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Evidence - Search and Seizure - Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure

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COMMENTS

EVIDENCE—SEARCH AND SEIZURE—STANDING TO SUPPRESS EVIDENCE OBTAINED BY UNCONSTITUTIONAL SEARCH AND SEIZURE—In 1955 the Supreme Court of California, in the case of *People v.*

Cahan,[1] discarded the common law rule which permitted the use in criminal prosecutions of evidence obtained by unreasonable search and seizure. By this ruling California acceded to the proposition, now accepted by nearly a majority of the states and by the federal courts,[2] that the only effective way to enforce a constitutional guarantee against unreasonable search and seizure[3] is to prohibit the use of evidence obtained by such means. Earlier, California had expressly rejected the exclusionary principle adopted by the federal courts,[4] but the traditional common law remedies for unreasonable search and seizure proved inadequate to wholly prevent law enforcement officers from employing reprehensible means in the search for evidence.[5]

Since its rejection of the common law rule the California court has handed down a number of decisions which make it plain that California now goes much farther than the federal courts or any of the other states in excluding evidence obtained by unreasonable search and seizure. Under the federal rule, for example, a defendant must move before trial to suppress illegal evidence.[6] In California this limitation is not observed.[7] Under the federal rule, evidence obtained by searching the person of one lawfully arrested

1 44 Cal. (2d) 434, 282 P. (2d) 905 (1955). See Barrett, "Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan," 43 CALIF. L. REV. 565 (1955).

2 See Appendix, Table I, to Justice Frankfurter's opinion in Wolf v. Colorado, 338 U.S. 25 at 38 (1949), for listing of the sixteen states which then adhered to the exclusionary rule for evidence obtained by unreasonable search and seizure. Since the *Wolf* decision three states have adopted the rule by legislation: *North Carolina,* N.C. Gen. Stat. (1953) §§15-27; *Texas,* Tex. Code Crim. Proc. (Vernon, 1941; Supp. 1956) art. 727a; *Rhode Island,* R.I. Gen. Laws (1938) c. 538, §16 [Acts and Resolves (1955) c. 3590]. Two states have adopted the rule by judicial decision: *Delaware,* Rickards v. State, 45 Del. (6 Terry) 573, 77 A. (2d) 199 (1950); *California,* People v. Cahan, 44 Cal. (2d) 434, 282 P. (2d) 905 (1955). In addition, Maryland observes the rule in the case of misdemeanors. Md. Code Ann. (Flack, 1951) art. 35, §§5, 5a.

3 U.S. CONST., Amend. IV. Similar provisions may be found in all state constitutions except that of New York. Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 COL. L. REV. 11 (1925).

4 People v. Mayen, 188 Cal. 237, 205 P. 435 (1922). See Grant, "Search and Seizure in California," 15 So. CAL. L. REV. 139 (1942).

5 Shortly before the Cahan decision two extreme examples of misconduct by California police in gathering evidence were brought to the attention of the United States Supreme Court in the cases of Rochin v. California, 342 U.S. 165 (1952) (conviction for possession of narcotics reversed where the evidence against defendant was obtained by "stomach pumping"), and Irvine v. California, 347 U.S. 128 (1954) (use of evidence obtained by surreptitiously placing microphone in defendant's bedroom was upheld, but the Court was severely critical of the employment of such means in gathering evidence). It is conceivable that a desire to overcome the stigma connected with these two cases affected the California court's deliberations in the Cahan case.

6 Weeks v. United States, 232 U.S. 383 (1914). See Edwards, "Seasonable Protests Against Unreasonable Searches and Seizures," 37 MINN. L. REV. 188 (1953).

7 People v. Berger, 44 Cal. (2d) 459, 282 P. (2d) 509 (1955).

is admissible.[8] In California evidence so obtained is not necessarily admissible.[9]

The most radical departure of the new California doctrine from federal precedents, however, lies in the rejection of the requirement of "standing" which the federal courts have always imposed. In *People v. Martin*[10] the California court announced its willingness to permit *any* criminal defendant to move for the exclusion of evidence obtained by unreasonable search and seizure —regardless of whether it was his premises that were searched or his property that was seized.

