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CALIFORNIA'S RULE OF VICARIOUS EXCLUSION: WHO MAY CHALLENGE THE CONSTABLE'S ERRORS?

Mark B. Simons*

INTRODUCTION

State and federal courts historically have identified the proper limits of police investigation through interpretation of search and seizure rules. The so-called "exclusionary rule" is not itself a limitation on police conduct, but rather a judicially created method of enforcement. Evidence discovered as a result of illegal police activity is excluded from trials. The frequency of this judicial review is affected by the existence of a standing requirement that reduces the number of defendants who may properly challenge any police action. Thus, in federal court, only a "person aggrieved" by a search can challenge it.

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2. In Rakas v. Illinois, 99 S. Ct. 421 (1978), the Supreme Court abandoned use of the standing terminology in criminal cases, while conceding that this in no way changed the result of any of its previous decisions. It concluded that the only issue was whether the defendant's personal right to be free from an unlawful search had been violated. Id. at 427-28. It did concede that standing could be an issue in some cases. Id. at 426 n.4.

In general, standing in federal court is premised on article III of the United States Constitution, which limits judicial power to "cases" and "controversies." At the very least this requires that a litigant be injured in fact by any action he sues to enjoin. See Flast v. Cohen, 392 U.S. 83 (1968). Whether the federal courts require more is open to question. In Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), the Court added to this constitutional minimum the requirement that "the interest sought to be protected . . . [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Id. at 153. The second prerequisite has been criticized, K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.07 (1973), and there is some indication that in more recent cases the Court has all but eliminated it. See Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (per curiam). See generally Scott, Standing in the Supreme Court—A Functional Analysis, 86 HARV. L. REV. 645, 660-69 (1973).

3. Rule 41(e) of the Federal Rules of Criminal Procedure provides, in pertinent part, that: "A person aggrieved by an unlawful search and seizure may move the
and the use of evidence against a federal defendant is not, in itself, a sufficient injury to permit an objection to the police discovery of it.4

Despite the substantial controversy over this limitation on challenges to police conduct,5 California remains the only state that ostensibly has eliminated the standing requirement.6 Because California's approach permits a defendant to suppress evidence in his case by raising vicariously the privacy violation of a third person, it has been denominated the "vicarious exclusion" rule.7

district court . . . for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized." The three leading federal cases on standing to object to an unlawful search and seizure are Jones v. United States, 362 U.S. 257 (1960), Alderman v. United States, 394 U.S. 165 (1969), and Rakas v. Illinois, 99 S. Ct. 421 (1978). From these cases it appears that a person has "automatic" standing if he is charged with a crime that includes as an essential element possession of the evidence seized, with a right to possession at the time of the seizure. In addition, those defendants who can establish that their privacy was invaded by the search or seizure have standing. See also Stone v. Powell, 428 U.S. 465, 488 (1976); Brown v. United States, 411 U.S. 223, 229 (1973).


6. Alderman v. United States, 394 U.S. 165, 204 (1969) (Fortas, J., dissenting). The Supreme Court has infrequently waived a standing requirement, though never in a criminal case. See Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953). Although these cases involve widely variant subject matter, one common factor that may have led the Court to permit a person to sue for the violation of a third party's rights was the difficulty the possessor would have had in asserting them. See generally Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 YALE L.J. 599, 627-28 (1962).

7. Thus in California, it has been said that ""a seizure is either legal or illegal, regardless of the person against whom the prosecution seeks to introduce the evidence . . . ." [citation omitted]. The identity of the defendant is a neutral factor." Shuey v. Superior Ct., 30 Cal. App. 3d 535, 543, 106 Cal. Rptr. 452, 457 (1973) (citing People v. Superior Ct. (Piersen), 274 Cal. App. 2d 228, 231, 78 Cal. Rptr. 830, 832 (1969)). While California has eliminated standing, the United States Supreme Court has been narrowing the class of defendants who can rely on the exclusionary rule. Thus in Jones v. United States, 362 U.S. 257, 261 (1969), the Court seemed to indicate that targets of the search would have standing even if their privacy was not invaded:

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

This so-called "target doctrine" was expressly repudiated in Alderman v. United States, 394 U.S. 165, 171-76 (1969).

McDonald v. United States, 335 U.S. 451 (1948), appeared to give a defendant
In an increasing number of areas, however, the California courts have imposed a standing requirement, at times without considering either the vicarious exclusion rule or the policies underlying it. This threatens the primary justifications for the doctrine by decreasing judicial economy and by increasing incentives to search illegally. After a discussion of the policies behind the vicarious exclusion rule, this article will focus on its application in the past two decades. The existence and effects of a reemerging standing requirement are analyzed along with the factors that may account for its continuing vitality. The article concludes that, having made the correct decision to eliminate standing, the California courts have not been able to do so consistently.

The Basis of Vicarious Exclusion

California adopted the exclusionary rule in *People v. Cahan* eight years before the Supreme Court in *Mapp v. Ohio* required all states to suppress the fruits of unreasonable searches and seizures. Six months after *Cahan*, the California Supreme Court first faced the vicarious exclusion issue in *People v. Martin*. In that case, the police entered an office and found the defendant with bookmaking paraphernalia. Although Martin denied an interest in either the office or the items seized, the court granted him standing to argue that the entry was illegal and that the evidence discovered should be suppressed.

Standing to contest the search of a codefendant. This was dispelled in *Wong Sun v. United States*, 371 U.S. 471 (1963).

11. *Id.* The defendant claimed that he had been paid one day's wages to sit in the office and answer the phone. Whether considered an employee or a guest, he was legitimately on the premises. At the time *Martin* was decided, this was insufficient to warrant standing in federal court, although *Jones v. United States*, 362 U.S. 257 (1960), changed that result. In *Martin*, the court could have permitted the defendant's challenge without totally abrogating standing by taking the approach later adopted in *Jones*. It rejected this approach in favor of the vicarious exclusion rule.

Since *Martin*, the California Supreme Court has reconsidered the vicarious exclusion rule only once in *Kaplan v. Superior Ct.*, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971). In *Kaplan*, the court rejected the argument that the California legislature had intended to repeal *Martin* silently by its adoption of the Evidence Code. That code nowhere mentioned standing but did provide that: "Except as otherwise provided by statute, all relevant evidence is admissible." *Cal. Evid. Code § 351* (West 1965). Although *Martin* was not embodied in any statute, the court had little difficulty in dispensing with the contention, finding that vicarious exclusion was too integral a part of the criminal law to be "overruled by any vague and indecisive provision in the
Consonance With the Goals of the Exclusion Doctrine

Rationale for Suppression. The court, in Martin, based vicarious exclusion on what might be considered a philosophical plane; it found that the logic of its decision to exclude in one case of police misconduct required exclusion in all.

Suppression of illegally obtained evidence can be justified by three theories. In the first, the protection against unreasonable searches is analogized to the right against self-incrimination. Exclusion then serves to prevent only those privacy violations that are coupled with an attempt to incriminate the victim with the evidence uncovered. At the time People v. Cahan and People v. Martin were decided, this rationale was prevalent in lower federal court decisions endorsing suppression as a remedy for police misconduct.

Exclusion is also justified on the basis that it preserves "judicial dignity" by allowing the judiciary to separate itself from the illegal acts. This rationale has never been the sole basis for any court decision adopting exclusion, but it has frequently supplemented the third rationale—deterrence of future illegality. Under the deterrence theory, it is assumed that police investigation is directed primarily at securing convictions and that suppression removes the incentive for acting in a proscribed manner.

The California Supreme Court, in Cahan, rejected the lower federal court rule and relied on the latter two theories in adopting exclusion, stating:


12. Professor Amsterdam proposes two different perspectives on the fourth amendment. It can be viewed as "a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 367 (1974).


