Search, Seizure, and Washington's Section Seven: Standing from *Salvucci* to *Simpson*

by Mark H. Adams and George R. Nock***

In *Jones v. United States*,[1] the United States Supreme Court gave birth in 1960 to the rule of "automatic standing," that is, the doctrine that one automatically has standing to contest an allegedly illegal search where his possession of the seized evidence is an essential element of the offense with which he is charged. The accused does not have to show that his own fourth amendment[2] rights were violated, but only that the search and seizure was unconstitutional. The Supreme Court, however, gradually eroded the "automatic standing" rule during the 20 years following *Jones*, finally and completely overturning it in *United States v. Salvucci*.[3] This article first traces the evolution of that turnabout and discusses the approach that has replaced the *Jones* rule in the Supreme Court. It then discusses the Washington Supreme Court's continued adherence to the automatic standing rule, despite the *Salvucci* decision, under the

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In Part I of this article, Commissioner Adams sets forth the history of the United States Supreme Court's abandonment of its doctrine of "automatic standing" in cases applying the fourth amendment to the U.S. Constitution and of the Washington Supreme Court's retention of the doctrine under article I, section 7 of the Washington constitution. Using Part I as background, Professor Nock in Part II then analyzes the concept of standing in light of the declared purposes of the exclusionary rule and suggests that courts consider discarding the rationale of deterrence of police misconduct and replacing it with the concept that the exclusionary rule is a moral imperative for the vindication of that right to privacy.

This article represents the respective personal viewpoints of its authors and should not be construed as representing in any way the position of the Washington Court of Appeals or any of its judges.

1. 362 U.S. 257 (1960).

2. The fourth amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

3. 448 U.S. 83 (1980).

Washington Constitution rather than the fourth amendment. After focusing on the failure of the United States Supreme Court to fashion a standing rule consistent with the Court's stated purpose for the exclusionary rule, this article urges the Washington court to interpret the state's constitution in a more consistent, principled fashion. The Washington Supreme Court has stated on separate occasions that the primary purposes behind the Washington standing rule are to deter official misconduct in searches and seizures and to preserve the underlying privacy values of the Washington constitution. This article will conclude that the Washington court should adopt the second of these two purposes for the principled development of its standing rule in the best tradition of American federalism and jurisprudence.

PART I

A. Background: Jones v. United States

In *Jones,* federal officers arrested Cecil Jones and charged him with violating federal narcotics laws. The charges resulted from the officers' discovery of illicit narcotics during execution of a warrant to search an apartment in which Jones was present but did not reside. Jones moved to suppress the evidence on the grounds that the warrant was not issued upon probable cause. The government challenged Jones' standing to move to suppress because he neither admitted owning the seized articles nor showed any interest in the apartment greater than that of "invitee or guest."[4]

The Court acknowledged the longstanding principle that a person cannot claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given."[5] That principle, the Court noted, ordinarily requires a person claiming fourth amendment protection to show that he himself was the victim of an invasion of privacy, *i.e.,* is either the owner of the seized property or one who has a substantial possessory interest in the premises searched.[6]

The *Jones* Court, however, carved out an exception to the personal privacy standing requirement in cases where possession

4. 362 U.S. at 259.
5. *Id.* at 261; Hatch v. Reardon, 204 U.S. 152, 160 (1907).
6. 362 U.S. at 261.

of the seized evidence is an element of the offense charged. It did so for two reasons: (1) A defendant charged with a possessory offense might be able to establish his standing to move for suppression only by giving self-incriminating evidence which could be used against him subsequently at trial;[7] and (2) the prosecution should not be allowed the "advantage of contradictory positions," *i.e.*, asserting on the one hand that the accused possessed the goods and is guilty, while arguing on the other hand that he did not possess them for purposes of standing to claim the protections of the fourth amendment.[8] Thus, in order to prevent both the risk of self-incrimination and what became known as the "vice of prosecutorial self-contradiction,"[9] the *Jones* Court held that such a defendant had automatic standing to rely upon the fourth amendment without having to show an interest in the premises searched or the property seized. The defendant had only to show that the search and seizure of the evidence was unconstitutional. *Jones* went on to hold, alternatively, "that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs."[10]

B. The Erosion of Jones

The Supreme Court eliminated the first of the *Jones* Court's justifications for its "automatic standing" rule in *Simmons v. United States.*[11] In *Simmons,* the Court held that when a defendant testifies in support of a motion to suppress evidence on fourth amendment grounds, his testimony may not later be admitted against him at trial on the issue of guilt unless he fails to object.[12]

In 1973, the Court considered the effect of *Jones* in the case of *Brown v. United States.*[13] In *Brown,* the government accused the defendants of transporting stolen goods and conspiracy to transport stolen goods in interstate commerce. The goods were

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7. *Id.* at 261-63.

8. *Id.* at 263-64.

9. *See* Brown v. United States, 411 U.S. 223, 229 (1973).

10. Simmons v. United States, 390 U.S. 377, 390 (1968) (summarizing the alternative holding of *Jones*).

11. 390 U.S. 377 (1968).

12. *Id.* at 394.

13. 411 U.S. 223 (1973).

owned by a company for which Brown was a warehouse manager and Smith, another defendant, was a truck driver. The government accused Brown and Smith of pilfering the goods in Ohio and delivering them to Clinton Knuckles, owner of a store in Kentucky. Police officers seized the goods pursuant to a warrant to search Knuckles' store. Knuckles was present at the store during the search, but Brown and Smith were then in custody in Ohio. All three defendants moved to suppress evidence obtained by the search. The trial court granted Knuckles' motion on grounds the search warrant was defective, but denied the motion of Brown and Smith because they failed to assert a proprietary or possessory interest in the searched premises or in the goods seized.[14]

The Supreme Court affirmed. The Court noted that *Simmons* had undermined the "self-incrimination dilemma, so central to the *Jones* decision . . . ," but found it unnecessary to reconsider the *Jones* holding because, unlike in *Jones*, the government's case against Brown and his co-defendants did not "depend on [their] possession of the seized evidence at the time of the contested search and seizure."[15] The defendants had transported and sold the stolen goods to Knuckles some two months before the search, and the indictments were limited to the period before the search. Therefore, the Court saw no risk to the defendants of either self-incrimination or prosecutorial self-contradiction. The Court declared that the defendants had no standing to challenge the search and seizure because they (a) were not on the premises when the search and seizure occurred, (b) alleged no proprietary or possessory interest in the premises, and (c) were not charged with an offense, an element of which was possession of the seized evidence at the time of the search and seizure.[16] *Brown* reiterated that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."[17]

The Supreme Court accelerated its movement away from the automatic standing rule in *Rakas v. Illinois*.[18] In the process, whereas *Simmons* eliminated the "self-incrimination dilemma"

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14. *Id.* at 225-26.

15. *Id.* at 228.

16. *Id.* at 229.

17. *Id.* at 230 (citations omitted); *accord* Alderman v. United States, 394 U.S. 165, 174 (1969).

18. 439 U.S. 128 (1978).

behind the *Jones* rule, *Rakas* in effect eliminated the second basis for that rule, the "vice" of prosecutorial contradiction.

