

11-1-1979

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Recommended Citation

Richard L. Allen and John A. Schaffer, *Great Expectations: Privacy Rights in Automobiles*, 34 U. Miami L. Rev. 99 (1979)

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Great Expectations: Privacy Rights in Automobiles

RICHARD L. ALLEN* and JOHN A. SCHAEFER**

The authors examine the history of the standing doctrine as it relates to the ability to contest searches and seizures. After analyzing the cases in this area, the recent Supreme Court case of Rakas v. Illinois is discussed and critiqued in depth. Cases decided after Rakas serve as the backdrop for a discussion of the exclusionary rule and the privacy rights of automobile passengers. Finally, the authors propose an alternative to the Rakas holding.

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I. INTRODUCTION

There are currently over 100,000,000 automobiles on the road in the United States, logging over 1,000,000,000,000 miles per year.¹ In a recent year, each car traveled an average of twenty-eight miles per day.² It is thus apparent that automobile travel has become a crucial part of our day-to-day living. Yet despite the abundant number of hours Americans spend each year in automobiles, the courts have failed to acknowledge the actual expectations of privacy of

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1. U.S. DEP'T OF TRANSPORTATION, NATIONAL TRANSPORTATION TRENDS AND CHOICES 86 (1977).

2. *Id.*

those who travel on the nation's roads.

This article addresses the treatment by the courts of privacy rights as they relate to searches and seizures of automobiles and their contents. The judiciary has been unrealistic in its treatment of privacy expectations as reflected by the factors used to determine one's privacy rights in any given vehicle.

Further, the judicially created doctrine known as the exclusionary rule, which prevents evidence illegally obtained by the police from being used to prosecute an accused criminal, is examined with reference to the protection of privacy rights. Because search and seizure limitations depend upon notions of privacy, this article also analyzes the changing concepts of the judiciary regarding the right to privacy. Finally, an alternative to the current judicial treatment of the privacy expectations of automobile passengers is suggested.

II. THE EVOLUTION OF STANDING

A. Introduction

The fourth amendment to the United States Constitution 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, 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.³

In order to ensure the protection provided by this amendment, the Supreme Court created a remedy which excludes from trial all evidence obtained in violation of this constitutional safeguard.⁴ Before a defendant can object to an unlawful search and attempt to have the evidence obtained therefrom excluded, however, he must first establish that he has standing to raise his fourth amendment contention. This section analyzes the evolution of the law of standing to challenge illegal searches and seizures, including the recent landmark Supreme Court standing case of *Rakas v. Illinois*.⁵

3. U.S. CONST. amend. IV.

4. See *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule was applied to trials in the state courts in *Mapp v. Ohio*, 367 U.S. 643 (1961).

5. 439 U.S. 128 (1978).

B. *Pre-Rakas*

The problem of standing in fourth amendment cases has been troublesome to both courts and commentators for a considerable number of years.⁶ The primary question in a standing problem is not whether a search is illegal, but rather whether the individual challenging the search has the legal ability to do so.⁷

Any analysis of the law of standing in privacy cases must begin with *Jones v. United States*.⁸ Jones was an occasional occupant of a friend's apartment.⁹ He was present in the apartment when federal officers arrived with a search warrant and found narcotics. After being charged with violating federal narcotics laws,¹⁰ Jones moved to suppress the narcotics on the ground that the warrant had been issued without a showing of probable cause.¹¹ The district court denied the motion finding that Jones lacked standing.¹² The Supreme Court reversed. Writing for the Court, Justice Frankfurter stated:

6. General notions of standing require that one have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). While a defendant moving to suppress incriminating evidence would seem to have "a personal stake in the outcome," that alone is not sufficient to establish standing under the fourth amendment. *See, e.g., United States v. West*, 453 F.2d 1351, 1353 (3d Cir. 1972). *White & Greenspan, Standing to Object to Search and Seizure*, 118 U. Pa. L. Rev. 333, 334 n.3 (1970) and articles cited therein.

7. "The issue [of standing] is inextricably bound to the philosophical underpinning of the application of the exclusionary rule as a means of enforcing the Fourth Amendment." *United States v. West*, 453 F.2d 1351, 1353 n.5 (3d Cir. 1972). *See notes 141-44 and accompanying text infra.*

The discussions of standing by the Supreme Court often employ language which suggests that a defendant's rights have not been violated. In effect, however, the Court has denied the defendant the benefits of the exclusionary rule without regard to any violation of his fourth amendment rights. This misstatement of the issues adds to the confusion surrounding the exclusionary rule. *See Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1, 1 (1975).

8. 362 U.S. 257 (1960). Prior to *Jones*, a defendant was allowed standing only if he could show that he had a possessory or proprietary interest in the property seized or the premises searched. For cases and comments dealing with pre-*Jones* standing see *Knox, supra note 7*, at 35 n.238; *Edwards, Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U.L. Rev. 471 (1952).

9. Jones lived elsewhere, but had a key to the apartment and as a guest could use it at will. He kept a suit and shirt in the apartment and had slept there "maybe a night." *Jones v. United States*, 362 U.S. 257, 259 (1960).

10. Jones was charged with having purchased, sold, dispensed and distributed narcotics, not in or from the originally stamped package, and with having facilitated the concealment and sale of the same narcotics, knowing them to have been illegally imported into the United States, violations of 26 U.S.C. § 4704(a) (1954) and 21 U.S.C. § 174 (1956) respectively. 362 U.S. at 258.

11. 362 U.S. at 259.

12. *Id.* at 259-60. The Court of Appeals for the District of Columbia Circuit held that Jones lacked standing but that the evidence had been lawfully obtained.

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search and 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.¹³

Thus, in order to obtain standing, one must establish "that he himself was the victim of an invasion of privacy."¹⁴ It is settled law that one has no standing to challenge a search unless his own personal rights have been violated.¹⁵

The Court found that Jones had standing on two separate and distinct grounds.¹⁶ First, he had "automatic standing" because he had been charged with a crime in which an essential element was the possession of the item seized at the time of the search.¹⁷ This "automatic standing" rule was formulated to alleviate the preexisting situation in which defendants, in order to exercise their fourth amendment right, were compelled to claim a proprietary or possessory interest in the property searched in order to obtain standing,¹⁸ thereby relinquishing their fifth amendment privilege against self-incrimination.¹⁹ This inequity was further compounded by the government's ability to take advantage of the defendant's paradox—if the defendant did not claim a possessory interest, he had no standing, but he could still be convicted of possession. The Court stated that "[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely con-

13. 362 U.S. at 261. Although the Court was dealing specifically with interpreting the language of rule 41(e) of the Federal Rules of Criminal Procedure, the *Jones* holding is applicable to any type of criminal standing case. The Court has stated that rule 41(e) conforms to the general standard and is no broader than the constitutional rule. *Alderman v. United States*, 394 U.S. 165, 173 n.6 (1969).

14. *Id.*

15. See, e.g., *Alderman v. United States*, 394 U.S. 165, 171-72 (1969); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943).

16. 362 U.S. at 263.

17. *Brown v. United States*, 411 U.S. 223 (1973) provides an excellent example of how this portion of the *Jones* holding has been applied. The defendants were convicted of transporting and conspiring to transport stolen goods in interstate commerce. The charges against them were limited to acts committed *before* the day of the alleged illegal search. Thus, they had no automatic standing under *Jones* since the charges did not depend upon possession of the seized items at the time of the contested search.

18. See authorities cited in note 8 *supra*.

19. The defendant was "obligated to choose one horn of the dilemma." *Connolly v. Medalie*, 58 F.2d 629, 630 (2d Cir. 1932); see *Simmons v. United States*, 390 U.S. 377, 391 (1968) (extending standing to "nonpossessory" offenses). See notes 32-37 and accompanying text *infra*.

tradictory assertions of power by the Government."²⁰ Therefore, the Court afforded Jones automatic standing and did not actually need to determine whether he had an interest in the premises searched or the property seized.²¹

The Court continued its analysis, however, by finding that Jones had standing because he had the "legally requisite interest in the premises."²² The Court frankly admitted that it had never defined the extent of an individual's interest in the searched premises required to maintain a motion to suppress.²³ After analyzing lower court decisions in this area, the Court went beyond property concepts in its assessment of "requisite interest":

[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, . . . has been shaped by distinctions whose validity is largely historical. . . . Distinctions such as those between "lessee," "licensee," "invitee" and "guest," . . . ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.²⁴

With property concepts no longer a hindrance, the Court proceeded to fashion the rule that "anyone legitimately on [the] 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."²⁵

Persons *legitimately on the premises* were included in the category of those who have a *legally requisite interest* in the searched premises. Although Justice Frankfurter's rationale for this inclusion is somewhat sketchy, it can be surmised that the Justices recognized the view that one's security or privacy is invaded whenever he is legitimately present during a search. *Jones*, although eliminating

20. 362 U.S. at 263-64. For an argument that there was no contrary position on the part of the government in *Jones* and that the automatic standing rule should be abolished, see Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421, 444 (1975).

21. 362 U.S. 263-65. The Court reasoned that, "[t]he same element in this prosecution which has caused a dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." *Id.* at 263.

22. *Id.* at 263.

23. *Id.* at 265.

24. *Id.* at 266.

25. *Id.* at 267. Jones was legitimately on the premises since the owner of the apartment had consented to his presence. In contrast, a burglar or a trespasser would not have standing, as his presence on the premises would be wrongful. *See, e.g.*, *United States v. Cassell*, 542 F.2d 279 (5th Cir. 1976); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977).

property concepts as a talisman in search and seizure standing questions, did not eliminate standing based on a showing of possessory or proprietary interest in the premises searched or the property seized.²⁶

The *Jones* decision eliminated the defendant's dilemma through its automatic standing holding for possessory type offenses; it did not, however, address nonpossession cases. *Simmons v. United States*²⁷ presented that question eight years later. The lower court ruled that the defendant, charged with robbery, could only gain standing to object to the admission of a suitcase²⁸ by testifying that he was its owner. If he were to testify to ownership at the hearing on the motion to suppress, however, he took the risk that his testimony would later be used to incriminate him. On appeal, the Supreme Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another"²⁹ and held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."³⁰ Consequently, *Simmons* extended the rationale of *Jones* to nonpossessory offenses and eliminated the dilemma confronting defendants who wished to gain standing by asserting proprietary ownership of a seized item.³¹

While *Simmons* dealt with an aspect of the first holding in *Jones*, *Mancusi v. DeForte*³² concerned *Jones*' alternative holding, the "legitimately on [the] premises" rule. State officials had seized records from an office of the Teamsters Union shared by DeForte and others without a warrant while he was present and despite his

26. An example of standing based upon a possessory interest in the property seized without an interest in the premises searched may be seen in *United States v. Jeffers*, 342 U.S. 48 (1951). The defendant was granted standing to contest an illegal search of his aunt's hotel room on the basis of his property interest in the items seized (19 bottles of cocaine). *Id.* at 53. See *White & Greenspan*, *supra* note 6, at 344.