16. The theory first appeared in Weeks v. United States, 232 U.S. 383 (1914), which first prohibited the use of evidence obtained in violation of the fourth amendment in federal prosecutions. Professor Kamisar has recently urged reliance on this theory as a preferred basis for exclusion. Kamisar, Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?, 62 Jud. 66 (1978).
Exclusion of the evidence cannot be justified as affording protection or recompense to the defendant . . . . It does not protect the defendant from the search and seizure, since that illegal act has already occurred. If he is innocent or if there is ample evidence to convict him without the illegally obtained evidence, exclusion of the evidence gives him no remedy at all . . . . We have been compelled to reach that conclusion [to exclude] 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 . . . . [When] courts respect the constitutional provisions by refusing to sanction their violation they will not only command the respect of law abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways.1

While a standing requirement is implicit in a system based on the victim incrimination theory, it is antithetical to one based on judicial dignity and deterrence. When presented with the standing issue in Martin, the court found its decision foreclosed by the reasoning of Cahan:

[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.18

Vicarious exclusion is therefore more compatible with the deterrent purpose of suppression. If vicarious exclusion is also to be considered a wise rule, two related inquiries must produce affirmative answers: does exclusion actually deter unlawful

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17. 44 Cal. 2d at 443, 445, 449, 282 P.2d 905, 910-11, 914. The United States Supreme Court seems to base its use of the exclusionary rule on a deterrence theory. See Linkletter v. Walker, 381 U.S. 618 (1965); Elkins v. United States, 364 U.S. 206, 222 (1960); Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Cmty. L. Rev. 342, 352 (1967).

18. 45 Cal. 2d at 760, 290 P.2d at 857.
police conduct, and does the elimination of standing increase this deterrent effect?

Exclusion as a Deterrent to Police Misconduct. When simply stated, the deterrent effect of the suppression doctrine makes great sense. Critics, however, have correctly noted that the rule directly deters police misconduct only in those investigations where prosecution is the chief goal. Even in those cases that are prosecuted, certain assumptions are made by proponents of exclusion. For example, there is good reason to believe that police officers are sometimes more interested in arrests than convictions. In addition, deterrence depends on a well-informed police force. There is little reliable data on the extent to which police officers are told of new search and seizure rulings, or of the accuracy of the information they receive.

More important, however, than the assumptions implicit in the deterrence argument is the conduct encouraged by exclusion. The rule not only assumes that the police are interested in the final outcome of the case and in learning about legal restrictions on their investigatory power, it promotes this interest. Even if the assumptions are incorrect, the rule encourages the prosecutorial officials who have the appropriate power to rectify the situation. It is their interests that are sacrificed if


20. See Oaks, supra note 5. Prostitution and gambling are examples of crimes in which police harassment of violators may be the primary objective. Often the recovery of stolen property is of paramount concern, and the willingness to forego prosecution nullifies the inhibitive effect of exclusion. Moreover, since contraband is not returned even if the search is illegal, it may seem preferable to an officer to make a stop when he has a hunch that the one detained is in possession of narcotics or weapons. Although he may be unable to justify the seizure in court, In re Tony C., 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978), the officer will have removed contraband from the streets.

In his exhaustive article on the deterrent effect of the exclusionary rule, Professor Oaks explores in detail the assumptions behind the adoption of exclusion and collects those few empirical studies which had then been made. Oaks, supra; see also Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Stud. 243 (1973); Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1974); Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L. Bull. 5, 35-39 (1979). Generally it has not been easy to test empirically the deterrent effect of exclusion because of the difficulty in isolating the exclusionary rule from other causative factors and in measuring its influence in any reliable way. The rule seems to have had a positive effect on police training. Nagel, Testing the Effects of Excluding Illegally Seized Evidence, 1965 Wis. L. Rev. 283. In addition, police awareness of constitutional limitations has increased. Oaks, supra at 708. Finally, it appears that the effectiveness of exclusion is higher in more serious cases. J. SKOLNICK, JUSTICE WITHOUT TRIAL 228 (1966).

they fail to do so. Thus, while the exclusionary rule may now have an imperfect deterrent effect, its very existence should serve to improve the situation.

The Effect of Standing on Deterrence. Some who accept the deterrent effect of exclusion see no need to eliminate standing. They argue that vicarious exclusion does not increase deterrence because its underlying premise is incorrect. These opponents recoil at the image, implicit in Martin, of the sophisticated, amoral officer who in a calculating fashion accepts the invitation to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others. This notion is particularly hard to accept, since in suppression hearings, courts routinely resolve credibility disputes in the officer's favor. Thus, suppression occurs only when the officer, through ignorance or honesty, admits conduct that violates privacy.

The extreme variance in the training of police officers and in their relationship to the community they patrol weakens behavioral generalizations. However, there seems to be good reason to question the extent to which fourth amendment rights exist independent of the exclusionary rule. Professor Kamisar has collected an enlightening set of police statements given in response to the imposition of the exclusionary rule in their jurisdictions. They echo the remarks of William Parker, who, when Chief of Police of Los Angeles, lamented the new restrictions required by exclusion but promised that "[a]s long as the exclusionary rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule." Professor Skolnick's study of the police suggests that when they are unconcerned with exclusion, the police are not troubled by violating a suspect's fourth amendment rights. Even district attorneys have been known to phrase their advice to the police in terms of exclusion, not privacy. The lesson from this seems

22. 45 Cal. 2d at 760, 290 P.2d at 857.
25. W. Parker, Parker on Police 117 (1957) (emphasis added).
26. See J. Skolnick, supra note 20, at 139-49, 223. This is prevalent in narcotics cases where, routinely, the police violate the rights of minor violators to obtain information about their sources.
27. In People v. Superior Ct. (Cook), 84 Cal. App. 3d 491, 148 Cal. Rptr. 704 (1978), the California Court of Appeals recently considered a case involving electronic surveillance conducted without judicial authorization. The officer who conducted the surveillance had testified that before doing so
clear: judicial failure to punish misconduct by exclusion is viewed by the police as a sanction of their behavior. Therefore, a standing limitation seems likely to increase police disregard of the rights of those who are searched in order to find evidence that can also be used against a third person.

In its rejection of vicarious exclusion in Alderman v. United States, the United States Supreme Court did not go so far as to claim that there is no deterrence lost by requiring standing. Rather, the Court concluded that the additional deterrence is "minimal" and insufficient to justify the social cost. Since the amount of additional deterrence resulting from vicarious exclusion has never been quantified, it is difficult to argue with the Court's conclusion.

"Minimal deterrence" has not been an easily applied measure. For example, in Kaufman v. United States, decided two weeks after Alderman, the Court held that the failure to object to a search at or before trial did not preclude raising it in a federal post-conviction proceeding. The government had argued unsuccessfully that the minimal additional deterrence resulting from this new opportunity to object did not justify the release of any guilty persons. Recently, the Court changed its mind and denied post-conviction relief in the same situation, finding that the deterrence was, in fact, insufficient. No data explaining this shift accompanied the opinion. Regardless of the correctness of either decision, the shift demonstrates the problem in predicking the existence of the exclusionary rule on

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he talked to a deputy district attorney in the San Luis Obispo District Attorney's office . . . and that the deputy district attorney, after calling back, said that the use of the electronic surveillance equipment was all right, provided that the case against the suspects was not completely dependent upon what was overheard with the equipment.

Id. at 497, 148 Cal. Rptr. at 708 (emphasis added). The deputy district attorney apparently did not deny that this accurately reflected his advice, although he thought he gave it after the defendant's arrest and not prior to the surveillance. Id.

28. Kamisar reports the following statement made by a detective in St. Paul, Minnesota:

No officer lied upon the witness stand. If you were asked how you got your evidence, you told the truth. You had broken down a door or pried a window open . . . often we picked locks . . . The Supreme Court of Minnesota sustained this time after time. [The] judiciary okayed it; they knew what the facts were.


30. Id. at 175.
32. Id. at 225-26.
a calculation of the apparently incalculable.

The decision in Alderman was couched in terms that suggested that standing balances the competing social interests in deterring unlawful searches and reducing the costs inherent in excluding relevant evidence of guilt. This is insupportable. Whether a person has standing depends largely on his relationship to the premises searched or item seized. Neither the seriousness of the crime charged, the nature of the law enforcement misconduct, nor the officer’s expectation that the person would be prosecuted with the evidence unlawfully obtained are taken into account. Standing simply reduces the number of occasions that an illegally obtained item is suppressed. Its effect on police deterrence and the costs to society are completely random.

Debating the additional deterrent effect of vicarious exclusion ignores the likelihood that the imposition of standing threatens the efficacy of exclusion itself by making its application less certain. An officer who knows that the results of an improper search will be suppressed is less likely to undertake it than one who is unsure. There is a useful analogy in the exclusion of statements obtained in violation of the Miranda rule. For several years after Miranda, it was unclear whether a statement obtained without the required warnings could be used to impeach a defendant who testified. In People v. Nudd, the California Supreme Court ruled it could be so used. In People v. Disbrow, decided two years after Nudd, the supreme court reversed its position. During the period when Nudd controlled, there appeared to be a marked increase in police interrogation after a defendant had invoked his right to silence. Undoubtedly, the police recognized that such a practice could only be beneficial. If the police ceased questioning the defendant, there would be no statement; continuing the interrogation might lead to an admission which would hamper the suspect’s ability to testify in his defense at trial.