Rakas involved an effort to suppress as evidence a sawed-off rifle and rifle shells that were seized during a search of an automobile in which the defendants were passengers. The defendants asserted no ownership interest in either the car or the weaponry found in the glove compartment and under the front passenger seat of the car. They argued that the Court should broaden the *Jones* rule to confer automatic standing upon them as defendants at whom a search was directed as "targets."[19] Seizing on the alternative holding of *Jones*, they also argued that they had standing to contest the search because they were "legitimately on the premises" (in the car) at the time of the search.[20]

The *Rakas* majority refused to adopt either the so-called "target theory"[21] of standing or the idea that the phrase "legitimately on the premises" should include passengers in an automobile. Instead, the Court emphasized that fourth amendment rights are personal to and may be asserted only at the instance of one who has a legitimate expectation of privacy in the area searched.[22] The *Rakas* Court was concerned lest, by conferring standing to raise vicarious fourth amendment claims, it would unduly extend the exclusionary rule.[23] The Court concluded that no useful analytical purpose was served in the context of suppression of evidence by considering the question of standing

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19. *Id.* at 133.

20. *Id.* at 132.

21. The *Rakas* majority opinion, *id.* at 132-38, discusses the defendants' "target" theory at length. The theory, if not the appellation, appears to stem from the following language in Jones v. United States, 362 U.S. 257, 261 (1960):

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

(Emphasis added.) *See* Alderman v. United States, 394 U.S. 165, 207-09 (1969) (Fortas, J., concurring and dissenting).

22. *Rakas*, 439 U.S. at 143. In stressing the expectation-of-privacy factor, the Court relied on the analysis developed in Katz v. United States, 389 U.S. 347, 351-53 (1967) (electronic eavesdropping on calls placed from a telephone booth), and applied in United States v. Chadwick, 433 U.S. 1, 7 (1977) (search of a double-locked footlocker into which personal effects had been placed). *See also* Warden v. Hayden, 387 U.S. 294, 304 (1967) ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property . . . .") (majority opinion of Brennan, J.).

23. 439 U.S. at 137.

apart from substantive fourth amendment law.[24] The Court stated the following:

> [T]he question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.[25]

Inasmuch as Rakas and the other defendant made no showing of a legitimate expectation of privacy in the glove compartment or the area under the seat of the car in which they were but passengers, the Court found that they lacked standing to contest the search of someone else's car.[26] The phrase "legitimately on the premises," coined to express the alternate basis for standing in *Jones,* was explicitly rejected as creating "too broad a gauge for measurement of Fourth Amendment rights."[27]

Also ominous for the future viability of *Jones,* moreover, was the *Rakas* Court's implicit rejection of the prosecutorial self-contradiction factor. The prosecutor argued at the suppression hearing that the defendants lacked standing to challenge the search because they did not own the rifle, the shells or the automobile,[28] yet at the trial was able to tie them to a robbery in which the rifle was used[29] and the automobile was the getaway vehicle. In declining to hold that the defendants had automatic standing to challenge the search, the Court never alluded to the prosecutorial self-contradiction factor.[30]

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24. *Id.* at 138-40.

25. *Id.* at 140. This analysis was summarized in Rawlings v. Kentucky, 448 U.S. 98, 106 (1980): "After *Rakas,* the two inquiries [standing and legitimate expectation of privacy] merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner."

26. 439 U.S. at 149-50, n. 17.

27. *Id.* at 142 (footnote omitted).

28. *Id.* at 130.

29. The Supreme Court's opinion does not specifically refer to use of a rifle in the robbery, but the Illinois Appellate Court's opinion below relates that a prosecution witness identified the rifle as that used by the robbers. People v. Rakas, 46 Ill. App. 3d 569, 572, 360 N.E.2d 1252, 1254-55 (1977).

30. Nor, for that matter, did the concurring opinion of Justice Powell or the dissenting opinion of Justice White allude to the prosecutorial self-contradiction factor.

C. Jones *is Overruled*

Simmons and *Rakas* set the stage for *United States v. Salvucci.*[31] In *Salvucci,* John Salvucci and John Zackular were charged with possession of stolen mail.[32] The police seized twelve checks during the search of an apartment rented by Zackular's wife.[33] The defendants moved to suppress. The government argued that they lacked standing. The district court suppressed the evidence. The court of appeals affirmed the suppression order. The court of appeals observed that despite *Simmons'* elimination of the self-incrimination problem that underlay *Jones,* the "Supreme Court itself has questioned, but unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vitality of the doctrine of automatic standing."[34] Therefore, the court of appeals felt compelled to follow *Jones* until the Supreme Court decided to overrule the automatic standing doctrine.

The Supreme Court accepted the invitation. Writing for a 7-to-2 majority, Justice Rehnquist[35] expressly reversed the automatic standing rule of *Jones v. United States.* The majority declared that the self-incrimination dilemma had been eliminated by *Simmons* and that *Rakas* and other decisions "clearly establish that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction."[36] Both prongs of the *Jones* automatic standing ration-

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31. 448 U.S. 83 (1980).

32. 448 U.S. at 85.

33. Although the Court's opinion states the apartment was rented by Zackular's mother, 448 U.S. at 85, the First Circuit's opinion of which certiorari was granted, 599 F.2d 1094 (1979)—including the search affidavit quoted verbatim at 1095—consistently describes the apartment as belonging to Zackular's wife. Zackular and his "wife" maintained separate apartments. Neither he nor Salvucci was prepared to show a legitimate expectation of privacy in the wife's apartment or a proprietary or possessory interest in the illicit checks. 599 F.2d at 1097.

34. 599 F.2d at 1097 (citations to *Rakas* and *Brown* omitted).

35. Justice Rehnquist also wrote the majority opinions for the Court in *Rakas* and in the companion case to *Salvucci,* Rawlings v. Kentucky, 448 U.S. 98 (1980). Justices Marshall and Brennan dissented in all three cases. Justices White and Stevens, who also dissented in *Rakas,* concurred with the majority's analysis in *Salvucci* and *Rawlings.*

36. 448 U.S. at 90. Justice Marshall, writing in dissent in *Salvucci,* conceded the elimination of the prosecutorial self-contradiction concern when he wrote: "By holding today in *Rawlings* . . . that a person may assert a Fourth Amendment claim only if he has a privacy interest in the area that was searched, the Court has, to be sure, done away with that logical inconsistency." 448 U.S. at 97 (Marshall, J., dissenting).

ale were eviscerated. Thus, the Court abandoned the automatic standing rule of *Jones* and stated its intention to limit the availability of the exclusionary rule to defendants who have been subjected to a violation of their fourth amendment rights.[37]

D. The New Test: Legitimate Expectation of Privacy

What has the demise of "automatic standing" in *Salvucci* done to the concept of standing to move to suppress evidence seized from someplace other than the person of the accused? It should be clear that a majority of the present Supreme Court, as exemplified by the decisions in *Salvucci,* its companion case of *Rawlings v. Kentucky,*[38] and *Rakas,* will grant a defendant standing to suppress seized evidence only if the accused had a legitimate expectation of privacy in the area searched. The accused bears the burden of proving his legitimate expectation of privacy,[39] and the issue will be decided on a case-by-case basis.

Legal possession or ownership of a seized good will not invariably confer the ability to assert the protection of the fourth amendment; the Court has emphatically rejected the notion that "arcane distinctions developed in property and tort law" ought to control the fourth amendment inquiry.[40] Nor will the fact that one is "legitimately on the premises" any longer confer standing to suppress.[41] Even the fact of actual, physical possession of the seized good will not be determinative.[42] A discussion of the respective positions of the majority and the two dissenters in *Salvucci* and *Rawlings* will illustrate the Court's current position as to the standing rule.

