# THE SHIFTING NATURE OF STASH-HOUSE STANDING AND SENTENCING

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ABSTRACT

Although numerous works have scrutinized Fourth Amendment standing jurisprudence, none have examined the relationship between standing and substantive criminal law precedent. To decide if a defendant has standing to challenge the search of a place, courts look to the defendant's possessory and controlling interests in the place searched. Courts examine these same interests to decide if the evidence will sustain a conviction for maintaining a drug-involved premises, 21 U.S.C. § 856 ("§ 856"), or a two-level sentencing enhancement for maintaining a drug-related premises, United States Sentencing Guideline § 2D1.1(b)(12) ("the Enhancement"). Many federal drug-related cases before the courts involve § 856, the Enhancement, or both. One might expect Fourth Amendment standing and § 856/Enhancement inquiries to have the same resolution because each turns on evaluating the same interests of the defendant. However, in reality defendants are being told that their possessory and controlling interests are not enough to confer standing but rise to a level deserving of punishment. This article analyzes this contradiction, the reasons for it, and ways courts can reduce the dissonance between the two bodies of jurisprudence.



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## I.
## INTRODUCTION

Although numerous works have scrutinized Fourth Amendment standing jurisprudence, none have examined the relationship between standing and substantive criminal law precedent. Under current precedent in many circuits, a defendant who does not have a sufficient interest in a premises to challenge a search of that premises can still have (1) a sufficient interest to sustain a conviction for maintaining a drug-involved premises, 21 U.S.C. § 856 ("§ 856"), and (2) a sufficient interest to receive a two-level sentencing enhancement for maintaining a drug-related premises, United States Sentencing Guideline (U.S.S.G.) § 2D1.1(b)(12) ("the Enhancement"). That is, courts treat a defendant's possessory and privacy interests in a premises used for drug-related purposes differently when evaluating her constitutional rights than when evaluating her criminal culpability.

Part II of this article outlines the legal frameworks for determining how a defendant's interest in a drug-related premises affects her constitutional rights and criminal culpability. Part III offers potential explanations for courts' disparate treatment of a defendant's possessory and privacy interests in a premises when answering these questions. Part IV suggests ways that courts could harmonize this dissonance. Whatever approach that courts take, or do not take, simply recognizing the relationship between standing and substantive criminal law precedent would likely improve all jurisprudence.

## II.
## THE LEGAL FRAMEWORKS

Courts examine a similar list of factors when analyzing Fourth Amendment standing, § 856, and the Enhancement. Despite this similarity, courts tend to find a defendant's possessory and controlling interest insufficient for the Fourth Amendment's constitutional protections, but sufficient to sustain a § 856 conviction or to apply the Enhancement (collectively, "drug-related-premises precedent"). Before unpacking why this phenomenon occurs[1] and whether this disparity warrants any corrective action,[2] this section provides a brief history and legal background of both Fourth Amendment standing and drug-related-premises precedent.

### *A. Fourth Amendment Standing*

A criminal defendant can move to suppress evidence only if a search or seizure violates *her* Fourth Amendment rights, not the rights of a third party.[3]

1. *See infra* Part III.

2. *See infra* Part IV.

3. *See* United States v. Salvucci, 448 U.S. 83, 85 (1980); *see also* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 135 (2d ed. 2014).

This principle, known as Fourth Amendment standing, limits the range of cases to which courts can apply the Fourth Amendment's exclusionary rule.[4]

The Fourth Amendment standing doctrine dates back to the early twentieth century, though the Supreme Court did not explicitly refer to standing or delineate a rule akin to the Court's current jurisprudence at that time.[5] For example, in 1923, the Court in *Essgee Company of China v. United States* distinguished between a corporation's right to object to a subpoena duces tecum and a corporate officer's right to object to the introduction of corporate documents in proceedings against him.[6] Two years later, in *Agnello v. United States*, the Court reversed Frank Agnello's conviction on the ground that a warrantless search of his bedroom violated his Fourth Amendment rights, but simultaneously refused to do so for his equally charged codefendants, holding that "[t]he introduction of the evidence of the search and seizure did not transgress *their* constitutional rights."[7] Decisions like these were precursors to modern standing doctrine.

Although the Court did not articulate a clear and broadly applicable rule in these early cases, lower federal courts began to cite them for the proposition that defendants could not invoke the Fourth Amendment to object to the introduction of evidence unless (1) the government sought to use the disputed evidence against them *and* (2) they had been a victim of an unconstitutional search and seizure.[8] However, the definition of "victim of an unconstitutional search or seizure" remained far from clear: courts, including the Supreme Court, reached disparate results—and relied on different rationales—in similar cases.[9]

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4. Rakas v. Illinois, 439 U.S. 128, 134 (1978); *see also* CLANCY, *supra* note 3, at 135. For more on the history of the exclusionary rule, see AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 173–74 (2012).

5. Essgee Co. of China v. United States, 262 U.S. 151, 157 (1923).

6. *Id.* at 158 ("An officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity and is not, therefore, protected against their production or against a writ requiring him as agent of the corporation to produce them.").

7. Agnello v. United States, 269 U.S. 20, 35 (1925) (emphasis added). The Court also alternatively held that introduction of the evidence did not result in prejudicial error against the codefendants, *see id.* at 34–36, but discussion of that analysis is outside the scope of this article.

8. *See, e.g.*, Goldstein v. United States, 316 U.S. 114, 121 n.12 (1942) (surveying cases).

9. *E.g.*, *compare* McDonald v. United States, 335 U.S. 451, 453–56 (1948), *with Agnello*, 269 U.S. at 35–36. Some of these differences resulted from other, since-discarded exclusionary rule doctrines. The Court originally interpreted the government's use of illegally obtained evidence for impeachment purposes as violating the Fifth Amendment's right to be free from compelled self-incrimination. *See, e.g.*, *Agnello*, 269 U.S. at 33–34; David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 21–22 (2013). This interaction between the Fourth and Fifth Amendments occasioned prejudicial-error-related inquiries about how, when, and against whom the government sought to introduce evidence. *Agnello*, 269 U.S. at 29–30, 33, 35–36; AMAR, *supra* note 4, at 223. Similarly, when the Court first developed the exclusionary rule, defendants would actually petition or apply to the court to have their property returned. Weeks v. United States, 232 U.S. 383, 388–99 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); Silverthorne Lumber Co. v. United

Indeed, Fourth Amendment standing doctrine lacked defined contours until the Warren Court took up the issue in the 1960s.[10] Yet in demarcating these boundaries, the Warren Court actually "extended standing to categories of people whose rights were arguably not implicated by the search or seizure that produced the evidence."[11]

For example, in *Jones v. United States*, the Court held that a defendant had standing even though he claimed no ownership interest in the apartment searched or the drugs seized from it.[12] The only evidence of the defendant's interest in the apartment came from his testimony during the motion to suppress, where he explained that

> the apartment belonged to a friend, Evans, who had given him the use of it, and a key, with which [the defendant] had admitted himself on the day of the arrest. . . . [H]e testified that he had a suit and shirt at the apartment, that his home was elsewhere, that he paid nothing for the use of the apartment, that Evans had let him use it "as a friend," that he had slept there "maybe a night," and that at the time of the search Evans had been away in Philadelphia for about five days.[13]

The government argued that this failed to establish standing, because a defendant needed a greater possessory or controlling *quantum of interest* in the place searched to maintain a motion to suppress.[14] This quantum-of-interest test represented "the prevailing view in the lower courts" at the time of *Jones*,[15] in which courts would examine common law principles of private property law to determine if a defendant had standing.[16] In rejecting this prevailing approach, the Court explained that constitutional law doctrine should not be shaped by "gossamer" property law distinctions, which, in the Court's view, constantly evolve.[17] The Supreme Court instead decided to confer standing on a much broader class of defendants, holding "that anyone legitimately on premises

States, 251 U.S. 385, 391–92 (1920). When district courts denied defendants relief, complicated questions arose on appeal about whether the government had other evidence to sustain the conviction or whether the government used the evidence in a way that was prejudicial to a defendant or her codefendants. *Compare McDonald*, 335 U.S. at 453–56, *with Agnello*, 269 U.S. at 35–36.

10. CLANCY, *supra* note 3, at 136.

11. *Id.*

12. Jones v. United States, 362 U.S. 257, 259 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

13. *Id.*

14. *Id.* at 265–66.

15. *Id.* at 265.

16. *Id.* at 266.

