery in the first degree, (2) assault in the first degree, (3) grand larceny in the first degree and (4) unlawful possession of a weapon. Polstein, *How to "Settle" a Criminal Case,* 8 PRAC. LAW. 35, 38 (1962). According to the interpretation that has been given *Jones,* the prosecutor can prevent the defendant from qualifying for automatic standing by deviating from his usual practice of charging

itself charges possession."[73] Consequently, standing is still denied to some defendants who fear to establish standing because of the dilemma. Only a single federal circuit has extended the rationale to cases involving derivative contraband,[74] and no court has been willing to eliminate the requirement of claiming and proving a possessory or proprietary interest in the objects seized for defendants charged with theft or other crimes in which the admission of possession of certain evidence would be particularly incriminating.[75] Also, a defendant may be placed in a similar dilemma if he must claim and prove an interest in certain types of premises, for example, a disorderly house. The first branch of *Jones*, if limited to crimes of possession, does not exempt these defendants even though they are also "in a very real sense" on the horns of a dilemma. These inequities could have been avoided by precluding all admissions made at the suppression hearing from the trial.[76] The requirement of the claim and the proof would still be essential to obtain standing, but no admissions could be introduced at the trial. This solution offers simplicity and ease of application, and eliminates the need for differentiating between the various situations in which the dilemma arises.

II. Standing Based on an Invasion of an Individual's "Privacy Interests" in the Premises Searched

If a defendant was unable or unwilling to claim a possessory or proprietary interest in the object seized, he could still obtain standing under the pre-*Jones* law by claiming and proving a possessory or proprietary interest in the premises searched.[77] Proof of such interests was the only means of establishing that one was aggrieved by an unlawful search of the premises;

an offense of illegal possession among the several offenses usually charged. *But see* note 12 *supra* and accompanying text.

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

74. Simpson v. United States, 346 F.2d 291 (10th Cir.), *petition for rehearing denied*, 346 F.2d 295 (1965).

75. *E.g.*, State v. Pokini, 45 Hawaii 295, 367 P.2d 499 (1961); People v. Kelly, 23 Ill. 2d 193, 177 N.E.2d 830 (1961), *cert. denied*, 370 U.S. 928 (1962); People v. DeFilippis, 54 Ill. App. 2d 137, 203 N.E.2d 627, *petition for rehearing denied*, 54 Ill. App. 2d 145, 203 N.E.2d 631 (1964).

76. The Court also could have expressed its holding in language that had to be interpreted as exempting every defendant faced with the dilemma from making the claim. This approach would have required defining a class which includes all defendants who could establish standing by the traditional rule if uninhibited by the apprehension that the claim might be introduced at the trial. However, this determination would have to be made solely by examining the prosecutor's indictment and without asking the defendant to claim and show his interest. When confronted with this problem, the Supreme Court exempted only those defendants charged with a crime of possession, the class most obviously enmeshed in the dilemma.

77. For authority for this proposition see note 4 *supra*.

and only by this method could a defendant suppress all of the objects seized. All invitees and licensees were precluded from obtaining standing by this means and consequently from suppressing all evidence seized as a result of the search.[78] The anomalous result that flowed from this traditional rule was to permit the owner to gain standing but to deny standing to his guest who legitimately occupied the premises at the time of the search.[79] If the search produced the only evidence that could convict both the owner and the guest, the owner would be able to escape conviction, but his guest would not. Thus, it is likely that this traditional rule failed to inhibit illegal police practices.

In *Jones v. United States,*[80] Mr. Justice Frankfurter, recognizing the fallibilities of a standing rule based on real property interests, propounded a new means for establishing that one was aggrieved by an unlawful search of a premises.

> No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by ways 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.[81]

Applying this rationale, the Court decided that a guest in the apartment of another could invoke the privacy of the premises and could thus obtain standing to challenge the legality of a search of the premises. Furthermore,

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78. For authority for this proposition see note 5 *supra.*

79. Payne v. State, 330 P.2d 382, 383 (Okla. Crim. App. 1958).

If this situation occurs and the defendants are tried together, then at the trial the evidence will be admissible against one defendant, but not the other. Since the same jurors will judge the guilt of both defendants and will see the suppressed evidence, they will be tempted to infer the value of the evidence against the defendant who suppressed the evidence even though instructed to the contrary. Since it is impossible to be certain that the jury disregards the evidence, the only solution is to allow a severance to assure that only defendants against whom equal evidence can be produced will be tried together. This may be difficult since the common law rule allows severance if the prosecution requests it and leaves the matter entirely to the discretion of the court if requested by the defense. *E.g.,* United States v. Marchant, 25 U.S. (12 Wheat.) 480 (1827); Jackson v. State, 104 Ala. 1, 16 So. 523 (1894); Malone v. State, 77 Miss. 812, 26 So. 968 (1900). For a discussion of common law severance see ABBOTT, CRIMINAL TRIAL PRACTICE § 162 (4th ed. 1939); BISHOP, NEW CRIMINAL PROCEDURE § 1018 (4th ed. 1895); 53 AM. JUR. *Trial* § 56 (1945). The law on severance today is generally covered by statutes which either codify the common law or make severance mandatory at the election of the accused. *E.g.,* IDAHO CODE ANN. §§ 19-2106 to -2109 (1948); MINN. STAT. ANN. § 631.03 (1956).