The dissenters in both *Salvucci* and *Rawlings,* Justices Marshall and Brennan, argued two major points. The first is that the "self-incrimination dilemma" relied on in *Jones* may not have been put to rest after all, because the *Simmons* rule against the prosecution's use of suppression hearing testimony for purposes of making its case at trial has not been extended to preclude use of such testimony to impeach the defendant if he

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37. *Id.* at 95; *accord* Alderman v. United States, 394 U.S. 165, 171-74 (1969).
38. 448 U.S. 98 (1980).
39. *See* 448 U.S. at 104.
40. *Id.* at 105; *accord Salvucci,* 448 U.S. at 91; *Rakas,* 439 U.S. at 143.
41. *Salvucci,* 448 U.S. at 92; *Rakas,* 439 U.S. at 142, 147-48.
42. *Salvucci,* 448 U.S. at 92.

takes the stand.[43] The *Salvucci* majority declined to decide whether this "use immunity" extends beyond the prosecution's case-in-chief to preclude impeachment of the defendant. The majority characterized the issue as more aptly relating "to the proper breadth of the *Simmons* privilege," which it need not then resolve, and declared peremptorily that the issue simply did not relate to the need for retaining automatic standing.[44] The majority hinted in a footnote, however, that it saw no impediment to use of suppression hearing testimony for purposes of impeaching a defendant who elected to take the stand.[45] Moreover, the Court has approved impeachment of a defendant by means of a prior inconsistent statement to police that was inadmissible, under *Miranda v. Arizona*,[46] in the prosecution's case-in-chief.[47] The Court has also approved impeachment of a defendant by means of evidence illegally seized.[48] Thus, the *Salvucci* dissenters' concern appears well founded; the "self-incrimination dilemma" will no longer be viewed by the majority as grounds to preclude the use of suppression hearing testimony for impeachment purposes.

Justice Marshall expressed the dissenters' second misgiving about abandonment of the "automatic standing" rule in *Rawlings v. Kentucky*.[49] In *Rawlings*, the police arrived at a house to serve an arrest warrant on the homeowner. He was not home, but five others were, including visitors Rawlings and Vanessa

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43. *Id.* at 96 (Marshall, J., dissenting).

44. *Id.* at 94.

45. *Id.* at 94 n. 9: "This Court has held that 'the protective shield of *Simmons* is not to be converted into a license for false representations. . . .' United States v. Kahan, 415 U.S. 239, 243 (1974)."

46. 384 U.S. 436 (1966).

47. Harris v. New York, 401 U.S. 222 (1971). Remarkably, Professors White and Greenspan in their article, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 342 (1970), described *Miranda* as stating that

> impeaching statements are incriminating and are, therefore, admissible only if the defendant makes them after effective waiver of his privilege against self-incrimination. *Simmons* holds that a defendant testifying at a hearing on a fourth amendment claim does not waive his privilege. It seems, therefore, that the defendant is protected against *any use* of [suppression hearing] testimony at his trial.

(Emphasis added.) (Footnotes omitted.) The rationale of *Miranda* was sharply curtailed in *Harris v. New York* in a way that was not foreseen by these commentators.

48. United States v. Havens, 446 U.S. 620 (1980). In *Havens*, a defendant testified he had nothing to do with a cocaine smuggling incident. The Supreme Court approved the impeachment of his credibility by means of physical evidence that was obtained by an illegal search and seizure.

49. 448 U.S. 98 (1980).

Cox. While searching the house for the owner, several officers detected marijuana smoke and seeds. Two officers left to get a search warrant while others stayed behind with the occupants. The police returned 45 minutes later with a warrant and ordered Cox to empty the contents of her purse. The purse contained large quantities of illegal drugs that Rawlings had placed in it just before the police arrived. As Cox poured the drugs out onto a coffee table, she turned to Rawlings and told him to "take what was his." Rawlings immediately claimed ownership of the drugs.[49.1] The Supreme Court held that Rawlings lacked standing to challenge the search because he had no legitimate expectation of privacy in Cox's purse.[49.2] The *Rawlings* dissenters proceeded on the understanding that the defendants in *Rakas* had not claimed fourth amendment protection based on automatic standing or on their actual possessory interest in the items seized, but had argued they had standing simply because they were "legitimately on the premises."[50] The dissenters contended that since *Rakas* did not address the *Jones* automatic standing rule and did not preclude standing based on one's possessory interest in the items seized, but was confined to overruling the "legitimately on the premises" alternative holding of *Jones*, the *Rakas* decision simply did not support the rationale of the *Rawlings* majority.[51]

The *Rawlings* dissenters appear to have read *Rakas* far too narrowly. Justice Rehnquist, writing for the *Rawlings* majority,[52] noted that *Rakas* had "abandoned a separate inquiry into a defendant's 'standing' to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a 'legitimate expectation of privacy' in the area searched. See *Katz v. United States*, 389 U.S. 347 (1967)."[53] Furthermore, the majority held that the defendant after *Rakas* "bears the burden of proving not only that the search of [Vanessa] Cox's purse was illegal, but also that he [Rawlings] had a legitimate expectation of privacy in

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49.1 *Id.* at 100-01.

49.2 *Id.* at 104-06.

50. *Id.* at 114-15.

51. *Id.* at 115.

52. Justice Rehnquist wrote the majority opinions in *Rakas*, *Rawlings*, and *Salvucci*. *See supra* note 35.

53. 448 U.S. at 104.

that purse."[54] The *Rawlings* majority, relying on *Rakas*, explicitly rejected the notion that a defendant's claim of ownership of the items seized is determinative. Rather, the defendant's legitimate expectation of privacy in the area searched is the key regardless of who owns or possesses the property.[55]

A close reading of *Rakas* supports Justice Rehnquist's interpretation of it. The fact is that *Rakas* completely abandoned the idea that a determination of "standing" could be made apart from an inquiry into whether the search and seizure at issue infringed a fourth amendment interest of the accused.[56] Thus, not only did *Rakas* overrule the "legitimately on the premises" aspect of *Jones*, but it entirely refocused the inquiry to be pursued whenever a defendant seeks to suppress evidence seized as a result of an allegedly illegal search.[57] The interest at stake and which the defendant must show, as announced by *Rakas*[58] and reaffirmed by *Salvucci*,[59] is whether the "person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." To the extent the dissenters in *Salvucci/Rawlings* persist in inquiring into a defendant's "standing" based on his ownership of or possessory interest in the items seized,[60] they are trying to close the barn door after the horse is loose. Those concepts, it is clear, are no longer determinative.

In *Salvucci*, the Supreme Court completed its inexorable march towards overruling the "automatic standing" rule. In

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54. *Id.*

55. *Id.* at 105-06.

56. 439 U.S. at 140. *See supra* note 25, and accompanying text.

57. The refocusing of the inquiry was presaged in Mancusi v. DeForte, 392 U.S. 364 (1968), in which Justice Harlan—writing for a 6-to-3 majority that included, incidentally, Justices Brennan and Marshall—stated:

> In *Jones* . . . we held that 'anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him.' The Court's recent decision in *Katz v. United States* also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.

Id. at 368 (citations omitted).

58. 439 U.S. at 143 (citing Katz v. United States, 389 U.S. 347 (1967)).

59. 448 U.S. at 91-93.

60. 448 U.S. at 116-18. Some commentators have joined in the dissenters' criticism of the majority for its abandonment of property ownership or possessory interest "as the core of the protection of privacy" by the fourth amendment. *See, e.g., The Supreme Court, 1979 Term*, 94 HARV. L. REV. 196, 203 (1980).