27. 390 U.S. 377 (1968).

28. The suitcase had been seized from the basement of a house in which the defendant had no interest. *Id.* at 391.

29. *Id.* at 394.

30. *Id.* The defendant's dilemma, however, is not fully relieved. See *United States v. Kahan*, 415 U.S. 239 (1974) (defendant's pretrial statements denying sufficient funds to obtain counsel used against him in the government's case in chief. *Simmons* inapplicable because incriminating component of the defendant's pretrial statement was knowledge of its falsity).

See also *People v. Sturgis*, 58 Ill. 2d 211, 317 N.E.2d 545 (1974) (defendant's testimony at trial impeached through introduction of prior statements at a motion to suppress).

31. *Jones* might not have withstood the *Simmons* rationale. See *Brown v. United States*, 411 U.S. 223, 229 (1973); note 136 *infra*.

32. 392 U.S. 364 (1968).

protests.³³ The seized records were admitted at his trial for conspiracy, coercion and extortion. The Supreme Court first considered DeForte's standing to object to the seizure of the records. The Court acknowledged that the records seized were the property of the union and not DeForte and that for him to acquire standing, the search must have violated his personal rights.³⁴ Although the defendant was "legitimately on [the] premises" searched, the Court found it necessary to analyze the question of standing in light of its then recent decision in *Katz v. United States*:³⁵

Katz . . . 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*. . . . The crucial issue, therefore, is whether, in light of all the circumstances, DeForte's office was such a place.³⁶

Because *Jones* had eliminated the requirement of legal possession and ownership, it made no difference that DeForte shared the office and that it was owned by the union.³⁷ Relying upon the *Katz* reasoning, the Court held that DeForte had standing because:

DeForte . . . could reasonably have expected that only those persons [union employers and employees] and their personal or business guests would enter the office, and that records would not be touched except with their permission This expectation was inevitably defeated by the entrance of state officials³⁸

Mancusi thus switched from a rigid application of the *Jones* "legitimately on [the] premises" test to a determination of one's reasonable expectation of privacy in the premises searched.³⁹ Justice Black criticized this extension in his dissent:

DeForte clearly was "legitimately on [the] premises" and thus his standing should be obvious . . . without the Court's extended discussion of "reasonable expectation" This reasoning in terms of "expectations," however, requires conferring standing

33. *Id.* at 365.

34. *Id.* at 367.

35. 389 U.S. 347 (1967).

36. 392 U.S. at 368 (emphasis added) (citations omitted).

37. The fourth amendment's "protection" from unreasonable searches and seizures applies to business premises as well as to residences. See *Michigan v. Tyler*, 436 U.S. 499 (1978); See *v. City of Seattle*, 387 U.S. 541 (1967); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); 3 W. LAFAYE, SEARCH AND SEIZURE 563 (1978).

38. 392 U.S. at 369.

39. Under this new analysis, the Court compared the facts in *Jones* with those in *Mancusi* and determined that the *Jones* test would have produced the same result. *Id.* at 370.

without regard to whether the agent happens to be present at the time of the search or not, a rather remarkable consequence of the statement in *Jones*.⁴⁰

Until recently, the last major Supreme Court fourth amendment "standing" case was *Alderman v. United States*.⁴¹ There, petitioners were convicted of conspiring to transmit murderous threats in interstate commerce.⁴² The petitioners subsequently discovered that the place of business of one of the petitioners had been subject to electronic surveillance by the government.⁴³ The petitioners argued that any illegally obtained evidence used to convict any one defendant should not be admissible against any other co-defendant or co-conspirator.⁴⁴

Writing for the majority, Justice White rejected this argument stating that there are no special standing rules for co-conspirators and that the Court was bound by "[t]he established principle . . . that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."⁴⁵ Thus, the Court adhered to the principle that fourth amendment rights are personal rights not to be asserted vicariously.⁴⁶

The Court recognized that its refusal to extend standing to a co-conspirator, based solely upon his relationship to the party whose rights had been infringed, limited the scope of the exclusionary rule.⁴⁷ A policy decision was made in favor of providing society with relevant, probative evidence rather than minimally increasing the deterrent effect of the exclusionary rule.⁴⁸

In part II of the *Alderman* opinion, however, the Court stated that a homeowner, who also happened to be a co-conspirator, on

40. *Id.* at 376. The *Mancusi* standing inquiry could be viewed as limiting the *Jones* "legitimately on [the] premises" test because it is conceivable that one legitimately in a business office or other premise might lack the requisite reasonable expectation of privacy.

41. 394 U.S. 165 (1968).

42. Violations of 18 U.S.C. § 371, 875(c) (1948). 394 U.S. at 167.

43. *Id.* at 167-68.

44. *Id.* at 171.

45. *Id.* at 171-72.

46. *Id.* at 174. *But see* Justice Harlan's separate opinion in which he argued that the ruling of the Court actually permits some defendants to assert vicariously the personal rights of others. *Id.* at 189, 194.

47. *Id.* at 174-75.

48. The majority stated: "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." *Id.* at 175.

whose premises the alleged unlawful surveillance took place, had standing to object to any conversation in which he participated or any conversation occurring on his premises, whether or not he was present, because such conversations were the fruit of an unauthorized invasion of an area in which the homeowner had a right to expect privacy.⁴⁹ In addition, any petitioner whose conversation had been unlawfully overheard had standing to object to the use of that conversation against him.⁵⁰

Justice Harlan dissented on these points, being of the opinion that standing should only be granted to those who had participated in an unlawfully overheard conversation and not to a property owner whose conversational privacy had not been infringed.⁵¹ He stated that under traditional notions of standing, an "absent property owner does not have a property interest of any sort in a conversation in which he did not participate."⁵² Thus, Justice Harlan believed that the majority decision was based upon a forced misapplication of the "fruits" theory.⁵³

It seemed evident to Harlan that the area of conversational privacy in standing law had to be reconsidered in the light of *Katz v. United States*.⁵⁴ Using a *Katz* analysis, third parties would reasonably expect their conversations to remain private, even to the extent of the owner of the premises where the conversation took place. Therefore, even a property owner should not have standing to assert an invasion of a third party's personal right to a private conversation.⁵⁵ Justice Harlan predicted that confusion in the lower courts would result from the misleading rationale behind the property rule established by the majority.⁵⁶

Justice Fortas, separately concurring and dissenting, supported a "target theory" approach to standing under which any person against whom an investigation is directed has standing to object to the use of the illegally obtained material and its fruits.⁵⁷ He took the

49. *Id.* at 176.

50. *Id.*

51. *Id.* at 187, 189.

52. *Id.* at 190.

53. *Id.*

54. *Id.* at 191. In the field of conversational privacy "the Fourth Amendment protects persons, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967).

55. 394 U.S. at 191-92. Justice Harlan's rationale for this holding is identical to the majority reasoning used to deny standing to co-conspirators: to provide the public with probative, relevant evidence for prosecution at the expense of a marginal extension of a deterrent effect under the exclusionary rule. *Id.* at 193. See note 8 and accompanying text *supra*.

56. *Id.* at 196.

57. *Id.* at 201. Justice Douglas agreed that the fourth amendment protects those against

following words from *Jones* to support his proposition: "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*" ⁵⁸ Although his argument fell on deaf ears, ⁵⁹ Justice Fortas felt that this expansion ⁶⁰ of standing law would ensure the Court's integrity because the legality of the means utilized by the state in investigating a "target" would be properly probed through the defendant's motion to suppress. ⁶¹

Jones, *Simmons*, *Mancusi*, and *Alderman* have long been recognized as the major enunciations of the guidelines of the Supreme Court in fourth amendment standing cases. To this list, the landmark ruling in *Rakas v. Illinois* ⁶² has now been added.

whom an investigation is directed. *See id.* at 187.

58. *Id.* at 207 (quoting 362 U.S. at 261) (emphasis added by Justice Fortas). Confusion arises with regard to the interpretation of the phrase "one against whom the search was directed." The petitioners would have it mean one whom the law enforcement agents intend to use the evidence against, rather than one who actually suffers the intrusion of the search and seizure by being the actual victim of the invasion of privacy. *United States v. Cella*, 568 F.2d 1266, 1282 (9th Cir. 1978).

59. While the majority ignored Justice Fortas' suggestion, Justice Harlan specifically rejected it stating that a broader standing rule would only have had a marginal impact upon police conduct. 394 U.S. at 188 n.1.

A few commentators have expressed an interest in this approach to standing. *See White & Greenspan, supra* note 6, at 349, in which the authors propose a rule which would allow standing to any one against whom the police sought to obtain evidence. Under this rule, standing would not be based upon a fourth amendment right (since one cannot vicariously assert the rights of another from whom the evidence was illegally obtained), but rather upon the policy underlying the rule in *Mapp v. Ohio*, 367 U.S. 643 (1961). *See* note 1 and accompanying text *supra*.

Compare this approach with another commentator's proposal that standing should be granted whenever there is an arguable violation of the fourth amendment rights of the individual challenging the search. *Knox, supra* note 7, at 2, 46-50.

60. The broadest approach to standing imaginable would afford standing to all defendants. This total abolition of a standing rule has been suggested or analyzed in the following: *United States v. West*, 453 F.2d 1351 (3d Cir. 1972); *Rosencranz v. United States*, 334 F.2d 738 (1st Cir. 1964) (Adrich, J., concurring); *Binkiewicz v. United States*, 281 F. Supp. 233, 237 (D. Mass. 1968); 3 W. LAFAVE, *supra* note 37, at 608; Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367, 433 (1974); Comment, *Standing to Object to Unreasonable Searches and Seizures*, 34 U. CHI. L. REV. 342 (1967). Abolishing standing completely exacts a large price as it would require excluding all evidence resulting from an illegal search, regardless of any deterrent effect. *White & Greenspan, supra* note 6, at 366.

61. 394 U.S. at 206. Fortas felt that a rule which denied standing to a defendant who was the target of an investigation and allowed the admission of unlawfully obtained evidence, legitimized the conduct which procured the evidence. *Id.* at 204 n.3, (citing *Terry v. Ohio*, 392 U.S. 1, 13 n.2 (1968)).

62. 439 U.S. 128 (1978). The composition of the Court has changed dramatically in the intervening decade; Justices Rehnquist, Powell, Blackmun, Brennan, Stevens and Chief Justice Burger are "new" to the issue of fourth amendment standing.

