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CRIMINAL PROCEDURE—THE DEMISE OF STANDING TO ASSERT FOURTH AMENDMENT VIOLATIONS—United States v. Salvucci, 448 U.S. 83 (1980)

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CRIMINAL PROCEDURE—THE DEMISE OF STANDING TO ASSERT FOURTH AMENDMENT VIOLATIONS—*United States v. Salvucci*, 448 U.S. 83 (1980).

I. INTRODUCTION

In *United States v. Salvucci*[1] two defendants, John Salvucci and Joseph Zackular, were charged with twelve counts of unlawful possession of stolen mail. Incriminating evidence, consisting of welfare checks and a checkwriting machine, was seized during a search of an apartment rented by Zackular's wife.[2] The search was conducted pursuant to a warrant. Defendants filed a motion to suppress the evidence on the ground that the search warrant had been issued without probable cause.[3] Following the suppression hearing, the United States District Court for the District of Massachusetts held that the affidavit supporting the warrant was defective.[4] The search was found to be unlawful and defendants' motion to suppress was granted.[5]

The prosecution appealed the lower court's suppression order, challenging defendants' standing to assert a fourth amendment violation.[6] The United States Court of Appeals for the First Circuit held that defendants had "automatic standing" to challenge the constitutionality of the search by virtue of their being charged with a possessory offense.[7] The appellate court affirmed the district court's holding.[8]

Traditionally, a defendant was required to show some proprie-

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1. United States v. Salvucci, 559 F.2d 1094 (1st Cir. 1979), *rev'd & remanded*, 448 U.S. 83 (1980).

2. The Supreme Court stated that Zackular's mother's apartment was searched. 448 U.S. at 85.

3. 599 F.2d at 1094-95.

4. *Id.*

5. *Id.* at 1094.

6. *Id.* at 1095.

7. *Id.* at 1097.

8. The fatal defect in the present affidavit is that it does not disclose the date of the conversation overheard by the informant in which Zackular stated that the checkwriter used to print forged checks was being kept in his wife's apartment in Melrose. Without this date, there was no way for the magistrate to determine whether the information was sufficiently timely to support the warrant.

Id. at 1096.

tary or possessory interest either in the premises searched or the items seized before actual standing to assert a fourth amendment claim would be conferred.[9] After a demonstration of the requisite interest, the court would determine whether the search and seizure were unlawful. If a constitutional violation had occurred, its fruits would be barred by the exclusionary rule from admission into evidence.[10]

Jones v. United States,[11] decided in 1960, created an exception to the traditional standing rule. The First Circuit, following *Jones*, held that individuals charged with crimes of possession could challenge the admissibility of seized evidence without proving that their personal fourth amendment rights were violated.[12] Prior to *Jones*, the exclusionary rule was available only when a defendant showed the requisite possessory interest in the confiscated items.[13] When the crime was one of possession, such a showing amounted to a confession of guilt.[14] Thus, defendants were forced to weigh their fourth amendment rights[15] against those granted by the fifth amendment.[16] *Jones* eliminated the proof requirement in such a situation: individuals charged with possessory offenses "automatically" could challenge the constitutionality of a search and seizure.[17]

The First Circuit, though it granted automatic standing to defendants, questioned the vitality of the doctrine in light of a 1968 Supreme Court decision, *Simmons v. United States*.[18] *Simmons* held that testimony proffered in support of a motion to suppress could not be used against a defendant at trial on the issue of

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9. *See* Irvine v. California, 347 U.S. 128, 136 (1954); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932).

10. FED. R. CRIM. P. 41(e) (1972) states: "If the motion [to suppress] is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial."

11. 362 U.S. 257 (1960).

12. 599 F.2d at 1097.

13. *Id.*

14. 362 U.S. at 261-62.

15. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

16. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

17. 362 U.S. at 263-64.

18. 390 U.S. 377 (1968).

guilt.[19] Since *Simmons* barred the introduction of pretrial testimony at the trial on the merits, the self-incrimination dilemma that prompted the Supreme Court to devise automatic standing was no longer a threat. The Supreme Court granted certiorari to *United States v. Salvucci*[20] to determine conclusively the effect that *Simmons* had on automatic standing.