Rejection of the requirement of standing by this outstanding court calls for a re-evaluation of the requirement as it is imposed in every other jurisdiction that observes the exclusion principle. The analysis which follows will seek to accomplish this, first, by examining the standing requirement as it has been applied in federal practice; second, by inquiring into whether or not the requirement, as applied, is justified in the light of the theories and purposes of the exclusionary rule; and third, by attempting to ascertain what effect, if any, the California doctrine will have upon the practice in other jurisdictions following the federal rule.

I. *The Requirement of Standing Under the Federal Rule*

From the very beginning, the lower federal courts have sought to limit the scope of the exclusionary principle adopted by the Supreme Court in *Weeks v. United States*.[11] One of the most effective means of cutting down the scope of the rule has been the "standing requirement." Of all the limiting rules, this has been called "the most devitalizing force."[12]

A typical statement of the standing requirement is, "The guaranty of the Fourth Amendment . . . is a personal right or privilege, that can only be availed of by the owner or claimant of the property subjected to unreasonable search and seizure."[13] In effect, this requirement imposes on one seeking to suppress evidence under the *Weeks* doctrine the necessity of showing a definite

[8] See Agnello v. United States, 269 U.S. 20 (1925); United States v. Rabinowitz, 339 U.S. 56 (1950).

[9] People v. Brown, 45 Cal. (2d) 640, 290 P. (2d) 528 (1955); People v. Simon, 45 Cal. (2d) 645, 290 P. (2d) 531 (1955).

[10] 45 Cal. (2d) 755, 290 P. (2d) 855 (1955).

[11] 232 U.S. 383 (1914).

[12] Grant, "Circumventing the Fourth Amendment," 14 So. CAL. L. REV. 359 (1941).

[13] Graham v. United States, (8th Cir. 1926) 15 F. (2d) 740 at 742, cert. den. sub nom. O'Fallon v. United States, 274 U.S. 743 (1927).

interest—usually proprietary—in either the premises searched or the property seized, or both. The motion to suppress the evidence, which must ordinarily be made in a special proceeding before trial,[14] must contain averments of the requisite interest. The question of whether the requisite interest exists, however, is often a difficult one. The Supreme Court has never given an authoritative answer,[15] nor has there been complete agreement among the lower federal courts as to the proper tests for determining the existence of the necessary interest.

The "standing" requirement, as stated in the preceding paragraph, looks to the Fourth Amendment as the ultimate test of "interest." As a matter of logic, it would seem that a person has adequate interest (or "standing") if he can show that the evidence in question was obtained by some violation of his Fourth Amendment rights. The Fourth Amendment's protection extends to "persons, houses, papers, and effects. . . ." To be unconstitutional, a search must invade at least one of these protected possessions. "Houses," in this context, seems always to have been interpreted to mean "dwellings."[16] Where the movant can show lawful occupancy of the illegally searched premises as a dwelling, *and* ownership of the articles seized therefrom, there is little doubt as to his standing to suppress the evidence.[17] When something less than this is shown, however, as is nearly always the case in the reported decisions, the standing of the movant becomes doubtful. If, for instance, the petitioner is in lawful occupancy of the premises searched, but does not occupy it as a dwelling, then his constitutional rights have not been violated by the search. His standing to seek suppression of evidence obtained in the course of such a search must rest upon his ownership of the articles seized or on the fact that they were taken from his person. Thus in *Occinto v. United States*[18] an illegal still was seized from the defendant's barn. Defendant's motion to suppress the use of the still in evidence was denied. Since the still was seized from his

14 Weeks v. United States, 232 U.S. 383 (1914). The pre-trial motion is necessary to avoid the disrupting effect of having to decide at trial the collateral issue of whether or not the evidence was lawfully obtained. See Edwards, "Seasonable Protests Against Unreasonable Searches and Seizures," 37 MINN. L. REV. 188 (1953).

15 See note 67 infra.

16 See Nunes v. United States, (1st Cir. 1928) 23 F. (2d) 905; Samson v. United States, (1st Cir. 1928) 26 F. (2d) 769. But cf. Hobson v. United States, (8th Cir. 1955) 226 F. (2d) 890.

17 But cf. Coon v. United States, (10th Cir. 1929) 36 F. (2d) 164; Rossini v. United States, (8th Cir. 1925) 6 F. (2d) 350.