C. Rakas v. Illinois: *The Dent in Traditional Standing Concepts*

1. THE MAJORITY OPINION

On December 5, 1978, in a five-to-four decision, the Supreme Court affirmed a lower court conviction of two petitioners for armed robbery in the case of *Rakas v. Illinois*.⁶⁴ The facts of *Rakas* are simple: a police officer on patrol was notified that a local clothing store had been robbed. He spotted a dark Plymouth Roadrunner believed to be the getaway car. He and several other officers, who had been called for assistance, stopped the car and ordered the occupants, two male petitioners and two female companions, out of the car. A search revealed a box of rifle shells in the locked glove compartment and a sawed off rifle under the front passenger seat.⁶⁵ A subsequent inquiry disclosed that one woman who had been driving the car prior to the search was the car's owner.

Prior to trial, two of the passengers, Frank L. Rakas and Lonnie L. King,⁶⁶ moved to suppress the seized evidence alleging a violation of the fourth and fourteenth amendments.⁶⁷ They did not, however, assert ownership of the seized rifle or shells.⁶⁸ The trial court denied the motion to suppress, holding that because the defendants had no proprietary interest in either the rifle, the shells or the car, they lacked standing to challenge the search.⁶⁹ After the Supreme Court

63. Kilpatrick, *Burger Court Turns the Table on Criminals, A 5-4 Ruling Re-Interprets Fourth Amendment*, Miami Herald, Dec. 16, 1978, § A, at 8, col. 1. The author of the editorial, James Kilpatrick, claims the Court "struck a blow for common sense" and "[i]n Earl Warren's time, it would have gone the other way." See also PLAYBOY, Apr. 1979, at 63.

64. 439 U.S. 128 (1978), *aff'g* People v. Rakas, 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977).

65. *Id.* at 130.

66. At the time of the robbery, Mr. Rakas was 28 and Mr. King, alias Douglas Clontz, was 30. Both men had long criminal records. Kilpatrick, *supra* note 63.

67. 439 U.S. at 130.

68. *Id.* Petitioners claimed that they were never asked whether they owned the rifle or shells. The Court rejected this argument stating that the burden of establishing the violations of one's fourth amendment rights is upon the proponent in a motion to suppress. *Id.* n.1.

Had the defendants claimed ownership of the seized items, it appears that they would have had standing to contest the search under the rationale of *Simmons*. In addition, their admission of ownership could not have been used by the prosecution at trial. See notes 27-30 and accompanying text *supra*.

It is unclear why the defendants did not claim ownership. Either they were not the owners or it was a strategic move made so that they could later deny ownership and not be subject to impeachment by a pretrial admission.

69. 439 U.S. at 131. Thus, because it was determined that the petitioners lacked standing, neither the lower courts nor the Supreme Court ever reached the issue of whether there was probable cause for the search. *Id.*

of Illinois refused to hear the petitioners' appeal,⁷⁰ the Supreme Court of the United States granted certiorari⁷¹ "in light of the obvious importance of the issues raised to the administration of criminal justice."⁷²

In their attempt to establish standing, the defendants advanced a two-pronged argument based in part on the Court's decision in *Jones v. United States*.⁷³ First, they asserted that the Court should adopt the "target theory"⁷⁴ under which anyone at whom a search was "directed" would have standing to contest its legality.⁷⁵ Alternatively, they argued that they had standing because, as passengers in the searched automobile, they were "legitimately on [the] premises" at the time of the search.⁷⁶

Before discussing these claims, the Court foretold its departure from traditional standing law:

[W]e are not at all sure that the determination of a motion to suppress is materially aided by labeling the inquiry identified in *Jones* as one of standing, rather than simply recognizing it as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge.⁷⁷

With the tone thus set, it is hardly surprising that the Court flatly rejected the "target theory." Even the dissent rejected this theory,⁷⁸ which now appears to be constitutionally foreclosed except for possible state applications.⁷⁹

70. *Id.*

71. 435 U.S. 922 (1978).

72. 439 U.S. at 130.

73. 362 U.S. 257 (1960).

74. See notes 57-61 and accompanying text *supra*.

75. 439 U.S. at 132. It is noteworthy that the Court mentions an aspect of traditional standing doctrine which was not considered in *Jones* and which was unquestioned by the Court. This is "the proposition that a party seeking relief must allege . . . a personal stake or interest in the outcome of the controversy as to assure the concrete adverseness which Art. III requires." *Id.* at 424 n.2 (citing *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974); *Flast v. Cohen*, 392 U.S. 83, 99 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962)). See note 6 *supra*.

Thus, one not a defendant in a criminal action lacks standing even though his fourth amendment rights may have been violated by an illegal search. In *Rakas*, therefore, the owner-driver could not assert an objection to the search. Moreover, if he is never charged with an offense emanating from the actions in the case, his only recourse is a civil action for damages, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Monroe v. Pape*, 365 U.S. 167 (1961), or a state cause of action for invasion of privacy or trespass. 439 U.S. at 134.

76. 439 U.S. at 132.

77. *Id.* at 133.

78. 439 U.S. at 156 n.1 (White, J., dissenting).

79. See note 15 *supra*.

After burying the "target theory,"⁸⁰ the Court made a radical departure from traditional standing law. Announcing its new approach, the Court stated: "[T]he better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."⁸¹ Thus, substantive fourth amendment doctrine, rather than the confusing issue of standing, will now be the primary subject of the Court's inquiry.⁸² As the Court implied, this is not an entirely novel approach. In *Katz*, the Court also began its inquiry with an analysis of substantive fourth amendment law to determine whether a person in a telephone booth could rely on the protection of the fourth amendment.⁸³ *Mancusi v. DeForte*⁸⁴ was held up as an example of the now defunct standing analysis in which the Court focused on the issue of standing without inquiring into the merits of the substantive question.⁸⁵ The Court then explicitly set forth the appropriate inquiry:

[T]he question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in

80. Three reasons were given for burying the target theory: (1) the two holdings in *Jones* would have been superfluous since Jones had been the "target" of the search; (2) the reasons advanced by Justice Harlan in *Alderman*, 394 U.S. 165, 188 n.1 (1969), wherein he said that the target theory presents "very substantial administrative difficulties," and (3) such a broad grant of standing "to raise vicarious fourth amendment claims would necessarily mean a more widespread invocation of the exclusionary rule." 439 U.S. at 133-38.

In discussing the last of these reasons, the Court's dislike for the exclusionary rule became apparent. Justice Rehnquist 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." *Id.* at 137. Thus it appears that the majority in this case deemed the societal cost of applying the exclusionary rule in this situation, and allowing a "target" defendant standing, too expensive. See also notes 141-44 and accompanying text *infra*.

81. 439 U.S. at 139. Justice Rehnquist cautioned, however, that nothing in *Rakas* should be construed as casting any doubt on cases which view standing from two perspectives; i.e. whether he is asserting his own legal rights rather than those of third parties. *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 112 (1976); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970)).

At least one commentator proposes that fourth amendment standing cases should be harmonized with the rules governing standing which are needed to raise other constitutional issues. See *Knox*, *supra* note 8, at 30-35.

82. 439 U.S. at 140. The majority asserts that the inquiry under either approach is the same.

83. *Katz v. United States*, 389 U.S. 347, 352 (1968).

84. 392 U.S. 364 (1968). For a discussion of *Mancusi*, see notes 32-34, and accompanying text *supra*.

85. 439 U.S. at 139 n.7.

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.⁸⁶

With these few words, the "rubric of standing"⁸⁷ has been swept away. The tests, analyses and philosophical underpinnings employed in prior standing cases, while still relevant, are now subject to reformulation. Past standing cases now stand on shaky ground as the Court shifts its focus to a substantive fourth amendment analysis of the merits rather than a methodical application of standing tests.

Having first rephrased the inquiry, the majority next launched an attack on the time honored "legitimately on [the] premises" test of *Jones*.⁸⁸ The petitioners in *Rakas* argued that, as passengers in the searched automobile, they had standing to contest the validity of the search because like Jones in his friend's apartment, they were legitimately on the premises when their fourth amendment rights were violated.

Under the light of the new inquiry, Justice Rehnquist reexamined *Jones* and found that the respondent there had a legitimate expectation of privacy in the apartment and could thus claim the protection afforded by the fourth amendment.⁸⁹ According to Justice Rehnquist, *Jones* now stands for "the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place."⁹⁰

86. *Id.* at 140.

87. *Id.*

88. The Court noted that with few exceptions the lower courts have literally applied the holding of *Jones*. *Id.* at 142 n.10. See, e.g., *United States v. Medina-Flores*, 477 F.2d 225, 228 (10th Cir. 1973) (passenger had standing to object to warrantless search of carryall since he was a "person aggrieved" within the meaning of FED. R. CRIM. P. 41(e)); *United States v. Peisner*, 311 F.2d 94, 105 (4th Cir. 1962) (defendant never claimed an interest in seized contraband but as a passenger he was lawfully in the car when the seizure was made and could move for suppression); *United States v. Harris*, 5 M.J. 44, 46 (C.M.A. 1978) (standing for passenger who was legitimately present at the scene of the search); cf. *Harper v. State*, 84 Nev. 233, 236-39, 440 P.2d 893, 895-97 (1968) (passenger had no standing to contest search where driver alleging ownership gave permission to search).

Most courts agree that an occupant of a vehicle cannot have standing merely by virtue of his presence if he possesses a stolen vehicle. See 3 W. LAFAYE, *supra* note 37, § 11.3(e) at 573 and cases cited therein. *But see*, *Cotton v. United States*, 371 F.2d 385, 391 (9th Cir. 1967) (thief had standing in stolen car because he asserted a paramount possessory interest); and *Simpson v. United States*, 346 F.2d 291, 294 (10th Cir. 1965) (defendant who claimed possessory interest in automobile had standing despite lack of ownership).

89. 439 U.S. at 143.

90. *Id.* at 142 (citations omitted). *Jones*, *Marcusi*, and *United States v. Jeffers*, 342

Instead of the "legitimately on [the] premises" test, the Court wishes us to turn to *Katz* for guidance. Thus, the bottom line inquiry appears to be "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."⁹¹ To determine whether an expectation of privacy is legitimate or not, the majority would employ concepts of real or personal property law and understandings which are recognized and permitted by society.⁹² Thus, although one's legitimate presence on the premises may now be considered, it is not a controlling factor⁹³ in determining whether a legitimate expectation of privacy exists.