Rawlings the Court also made clear its departure from traditional considerations of standing when deciding whether a defendant will be heard to complain about the admissibility of illicit goods he is accused of possessing. Courts now must examine a defendant's legitimate expectation of privacy on a case-by-case basis under the fourth amendment. And yet the cases have come full circle, in a way, since *Jones*. The Court's new doctrine, born of a desire to limit the exclusionary rule,[61] focuses the fourth amendment right back where *Jones* placed it: "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."[62]

E. The Washington Approach: "Automatic Standing" is Retained Under the State Constitution

The Washington Supreme Court promptly adopted the *Jones* automatic standing rule. In *State v. Michaels*,[63] the state argued that the defendant, who was driving a car that police searched illegally, lacked standing to challenge the search because he did not own the car. The *Michaels* court declared that the Washington Constitution and the Constitution of the United States do not protect only those who have legal title to the premises searched.[64] The court explicitly relied on the "legitimately-on-premises" rule of *Jones* and endorsed the rationale of the automatic standing doctrine, in holding that Michaels did have standing.[65]

Michaels remained the rule in Washington until *State v. Simpson*,[66] a 1980 case decided only six months after *Salvucci* and *Rawlings*. *Simpson* involved the police arrest of a man wanted on a felony warrant. The officers waited for the suspect at his home and placed him under arrest after he arrived in a pickup truck.[67] One officer thought the truck (which had big tires, mag wheels, and two beer decals in the back window) "did

61. *See Rakas*, 439 U.S. at 137.
62. *Jones*, 362 U.S. at 261.
63. 60 Wash. 2d 638, 374 P.2d 989 (1962).
64. *Id.* at 646, 374 P.2d at 993.
65. *Id.* at 646-47, 374 P.2d at 993.
66. 95 Wash. 2d 170, 622 P.2d 1199 (1980).
67. *Id.* at 172, 622 P.2d at 1202.

not match" the arrestee and radioed for a registration check.[68] The policemen then took the arrestee to jail, where they learned that the license plate was not assigned to that truck and concluded that either the plate or the truck was stolen. The officers returned to impound the truck and noticed it had no front license plate. They used the arrestee's key to unlock the truck to ascertain the vehicle identification number. They used that number to run another check and confirmed that the truck was stolen. They then read the arrestee his *Miranda* rights, questioned him, and obtained his admission that he had bought the truck knowing it was stolen.[69] Before trial the defendant moved to suppress both the evidence derived from the vehicle identification number and his incriminating statements to the police. The prosecution challenged his standing to move for suppression of the evidence.

The *Simpson* majority[70] conceded that *Salvucci* had recently overruled *Jones* and abolished the fourth amendment standing rule. The majority, however, fixed upon the terse language of the Washington Constitution search and seizure provision, which provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[71] Declaring that the court could interpret the state constitution as conferring a higher degree of protection than is provided by the federal constitution,[72] the *Simpson* court held that the *Michaels* automatic standing rule would be continued under the banner of the Washington Constitution.[73] The court based its retention of the automatic standing doctrine partially upon the state constitution's "privacy clause,"[74] but principally upon the self-incrimi-

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68. The officer thought the arrestee was older than one likely to own such a truck. *Id.* at 173, 622 P.2d at 1202.

69. *Id.*

70. Justice Williams wrote the lead opinion in which three others concurred. The term "majority" is used to describe this opinion, despite the fact that it represents the views of only four Justices. Justice Utter concurred separately. Justice Horowitz wrote a dissenting opinion on behalf of two other dissenters. Justice Stafford did not participate in the decision.

71. WASH. CONST. art. I, § 7.

72. 95 Wash. 2d at 178, 622 P.2d at 1205.

73. *Id.* at 181, 622 P.2d at 1206.

74. *Id.* at 179-81, 622 P.2d at 1205-06. The court appears not to have relied on the second *Jones* factor, that of prosecutorial self-contradiction. *Id.* at 179, 622 P.2d at 1205. As regards that factor *see* White & Greenspan, *supra* note 47, at 343 where the authors state:

> [N]o Supreme Court case has ever suggested that the state government may not attempt to gain a conviction by asserting inconsistent positions at two sep-

nation dilemma which it found was still present due to possible impeachment use of suppression hearing testimony. The court reasoned that, since possession was an essential element of the offense and the defendant had possession at the time of the contested search, he was entitled to the full protection of the automatic standing doctrine.[75] As a matter of the doctrine's federal application the exclusionary rule would be available if a person (1) was charged with an offense, one element of which was possession of an item at the time of the search, and (2) was able to show that the search and seizure was unconstitutional.[76]

Then, having found that defendant Simpson had automatic standing to move to suppress the evidence proffered against him, the majority nevertheless proceeded to address the State's argument that Simpson had no legitimate expectation of privacy in the vehicle identification number. The argument was premised upon the idea that a defendant "who has acquired automatic standing in effect stands in the shoes of an individual properly in possession of the property," so the court felt obliged to inquire whether a rightful possessor of the truck could have had a legitimate expectation of privacy in the identification number, making a search warrant necessary.[77] The majority found that Simpson had such an expectation of privacy in the stolen truck's identification number, and that the warrantless search was unlawful.[78]

The dissenters in *Simpson*, in an opinion written by Justice Horowitz, argued that the Washington courts had always interpreted the state's constitutional search and seizure provision identically to the federal fourth amendment;[79] that the *Michaels* court's adoption of automatic standing was based solely on the *federal* constitutional analysis of *Jones*;[80] and that, as *Salvucci* makes clear, the possible impeachment use of suppression hearing testimony

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> arate stages in the criminal process. Thus, [this] rationale would probably support the retention of the "standing to avoid the dilemma" principle only in federal cases.

(Footnote omitted).

75. 95 Wash. 2d at 181-82, 622 P.2d at 1207.

76. *Salvucci*, 448 U.S. at 87; United States v. Oates, 560 F.2d 45, 52-56 (2d Cir. 1977); United States v. Delguyd, 542 F.2d 346, 350 (6th Cir. 1976).

77. 95 Wash. 2d at 182, 622 P.2d at 1207.

78. *Id.* at 188, 192, 622 P.2d at 1210, 1212.

79. *Id.* at 195-96, 622 P.2d at 1214-15.

80. *Id.* at 196, 622 P.2d at 1215.

> has no place in the decision to extend or abandon the automatic standing rule. . . . The automatic standing doctrine was never intended as a "license to lie" for the defendant; it was not developed to allow the defendant to perjure himself without sanction or consequence. . . . The challenge to the veracity of the defendant as a witness is a procedural matter which is irrelevant to the establishment of his substantive Fourth Amendment rights under the automatic standing doctrine.[81]

The dissenters went on to accuse the majority of being result oriented rather than "principled" in its interpretation of the state constitution in a manner inconsistent with the Supreme Court's interpretation of the federal constitution.[82]

Although the automatic standing rule of *Jones* seems dead in the federal courts after *Salvucci*, the Washington Supreme Court has retained the rule. While choosing to depart from *Salvucci* and to retain the automatic standing rule in Washington, the Washington Supreme Court implicitly found that a thief can have a legitimate expectation of privacy in the item he has stolen[83] and that the possibility of impeaching him with his words spoken at a suppression hearing provides—*Salvucci* notwithstanding—a "continuing policy basis" for adherence to the

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81. *Id.* at 198-99, 622 P.2d at 1216.

82. *Id.* at 199-202, 622 P.2d at 1216-18. *See* Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

83. *Cf.* Rakas v. Illinois, 439 U.S. 128, 141 n.9 (1978):

> The Court in *Jones* was quite careful to note that "wrongful" presence at the scene of a search would not enable a defendant to object to the legality of the search. 362 U.S. at 267. The Court stated: "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. *This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched." Ibid.* (Emphasis added). Despite this clear statement in *Jones*, several lower courts inexplicably have held that a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile. *See, e.g., Cotton v. United States*, 371 F.2d 385 (CA9 1967); *Simpson v. United States*, 346 F.2d 291 (CA10 1965).