18 (8th Cir. 1931) 54 F. (2d) 351.

barn, defendant's dwelling was not violated by the search, and because defendant disclaimed ownership of the still, his rights were not violated by the seizure. Defendant, therefore, had no standing to raise the issues.

If defendant can establish his lawful occupancy of the dwelling illegally searched, then he can move to suppress the articles seized as evidence, despite his disclaimer of any interest in the seized articles.[19] Similarly, if defendant can establish his ownership of the property illegally seized from the dwelling of a third party, he can have that property suppressed as evidence despite his lack of interest in the premises searched.[20]

The Fourth Amendment proscribes the unreasonable search of "persons" as well as houses. One might expect like rules of standing to be applied where a "person" has been searched as are followed when a "house" has been searched. Thus, where evidence has been unlawfully seized from the person of the defendant, as, for example, in the course of an invalid arrest, the one whose person was thus violated should have standing to object to the use of such evidence without claiming ownership of the seized articles. In both cases a right of movant under the Fourth Amendment has been violated, and logic would seem to require exclusion of the evidence in both instances. It is not clear that this is the law, however. There are strong dicta in support of the proposition, but no reported holdings.[21] The cases that have actually decided this question support the view that exclusion of the evidence will be denied unless the petitioner also claims ownership of the seized articles, or at least admits his possession of them.[22] This view is reinforced by the decisions in cases where an automobile has been stopped and searched without warrant and evidentiary articles seized therefrom. While the integrity of an automobile is not expressly secured by the Fourth Amendment, it seems never

[19] Hobson v. United States, (8th Cir. 1955) 226 F. (2d) 890; State v. Scott, 41 Wyo. 438, 286 P. 390 (1930). But cf. Lewis v. United States, (10th Cir. 1937) 92 F. (2d) 952; Scoggins v. United States, (D.C. Cir. 1952) 202 F. (2d) 211.

[20] Pielow v. United States, (9th Cir. 1925) 8 F. (2d) 492; United States v. Stappenback, (2d Cir. 1932) 61 F. (2d) 955. But see Chicco v. United States, (4th Cir. 1922) 284 F. 434; Ingram v. United States, (9th Cir. 1940) 113 F. (2d) 966. Cf. United States v. Pete, (D.C. D.C. 1953) 111 F. Supp. 292, where embezzler was denied standing to object to seizure of embezzled property she had left with a third party.

[21] "Wyche was aggrieved [rule 41 (e)] because the search was of his person. He therefore had standing to object to its admission without asserting ownership of the property seized." Fahy, J. concurring in Wyche v. United States, (D.C. Cir. 1951) 193 F. (2d) 703 at 705. See also United States v. Fowler, (S.D. Cal. 1955) 17 F.R.D. 499.

[22] Lewis v. United States, (10th Cir. 1937) 92 F. (2d) 952; Harvey v. United States, (D.C. Cir. 1951) 193 F. (2d) 928; Gaskins v. United States, (D.C. Cir. 1955) 218 F. (2d) 47.

to have been questioned that an unreasonable search of an automobile is unconstitutional, and that evidence seized in the course of such a search is subject to exclusion under the *Weeks* doctrine.[23] The cases are not uniform on the point, but they tend to deny standing to suppress evidence seized from his automobile to one who does not also claim ownership of the articles seized.[24]

In still another area the logic of the standing requirement seems to indicate a result contrary to that which probably would obtain in practice. Where evidentiary articles belonging to petitioner are unlawfully seized from the person of a third party, petitioner theoretically should be able to get the evidence suppressed. This, however, probably is not the law, if some dicta are to be taken at face value.[25]

To suppress "papers and effects" wrongfully seized from some source other than the movant's dwelling or person, then, he must allege his ownership of the articles.[26] This poses a dilemma for a defendant who is charged with possession of unlawful property —for example, an unlicensed still, gambling devices, narcotics, etc. —seized from him in violation of the Fourth Amendment. His motion to suppress the evidence will be denied unless he admits the facts essential to prove his guilt. But by making such an admission, the defendant waives his privilege against self-incrimination under the Fifth Amendment. This aspect of the standing requirement rigorously limits whatever effectiveness the exclusionary principle may have as a defender of Fourth Amendment rights. But such a result is not without a countervailing advantage, viz., it enhances the possibilities of bringing criminals to justice by removing a barrier which would otherwise prevent the production of all the facts pertaining to a defendant's guilt. This practice of forcing a defendant to waive either his right to exclude the evidence or his privilege against self-incrimination has been criticized

23 See Carroll v. United States, 267 U.S. 132 (1924).

24 United States v. Eversole, (7th Cir. 1954) 209 F. (2d) 766; Wilson v. United States, (10th Cir. 1955) 218 F. (2d) 754. But see Ellsworth v. State, (Okla. Cr. App. 1956) 295 P. (2d) 296.