The Court ruled that defendants charged with crimes of possession no longer could invoke automatic standing to challenge the constitutionality of a search and seizure. Justice Rehnquist, writing for the majority, stated without equivocation that the need for automatic standing no longer exists.[21] Following *Simmons*, individuals were freed from the need to weigh their fourth amendment protections against those granted by the fifth amendment. Any testimony or evidence proffered to assert actual standing cannot be admitted at trial.[22]

Justice Marshall, in his dissent to *Salvucci*, pointed out that, although such evidence cannot be admitted at trial, it can be used for impeachment purposes.[23] Further, other language in the majority opinion has ramifications far beyond a fourth versus fifth amendment dilemma. No longer does a claim to possession of the seized good suffice to confer actual standing. The Court focused on "not merely whether the defendant had a possessory interest in the items seized, but whether he had an *expectation of privacy in the area searched.*"[24] The Court has narrowed the class of persons protected by the fourth amendment to those with the requisite interest in the premises searched, not in the items seized. Objections to unreasonable searches and seizures may be raised only by those with a legitimate "expectation of privacy" in the premises.[25]

This "legitimate expectation of privacy" standard was devised in another Supreme Court decision, *Rakas v. Illinois*.[26] In that case, the police searched a motor vehicle in which defendants were passengers and confiscated a rifle and some shells.[27] Defendants

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19. *Id.* at 394.
20. 444 U.S. 989 (1979).
21. United States v. Salvucci, 488 U.S. 83, 95 (1980).
22. *Id.* at 89-90. *See also* Simmons v. United States, 390 U.S. at 394.
23. 448 U.S. at 96.
24. *Id.* at 93 (emphasis added).
25. *Id.*
26. 439 U.S. 128 (1978).
27. *Id.* at 130. Defendants, charged with armed robbery, were indeed the targets of the police search. *Id.* at 169 (White, J. dissenting).

contended that they had standing to object to the search and seizure. The majority held that individuals have standing only when they have "a legitimate expectation of privacy in the invaded place."[28] As mere guests in the automobile, defendants did not have a sufficient interest.[29] In *Rakas*, Justice Rehnquist noted that defendants failed to claim a possessory or proprietary interest in the seized items.[30] In *Salvucci*, he rejected that prong of the standing test: actual standing can be secured only through an expectation of privacy in the area searched.[31]

Justice White, in his dissenting opinion, questioned whether anything short of ownership of the searched vehicle would satisfy the *Rakas* test.[32] Construing a privacy interest in the premises to mean ownership narrows the class of individuals protected by the fourth amendment only to those who hold property. The *Salvucci* decision not only extinguished automatic standing but also heralded the demise of actual standing for a number of individuals subjected to unreasonable searches and seizures.

Salvucci's ramifications will become clear when standing is placed in a historical perspective. The history of standing thus is presented in part II of this note. An analysis of the exclusionary rule and its purpose under the fourth amendment is presented in part III. In part IV, this note concludes by demonstrating how the Supreme Court's narrow definition of fourth amendment standing has deprived a number of individuals of the exclusionary rule's protections.

II. HISTORICAL BACKGROUND

A. *The Exclusionary Rule and the Concept of Standing*

In the 1914 case of *Weeks v. United States*,[33] the Supreme Court established the exclusionary rule for federal criminal proceedings.[34] Evidence secured through an unlawful search and sei-

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28. *Id.* at 143.

29. "They conceded that they did not own the automobile and were simply passengers; the owner of the car had been the driver of the vehicle at the time of the search." *Id.* at 130.

30. *Id.* at 148.

31. 448 U.S. at 93.

32. 439 U.S. at 164-65 (White, J., dissenting).

33. 232 U.S. 383 (1914).

34. In that case, defendant's home was broken into by the authorities and subjected to a warrantless search. Certain of defendant's personal papers were

zure resulted in prejudicial error if admitted at trial in federal court.[35] In 1961 the Court applied the rule to state court proceedings: "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[36] Before a defendant could exclude illegally obtained evidence, he was required to prove that his own fourth amendment rights had been violated. This obliged a defendant to show some proprietary or possessory interest in what was searched or seized.[37] If he could demonstrate the requisite interest in both the area searched and the item seized, almost all courts granted standing. If a defendant could show either, most courts considered him to have standing.[38]

Prior to *Jones*, the law was very unsettled about the degree of interest a defendant needed to gain standing. In determining the sufficiency of a defendant's interest, the courts applied the "sometimes confusing distinctions of the common law on property."[39] In 1934, the Ninth Circuit held that an individual had to be the owner, lessee, or lawful occupant[40] of the searched premises before he could challenge the constitutionality of a search and seizure. In the Second Circuit, however, a guest or employee who dwelled on the premises had standing to object to an unlawful search.[41] The Second and Tenth Circuits were in disagreement as to whether a bailee had the requisite interest to assert standing.[42] The Second Circuit denied standing to an employee whose desk had been subjected to a search.[43] The United States Court of Appeals for the District of Columbia Circuit reached the opposite conclusion.[44] Thus, the law concerning standing, at this time, was unclear.

A possessory interest in the item seized also would be suffi-

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unlawfully confiscated and admitted into evidence against him at trial on charges of lottery offenses. *Id.* at 386-87.

35. *Id.* at 398.

36. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

37. *See* Jones v. United States, 362 U.S. at 261.