17. *Id.*; *see also* Chapman v. United States, 365 U.S. 610, 617 (1961); AMAR, *supra* note 4, at 126–27.

where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[18]

Eighteen years later, and with a slightly different composition of Justices, the Supreme Court began trimming back the class of defendants who would have standing under the Fourth Amendment. Perhaps one of the most important cases during this era was *Rakas v. Illinois*, where the Supreme Court confronted the question of whether passengers in an automobile had standing to contest a search when they did not own the car or the contraband seized from the search.[19] In *Rakas*, the passenger-defendants argued that (1) the Court should broaden the rule of *Jones* to confer standing on any criminal defendant at whom law enforcement directs a search ("the target theory"), or alternatively, (2) although the case involved an automobile, they were "legitimately on [the] premises" within the meaning of *Jones*.[20]

The Court declined to adopt the target theory of standing and explained that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."[21] The Court went on to state that Fourth Amendment standing constituted a substantive merits question, rather than a separate Article III standing question.[22] Thus the Fourth Amendment standing inquiry turned on "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."[23]

The Court further explicated that, to determine if law enforcement had infringed such an interest, courts should look to whether a defendant had an objectively reasonable expectation of privacy in the place searched[24]—a standard borrowed from the search inquiry outlined in *Katz v. United States*.[25]

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18. *Jones*, 362 U.S. at 267.

19. Rakas v. Illinois, 439 U.S. 128, 129–30 (1978).

20. *Id.* at 132; *see also* Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 579 (1988) (explaining target theory of standing).

21. *Rakas*, 439 U.S. at 134.

22. *Id.* at 138–40.

23. *Id.* at 140.

24. *Id.* at 143.

25. Katz v. United States, 389 U.S. 347 (1967). This test actually comes from Justice Harlan's concurrence in *Katz*, *id.* at 360–61 (Harlan, J., concurring), adopted by the Court as its standard in later opinions, *see, e.g.*, Kyllo v. United States, 533 U.S. 27, 31–35 (2001) (tracing the evolution of Fourth Amendment jurisprudence). This test determines the level of Fourth Amendment protection that someone receives by asking whether society recognizes that person's expectation of privacy as objectively reasonable. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). Although *Katz* technically begins with the inquiry of whether an individual has a subjective expectation of privacy before moving on to the objective inquiry, courts pay little attention to the subjective inquiry. *See* Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 122 (2015).

The Court then rejected *Jones*'s "legitimately on [the] premises" language as a rule guiding application of the standing inquiry[26] and limited *Jones* to its facts:

> the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.[27]

The Court held that the defendants lacked standing because they "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized."[28] Although the Court appeared to reaffirm *Jones*'s holding that "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like" did not control,[29] it explicitly cited property law concepts as sources that courts should consider when deciding what constitutes an objectively reasonable expectation of privacy.[30] In the end, the Court appeared to rely heavily, if not solely, on concepts of property law to distinguish *Jones*:

> Jones not only had permission to use the apartment of his friend, but had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment. Except with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it.[31]

Two years later, in *United States v. Salvucci*, the Supreme Court explicitly overruled *Jones* and rejected an automatic standing rule in cases involving possession of contraband.[32] Specifically, the *Salvucci* Court held that possession of a seized good does not automatically confer a legitimate expectation of privacy in the area where law enforcement found the contraband.[33]

After *Rakas* and *Salvucci*, a defendant could not establish Fourth Amendment standing merely by having an ownership or privacy interest in the evidence seized.[34] Instead, to challenge a search of a premises, a defendant needed an objectively reasonable and personal expectation of privacy in the place searched.[35]

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26. *Rakas*, 439 U.S. at 142–48.
27. *Id.* at 143.
28. *Id.* at 148.
29. *Id.* at 143.
30. *See, e.g.*, *id.* at 143–44 n.12; *see also* CLANCY, *supra* note 3, at 149–50 & n.353.
31. *Rakas*, 439 U.S. at 149.
32. United States v. Salvucci, 448 U.S. 83, 92 (1980).
33. *Id.*
34. Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980); *see also* CLANCY, *supra* note 3, at 135.
35. *See* Minnesota v. Carter, 525 U.S. 83, 88 (1998).

Defining this objectively reasonable expectation of privacy becomes more difficult if the defendant does not own or rent the premises that was searched.[36] The Court has remarked that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[37] How property law affects Fourth Amendment standing is largely intuitive: a tenant or hotel guest will have a legitimate expectation of privacy in a premises whereas someone who is "wrongfully" present on a premises—such as a burglar—has no objectively reasonable expectation of privacy.[38] Trespassers excluded, the Supreme Court has offered less guidance on how to evaluate a defendant's expectation of privacy if she does not have a defined property right in the premises.

What the Court has clearly stated, however, is that an overnight guest, with no established property right in a premises, may claim a legitimate expectation of privacy.[39] In *Minnesota v. Olson*, the Supreme Court explained that "[s]taying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society."[40] Moreover, the overnight guest enters another person's home "precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside."[41] Importantly, the Supreme Court noted that a guest's expectation of privacy is not undermined by the fact that a host has a superior controlling interest in the property—the ability to include or exclude whomever without the guest's consent.[42]

Contrary to the overnight guest, the Supreme Court has found that a fleeting guest "merely present with the consent of the householder" lacks a legitimate expectation of privacy.[43] In *Minnesota v. Carter*, the Supreme Court held that visitors who had been bagging cocaine at another person's house for approximately two-and-a-half hours did not have an objectively reasonable expectation of privacy in the place searched sufficient to confer standing.[44] Factors important to the Court in reaching this conclusion included that the defendants (1) were on the premises for a "purely commercial" transaction, (2) were there for a "relatively short period of time," and (3) lacked previous social

36. *See* CLANCY, *supra* note 3, at 149–56.
37. Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).
38. *Id.* at 141 n.9; Stoner v. California, 376 U.S. 483, 489–90 (1964).
39. Minnesota v. Olson, 495 U.S. 91, 98 (1990).
40. *Id.*
41. *Id.* at 99.
42. *See id.* at 99–100.
43. Minnesota v. Carter, 525 U.S. 83, 90 (1998).
44. *Id.* at 86, 91.

connections with the householder.[45] These factors—(1) nature of the visit, (2) length of the visit, and (3) type of connection to the householder—have served as the basis for courts to generate more subcategories of factors to examine when deciding what expectation of privacy a non-overnight guest may have.[46]

Yet it is hard to reconcile the logic of *Olson* with the outcome and factor test developed in *Carter*.[47] *Olson* reached a determination about legitimate expectations of privacy not by reference to fact-specific inquiries about the defendant's reason for visiting, length of visit, or connection to the host, but by reference to the defendant's status as a guest, albeit an overnight guest.[48] Hosting guests during the day—and protecting their privacy from outside intruders—is as long-standing a social custom as having overnight guests.[49] In *Carter*, the Supreme Court failed to explain why a daytime guest's expectations of privacy are fact-specific while overnight guests have a facially valid expectation of privacy.[50] *Carter* and similar cases seem to suggest that, despite the lip service paid to freestanding "privacy" interests, courts do not reference empirical data or other objective indicators of society's expectations of privacy in evaluating Fourth Amendment standing. Rather, courts look to "gossamer" property law concepts and facts that relate to a defendant's possessory or controlling interest in a premises to decide whether she is more a casual visitor or a full-time resident.[51] *Olson* and *Carter* become easier to reconcile if *Olson* is viewed via this fluid spectrum;[52] that is, an overnight guest is closer to a resident, for purposes of privacy expectations, on that spectrum.

On the other hand, conducting drug-related activity on a premises seems to move a defendant in the other direction, deserving of less privacy. In cases involving premises used for drug dealing or manufacturing, circuits have given particular weight to *Carter*'s commercial factor in concluding that a defendant lacked an objectively reasonable expectation of privacy sufficient to confer standing.[53]

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45. *Id.* at 91; *see also* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 1025–26 (2010).

46. *See, e.g.*, United States v. Gray, 491 F.3d 138, 145, 153–54 (4th Cir. 2007); *see also* United States v. Nerber, 222 F.3d 597, 604 (9th Cir. 2000).

47. *See Carter*, 525 U.S. at 108–10 (Ginsburg, J., dissenting).

48. *See* Minnesota v. Olson, 495 U.S. 91, 98–100 (1990).

49. *See Carter*, 525 U.S. at 108–09 (Ginsburg, J., dissenting).

50. *See id.* at 109–11.

51. *Id.* at 86 (majority opinion), 91 (Scalia, J., concurring); *Gray*, 491 F.3d at 145, 151–54; *see also* Rakas v. Illinois, 439 U.S. 128, 153 (1978) (noting that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas").

52. Admittedly, this reading of *Olson* somewhat contradicts the plain language of the opinion, which makes an overarching declaration about overnight guests' interests. *Olson*, 495 U.S. at 98–100.

53. *See, e.g.*, *Gray*, 491 F.3d at 145; *see also* CLANCY, *supra* note 3, at 157 n.371 (surveying cases).