Moving next to the facts of *Rakas*, the Court reiterated that the defendants had asserted neither a property nor a possessory interest in either the car or the items seized, nor had they shown any expectation of privacy in the glove compartment or the area under the seat.⁹⁴ As support for the proposition that a passenger has no expectation of privacy in these areas, the Court analogized those places to the trunk of a car submitting that mere passengers cannot legitimately expect any privacy in the trunk of another's car.⁹⁵ Absent any showing by the petitioners of an expectation of privacy in the areas searched, they were foreclosed from contesting the validity of the search and the admissibility of the items seized.

2. THE CONCURRING OPINION

Unlike his brethren on the majority, Justice Powell, joined by Chief Justice Burger, felt that the narrow issue before the Court

U.S. 48 (1951) all recognized that one may have a reasonable expectation of privacy in premises that one does not own or rent. See notes 25-26 and accompanying text *supra*.

91. 439 U.S. at 143.

92. *Id.* The Court noted that one of the principal rights attaching to property is the right to exclude all others.

93. Justice Rehnquist recognized that *Katz* rejected basing expectations of privacy on common law property concepts. He noted, however, that the Court has never altogether abandoned the use of property concepts in determining whether a privacy interest is protected by the fourth amendment, 439 U.S. at 143-44 n.12 (citing *Alderman v. United States*, 394 U.S. 165 (1969) for the proposition that one's *property interest* in his own home allowed a defendant to object to conversations occurring there even though he himself was not present). See notes 51-56 and accompanying text *supra*.

The Supreme Court has often defined standing in terms of property concepts by holding that standing may be established by a "proprietary or possessory interest in the premises," *Brown v. United States*, 411 U.S. 223, 229 (1973), or by having a "property interest" in the items seized. See, e.g., *United States v. Jeffers*, 342 U.S. 48 (1951); 3 W. LAFAYE, *supra* note 37, § 11.3 at 544. The dissenting Justices took the majority to task for its reference to property concepts. See notes 199-200 and accompanying text *infra*.

94. 439 U.S. at 148.

95. *Id.* *Jones*' "legitimately on [the] premises" test is limited to the facts of that case. *Id.* at 143.

was: "Did the search of [the petitioners'] friend's automobile after they had left it violate any Fourth Amendment right of the petitioners?"⁹⁶ The ultimate inquiry thus becomes "[W]hether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances?"⁹⁷

Having thus rephrased the inquiry, Justice Powell listed a few of the multitude of factors which will be considered to determine if one has a reasonable claim to privacy: (1) what precautions one took to maintain privacy;⁹⁸ (2) how one utilizes a premise;⁹⁹ (3) historical factors;¹⁰⁰ and, (4) property rights.¹⁰¹ While Justice Powell conceded that his test provides little or no guidance for law enforcement officials, he maintained that it is faithful to the principles of the fourth amendment.¹⁰²

Instead of looking at the facts of the instant case, however, Justice Powell relied heavily upon the historical treatment given to automobile searches, concluding that, "[n]othing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in an automobile and one's expectation when in other locations."¹⁰³ After engaging in a myopic inquiry which determined merely that the passengers had no control over the car or its keys, Justice Powell boldly stated: "[I]t is unrealistic—as the shared experience of us all bears witness—to suggest that these passengers had any reasonable expecta-

96. *Id.* at 151.

97. *Id.* at 152. This is a different phrasing than the majority used for its new inquiry. See notes 96 and 102 and accompanying text *supra*. At first glance there appears to be no substantive difference in application. Justice Powell's approach may be more fluid and unpredictable in that emphasis is placed on "the surrounding circumstances" which will change with the fact pattern in each case.

98. *Id.* (citing *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (defendants locked effects in a footlocker thus manifesting an expectation that the contents would remain free from public examination); *Katz v. United States*, 389 U.S. 347, 352 (1967) (defendant who shut the door of a phone booth expected that his words would not be heard by others). The petitioners in *Rakas* shut the doors of the car. Should it make a difference if they locked the car doors or if one of them was the one to lock the glove compartment? According to Justice Powell, if it was shown that any of the petitioners had possessed the keys to lock the glove compartment, or if a rifle had not been found, then a "closer case" might have resulted. In addition, because the petitioners had no fourth amendment right to resist a police order to vacate the car following a proper stop, the closing of a door did not have the same significance as it might have had in other contexts. 439 U.S. at 155 n.4.

99. 439 U.S. at 153.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 153-54 (emphasis added).

tion that the car in which they had been riding would not be searched after they were lawfully stopped and made to get out."¹⁰⁴

3. THE DISSENTING OPINION

In a spirited opinion, the four dissenting justices, led by Justice White,¹⁰⁵ challenged the majority on a number of points. First, they observed that the majority had eroded two fundamental principles of fourth amendment law: (1) that there is at least some expectation of privacy in the interior of an automobile¹⁰⁶ and (2) that persons "legitimately on [the] premises" have standing to contest a search.¹⁰⁷ Second, the Court had in the past assumed that passengers were entitled to protection against unreasonable searches occurring in their presence.¹⁰⁸ This assumption had always appeared reasonable because, under the *Jones* test, all private premises would seem to be treated similarly for standing purposes.¹⁰⁹ Third, the dissenters criticized the majority opinion for hinging expectations of privacy on ownership and property concepts which had been buried by *Katz* and *Jones*.¹¹⁰ According to Justice White, the relevant inquiry, taken from *Mancusi*, should be "whether petitioner had an interest in connection with the searched premises that gave rise to a 'reasonable expectation [on his part] of freedom from

104. *Id.* at 155. Perhaps Justice Powell should have been more concerned with the underlying facts of *Rakas*. He noted that varying factors can change the outcome of the case, yet blandly stated that because the facts of the instant case were not comparable to those in *Jones*, *Katz*, and *Chadwick*, the petitioners' "minimal" expectations of privacy were not reasonable.

105. Joining Justice White were Justices Brennan, Marshall and Stevens.

106. 439 U.S. at 157 (citing *Chadwick*). The Court in *Chadwick* declared that, "[a] search, even of an automobile, is a substantial invasion of privacy." 433 U.S. at 12-13.

107. The dissent was apparently shocked at the evisceration of the *Jones* principal so soon after the unanimous opinion authored by the Chief Justice which supported the principal in *Brown v. United States*, 411 U.S. 223, 227 n.2 (1973). 439 U.S. at 158.

108. 439 U.S. at 158-59. The dissent also noted decisions in which the petitioner was not the owner of the auto yet the case was heard on its merits. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Chambers v. Maroney*, 399 U.S. 42 (1970). *See also* note 98 *supra*.

109. 439 U.S. at 159.

110. *Id.* at 162. The Court in *Katz* stated that "[t]he premise that property interests control the right of the Government to search and seize has been discredited," 389 U.S. at 353 (1967) (citations omitted).

The dissent claims the Court is returning to the notion that only trespass on property rights will violate the fourth amendment. *See Olmstead v. United States*, 277 U.S. 438, 466 (1928).

By linking privacy protections to outmoded concepts of possession, title or ownership, fourth amendment protections are limited to only those affluent enough to buy or obtain possession to gain their zone of privacy. 439 U.S. at 166.

See Justice Harlan's criticism of the utilization of property concepts in *Alderman v. United States*, 394 U.S. 165, 191 (Harlan, J., concurring and dissenting) and note 62 *supra*.

governmental intrusion' upon the premises."¹¹¹

To answer what it believed to be the proper inquiry, the dissent analyzed the facts in the light of *Katz* and found the majority's conclusion to be inconsistent. According to the dissent, *Katz* had recognized that an individual in a business office, in a friend's apartment, in a taxicab, or in a phone booth may rely on the protection of the fourth amendment.¹¹² It thus seems logical that a person riding in a private automobile with the permission of the owner is entitled to the same protection.¹¹³

At a minimum, the dissent expressed the fear that the police will have no idea who has a legitimate expectation of privacy in automobiles.¹¹⁴ At worst, the dissent worried that the majority had declared "'open season' on automobiles."¹¹⁵ Because only the owner of the vehicle or the seized item can object to a search, police have nothing to lose by searching a car with more than one occupant in hopes that an illegal search will yield evidence against a mere passenger who cannot object.¹¹⁶

4. ANALYSIS

The philosophical basis for the *Rakas* opinion was foreshadowed in earlier cases so the decision should not have come as a complete shock.¹¹⁷ For example, in *Mancusi* the inquiry was whether DeForte's office was an area "in which there was a reasonable expectation of freedom from governmental intrusion."¹¹⁸ This is very simi-

111. 439 U.S. at 161 (quoting *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968)).

112. 389 U.S. at 352 (footnotes omitted).

113. The dissent stated "a person legitimately on private premises knows the others allowed there and, though his privacy is not absolute, is entitled to expect that he is sharing it only with those persons and that governmental officials will intrude only with consent or by complying with the Fourth Amendment." 439 U.S. at 164. (citations omitted).

114. The prior "legitimately on [the] premises" test had provided a "bright line" by which the police could distinguish between the protected and the unprotected. *Id.* at 168. This easily adopted test provided for predictability, ease of enforcements, and limited police discretion. The majority, however, criticized Justice White's "bright line" test as being unworkable. *See id.* at 145-46 n.13.

115. 439 U.S. at 157 (White, J., dissenting).

116. *Id.* at 168-69. The Court in *Terry v. Ohio*, 392 U.S. 1 (1968), warned that "[a] ruling admitting evidence in a criminal trial, . . . has the necessary effect of legitimizing the conduct which produced the evidence . . ." *Id.* at 13.

If a policeman has no firm guidelines defining legal searches, he may either indulge in undesirable conduct or refrain from that which is desirable. *See generally* Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. Rev. 499, 552 n.379 (1964).

117. Commentators have also framed similar inquiries as those advanced in *Rakas*. *See* Trager & Lobenfeld, *supra* note 20, at 450; 3 W. LAFAYE, *supra* note 37, § 11.3 at 570.

118. 392 U.S. at 368. (citations omitted). *See also* notes 34-40 and accompanying text *supra*.

lar to the Court's new substantive fourth amendment inquiry. In *Alderman*, Justice Harlan wanted the majority to reinterpret standing according to substantive fourth amendment principles rather than property concepts.¹¹⁹ It is probable that the effect of the *Rakas* opinion will be to relegate prior standing principles to noncontrolling factors in the Court's inquiry as to whether there is a legitimate expectation of privacy in the area searched.

The majority's characterization of the new inquiry in terms of fourth amendment substantive questions rather than ancient standing concepts has considerable merit. The new test represents a balancing of the desire of people to be left alone against necessary limitations on that desire due to the needs of a free society.¹²⁰ It is obvious, however, that this new inquiry presents an ad hoc approach. Each individual fact must now be examined to determine whether one's expectation of privacy has been invaded. Only when this threshold inquiry has been answered affirmatively, may one contest the validity of a search and seizure. The issue of probable cause then comes into play with its own ad hoc facts and circumstances approach. With no "bright line" standing tests to apply to various facts, extensive litigation is inevitable.