38. Griswold, *The Supreme Court 1959 Term*, 74 HARV. L. REV. 81, 152 (1960).

39. Weeks, *Standing To Object In The Field of Search & Seizure*, 6 ARIZ. L. REV. 65, 66 (1964).

40. Kwong How v. United States, 71 F.2d 71, 75 (9th Cir. 1934).

41. Daddio v. United States, 125 F.2d 924, 925 (2d Cir. 1942).

42. *See In re* Number 32 E. 67th St., 96 F.2d 153 (2d Cir. 1938); Lewis v. United States, 92 F.2d 952 (10th Cir. 1937).

43. United States v. Ebeling, 146 F.2d 254 (2d Cir. 1944).

44. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

cient to achieve standing.[45] As the District of Columbia Circuit held in *United States v. Jeffers*,[46] an objection to the admission of evidence could be made on the basis of ownership of the unlawfully seized property. This requirement weighed heavily upon individuals charged with crimes of possession. "At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises."[47] These suspects were pinioned on the horns of a dilemma and, in the words of Judge Learned Hand, could choose only between horns.[48] Individuals could assert a violation of their fourth amendment rights only at the risk of self-incrimination. The courts were wont to read this as an involuntary waiver of fifth amendment protections. Having voluntarily testified at a suppression hearing, a defendant could not object to use of his statements at trial.[49]

In *Jones*, the Supreme Court attempted to resolve this dilemma. The Court granted automatic standing in instances where the indictment itself charged possession since there "the defendant in a very real sense [was] revealed as a 'person aggrieved by an unlawful search and seizure.' "[50] The Court intended to achieve two results by creating automatic standing: To remove the self-incrimination dilemma;[51] and to prevent the prosecution from charging a defendant with possession yet asserting that he lacked enough of a possessory interest to have standing.[52] Out of concern for the plight of such defendants, the Court waived the requirement for a showing of actual standing.[53]

To resolve much of the confusion surrounding actual standing,

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45. *See* Jeffers v. United States, 187 F.2d 498 (D.C. Cir. 1950), *aff'd*, 342 U.S. 48 (1951); Occinto v. United States, 54 F.2d 351 (8th Cir. 1931); Belcher v. United States, 50 F.2d 573 (8th Cir. 1931); Klein v. United States, 14 F.2d 35 (1st Cir. 1926).

46. 187 F.2d 498, 501 (D.C. Cir. 1950), *aff'd*, 342 U.S. 48 (1951).

47. Jones v. United States, 362 U.S. at 262.

48. In Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932), Judge Hand wrote:

> Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.

Id. at 630.

49. Heller v. United States, 57 F.2d 627, 629 (7th Cir.), *cert. denied*, 286 U.S. 567 (1932).

50. 362 U.S. at 264.

51. *Id.* at 262.

52. *Id* at 263.

53. *Id.*

the *Jones* Court disregarded the property law concepts establishing an interest in the premises searched and created a new standard: "anyone legitimately on the premises"[54] during a search could challenge the search's legality through a motion to suppress. Thus, *Jones* held that defendants charged with possessory offenses had automatic standing to challenge the lawfulness of a search and seizure. In addition, defendants charged with any crime had a sufficient interest in the searched premises to attain actual standing if legitimately present during a search. Jones, a guest in a friend's apartment, was found by the Court to have been legitimately on the premises.[55]

This was a far more expansive reading of standing than that established by earlier cases that required a showing of ownership or lessee status.[56] Thus, Jones was allowed standing on two grounds: he had automatic standing to challenge the constitutionality of the search and seizure because he was charged with a possessory offense; and he had actual standing to object to the actions of the authorities because he was present during the search.[57] Jones displayed a sufficient interest in *both* the premises searched and the property seized. When a defendant's case fell outside *Jones'* parameters, however, the defendant was not protected.

B. *Standing After* Jones

Defendants charged with nonpossessory offenses who were not legitimately on the premises at the time of the unlawful search still were compelled to balance their fourth and fifth amendment rights in determining whether to seek actual standing. Those who took the stand at the suppression hearing often found their testimony used against them at trial.[58] The Court believed that *Jones* had not gone far enough in protecting individuals from unreasonable searches and seizures and, in 1968, handed down the *Simmons* decision: a defendant's testimony in support of a motion to suppress was held inadmissible at trial on the issue of guilt.[59] *Simmons* was

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54. *Id.* at 267.

55. *Id.* at 263.

56. *See* notes 40-44 *supra* and accompanying text.

57. 362 U.S. at 263.

58. *See, e.g.*, United States v. Airdo, 380 F.2d 103 (7th Cir.), *cert. denied*, 389 U.S. 913 (1967). Monroe v. United States, 320 F.2d 277 (5th Cir. 1963), *cert. denied*, 375 U.S. 991 (1964).