In many situations, the police are faced with searching

34. It is noteworthy that the United States Supreme Court has recently rejected the argument that the seriousness of the offense itself can excuse a warrant. In Mincey v. Arizona, 437 U.S. 385 (1978), the Court reversed the defendant’s murder conviction and found that there is no murder scene exception to the warrant requirement.
37. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).
either on questionable grounds or not searching at all. In the investigation of narcotics offenses or crimes involving multiple defendants, officers are likely to believe that persons other than the privacy victims can be prosecuted with any evidence discovered. If court decisions permit the use of unlawfully obtained evidence against non-victims, there are incentives for an officer to conduct the search. Studies confirm that the removal of incentives can deter conduct, but that this method of behavior modification is more likely to fail if not followed methodically. Use of a standing requirement to insulate some searches from judicial review will inevitably have that effect.

Thus, the exclusionary rule seems likely to inhibit future police illegality at least in those areas where prosecution is the presumed result of the investigation. In other areas, the ineffectiveness of suppression is not so much an argument against that doctrine as an argument for an additional sanction to supplement it. Moreover, the elimination of standing makes judicial review of every unlawful search available in cases prosecuted. While the additional deterrent effect of these extra challenges is unknown, a contrary rule would make the imposition of sanctions more haphazard and threaten to undermine the entire deterrent effect of suppression.

Practical Difficulties with a Standing Requirement

Although the court in Martin discussed only the philosophical basis for the rejection of a standing requirement, it is likely that practical considerations played a role in the decision, and that they continue to buttress the doctrine. At the time Martin was decided, fewer than half the states excluded evidence found in an unreasonable search. The only well-developed body of the law on the standing question evolved from lower federal court decisions. Those opinions justified exclusion as a remedy for a wrong done to a particular defendant, and permitted only those so wronged to benefit. The ease in stating this rule belies the difficulties the courts had in applying it.

Anomalies in the Federal Rule. In determining whether a defendant had sufficient interest in the premises searched, common law property rules were exalted over attempts to determine the nature of the privacy protected by the fourth

amendment. Substantial time was spent categorizing particular defendants as owner, lessors, lessees, guests, bailees, trespassers, and the like. It was then necessary to determine which of these categories had sufficient interest to challenge the evidence in a particular case. Not until five years after Martin, in Jones v. United States, did the United States Supreme Court define the area more exactly, rejecting the “gossamer” distinctions of the common law and finding that anyone legitimately on the premises when a search occurred could challenge its legality.

The determination of who had sufficient interest in the item seized was also unsatisfactory. Several courts ruled that no one could have a possessory interest in contraband, including stolen items. Needless to say, this immunized a large number of searches from judicial review. Moreover, to establish standing in federal court, the defendant often had to provide key evidence against himself on the issue of guilt by proving his control over the contraband. Though Justice Traynor did not mention it, the court in Martin may have been loathe to subject itself to the tender mercies of a doctrine that forced a defendant to admit his guilt or forego his right to challenge a search. The dilemma, avoided by the rejection of standing, was poignantly 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 bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.

Again, this dilemma was not alleviated until the United States Supreme Court’s decisions in Jones and Simmons v. United

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42. Id. at 266-67. The recent decision in Rakas v. Illinois, 99 S. Ct. 421 (1978), may undermine this. Rakas rejected the Jones rule that gave standing to anyone legitimately on the premises and replaced it with a more ambiguous standard. Despite the denials of the majority, it seems likely that the lower federal courts will utilize common law property concepts to refine this ambiguity.
43. This position may still be the law except in those situations where the crime charged is possession of the contraband. United States v. Sacco, 436 F.2d 780 (2d Cir.), cert. denied, 404 U.S. 834 (1971); see also United States v. Oates, 460 F.2d 45, 55 n.6 (2d Cir. 1977); see generally Trager & Lobenfeld, The Law of Standing Under the Fourth Amendment, 41 BROOKLYN L. REV. 421, 436-44 (1975).
44. Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932).
States, decided several years after Martin. Thus Martin’s rejection of standing may have been caused as much by the practical problems then inherent in the doctrine as by the logical implications of the court’s reliance on deterrence as the justification for exclusion.

Even today numerous anomalies exist in the application of the standing requirement. Consider a situation where A, while a guest in B’s home, hides a pistol on a window ledge. Under questionable circumstances, the police enter and find the weapon. If A is charged with possession of the pistol, he has automatic standing and can challenge the search without establishing any connection to the premises or the weapon. If, however, A is charged with murder and the primary evidence against him is the pistol and related ballistics testimony, he does not have automatic standing and must establish a sufficient relationship to the premises or gun before he can challenge the police entry. If A testifies that he was on the premises at the time of the search at B’s invitation, he will have standing, unless he is a mere “casual visitor.” That term has not yet been defined and may deny standing to all but a person who has slept on the premises and has a key, or it may deny standing only to a person there for a few moments. If A is more than a “casual visitor” but goes to the store for a pack of cigarettes returning moments later when the search is com-

46. To avoid Hand’s dilemma, Jones had held that a person charged with certain possessory crimes had automatic standing. See note 3 supra. Simmons sought to avoid the problem more completely by holding that testimony given by the defendant at the hearing on the suppression motion could not be introduced against him during the prosecution’s case-in-chief. Although Simmons did not discuss use of this testimony against the defendant to impeach contradictory testimony he gave at trial, there seems good reason to believe it would be admissible for this purpose. First, Walder v. United States, 347 U.S. 62 (1954), held that illegally seized evidence could be used against the defendant to impeach him after he testified and generally denied the charges. In addition, a statement obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), can be used to impeach a defendant whose trial testimony conflicts with it. Harris v. New York, 401 U.S. 222 (1971). But see People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

The Supreme Court has suggested that Simmons may have obviated the need for automatic standing. Brown v. United States, 411 U.S. 223, 228-29 (1973). If the defendant can be impeached by his testimony at the pre-trial hearing, a need for the continued vitality of the automatic standing rule seems to exist.

50. Id. at 429-30.
plete, he would be without standing, unless, of course, he admitted that the weapon was his. All of this testimony is highly relevant in A’s trial. Though it could not be used in the prosecution’s case-in-chief or to rebut the inconsistent testimony of an alibi witness, it would appear to be admissible to counter inconsistent testimony by A. Finally, if B was also charged in connection with the homicide, he could move to suppress the pistol though he never knew A brought it to his house and if asked, would deny he had ever seen the weapon before.

Vicarious exclusion eliminates these anomalies as well as the court hearings necessary to sort out the facts underlying them. In addition, there is no need to decide whether the courts or the defendant must be trapped in the dilemma that results when a person seeks to suppress evidence that he will deny any connection with at trial. Finally, this can be done without sacrificing one important virtue of a standing requirement, an adversary proceeding. It is obvious that a criminal defendant can be relied on to attack vigorously the admissibility of any evidence used to convict him, whether or not he was a victim of the search that led to its discovery.

An Alternative: The Expanded Target Doctrine. Numerous alternatives to the federal rule of standing have been pro-

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52. See Alderman v. United States, 394 U.S. at 171-73.
53. See note 46 supra.
54. As the owner of the house, B has a substantial interest in the premises and has standing regardless of his connection to the weapon. Jones v. United States, 362 U.S. at 265-67. Of course, if C owned the house and rented it to B, B would still have standing, although C would not.
55. That federal standing is somewhat confused is evident. The Supreme Court has recently criticized the ambiguity of the Jones test and the anomalous decisions resulting from it. Rakas v. Illinois, 99 S. Ct. at 431 & n.13, 432 & n.14. The rule set out in Rakas is apt to be more difficult to interpret. Those who seek to maintain a standing requirement see this lack of clarity as a boon. See White & Greenspan, Standing to Object to Search and Seizure, 118 U. PA. L. REV. 333, 355-56 (1970); Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Cm. L. REV. 342, 358 (1967). They argue quite cogently that a clear standing rule would accomplish nothing so much as signalling the police as to whom they could search with impunity. Presumably the more ambiguous the standing rule is, the more it operates like vicarious exclusion. The costs to the judiciary both in time and dignity from wrestling with this ambiguity are not discussed.
56. Presently, if the defendant testifies at the hearing but not at the trial, the hearing testimony cannot be introduced by the prosecution even if the defense is inconsistent with it. Simmons v. United States, 390 U.S. 377 (1968). If, however, the defendant testifies at trial in a manner inconsistent with his previous testimony it apparently can be introduced. See note 46 supra.
posed, but only one appears to be a realistic effort to relate standing directly to deterrence. According to that proposal: “If a reasonable man in the officer’s position at the time of the search would seek to obtain evidence against either the defendant or the class of people to which the defendant belongs, the defendant has standing.”