(Emphasis in original.) *See also Rakas*, 439 U.S. at 143 n.12:

> A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence, in the words of *Jones*, 362 U.S., at 267, is "wrongful"; his expectation is not "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring).

automatic standing rule.[84]

The lesson for defense counsel in Washington courts is clear: When seeking to establish standing in a suppression hearing for a client charged with possessing the article sought to be suppressed, the defense should rely upon Washington Constitution article I, section 7. The fourth amendment will not be sufficient unless the accused can show a legitimate expectation of privacy in the place searched.[85]

PART II

A. The Concept of Standing in Light of the Purposes of the Exclusionary Rule

Against the foregoing background, it is possible to examine the various opinions of the United States Supreme Court in search of a coherent rationale for rules of "standing" to invoke the exclusionary rule.[86] On the assumption that a rule of judge-made law ought to be interpreted in order to advance its purposes, we turn to the various purposes articulated in justification of the exclusionary rule. And it is clear that the preeminent purpose is the deterrence of official misconduct.[87] The application of the rule is designed to remove any incentive for law enforcement officials to commit unlawful searches or seizures by insuring that the product thereof cannot be admitted in evidence by the prosecution in criminal cases. It serves to "punish" erring police officers as well, by frustrating their presumed vital interest in obtaining convictions, through making such convictions difficult or impossible where the officers have misconducted themselves.

The "negative side effect" of the exclusionary rule, an effect

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84. 95 Wash. 2d at 179-81, 622 P.2d at 1206.

85. *Simpson*, 95 Wash. 2d at 178, 622 P.2d at 1205, cites Alaska (State v. Glass, 583 P.2d 872 (Alaska 1978)), and Montana (State v. Brackman, 178 Mont. 105, 582 P.2d 1216 (1978)), as other states which have held that their own constitutions provide a higher degree of protection in search and seizure cases than does the fourth amendment.

86. "Standing," incidentally, is a useful term, despite the United States Supreme Court's asseverations of its obsolescence, and will be used in the following analysis.

87. This is the only purpose cited in either *Rakas*, 439 U.S. at 134 n.3, or *Simpson*, 95 Wash. 2d at 180, 622 P.2d at 1206, for the exclusionary rule. The deterrent purpose of the rule is also the linchpin of Stone v. Powell, 428 U.S. 465 (1976), and Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, the Court even shaped substantive fourth amendment law on the premise of the rule's deterrent purpose and the need to articulate principles of police conduct that could reasonably be expected to influence police behavior. A secondary purpose advanced for the exclusionary rule will be discussed *infra* notes 101-03 and accompanying text.

always emphasized in opinions limiting the rule's scope, is the fact that it excludes relevant and probative evidence and thus hampers the search for truth.[88] This means that guilty people sometimes go free. As will be seen, judicial concern over the negative social consequences of the exclusionary rule is the apparent explanation for development of the rule along lines sometimes inconsistent with its purposes.

But it is at once clear that any sort of standing requirement is at odds with the deterrent purpose of the exclusionary rule. It was early recognized by the great Justice Roger J. Traynor of the California Supreme Court that full deterrent efficacy of the rule requires that the prosecution be prevented from using illegally obtained evidence, regardless of the person against whom it is offered.[89] Accordingly, that court adopted the rule that any person against whom such evidence is offered can complain of the manner in which it was obtained, regardless of whether his own fourth amendment rights were violated.[90]

The United States Supreme Court, however, has neither accepted nor seriously attempted to refute the logic of this posi-

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88. *See, e.g., Rakas*, 439 U.S. at 137.

The disadvantage of the exclusionary rule—freeing the guilty—is obvious. The best argument for its deterrent rationale is that other methods of enforcing fourth amendment rights are predictably or demonstrably ineffective. A central premise of Mapp v. Ohio, 367 U.S. 643 (1961), was that methods less destructive of the truth determining process had clearly proved inefficacious. The exclusionary rule is effective because, and to the extent, that it causes sanctions to be invoked at the instance of a party to litigation, with much at stake. By contrast, juries and even administrative agencies are unlikely to become sufficiently upset at police conduct which has resulted in uncovering serious crime to impose meaningful sanctions in the nature of civil damages or officer reprimands. The Chief Justice of the United States has proposed creation of an impartial quasi-judicial tribunal to administer damage suits based on fourth amendment violations. The effectiveness of such a remedy is obviously a matter of hopeful speculation. And the Chief Justice would not abandon the exclusionary rule absent implementation of an equally effective remedy. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 412-24 (1971) (Burger, C.J., dissenting).

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

90. *Id.* This theory was found persuasive by the reporters of the *Model Code of Pre-Arraignment Procedure* and initially adopted by the American Law Institute. Ultimately, the Institute adopted an extremely loose standing requirement. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.1(5) commentary at 217-18 (1975).

Ironically, the California rule may have been jettisoned by the voters of that state. Proposition 8, adopted by the California electorate in June, 1982, purports to work massive changes in California criminal procedure, including the abolition of search and seizure rules not mandated by the federal constitution. The validity of this measure under state law is in question and will eventually be adjudicated by the California Supreme Court. *See* Uelman, *Proposition 8 Casts Uncertainty Over Vast Areas of Criminal Law*, CALIF. LAW. July-Aug., 1982, at 43.

tion. Its reasoning is illustrated by the following quotation:

> The necessity for a showing of a violation of personal rights is not obviated by recognizing the deterrent purpose of the exclusionary rule, *Alderman v. United States*, [394 U.S.] at 174. Despite the deterrent aim of the exclusionary rule, we never have held that unlawfully seized evidence is inadmissible in all proceedings or against all persons.[91]

Rather, logic appears to be tempered by a purely pragmatic desire to limit the scope of the exclusionary rule in order to avoid paying the considerable social costs which it exacts. The Court appears to be gambling on the notion that it can preserve the deterrent efficacy of the rule while paying the price of its application in ever-fewer situations. The Court has stated:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.[92]

Similar reasoning was applied in *Stone v. Powell*,[93] in which the Court refused, in general, to recognize search-and-seizure claims on collateral attack, on the theory that sufficient deterrence was provided by allowing their assertion at trial and on direct appeal.

Whatever the merit of *Stone v. Powell*, which did not involve "standing," the concepts of standing and deterrence are demonstrably incompatible. Deterrence is based on the vindication of a public interest; to allow its vindication only by a personally aggrieved private individual is to ensure that its vindication will be haphazard at best, and to guarantee the long term impairment of that public interest.

In *Rakas*, nonetheless, after beginning with the well-worn notion that the purpose of the exclusionary rule is deterrence, the Court advanced to the highly questionable assumption that

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91. *Rakas*, 439 U.S. at 134 n.3.
92. *Id.* at 137 (quoting Alderman v. United States, 394 U.S. 165, 174-75 (1969)).
93. 428 U.S. 465 (1976).

effective deterrence would survive the *Rakas* rule itself which, as the dissenters pointedly noted, would give the unscrupulous police officer every incentive to "engage in patently unreasonable searches every time an automobile contains more than one occupant."[94]

To this point, of course, the entire area of deterrence was speculative. The Court speculated that it could retain deterrence while making encroachments on the sanctions available for fourth amendment violations. Skeptics speculated that police would be quick to identify and seize upon the loopholes created by the Court's restrictions on available remedies.[95] Such speculation was to be expected. The efficacy of deterrence under any circumstances is more a matter of faith than hard data, a faith resting on rational assumptions, such as that people can be counted upon to identify and act upon their own enlightened self-interest. The criminal law is built in part upon a foundation of faith in deterrence—a faith often as touching as that of preliterate peoples who observe a third year of drought by increasingly frenzied rainmaking ceremonies. Curiously, the exclusionary rule itself is the product of speculation concerning deterrence: judicial speculation that the occasional inability of the law to convict the guilty, resulting from suppression of evidence obtained in violation of the Constitution, would not impair the general deterrent efficacy of the criminal law. This kind of speculation is as old as civilization, being manifested in the ancient practice of decimation, under which every tenth member of a deserting military unit was executed, as an example to other cohorts. The king speculated that random punishment would have the necessary *in terrorem* effect; he had no choice, the alternative of executing all of the guilty being infeasible.