59. 390 U.S. at 394. The three defendants, Andrews, Simmons, and Garrett, were charged with robbing a federally insured savings and loan association. Garrett

influenced by *Katz v. United States*,[60] which completely rejected the old property law view of standing.[61] A personal privacy interest, not one of property ownership, was substituted. "For the Fourth Amendment protects people, not places[;] . . .'[t]he premise that property interests control the right of a Government to search and seize has been discredited.' "[62] The principles established in *Jones* thus expanded and the concept of standing widened. A "personal privacy interest" was all that had to be shown to attain actual standing.[63] Any evidence proffered in support of this interest was inadmissible on the issue of guilt at trial.

This trend, however, slowed by 1969. In that year, the Supreme Court decided *Alderman v. United States*.[64] In that case, three defendants were charged with transmitting murderous threats through interstate commerce. Defendant Alderisio's place of business had been placed under electronic surveillance by the authorities.[65] Defendants contended that the tapped conversations had been overheard illegally and that their content was inadmissible against all three suspects.[66] The Court rejected that argument, declaring that Alderisio alone had standing. The other defendants had not participated in any conversations on the premises, nor did they own the building.[67]

Justice Fortas, in his dissent, argued that standing under *Jones* extended to all those individuals who were targets of a search.[68] As support he quoted *Jones'* language: "[i]n order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have

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testified at a suppression hearing that the suitcase found on the premises of Andrews' mother was similar to one he owned. He declared that its content belonged to him. His testimony was admitted into evidence at trial. *Id.* at 380-81.

60. 389 U.S. 347 (1967).

61. The property law concepts are discussed in text accompanying notes 39-44 *supra*.

62. 389 U.S. at 351. Defendant in that case was charged with transmitting wagering information interstate. His conversations, made in a public telephone booth, had been tapped by the Federal Bureau of Investigation. *Id.* at 348.

63. *Id.* at 351.

64. 394 U.S. 165 (1969).

65. *Id.*

66. *Id.* at 171.

67. *Id.* at 176. It is interesting to note that two years earlier, in the *Katz* decision, the Court rejected the focus on "area" in favor of "personal privacy." 389 U.S. at 350. In *Alderman*, the Court once again returned to a discussion of property interests. 394 U.S. at 176.

68. *Id.* at 205-06 (Fortas, J., dissenting).

been . . . *one against whom the search was directed* . . . ."[69] He would have conferred standing upon all three defendants.

The majority did not read *Jones* so literally. As a result, the owner of premises under electronic surveillance was given actual standing to assert a violation of his fourth amendment rights, even if he made no statements.[70] In other words, a property owner was granted standing to suppress another person's conversations as well as his own. An individual who did not own the premises but who was the target of an investigation involving illegal wiretapping, however, could not obtain actual standing unless he made statements on the premises.

The expectation of privacy established in *Katz* was narrowed somewhat. Allowing an owner of the premises to suppress someone else's private conversations merely because they were held on his property signaled a retreat to the old ownership confines found so unwieldy in the past. As Justice Harlan wrote in his dissent in *Alderman*, "the right to the privacy of one's conversation does not hinge on whether the Government has committed a technical trespass upon the premises on which the conversations took place."[71] Attainment of actual standing once more required a showing of ownership.

Automatic standing, too, was eviscerated. *Brown v. United States*[72] heralded its demise, saying that *Jones* was no longer necessary. Defendants in *Brown* sought to suppress evidence seized from an unlawful search of a store belonging to a coconspirator.[73] Because possession was a material element of the offense with which they were charged, they contended that they had automatic standing to object to the actions of the authorities.[74] The Court denied them standing, limiting *Jones* to situations where "posses-

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69. *Id.* at 207 (citing Jones v. United States, 362 U.S. at 261).

70. 394 U.S. at 191 (Harlan, J., dissenting).

71. *Id.* at 190-91.

72. 411 U.S. 223 (1973). The three defendants in that case were charged with transporting stolen goods and with conspiracy to transport stolen goods in interstate commerce. Defendants Brown and Smith stored the stolen items in a warehouse belonging to defendant Knuckles. *Id.* at 224-25. All three suspects moved to suppress the evidence on the ground that the warrant authorizing the search was defective. The motion to suppress was allowed only for defendant Knuckles. Brown and Smith failed to allege any proprietary interest in the premises searched or the goods seized. *Id.* at 225-26.

73. *Id.* at 228.

74. *Id.* at 227.

sion *at the time of the contested search and seizure* is 'an essential element of the offense . . . charged.' "[75] The question whether to overrule *Jones* was reserved for a later date.[76] The Court viewed the self-incrimination factor as no longer present:

> [t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution. Subsequent to *Jones*, in *Simmons v. United States*, . . . we held that a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearing to establish standing to move to suppress evidence.[77]

Yet such statements still are available to the prosecution for purposes of impeachment.[78] The Court began to challenge the principle upon which automatic standing was established.