57. One other alternative would treat the objection to illegally obtained items as an evidentiary privilege and govern standing by the same rules that determine who is a “holder” of a privilege. See C. McCormick, Law of Evidence 153-54 (2d ed. 1972); Comment, Standing to Suppress Evidence Obtained by an Unconstitutional Search and Seizure, 55 Mich. L. Rev. 567, 578 (1957). This simply substitutes labeling for analysis and assumes the answer to the question. Evidentiary privileges have always been thought of as personal, and so, vicarious exercise of them is not permitted. This does not help determine whether an objection to illegally obtained evidence should be treated in the same way, however.

One commentator has suggested permitting vicarious exclusion in those situations where the victim is unable to challenge the search. Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342, 359-61 (1967). This proposal would bring vicarious exclusion into line with those other United States Supreme Court cases that permit the third party exercise of constitutional rights. See note 6 supra. Presumably the privacy victim is unavailable if he is not prosecuted. Even if unprosecuted, he would be permitted by this proposal to waive the illegality and effectively deny the defendant standing. This proposal seems to ignore the fact that the police often search or arrest minor violators primarily to obtain information against more serious offenders. See note 26 and accompanying text supra. In such situations, dismissal of the charges against the privacy victim may not be a sufficient disincentive to deter future illegality.

58. White & Greenspan, Standing to Object to Search and Seizure, 118 U. Pa. L. Rev. 333, 353 (1970). This proposal was adopted as a compromise by the American Law Institute in its proposed official draft of its Model Code of Pre-Arraignment Procedure. A.L.I., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.1(5) (April 15, 1975) (Draft). The reporters had urged the California rule eliminating standing, id. at 561, but the council opposed that view, id. at 560. The compromise that resulted provided:

(5) Standing. A motion to suppress may be made by any defendant against whom things seized are to be offered in evidence at a criminal trial, if such things were obtained by a search of or seizure from
(a) the defendant; or
(b) a spouse, parent, child, brother or sister of the defendant, or any member of his household, or
(c) any person with whom the defendant resides or sojourns; or
(d) a co-defendant, co-conspirator, or any person chargeable with the same crime with which the defendant is charged; or
(e) any person with whom the defendant conducts a business; or
(f) any other person if, from the circumstances, it appears that the search or seizure was intended to evade the application of this Part II to any of the persons described in paragraphs (a) to (e) inclusive.

It should be noted that the compromise differs from the White and Greenspan proposal in two significant ways. First, it adds to those who would have standing those defendants who have certain business (legal and illegal) and personal relationships with the privacy victim. Id. § 5(b)-(c). Second, it limits the White and Greenspan proposal by adding to their requirement (that the defendant be the target) an additional obligation that the search was undertaken to evade the defendant’s standing. It
The primary advantage of this alternative is that it takes into account the fact that in certain investigations, primarily those related to drugs and conspiracies, police either know that others in addition to the privacy victim can be prosecuted with the evidence sought, or hope that this is the case. Thus, in a search for drugs, a reasonable officer may not know the name of the privacy victim's source, but he may anticipate that discovery of the contraband will induce disclosure of the identity of a person more central to the chain of distribution. If this discovery occurred, the "bigger fish" would also have standing to attack the search. Though similar to the "target doctrine" rejected by the Supreme Court in Alderman, this alternative gives more defendants standing by including those who were not specifically in the officer's mind at the time of the search but who could be reasonably included in that class of people likely to be prosecuted as a result of the search.

Though a significant improvement over federal standing, this "expanded target doctrine" compares unfavorably to the California rule. Even its proponents recognize that adoption of this approach would lead to lengthy hearings about the knowledge, experience, and information possessed by the officer who conducted the search. Moreover, it is unclear which officer's knowledge, experience, and information would be relevant. For example, in United States v. Ceccolini, the federal government, with the assistance of the local police, had been investigating bookmaking in a small town in upstate New York. For several months the probe had focused on a small florist shop. Seems likely that this additional obligation would effectively negate the value of the proposal. In almost all situations, the officer will be able to provide an alternative explanation for his decision to search the privacy victim, e.g., the victim had the item sought in the investigation. In the face of such an explanation, it would be unlikely that the defendant can establish the "evasion" motive necessary to grant him standing.

59. The target doctrine is defined at note 7 supra.
60. White & Greenspan, supra note 58, at 355. In attacking the target doctrine in Alderman v. United States, Justice Harland noted the administrative difficulties that could arise in a wiretapping case:

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

394 U.S. at 188 n.1 (concurring opinion).
One day, Officer Bora, while at the shop to talk with his girlfriend, who was an employee, noticed an envelope stuffed with money on the cash register. He opened it and discovered policy slips. Later that day he reported his findings to federal agents. Had standing been an issue in the case, there would have been a real issue under the proposed alternative as to whose state of mind would be relevant: Bora's, the other officers' in the local department, and/or the agents' in the F.B.I. A broad view can dramatically lengthen the hearing. A narrow view would treat police officers in a more insular fashion than reality allows or public policy should encourage.

Finally, the courts would have substantial discretion as to whether the defendant should be included in the class against whom the officer sought evidence. It would be difficult, if not impossible, to rebut an officer's statement that he looked for narcotics solely to prosecute the possessor without regard for his source. A court faced with the prospect of freeing a guilty seller may not be disposed to doubt the officer, or in a more ambiguous situation, treat the class expansively. Given the hostility of many trial judges to the exclusionary rule, "the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level."[62]

Since no jurisdiction has ever adopted the expanded target doctrine, there has been no opportunity to learn the ease with which these problems might be solved. The substantial administrative difficulties entailed by the rule and the likelihood that its implementation would increase the ambiguity surrounding standing seem sufficient to reject this alternative.

Summary

Vicarious exclusion is more consistent with the deterrent goal of the exclusionary rule than either the federal doctrine of standing or the "expanded target" alternative. Moreover, imposing a standing requirement adds an extra and time-consuming layer to the court hearings on motions to suppress.

Upon close analysis, the insistence on standing, particularly at the federal level, appears to be a rejection of exclusion itself. There is a consistent majority of the United States Supreme Court which restricts the range of cases in which an

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illegal search leads to exclusion. The Court has permitted unlawfully obtained evidence to be introduced before a grand jury and to be used in impeaching a defendant whose testimony would be contradicted by it. If taken by state officers, such evidence is admissible in a federal civil tax proceeding. A sentencing judge can consider unlawfully obtained evidence. It appears that a witness' testimony at trial that results from an unlawful search will not be suppressed, although a per se rule was rejected. A state prisoner can no longer seek suppression in a federal habeas proceeding. Finally, there appears to be some support for denying exclusion when the officer neither knew nor should have known that the search was unlawful. Each of these decisions rested on the bald statement that little additional deterrence would result from requiring exclusion.

Although the California approach is more likely to promote the goals of exclusion with greater judicial economy, standing will continue to be imposed by those systems that have lost faith in the efficacy of suppression. To the extent that standing is imposed because of the belief that suppression is an ineffective deterrent, the standing requirement guarantees the accuracy of its own predicate.

**CALIFORNIA’S APPLICATION OF VICARIOUS EXCLUSION**

California’s vicarious exclusion rule is usually described in the clear terms one reserves for basic doctrine. However, it has not been applied consistently. After a brief consideration of the classes of defendants who have been helped by the rule, consid-

66. The United States Supreme Court has not ruled on this issue although three circuit courts have approved it. United States v. Lee, 540 F.2d 1205 (4th Cir.), cert. denied, 429 U.S. 894 (1976); United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975); United States v. Schipani, 435 F.2d 26 (2d Cir.), cert. denied, 401 U.S. 983 (1970).
70. Ever since People v. Martin..., California has enforced the so-called “vicarious exclusionary rule,” which, in brief, does not require a defendant who would suppress illegally obtained evidence to prove that he has “standing” to raise the issue.... California enforce[s] the exclusionary rule for its deterrent effect, disregarding nice questions of standing with respect to the particular defendant who moves to suppress. Shuey v. Superior Ct., 30 Cal. App. 3d 535, 542, 106 Cal. Rptr. 452, 457 (1973).
eration will be given the cases where a standing requirement was expressly or silently imposed by the California courts. The effect of this tenacity and certain reasons for it will be examined.