For example, in *United States v. Gray*, the Fourth Circuit held that a defendant lacked standing to contest a search notwithstanding the fact that he (1) visited the premises four to five times a week, spending several hours on the premises each visit, (2) kept personal effects on the premises, (3) had a key and occasionally spent the night, and (4) engaged in noncommercial activities while on the premises—such as watching television and playing video games.[54] The Fourth Circuit reached its holding that the defendant lacked an objectively reasonable expectation of privacy largely from the fact that the defendant "was conducting an extensive drug operation from someone else's home."[55]

In short, courts will be unlikely to find that a defendant has an objectively reasonable expectation of privacy if she does not own or rent the drug-related premises. This remains true despite whatever one might say about the defendant's descriptive or normative expectations of privacy.[56]

### *B. Maintaining a Drug-Related Premises: § 856 and the Enhancement*

This denial of standing can cause problems for defendants facing charges for maintaining a drug-related premises that they themselves do not own or rent. Chapter 13 of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 856, criminalizes the act of knowingly maintaining a premises "for the purpose of manufacturing, distributing, or using any controlled substance."[57] Courts assess whether a defendant "maintained" a premises by evaluating the defendant's possessory interest in the premises and the degree of dominion or control she exercised over the premises.[58]

Similarly, the Enhancement provides for a two-level sentencing enhancement if a defendant "maintained a premises for the purpose of manufacturing or distributing a controlled substance."[59] The commentary to the Enhancement instructs courts to evaluate (1) a defendant's possessory interest in the premises and (2) a defendant's control of "access to, or activities at, the premises" in "determining whether the defendant 'maintained' the premises."[60] The commentary also directs courts to determine the defendant's primary or

54. *Gray*, 491 F.3d at 154.

55. *Id.* at 153.

56. *See* Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 50 (2009).

57. 21 U.S.C. § 856(a)(1) (2016).

58. *See, e.g.*, United States v. Morgan, 117 F.3d 849, 855–58 (5th Cir. 1997).

59. U.S.S.G. § 2D1.1(b)(12) (2016).

60. § 2D1.1(b)(12) cmt. n. 17; *see* Stinson v. United States, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

principal use of the premises—that is, "how frequently the premises was used by the defendant for" lawful versus unlawful purposes.[61]

In defining "maintenance" for both § 856 and the Enhancement, courts focus on roughly the same factors, which relate to whether the defendant had a sufficient possessory or controlling interest in the premises.[62] The statute amending the U.S.S.G. suggests that Congress intended courts to apply the same standards in interpreting "maintenance" for purposes of applying § 856 and the Enhancement,[63] and courts interchangeably refer to precedent concerning § 856 and the Enhancement when defining "maintenance" in both contexts.[64]

Like precedent interpreting Fourth Amendment standing doctrine,[65] courts evaluating a defendant's possessory interest in the premises decide whether they can fairly say that the defendant in question was "far from a casual visitor."[66] Courts tend to find that the defendant "maintained" the premises when there are indicators that the defendant had a strong possessory interest in the location, including that the defendant (1) supervised the premises, (2) helped with upkeep of the premises, (3) used the premises for an extended period, (4) had a key to the premises, (5) set up personal services to or with the premises' address, (6) stored personal belongings there, or (7) otherwise asserted rights consistent with possession (e.g., excluding others).[67] Courts also scrutinize these factors when determining the defendant's controlling interest or dominion over the premises—the second factor in the § 856/Enhancement inquiries.[68] Other factors relevant to a defendant's controlling interest include whether she had (1) supervisory authority over the premises' activities, (2) unlimited access to and on the premises, or (3) responsibility for coordinating the transportation of drugs and drug proceeds to and from the premises.[69] On the whole, the "maintenance"

61. § 2D1.1(b)(12) cmt. n. 17. In upholding application of the Enhancement, some circuits have noted that "as long as [the drug-related purpose] is more than 'incidental or collateral,' [it] does not have to be the 'sole purpose.'" United States v. Sanchez, 810 F.3d 494, 497 (7th Cir. 2016) (quoting § 2D1.1(b)(12)).

62. *Compare, e.g.*, United States v. Flores-Olague, 717 F.3d 526, 532 (7th Cir. 2013) (interpreting the Enhancement), *with* United States v. Verners, 53 F.3d 291, 296 (10th Cir. 1995) (interpreting § 856).

63. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 6, 124 Stat. 2372, 2373 (2010) ("[T]he United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)[.]").

64. *See, e.g.*, *Flores-Olague*, 717 F.3d at 532.

65. *See* United States v. Gamez-Orduño, 235 F.3d 453, 459 (9th Cir. 2000).

66. *Flores-Olague*, 717 F.3d at 532 (quoting United States v. Scull, 321 F.3d 1270 (10th Cir. 2003)); *see also Verners*, 53 F.3d at 296.

67. *See* United States v. Benitez, 809 F.3d 243, 249 (5th Cir. 2015); *Verners*, 53 F.3d at 296; United States v. Clavis, 956 F.2d 1079, 1091 (11th Cir. 1992).

68. *See, e.g.*, United States v. Sanchez, 810 F.3d 494, 496–97 (7th Cir. 2016).

69. *See* United States v. Evans, 826 F.3d 934, 938 (7th Cir. 2016); *Sanchez*, 810 F.3d at 497; United States v. Morgan, 117 F.3d 849, 857–58 (5th Cir. 1997).

inquiry represents more of a holistic balancing test than a factor checklist. Courts often find that a defendant maintained a drug-related premises on the ground that a strong showing of a defendant's possessory interest can outweigh a weak showing of a defendant's controlling interest and vice versa.[70]

## III.
## EXPLAINING THE DISSONANCE

The holistic balancing approach used in the § 856 and Enhancement context bears striking similarities to courts' analysis of Fourth Amendment standing.[71] Yet despite these similarities and the factual similarities common between standing questions and § 856/Enhancement questions, courts often reach seemingly disparate results in resolving the two inquiries, i.e., holding that a defendant "maintained" the premises despite not qualifying for the protection of the Fourth Amendment.

For instance, in *United States v. Clark*, the Fourth Circuit upheld application of the Enhancement on facts demonstrating a weaker possessory and controlling interest than that of the defendant in the Fourth Circuit's earlier *Gray* decision, in which the Court affirmed that the defendant did not have a sufficient possessory interest in the premises to confer Fourth Amendment standing.[72] In *Clark*, the defendant visited the premises only to drop off drugs and pick up proceeds from drug sales, occasionally staying overnight between trips.[73] The defendant did not own or rent the premises and exercised at most joint control over it with her fellow co-conspirators.[74] She did not keep personal effects on the premises, and no record evidence established other facts relevant to a possessory or controlling interest, such as possession of a key.[75] Nevertheless, the court concluded that she "maintained" the premises for purposes of applying the Enhancement.[76]

The tension between the *Clark* and *Gray* holdings is not anomalous. Courts routinely uphold § 856 convictions and application of the Enhancement on facts that would fail to establish Fourth Amendment standing under their precedent.[77]

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70. *See, e.g.*, United States v. Jones, 778 F.3d 375, 384 (1st Cir. 2015).

71. *Compare* Rakas v. Illinois, 439 U.S. 128, 153 (1978) (Powell, J., concurring), *with Flores-Olague*, 717 F.3d at 532, *and Verners*, 53 F.3d at 296.

72. United States v. Clark, 665 F. App'x 298, 301–03 (4th Cir. 2016) (per curiam).

73. *Id.*

74. *Id.*

75. *Id.* at 303.

76. *Id.* at 304.

77. *Compare* United States v. Jones, 949 F. Supp. 2d 316, 320 (D. Mass. 2013) (no standing), *with* United States v. Jones, 778 F.3d 375, 386 (1st Cir. 2015) (upholding application of the Enhancement on same facts), *and* United States v. Morgan, 117 F.3d 849, 855–58 (5th Cir. 1997) (§ 856), *and* United States v. Evans, 826 F.3d 934, 938 (7th Cir. 2016) (upholding application of the Enhancement); *see also* United States v. Stanton, No. CRIM. 11-57, 2012 WL 4815402, at *7 (W.D. Pa. Oct. 10, 2012) (recognizing disconnect between contesting standing and charging a defendant with § 856).

This section examines a descriptive and a normative explanation for the dissonance.

Descriptively, differences between when and how these inquiries come before the courts might explain why courts reach seemingly divergent results—a phenomenon I refer to as "case presentation." As a collective group, defendants who do not own or rent a drug-related premises have less incentive to develop facts supporting their possessory and controlling interest in the premises when it can still make a difference for standing purposes. In contrast, the government must develop a record regarding a defendant's "maintenance" of a drug-related premises at trial and for sentencing. This affects a district court's initial ruling and, relatedly, how an appellate court can evaluate a defendant's interest in a drug-related premises.

Normatively, the difference in precedent might also be explained by the principle that society does not recognize an expectation of privacy in conducting drug-related activity. This justification, which courts themselves offer, assumes that illicit drug-related activity either undermines or detracts from what would otherwise be an objectively reasonable expectation of privacy.[78]

In the end, the descriptive explanation can account for some, but not all, of the dissonance between standing and drug-related-premises precedent. The normative explanation can account for the remaining dissonance, but it presents its own contradictions upon further examination.

### *A. Case Presentation*

How and when facts about a defendant's possessory and controlling interest in a premises come before a court might partially explain why standing and drug-related-premises precedent do not align. Burdens of proof, standards of review, and the types of cases that arise on appeal all can alter the record before a court and how a court analyzes that record.