80. 362 U.S. 257 (1960).

81. *Id.* at 267.

this rationale establishes that both owners and their guests are aggrieved in the same way by an unlawful search of the premises, and both would have standing to suppress all evidence illegally seized.[82]

The application of this rationale for standing forces the courts to analyze the bounds of privacy of premises protected by the fourth amendment. First, the requirement of "legitimately on the premises" necessitates defining those classes of individuals who may invoke the privacy of premises which they occupy. Secondly, and more difficult, is defining in what physical areas an individual's "privacy interests" in the premises are invaded by an alleged unlawful search of the premises.

A. *"Legitimately on the Premises"*

In *Jones,* the defendant established that the lessee of the apartment had consented to his presence there. With one exception,[83] the courts applying the second rationale of *Jones* have similarly defined "legitimately" so as to include all individuals present with the express or implied consent of the person who had a possessory or proprietary interest in the premises; therefore only trespassers are excluded from utilizing this new rationale to obtain standing.[84]

However, in one maverick decision, *State v. Keeling,*[85] it was held that an individual could not be "legitimately on the premises" if his sole reason for

82. *E.g.,* United States *ex rel.* Eastman v. Fay, 225 F. Supp. 677 (S.D.N.Y. 1963), *cert. denied,* 381 U.S. 954 (1965); State v. Manetti, 189 A.2d 426 (Del. Super. Ct. 1963); Vines v. State, 397 S.W.2d 868 (Tex. Crim. App. 1966); see United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963). Some states, however, have not been convinced of the soundness of this rationale. State v. Carr, 2 Conn. Cir. 247, 197 A.2d 663 (1963) (guests of a barber shop proprietor were denied standing); Combs v. Commonwealth, 341 S.W.2d 774 (Ky. 1961) (son at grandfather's home denied standing); Head v. State, 246 Miss. 203, 136 So. 2d 619, *cert. denied,* 371 U.S. 910 (1962); State v. Worley, 383 S.W.2d 529 (Mo. 1964), *cert. denied,* 381 U.S. 941 (1965); State v. Callaghan, 144 Mont. 401, 396 P.2d 821 (1964); State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962) (lawful bailee of an automobile denied standing); McDoulett v. State, 368 P.2d 522 (Okla. Crim. App. 1961); Commonwealth v. Smith, 201 Pa. Super. 511, 193 A.2d 778 (1963); Gaskin v. State, 365 S.W.2d 185 (Tex. Crim. App. 1963).

However, if the tenant gives consent to a search, that consent will bind the guest. Burge v. United States, 342 F.2d 408 (9th Cir. 1965). On the other hand, if the guest gives consent, this does not bind the owner. Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).

83. State v. Keeling, 182 N.E.2d 60 (Ohio C.P. 1962).

84. State v. Pokini, 45 Hawaii 295, 367 P.2d 499 (1961) (stolen automobile); Britt v. State, 242 Ind. 548, 180 N.E.2d 235 (1962) (trespasser in a home); Slyter v. State, 246 Miss. 402, 149 So. 2d 489 (1963) (stolen automobile); State v. Liosi, 91 Ohio L. Abs. 161, 185 N.E.2d 790 (Ct. App. 1962) (trespasser in a leased basement); Lucus v. State, 368 S.W.2d 605 (Tex. Crim. App.), *cert. denied,* 375 U.S. 925 (1963) (trespasser in apartment).

85. 182 N.E.2d 60 (Ohio C.P. 1962).

being there was for unlawful purposes.[86] Applying this reasoning, one defendant, a guest in an apartment who knew nothing of the illegal gambling activities, was granted standing but the other guests who were engaged in the gambling activities were denied standing. This interpretation of "legitimately on the premises" seems to be inconsistent with the purposes of the second rationale of *Jones,* that is to inhibit illegal police practices by enlarging the class of people whose privacy is invaded by a search. Also this definition of "legitimately" narrows the privacy of premises rationale of *Jones,* contrary to its intended goal of liberalizing standing requirements to effectuate the fourth amendment's safeguards of the right of privacy. Moreover, in *Jones,* the defendant was using the premises as a hideout for narcotics, an unlawful activity. The Court did not even consider the question of whether this was his sole purpose for being in the apartment but rather only whether he was present with the consent of the lessee.

B. *"Privacy Interests" in the Premises Searched*

The breadth of the second rationale of *Jones* also depends upon the areas in which a person may invoke the privacy of the premises searched. Consideration must also be given to whether the "privacy interests" of a temporary visitor, "legitimately on the premises," are the same as those of the person who has a possessory or proprietary interest in the premises. Since the purpose of the second rationale of *Jones* was to liberalize standing rules and to broaden the scope of privacy of premises safeguarded by the fourth amendment, it is possible that wherever the privacy of the premises is invaded as to one individual, it is invaded as to all others legitimately on the premises. Therefore each can establish an invasion of his privacy, the requisite for standing.