25 See, e.g., United States v. Walker, (2d Cir. 1951) 190 F. (2d) 481, where the court upheld the validity of the search by reason of the third party's consent, but expressed obiter the view that defendant could not object to a search of premises not occupied by him nor to a seizure of property not within his possession.

26 It has sometimes been held that he must show *both* seizure from his person or dwelling and ownership of the articles. Coon v. United States, (10th Cir. 1929) 36 F. (2d) 164. See also Occinto v. United States, (8th Cir. 1931) 54 F. (2d) 351.

as unfair[27] and even as unconstitutional.[28] The federal courts, however, have countered this argument with plain language: ". . . 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. . . . If they come as victims, they must take on that rôle with enough detail to cast them without question. . . . They [are] obliged to choose one horn of the dilemma."[29] The decisions indicate that the problem facing the defendant in these cases is insuperable. In one case, defendant, charged with unlawful possession of alcoholic liquor, tried to escape by admitting ownership of the seized beverages while alleging that he did not know of the illegal alcoholic content. Defendant's motion to suppress the evidence was denied and he was convicted on the strength of the evidence. On appeal, the court said, "As . . . plaintiff in error voluntarily admitted all that the officers found . . . , he could not have been substantially injured by the admission of such evidence."[30] Another defendant, in a very recent case, tried a more direct approach. Charged with possession of illegal whiskey, she denied ownership of the premises and interest in the whiskey seized thereon. When her motion to suppress the whiskey as evidence was denied, she appealed, claiming that the court's refusal to suppress the evidence unless she first waived her Fifth Amendment protection against self-incrimination was denial of due process. But the Court of Appeals for the Fifth Circuit declined the invitation to override existing precedents.[31]

In yet another respect the standing requirement serves to minimize any value the exclusionary rule might have for a defendant charged with possession of illegal property. The concept of "possession" employed in determining whether defendant has sufficient interest in the property to question the search and seizure differs from that used in establishing the fact of guilt. A defendant may not have sufficient possession of the property searched to challenge the admissibility of articles seized therefrom, but may still be guilty of unlawful possession. The question may arise where a

27 97 UNIV. PA. L. REV. 728 (1949).

28 Edwards, "Standing to Suppress Unreasonably Seized Evidence," 47 N. W. L. REV. 471 at 487 (1952), applies by analogy the doctrine of "unconstitutional conditions." This argument is without merit, however, if the exclusionary principle is not a constitutional requirement, as it probably is not. See p. 576 infra.

29 Connolly v. Medalie (2d Cir. 1932) 58 F. (2d) 629 at 630.

30 Rossini v. United States, (8th Cir. 1925) 6 F. (2d) 350 at 352.

31 Lovette v. United States, (5th Cir. 1956) 230 F. (2d) 263.

landlord occupies part of a building and leases part to third persons. If an unreasonable search and seizure of the part occupied by the lessee uncovers contraband property, the landlord will be denied standing to object to the contraband as evidence against him in a criminal action for unlawful possession of the property, unless he admits ownership of the contraband.[32] In one case, a defendant tried to avoid such a result by contending that if the court denied her standing to suppress the evidence because of her lack of interest therein, the question of illegal possession could not go to the jury for want of evidence. This contention was not accepted by the court.[33] In another case defendant had left some clothes in a friend's apartment. A search was made of the friend's apartment, and morphine was found in some of the clothes defendant had left there. Defendant, charged with possession of narcotics, admitted ownership of the clothes, but denied any interest in the morphine. It was held that he had no standing to object to the morphine as evidence since he disclaimed ownership of it, but his possession was sufficient to establish his guilt.[34]