Again, although Fourth Amendment standing procedurally operates similarly to Article III standing, courts treat Fourth Amendment standing as a substantive merits question.[79] The government must challenge standing in a

78. Two other possibilities that I do not explore in depth in this article could also explain the divide: courts rendering holdings about standing separate from holdings about § 856 and the Enhancement may (1) not be aware of the dissonance or (2) feel no need to reconcile it. This article assumes that judges and clerks do competent and diligent work to get around the first possibility and hopes to illustrate the gap, and the need for reconciliation, for any judges fitting within the second possibility.

79. *See* Steagald v. United States, 451 U.S. 204, 208–11 (1981) (analyzing standing in the Fourth Amendment context as a substantive merits claim that can be waived); United States v. Sheffield, 832 F.3d 296, 304 (D.C. Cir. 2016); United States v. Castellanos, 716 F.3d 828, 832 n.3 (4th Cir. 2013); United States v. Taketa, 923 F.2d 665, 669–70 (9th Cir. 1991); *see also* CLANCY, *supra* note 3, at 135; Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1687–88 (2007) (comparing Article III standing/justiciability issues to Fourth Amendment standing).

timely manner at the trial level,[80] but defendants bear the burden of proving standing once challenged.[81] Rulings on a defendant's standing occur mostly before trial at suppression hearings, and defendants cannot pursue interlocutory appeals of a denial of a motion to suppress.[82] The government does not need to produce evidence to defeat standing, and courts do not prevent prosecutors from alleging that a defendant lacks standing even when they charge a defendant with a § 856 violation or argue for application of the Enhancement at sentencing.[83]

Thus, defendants early in the trial process face a tough choice. Obviously, a defendant would prefer to suppress damning evidence found at the drug-related premises. However, if a defendant contests standing, she could expose information about her possessory interest in the drug-related premises to the prosecution, and this information—directly or indirectly—could give the government an upper hand at trial. It is true that a defendant's statements at a suppression hearing cannot be used against her at trial in the government's case-in-chief, e.g., to prove possession.[84] But the government can still use the defendant's testimony to impeach her if she testifies, and most defendants in drug-related-premises cases will be reticent to give the government information that it can use to pursue lines of investigation about an interest in the drug-related premises of which the government may not yet be aware.[85] In many cases, this translates to less incentive for defendants to develop a robust record concerning their possessory or controlling interest in a drug-related premises at the motion to suppress stage.

On the other hand, the government has to produce such evidence, demonstrating a defendant's possessory or controlling interest in a drug-related premises, at trial to support a § 856 conviction or application of the

80. *See Steagald*, 451 U.S. at 208–09.

81. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); *see also* United States v. Gray, 491 F.3d 138, 143–44 (4th Cir. 2007).

82. Di Bella v. United States, 369 U.S. 121, 131–33 (1962); *In re* Search of Elec. Commc'ns in the Account of chakafattah@gmail.com at Internet Serv. Provider Google, Inc., 802 F.3d 516, 525 (3d Cir. 2015); United States v. Marasco, 487 F.3d 543, 546 (8th Cir. 2007); United States v. Williams, 413 F.3d 347, 354 (3d Cir. 2005); United States v. Calandra, 706 F.2d 225, 227–28 (7th Cir. 1983); United States v. Dorfman, 690 F.2d 1217, 1222 (7th Cir. 1982). *But see* Perlman v. United States, 247 U.S. 7, 13 (1918); 6 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.7(a) (5th ed. 2004).

83. United States v. Roberts, 913 F.2d 211, 221 (5th Cir. 1990); *see also* United States v. Phillips, 936 F.2d 1252, 1254–55 (11th Cir. 1991).

84. Simmons v. United States, 390 U.S. 377, 394 (1968); *see also* United States v. Salvucci, 448 U.S. 83, 89–90 (1980); Davies, *supra* note 45, at 987.

85. For instance, if the defendant admits that someone gave her a key to the premises or allowed her to stay there overnight, the government will have new witnesses to interview and can use the defendant's testimony for impeachment purposes if a defendant claims that she lacks knowledge of activity occurring on the drug-related premises. *See* United States v. Havens, 446 U.S. 620, 624–29 (1980); Harris v. New York, 401 U.S. 222, 226 (1971); United States v. Beltran-Gutierrez, 19 F.3d 1287, 1289 (9th Cir. 1994); People v. Sturgis, 317 N.E. 2d 545, 548 (Ill. 1974); *see also* Simien, *supra* note 20, at 563.

Enhancement.[86] Therefore, district courts analyzing questions about a defendant's possessory or controlling interest in a drug-related premises often receive more evidence about these matters at the trial stage or later—i.e., after the chance to contest a search has passed, or after a judge has already denied a motion to suppress.

The government also benefits from this favorable litigation position on appeal. Appellate courts employ a clear error standard to review the district court's factual findings related to a motion to suppress, a § 856 conviction, or application of the Enhancement.[87] While appellate courts ostensibly review legal determinations related to all of these conclusions de novo, they view the evidence in the light most favorable to the government when it prevailed below, crediting every inference that the judge or jury could have drawn in the government's favor.[88] The government is the prevailing party below in almost all appeals: with certain rare exceptions, the government cannot appeal an acquittal,[89] but most convicted defendants have an incentive to exhaust their appeals, even when their challenges lack merit. Consequently, appellate courts more often confront these questions in contexts favoring the government, which at least in part explains why precedent would be less defendant-friendly in the aggregate.

Still, some appeals arise where the government did not prevail below. For example, the government can take interlocutory appeals from an order suppressing evidence,[90] and the government can also appeal a district court's grant of acquittal notwithstanding a jury's verdict of conviction.[91] Likewise, some defendants take the gamble and claim a possessory interest in a drug-related premises at the motion to suppress stage.[92] Thus, some district and appellate courts review facts that, if not favorable to defendants, at least warrant more developed analysis than the treatment they currently appear to receive.[93]

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86. *See* United States v. Facen, 812 F.3d 280, 289–90 (2d Cir. 2016) (government must prove all elements of § 856 beyond a reasonable doubt); United States v. Jones, 778 F.3d 375, 383–84 (1st Cir. 2015) (government must prove that the defendant "maintained" the premises by a preponderance of the evidence for purposes of the Enhancement).

87. Ornelas v. United States, 517 U.S. 690, 699 (1996) (motion to suppress); *see also* United States v. Gray, 491 F.3d 138, 143 (4th Cir. 2007) (motion to suppress); *Facen*, 812 F.3d at 286, 289–90 (§ 856); *Jones*, 778 F.3d at 383 (Enhancement).

88. *See, e.g.*, *Facen*, 812 F.3d at 286, 289–90; United States v. Slocumb, 804 F.3d 677, 681 (4th Cir. 2015).

89. *See, e.g.*, *Facen*, 812 F.3d at 286 (exception for a district court's judgment of acquittal notwithstanding the verdict).

90. *See* 18 U.S.C. § 3731 (2012).

91. *See, e.g.*, *Facen*, 812 F.3d at 286.

92. United States v. Jones, 949 F. Supp. 2d 316, 320 (D. Mass. 2013); *see also* United States v. Stanton, No. CRIM. 11–57, 2012 WL 4815402, at *7 (W.D. Pa. Oct. 10, 2012) (defendant contested standing despite being charged with § 856 violation).

93. The rule of lenity points to this result. United States v. R.L.C., 503 U.S. 291, 305 (1992).

At a minimum, courts must announce some legal principle that distinguishes their dissonant decisions in cases where a defendant contests both standing and the "maintenance" element of her § 856 conviction/Enhancement. In such cases, courts are analyzing the exact same facts but reaching different conclusions. For instance, in *United States v. Jones* ("First Circuit *Jones*"), the First Circuit evaluated what it takes to "maintain" a drug-related premises as a matter of first impression and upheld application of the Enhancement[94] in a case where the district court found that the defendant did not have standing to bring his motion to suppress.[95] After reviewing the commentary to the Enhancement and surveying § 856 precedent, the First Circuit set out the following factors to govern its analysis of a defendant's "maintenance" of a drug-related premises: "[a]cts evidencing such matters as control, duration, acquisition of the site, renting or furnishing the site, repairing the site, supervising, protecting, supplying food to those at the site, and continuity."[96] By comparison, the First Circuit's already-extant Fourth Amendment precedent commanded courts to analyze the following factors in determining whether a defendant has an objectively reasonable expectation of privacy sufficient for standing:

> ownership, possession, and/or control; historical use of the property searched or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case.[97]

Excluding the buzzword "privacy," the factors are near mirror images.[98]

Reviewing the evidence cited for the conclusions of both the district court and the appellate court in First Circuit *Jones* demonstrates that "privacy" had little freestanding value as a legal concept compared to the courts' evaluations of the defendant's possessory and controlling interests.[99] After noting that the defendant did not have an ownership interest in the apartment used as a drug stash house, the district court looked to the following facts to assess whether he had standing:

> Jones had possession and control over the apartment. Jones said that he knew . . . the tenant in whose name the utilities are listed.

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94. United States v. Jones, 778 F.3d 375, 383–86 (1st Cir. 2015).

95. *Jones*, 949 F. Supp. 2d at 320.

96. *Jones*, 778 F.3d at 384 (citing United States v. Clavis, 956 F.2d 1079, 1091 (11th Cir. 1992) (alteration in original)).