Clearly, a search of an individual's home or apartment is a sufficient invasion of his privacy to give him standing to challenge the legality of the search.[87] Since *Jones,* temporary dwellers and other visitors, licensees or invitees, also have been held to have standing to challenge the legality of a search of a home or apartment made while they were "legitimately on the premises."[88] In these situations, closely analogous to the facts of *Jones,* the

86. The decision in this case, if followed to its logical extreme, would make the suppression hearing the ultimate forum for the question of guilt. The question of standing would turn on the lawfulness of the defendant's activities. If his activities were lawful, he would get standing; if unlawful, he would not.

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

88. Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); United States v. Blitz, 199 F. Supp. 326 (E.D.N.Y. 1961); Leveson v. State, 138 So. 2d 361 (Fla. 1962); Belton v. State, 228 Md. 17, 178 A.2d 409 (1962); see Wion v. United States, 325 F.2d 420 (10th Cir. 1963); Smith v. Commonwealth, 375 S.W.2d 242 (Ky. 1964).

courts have recognized that the privacy of both owner and visitor is invaded by a search of the premises. However, if a search occurs after a temporary guest has left the home or apartment of another, the temporary guest apparently will not be able to obtain standing by claiming that the search invaded his privacy.[89] He is unable to meet the "legitimately on the premises" requirement. Yet the "privacy interests" of the owner are invaded by a search of his premises irrespective of his presence or absence.

A private business office of an individual may be likened to his home in the sense that there is the same reasonable expectation that the privacy of the premises will not be violated by an unlawful search. Accordingly, a search of a business office is an invasion of the privacy of the premises of the person who uses the office whether or not he is present.[90] If a temporary guest is present in a private office when a search occurs, it would seem that a search of the premises would infringe upon his expectations of privacy in the same way it would infringe upon the right of privacy of the usual occupant, and the guest should therefore have standing. If, however, the office did not afford any privacy to the usual occupant, then it could hardly be said that a guest could invoke the privacy of the premises.[91]

The privacy of an individual in an automobile has long been recognized as protected by the fourth amendment from unlawful searches.[92] However, before *Jones,* only owners and their lawful bailees could establish that a search invaded their "privacy interests" in the automobile because the traditional rule required one to claim and show a possessary or proprietary interest in the premises searched.[93] Applying the second rationale

89. *E.g.,* United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); Commonwealth v. Raymond, 412 Pa. 132, 194 A.2d 150 (1963).

90. Villano v. United States, 310 F.2d 680 (10th Cir. 1962) (defendant present during search); Henzel v. United States, 296 F.2d 650 (5th Cir. 1961) (occupant not present during search of corporate office); *cf.* Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (search of car belonging to defendant's adult son while neither was present).

91. This also pertains to searches of public areas of commercial stores and publicly owned buildings. If the guest is in a private section of the building, he will probably be able to invoke its privacy; however, if he is present in the sections which are public, there is no privacy that he can invoke.

92. Carrol v. United States, 267 U.S. 132 (1925).

93. Shurman v. United States, 219 F.2d 282 (5th Cir.), *cert. denied,* 349 U.S. 921 (1955); Wilson v. United States, 218 F.2d 754 (10th Cir. 1955); see Williams v. United States, 323 F.2d 90 (10th Cir. 1963), *cert. denied,* 376 U.S. 906 (1964); Brubaker v. United States, 183 F.2d 894 (6th Cir. 1950); Williams v. United States, 66 F.2d 868 (10th Cir. 1933); Mabee v. United States, 60 F.2d 209 (3d Cir. 1932); Holt v. United States, 42 F.2d 103 (6th Cir. 1930); Hogg v. United States, 35 F.2d 954 (5th Cir. 1929); United States v. Shelton, 59 F. Supp. 273 (E.D. Ky. 1945); Brown v. Commonwealth, 378 S.W.2d 608 (Ky. 1964); State v. Littlefield, 213 A.2d 431 (Me. 1965); Head v. State, 136 So. 2d 619 (Miss.), *cert. denied,* 371 U.S. 910 (1962); State v. Worley, 383 S.W.2d 529 (Mo. 1964), *cert. denied,* 381 U.S. 941 (1965); State

of *Jones*, it has been held that passengers in automobiles are aggrieved by an unlawful search of the car in the same manner as the owner, and therefore both have obtained standing to challenge a search.[94]

Deciding whether the requirements laid down in *Jones* are met becomes more complex when a search is restricted to one or more automobiles on a private estate. To have standing, must a defendant be in the automobile at the time of the search or is his legitimate presence on the estate sufficient to meet the requirements of the *Jones* test? In *United States v. Costner*,[95] federal agents made an unlawful entry onto private premises and searched both an automobile and one of the buildings. The defendants, one a part time resident, and the other legitimately on the premises, were given standing to object to evidence seized from the automobile. The implicit reasoning of the holding is that the defendants' legitimate presence on the private estate permitted them to invoke the privacy of the automobile and building located within the curtilage of the home. However, if more than one guest has a locked automobile on the property of a third party, it is not clear that one guest would be able to invoke the privacy of the other guest's locked automobile merely because the one guest is legitimately on the premises of a third party.