It is clear that the standing requirement, as it has been applied in the lower federal courts, severely *limits* the scope of the exclusionary rule. Nevertheless, all the states except California which have adopted the exclusionary principle have accepted the rule with all its ramifications, including the standing requirement.[35] California, on the other hand, has specifically renounced any binding effect that federal precedents might have on the development of the rule in that state.[36] Unfettered by federal experience, the California Supreme Court has refused to apply the standing requirement, which it considers to be a "needless refinement."[37]

II. *Is the Standing Requirement Justifiable?*

A. *The Theory of Exlusion.* The standing requirement has been criticized as being illogical, unfair, and inconsistently ap-

[32] Klein v. United States, (1st Cir. 1926) 14 F. (2d) 35; Rosenberg v. United States, (8th Cir. 1926) 15 F. (2d) 179. See also Nunes v. United States, (1st Cir. 1928) 23 F. (2d) 905.

[33] Lovette v. United States, (5th Cir. 1956) 230 F. (2d) 263.

[34] Ingram v. United States, (9th Cir. 1940) 113 F. (2d) 966.

[35] For state decisions adopting the standing principle, see annotation in 50 A.L.R. (2d) 531 at 577-583 (1956), and the earlier annotations which it supplements.

[36] ". . . [T]his court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them." People v. Cahan, 44 Cal. (2d) 434 at 450, 282 P. (2d) 905 (1955).

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

plied.[38] Probably the strongest argument against the standing requirement is the fact that it has remained after the theory which gave birth to it has been discarded. The early cases, following a dictum in *Boyd v. United States*,[39] based the exclusion of evidence on the *Fifth* Amendment privilege against self-incrimination.[40] So long as this remained the theory of exclusion, there could be little doubt that only the person whose property had been seized could object to its use in evidence against him. This theory, however, was inadequate, for most of the cases involving unreasonable search and seizure could not logically be brought within the customary concept of self-incrimination.[41] In *Weeks v. United States*,[42] the case establishing the exclusion rule, no mention was made of the Fifth Amendment. Ultimately, the Fifth Amendment interpretation of the exclusion principle became extinct.[43]

Another early theory was that the exclusion of such evidence rested on the property right of the victim of an illegal search and seizure to have the seized articles returned. If this were the proper analysis, clearly no criticism could be made of a standing requirement. If the person seeking return of the property had no more title to it than the officers who seized it or the court to which it had been committed, then he had no right to have it returned. But this theory was never very strong. It did not account for the fact that not only the articles taken but also any evidence indirectly resulting from the illegal search and seizure could be suppressed as evidence.[44] Moreover, illegally seized contraband, for which no right of return existed, could be suppressed as evidence.[45]

A third theory regarded exclusion as a constitutional require-

[38] See Grant, "Circumventing the Fourth Amendment," 14 So. CAL. L. REV. 359 (1941); Edwards, "Standing to Suppress Unreasonably Seized Evidence," 47 N. W. L. REV. 471 (1952); 3 U.C.L.A. L. REV. 55 (1955).

[39] ". . . [W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." 116 U.S. 616 at 633 (1886).

[40] See Gouled v. United States, 255 U.S. 298 (1921); Amos v. United States, 255 U.S. 313 (1921); Agnello v. United States, 269 U.S. 20 (1925).

[41] The Boyd case itself, from which this Fifth Amendment theory of exclusion was derived, presented a conventional self-incrimination situation. The defendant there was forced to take an active role in providing evidence against himself. The later cases lacked this element.

[42] 232 U.S. 383 (1914).

[43] See Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 COL. L. REV. 11 (1925); Grant, "Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence," 15 So. CAL. L. REV. 60 (1941).

[44] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Cf. Nardone v. United States, 308 U.S. 338 (1939). See also 24 IND. L. J. 245 (1949).