97. United States v. Aguirre, 839 F.2d 854, 856–57 (1st Cir. 1988); *Jones*, 949 F. Supp. 2d at 320 (citing these factors).

98. This similarity between the factors used for assessing standing, outlined *supra* Part II.A, and the factors that the majority of circuits cite in drug-related-premises precedent, outlined *supra* Part II.B, is consistent across other circuits.

99. *See Jones*, 778 F.3d at 383–86; *see also* Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 274 (1999).

> He also said that [the tenant] paid the rent for the apartment, but that he would give the rent to the landlord when she wasn't there. Further, Jones had a key and ready access to the apartment and kept some clothing and a toothbrush there. Indeed, he was in his boxers when the police arrived. Jones occasionally slept at the [apartment in question] and stated that he had stayed overnight the night before the search warrant was executed.[100]

The district court then concluded that the defendant lacked standing because "his primary activity [at the apartment] was selling drugs, an illicit commercial function that society doesn't value."[101]

On appeal, the First Circuit examined the same facts that the district court analyzed:

> There was ample evidence that the defendant exercised dominion and control over the apartment. He had a key, came and went at will, and slept there whenever he pleased. He—and no one else—kept clothes and toiletries there. In addition, he controlled the activities that took place at the apartment (by, for example, furnishing a key to his coconspirator) and ensured that the premises would remain available by delivering rent payments.[102]

However, the First Circuit found that the same possessory and controlling interests that failed to confer standing were enough to uphold application of the Enhancement on appeal.[103]

To reiterate, in First Circuit *Jones*, both the district court and the First Circuit evaluated only the defendant's possessory and controlling interests in the apartment—informed by concepts of property law—to reach their conclusions and cited the exact same evidence to establish these interests. Still the outcome was that the defendant did not have enough of a possessory or controlling interest for standing, but had enough for "maintenance."[104]

### *B. No Privacy Interest in Drug-Related Activity*

The only basis for distinguishing these disparate conclusions is the principle that society does not recognize an objectively reasonable expectation of privacy in illicit drug-related activity.[105] In a way, this principle resolves the disparity

100. *Jones*, 949 F. Supp. 2d at 320.

101. *Id.*

102. *Jones*, 778 F.3d at 385.

103. *Id.* at 383–86.

104. *Compare id.* at 384–86, *with Jones*, 949 F. Supp. 2d at 320.

105. *See* Minnesota v. Carter, 525 U.S. 83, 90–91 (1998). For example, in First Circuit *Jones*, the district court emphasized the fact that the defendant's "primary activity [at the apartment] was selling drugs, an illicit commercial function that society doesn't value." *Jones*, 949 F. Supp. 2d at 320.

between standing and drug-related-premises precedent.[106] Courts accord special protection to the home in Fourth Amendment jurisprudence.[107] Scholars agree that homes receive this special status because "privacy within the home, is psychologically and politically important to individuals in a way, or to a degree, that privacy in other contexts is not."[108] This assumption takes center stage in precedent differentiating privacy interests in homes from privacy interests in businesses or other commercial property.[109]

Given that commercial activity renders a premises less private, it is easy to understand why courts would then accord even less status to a premises used for *illegal* commercial activity. Criminalization of a commercial activity is somewhat of a proxy for the value that society ascribes to that activity.[110] Put another way, courts may be equating violation of drug-related-premises regulations with a finding that a defendant is "wrongfully present" within the meaning of the Supreme Court's expectation of privacy jurisprudence.[111]

To be sure, deterring drug-related activity in private residences partly motivated Congress's enactment of § 856 and its direction to the Sentencing Commission to adopt the Enhancement.[112] By adding another drug-related statute and enhancement to an already-expansive federal regulatory scheme, Congress in a sense codified a belief that maintaining a drug-related premises presents a unique evil in addition to the normal attendant harms of drug-related crime;[113] maintaining such a premises transforms sacred private space into a

106. This seems to be an animating principle behind *Carter* and related circuit court precedent. *See Carter*, 525 U.S. at 90–91; *see also id.* at 92–97 (Scalia, J., concurring); *see, e.g.*, United States v. Gray, 491 F.3d 138, 152–54 (4th Cir. 2007).

107. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001).

108. Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 915 (2010); *see also* William Cuddihy, *Warrantless House-to-House Searches and Fourth Amendment Originalism: A Reply to Professor Davies*, 44 TEX. TECH L. REV. 997, 1000–11 (2012) (noting originalist understanding concerning the importance of protecting the home from warrantless searches); AMAR, *supra* note 4, at 128–30 (noting the importance of "houses" to the founding understanding of the Fourth Amendment and the Supreme Court's evolving Fourth Amendment jurisprudence); *cf.* Simien, *supra* note 20, at 555–56 (noting the Fourth Amendment's protection of other premises besides the home).

109. *See* New York v. Burger, 482 U.S. 691, 702 (1987); Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986); *see also* Stern, *supra* note 108, at 922; Ramsey Ramerman, *Shut the Blinds and Lock the Doors—Is That Enough?: The Scope of Fourth Amendment Protection Outside Your Own Home*, 75 WASH. L. REV. 281, 287–89 (2000).

110. This can also be seen in the United States' expansive list of possession offenses. Probable cause or reasonable suspicion of possession opens the door to the home and other areas of privacy. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 908–10 (2001).

111. Rakas v. Illinois, 439 U.S. 128, 141 n.9 (1978); *see also* AMAR, *supra* note 4, at 303 ("The word 'unreasonable' in the Fourth Amendment also authorizes interpreters to take evolving social norms into account.").

112. *See* United States v. Miller, 698 F.3d 699, 707 (8th Cir. 2012); *see also* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 6, 124 Stat. 2372, 2373 (2010).

113. *See Miller*, 698 F.3d at 707 (noting that Congress "intended to deter the manufacture and distribution of illegal drugs . . . where children are being raised"); *see also* Aziz Z. Huq, *How*

dangerous den of criminal activity. Accordingly, courts may view codification of § 856 and the Enhancement as evidence that defendants do not have objective privacy interests in turning other people's homes into a drug-related premises.[114] However, this assumption carries with it complications that do not square with logic or precedent.[115]

For one, the Supreme Court, not Congress, has traditionally defined society's expectations of privacy. The Supreme Court has never held that someone loses an expectation of privacy in her home because she conducts illegal activity in it.[116] Circuit courts assuming that a non-resident has no objectively reasonable expectation of privacy by virtue of her participation in drug-related activity seem to be extrapolating more from *Minnesota v. Carter* than that case announced; in *Carter,* the Court considered the commercial nature of the activity conducted by defendants as a factor in its analysis, but did not construe it as dispositive.[117]

And while appellate opinions can obfuscate the exact weight that lower courts attribute to a defendant's drug-related activity in holding that a non-resident does not have an objectively reasonable expectation of privacy in a premises, many circuit court opinions defy *Minnesota v. Olson*, where the Supreme Court explicitly held that a person's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable."[118] *Olson*'s explicit holding cannot be reconciled with circuit precedent like First Circuit *Jones*, which proceed on the understanding that a defendant loses her objectively reasonable expectation of privacy by rolling out of bed and doing something commercial or illegal in the house.[119]

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*the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 149 (2016) (noting role that Congress plays in Fourth Amendment jurisprudence); Minnesota v. Carter, 525 U.S. 83, 97–99 (1998) (Scalia, J., concurring) (same).

114. *Cf.* Dubber, *supra* note 110, at 966–67 (noting how modern criminal law is based on the assumption that state and societal interests are identical); *see also* AMAR, *supra* note 4, at 134 ("The enactors of the Fourteenth Amendment surely believed that congressional legislation would provide important evidence of proper national norms and baselines.").

115. *See* Weinreb, *supra* note 99, at 274–75 (discussing precedent and noting that, regardless of a guest's activity, "it is the guest's own privacy that protects him from unauthorized surveillance").

116. *See* Kyllo v. United States, 533 U.S. 27, 37 (2001); *see also* United States v. Washington, 573 F.3d 279, 283 (6th Cir. 2009).

117. *Carter*, 525 U.S. at 91.

118. Minnesota v. Olson, 495 U.S. 91, 96–97 (1990).

119. United States v. Gray, 491 F.3d 138, 166–70 (4th Cir. 2007) (Michael, J., dissenting). In *Jones*, the defendant actually testified that he stayed overnight the night before the search occurred. United States v. Jones, 949 F. Supp. 2d 316, 320 (D. Mass. 2013). *Olson*'s holding should confer standing on such a defendant. *Olson*, 495 U.S. at 99; *see also* United States v. Gamez-Orduño, 235 F.3d 453, 459–60 (9th Cir. 2000) (noting that overnight-guest inquiry does not turn on whether the guest-host relationship was social or commercial). However, such holdings may be reconcilable where the overnight guest is a trespasser. *See* Luke M. Milligan, *The Fourth Amendment Rights of*

## IV.
## SUGGESTED APPROACHES

If courts want to resolve drug-related-premises cases in more principled ways that harmonize their precedent and Supreme Court precedent, then they can take steps to modify (1) procedural precedent influencing case presentation and (2) substantive precedent concerning a defendant's possessory and controlling interest in a drug-related premises across differing doctrinal arenas. This section surveys a few possible approaches in each context, but by no means exhaustively determines all possible approaches. It suggests places to begin narrowing the gaps between Fourth Amendment standing precedent and § 856/Enhancement precedent.