Actual standing was further narrowed in *Rakas*, decided in 1978.[79] Defendants, passengers in an automobile, declared that they had actual standing to object to the search of the car since they were legitimately on the premises.[80] The Supreme Court declared that the legitimately "on the premises" ground for actual standing was too broad, further challenging *Jones'* viability.[81] Instead, actual standing existed only when one had "a legitimate expectation of privacy in the invaded place."[82] The *Rakas* majority then attempted to reconcile its position with *Jones* by asserting that defendant in that instance, who was a guest in another's apartment, actually had an expectation of privacy.[83]

Justice White, in a lengthy dissent, declared that the Court once again had relegated standing to property law definitions.[84] Indeed, one of the factors that the *Rakas* majority pointed to in explaining that Jones had a legitimate expectation of privacy was that he had a key to the apartment.[85] The passengers in *Rakas*, who were denied standing, had no such control over the vehicle in

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75. *Id.* at 228 (citing Simmons v. United States, 390 U.S. at 390) (emphasis added).
76. *Id.*
77. *Id.*
78. United States v. Salvucci, 448 U.S. at 96 (Marshall, J., dissenting).
79. Rakas v. Illinois, 439 U.S. at 128.
80. *Id* at 132.
81. *Id.* at 143.
82. *Id.*
83. *Id.*
84. *Id.* at 156-57 (White, J., dissenting).
85. *Id.* at 164-65.

which they were riding. According to Justice White, nothing short of ownership of the automobile would have satisfied the majority's expectation of privacy test.[86]

After *Rakas*, actual standing was so constricted that there were only three ways to attain it: To own the area searched; to control access to that area, as Jones could through possession of a key to the searched apartment; or to claim ownership of the seized evidence.[87] Legitimate presence on the property of another, absent some control, proved unavailing.

Rawlings v. Kentucky,[88] decided the same day as *Salvucci*, further limited actual standing by making *Rakas'* requisite expectation of privacy difficult to establish. In *Rawlings*, defendant was present at the unlawful search of another's home. His companion's purse was searched. At her request, he claimed ownership of illicit drugs that were in the purse. Charges of possession were brought against him, and he attempted to suppress the evidence.[89]

Justice Rehnquist wrote the opinion for the majority. He asserted that defendant bore the burden of proving both that the search of the woman's purse was illegal and that he had a legitimate expectation of privacy in the purse.[90] Justice Rehnquist contrasted the *Rawlings* situation with the one in *Jones*. Rawlings had known the owner of the purse for only a few days, had never before used the purse to store items, and could not prevent others from having access to it.[91] Jones, on the other hand, was a guest in an apartment, and he had a key.[92] When *Rakas* and *Rawlings* are read together, it becomes apparent that the grounds to claim actual standing have been so narrowly drawn as to require an assertion of ownership of the area searched.

Rawlings' claim to ownership of the drugs proved to be unavailing. The majority held that, while ownership of the seized drugs was one fact to consider in deciding the issue of standing, *Rakas* had rejected adherence to property law concepts in determining fourth amendment interests.[93] Therefore, a privacy in-

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86. *Id.*

87. Comment, *Constitutional Law—Searches & Seizures—Standing & Fourth Amendment Rights*, 46 TENN. L. REV. 827, 845 (1979).

88. 448 U.S. 98 (1980).

89. *Id.* at 101.

90. *Id.* at 104.

91. *Id.* at 105.

92. Although Jones did possess a key to his friend's apartment, he had spent only one night there. 362 U.S. at 259.

93. 448 U.S. at 104.

terest in the searched premises tantamount to ownership is required for actual standing, yet this privacy interest cannot be shown by ownership of the seized goods. " '[A]rcane' concepts of property law"[94] once again govern the determination of actual standing.

In *Salvucci*, the Court turned to the concept of automatic standing. Justice Rehnquist wrote that the self-incrimination dilemma that prompted the *Jones* decision had been obviated by *Simmons*. Since any testimony offered in support of a suppression motion was inadmissible at trial on the issue of guilt, *Simmons* protected defendants charged with both possessory and nonpossessory offenses.[95] The first basis for automatic standing was held no longer to exist.

Another anomaly considered by the Court in *Jones* was the self-contradiction allowed the prosecution in denying standing to an individual charged with a possessory offense.[96] Justice Rehnquist, in *Salvucci*, easily dismissed this by stating: "[d]evelopments in the principles of Fourth Amendment standing, as well, clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure."[97]

These "developments" were the narrowing of fourth amendment privacy interests solely to the premises searched, not to the items seized. Justice Rehnquist dismissed the *Jones* Court's assumption that possession of a seized item also was sufficient to attain standing. According to Justice Rehnquist, that assumption was incorrect.[98]

After *Salvucci*, an individual charged with a possessory offense no longer can assert automatic standing. In order to attain actual standing, he must allege a legitimate expectation of privacy in the premises searched. The self-incrimination and self-contradiction problems have been obviated since a declaration of ownership of the seized goods is insufficient to confer standing. The dilemma has been resolved, but at what cost?