[45] Weeks v. United States, 232 U.S. 383 (1914) (lottery tickets); Amos v. United States, 255 U.S. 313 (1921) (liquor); United States v. Jeffers, 342 U.S. 48 (1951) (narcotics).

ment integral to the Fourth Amendment itself. This theory has been widely accepted, despite the fact that the Fourth Amendment says nothing about exclusion of evidence. Cases decided by the Supreme Court before 1914—and favorably cited (though distinguished) in the *Weeks* case—had held that the Fourth Amendment does *not* require exclusion of evidence.[46] The *Weeks* case, however, treated the question of exclusion as a constitutional issue without mentioning the Fifth Amendment, so a Fourth Amendment interpretation is the only alternative. Under this theory a standing requirement is certainly no anomaly. The familiar constitutional law doctrine of standing may be applied, thus permitting only a party whose constitutional rights are alleged to have been violated to raise the issue of unreasonable search and seizure.[47]

The "constitutional requirement" theory is not yet dead, but it probably is not the view currently held by a majority of the Supreme Court. The celebrated case of *Wolf v. Colorado*[48] came very close to holding that "... the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[49] The majority opinion expressly refused to make this ruling,[50] but it is nevertheless probable that the quoted statement more accurately describes the consensus of the present Court than would any statement based on a constitutional interpretation.[51]

While the *Wolf* case established that the federal exclusionary principle was *not* binding on the states, it also ruled that the protection against unreasonable search and seizure provided by the Fourth Amendment *was* enforceable against the states through the Fourteenth Amendment Due Process Clause. Since the Fourth Amendment's provisions had previously been regarded as inap-

46 Adams v. New York, 192 U.S. 585 (1904).

47 See Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900). See also Edwards, "Standing to Suppress Unreasonably Seized Evidence," 47 N.W. L. REV. 471 (1952); Grant, "Circumventing the Fourth Amendment," 14 So. CAL. L. REV. 359 (1941).

48 338 U.S. 25 (1949).

49 Id. at 39-40 (concurring opinion of Justice Black).

50 Id. at 33.

51 Of the three justices who dissented in the Wolf case, only Justice Douglas remains on the Court today. The probable views of the subsequently appointed justices can be estimated from the Court's opinions. Justice Warren concurred in the majority opinion in Irvine v. California, 347 U.S. 128 (1954), which ably expounded the "rule of evidence" theory of exclusion as opposed to the constitutional interpretation. Justice Clark, concurring separately in the same case, expressed dissatisfaction with Wolf v. Colorado, but nevertheless was willing to abide by that rule even in such a "hard case" as Irvine presented. Justice Harlan's dissent in Rea v. United States, 350 U.S. 214 at 218 (1956), expresses a view that can hardly be squared with the concept of exclusion as a constitutional requirement.

plicable to the states, the Court invited the states who had previously rejected the exclusionary principle to "... reconsider their evidentiary rules"[52] in the light of the *Wolf* decision. California's response to this suggestion is embodied in the *Cahan* case.[53] The California court's decision was that the principle could not be defended as a constitutional requirement, but that as a judicially created rule of evidence it was quite proper.

This decision raises the fundamental question. If it is conceded that the exclusionary principle is a rule of evidence only, should the federal and state courts which apply the rule follow the lead of California in discarding the standing requirement as a "needless refinement"? Such a result does not seem to be called for by the mere fact that exclusion is no longer regarded as a constitutional requirement.

B. *Analogy to Other Evidentiary Rules.* As a "rule of evidence," the exclusionary principle must be viewed as a judge-made instrumentality for effectuating the policy of the Fourth Amendment. The evidence is not excluded because of any lack of reliability or probative value. Rather its exclusion is a means of indirectly effectuating a public policy that is wholly extrinsic to the primary function of the law of evidence. In this respect the federal exclusionary rule is not entirely in a class by itself, for this is the essence of traditional evidentiary privileges.[54]

There are two basic types of rules relating to the admissibility of evidence, viz., rules designed to keep out evidence which does not positively further the objective of ascertaining the truth of the fact in question,[55] and rules designed to exclude evidence for policy reasons despite its possible contribution to the objective of finding the truth.[56] Exclusion of certain types of evidence is thought to have a beneficial effect in promoting some legal interests *other* than the interests of the parties as such in the just settlement of the issues on trial.[57] The purposes served by these

[52] Irvine v. California, 347 U.S. 128 at 134 (1954).

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

[54] See McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 (1938). Wigmore classifies the Weeks rule as a "rule of absolute exclusion" in the group of "rules of extrinsic policy," which group also includes the traditional "rules of privilege." 8 WIGMORE, EVIDENCE, 3d ed., §2184 (1940).

[55] E.g., the hearsay rule, the secondary evidence rule, the opinion rule, etc.