In homes, private offices, and automobiles at least one individual has the right to exclude all others and to anticipate the privacy of the premises.

v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962); McDoulett v. State, 368 P.2d 522 (Okla. Crim. App. 1961); *cf.* State v. Watson, 386 S.W.2d 24 (Mo.), *appeal dismissed mem.*, 381 U.S. 275 (1965); Weeks, *Standing To Object in the Field of Search and Seizure*, 6 ARIZ. L. REV. 65 (1964).

94. United States v. Peisner, 311 F.2d 94 (4th Cir. 1962) (passenger of automobile charged with transporting obscene material in interstate commerce); People v. Adorno, 37 Misc. 2d 36, 234 N.Y.S.2d 674 (Sup. Ct. 1962); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962); see Williams v. United States, 323 F.2d 90 (10th Cir. 1963); United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962). *Contra,* McCain v. State, 151 So. 2d 841 (Fla. Dist. Ct. App. 1963) (distinction based on difference between a dwelling and an automobile); Carter v. State, 236 Md. 450, 204 A.2d 322 (1964) (distinction based on passenger's lack of control of automobile); State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962).

Passengers in taxicabs also have attempted to gain standing under the second rationale of *Jones*. It has been held that individuals in taxicabs have the same right of privacy as passengers in private automobiles. If a guest in an automobile would have standing then so should the paying passenger in a taxicab. People v. Adorno, 37 Misc. 2d 36, 234 N.Y.S.2d 674 (Sup. Ct. 1962); see Rios v. United States, 364 U.S. 253 (1960).

It is clear that if the owner of a car lends his vehicle to a bailee and the bailee later gives consent to search the car, that consent will not bind the owner who will still have standing to object. The explanation for this result is that the owner's "privacy interests" are greater than those of his guest. United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964).

95. 217 F. Supp. 644 (E.D. Tenn. 1963).

A more complex problem arises in *common areas* of multiple dwellings, where no one individual has the right to exclude all others. To date no court has been willing to accept the argument that a search made in these areas is an invasion of the personal "privacy interests" of a tenant or his guest.[96] These results seem defensible on the ground that in such common areas where more than one individual have equal access, no one individual can reasonably claim "privacy interests" in view of the shared use of the premises. In *Minker v. United States,* [97] the Third Circuit was faced with the argument that a tenant of an apartment building had "privacy interests" in the outside grounds which would give him standing to object to a search of a trash can which was placed there for his use and the use of three other tenants. In rejecting the defendant's argument, the court weighed "the nature of the individual's interest in and the extent of the claimed privacy in the premises searched."[98] Sometimes, the extent of an individual's privacy has been determined by an analysis of the "curtilage," within which one has a right to be free from unreasonable searches. However, attempting to define "curtilage" may obscure an analysis of the underlying issue, the "privacy interests" of an individual in the premises searched.[99]

The significance of the "privacy interests" element of the *Jones* rationale is manifested most clearly in the case of an individual legitimately occupy-

96. United States v. Miguel, 340 F.2d 812 (2d Cir.), *cert. denied,* 86 Sup. Ct. 116 (1965). "[T]he lobby of a multi-tenant apartment house [is not] within the 'curtilage' of each tenant." *Id.* at 814. It is important to note that the very basis of the crime (violation of narcotics laws) was possession of contraband per se and thus the defendant should have been afforded standing because of the dilemma. *Cf.* State v. Nash, 74 N.J. Super. 510, 181 A.2d 555 (Essex County Ct. L. 1962); White v. State, 362 S.W.2d 650 (Tex. Crim. App. 1962). *But cf.* McDonald v. United States, 335 U.S. 451 (1948). "[E]ach tenant of a building, *while he has no right to exclude from the common hallways those who enter lawfully,* does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry." *Id.* at 458 (concurring opinion) (Emphasis added.); People v. Pitts, 26 Ill. 2d 395, 186 N.E.2d 357 (1962).

Difficult decisions with respect to whether a defendant should have standing to challenge a search are often avoided by the courts. If a search appears patently lawful to a court, the motion to suppress will be denied ultimately and any examination of the standing issue would be merely academic. Therefore under these circumstances the defendant is assumed to have standing, but the motion to suppress is denied on the basis of the legality of the search. See United States v. Brown, 296 F.2d 565 (4th Cir.), *cert. denied,* 369 U.S. 812 (1961) (lessee denied standing when search was obviously lawful); State v. Nash, 74 N.J. Super. 510, 181 A.2d 555 (Essex County Ct. L. 1962); Campos v. State, 172 Tex. Crim. 179, 356 S.W.2d 317 (1962).

97. 312 F.2d 632 (3d Cir. 1962), *cert. denied,* 372 U.S. 953 (1963).

98. *Id.* at 634.