**Liberal Application of the Basic Doctrine**

Vicarious exclusion has been applied in a myriad of circumstances. On occasion it is relied on although the defendant would have had standing under the federal rule.71 Vicarious exclusion permits consideration of the merits in such cases without a lengthy determination of the standing issue. In addition, the *Martin* rule has been used in situations that are consistent with a limited standing rule, although beyond current federal protection. Thus, in California, defendants may challenge the search or arrest of co-defendants and accomplices,72 and of spouses.73 Before the decision in *Jones v. United States* removed the distinction between defendants with a substantial property interest and "mere guests,"74 California accorded these visitors standing.75 Although subsequent federal decisions have refused to adopt the target doctrine suggested in *Jones*,76 individuals who are the real targets of the search of another may challenge the search under *Martin*.77 Employees of a com-

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72. People v. Jackson, 254 Cal. App. 2d 655, 62 Cal. Rptr. 208 (1967); People v. Gonzales, 186 Cal. App. 2d 370, 9 Cal. Rptr. 21 (1960). In *Jackson*, the police were investigating a series of thefts at Pacific Gas and Electric Company's substations when they observed the defendant and Charles Lee acting suspiciously nearby. The two men fled when the police appeared. After his valid arrest, Jackson told the police the location of Lee's pickup. A search of that vehicle led to the discovery of bolt cutters, which were introduced against the defendant. *Martin* permitted Jackson to challenge the search of Lee's truck. Although not an issue in the case, one wonders what effect a consent by Jackson to the search of the truck would have had. Even if it would not bind Lee, should it not bind Jackson? Or does he get the benefit of the privacy violation without the victim's power to waive it? No case on this point has been found.


74. *Jones v. United States*, 342 U.S. 257 (1960); see text accompanying notes 41, 42 supra.

75. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1956); People v. Colonna, 140 Cal. App. 2d 705, 295 P.2d 490 (1956). In addition, California grants standing to a guest who is absent from the premises at the time of the search. People v. Rightnour, 243 Cal. App. 2d 663, 52 Cal. Rptr. 654 (1966). There is no federal protection. See text accompanying note 51 supra.

76. See note 7 supra.

pany searched by the police may challenge the seizure of records. 78

Finally, California permits challenges in situations that are inconsistent with any notion of limited standing. For example, a defendant can challenge a search while denying any connection with the premises searched or items found. 79 Similarly, courts have permitted an objection without any consideration of the defendant's relationship to the place searched or the item seized. 80 In addition, under Martin, a defendant may challenge the search or arrest of an uncharged person when information that incriminates the defendant comes into police possession as a result of the search or arrest. 81 Thus, in Kaplan v. Superior Court, 82 the defendant in a drug sales prosecution was permitted to challenge the search of a drug purchaser that resulted in the discovery of the drug allegedly sold. The purchaser had been immunized from prosecution in return for his testimony against Kaplan. That testimony was also suppressed.

The same result is reached when the information gathered by the police from the third person aids in their investigation of the defendant, although it is not evidence against him. In Ferdin v. Superior Court, 83 police arrested and interrogated one Garcia, who provided enough information for them to obtain a

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78. Id.
79. [A] motion under section 1538.5 is directed not to the identity of the culprit but to the legality of specific items of evidence obtained by a search and seizure. It is, in a sense, in the nature of a proceeding in rem against the evidence itself. The only connection that need be shown between the evidence and the moving party, accordingly, is a sufficient interest to give the latter standing to make the motion. In the case at bar standing is provided by the rule in this state that a defendant against whom incriminating evidence is offered in a criminal prosecution, as here, has standing to seek its suppression on the ground of illegal search and seizure.


80. People v. Randall, 33 Cal. App. 3d 523, 109 Cal. Rptr. 143 (1973). The court also ruled that in a state court prosecution the standing to challenge a search made by federal customs agents is based on state law. Id. at 527-28, 109 Cal. Rptr. at 146. In federal court, standing is based on federal law although California officers conduct the search. United States v. Cella, 568 F.2d 1266 (9th Cir. 1977).


82. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).
search warrant for the defendant's residence. The court granted the defendant standing to seek suppression of the heroin subsequently found at his home on the basis that Garcia's arrest was invalid and the warrant was a fruit of that arrest.

Ferdin has had an interesting impact on a non-standing area. As a strategy matter, defendants often seek the names of any confidential informant connected to a criminal case. There are a variety of reasons for this, not the least of which is the hope that the prosecution will refuse to disclose and the court will then order a dismissal. It has long been held that defendants can only obtain the names of those informants who are material on the issue of guilt or innocence; citizens who give information used by the police only to establish probable cause for a search warrant are not discloseable on motion by the defendant. Ferdin opens a significant wedge in this confidentiality. In Theodore v. Superior Court, the California Supreme Court suggested that the logic of Martin required disclosure of the name of a "search-warrant informant" when the defendant seeks to challenge the legality of the search or arrest of the informant in order to suppress his own search as a fruit of that primary illegality. Thus, a rule that allows standing effectively grants a defendant greater discovery rights than he would otherwise have.

On at least one occasion, vicarious exclusion has been mechanically applied, although no standing problem existed. Use of the doctrine permitted the court to fashion a substantive limitation on search and seizure without considering certain negative policy implications. In Shuey v. Superior Court, several police officers arrived at the house of a reputed drug dealer and sought permission to search. The occupant, Paul Shuey, 84. The government has a privilege not to disclose the identity of persons who supply it with information about crimes. Cal. Evid. Code § 1041 (West 1965). Since People v. Garcia, 67 Cal. 2d 830, 434 P.2d 366, 64 Cal. Rptr. 110 (1967), it has been clear that the "privilege must yield when it is shown that the informant . . . is a material witness for the defense and non-disclosure would deprive the defendant of a fair trial. . . . [D]isclosure must be ordered upon pain of dismissal." Id. at 842, 434 P.2d at 374, 64 Cal. Rptr. at 118 (emphasis in original). Accord, People v. Goliday, 8 Cal. 3d 771, 505 P.2d 537, 106 Cal. Rptr. 113 (1973) (not a material witness); Honore v. Superior Court, 70 Cal. 2d 162, 449 P.2d 169, 74 Cal. Rptr. 233 (1970).

85. Cal. Evid. Code § 1042(b) (West 1965). The same rule applies to an individual who provided the police with information that enabled them to have sufficient probable cause to conduct a warrantless search and is not a material witness as to guilt or innocence. Id. § 1042(c).

86. 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972).

87. Id. at 104, 501 P.2d at 253-54, 104 Cal. Rptr. at 245-46.

refused to consent to the search so one of the officers departed to obtain a warrant. The other officers remained with Shuey and undertook a three hour occupation of the residence while the warrant was prepared. The chief objection to invalidating the police conduct was that it had interfered only with Paul Shuey’s ability to destroy the contraband that was discovered when the warrant arrived and was executed. The court was plainly troubled by the need to rely on a right to destroy evidence, since on other occasions the existence of such a right had been denied. The dilemma was eased by the presence of Mrs. Shuey, who was also charged. She had been nowhere near the residence during the occupation and could be granted relief without discussion of a right to destroy. The court then suppressed the evidence against Mr. Shuey, stating, “Martin and Kaplan, therefore, demand that ‘his’ result in this court must be the same as ‘hers’ and that we must not be swayed by disapproval of what Paul would have done, had his visitors departed at 11 a.m.”

The court’s conclusion that Martin foreclosed any policy limitation on Mr. Shuey’s standing seems faulty. The situation presented in Shuey was significantly different from that in the normal vicarious exclusion case, where the defendant is permitted to object to evidence although his privacy has not been invaded. In Shuey, Paul’s privacy was clearly invaded; even under the federal rule he would have qualified as a “person aggrieved.” The argument against his challenge was not that he lacked standing but that one should not be able to benefit by his own wrong. A doctrine designed to ameliorate the standing problem does not respond to that argument. Shuey should have provided an opportunity for the court to balance the problems in approving police impropriety against those inherent in recognition of a right to destroy. It seems unwise to use a rule of standing to avoid this issue even if the conclusion reached is desirable.