[56] E.g., the privilege against self-incrimination, and the privileges extended to confidential communications between husband and wife, attorney and client, physician and patient, etc.

[57] See generally MCCORMICK, EVIDENCE, §§72-73, pp. 151-153 (1954); McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 (1938).

two types of rules are often in conflict. The "rules of privilege"[58] compromise the interest of truth in favor of extrinsic considerations. But the laws resists, if it does not prohibit, the sacrifice of truth to the demands of policy-supported expedients. Accordingly, the interest served by the privilege must itself be compromised. This is accomplished by means of the doctrine of waiver and by restricting the exercise of the privilege to certain persons and certain occasions.

All evidentiary privileges, then, are subject to limitations. One such limitation is the rule that it may be asserted only by the one to whom the privilege "belongs."[59] The right to rely on other evidentiary rules accrues as an incident of being a party to litigation. But a rule of privilege may be asserted only by one who claims an extrinsic interest of the type the privilege is designed to protect. No abstract reason exists for limiting the exercise of rules of privilege to certain designated persons. It is the *existence* of the rule that serves the extrinsic policy, and not the *application* of the rule in particular cases. The policy behind the privilege would seem to be more effectively promoted if anyone desiring to exclude "privileged" evidence were allowed to do so, but the courts have been unwilling to subvert the objective of ascertaining the truth to this extent. A person who does not have the requisite standing is not permitted to raise the privilege. The propriety of such a standing requirement has not been criticized, and it does not seem inappropriate to make a similar requirement in connection with the privilege to suppress evidence resulting from unreasonable search and seizure.

If the rule permitting the exclusion of evidence obtained by unreasonable search and seizure is to serve solely as a means of deterring overzealous law enforcement, and not as a means of remedying invasions of constitutional right, then admittedly the rights of the defendant in the property searched or seized have no bearing on the policy of the rule. It must also be recognized, however, that the fact that evidence against the accused was obtained by unreasonable search and seizure has no bearing on his guilt.

58 The term "privilege" is used here in the sense McCormick advocates as proper. He classes as "rules of privilege" all those rules whereby evidence is excluded, despite its relevance and reliability, for reasons of extrinsic policy. McCormick was among the first to recognize that the federal exclusionary rule is most properly treated as an evidentiary rule of privilege. McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 at 450 (1938); MCCORMICK, EVIDENCE, §74, pp. 153-154 (1954).

59 McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 at 448-449 (1938).

The release of apparently guilty persons should be held to the absolute minimum deemed necessary to effectuate the deterrent policy of the exclusionary rule. If unreasonable searches and seizures can be discouraged without excluding evidence in every instance, then some compromise of the exclusionary rule should be made with that other strong public policy which *demands that law breakers be brought to justice.* The problem of selecting the instances in which exclusion should not be permitted has been solved in the federal courts by restrictive rules such as the standing requirement.[60] Similar means of selection are employed in the case of other evidentiary privileges, so a limiting rule which serves to reconcile, in part, this conflict of policies should not lightly be discarded as a "needless refinement."

Completely apart from any idea of exclusion as a constitutional requirement, an inherent notion of fairness is violated when a man's domicile is unlawfully invaded and the fruits of that invasion are later used against him in a criminal proceeding. This is contrary to the idea that litigation is an honorable "sport," a concept that may be the real basis of the exclusionary principle.[61] Where the defendant has suffered no wrong, however, but is merely seeking to take advantage of a wrongful invasion of another's rights, our sympathies are not thus aroused. Fairness does not require that he be immunized from punishment merely because the rights of a third party have been violated.[62]

Whatever may be the distinctions which serve to separate the privilege to exclude evidence obtained by unreasonable search and seizure from the historic evidentiary privileges, in this respect at least they are properly analogous—some limitation is necessary to reconcile the conflicting policies. A limitation restricting the privilege to those whose Fourth Amendment rights have been violated seems to be a reasonable compromise.