99. United States v. Miguel, 340 F.2d 812 (2d Cir.), *cert denied,* 86 Sup. Ct. 116 (1965); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963).

ing a public premises.[100] In *State v. Bibbo*,[101] the defendant, a customer in a store, attempted to suppress lottery slips which were picked up by a police officer after the defendant had dropped them on the floor of the store. The defendant argued that his lawful presence in the store was sufficient to entitle him to standing. Obviously, the defendant was unable to establish any "privacy interests" in the premises searched, a public area, and for this reason the court denied standing.

Although at one time the defendant was "legitimately on the premises," standing will be denied if he has relinquished his association with the premises before the search occurs.[102] In *Fisher v. United States*,[103] the defendants faked a robbery of their personal possessions from their living quarters to collect insurance, and buried these goods in the back yard. Later, the defendants moved from the premises, and investigators found the buried objects. The defendants, who were charged with conspiracy to commit mail fraud, were denied standing to suppress the goods because they were not legitimately on the premises at the time of the search and had no right to be there.

However, if an initial search occurs when a defendant has a legitimate interest in the premises and a subsequent search is made after the premises has been abandoned, standing may still be given if the second search is made on the basis of information gained during the first. In *United States v. Paroutian*,[104] the defendant lived in an apartment as a guest of Graziani, who rented the premises. Federal agents made searches of the apartment on April 18th and 20th and found a closet with a false wall. On June 19th, after Graziana and the defendant had been evicted, federal agents again searched the apartment and removed the false wall for the first time. Narcotics were found, and the defendant objected to the final search. The government asserted that standing should be denied because the defendant was not legitimately on the premises at the time of the successful search, but

100. Ferguson v. State, 236 Md. 148, 202 A.2d 758 (1964) (search of a public parking lot); State v. Bibbo, 83 N.J. Super. 36, 198 A.2d 810 (App. Div. 1964) (search of a store).

101. 83 N.J. Super. 36, 198 A.2d 810 (App. Div. 1964). *But see* United States v. Pisano, 191 F. Supp. 861 (S.D.N.Y. 1961). It is not clear which section of the store was searched. If it was a public area, then this holding is directly contrary to *Bibbo*.

102. Frank v. United States, 347 F.2d 486 (D.C. Cir.), *petition for cert. dismissed*, 86 Sup. Ct. 317 (1965); United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801 (W.D. Pa. 1963); State v. Engberg, 377 S.W.2d 282 (Mo. 1964); Martin v. State, 375 P.2d 481 (Okla. Crim. 1962) (defendant no longer an automobile passenger, has no standing); *cf.* United States v. Lewis, 227 F. Supp. 433 (S.D.N.Y. 1964); Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963), *cert. denied*, 377 U.S. 999 (1964).

103. 324 F.2d 775 (8th Cir. 1963), *cert. denied*, 377 U.S. 999 (1964).

104. 299 F.2d 486 (2d Cir. 1962).

the Second Circuit conferred standing because "an unlawful search taints all . . . leads uncovered by the search."[105] Thus, if the defendant had standing to object to the first search, he had standing to object to the others.

III. Will Jones Become Constitutionally Binding Upon the States?

Because standing determines who may enforce the fourth amendment, it seems apparent that the Constitution places some limitations on the standing requirements that a state may adopt. Furthermore, the constitutional application of the federal exclusionary rule to the states may impliedly include the federal standing rules as necessary companions.[106] But even assuming the application of the federal exclusionary rule to the states does not automatically encompass the refinements of the federal standing rules developed in *Jones,* some guide as to whether the *Jones* tests will be applied to the states may be derived from an examination of other federal rules that have recently been considered for application to the states.[107] In *Ker v. California,*[108] the Supreme Court did not apply the federal knocking and entry statute[109] to the states because the statute[110] had not been based on

105. *Id.* at 489. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920); United States v. Sheba Bracelets, Inc., 248 F.2d 134 (2d Cir.), *cert. denied,* 355 U.S. 904 (1957).

106. State v. Manetti, 189 A.2d 426 (Del. Super. Ct. 1963); Belton v. State, 228 Md. 17, 178 A.2d 409 (1962); State v. Parsons, 83 N.J. Super. 430, 200 A.2d 340 (App. Div. 1964); State v. Michaels, 60 Wash. 2d 638, 646, 374 P.2d 989, 994 (1962).

In *Manetti,* the court stated that, "The States now appear not only subject to the restrictions of the Fourth Amendment but also subject to judicial construction thereof by the Federal Courts." State v. Manetti, *supra* at 427. "As we see it, the right to object in a case such as this, where the State proposed to use the illegally seized evidence against a defendant who was rightfully on the searched premises, is another necessary result of the *Mapp* decision." Belton v. State, *supra* at 23, 178 A.2d at 412. "But in our view the matter of defendant's standing here is controlled by *Jones v. United States* . . . ." State v. Parsons, *supra* at 443, 200 A.2d at 347. *Contra,* Leveson v. State, 138 So. 2d. 361, 364 (Dist. Ct. App. 1962), *aff'd,* 151 So. 2d 283 (Fla. 1963).