Although the Court's new inquiry has merit, its application in *Rakas* and the Court's recommendations as to its use in automobile search cases are questionable. The remainder of this article will deal with the major criticisms of the *Rakas* decision.

III. THE EXCLUSIONARY RULE

A. *The Rule in Rakas*

By denying standing to automobile passengers who possess no proprietary interest in the automobile in which they ride or in the items seized, the Court in *Rakas* has drawn precious blood from an already ailing exclusionary rule.¹²¹

The *Rakas* opinion uses the standing doctrine to reduce the importance of the exclusionary rule, but does so without analyti-

119. 394 U.S. at 191 (1969). See also note 54 *supra*.

120. See notes 188-212 and accompanying text *infra*. In the aftermath of *Rakas*, one court stated that it was not clear from *Rakas* whether the automatic standing rule of *Jones* was eliminated in cases where there is prosecutorial self-contradiction. *United States v. Ochs*, No. 78-1163, slip op. at 1659 n.4 (2d Cir. Mar. 13, 1979). For a case of prosecutorial contradictory positions in an auto search, see *Glisson v. United States*, 406 F.2d 423 (5th Cir. 1969).

120. See Trager & Lobenfeld, *supra* note 20, at 450.

121. For an excellent discussion of Supreme Court cases which have undermined the exclusionary rule, see Comment, *Exclusionary Rule under Attack*, 4 U. BALT. L. REV. 89 (1974).

cally addressing the benefits and shortcomings of the rule. The only references to the exclusionary rule in Justice Rehnquist's opinion clearly show the Court's awareness that its decision narrows the applicability of the rule.

Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. . . . Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.¹²²

Although the Court asserted that problems with the exclusionary rule are properly considered when deciding an issue of standing, it never addressed those problems or the merits of the rule. As the dissenters recognized,¹²³ if the Court was troubled by the practical impact of the exclusionary rule, it should have squarely faced the issue of the rule's continued validity rather than manipulating the standing doctrine to reach a desired result in the specific case.¹²⁴

B. *History and Purpose*

Evidence obtained in violation of the fourth amendment was first excluded by the Supreme Court in the 1886 case of *Boyd v. United States*.¹²⁵ The evidence excluded in *Boyd* was obtained under a revenue statute which authorized the courts to require the defendant to produce his private records. The Court based its exclusion of such evidence upon both the fourth and fifth amendments, commenting that requiring the compulsory production of private records is tantamount to an unreasonable search and seizure.¹²⁶

The first Supreme Court case to base the exclusionary rule solely upon the fourth amendment was *Weeks v. United States*,¹²⁷

122. 439 U.S. at 137-38 (footnote omitted). The Court also noted that "since the exclusion rule is an attempt to effectuate the guaranties of the Fourth Amendment . . . , it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections." *Id.* at 134 (citation and footnote omitted).

123. *Id.* at 157 (White, J., dissenting).

124. *Cf. Stone v. Powell*, 428 U.S. 465, 536-42 (White, J., dissenting) ("I would join . . . in substantially limiting the reach of the exclusionary rule . . .").

125. 116 U.S. 616 (1886).

126. *Id.* at 634-35.

127. 232 U.S. 383 (1914), *overruled on other grounds*, *Elkins v. United States*, 364 U.S. 206 (1960).

decided in 1914. In a unanimous decision, the Court commented that "[i]f letters and private documents can . . . be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value"¹²⁸

Six years after *Weeks*, the Court, in *Silverthorne Lumber Co. v. United States*,¹²⁹ adopted what has come to be known as the "fruit of the poisonous tree" doctrine.¹³⁰ Analogizing illegally obtained evidence to a poisonous tree, the Court held that not only should the evidence obtained in the illegal search be excluded from court, but that the "fruits" of that "tree"—other evidence which would not have been found without the aid of the initial illegal search—should also be excluded.¹³¹

The fourth amendment provides that the people shall be secure against unreasonable searches and seizures;¹³² however, it does not explicitly delineate the consequences for violation of this guarantee. The *Weeks* Court resolved the resulting confusion, reasoning that if a court could not sanction a legally deficient search or seizure *before* a government official acts,¹³³ then it should not possess the ability to sanction the search or seizure *after* it has occurred.¹³⁴ As the Court noted:

The tendency of those who execute the criminal laws . . . to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people

128. *Id.* at 393.

129. 251 U.S. 385 (1920).

130. The phrase "fruit of the poisonous tree" was first used in *Nardone v. United States*, 308 U.S. 338, 341 (1939).

131. 251 U.S. at 392. The *Nardone* decision, however, established the "independent source" and the "attenuation" exceptions to the doctrine. Under the former, evidence obtained *independently* of the tainted evidence is not fruit of the poisonous tree. Under the attenuation exception, the prosecution can prove that the connection between the initial illegally obtained evidence and the derived evidence is "so attenuated as to dissipate the taint." *Id.* at 341. See generally Bain & Kelly, *Fruit of the Poisonous Tree: Recent Developments as Viewed Through its Exceptions*, 31 U. MIAMI L. REV. 615, (1977); Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579 (1968).

132. U.S. CONST. amend. IV.

133. The courts, for example, must first determine that there is sufficient cause for a search warrant to issue.

134. See Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 34; Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 25 (1925); Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?* 62 JUDICATURE 67, 68 (1978).

of all conditions have a right to appeal for maintenance of such fundamental rights.¹³⁵

The Court concluded that to sanction such proceedings would be to affirm judicially a "manifest neglect if not an open defiance of the prohibitions of the Constitution . . ." ¹³⁶ Thus, at its inception, the purpose of the exclusionary rule was to insure that the judiciary would enforce the mandate of the fourth amendment and minimize the courts' departure from their role as defenders of the Constitution.¹³⁷

As exclusion cases became more common, the Court began to recognize that enforcement of the rule appeared to deter illegal police conduct. This apparent side effect was elevated to a "purpose" in *Elkins v. United States*¹³⁸ in which the Court stated that "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."¹³⁹ The decision went on to say that "there is another consideration—the imperative of judicial integrity,"¹⁴⁰ but the primary rationale behind the opinion was clearly deterrence.¹⁴¹ In *Mapp v. Ohio*,¹⁴² the Supreme Court reasoned that the exclusionary rule is an essential part of the fourth amendment and applied the rule to the states through the fourteenth amendment due process clause. The Court justified its action finding that the purposes of the exclusionary rule are to protect judicial integrity,¹⁴³ and to provide a deterrent effect upon law enforcement officials.¹⁴⁴ Indeed, the Court stated that the exclusionary rule is the *only* effective method to compel respect for the fourth amendment.¹⁴⁵

Four years after *Mapp*, in *Linkletter v. Walker*,¹⁴⁶ the Court stated that the controlling purpose of the exclusionary rule is "to

135. *Weeks v. United States*, 232 U.S. 383, 392 (1914).

136. *Id.* at 394.

137. For a more detailed examination of the exclusionary rule, see Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978).

138. 364 U.S. 206 (1960).

139. *Id.* at 217.

140. *Id.* at 222.

141. Less than one page of the nineteen page opinion discusses the judicial integrity purpose, and even then it is described only as "another consideration." *Id.*

142. 367 U.S. 643 (1961).

143. *Id.* at 659 (citing *Elkins v. United States*, 364 U.S. 206 (1960)).

144. *Id.* at 656.

145. *Id.* (citing 346 U.S. at 207). The Court reasoned that the exclusionary rule removes the incentive to disregard privacy rights.

146. 381 U.S. 618 (1965).

deter the lawless action of the police"¹⁴⁷ and that this purpose would not be served by "the wholesale release of the guilty victims." The shift from judicial integrity to deterrence as the primary purpose behind the rule was completed in *United States v. Calandra*,¹⁴⁸ a 1974 decision in which the Court noted that the exclusionary 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."¹⁴⁹ It is apparent that judicial integrity is no longer recognized as the prime purpose behind the exclusionary rule; the deterrent effect of the rule has become the driving force behind its existence.

C. Viability of the Rule

Critics of the exclusionary rule point to empirical studies which challenge the deterrent effect of the rule¹⁵⁰ and also note that the rule applies *after* the search or seizure has occurred.¹⁵¹

From a public relations point of view, [the exclusionary rule] is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes.

. . . [I]t works after the fact, so that by then we know who the criminal is, the evidence against him, and the other circumstances of the case.¹⁵²

Subsequent research has raised questions regarding the validity of these empirical studies, however. Although the earlier surveys sug-

147. *Id.* at 637. The issue in *Linkletter* was whether *Mapp* should be applied retroactively. The Court found that "the wholesale release of the guilty victims" of past illegal searches would do nothing to deter future illegal police actions. *Id.*

148. 414 U.S. 338 (1974). *Calandra* held that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from him in an earlier unlawful search.

149. *Id.* at 348.

150. E.g. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). See also Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 245-48 (1973).

151. See, e.g., *Irvine v. California*, 347 U.S. 128 (1954), in which the Court noted, "[t]hat the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that is deters invasions of right by the police." *Id.* at 136 (1954).

152. J. KAPLAN, CRIMINAL JUSTICE 215-16 (2d ed. 1978). For other criticism of the exclusionary rule, see Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM L. CRIMINOLOGY & POLICE SCI. 266 (1961); Wilkey, *Why Suppress Valid Evidence?* 13 PROSECUTOR 124 (1977).

gested little relationship between the exclusionary rule and its deterrent effect on police behavior,¹⁵³ other investigations reveal a marked relationship between adoption of the rule and a reduction in the amount of unconstitutional police behavior.¹⁵⁴ The authors of the more recent studies give added weight to the deterrent justification for the rule.¹⁵⁵

Critics who object to the exclusionary rule because it takes effect after the unconstitutional search or seizure¹⁵⁶ have lost sight of the original purpose of the rule recognized in *Weeks*.¹⁵⁷ Judicial integrity demands that the efforts of the courts and their officers to bring the guilty to punishment should not be aided by the sacrifice of principles deeply embodied in our fundamental law.¹⁵⁸

If it is true, as Cooley said of the Fourth Amendment 110 years ago, that "it is better oftentimes that crime should go unpunished than that a citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity," why is it no less true when the accused's premises *have been* invaded or his constitutional rights otherwise violated? If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it has violated the Constitution?¹⁵⁹

Failure to exclude evidence seized in violation of the fourth amendment merely because the unlawful search and seizure has already occurred would give judicial affirmation to police defiance of the Constitution.