### *A. Procedural Precedent*

Even if courts work to harmonize the dissonance between standing and § 856/Enhancement, the problems arising from case presentation will continue to present an obstacle to achieving consistency in drug-related-premises precedent.[120] However, by incorporating existing procedural devices—such as waiver, forfeiture, judicial estoppel, or judicial admissions—to the current procedures used in this context, courts could address this problem without manufacturing new procedural devices. At least for cases involving both Fourth Amendment standing and § 856/Enhancement inquiries, courts could force a choice between contesting standing and convicting a defendant of a § 856 violation or supporting an application of the Enhancement by extending certain procedural doctrines.[121]

Waiver or forfeiture on appeal is one procedural device that could reduce the dissonance.[122] Because Fourth Amendment standing presents a merits issue,[123] the government can waive or forfeit arguments against standing.[124]

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*Trespassers: Searching for the Legitimacy of the Government-Notification Doctrine*, 50 EMORY L.J. 1357, 1359 (2001).

120. Arguably, removing the no-privacy-interest-in-illegal-activity barrier would make it more likely that defendants could and would move to suppress evidence obtained against them in drug-related-premises cases, but this substantive change would not resolve all the procedural barriers described in this section.

121. Ultimately, sentencing enhancements are within the district court's discretion, and the government does not need to affirmatively argue for or against them, but this proposal recommends that the district court take the government's opposition to standing into account when deciding the propriety of an enhancement.

122. When the court construes the government's decision as a conscious one, it refers to it as waiver; when it construes the government's decision as inadvertent, it refers to it as forfeiture. *See, e.g.*, United States v. Walker, 665 F.3d 212, 227 (1st Cir. 2011) (noting differing procedural implications for waiver versus forfeiture).

123. *See* Steagald v. United States, 451 U.S. 204, 209 (1981); United States v. Sheffield, 832 F.3d 296, 304 (D.C. Cir. 2016); United States v. Castellanos, 716 F.3d 828, 832 n.3 (4th Cir. 2013); United States v. Stearn, 597 F.3d 540, 551–52 n.11 (3d Cir. 2010); United States v. Taketa,

This plays out frequently on appeals concerning a motion to suppress: when the government has taken a contrary position related to a defendant's possessory interest at trial, some appellate courts hold that the government cannot contest a defendant's standing on appeal.[125]

Although it is used more rarely, another similar procedural device that could help solve this problem is the doctrine of judicial estoppel.[126] Judicial estoppel precludes a party from taking contradictory litigation positions.[127] Most versions of the doctrine[128] prohibit a party from assuming contrary positions only if the party succeeds in arguing one position earlier and tries to advance a contrary position later on appeal or in another related proceeding.[129] However, some versions bar parties from taking contrary positions irrespective of their earlier success or failure in advancing the position.[130] In deciding the applicability of judicial estoppel, most courts examine (1) whether the party's later position was clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept that earlier position; and (3) whether allowing the

923 F.2d 665, 669 (9th Cir. 1991); United States v. Foster, 763 F. Supp. 2d 1086, 1090 (D. Minn. 2011); Kontorovich, *supra* note 79, at 1687.

124. *Steagald*, 451 U.S. at 209; *Sheffield*, 832 F.3d at 304; United States v. Dupree, 617 F.3d 724, 729 (3d Cir. 2010); United States v. Amuny, 767 F.2d 1113, 1122 (5th Cir. 1985); *see also* United States v. Gonzales, 79 F.3d 413, 419 (5th Cir. 1996) (noting exceptions to waiver of standing arguments).

125. *See Steagald*, 451 U.S. at 209; *Gonzales*, 79 F.3d at 419; *Amuny*, 767 F.2d at 1121–22 & n.5.

126. However, the Tenth Circuit and D.C. Circuit have outright rejected the doctrine. *See* David S. Coale, *A New Framework for Judicial Estoppel*, 18 REV. LITIG. 1, 10 (1999).

127. "Very simply stated, the doctrine prevents a party from taking a position contradictory to a position which that party adopted previously." Nicole C. Frazer, *Reassessing the Doctrine of Judicial Estoppel: The Implications of the Judicial Integrity Rationale*, 101 VA. L. REV. 1501, 1502 (2015); United States v. Issacs, 708 F.2d 1365, 1367–68 (9th Cir. 1983) (judicial estoppel in the criminal context); *see also generally* Kimberly J. Winbush, *Judicial Estoppel in Criminal Prosecution*, 121 A.L.R. 5TH 551 (2004). Courts occasionally refer to judicial estoppel as a judicial admission, ACLU of Nev. v. Masto, 670 F.3d 1046, 1065 (9th Cir. 2012), but the two doctrines are distinct because estoppel can sometimes bar contrary arguments about the facts *and* the law. Lawrence B. Solum, *Caution! Estoppel Ahead:* Cleveland v. Policy Management Systems Corporation, 32 LOY. L. REV. 461, 468–72 (1999).

128. The Supreme Court has noted that the "circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982)); *see also* Frazer, *supra* note 127, at 1502–03, 1506–09 (noting that no uniform approach has emerged and examining the different approaches that the federal circuits take in applying the doctrine of judicial estoppel).

129. Davis v. Wakelee, 156 U.S. 680, 689 (1895) ("It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ."); Scarano v. Cent. R. Co. of N.J., 203 F.2d 510, 513–14 (3d Cir. 1953); Coale, *supra* note 126, at 4–6 (surveying differing views of judicial estoppel in the majority of circuit courts); *see also* Solum, *supra* note 127, at 468–72.

130. Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996); Coale, *supra* note 126, at 6–7 (outlining how courts apply the fast-and-loose approach to judicial estoppel); *see also* Solum, *supra* note 127, at 468–72.

party to assert the inconsistent position would give it an unfair advantage.[131] However, the Supreme Court has explained that such factors are not "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel" and that "[a]dditional considerations may inform the doctrine's application in specific factual contexts."[132] Admittedly, there is a dearth of examples of courts applying the judicial estoppel doctrine to the government in criminal cases.[133] However, courts have applied the doctrine to the government,[134] and at least one circuit court has even applied the doctrine of judicial estoppel to find that the government cannot take contradictory litigation positions concerning a defendant's possessory interest in an effect searched and his expectation of privacy in that effect.[135]

Courts by and large treat application of waiver, forfeiture, and judicial estoppel as equitable doctrines over which they have discretion to apply at the urging of the parties or sua sponte.[136] The doctrines help to prevent courts from being misled by a change of position and to preclude parties from unfairly benefitting from inconsistent or late-raised arguments.[137] In one form or another, these doctrines aim to "protect the integrity of the judicial process."[138]

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131. *New Hampshire v. Maine*, 532 U.S. at 750–51. Courts sometimes delineate between assertions of facts and assertions of law. *See* United States v. Villagrana-Flores, 467 F.3d 1269, 1278 (10th Cir. 2006) (finding that judicial estoppel applies only to assertions of fact); Helfand v. Gerson, 105 F.3d 530, 535 (9th Cir. 1997) (finding that judicial estoppel applies to both factual and legal assertions).

132. *New Hampshire v. Maine*, 532 U.S. at 751.

133. United States v. Grap, 368 F.3d 824, 830–31 (8th Cir. 2004); United States v. Owens, 54 F.3d 271, 275 (6th Cir. 1995); United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993); *see also* Hilary S. Ritter, *It's the Prosecution's Story, but They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 840–41 (2005). Some courts in rejecting application of judicial estoppel to the government in a criminal case cannot even find cases applying it. *See* Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995); United States v. Kattar, 840 F.2d 118, 129 n.7 (1st Cir. 1988) (noting that "as far as [the court could] tell, this obscure doctrine has never been applied against the government in a criminal proceeding").

134. *See, e.g.*, United States v. Liquidators of European Fed. Credit Bank, 630 F.3d 1139, 1149 (9th Cir. 2011); *see* People v. Jones, 217 N.W.2d 884, 888 (Mich. Ct. App. 1974); United States v. Sims, No. CR 10-01325 MMM, slip op. at 8 n.47 (C.D. Cal. May 24, 2011), *aff'd*, 504 F. App'x 614 (9th Cir. 2013); United States v. Erickson, 732 F.2d 788, 792 (10th Cir. 1984) ("The government should not be taking opposite factual positions in two different, but related, cases."); Corniel-Rodriguez v. Immigration & Naturalization Serv., 532 F.2d 301, 306–07 (2d Cir. 1976) (applying doctrine of equitable estoppel to government in an immigration case).

135. United States v. Issacs, 708 F.2d 1365, 1367 (9th Cir. 1983); *see also* People v. Gross, 465 N.E.2d 119, 122 (Ill. Ct. App. 1984).