In Ker v. California, 374 U.S. 23, 34 (1963), the Supreme Court added strength to this argument by citing *Jones* as support for a constitutional limitation on the rule making power of the states. There is also language in Mapp v. Ohio, 367 U.S. 643, 653 (1961), that suggests that both standing and the *Jones* rationale may be part and parcel of the exclusionary rule. However, this language can also be construed as merely bolstering the value of the exclusionary rule.

107. See also Pointer v. Texas, 380 U.S. 400 (1965); Beck v. Ohio, 379 U.S. 89 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

108. 374 U.S. 23 (1963).

109. 18 U.S.C. § 3109 (1951).

110. Miller v. United States, 357 U.S. 301 (1958).

the Constitution.[111] On the other hand, in *Aguilar v. Texas*,[112] the Court applied a prior interpretation[113] of the federal probable cause rule[114] to the states because the rule had been interpreted "in light of the constitutional"[115] requirement. Even though standing is not mentioned in the fourth amendment, it is similar to probable cause because it relates to the implementation of the fourth amendment in every case and is unlike rules which apply only to specific types of searches, such as the federal knocking and entry statute involved in *Ker*. Moreover, every search and seizure case considered by the Supreme Court since *Mapp* with the exception of *Ker* was held to have a constitutional base.[116]

Furthermore, the federal standing rules could be applied to the states for the same reason that the federal exclusionary rule was applied to the states in the *Mapp* decision. Even though the fourth amendment does not compel the use of the exclusionary rule, the Supreme Court reached the *Mapp* decision because it felt that the exclusionary rule was the only practical means of inhibiting state police violations of the fourth amendment. The Supreme Court could reason further that because the exclusionary rule was partially ineffective in the federal courts before *Jones* extended its use, the intended purpose of the exclusionary rule may not be achieved in the states unless *Jones* is applied there also.

Even though the *Jones* opinion is expressly stated to be an interpretation of Rule 41(e),[117] the Court has ample constitutional authority upon which

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111. However, the dissent points out that the mere fact that a case is decided on the authority of the supervisory powers of the Court in no way implies that the same result was not compelled by the fourth amendment. Ker v. California, 374 U.S. 23, 53 (1963). Furthermore, in Beck v. Ohio, 379 U.S. 89 (1964), the defendant was convicted of possession of clearing house slips. A search of the defendant's person after arrest was upheld by the Ohio Supreme Court as a search incidental to an arrest which was lawful under the state's requirements of probable cause. The Supreme Court held that the arrest was illegal because probable cause did not exist. The opinion indicated that federal standards of probable cause must be applied by the states.

112. 378 U.S. 108 (1964).

113. Giordenello v. United States, 357 U.S. 480 (1958). The Court's footnote in *Aguilar* points out that an arrest warrant was involved in *Giordenello* but that despite this distinction the same standard applied in the case at bar. Aguilar v. Texas, *supra* note 112, at 112 n.3.

114. FED. R. CRIM. P. 4.

115. Aguilar v. Texas, 378 U.S. 108, 112 n.3 (1964).

116. Beck v. Ohio, 379 U.S. 89 (1964) (search of an automobile); Aguilar v. Texas, 378 U.S. 108 (1964); Preston v. United States, 376 U.S. 364 (1964) (search of an automobile after defendant was in jail was held to be an unreasonable search); Wong Sun v. United States, 371 U.S. 471 (1963) (oral evidence illegally obtained falls within the realm of *Mapp*); see Stoner v. California, 376 U.S. 483 (1964) (search of hotel room with consent of owner unreasonable under *Mapp*).

117. Jones v. United States, 362 U.S. 257, 260 (1960).

to base the two *Jones* rationales. The privacy of premises basis for standing could be founded on the effectuation of privacy safeguards of the fourth amendment, but the elimination of the dilemma might require the court to use the fifth amendment along with the fourth. The requirement that a defendant claim a possessory or proprietary interest to obtain standing may violate the right against self incrimination.[118] If the fact of possession might contribute to the defendant's conviction, to force the defendant to confess that fact would be tantamount to compelling him to incriminate himself.[119] Some courts have held that this position is untenable because no person is required to enforce his fourth amendment rights, and therefore, the decision to claim and prove standing is voluntary.[120] However, it is submitted that such an approach leads to the conclusion that in some situations a person is not entitled to the protection of both the fourth and fifth amendments at the same time.[121]

118. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. Whether the Supreme Court would extend the privilege against self incrimination to require an exemption from standing is a matter of conjecture. There are obviously some situations in which the required claim would not be incriminating to the defendant. To exempt the defendant from establishing standing, it might be asserted, would be a fairer way to treat the accused because he should be free in formulating every possible defense against the prosecution's efforts to establish the incriminating fact of possession. To establish a fifth amendment right under the traditional case law, a defendant need not prove that his statements would be incriminating; he must merely *assert* that to speak *might tend* to be incriminating. *E.g.*, Hoffman v. United States, 341 U.S. 479, 488 (1951). This argument recently found added strength when for the first time the fifth amendment was applied to the states. Malloy v. Hogan, 378 U.S. 1 (1964).