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94. *Id.* at 105.
95. 448 U.S. at 90.
96. 362 U.S. at 263.
97. 448 U.S. at 88-89.
98. *Id.* at 90.

III. ANALYSIS

Justice Rehnquist, in *Salvucci*, stated that the exclusionary rule is but one form of remedy for fourth amendment violations and, as such, is available only to those whose rights have been violated. It cannot be asserted vicariously by persons who are third parties to a search.[99] The remedy is to be afforded only to the victims of unreasonable searches and seizures.[100]

There are two prevailing schools of thought as to the function of the exclusionary rule. Some authorities view it as a means of deterring unlawful police actions.[101] Others perceive it as part and parcel of the fourth amendment guarantees and thus as an individual right.[102] Those alleging it to be a deterrent measure argue that its purpose is not to redress the injury to the search victim: that person's disrupted privacy cannot be restored. Rather, deterrence of future unlawful police activity is the purpose behind the rule.[103] To Justice Rehnquist, the exclusionary rule is but one of many methods available to the courts to assure proper police conduct.[104]

The deterrence rationale can be used to come to a very different conclusion than that reached by Justice Rehnquist. Contrary to Justice Rehnquist's belief, the exclusionary rule can be viewed as the sole effective deterrent of unlawful police activity. It should, therefore, be applied broadly. Thus the protections of the exclusionary rule need not be limited solely to the victims of unreasonable searches. Third parties, such as defendants in *Rakas* and *Rawlings*, also should be able to reap its benefits. To hold otherwise would allow the authorities to violate one person's privacy in order to secure evidence against another.

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99. *Id.* at 86.

100. *Id.*

101. *See, e.g.*, Traynor, *Mapp v. Ohio At Large In The Fifty States*, 1962 DUKE L.J. 319; Comment, *Evidence—Search & Seizure—Standing to Suppress Evidence Obtained by Unconstitutional Search & Seizure*, 55 MICH. L. REV. 567 (1957); Comment, *Standing to Object to an Unreasonable Search & Seizure*, 34 U. CHI. L. REV. 342 (1967); Note, *Standing to Object to an Unlawful Search & Seizure*, 1965 WASH. U. L.Q. 488 (1965). *See also* Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974); Linkletter v. Walker, 381 U.S. 618 (1965); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. at 383.

102. *See* United States v. Chadwick, 433 U.S. 1 (1977); Safarik v. United States, 62 F.2d 892 (8th Cir. 1933); Comment, *supra* note 87, at 827. *See also* text accompanying notes 107-11 *infra*.

103. United States v. Calandra, 414 U.S. 338, 347 (1974).

104. Irvine v. California, 347 U.S. 128 (1954).

As Judge Traynor noted in *People v. Martin*,[105] "if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified."[106] California, pursuant to its state constitution, goes so far as to disallow the admitting into evidence of the fruits of an unlawful search and seizure without requiring a showing of standing.[107]

The Supreme Court, which has a more restricted view of the exclusionary rule, considers it to be a mere deterrence measure.[108] The Court has drawn the confines of standing so narrowly as to apply solely to persons with an ownership interest in the area searched. To view the rule as a deterrence measure yet to give such a small number of people standing to suppress illegally obtained evidence amounts to a contradiction.

A. *Third Parties and the Exclusionary Rule*

McDonald v. United States[109] was decided in 1948. In that case, the Court determined that the fruits of an unlawful search were inadmissible against both the individual who rented the premises and his codefendant.[110] Later cases have rejected such an application of the exclusionary rule.[111] No longer can an individual challenge the admissibility of incriminating evidence absent a showing of standing. He must demonstrate a violation of his own privacy before the exclusionary rule can be invoked.[112] Thus, the police can circumvent fourth amendment proscriptions by conducting searches against one individual in the hope of securing evidence against his coconspirators. Defendants in *Rakas* were indeed the targets of an unlawful search. They were passengers in a motor vehicle matching the description of a robbery getaway car. Their

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105. 45 Cal. 2d 755, 290 P.2d 855 (1955).

106. *Id.* at 760, 290 P.2d at 857.

107. *Id.*

108. "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974).

109. 335 U.S. 451 (1948).

110. *Id.* at 456.

111. *See* Brown v. United States, 411 U.S. at 223; Alderman v. United States, 394 U.S. at 165; United States v. Dye, 508 F.2d 1226 (6th Cir.), *cert. denied*, 420 U.S. 974 (1974); United States v. Hearn, 496 F.2d 236 (6th Cir.), *cert. denied*, 419 U.S. 1048 (1974).