136. *See New Hampshire v. Maine*, 532 U.S. at 750–51; Frazer, *supra* note 127, at 1502 ("Judicial estoppel is an equitable, court-created, discretionary doctrine that may be invoked by either a party or the court sua sponte."); Ritter, *supra* note 133, at 838.

137. *New Hampshire v. Maine*, 532 U.S. at 749–50; Coale, *supra* note 126, at 2, 25; Frazer, *supra* note 127, at 1509–10.

138. *New Hampshire v. Maine*, 532 U.S. at 749 (citing Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)); *see also* Coale, *supra* note 126, at 2, 25; Frazer, *supra* note 127, at 1509–10.

Likewise, although not an equitable doctrine, the doctrine of judicial admissions presents another useful procedural analog for courts to consider applying in the drug-related-premises context.[139] A judicial admission is a factual admission made by a party before the court that binds that party both at trial and on appeal.[140] Courts typically construe only deliberate voluntary concessions as judicial admissions, but judicial admissions can arise from a party's involuntary act in "a limited class of situations."[141] Like judicial estoppel, the doctrine of judicial admissions establishes categories of statements that parties cannot later contradict;[142] a judicially admitted fact cannot be contested at trial unless the court allows the party to withdraw the admission.[143]

Some version of these doctrines, or an extension of the district court's equitable power, could bar the government from taking contrary positions at the motion to suppress stage, trial, or sentencing:[144] courts could (1) construe the government's decision to charge a violation of § 856 as a constructive waiver of its right to contest standing and construe an opposition to standing as a constructive waiver of arguing for the Enhancement;[145] (2) view a decision to

139. The doctrine of judicial admissions is not normally treated as an equitable doctrine, but a district court's decision to treat something as a judicial admission or not is reviewed for abuse of discretion. Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 227 (9th Cir. 1988).

140. United States v. Crawford, 372 F.3d 1048, 1055 (9th Cir. 2004); Keller v. United States, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995); United States v. Belculfine, 527 F.2d 941, 944 (1st Cir. 1975); *Judicial Admissions*, 64 COLUM. L. REV. 1121 (1964); *see also id.* at 1122 n.14 (noting occasional use of judicial admissions in criminal trials); Young v. United States, 315 U.S. 257, 258–59 (1942) (noting difference between judicial admissions and attempts to stipulate to governing criminal law); *see generally* Fortune, *Judicial Admissions in Criminal Cases: Blocking the Introduction of Prejudicial Evidence*, 17 CRIM. L. BULL. 101 (1981).

141. *Belculfine*, 527 F.2d at 944; *see* Coale, *supra* note 126, at 12–13.

142. Coale, *supra* note 126, at 2.

143. *See, e.g.*, Minter v. Wells Fargo Bank, N.A., 762 F.3d 339, 347 (4th Cir. 2014); *see also* Hon. William J. Giacomo, *Admissions: What They Are and How They Can Impact Litigation*, 32 PACE L. REV. 436, 442 (2012); Coale, *supra* note 126, at 2.

144. *See* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1456 (2001) ("[H]aving successfully taken the position that a specific set of facts lead to a particular legal conclusion, the prosecution should not be permitted to shift to an inconsistent position."); Simien, *supra* note 20, at 565–66; *see also* David K. Thompson, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 568 (1979) (noting equitable consideration in applying estoppel doctrines); United States v. Stanton, No. CRIM. 11-57, 2012 WL 4815402, at *6–7 (W.D. Pa. Oct. 10, 2012) (recognizing disconnect between contesting standing and charging a defendant with § 856).

145. *See, e.g.*, United States v. Lucas, 499 F.3d 769, 779 n.5 (8th Cir. 2007) ("The waiver doctrine is most appropriately applied when the government has taken inconsistent positions during the course of the litigation and such inconsistency has affected the factual record."); United States v. Morales, 737 F.2d 761, 764 (8th Cir. 1984) (barring government from contesting standing on appeal due to contradictory positions about defendant's possessory interest in premises at motion to suppress and at trial); *see also* United States v. Garcia-Lopez, 309 F.3d 1121, 1123 (9th Cir. 2002) (noting that the government can waive arguments explicitly and implicitly); United States v. Jones, 23 F.3d 1307, 1311 (8th Cir. 1994) (discussing concept of constructive waiver as it applies to criminal defendants); United States v. Dougherty, 473 F.2d 1113, 1124 (D.C. Cir. 1972) (same); United States v. Agbebiyi, 575 F. App'x 624, 632 (6th Cir. 2014) (same). *But see* United States v. Guthrie, 931 F.2d 564, 569 (9th Cir. 1991) (holding that government did not waive right

charge a § 856 violation as a judicial admission that a defendant has standing to contest a search of the drug-related premises;[146] or (3) treat a successful lack-of-standing argument on a motion to suppress as judicially estopping the prosecution from proceeding with a § 856 charge at trial or arguing for the Enhancement at sentencing.[147] These procedural rules would ensure consistency within cases and, over time, could lead to consistency between standing precedent and drug-related-premises precedent.[148]

Critics will note that some of these rules could have the effect of creating an automatic-standing rule in drug-related-premises cases—an outcome that *Salvucci*, discussed *supra* Part II.A, may bar.[149] That is, if *Salvucci* prevented a possession charge from automatically conferring standing on a defendant, courts should not establish procedural devices conferring premises-based standing simply because a defendant faces charges related to that premises. However, drug-related-premises cases present considerations different from possession cases. The Court premised its holding in *Salvucci* on the assumption that a possessory interest in contraband seized is not necessarily relevant to a defendant's privacy interest in the place searched.[150] But a possessory interest in a drug-related premises necessarily goes to a defendant's privacy interest in the place searched.[151] Moreover, the Court in *Salvucci* "simply rejected conferral of

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to contest standing on appeal where it was unsuccessful at trial in persuading the jury that defendant controlled the premises).

146. *See* United States v. Blood, 806 F.2d 1218, 1220 (4th Cir. 1986) (acknowledging that a prosecutor's statements during pretrial proceedings and opening statements can act as judicial admissions). *But see* United States v. Singleton, 987 F.2d 1444, 1449 (9th Cir. 1993) ("We . . . conclude that the district court erred by relying solely on the government's theory of the case in finding that Singleton had standing to contest the search."). Another approach would be to allow defendants to admit the government's statements in contesting standing as party admissions about the defendant's possessory interest in a premises. *See, e.g.*, Poulin, *supra* note 144, at 1434–42. Treating this as a judicial admission would be similar to applying the law of variance. *See, e.g.*, Berger v. United States, 295 U.S. 78, 82 (1935); *see also* United States v. Cina, 699 F.2d 853, 857 (7th Cir. 1983) (discussing genesis of the judicial admissions doctrine).

147. *See* United States v. Davis, 932 F.2d 752, 756 n.2 (9th Cir. 1991) ("[T]he district court concluded that under the rule of *United States v. Issacs*, the government was estopped from arguing that defendant was the culpable possessor of incriminating evidence, while denying that there was any expectation of privacy." (internal citations omitted)). "In criminal cases, judicial estoppel should apply if the prosecution prevailed in a manner consistent with acceptance of the prior position." Poulin, *supra* note 144, at 1454; *see also* Konstantinidis v. Chen, 626 F.2d 933, 937 n.6 (D.C. Cir. 1980) (noting that judicial estoppel does not require prior litigation of the issue in question); Poulin, *supra* note 144, at 1452–53 (arguing that courts should employ judicial estoppel to prevent prosecutors from taking inconsistent positions in separate proceedings). Similarly, appellate courts have discretion to treat statements in briefs as judicial admissions. Gospel Missions of Am. v. City of Los Angeles, 328 F.3d 548, 557 (9th Cir. 2003).

148. In addition, "[b]arring the prosecution from asserting a position inconsistent with an earlier position will promote fair enforcement of the criminal laws without unduly impeding the goal of law enforcement." Poulin, *supra* note 144, at 1426.

149. United States v. Salvucci, 448 U.S. 83, 92 (1980).

150. *Id.* at 92–93.

151. *See* United States v. Gomez, 276 F.3d 694, 698 (5th Cir. 2001); United States v. Bustamante, 990 F.2d 1261 n.1 (9th Cir. 1993); United States v. Morales, 737 F.2d 761, 763 (8th

*automatic* standing; it did not condone prosecutorial self-contradiction."[152] Since *Salvucci*, circuit courts have held that "*Salvucci* does not permit the government to argue possession but deny expectation of privacy where the circumstances of the case make such positions necessarily inconsistent."[153]

Others may object that these procedural rules should constrict a defendant's range of permissible litigation positions just as they would constrain the government. However, *Simmons v. United States* would seem to foreclose such an argument.[154] In *Simmons*, the Supreme Court held that a defendant's testimony at a suppression hearing "may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."[155] The Court based its holding on the fact that a defendant's testimony is an "integral part of his Fourth Amendment exclusion claim"[156] and he should not have to choose between protection of his constitutional rights and a litigation position.[157] The same would be true in the context of a defendant testifying to show that she has standing to pursue a Fourth Amendment claim.[158]

### *B. Substantive Precedent*

Regardless of whether courts adopt these suggested procedural approaches, they should move substantive Fourth Amendment standing precedent closer to the substantive precedent governing § 856 and the Enhancement.[159] The inquiry

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Cir. 1984); United States v. Rodriguez, 100 F. Supp. 3d 905, 918–19 (C.D. Cal. 2015); *see also* Simien, *supra* note 20, at 565 & n.323.