A related constitutional concept that could be used to support the *Jones* solution for the dilemma is that convictions must result from the use of methods that are consistent with our accusatorial theory of criminal justice. Escobedo v. Illinois, 378 U.S. 478 (1964); Watts v. Indiana, 338 U.S. 49 (1949); Gouled v. United States, 255 U.S. 298 (1921). For a recognition of the close relationship of these two theories see Malloy v. Hogan, *supra* at 8-9. According to this theory, fundamental constitutional principles command the prosecutor to prove his case by the use of evidence secured independent of the cooperation of the defendant. If the defendant is forced or strongly induced to admit facts which aid the prosecution in proving the offense charged, then our system of criminal justice degenerates into the inquisitorial type. See Watts v. Indiana, *supra* at 54. Furthermore, if the defendant is induced to waive his fourth amendment right because he feels that he should not make the required claim of standing, then an effective defense would be cleared from the prosecution's path to conviction. This result would be a deviation from our strictly accusatorial system.

119. See Safarik v. United States, 62 F.2d 892 (8th Cir. 1933).

120. See Kaiser v. United States, 60 F.2d 410 (8th Cir. 1932); Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932); Heller v. United States, 57 F.2d 627 (7th Cir.), *cert. denied*, 286 U.S. 567 (1932); Vaught v. United States, 7 F.2d 371 (9th Cir. 1925); State v. Williams, 69 Ohio App. 361, 41 N.E.2d 717 (1941); Bell v. State, 94 Tex. Crim. 226, 250 S.W. 177 (1923), *writ of error dismissed*, 266 U.S. 640 (1924).

121. See Heller v. United States, *supra* note 120, at 629-30 (dissenting opinion).

IV. California and New York

California adopted the exclusionary rule in 1955[122] and shortly thereafter, in *People v. Martin*[123] the traditional standing rules were challenged. The Supreme Court of California responded by completely abolishing all requirements for standing. Justice Traynor reasoned that if the purpose of the exclusionary rule is to prevent unlawful police activity, any procedure which condones illegal practices is inconsistent with that purpose and should be prohibited.[124] However, the potentially inhibiting effect on police practices may have been lessened by lowering the level of probable cause needed to make a lawful arrest.[125]

Arguments which support California's novel venture recognize that the purpose of the exclusionary rule is to deter the police from obtaining evidence illegally; thus when the use of any unlawfully obtained evidence is allowed by denying standing to a defendant, the effect is to undermine the express reason for having the exclusionary rule. On the other hand, those in favor of standing requirements base their opinion on an abhorrence of the coddling of criminals. This argument, as set forth by Mr. Justice Cardozo, is, why should "[t]he criminal . . . go free because the constable has blundered."[126] In addition, it is argued that only those whose rights have

122. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

> We have been compelled to reach that conclusion [the exclusionary rule] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. *Id.* at 445, 282 P.2d at 911-12.

123. 45 Cal. 2d 755, 290 P.2d 855 (1955). For additional commentary see Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U.L. Rev. 65 (1957); Comment, 55 Mich. L. Rev. 567 (1957); Note, *Procedures for Suppressing Illegally Seized Evidence*, 20 Mont. L. Rev. 225 (1959); Note, 15 Wyo. L.J. 218 (1961).

> 124. [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. People v. Martin, 45 Cal. 2d 755, 760, 290 P.2d 855, 857 (1955). Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissable whether or not it was obtained in violation of the particular defendant's constitutional rights. *Id.* at 761, 290 P.2d at 857.

Accord, People v. Ibarra, 34 Cal. Rptr. 863, 386 P.2d 487 (1963) (unlawful possession of heroin); People v. Jager, 303 P.2d 115 (Cal. 1956) (burglary and conspiracy); People v. Calonna, 295 P.2d 490 (Cal. 1956) (possession of Indian Hemp); People v. Silva, 295 P.2d 942 (Cal. 1956) (unlawful possession of narcotics); People v. Kitchens, 294 P.2d 17 (Cal. 1956) (possession of narcotics).

125. See Ker v. California, 374 U.S. 23 (1963); People v. Blodgett, 46 Cal. 2d 106, 293 P.2d 57 (1956); Note, 50 Geo. L.J. 585, 596-97 (1962). *But see* Beck v. Ohio, 379 U.S. 89 (1964).

126. People v. Defoe, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

been invaded should have standing to complain. To date California stands alone as the only state without standing requirements.

New York deserves special consideration because its statutory standing requirement has been interpreted as codifying the California rule. The statute reads in part, "A person claiming to be aggrieved by an unlawful search and seizure . . . may move for the return of such property or for the suppression of its use as evidence."[127] Two trial judges, who have had occasion to interpret this statute, have reached contrary conclusions about the statute's meaning.[128] Judge Sobel in *People v. Smith*[129] and again in *People v. Estrada*[130] construed the statute as a codification of the California rule. His contention is that "it was the intention of the Legislature to confer 'standing' upon any person having reasonable grounds to believe that the product of the search may be used as evidence against him."[131] Judge Shapiro, on the other hand, contends that the statute is no more than the traditional rule.[132] His argument is that the defendant must not only claim but also prove that he is "aggrieved by an unlawful search and seizure." To date the state's Appellate Division has not resolved these conflicting interpretations.