112. United States v. Hearn, 496 F.2d 236, 240 (6th Cir.), *cert. denied*, 419 U.S. 1048 (1974).

female companions were not suspects to the crime.[113] *Rakas*, though, ruled that actual standing is no longer available to individuals legitimately on the premises.[114] Standing is available only to those who have a legitimate expectation of privacy tantamount to ownership of the premises. The search of the motor vehicle in *Rakas*, arguably unlawful, could not be contested by defendants.[115] *Rakas* emasculated the exclusionary rule: illegal police activity was encouraged, not deterred.[116]

The results reached by those who view the exclusionary rule as an individual right guaranteed by the fourth amendment are equally inconsistent. Even though these theorists view the right as personal to the one asserting it, they still require a showing of a proprietary or possessory interest in what was searched or seized before the exclusionary rule can be invoked.[117] The case law indicates that an assertion of ownership of the searched premises is necessary to demonstrate an interest sufficient to attain standing.[118] The Supreme Court, therefore, has allowed the fourth amendment to apply to a very small number of individuals. If the exclusionary rule were included within the amendment as a *personal* safeguard, then many victims of unreasonable searches and seizures would be rightless as well as remediless since the protections against unlawful police activity apply only to the propertied.[119]

If, however, the fourth amendment were to be viewed as a *societal* right to privacy, the exclusionary rule could fulfill its deterrence objectives. "[I]f the exclusionary rule follows from the Fourth Amendment itself, there is no basis for confining its invocation to persons whose right of privacy has been violated by an illegal search."[120] Indeed, some commentators have read two rights into its language: A personal right to be free from unreasonable

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113. Rakas v. Illinois, 439 U.S. at 130.

114. *Id.* at 142.

115. *Id.* at 148.

116. *Compare* Broeder, Wong Sun v. United States: *A Study in Faith & Hope*, 42 NEB. L. REV. 483, 539 (1963); Comment, *supra* note 101, at 357; Comment, *Search & Seizure: Admissibility of Illegally Acquired Evidence Against Third Parties*, 66 COLUM. L. REV. 400, 404 (1966).

117. Irvine v. California, 347 U.S. 128, 136 (1954).

118. *See* Rawlings v. Kentucky, 448 U.S. at 119; Rakas v. Illinois, 439 U.S. at 156 (White, J., dissenting).

119. "Without a showing of an interest in the property or the right to control it, they have no standing to suppress the evidence taken from the truck." United States v. Dye, 508 F.2d 1226, 1233 (6th Cir.), *cert. denied*, 420 U.S. 974 (1974).

120. Alderman v. United States, 394 U.S. at 205 (Fortas, J., concurring in part & dissenting in part).

searches; and a general right of the citizenry to be free from tainted evidence corrupting the functions of the courts.[121] Eliminating the need for proof of a personal privacy interest would further society's objective of excluding the fruits of unlawful searches from admission into evidence. Frequently, under the personal privacy test, no one has the requisite interest to object.

Whether the exclusionary rule is construed as a deterrence tool or as one element of the fourth amendment, it must be applied broadly to achieve its purpose. As Justice Douglas pointed out in his dissent in *Irvine v. California*,[122] "Exclusion of evidence is indeed the *only* effective sanction [to unlawful police searches.]"[123] Contrary to Justice Rehnquist's contention,[124] it is not merely one method of many to be called upon to curtail police abuses. The narrow reading of standing evinced by *Rawlings* and *Salvucci* makes achievement of the deterrence objective impossible. The true targets of unlawful police activity are barred from "vicariously assert[ing]"[125] fourth amendment violations.

B. *Standing After* Salvucci

In *Salvucci*, Justice Rehnquist asserted that automatic standing amounted to a "windfall"[126] to criminal defendants. In *United States v. Di RE*,[127] however, the Court held:

> [w]e have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. . . . But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.[128]

Balancing deterrence objectives against the possibility that some guilty individuals may go free leads to the absurdity of using a cost-benefit analysis to decide whether a constitutional right is

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121. Comment, *supra* note 101, at 365.
122. 347 U.S. 128 (1954).
123. *Id.* at 151 (emphasis added) (Douglas, J., dissenting).
124. 448 U.S. at 86.
125. *Id.*
126. *Id.* at 95.
127. 332 U.S. 581 (1948).
128. *Id.* at 595.

applicable.[129] Granting the protections of the fourth amendment only to those with a property interest in the searched premises permits unlawful searches to be directed against third parties. Hence, the victims of unlawful police activity in many instances are barred from asserting a constitutional violation. The courts then become participants in a grave injustice to society.

The *Rakas* opinion, which established the expectation of privacy test, was written by Justice Rehnquist.[130] He pointed out that defendants "asserted neither a property nor a possessory interest in the automobile, *nor an interest in the property seized.*"[131] In applying the *Rakas* rationale to *Salvucci*, he disregarded the second prong of traditional fourth amendment standing analysis. Possession of a seized good was no longer Justice Rehnquist's focus; rather, he emphasized a legitimate expectation of privacy in the area searched.[132] Possession was held to create " 'too broad a gauge for measurement of Fourth Amendment rights.' "[133]

If the *Salvucci* Court has eliminated the second prong of the standing test, which it appeared to do despite its dearth of explanation, it is contrary to a lengthy history of case law.[134] Further, rejecting possession as a ground for standing eliminates the self-incrimination dilemma but creates a more serious problem. If possession of the seized good is insufficient to confer standing, defendants will not have to take the stand to make such a claim. Nor will the police tactics used to obtain the evidence come under judicial scrutiny. The deterrence rationale behind the exclusionary rule is not satisfied by such a narrow definition of standing.