60 See Grant, "Circumventing the Fourth Amendment," 14 So. CAL. L. REV. 359 (1941).

61 Wigmore makes frequent reference to this "noble sport" theory of litigation to explain the existence of certain rules pertaining to the exclusion of evidence, especially the rules of privilege. His tenor is half-facetious in his references to this theory, but it does not seem unlikely that some such idea may have had considerable, though unconscious, effect in the origin of some of these rules. This "noble sport," he says, has certain rules of fair play. "One of these is to give something of a start to the victim of the chase, to follow him by certain rules only, and to respect his feelings so far as may be. This complicates the sport, and adds zest for the pursuers by increasing the skill and art required by them for success. The expedient of convicting a man out of the mouth of his wife is (let us say) poor sport, and we shall not stoop to it." 8 WIGMORE, EVIDENCE, 3d ed., §2228, p. 228 (1940).

62 McCormick, "The Scope of Privilege in the Law of Evidence," 16 TEX. L. REV. 447 at 449 (1938); MCCORMICK, EVIDENCE, §74, p. 154 (1954).

C. *Federal Rule 41(e).* There is another factor which will tend to keep the federal courts, at least, from following California's example in discarding the standing requirement. The standing requirement has been codified in rule 41 (e) of the Federal Rules of Criminal Procedure.[63] That rule gives the privilege of return of property and suppression of its use as evidence to "a person aggrieved by an unlawful search and seizure."[64] The Advisory Committee on Rules intended this rule as "a restatement of existing law and practice."[65] It has been suggested that the term "person aggrieved" in the rule may include not only persons whose homes or property were searched or seized but all persons confronted with evidence obtained by illegal search and seizure.[66] One so confronted may indeed be "aggrieved" in a very real sense, but such a construction of the term clearly does not comport with "existing law and practice" as indicated by the decisions to date. It must be noted, however, that the Supreme Court has never expressly decided that the standing requirement is an integral part of the federal exclusionary rule.[67] Accordingly, it is not absolutely clear that the standing requirement will be upheld if and when its legality is ever squarely in issue. Indeed, one instance may be cited in which the Court apparently refused to apply the standing requirement in the strict manner with which the lower federal courts have applied it. In *McDonald v. United States*[68] the Court reversed the conviction of a defendant when the motion of his co-defendant for the return of property illegally seized from him had been erroneously denied. The Court said, "... the denial of McDonald's motion was error that was prejudicial to Washington as well. ... If the property had been returned to McDonald, it would not have been available for use at the trial." This case does cast a shadow of doubt on the validity of the federal standing requirement, since it is difficult to see how Washington could have been prejudiced by the admission of the evidence if he had no right to exclude it. It seems probable, though, that the *McDonald*

63 18 U.S.C. (1952) c. 237, §3771, Rule 41 (e), p. 2547.

64 Ibid.

65 Id., Notes of Advisory Committee on Rules, Note to Subdivision (e).

66 97 UNIV. PA. L. REV. 728 (1949).

67 "While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized." Goldstein v. United States, 316 U.S. 114 at 121 (1942).

68 335 U.S. 451 at 456 (1948), noted in 97 UNIV. PA. L. REV. 728 (1949).

case will be limited to its facts,[69] or at most that it will be regarded as authoritative only in cases where co-defendants are tried together.[70]

Conclusions

In categorically rejecting the standing requirement, California has gone beyond all existing precedent. Even under the "rule of evidence" theory of exclusion, which California accepts, the standing requirement is not a "needless refinement." An analogous restriction is imposed on all evidentiary privileges, and serves to compromise the conflict between the extrinsic policy of the privilege and the policy of ascertaining the truth at trial. In this instance the extrinsic policy of deterring unreasonable searches and seizures probably can be effectuated without making the privilege of exclusion available to criminal defendants who claim no interest in the property searched or seized. The cases do not indicate that the abolition of the standing requirement of the federal rule would result in a decrease in unreasonable search and seizures by federal officers. Perhaps California's rejection[71] of the standing requirement is reasonable if the *Rochin* and *Irvine* cases are illustrative of law enforcement conditions in that state. It may be that, after the practices which gave rise to those cases have been curbed, California itself may reconsider its rejection of the standing requirement, and in so doing conclude that the exclusion of evidence at the behest of *any* criminal defendant involves a sacrifice of the public interest too great in comparison to the public benefit secured thereby. In any event, no compelling reason appears which should lead other states to follow the California example.

Robert C. Casad, S. Ed.

69 See 97 UNIV. PA. L. REV. 728 (1949).
70 But note the changes in the personnel of the Court since the McDonald case.
71 See note 5 supra.