Traditional Exceptions to Vicarious Exclusion

Despite its use in a variety of factual contexts, the Califor-
nia courts have not applied vicarious exclusion without exception. However, the tenacity of the standing requirement in California does not seem to rest on any ambivalence toward the exclusionary rule. Unlike the United States Supreme Court, 92 California's high court has enthusiastically embraced the use of suppression to enforce its regulation of law enforcement practices. In contrast to the federal rule, illegally obtained evidence can rarely be used in California to impeach a defendant who testifies 93 and probably cannot be considered by the sentencing judge. 94 There is no indication that California courts will admit a witness' testimony that results from an unlawful search. 95 Nor has any California case suggested that exclusion will be denied when the officer neither knew nor should have known that the search was unlawful. 96

Nevertheless, the *Martin* rule has been rejected in a few particular situations. Since *People v. Varnum*, 97 it has been clear that California courts will not permit a defendant to suppress another person's statement, or its fruits, on the basis that it was illegally obtained. In *Varnum*, the police elicited statements from an in-custody accomplice that led to the discovery of a murder weapon. Prior to the statements, the suspect was not informed of her right to remain silent. The defendant sought to suppress the weapon because it was a fruit of the illegal interrogation of his accomplice. The court declined to extend the *Martin* rule to the fifth and sixth amendment rights protected by *Escobedo* 98 and *Miranda*, 99 explaining that the right to counsel and the privilege against self-incrimination are personal and not violated as long as the evidence uncovered is not used against the person who made the statements. The court stated that: "Unlike unreasonable searches and seizures, which always violate the Constitution, there is nothing unlawful in questioning an unwarned suspect so long as the

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92. See text accompanying notes 63-69 supra.
93. For a discussion of the use of illegally obtained statements and physical evidence to impeach a defendant in California and federal courts, see *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).
94. The California Supreme Court's recent grant of a hearing in *People v. Belleci*, July 27, 1978, CR. 20604, would seem to so indicate.
96. But see text accompanying note 69 supra.
police refrain from physically and psychologically coercive tactics condemned by due process and do not use against the suspect any evidence obtained."

While it is questionable whether the philosophical basis for excluding a statement logically compels a standing requirement, it is manifest that such a requirement does not produce the same problems it creates in the fourth amendment area; no complex determination as to whether the defendant is a privacy victim need be made when an interrogation rather than a search is challenged. Only the person who made the statement can object to it. In addition, a practical argument never mentioned by the court provides a sufficient basis for the distinction between Martin and Varnum. Witnesses to a crime who know the location of hidden evidence are likely to have some connection with the suspect. Arguably, the witness would violate one or more provisions of the Penal Code if he was initially reluctant to disclose the location of the items to the police. Extending vicarious exclusion to Miranda violations would convert every defense attorney into a prosecutor, searching the Penal Code for crimes the officer could have charged against the witness. Once found, the Penal Code violations would provide the basis for arguing that the witness was a suspect at the time of the interrogation, and that the failure to warn the witness/suspect of his rights precludes use of the evidence he helped the police find.

In search and seizure cases, the California courts have denied use of the vicarious exclusion doctrine to one discrete and easily identifiable segment of the population. It is standard to

100. 66 Cal. 2d at 812-13, 427 P.2d at 776, 59 Cal. Rptr. at 112.
101. The refusal to extend vicarious exclusion to this area is usually explained on the basis that fifth amendment rights are “personal” while the fourth amendment prescribes a code of governmental conduct for the protection of all persons. See, e.g., Alderman v. United States, 394 U.S. 165, 205 (1969) (Fortas, J., dissenting). The language of the two constitutional provisions does not make this manifest. Initially, federal courts viewed search and seizure violations as “personal.” Also, it is far from certain that California excludes invalid confessions solely to aid the victim without concern for the deterrent effect on police practices. In People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), the court denied a statement taken in violation of Miranda to impeach a defendant. It concluded that a contrary result would prompt future Miranda violations and that the court’s own dignity would be impaired by use of such a statement. Id. at 113, 545 P.2d at 279, 127 Cal. Rptr. at 367.
102. CAL. PENAL CODE § 32 (West 1970) and § 496 (West Supp. 1978) forbid, inter alia, helping a person conceal evidence of his crime or stolen property. One who knew the location of such an item and refused, on request, to disclose it to the police would violate the law. A later disclosure would, of course, not act to purge the original violation.
require parolees to relinquish their right against unreasonable searches as a condition of parole. This is also common for probationers who have committed certain types of criminal offenses.11

The courts have consistently refused to allow these people to rely on the privacy rights of members of their household to avoid the implications of their own waiver.14 Despite some difficulty in defining the extent of the parolee's household,105 this limitation on vicarious exclusion seems necessary to give substance to the waiver. In effect, it is no different than preventing one spouse who has consented to a search from objecting to admission of the fruits on the basis that the other spouse did not consent. The exception causes few problems of scope; it is a simple enough matter to determine if a particular individual has executed a search clause. Moreover, an honest, though mistaken, belief by an officer that a person has entered into such a waiver is not sufficient to permit application of the exception.106

In addition to the above exceptions, the courts have imposed a standing requirement in several instances that are not so easily explained and appear to foreshadow a reemerging standing requirement in the application of the exclusionary rule.

The Reemergence of Standing in California

Burglars and Trespassers. A growing body of case law suggests that a standing requirement has been imposed on challenges to violations of the knock-notice regulation of police entry. The knock-notice statutes are codifications of the common law designed specifically to alert people inside a residence to the presence of police officers.107 It is assumed that this alert

103. Any probation condition must be reasonably related to the crime of which the defendant is convicted. In re Bushman, 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970).
107. California regulates the occasions when the police may break into a house with two parallel statutes: one of which governs warrantless entries, while the other
reduces the likelihood of violent confrontation between the resident and the police. When the occupant is lawfully on the premises and the alert itself might frustrate the officer's investigation or increase his peril, the courts have modified the requirements and allowed substantial compliance with the rules. Thus, knock-notice limitations have always depended on who was inside and what that person was doing. This has given rise to some unfortunate language that presages the existence of a standing limitation that would deny a trespasser or burglar the right to challenge the police entry. In People v. Superior Court (Cook), the court stated that:

The purposes and policies underlying Penal Code section 844 were explained in Duke v. Superior Court: (1) the protection of the privacy of an individual in his home; (2) the protection of innocent persons who may also be present on the premises where an arrest is made; (3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice; and (4) the protection of police who might be injured by a startled and fearful householder.

It is immediately apparent that neither of the persons inside apartment 13 was within the class for whose benefit and protection the knock-notice requirements of section 844 were enacted. They had no lawful business in the apartment and in fact were in the very process of burglarizing the premises when Officer Estes arrived.
In *People v. Solario*, the California Supreme Court confirmed a series of courts of appeals decisions that had held that trespassers and burglars were not within the class of people protected by the knock-notice rule and, therefore, could not object to its violation. In *Solario*, an officer observed two men outside an apartment building who matched the description of two suspects in a burglary that had occurred ten days earlier at the same location. After following them into the building, the officer found a door on the fourth floor that appeared to have been recently pried open. The door was open, and the defendant was acting in a manner that led the officer to conclude that a burglary was in progress. Announcing his presence as he entered, the police officer arrested the defendant and another man.

The court found that the defendant could not complain of any knock-notice violations. While the appellate cases had not specifically adverted to a standing problem, the California Supreme Court in *Solario*, in a somewhat confusing manner, found that the *Martin* rule was inapposite. The court reasoned that a burglar could not rely on his victim’s privacy violation because no such violation existed; the officer’s entry was designed to protect, not encroach on, that privacy.

The *Solario* decision can mean one of two very different things. First, the decision could mean that a burglar or trespasser can never challenge an officer’s no-knock entry since, by definition, a burglar or trespasser is always violating his victim’s privacy. This interpretation, already adopted by two different appellate courts, would, in effect, impose a rule of standing. Secondly, *Solario* can be viewed as a non-standing decision interpreting the substance of the knock-notice rules. In *Solario*, as well as every other appellate decision that denied relief to intruders, the officer had substantial reason to believe that the occupant was an intruder. In such a situation, it makes sense to deny relief regardless of whether the person was present without permission. Thus, if Mr. Solario had actually been

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112. 19 Cal. 3d 760, 566 P.2d 627, 139 Cal. Rptr. 725 (1977).
114. 19 Cal. 3d at 764, 566 P.2d at 629, 139 Cal. Rptr. at 727.
an eccentric resident of the apartment and, following entry, the police had discovered contraband inside, he would have been unable to suppress the evidence because the police conduct was reasonable.