The exclusion of evidence obtained in violation of the fourth amendment is not dependent upon the severity of that intrusion or the good faith of the officer involved in the initial search and seizure. Under the American Law Institute's Model Code of Pre-

153. See note 166 *supra*.

154. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974); Critique, 69 Nw. U.L. Rev. 740 (1974).

155. It is interesting to note that while some critics of the rule are urging its modification or elimination on the ground that it has had little effect on police behavior, other critics are calling for the rule's repeal or modification on the ground that the police have attained such a high level of compliance with the fourth amendment guaranties that the rule is no longer needed as a deterrent. See Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 13 (1979).

156. See note 168 *supra*.

157. See text accompanying notes 153-57 *supra*.

158. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

159. Kamisar, *supra* note 155, at 13 (1979) (emphasis and brackets in original) (quoting T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 306 (1st ed. Boston 1868)).

Arrest Procedure,¹⁶⁰ however, a motion to suppress evidence will be granted only if the court finds that the violation upon which it is based was "substantial," or otherwise required by the Constitution.¹⁶¹ The Code adds that a violation will be deemed substantial if it was willful, regardless of any good faith on the part of the police officer involved.¹⁶² Among those criteria used to determine the substantiality of a violation are: the extent of deviation from lawful conduct, and the extent to which privacy was invaded.¹⁶³

Other proposals would limit the applicability of the exclusionary rule in situations where police good faith is present,¹⁶⁴ or would replace the rule with a tort action against the offending police officer or his employer.¹⁶⁵ All of these proposals are aimed at insuring that criminals do not go free as a result of "incidental" search and seizure violations. Yet with all these alternatives to the exclusionary rule, the fact remains that the government will continue to obtain convictions on the basis of unconstitutional police misconduct unless illegally obtained evidence is suppressed. Any "after the fact" remedy fails to recognize that any "violation," whether substantial or not, is by definition offensive to the privacy and property guarantees of the fourth amendment. If the integrity of the Constitution is to remain, any violation of its terms, regardless of how it is labeled, must be condemned by the Court. The government should not be judicially encouraged to pursue unconstitutional methods and conduct. It may also be argued that a private tort action is of little use to a convict whose constitutional rights have been violated by an illegal search or seizure.¹⁶⁶

D. Conclusion

The *Rakas* opinion uses the standing doctrine to limit the scope of the exclusionary rule without addressing whether such a limita-

160. ALI MODEL CODE OF PRE-ARREST PROCEDURE (1975).

161. *Id.* § 290.2(2). For examples of fourth amendment violations which some critics might deem nonsubstantial, see Boker & Corrigan, *Making the Constable Culpable: A Proposal to Improve the Exclusionary Rule*, 27 HASTINGS L.J. 1291, 1297-98 (1976); Sunderland, *supra* note 137, at 153-55 (1978).

162. ALI Model Code of Pre-Arrest Procedure § 290.2(3) (1975).

163. *Id.* § 290.2(4).

164. *E.g.* Weber, *Good Faith of Peace Officers in Search and Seizure: Seeking Proper Limits to the Exclusionary Rule*, 53 L.A.B.J. 307 (1977).

165. *E.g.* Oaks, *supra* note 150 at 756-57; Schad, *Police Liability for Invasion of Privacy*, 16 CLEV.-MAR. L. REV. 428 (1967).

166. One problem with the tort remedy is its viability in a jury trial. Certainly an accused or convicted criminal will be prejudiced before a jury in his attempts to recover damages from the police officer or government entity responsible for his capture and prosecution.

tion is consistent with the purposes of the rule.¹⁶⁷ By couching its opinion in the standing doctrine and creating a "legitimate expectation of privacy" test which revolves around property concepts,¹⁶⁸ the Court has, in effect, reduced the substantive fourth amendment rights of the accused. A standing limitation based upon unrealistic notions of possessory interest rather than real-to-life privacy expectations¹⁶⁹ is inconsistent with the purposes behind the exclusionary rule.

The *Rakas* majority has minimized the impact of the exclusionary rule without providing any substantive justification or alternative privacy protection. Furthermore, by relying upon the standing doctrine to restrict the rule, the Court has declared "open season on automobile passengers"¹⁷⁰ because passengers will lack the opportunity to assert that their fourth amendment rights have been violated.

Further, the *Rakas* approach fails to articulate factors, other than property interests, which will establish a legitimate expectation of privacy. By creating this void, the Supreme Court has left the lower courts and the police with wide discretion, and perhaps confusion, in performing their responsibilities. Even if a possessory interest is to be the sole factor for determining the existence of an expectation of privacy, it remains uncertain whether notions of equitable title or constructive ownership may also provide a defendant with a legitimate expectation of privacy in an automobile or in its contents.

IV. THE IMPACT OF *Rakas*

Prior to *Rakas*, there was a presumption that a mere passenger in an automobile was entitled to fourth amendment protection against unreasonable searches and seizures conducted in his presence.¹⁷¹ As a result of the *Rakas* opinions, however, passengers have

167. See notes 121-24 and accompanying text *supra*.

168. See notes 171-218 and accompanying text *infra*.

169. See note 172 *infra*.

170. 439 U.S. at 157 (White, J., dissenting) ("Insofar as passengers are concerned, the Court's opinion today declares an 'open season' on automobiles."); see notes 187-88 *infra* and accompanying text.

171. On numerous occasions, the Supreme Court has reached the merits in cases questioning the validity of automobile searches even though the petitioners did not own or possess the vehicle in question. *E.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Dyke v. Taylor Implement Co.*, 391 U.S. 216 (1968); *Preston v. United States*, 376 U.S. 364 (1964); *Husty v. United States*, 282 U.S. 694 (1931). This presumption permeated the lower courts as well. In *United States v. Edwards*, 577 F.2d 883, 892, (1978) (en banc), for example, the Court of Appeals for the Fifth Circuit noted that lawful

been stripped of any fourth amendment rights unless they can show a legitimate expectation of privacy in the area searched or the items seized. In order to show such an expectation, a defendant must now rely upon property concepts. In his dissent, Justice White raised some interesting questions regarding the future application of these concepts:

If the nonowner were the spouse or child of the owner, would the Court recognize a sufficient interest? If so, would distant relatives somehow have more of an expectation of privacy than close friends? What if the nonowner were driving with the owner's permission? Would nonowning drivers have more of an expectation of privacy than mere passengers? What about a passenger in a taxicab? *Katz* expressly recognized protection for such passengers. Why should Fourth Amendment rights be present when one pays a cabdriver for a ride but be absent when one is given a ride by a friend?¹⁷²

Since the *Rakas* decision, lower courts have been wrestling with precisely these questions.

The District Court for the Southern District of New York was given the opportunity to answer Justice White's question concerning the standing of a nonowner spouse in *United States v. Rivera*.¹⁷³ While the court denied standing to a mere passenger in the car,¹⁷⁴ it addressed the merits of a motion to suppress which had been filed by another passenger—the husband of the owner of the searched automobile.¹⁷⁵ Another form of constructive possessory interest was

presence in a vehicle at the time of a stop for the purpose of effecting a search is sufficient to confer that reasonable expectation of privacy essential to a claim of standing. This assumption has since been reversed by the Fifth Circuit in *United States v. Williams*, 589 F.2d 210 (5th Cir. 1979) (citing *Rakas*). See also *Bustamonte v. Schenkloth*, 448 F.2d 699 (9th Cir. 1971), *rev'd on other grounds*, 412 U.S. 218 (1973); *United States v. Peisner*, 311 F.2d 94 (4th Cir. 1963).

172. 439 U.S. at 167 (White, J., dissenting) (footnotes omitted). The majority, it should be noted, raises questions about White's "bright line" test. *Id.* at 144-48. For the authors' proposed solution, see notes 289-90 and accompanying text *infra*.

173. 465 F. Supp. 402 (S.D.N.Y. 1979).

174. The court stated:

[I]t is apparent that Rivera lacks standing to attack the seizure. It was established in the course of the hearings that the 1970 green station wagon belonged to one Ada Ramirez—wife of Maximino Ramirez. Rivera has failed to demonstrate that he had any proprietary interest either in the car or the items seized. Accordingly, he lacks a reasonable expectation of privacy in the vehicle and the goods seized therein and is without standing to challenge the seizure.

465 F. Supp. at 411.

175. *Id.* While the court reached the merits, it refused to suppress the evidence on other grounds.

demonstrated in *United States v. Ochs*.¹⁷⁶ In that case, petitioner, Ochs, asserted no actual possessory interest in the car he had been driving or in a briefcase which had been seized during a search of that car. The record indicated, however, that the record owner of the car was heavily indebted to the petitioner and had given the petitioner a key to the automobile and the privilege of using the car whenever he wished.¹⁷⁷ The record further disclosed that the petitioner had possession of the car ninety percent of the time.¹⁷⁸ The Second Circuit allowed standing, citing *Rakas*, having found that the petitioner had "complete dominion and control" over the car with respect to all except its owner and thus "had standing because of his possessory interest in the automobile"¹⁷⁹

Assuming that other circuits follow the *Ochs* "dominion and control" test, it appears likely that drivers of borrowed automobiles may possess the requisite possessory interest to assert a legitimate expectation of privacy. If, however, an individual who has dominion and control of an automobile as to everyone *except the owner* also has a legitimate expectation of privacy in that automobile, it seems illogical to say that a passenger in the same car whose dominion is only subordinated to the owner and the driver, does not have a similar expectation of privacy.

Although no other cases involving automobiles have been decided, several quasi-possessory interests have been subjected to the *Rakas* analysis in cases dealing with drug-laden ships and airplanes. These cases may provide some guidance in determining the existence of a legitimate expectation of privacy in automobiles. The Fifth Circuit has determined that the captain of a ship "could perhaps assert sufficient protectable interests [and that] at least some of those aboard vessels may reasonably expect a degree of privacy."¹⁸⁰ Whatever degree of privacy a crewmember of a ship may have, however, it does not extend to every portion of the ship. In *United States v. Williams*,¹⁸¹ for example, the Fifth Circuit held that a crewmember "has no legitimate expectation of privacy in the hold of a merchant vessel,"¹⁸² but the decision implied that he may have such an expectation in the living quarters of the ship. A federal district court in Maine has refused to indulge in such distinctions

176. 595 F.2d 1247 (2d Cir. 1979).

177. *Id.* at 1252-53.

178. *Id.* at 1252 n.3.

179. *Id.* at 1253 n.4.

180. *United States v. Whitaker*, 592 F.2d 827, 828 n.2 (5th Cir. 1979).

181. 589 F.2d 210 (5th Cir. 1979).