V. Should Standing Be Required?

Standing reflects whether the defendant has been affected in a manner that is within the scope of the fourth amendment's protection, and only if he has, can he challenge the legality of the search. Under this procedure, the relief provided for a violation of the fourth amendment becomes operative only to persons who can obtain standing. Because of the intimate rela-

127. N.Y. Code Crim. Proc. § 813-C.

128. *Compare* People v. Smith, 35 Misc. 2d 533, 230 N.Y.S.2d. 894 (Kings County Ct. 1962), *with* People v. Cefaro, 45 Misc. 2d 990, 258 N.Y.S.2d 289 (Sup. Ct. 1965).

129. 35 Misc. 2d 533, 230 N.Y.S.2d 894 (Kings County Ct. 1962). This case is also significant for Judge Sobel's interpretation of *Jones*. It is his belief that the first rationale is limited only to contraband while the second branch is limited to fruits and instrumentalities. Thus, if a person legitimately on the premises is charged with possession of contraband, standing must be granted on the basis of the charged with possession rationale and cannot be obtained on the basis of legitimate presence on the premises. However, it is submitted that the two rationales of *Jones* are not mutually exclusive. Hence, the mere fact that a defendant is charged with possessing contraband does not, for that reason, bar the granting of standing under the premises rationale.

130. 44 Misc. 2d 452, 253 N.Y.S.2d 876 (Sup. Ct. 1964); see People v. Kramer, 38 Misc. 2d 889, 239 N.Y.S.2d 303 (Sup. Ct. 1963).

131. People v. Smith, 35 Misc. 2d 533, 541, 230 N.Y.S.2d 894, 902 (Kings County Ct. 1962).

132. People v. Cefaro, 45 Misc. 2d 990, 258 N.Y.S.2d 289 (Sup. Ct. 1965); see People v. Quagliana, 46 Misc. 2d 887, 261 N.Y.S.2d 404 (Erie County Ct. 1965).

tionship between standing and the constitutional guarantee, it is necessary that standing be consistent with the desired goals of the exclusionary rule, the expressed means for enforcing that guarantee.

The fourth amendment protects "The right of the people to be secure in their persons, houses, papers and effects . . . ."[133] Traditionally, the relief available for a violation of the fourth amendment, the exclusionary rule, was limited only to those individuals whose personal interests were invaded.[134] However, this view seems inconsistent with the most recently announced purpose of the exclusionary rule, to protect the people as a whole from unlawful police practices.[135] Although personal interests are safeguarded by the fourth amendment, the Court has placed overriding emphasis on the protection of society from unlawful police conduct. Because the other methods of preventing unlawful police conduct had failed, the exclusionary rule was felt to be the only effective means of enforcing the right to be free from unreasonable searches and seizures. This being the goal of the Court, the scope of the amendment may be to protect the entire public, and thus the people as a whole should have the right to enforce the exclusionary rule. If one may invoke the exclusionary rule only if his personal interests are invaded by an unlawful search, the police may continue to disregard the fourth amendment and use illegally seized evidence against those whose personal rights have not been invaded.

There are several steps that may be taken to make the standing rules more consistent with the present basis for the exclusionary rule. At the least, standing should be made freely available to every person who can fulfill the new requirements as liberalized by the second rationale of *Jones*. The dilemma of any individual defendant could be completely eliminated by excluding from the trial any incriminating claims or statements made by the defendant to establish standing at the suppression hearing. Alternatively, the first branch of *Jones* could be applied not only when the defendant is "charged with a crime of possession," but in all situations in which the defendant would be confronted with the dilemma. Either of these measures would be sufficient to protect most well represented individuals, but in light of the most recent expressions of the purpose of the exclusionary rule, to deter acts of privacy invasion by the police to the fullest extent, they are not sufficient. To achieve that overall social purpose most clearly and completely, the entire concept of standing will have to be

133. U.S. CONST. amend. IV.

134. Chicco v. United States, 284 Fed. 434 (4th Cir. 1922); United States v. Silverthorne, 265 Fed. 853 (W.D.N.Y. 1920).

135. Mapp v. Ohio, 367 U.S. 643 (1961); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

eliminated as a prerequisite to raising the claim of a fourth amendment violation. This was done in the California case of *People v. Martin*.[136] There, Justice Traynor reasoned that *any* use of illegally obtained evidence would undermine the deterrent effect of the exclusionary rule and concluded that evidence, unconstitutionally obtained, must be excluded "whether or not it was obtained in violation of the particular defendant's constitutional rights."[137] This seems to be the most effective and widely beneficial solution to the fourth amendment standing problem that has yet been articulated.

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136. 45 Cal. 2d 755, 290 P.2d 855 (1955).
137. *Id.* at 761, 290 P.2d at 857.