The Court's speculative, not to say gambling, approach to deterrence of official misconduct became somewhat informed by the facts of *United States v. Payner*.[96] Payner was convicted of filing a false income tax return. The return denied that he maintained a foreign bank account. The Internal Revenue Service knew that he did have a foreign bank account, having gleaned that information from an examination of the papers of one Wolstencroft, a Bahamian banker. The IRS had photographed Wol-

94. 439 U.S. at 168.
95. *See Id.* at 168-69 (White, J., dissenting).
96. 447 U.S. 727 (1980).

stencroft's papers after having removed them (with the aid of a trustworthy locksmith) from the banker's locked briefcase. The briefcase had been borrowed from the apartment of a private investigator employed by one Jaffe, an IRS agent, while the banker and the investigator were at dinner. The district court found that

> the United States, acting through Jaffe, "knowingly and willfully participated in the unlawful seizure of Michael Wolstencroft's briefcase. . . ." According to that court, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties. . . ."[97]

Faced with conclusive evidence that the United States government consciously used the standing rules developed by the Supreme Court as a way to commit flagrant constitutional violations without sanction of any sort, the Court unanimously declined to reconsider, or even to question, its holding that fourth amendment rights may be asserted only by those whose legitimate expectations of privacy have been violated. The only real issue in the case was whether the supervisory powers of the federal courts could be used as a device for denying admission of the evidence obtained through a violation of a third person's constitutional rights. By a vote of six to three, the Court answered in the negative. Although three justices thought that a nonconstitutional remedy should be provided to deter such grossly illegal bad-faith searches and seizures, it is worth repeating that none of the justices questioned the basic notion that suppression of evidence may be had, on constitutional grounds, only by the victims of constitutional violations. At this point, no justice of the United States Supreme Court has expressly either acknowledged or refuted the basic logic of the California position: that effective deterrence of constitutional violations requires that illegally obtained evidence be excluded at the instance of any person against whom it is offered.

Another consideration, entirely unspoken but perhaps more persuasive than the idea that deterrence may be had despite the existence of loopholes the size of quarries, is the idea that unrestricted use of the exclusionary rule actually inhibits its

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97. *Id.* at 730.

deterrent function. Under this theory, it is recognized that the exclusionary rule gives ample incentive to criminal defendants to raise every conceivable search and seizure claim. The resultant case-by-case determination of the meaning of such terms as "unreasonable searches and seizures" and "probable cause" has given the fourth amendment a bewildering complexity, far beyond the ability of even increasingly sophisticated law enforcement officers to cope with. By making compliance with fourth amendment guarantees impossible even for the usual officer who acts in good faith, the exclusionary rule is actually counterproductive. The officers are tempted, understandably, to throw up their hands at the legal complexities and plow ahead with whatever techniques will incriminate the suspect, hoping that the prosecutor will find a way to justify their actions in court. Whatever the accuracy of this theory, the Supreme Court is not likely to acknowledge it, bearing as it does ultimate responsibility for the present state of constitutional law.[98] Yet, to engage further in a personal speculation, this unarticulated, unacknowledged principle may in fact animate the Supreme Court's present eagerness to restrict application of the exclusionary rule.

On the other hand, the Court may simply have decided that deterrence of fourth amendment violations is not worth the substantial social costs entailed by exclusion of illegally obtained evidence. As the Court has stated: "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected."[99] But that view would call for reexamination of the entire exclusionary rule, a task which the Court is clearly unwilling to undertake.[100] Whatever the explanation, it is difficult to reconcile the *Rakas/Salvucci* doctrine with any serious judicial commitment to the idea of deterring official misconduct.

The Supreme Court has, on occasion, identified a second purpose of the exclusionary rule: to protect judicial integrity.[101]

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98. The Court has shown some tendency to opt for understandable rules at the expense of theoretical consistency. *See* New York v. Belton, 453 U.S. 454 (1981). But it has not seen fit to blame the exclusionary rule for the complexities of substantive fourth amendment law.

99. Rakas v. Illinois, 439 U.S. 128, 137 (1978).

100. New York v. Belton, 453 U.S. 454, 463 (1981) (Rehnquist, J., concurring).

101. United States v. Payner, 447 U.S. 727, 735-36 n.8 (1980); Stone v. Powell, 428

The courts, it is reasoned, become parties to official misconduct when they allow the use of evidence obtained through such misconduct.[102] This idea is both appealing and high-minded. Fulfillment of this noble purpose would, of course, dictate that any sort of standing requirement be abandoned. Judicial integrity, after all, is sullied by the admission of any illegally obtained evidence, no matter who was victimized by the illegality. Any standing rule would undermine this splendid purpose.

But "judicial integrity," where mentioned at all, is always listed as a secondary rationale of the exclusionary rule.[103] No case suggests that it is by itself sufficient to justify operation of the rule.

More to the point, the protection of judicial integrity can hardly be taken seriously as a basis for the exclusionary rule. No discernible principle would justify the protection of judicial integrity only within the perimeters in which the exclusionary rule has operated or, in the judgment of its most vocal proponents, ought to operate. "Judicial integrity" would logically require exclusion of all evidence obtained in violation of the fourth amendment, including exculpatory evidence illegally obtained by the government and turned over to the defense by the prosecution. It would encompass evidence obtained in violation of any constitutional provision. And it would require the exclusion of any evidence, in any kind of case, tainted by any sort of illegality. Moreover, "judicial integrity" could scarcely rely on the adversary system to ferret out illegality in the obtaining of evidence. The court itself would be obliged to examine closely any evidence offered in order to ensure the cleanness of its hands. In short, "judicial integrity" is an unworkable exclusionary rule rationale, which must sadly be disregarded.

B. Simpson *and the Purposes of the Exclusionary Rule*

It is inescapable that the Washington Supreme Court is more faithful than the United States Supreme Court to the stated purposes of the exclusionary rule. Both deterrence of official misconduct and protection of judicial integrity are served by maximizing the number of persons allowed to complain of

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U.S. 465, 485 (1976).

102. *See* People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955).

103. *See* cases cited *supra* note 101.

unlawful searches or seizures. And by retaining the automatic standing rule, the Washington court clearly expands the class of complainants.