182. *Id.* at 214.

when it was faced with similar circumstances, preferring to allow standing to all the defendants who were on board the ship in question: the owner, the captain and a crewmember.¹⁸³

In *United States v. Bruneau*,¹⁸⁴ a pilot whose argument regarding his partial possessory interest was found to be "incredulous" by the Eighth Circuit was denied standing to contest the search of the aircraft he was allegedly flying. The defendant claimed that he gave another man \$10,000 to help purchase the airplane. While he was able to show that he had indeed procured a \$10,000 loan from his bank, he could not substantiate that the money was actually used to purchase the aircraft.¹⁸⁵ The court gave no indication whether the defendant would have had standing if he had proven his case.

It is readily apparent that the Court's vague "notions of property law" guidelines are subject to considerable interpretation and that such guidelines are not always consistent with commonly accepted expectations of privacy. The *Rakas* opinion has made individuals' expectations of privacy contingent upon subtle distinctions "whose validity is largely historical."¹⁸⁶ Of far more concern than the lack of appropriate and clear guidelines for defendants, is the Court's open invitation to police to engage in unreasonable searches and seizures whenever an automobile contains more than one occupant.¹⁸⁷ Police are now fully aware that even without a warrant or probable cause, they may search an automobile containing two or more occupants, sacrificing the privacy rights of the owner in order to obtain evidence against mere passengers.¹⁸⁸

V. THE LEGITIMATE EXPECTATION OF PRIVACY IN VEHICLES

The inquiry of the Supreme Court in *Rakas* focused on whether the defendants "had a legitimate expectation of privacy" in particular areas of the automobile searched.¹⁸⁹ This section discusses the history and development of legitimate expectations of privacy in a motor vehicle.

The fourth amendment protects "persons, houses, papers and

183. *United States v. Hilton*, 469 F. Supp. 94, 106 (N.D. Me. 1979). The cases which have considered post-*Rakas* standing to contest searches of vessels are succinctly discussed in *United States v. Whitmore*, 595 F.2d 1303, 1312 (5th Cir. 1979).

184. 594 F.2d 1190 (8th Cir. 1979).

185. *Id.* at 1192-93.

186. *Jones v. United States*, 362 U.S. at 266.

187. *See* 439 U.S. at 168-69.

188. *See id.* at 169 (citing Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U. L. Rev. 266, 304-05 (1976)).

189. 439 U.S. at 148.

effects" from unreasonable searches.¹⁹⁰ The automobile comes within the broad category of one's effects and thus gains the protection afforded by the fourth amendment. These protections, however, do not extend equally to one's person, home, papers or effects. The leading automobile privacy case is *Carroll v. United States*,¹⁹¹ which arose during the days of prohibition when moonshiners were utilizing cars to peddle their wares. In this landmark case, agents acting with probable cause conducted a warrantless search of defendant's car and seized goods in transit.¹⁹² The Supreme Court upheld the "reasonableness" of this warrantless search and created an important exception to the warrant requirement based on the mobility of the object or premises searched.¹⁹³ It would not have been feasible for the agents to have procured a warrant before stopping the car to search it. For determining reasonableness, the warrantless search of a vehicle which can quickly be moved from the jurisdiction in which the warrant must issue is distinguishable from the warrantless search of an immovable structure.¹⁹⁴

190. U.S. CONST. amend. IV; see Bocigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 532 n.20 (1978), for an interesting tracing of the fourth amendment's history to the Magna Carta, Roman law and the Bible.

191. 267 U.S. 132 (1925).

192. Of course, the probable cause requirement of the fourth amendment still remains. One commentator has suggested that probable cause for auto searches is less certain today than it was 50 years ago when *Carroll* was decided. See 53 N.C.L. REV. 722, 747 (1975).

193. Other types of exigent circumstances calling for an exception to the fourth amendment warrant requirement are: (1) plain view, *Ker v. California*, 374 U.S. 23 (1963); (2) search incident to lawful arrest, *Chimel v. California*, 395 U.S. 752 (1969); (3) stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968); (4) abandonment, *United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973) (en banc); and (5) hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967); see *Carlton v. Estelle*, 490 F.2d 759, 761 (1973), *cert. denied* 414 U.S. 1043 (1973) (potential intervention by third party is an exigent circumstance).

It has been over 50 years since *Carroll* was decided and the case is generally cited for the proposition that "a car may be searched or seized without a warrant if there are both exigent circumstances and probable cause to believe that the car will yield contraband or evidence useful for prosecution of crime. . . ." Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 835 (1974).

Carroll specifically dealt with the provisions of the National Prohibition Act (the Volstead Act) which is of little importance in present day fourth amendment doctrine. For an interesting history of the car search doctrine and how it owes its birth to this Act, see Miles & Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105, 112 (1972).

194. 267 U.S. at 153. The general rule respecting homes was well expressed by the words of Lord Pitt:

The poorest man in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Quoted in N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE*

The *Carroll* doctrine was extended by *Chambers v. Maroney*.¹⁹⁵ The majority opinion by Justice White stated that there was no difference for fourth amendment purposes between the immediate search of an automobile without a warrant, and the immobilization of a car until a warrant is obtained.¹⁹⁶ *Chambers* permits a search to take place either at the time of arrest or after impoundment at the police station a short time thereafter, as the moving vehicle emergency still exists.¹⁹⁷ Once again, the Court examined the *practical* effect of the peculiar characteristics of the automobile on the application of the fourth amendment.¹⁹⁸ The apparent effect of the *Chambers* holding was the elimination of a warrant requirement

UNITED STATES CONSTITUTION, 49-50 (1937). The security of the dwelling house has always been of paramount concern to all Americans and no doubt was the basic concern of the framers when drafting the fourth amendment. See *United States v. Chadwick*, 433 U.S. 1, 8 (1977). The Supreme Court has been steadfast in ensuring that this sanctity is not unreasonably invaded by the government.

Carroll did not speak of any invasion of privacy brought about by the search although subsequent and present day decisions are intimately concerned with this topic. See notes 208-09 and accompanying text *infra*.

195. 399 U.S. 42 (1970).

196. *Id.* at 51-52.

197. *Id.* at 52. Professor LaFave suggests that the exigent circumstances no longer exist once the vehicle is in custody. 2 W. LAFAVE, SEARCH AND SEIZURE 528 (1978). Realistically, it is hard to visualize how an automobile can be mobile while impounded and under police supervision, and Justice White did not elaborate.

198. 399 U.S. at 51-52. The practical considerations noted by the Court are: the car is movable; the occupants are alerted and the car's contents may never be found again if a warrant must be obtained; the car may be taken out of the jurisdiction and tracing the car and searching it an extended time later would permit instruments or fruits of the crime to be removed prior to search.

In *Chambers*, the occupants were arrested at night, making a careful search impractical and unsafe for the officers. Alternatively, taking the vehicle to the station house promoted the car's safety and the owner's convenience. *Id.* at 52 n.10.

A more recent example of how the Supreme Court applies *Chambers* can be seen in *Texas v. White*, 423 U.S. 67 (1975), in which it was held proper for officers with probable cause to conduct a warrantless search of an automobile on the scene, to delay the search until a later time at the police station. The dissenters, Justices Marshall and Brennan, felt a factual difference made this case dissimilar to *Chambers*. In *Chambers*, the car was taken from a dark parking lot at night and searched later at the station for practical reasons, while in *White*, the seizure of the car took place at 1:30 in the afternoon in front of the First National Bank of Amarillo. To the dissenters, it did not appear that an immediate search was either impractical or unsafe for the arresting officers.

One commentator analogized the Court's treatment of people and cars in public places and stated that after *White*, the Burger Court's position became clear:

Henceforth, automobiles, at least those found in a public place, are evidently to be treated like people, also found in a public place. If the police have probable cause to search and seize a car or to arrest a person, they may act without the prior approval of a magistrate even when there is a reasonable opportunity to seek such approval.

Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335, 407 (1978).

for any automobile search.

In *Coolidge v. New Hampshire*,¹⁹⁹ however, the Court addressed this misconception stating, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."²⁰⁰ In its plurality opinion, the Court found that exigent circumstances simply were not present and the opportunity for search was not "fleeting." The police had known for some time of the role of the car in the crime, thus probable cause existed well before arrest. Moreover, when Coolidge was arrested in his home, the unoccupied car was parked on private property and was hardly mobile.²⁰¹ Under these circumstances the Court held that the automobile exception to the fourth amendment warrant requirement was irrelevant.²⁰²

More recently the scope of the automobile exception to the fourth amendment under the *Carroll-Chambers* doctrine was examined in *Cardwell v. Lewis*.²⁰³ Once again the Supreme Court failed to muster a majority to agree on an analysis in this admittedly difficult area.²⁰⁴ The Court was faced with a warrantless seizure of an automobile from a public parking lot and subsequent examination of the exterior of the car at the police impoundment lot.²⁰⁵ The plurality framed the issue thusly: "[W]hether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect."²⁰⁶

Writing for the plurality, Justice Blackmun noted that the mobile nature of an automobile was only one reason for having a less stringent warrant requirement for automobiles as compared to

199. 403 U.S. 443 (1971).

200. *Id.* at 461-62.

201. *Id.* at 460. In a footnote, the plurality of Justices Stewart, Douglas, Brennan and Marshall examined the term "mobile" as it applies to impounded cars. They recognized that any car is mobile to the extent that someone with keys could slip by the police and drive it away, but there was "no constitutional significance to this sort of mobility." *Id.* at 461 n.18.

202. *Id.* at 462. Because the search was invalid under the reasoning of both *Carroll* and *Chambers*, *Dyke v. Implement Mfg. Co.*, 391 U.S. 216 (1968) controlled. *Dyke* held that if a search of an automobile is impermissible at the time of arrest, it is invalid if conducted later at the station.

203. 417 U.S. 583 (1974).

204. Justices Blackmun, White, Rehnquist and Chief Justice Burger made up the plurality. As Professor Anthony Amsterdam has stated, "[f]or clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product . . ." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

205. 417 U.S. at 587-88.

206. *Id.* at 589. The existence of probable cause was not at issue, having been conceded by the defendant. *Id.* at 592.

houses.²⁰⁷ He continued by addressing directly the expectation of privacy in automobiles. Finding that automobiles are used primarily for transportation and only rarely serve as a residence or as a repository of personal effects and that its occupants are usually in plain view,²⁰⁸ Justice Blackmun stated "the search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building."²⁰⁹ It is thus apparent from *Lewis* that one's expectation of privacy in an automobile is diminished when compared to one's expectations of privacy in his home. How far it should be diminished is the critical question. The Court in the past and in the recent cases of *Rakas v. Illinois*²¹⁰ and *Delaware v. Prouse*²¹¹ has struggled with this problem. Before turning to these recent cases, however, a discussion of another area of law uniquely related to privacy concepts surrounding automobiles is relevant.