If, however, a defendant takes the stand in an effort to assert the requisite interest in the area searched, *Simmons* does not provide complete protection from the self-incrimination threat. Although pretrial testimony cannot be admitted on the issue of guilt,

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129. *See, e.g.*, White & Greenspan, *Standing To Object Search And Seizure*, 118 U. PA. L. REV. 333 (1970).

130. 439 U.S. at 128.

131. *Id.* at 148 (emphasis added).

132. 448 U.S. at 92.

133. *Id.* at 92-93.

134. *See* Jeffers v. United States, 187 F.2d at 498; Gibson v. United States, 149 F.2d 381 (D.C. Cir.), *cert. denied*, 362 U.S. 724 (1945).

See also 448 U.S. at 90-91 n.5, where Justice Rehnquist attempted to condition the *Jeffers* holding on *both* an interest in the premises searched and the property seized. On the contrary, the *Jeffers* case stands for the proposition that an interest in the property seized *alone* is sufficient to confer standing. United States v. Jeffers, 342 U.S. at 54. *See* text accompanying note 45 *supra*.

it can be used for impeachment purposes.[135] Justice Marshall, in his dissent to the *Salvucci* decision, declared: "[t]he use of the testimony for impeachment purposes would subject a defendant to precisely the same dilemma, unless he was prepared to relinquish his constitutional right to testify in his own defense, and would thereby create a strong deterrent to asserting Fourth Amendment claims."[136]

The Supreme Court earlier had hinted that the use of testimony for impeachment purposes is violative of the fifth amendment.[137] In *Miranda v. Arizona*,[138] the Court held that use of a defendant's own statements for purposes of impeachment rendered his words self-incriminating.[139] The *Jones* dilemma still exists.

IV. CONCLUSION

In *United States v. Salvucci*,[140] the Supreme Court overruled *Jones v. United States*,[141] which allowed defendants charged with possessory offenses to automatically challenge an unlawful search and seizure. Automatic standing, therefore, is no longer available to defendants charged with crimes of possession. To challenge the constitutionality of a search and seizure, all individuals, even those charged with possessory offenses, must now meet the requirements of actual standing.

The confines of actual standing have been severely restricted by *Salvucci* and *Rawlings*. Defendants now must allege an intrusion upon a legitimate expectation of privacy in order to have standing to suppress evidence secured through a fourth amendment violation. This privacy interest must be in the area searched; demonstration of an interest in the property seized will prove unavailing. Requiring a demonstration of a legitimate expectation of

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135. *See* Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967). Using testimony for impeachment purposes "undermines the policy of deterring unlawful police action. Although the prosecution could not use unlawfully obtained evidence in its case in chief such evidence would still be useful to it." *Id.* at 943. Thus, evidence suppressed as the fruit of an unlawful search and seizure is not completely barred from use by the prosecution. Its effect as an impeachment tool can be just as damaging to a defendant as if it were admitted on the issue of guilt.

136. 448 U.S. at 96 (Marshall, J., dissenting).

137. 384 U.S. 436 (1966).

138. *Id.*

139. *Id.* at 477.

140. 448 U.S. at 85.

141. 362 U.S. at 263.

privacy in the area searched confers standing only upon those with an ownership interest in the searched premises. Defendants who cannot make this showing cannot invoke the exclusionary rule to bar the fruits of unlawful police activity from admission into evidence.

In the two cases before the Supreme Court in 1980, defendants were left remediless despite apparently improper police action. In *Salvucci*, the lower courts found the search unreasonable since the warrant lacked probable cause.[142] In *Rawlings*, the question of an illegal detention was never answered due to the Court's focus upon defendant's standing.[143] Police activity was suspect in both instances, yet the courts were precluded from resolving the issue of unreasonableness because defendants were denied standing to object. The fruits of possible unlawful police tactics thus were admitted into evidence. The deterrence objective of the exclusionary rule was not met.

Restricting actual standing derogates the fourth amendment to a status far below that established by the framers of the Constitution. Fourth amendment protections can only be invoked by the propertied few.

The exclusionary rule is much more than a mere hindrance to the admission of relevant evidence. It is the sole effective check available to the citizenry against police abuses. In the words of the Supreme Court in *Mapp v. Ohio*,[144] "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard for the charter of its own existence."[145]

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142. 599 F.2d at 1096.
143. 448 U.S. at 106.
144. 367 U.S. 643 (1961).
145. *Id.* at 659.