Nor does the automatic standing rule foster deterrence merely by maximizing the number of instances in which official misconduct will be punished. It operates to deter certain kinds of police behavior. Since the rule gives standing to complain of a seizure to anyone charged with possession of a seized item at the time of the seizure,[104] a police officer contemplating seizure of contraband, stolen property, or anything else likely to be the subject of a possessory offense, can assume that the prosecution of at least one possessor would be jeopardized by the seizure's illegality. Under *Rakas/Salvucci*, by contrast, a police officer may be aware that an unlawful search or seizure might not violate the legitimate expectation of privacy of any potential defendant.[105]

The idea of deterrence was one of the express rationales behind the *Simpson* opinion.[106] It is the strongest of those rationales. The argument that automatic standing must be retained to prevent the prosecution from using defendant's statement, made to establish "standing," from being used to impeach him,[107] is met by the availability of a more surgically precise remedy—interpreting the Washington Constitution to prohibit such use. The court's opting to retain automatic standing springs from sounder principles, including deterrence. *Simpson's* deterrence rationale can be seen as lacking in theoretical purity in that the decision's advancement of the deterrent function is limited. Nothing short of the California "vicarious exclusionary rule" would provide the maximum deterrent effect necessary to prevent atrocities such as that described in *Payner*.[107.1] But to say that is not to criticize the *Simpson* opinion. For that

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104. United States v. Salvucci, 448 U.S. 83, 87 n.3 (1980); Brown v. United States, 411 U.S. 223, 229 (1973).

105. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980), in which Rawlings, by dumping his "stash" of controlled substances into the purse of a female companion, forfeited his legitimate expectation of privacy in the purse, and thus his right to complain of the search of it. His admission of possession, however, was enough to sustain his conviction. In *Salvucci* itself, the search of which defendants complained took place in an apartment rented by the wife of one of them. In each case, if the police could have ascertained in advance, or gambled, that the person whose rights they planned to violate was not a likely defendant, the exclusionary rule would not have prevented the violation.

106. State v. Simpson, 95 Wash. 2d 170, 180, 622 P.2d 1199, 1206 (1980).

107. *Id.*

107.1 *See supra* note 97 and accompanying text.

decision is based in part on what has become a rather quaint, though not altogether obsolete, principle—stare decisis. Automatic standing had been part of Washington law since 1962,[108] and although it was originally adopted under the compulsion of a federal rule that disappeared with *Salvucci*, the *Simpson* plurality was surely entitled to conclude, as it did, that the rule had "served our state well for 17 [sic] years"[109] and need not be abandoned absent better reasons than *Rakas/Salvucci's idee fixe* that all search and seizure questions boil down to whether a defendant's legitimate expectation of privacy has been violated. Preservation of the status quo from the radical change of United States Supreme Court jurisprudence is hardly an illegitimate state court function.

All that aside, however, the Washington Supreme Court ought to give due and reasoned consideration to the inherent tension between any sort of "standing" requirement in search and seizure cases and the declared exclusionary rule purposes of deterring official misconduct and promoting judicial integrity. As long as it proclaims those purposes, it ought to resort to them unequivocally in justifying any adjective rules it adopts for the resolution of search and seizure issues.

C. Washington—Cradle of a New Search and Seizure Theory?

Simpson represents a not-too-gingerly step by the Washington Supreme Court into what has been called the "new federalism"—the interpretation of state constitutional provisions, where permissible, differently from their federal constitutional analogs.[110] In the process of such interpretation, state courts enjoy an exhilarating, even intoxicating freedom. This freedom is restricted on the one side by the demands of the judicial process for rational decision making, and on the other—especially in Washington, a state with an elected judiciary and initiative constitutional amendments—by democratic realities. Any effective decision must be persuasive to the legal community and palatable to the concerned lay citizen.

The *Simpson* dissenters' criticism of the majority opinion as

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108. State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962).

109. 95 Wash. 2d at 181, 622 P.2d at 1206.

110. *See supra* note 82 and Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974).

insufficiently guided by "principle" in its interpretation of article I, section 7 of the Washington Constitution[111] is somewhat wide of the mark. If "principle" means "fully developed jurisprudence," there is some validity to the charge. But Anglo-American jurisprudence tends to develop in the wake of cases decided on ad hoc bases.[112] "Principle" to the dissenters equates with a justification for refusal to follow the lead of the United States Supreme Court. The dissenters would accord decisions of that body a presumption of correctness and place a heavy burden of rebuttal on those who would have the temerity to suggest a different approach.[113] This view, it is submitted, is admirable in the abstract, but untenable when applied to the concrete situation of the exclusionary rule.

This article has already demonstrated the unwillingness of the United State Supreme Court to apply the exclusionary rule in accordance with its declared purposes. It is difficult to give any weight to a line of cases supported by no principle other than *ipse dixit,* even if handed down by the final arbiter of the federal constitution. Subject to the constraints mentioned above, a state court should feel entirely free, if it has the requisite creative energy, to develop its own theories of reasoned interpretation of its own constitutional provisions—regardless of their linguistic resemblance, or lack thereof, to federal cognates—giving United States Supreme Court decisions such weight, if any, as their persuasive effect dictates.[114] To the extent that the Washington Supreme Court undertakes such development it will be free from the charge of result-oriented reaction to federal decisions.[115]

There are several different possible approaches to applying article I, section 7. One is to write off the exclusionary rule altogether, as a costly, noble experiment that failed to produce its promised pragmatic results.[116] But the Washington courts have

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111. *See* Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution,* 29 STAN. L. REV. 97 (1977).

112. *Cf.* Mr. Justice Holmes' celebrated cliche: "The life of the law has not been logic; it has been experience." O. HOLMES, THE COMMON LAW 5 (1880).

113. *See* State v. Simpson, 95 Wash. 2d 170, 199-202, 622 P.2d 1199, 1216-18 (1980).

114. *See* Falk, *The Supreme Court of California 1971-72, Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 CALIF. L. REV. 273 (1973).

115. *See* State v. Simpson, 95 Wash. 2d at 199, 622 P.2d at 1216.

116. *Cf.* the dissenting opinion of Chief Justice Burger in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 412-24 (1971).

shown no disposition to take this course, and there is little point in exploring it further. Another is to recognize deterrence as the purpose of the rule and build a jurisprudence by constant recurrence to that purpose. This approach would be reasonable if based on significant evidence that the exclusionary rule really does deter official misconduct. However difficult it may be to find hard evidence of such deterrent effect, *Payner* stands as a reminder of the consequences of relaxing the rule.

But there is another approach, one toward which the Washington Supreme Court appears to be moving. Quite simply, this approach would recognize the exclusionary rule as a moral imperative, not dependent upon any pragmatic justification. The court's movement toward this view is manifested in a recent Washington case, *State v. White*,[117] which, superficially, has nothing to do with standing. In that case, police made an arrest pursuant to a statute which the Washington Supreme Court held unconstitutionally vague. Since that holding rendered the arrest invalid, the issue was whether the fruit of the invalid arrest—in this case, a confession and certain seized goods—should be suppressed. The court held that it should be. But in reaching that conclusion, the court had to deal with the case of *Michigan v. DeFillippo*.[118]

On similar facts, the United States Supreme Court in *DeFillippo* refused to suppress the fruit of an unlawful arrest. It reasoned that, since the statute had never before been invalidated, it was presumptively valid. Police officers could not be expected, and should not be encouraged, to make their own determinations of the validity of duly-enacted statutes. Since police could not be deterred from making arrests under presumptively valid statutes, the deterrent purpose of the exclusionary rule would not be served by suppression. The Washington Supreme Court rejected this reasoning on three grounds: (1) The Washington statute was "flagrantly unconstitutional," and thus came within language in *DeFillippo* suggesting that suppression would be proper where a reasonable police officer should appreciate the statute's invalidity;[119] (2) even though police might not be deterred from arresting in like circumstances, legislatures could and should be deterred from enacting

117. 97 Wash. 2d 92, 640 P.2d 1061 (1982).
118. 443 U.S. 31 (1979).
119. 97 Wash. 2d at 102-04, 640 P.2d at 1067-68.

such statutes;[120] and (3) pursuant to the mandate of the Washington Constitution. In the court's own words:

> The result reached by the United States Supreme Court in *DeFillippo* is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be served. This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable governmental intrusions. Const. art. 1, § 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.[121]

From these observations it is but a short step toward a reexamination of the entire utilitarian jurisprudence on which the United States Supreme Court has based its development of the exclusionary rule. The Court has approached the enforcement of the fourth amendment in the same spirit as contemporary—and often ancient—lawyers approach the enforcement of the criminal law: as an effort to control human conduct through the threatened or actual imposition of sanctions.[122] These sanctions (punishment of a criminal, or exclusion of probative evidence offered in a criminal trial) being costly, they are to be imposed only when their social benefits clearly outweigh their costs.[123] The pragmatic effort to control conduct utterly supplants concern with the moral principles underlying, respectively, the criminal law and the fourth amendment. The idea of punishing violators of these principles simply because they are violators is thought pointless at best and barbaric at worst, since it would involve the imposition of social costs without corresponding benefits. Under such utilitarian jurisprudence, morality becomes irrelevant and the enforcement of law becomes divorced from the idea of justice.[124]

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120. *Id.* at 105-08, 640 P.2d at 1068-70.

121. *Id.* at 109-10, 640 P.2d at 1070-71 (footnotes omitted).

122. *See* Commonwealth v. Ritter, 13 Pa. D. & C. 285 (Ct. of Oyer and Terminer, Philadelphia, 1930) (quoting Plato, Seneca, Beccaria, and Hobbes in support of the proposition that punishment is justified only to serve some pragmatic goal). The criminal law, of course, seeks to control conduct not only through the threat of punishment, but also by using punishment for the reform or incapacitation of the offender.

123. *See id.;* Rakas v. Illinois, 439 U.S. 128, 134 n.3 (1978), and cases cited therein.

124. The three modern justifications for criminal punishment are deterrence, restraint, and rehabilitation. Yet deterrence does not require the punishment of the

The efficacy of deterrence in the criminal law, as noted earlier,[125] is suspect and speculative at best. The efficacy of the exclusionary rule in the deterrence of police misconduct is in grave doubt.[126] The idea of deterrence as justifying the exclusionary rule is stretched to the breaking point in most warrant cases, where the person to be deterred turns out to be the magistrate, whose judgment on probable cause does not accord with that of an appellate court. Furthermore, the use of deterrence as a justification for any kind of punishment trivializes and undermines the moral principle which is purportedly being enforced, as those engaged in enforcement speculate on how selective that enforcement may become without sacrificing deterrent efficacy. It is, in other words, time to acknowledge the severe limitations of the deterrent rationale that has long been used to sell the exclusionary rule to a skeptical bar and public.

If the Washington Supreme Court continues its march toward use of the exclusionary rule as a necessary remedy for every unlawful privacy violation that produces evidence offered in Washington courts, it can jettison the increasingly disturbing pretense of deterrence. It can state, with untroubled conscience, that it excludes evidence obtained through privacy violations simply because exclusion is morally right and legally necessary to uphold and vindicate the underlying privacy guarantee. It would have no answer to the pragmatist who would complain of the exclusion of relevant, probative evidence without announced compensating utilitarian justification. It would meet the argument of the angry prosecutor, livid at the freeing of the guilty, only by invoking the principle that privacy is as important as condign punishment (and by pointing out that, had the Constitution been observed, the prosecutor would not have had the evidence in the first place). It may, however, find a surprisingly receptive audience in the lay public, beset by crime and cynical about the exclusion of evidence in the holy name of deterrence—but perhaps able to grasp the simple morality of excluding evidence merely because it is right to redress the violation of

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guilty, but only of someone who can be made to appear guilty. Restraint and rehabilitation require only the identification of someone who needs treatment, not someone who is guilty of a crime. *See* C. S. Lewis, *The Humanitarian Theory of Punishment*, in God in the Dock 287 (1970).

125. *See supra* text accompanying note 95.

126. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 667 (1970).

a constitutional guarantee.

Such a rule would doubtless continue to have some significant deterrent effect. It would offer judicial integrity some comfortable protection. It would enhance the role of government as moral teacher, so eloquently proclaimed by Mr. Justice Brandeis.[127] But these things would no longer be the aim of the exclusionary rule, nor the purposes guiding its interpretation.

Recognition of the exclusionary rule as a moral imperative would provide the basis for interpretation of the rule in such areas as availability of the exclusionary rule on collateral attack[128] and attenuation of "fruit of the poisoned tree."[129] In such cases, it may well result in exclusion of evidence now admitted or granting of remedies now withheld, where the moral principle of the privacy guarantee is deemed sufficiently present.

But what of "standing?" Ironically, rejection of the United States Supreme Court's deterrence rationale and substitution of the principle of the exclusionary rule as a moral imperative would result in giving Washington the very "standing" doctrine expressed in *Rakas/Salvucci*. It is obvious that, with deterrence cast aside as a failed and nonmoral rationale, and "judicial integrity" regrettably abandoned as illusory, the only relevant inquiry becomes one of whether a party's privacy rights were violated. It would truly be immoral, as well as purposeless, to allow a party to receive the windfall benefit of a violation of someone else's rights. Only one who was disturbed in his own private affairs, or whose home has been invaded without authority of law, can properly demand exclusion under article I, section 7 on any but a deterence rationale. Indeed, the point seems to have been implicitly acknowledged in the following language from *White* (which also suggests unarticulated acceptance of the "moral imperative" exclusionary principle):

> We specifically note that this application of the exclusionary rule under Const. art. 1, § 7 will have no effect on our previous cases regarding "standing". [Sic.] Before a defendant has standing to challenge a search or seizure, he must adequately demonstrate that he has a reasonable expectation of privacy which society is prepared to recognize as legitimate. This

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127. Olmstead v. United States, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

128. *See* Stone v. Powell, 428 U.S. 465 (1976).

129. *See* United States v. Ceccolini, 435 U.S. 268 (1978); Wong Sun v. United States, 371 U.S. 471 (1963).

> establishes the "right to privacy" which may or may not give rise to the exclusionary remedy, depending on the circumstances.[130]

Despite the court's first sentence, it is clear that its emerging jurisprudence has profound implications for "standing." It has undermined the *Simpson* plurality's rationale for retaining the automatic standing rule and set the stage for a new and exclusive focus on violation of a particular defendant's legitimate expectation of privacy.

CONCLUSION

It is the proper function of commentators to exhort the judiciary to principled decision making. And it is the task of the courts to decide real cases under real pressures. We have begun with the Washington Supreme Court's rejection of an analytically unsupported, and therefore unpersuasive, opinion of the United States Supreme Court. And we urge the court to undertake development of a thoroughly principled alternative jurisprudence. There are two such alternatives. One proclaims deterrence as the proper purpose of the exclusionary rule, and shapes substantive and adjective search and seizure rules in order to fulfill that purpose. The other regards the exclusionary rule as a moral imperative for the vindication of the underlying constitutional privacy guarantee, requiring no further justification.

The Washington Supreme Court has tried first one, then the other, repudiating neither. At this point it is, in the metaphor of Mr. Justice Harlan, attempting to ride two rather unruly horses at once.[131] This article has indicated a familiarity with both of these fine steeds and a preference for one. The time has arrived for the Washington Supreme Court to place itself firmly astride one of these horses and train it as a worthy, useful, and gentle mount.

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130. 97 Wash. 2d at 110-11 n.9, 640 P.2d at 1071 n.9.

131. Garrity v. New Jersey, 385 U.S. 493, 501 (1967) (Harlan, J., dissenting).