152. United States v. Issacs, 708 F.2d 1365, 1367–68 (9th Cir. 1983).

153. *Id.* at 1368; *see also* United States v. Bagley, 772 F.2d 482, 489 (9th Cir. 1985); *Morales*, 737 F.2d at 763; United States v. Ross, 655 F.2d 1159, 1165 (D.C. Cir. 1981), *rev'd on other grounds*, 456 U.S. 798 (1982) (rejecting government's argument on appeal that defendant lacked standing when jury found defendant guilty of possession and government argued that defendant's trial tactic of denying knowledge of the bag containing narcotics stripped him of Fourth Amendment protections).

154. Simmons v. United States, 390 U.S. 377, 394 (1968).

155. *Id.*

156. *Id.* at 391.

157. *Id.* at 394.

158. At least for judicial estoppel, this objection may have little practical significance. If a defendant successfully suppresses evidence found at a drug-related premises, then the government likely will not have enough evidence to support a § 856 conviction or Enhancement; if the defendant is unsuccessful, courts following the majority approach will not apply judicial estoppel. *See* Coale, *supra* note 126, at 4–6; Ritter, *supra* note 133, at 862–63. Such an approach comports with the principles animating *Simmons*, Morgan G. Graham, *The Use of Suppression Hearing Testimony to Impeach*, 59 IND. L.J. 295, 315 (1984), and those animating the rule of lenity, *see* United States v. R.L.C., 503 U.S. 291, 305 (1992).

159. Some courts have already begun to take this approach. *See, e.g.*, United States v. Washington, 573 F.3d 279, 283 (6th Cir. 2009) (holding that "the use of a space for illegal activity does not alter the privacy expectations of a person who would otherwise have standing"); United States v. Sandoval, 200 F.3d 659, 660 (9th Cir. 2000) ("[W]e have previously rejected the argument that a person lacks a subjective expectation of privacy simply because he is engaged in illegal activity or could have expected the police to intrude on his privacy."); *see also* United

in all three contexts should be the same: whether the defendant exhibited a sufficient possessory or controlling interest in the premises such that others objectively would recognize that she exercises dominion over the property.[160]

Aligning these inquiries is consistent with the reasonableness standard underlying Fourth Amendment jurisprudence. A core principle of the reasonableness standard used to evaluate a defendant's expectation of privacy is that courts can evaluate this expectation before the allegedly unconstitutional action[161]—that is, did the defendant have an objectively reasonable expectation of privacy in the place searched before the search?[162] In many cases it is hard to distinguish a home from a drug-related premises ex ante; members of law enforcement often cannot confirm that a defendant is engaging in illegal commercial activity on a premises until they execute a warrantless search.[163] Treating ex post knowledge of drug-related activity as a disqualifier in non-resident cases perverts the standing inquiry and remains inconsistent with the approach that courts take in cases where a defendant owns or rents a premises.[164]

Furthermore, the Fourth Amendment and the exclusionary rule would be meaningless if they applied only when law enforcement does not find evidence of illegal drug-related activity.[165] Following such backwards logic undermines what the Supreme Court has "repeatedly held" is the exclusionary rule's "sole purpose": "deter[ring] future Fourth Amendment violations."[166] The

States v. Padilla, 508 U.S. 77, 82 (1993) (noting that participation in a criminal conspiracy does not add or detract from a defendant's expectations of privacy).

160. *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 1005 (2016) ("Personal-property law teaches that when a person expects continued exclusive control over an item, that expectation is likely to be clear to others, whether because others would expect the same with respect to their property under similar circumstances or because the owner has taken steps to make that expectation apparent."); Simien, *supra* note 20, at 565.

161. *See* Minnesota v. Carter, 525 U.S. 83, 110 (1998) ("If the illegality of the activity made constitutional an otherwise unconstitutional search, such Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.") (Ginsburg, J., dissenting); *see also* Kyllo v. United States, 533 U.S. 27, 34 (2001).

162. *See* Huq, *supra* note 113, at 147; Weinreb, *supra* note 99, at 274–75; Bryan D. Lammon, *The Practical Mandates of the Fourth Amendment: A Behavioral Argument for the Exclusionary Rule and Warrant Preference*, 85 WASH. U. L. REV. 1101, 1102, 1111, 1121–23 (2007).

163. *See Sandoval*, 200 F.3d at 660; Lammon, *supra* note 162, at 1123; Weinreb, *supra* note 99, at 274.

164. *See* United States v. Brown, 828 F.3d 375, 383–84 (6th Cir. 2016); *see also* United States v. Gamez-Orduño, 235 F.3d 453, 459–60 (9th Cir. 2000).

165. *See* Florida v. Riley, 488 U.S. 445, 463 (1989) (Brennan, J., dissenting); Weinreb, *supra* note 99, at 274–75.

166. Davis v. United States, 564 U.S. 229, 236–37 (2011); *see also* LARRY YACKLE, REGULATORY RIGHTS: SUPREME COURT ACTIVISM, THE PUBLIC INTEREST, AND THE MAKING OF CONSTITUTIONAL LAW 87–88 (2007) (discussing the theory that constitutional rights serve a regulatory purpose in governing state action and noting that "the content of substantive rights is best understood as a general standard of conduct for government to observe").

exclusionary rule's deterrence value arises from its ability to deter future violations of not only a specific defendant's rights, but also the rights of other individuals who might be affected by a law enforcement agency's unreasonable practices.[167] As other scholars have noted, law enforcement apprises itself of developments in standing doctrine and may be incentivized to use this information to strategically evade the Fourth Amendment's strictures.[168] If courts will not recognize a privacy interest in drug-related-premises cases, then the exclusionary rule becomes useless in all cases where law enforcement targets a non-resident for investigation.[169]

Although the Supreme Court has remarked that "it would be placing the cart before the horse to prohibit searches otherwise conforming to the Fourth Amendment because of a perception that the deterrence provided by the existing rules of standing is insufficient to discourage illegal searches,"[170] it remains to be explained why courts should construe a defendant's possessory or controlling interest in a drug-related premises narrowly for purposes of deterring constitutional violations and more broadly to deter drug-related crime. Indeed, the rule of lenity suggests that courts construing the definition of maintenance in the face of ambiguous guidance from both the statute and the guidelines should resolve close calls in favor of defendants.[171] But even if courts construe drug-related-premises precedent broadly in favor of the government, they should reconcile this precedent with Fourth Amendment standing doctrine.

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167. *See* United States v. Leon, 468 U.S. 897, 906 (1984); Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 263 (2010); Donald L. Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 298 (1983); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 850–51 (2013).

168. *See* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 850–51 (2004); Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1306 (2000); Gray, *supra* note 9, at 52; Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2509–10 (1996). One recent standing article in a law enforcement publication actually begins, "Because almost all defendants charged with crimes are in fact guilty, they have few legitimate ways to defend against the charges." Devallis Rutledge, *Understanding Fourth Amendment "Standing"*, POLICE: L. ENFORCEMENT MAG. (Dec. 3, 2014), http://www.policemag.com/channel/patrol/articles/2014/12/understanding-fourth-amendment-standing.aspx [https://perma.cc/BU8H-UN4A].

169. Minnesota v. Carter, 525 U.S. 83, 110 (1998) ("If the illegality of the activity made constitutional an otherwise unconstitutional search, such Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.") (Ginsburg, J., dissenting).

170. Zurcher v. Stanford Daily, 436 U.S. 547, 562 n.9 (1978).

171. United States v. R.L.C., 503 U.S. 291, 305 (1992).

## V.
## CONCLUSION

One might expect that a defendant who did not own, rent, or otherwise exercise dominion over a premises would not be eligible for § 856 or the Enhancement, just as she would not have an objectively reasonable expectation of privacy under the Fourth Amendment. But the weight of authority suggests otherwise. Descriptively, this dissonance likely arises in part because of case presentation effects discussed *supra* Part III.A. Courts could minimize the impact of these effects across cases by adopting procedural devices that ensure consistency in drug-related-premises precedent. At the very least, courts should consider whether their approach in an individual drug-related-premises case comports with their general standing jurisprudence. Given the opportunity, courts should confine the Fourth Amendment standing inquiry to the same factors that courts analyze in drug-related-premises precedent, and they should not treat the illegality of drug-related activity as a trump card defeating a defendant's objectively reasonable expectation of privacy. This approach would bring standing precedent back into line with the Fourth Amendment's underlying reasonableness standard and the purpose behind the Supreme Court's formulation of the exclusionary rule. Courts should not ignore constitutional violations to deter drug-related crime.[172]

172. Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("If the Government becomes a lawbreaker, it breeds contempt for law[.]" (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting))).