The second proposed interpretation of Solario is more logical. If a person is calmly sitting in a house and police wrongly enter without either notice or reason to believe a burglary is occurring, no good reason exists for denying a challenge to the entry because in fact the person was a burglar. His status is a mere fortuity that neither caused the entry nor should preclude an objection to it.

Whether Solario was wrongly decided or simply incorrectly interpreted is not yet clear. However, it seems obvious that a standing limitation has some life in this area. This may reflect the fact that the knock-notice rule has fallen into general disfavor. The rule is only of statutory, not constitutional, dimension. Additionally, it has been riddled with exceptions. Whatever the reason, the imposition of standing will reduce the deterrent effect of the rule and increase judicial costs. Moreover, an overlap effect seems likely; police uncertainty as to the penalty for a violation of this statutory regulation may well affect their behavior in situations covered by the constitutional rules on entry.

One court has given an expansive reading to Solario and denied standing to burglars and trespassers who attempt to raise constitutional challenges to police entries to the scene of a crime. People v. Superior Court (Cleaver) recently considered the shootout of ten years ago between the Oakland police and the Black Panther party. Following an exchange of gunfire between the police and party members, Eldridge Cleaver and Bobby Hutton took refuge in the basement of Nellie Pierre. After the arrest of Cleaver and the shooting of Hutton, the

118. Originally, Cleaver was charged along with David Hilliard. Cleaver left the country, but Hilliard was prosecuted and convicted for his role in the incident. People v. Hilliard, 1 Crim. No. 10184 (Div. 1, March 21, 1973). In addition to his challenge to the search of the Pierre cellar, Cleaver challenged the search of Hilliard's car and, under Martin, relied on Hilliard's rights. Hilliard had challenged the same search in his case and lost. The court did not feel bound by the ruling in the earlier case, but upheld the search. 141 Cal. Rptr. at 576-80.
police searched the basement and found evidence that Cleaver sought to suppress on the basis that the search was unreasonable as to Ms. Pierre. Although the court noted that the record failed to establish whether Cleaver was a trespasser, it held, relying on Solario, that: "[I]nsofar as the defendant was a trespasser, he had no standing to assert any violation of the householder's privacy."\(^{119}\)

The Cleaver opinion extends Solario in two ways. First, the alleged violation of Ms. Pierre's rights was of constitutional, not statutory, dimension. Secondly, at the time the police entered her cellar, no trespass was in progress. The decision intimates that an intruder cannot challenge a police search of his victim's premises no matter how long after the intrusion it occurs. Even assuming the correctness of the Solario decision, its reasoning should not extend that far.

The police search of the Pierre cellar hours after the departure of the trespassers cannot reasonably be justified as protecting the householder's privacy. Nor should the conclusion be different if Cleaver had simply hidden himself in the cellar and the police had discovered him while conducting an illegal house-to-house search of every home in the immediate area. It would be illogical to deny him the normal benefit of the vicarious exclusion rule on the spurious ground that this search was designed to protect Ms. Pierre's privacy.

There is also a practical argument for allowing burglars and trespassers to assert vicarious exclusion generally. It is not always easy to determine the legitimacy of a person's occupancy, and the owner may have a significant motive to distort. People v. Shaw\(^{120}\) provides an example. In Shaw, the defendant was arrested in his girlfriend's car. Marijuana was found in a storage compartment on the ledge behind the rear seats. The court affirmed the trial court's denial of the suppression motion on the basis that the search was valid. Of interest is the concurring opinion, which noted that the girlfriend's uncontradicted testimony indicated that the defendant had stolen her car. The concurrence argued that, for this reason, the defendant should have no standing to raise an objection to the search of the automobile.\(^{121}\) It is not difficult to see the incentive of owners of vehicles or houses to put as much distance as possible between themselves and contraband found hidden on their prem-

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119. 141 Cal. Rptr. at 571.
120. 21 Cal. App. 3d 710, 98 Cal. Rptr. 724 (1971).
121. Id. at 715-17, 98 Cal. Rptr. at 727 (Herndon, J., concurring).
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ises. It would be unfortunate if this motivation were ignored in deciding to insulate searches from judicial review on the basis that the defendant is alleged to be a trespasser or thief.

Abandonment. In addition to the express limitations on the vicarious exclusion rule, California courts have precluded other defendants from challenging searches and seizures without any consideration of the vicarious exclusion doctrine or the policies it reflects. In several of the so-called "abandonment" cases, the courts have found that a defendant who discards property loses any right to question an official search or seizure of it.122 In People v. Smith,123 Smith and Walker were prosecuted for murdering two police officers. After fleeing the scene in a car he had rented two weeks earlier, Smith left the vehicle on a side street and traveled by public transportation. Evidence was seized from the automobile two days later without a warrant. The court refused to hear any argument about the legality of the seizure, stating: "It may reasonably be inferred from such conduct that Smith had abandoned any interest he possessed in either the car or its contents . . . . The police therefore were free to seize and search the vehicle without fear of infringing any of Smith’s constitutional rights."124

The abandonment doctrine may be a legitimate method of disposing of Smith’s own rights vis-a-vis the search, but Smith should have been able to raise the rights of the car owner under the Martin rule. In upholding the conviction, the court did not even discuss vicarious exclusion. There is no question that if Smith had been found walking next to the car and denied he knew anything about it or its contents, no standing requirement would hinder his challenge to any subsequent search.125 It makes no sense to distinguish this hypothetical set of facts from what actually happened in deciding whether the defendant can be heard.

The Smith problem becomes greater if one concludes that the defendant was hiding the vehicle when he left it on a side street between two other cars to prevent a quick check on its license plates.126 If hiding property in a place one does not con-

124. Id. at 800-01, 409 P.2d at 236-37, 48 Cal. Rptr. at 396-97.
126. 63 Cal. 2d at 800, 409 P.2d at 236, 48 Cal. Rptr. at 396.
control forfeits the right to argue for its suppression, a significant gap is opened in the vicarious exclusion doctrine.

In *People v. Superior Court (Barrett)*, the court of appeals came quite close to equating hiding and abandonment. Officer Rivera had learned that the defendant and his common law wife, Susan Sinclair, were selling drugs from their residence. Rivera called the Barrett home from a neighbor's and informed Sinclair that the police were aware of their enterprise and on the way. With the neighbor's permission, Rivera then observed Sinclair exit her home with a green bag and look in all directions. Another officer saw her place the bag inside a neighbor's trash can. Without the neighbor's permission, one of the officers then seized the green bag. The bag was later found to contain contraband. The neighbor testified at the suppression hearing that the defendants were permitted to use her trash can. For reasons best known to the court, it concluded that Sinclair had abandoned the bag and, with it, any right to challenge the seizure.

When Sinclair cast the trash bag into Mrs. Dorman's garbage can, any reasonable expectation of privacy was forsaken by her. She had no reason to expect that Mrs. Dorman would condone her illegal activities or cooperate in the concealment of the contraband. In a very real sense, Sinclair abandoned the trash bag when she cast it into her neighbor's garbage can. There can be nothing unlawful in the seizure of abandoned property.

It should be noted that, in both *Smith* and *Barrett*, the defendant was the target of the search. This heightens the anomaly in denying standing in those cases, while granting it to defendants who claim they never possessed the items discovered. One of the major reasons for the vicarious exclusion rule is the attempt to make exclusion less haphazard; that is, to regularize the loss of incentives for illegal police conduct. Should the courts continue to treat abandonment cases in the manner suggested by *Smith*, the utility of vicarious exclusion would be called into question.

There is no clear explanation for the decisions in *Cleaver, Smith*, and *Barrett*. It is likely that the California courts of appeals are more ambivalent about the exclusionary rule than is the supreme court and are, therefore, less sanguine about

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128. Id. at 1010, 100 Cal. Rptr. at 607.
129. See text accompanying note 39 supra.
discarding standing. This explanation of Cleaver and Barrett is unavailing to Smith. It is possible that Smith and the other abandonment cases reflect the non-comprehensive nature of the adjudicative process; Smith may have been decided without any thought to, much less rejection of, vicarious exclusion. One hesitates to reach that conclusion, particularly since a leading decision on attorney incompetence held that the defense attorney's unawareness of the Martin rule reduced his representation to a sham and a farce.¹³⁰

Perhaps we are seeing a loss of faith in the broad protection of privacy afforded by the California courts. If standing at the federal level can be explained by an ambivalence toward the exclusionary rule, perhaps it is an ambivalence towards certain substantive regulations of police conduct that gives the doctrine its strength at the state level. Thus, in Smith, the defendant would have relied on the car owner's right to be free of a warrantless search of a vehicle parked in the downtown area for two days. It is not surprising that a court might seek to leave that right intact without enforcing it on every occasion. A standing requirement, whether express or not, provides the means for accomplishing that.

Judicial reluctance to grant standing in Solario and Cleaver is understandable, although not doctrinally correct. It is one thing to assert that a defendant can vicariously raise the rights of another. It is quite a different issue to say that a burglar can rely on the privacy violation of the very individual on whose privacy he intruded. Certainly no case has directly held that a defendant can raise his victim's rights.¹³¹ Arguments in favor of vicarious exclusion in these situations may, therefore, be unavailing.

Certain observations about the effects of imposing a standing requirement in these cases can be made. In those areas where it is applied expressly, the courts will be taxed both in

¹³⁰ People v. Ibarra, 60 Cal. 2d 487, 34 Cal. Rptr. 863 (1963).
¹³¹ Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971) (discussed in text accompanying note 82 supra), could, with some imagination, be viewed as a case where a defendant relied on the privacy rights of his victim. The defendant was charged with selling drugs to a minor. In analogous circumstances, the minor has been held to be a “victim” and not an accomplice in the transaction. Thus, in a charge of lewd conduct with a minor (CAL. PENAL CODE § 288 (Deering Supp. 1978)), though the minor consents, he is not an accomplice, but the victim. See People v. Perez, 9 Cal. 3d 651, 510 P.2d 1026, 108 Cal. Rptr. 474 (1973); People v. Westek, 31 Cal. 2d 469, 190 P.2d 9 (1948). It is clear that the purchaser of drugs is not the seller's accomplice. People v. Labe, 43 Cal. App. 3d 766, 119 Cal. Rptr. 522 (1974). Thus, arguably, the minor purchaser in a drug sales case is the victim. The defendant in Kaplan relied on the privacy rights of the minor purchaser to suppress the evidence.
time and dignity by the attempt to distinguish between the objections of similarly situated persons. For example, courts will have to determine at what point an individual loses his status as a guest and becomes a trespasser because of criminal conduct that the host denies knowledge of. While this increase in judicial cost occurs only in the specific cases where standing is required, a diminution in the effectiveness of the exclusionary rule could be more widespread as the exaction of penalties for unlawful police conduct becomes less certain. The silent imposition of standing in the abandonment cases is at once less rational and less harmful: less rational because the merits of the issue are never considered; less harmful because no judicial costs are involved and because police conduct is less likely to be affected. The very fact that the standing requirement in the abandonment cases is hidden is both its most objectionable and most attractive feature.

Relationship of the Vicarious Standing Rule to the Fruit-of-the-Poisonous-Tree Doctrine

Judicial decisions in a related, though distinct, area must be considered in analyzing the overall application of vicarious exclusion in California. The "fruit-of-the-poisonous-tree" doctrine is a rule used to determine which products of an unlawful search are tainted and must be excluded. When the Martin rule is relied on to challenge the search or arrest of a person who provides information against the defendant, both doctrines may be called into play. Manipulation of the poisoned fruit rule can then have an effect on the vitality of vicarious exclusion. People v. Johnson and People v. Eastmon demonstrate the interplay of the two rules.

In Johnson, the police searched the home of one Howard and found a television set stolen in one of the burglaries charged against the defendant. Howard was later arrested and, after being shown the set, confessed, implicating Johnson. Johnson was arrested the next day and initially denied complicity. He was then taken to Howard’s residence. Howard joined the police and Johnson in the police car and repeated his confession, again naming Johnson. The defendant then confessed. The attorney general conceded that the search in which

133. See text accompanying notes 81-83 supra.
134. 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401 (1969).
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the television was found was illegal. The court had no difficulty in finding that Martin and not Varnum applied: even though Howard’s statement induced Johnson’s confession, the search that produced the television was the primary illegality. Thus, Johnson had standing to challenge the search of Howard’s home. The court had a more difficult time in finding that the taint of the illegal search had not been attenuated. Despite a strong dissent by Justice Mosk, who found the majority opinion in the style of Jacula Prudentum, the court found that Johnson’s statement was induced by exploiting the evidence found in the illegal search of Howard’s home, and no intervening act had served to attenuate the taint.

Eastmon presents a far narrower view of the fruit-of-the-poisonous-tree rule. In that case an officer illegally entered the home of Summers and Nicol and found heroin. The officer sought their assistance in setting-up the defendant for an arrest for the sale of drugs. To gain their aid he assured them that they would not be prosecuted for the heroin he had found, that he would not disclose the information to Summers’ probation officer, and that he would try to assist Nicol on her pending charge of possession of heroin for sale. Within hours, the couple purchased heroin from the defendant with marked bills. That evening, the officer executed a search warrant and found the marked bills in Eastmon’s possession.

It is manifest that the court did not want to suppress the evidence. While conceding the illegality of the warrantless entry into the Summers-Nicol residence, the court went to great lengths to note that the officer had probable cause to believe that Summers was in possession of heroin and had a good faith belief that Summers had consented to a warrantless search of his home as a condition of probation. The trial court implemented its reluctance to suppress by finding that the defendant lacked standing. The court of appeals saw Martin as an insurmountable barrier to this approach, but reached

136. 70 Cal. 2d at 545, 450 P.2d at 867, 75 Cal. Rptr. at 403.
137. See text accompanying notes 97-101 supra.
138. 70 Cal. 2d at 553, 450 P.2d at 872-73, 75 Cal. Rptr. at 408-09.
139. Id. at 558, 450 P.2d at 876, 75 Cal. Rptr. at 412.

For want of a nail the shoe is lost, for want of a shoe the horse is lost, for want of a horse the rider is lost.

G. Herbert, Jacula Prudentum, in Hervert's Remains (1652).

140. 61 Cal. App. 3d at 652, 132 Cal. Rptr. at 513. Summers himself thought he had agreed to such a condition. Id.
141. Id.
142. Id.
the same result by finding the taint of the illegal entry attenuated. It noted that the evidence against the defendant was not found in Summer’s home but was produced by the “intervening unregenerate heart” of Eastmon.143

Courts have some flexibility in interpreting the fruit-of-the-poisonous-tree doctrine. A narrow interpretation in situations like Eastmon will seriously undercut the deterrent effect of exclusion by insulating more than a few cases from judicial review. In narcotics enforcement, particularly, police investigations assume the existence of “little fish” who can be persuaded to identify sources and work with the police to arrange controlled purchases from them. The only prosecutions undertaken in this practice are of the “higher ups.” If the poisoned fruit doctrine precludes judicial review of the initial police act on the basis that it is an isolated event, the reality of the police procedure is ignored, and significant incentives for illegality at the early stages continue.

CONCLUSION

There are numerous criticisms of the exclusionary rule: it entails a significant social cost in the freeing of guilty persons; it operates in only a small area of police investigation; and its deterrent effect is largely an unprovable assumption. There is good reason to believe, however, that prosecutorial authorities govern their actions not by the scope of the fourth amendment but by the breadth of the suppression doctrine. California’s adoption of vicarious exclusion seems wise because it is administratively easier, is more equitable, and increases the deterrent effect of the exclusionary rule. Vicarious exclusion makes manifest that there is no judicial imprimatur to search the little guy unlawfully. It deters unlawful searches and seizures by making application of the suppression doctrine more systematic. Therefore, it is unfortunate that a standing requirement has begun to reemerge. Regardless of the reasons for the tenacity of the standing rule, the exceptions to vicarious exclusion threaten to undermine that doctrine as well as the exclusionary doctrine.

143. Id. at 654, 132 Cal. Rptr. at 514. See also United States v. Ceccolini, 435 U.S. 268 (1978), in which a person present at the time of an illegal search was asked about the fruit of the search and made a statement that incriminated the defendant. That witness then willingly appeared at trial to testify against Ceccolini. The Court suggested that the witness’ willingness to appear may be a sufficient intervening act to attenuate the taint.
rule generally. As it becomes less certain that unlawful police conduct will be thwarted by the exclusion of evidence, the scope of fourth amendment rights becomes similarly uncertain.