*Chimel v. California*²¹² stands for the proposition that a person and anything within his immediate control may be searched incident to arrest. "Within one's immediate control" has come to mean those areas where a person might obtain weapons or conceal or destroy evidentiary items. The question arises, how does the *Chimel*

207. 417 U.S. at 589-90.

208. *Id.* at 590. The last factor could be called into serious doubt today for cars with darkly tinted windows. Although travelling on public thoroughfares, the occupants and contents of these autos are definitely not in plain view. Whether this is an important distinction remains to be seen. It may be one of the factors taken into account after *Rakas* in determining one's expectation of privacy. The argument might be made, however, that it costs extra money to have heavily tinted windows, so only the more affluent could afford them and thus an unequal expectation of privacy could be purchased.

In addition, the contents of an automobile are often not readily viewable because of precautions taken to make them more private, for instance, locking items in the trunk. This should be a factor in determining whether one's legitimate expectations of privacy in a motor vehicle are less diminished because of the purposeful manner in which one attempts to make items private in a public vehicle. See *Katz*, 389 U.S. at 352 (shutting the door of the phone booth to make private a conversation in a public place).

209. *Id.* at 590 (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring)). The plurality quickly noted, however, that merely because one desires to be mobile and use the public thoroughfare, he does not waive his right to be free from unreasonable governmental intrusion. 417 U.S. at 591. While the plurality opinion noted that any invasion of privacy caused by the examination of the right rear tire and the taking of exterior paint scrapings was "abstract and theoretical," *id.* at 592, the dissent disagreed. They pointed out that the plurality had drawn a distinction between the car in *Coolidge* which had been parked on private property and the car in *Lewis* which was in a public lot, but had neglected to mention that the car had been parked in the public lot *in compliance with a police request to appear*. *Id.* at 57.

210. 439 U.S. 128 (1978); see notes 253-61 and accompanying text *infra*.

211. 440 U.S. 648 (1979); see notes 262-81 and accompanying text *infra*.

212. 395 U.S. 752 (1969).

rationale apply to searches of vehicles made incident to arrest?²¹³

It must be remembered that searches incident to lawful arrest comprise one of the narrow exceptions to the general principle of the fourth amendment that searches are unconstitutional unless authorized by a prior neutral magistrate.²¹⁴ The particular exception outlined in *Chimel* serves two primary purposes: (1) to permit the arresting officer to disarm a suspect for his own safety and to prevent any escape attempts, and (2) to preclude a suspect from destroying or concealing evidence.²¹⁵ A search extending beyond these limitations violates the policies of *Chimel*.

Once a person has been ordered out of his car, is the area within his immediate control that which he presently can reach or that area which he could have reached when he was seated in the vehicle? Prior to *Chimel*, under the rationale of *United States v. Rabinowitz*²¹⁶ and *Harris v. United States*,²¹⁷ a search of the entire vehicle was permissible after a lawful arrest, except for minor traffic violations.²¹⁸

In light of the recent Supreme Court case of *Pennsylvania v. Mimms*,²¹⁹ in which the Court held that persons (including passengers) riding in an automobile have no fourth amendment right not to be ordered from their vehicle once a legitimate stop has been made, the resolution of this problem is even more important. After *Chimel*, once an arrestee has left the car and is under police control, it would not appear that the vehicle is within his immediate control any more than the bedroom of an individual who was arrested in his living room is within that individual's immediate control. Most courts agree that a car may not be searched incident to arrest after the vehicle has been removed from the scene or the arrestee has been removed from the vehicle.²²⁰ On the other hand, courts have upheld

213. See Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A. L. REV. 626 (1970) wherein the author proposes that the application of the *Chimel* rule in auto searches be the same as in the area of residential searches.

214. See note 12 *supra*.

215. 395 U.S. at 762-63.

216. 339 U.S. 56 (1950).

217. 331 U.S. 145 (1947).

218. See *Preston v. United States*, 376 U.S. 364 (1964), which recognized that as a search incident to arrest must be contemporaneous with the arrest, a search of a vehicle at the police station is simply not incident to the prior arrest of the occupants. See also *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) (search of auto held not pursuant to arrest when car parked outside jail where arrestee taken).

219. 434 U.S. 106 (1977).

220. 2 W. LAFAVE, SEARCH AND SEIZURE 501 (1978); see *United States v. Edwards*, 554 F.2d 1331 (5th Cir. 1977) (suspect securely locked in rear of patrol car at time of search, not incident to arrest).

vehicle searches as incident to arrest even where it appears highly unlikely that an arrestee could gain access to the vehicle.²²¹ The additional factor of the automobile's mobility which played such an important part in the *Carroll-Chambers* doctrine, no doubt has had an effect on the courts' decisions.²²² A noted commentator has criticized the use of the mobility factor to somehow broaden the scope of a permissible search incident to arrest because "the *Chimel* rationale relates to the arrestee's access to the place searched rather than the risk that the evidence might otherwise become unavailable."²²³ The *Chimel* limitations on a search incident to arrest apply in a person's home. Should not these same limitations apply when the arrestee is outside his car, thereby forbidding warrantless searches of any part of the vehicle not within his immediate control?²²⁴

True, *Lewis* pointed out a few reasons why one should expect less privacy in an automobile than in his home: the use of public thoroughfares, exposure to public view, the car as a means of transportation rather than a residence.²²⁵ Other facts quickly come to

221. See, e.g., *Application of Kiser*, 419 F.2d 1134 (8th Cir. 1969) (police could search under blanket on back seat of car because defendant was "within leaping range").

See also the recent case where the *Terry* pat-down limited search was extended to the vehicle in which the suspect is riding, *United States v. Rainone*, 586 F.2d 1131 (7th Cir. 1978) (with the defendant at the back fender of the car the policeman placed his hand under the front seat discovering dynamite).

The Fifth Circuit does not follow this *Terry* approach to vehicle pat-down once the suspects have exited. See *Government of the Canal Zone v. Bender*, 573 F.2d 1329 (5th Cir. 1978).

222. See, e.g., *United States v. Frick*, 490 F.2d 666, 670 (5th Cir. 1973) (upholding search of attaché case which was two feet from defendant on the back seat of car when he was arrested. Exigent factors justifying the agent's actions were the "extremely mobile" objects: the automobile and the attaché case); see notes 8-21 and accompanying text *supra*.

223. 2 W. LAFAVE, *SEARCH AND SEIZURE* 500 (1978). The Supreme Court has not yet ruled directly on the constitutionality of a warrantless search of an automobile incident to an arrest and thus it remains a gray area. In *Gustafson v. Florida*, 414 U.S. 260 (1973), the Court permitted a full search of a suspect taken into custody for driving without a valid operator's license even though the officer had no fear of the arrestee being armed or dangerous. The Court, however, did not touch upon any issue concerning search of the auto incident to the lawful arrest. See also *United States v. Robinson*, 414 U.S. 218 (1973) (same).

224. The factors Professor LaFave would examine are: (1) whether or not the arrestee was placed in some sort of restraints; (2) the position of the defendant and the arresting officer in relation to the vehicle; (3) the ease or difficulty of gaining entry to the vehicle or of gaining access to the particular container or enclosure therein searched; (4) the number of officers present in relation to the number of arrestees or other persons. 2 W. LAFAVE, *SEARCH AND SEIZURE* 502-03 (1978).

Of course, in every search and seizure case the facts and circumstances determine the reasonableness of the search and the ultimate outcome. The privacy aspect of the automobile as viewed in modern society, however, would dictate the weight to be given the factors delineated.

225. See notes 203-09 and accompanying text *supra*.

mind when viewing the "public" aspect of the automobile: the variety of ways in which the government regulates autos—inspections, registration, licensing, traffic laws, insurance, parking, etc. As the Court pointed out in *Cady v. Dombroski*,²²⁶ the extent of police-citizen contact involving motor vehicles is much greater than police-citizen contact in a home.²²⁷ Although such contact often arises in regard to criminal or vehicular statutory violations, a great deal results from noncriminal activities, *i.e.*, accidents, disabled vehicles, or other community caretaking functions.²²⁸

Yet, however "public" an automobile might seem, all privacy is not discarded when one steps into a vehicle. The fourth amendment still stands as a protection from unreasonable searches and seizures of autos. Granted that there is some degree of privacy to be had in relation to the use of a motor vehicle, where is the line to be drawn? What degree of privacy can we expect in our automobiles today in light of its historical treatment and recent cases?

The watershed case of *Katz v. United States*²²⁹ permeates this entire inquiry just as it did the standing inquiry.²³⁰ *Katz* is most noteworthy for the proposition that "[t]he Fourth Amendment protects people, not places" and "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."²³¹ The Court's caveat, however, was that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."²³² While at first glance these latter two quotes appear to be diametrically opposed, *Katz* provides the distinction. *Katz* was in a public place, a glass-enclosed telephone booth, where all the world could see him. Although he was in an area accessible to the public and knowingly exposed, what he sought to preserve as private was his conversation.

226. 413 U.S. 440 (1973).

227. *Id.* at 441.

228. *Id.* Justice Rehnquist, writing for the majority in *Cady*, based the constitutional differences between searches of homes and vehicles on the ambulatory character of automobiles and the fact that extensive and often noncriminal contact with cars brings officials into plain view of criminal evidence. *Id.* at 442.

The effect of the holding in *Cady* is that a warrantless search of an automobile is legitimate even where the possibilities of the vehicle being removed or evidence in it being destroyed are remote or nonexistent. 1 W. LAFAYE, SEARCH AND SEIZURE 233 (1978).

229. 389 U.S. 347 (1967).

230. See notes 35-36, 54-56 & 91 and accompanying text *supra*.

231. 389 U.S. at 351. The Court rejected a trespass doctrine under which a fourth amendment violation turned on whether or not there was a physical intrusion into a given enclosure, thus overruling *Olmstead v. United States*, 277 U.S. 438 (1928) and *Goldman v. United States*, 316 U.S. 129 (1942). 389 U.S. at 351, 353.

232. *Id.* at 351.

He manifested this by shutting the door of the booth, thereby seeking to exclude the uninvited ear.²³³ Thus, his conversation was constitutionally protected from a search and seizure in violation of the fourth amendment. The government's eavesdropping activities "violated the privacy upon which he justifiably relied."²³⁴ The holding in *Katz* expanded the fourth amendment to protect people from unreasonable governmental intrusion into their legitimate expectation of privacy.²³⁵

After *Katz*, however, what expectations of privacy are considered legitimate or constitutionally justifiable? The answer to this question can only come from a delicate balancing of the present day societal standards, customs, and values which define privacy, against the need for the various techniques and mechanisms of an efficient law enforcement body. A workable constitutional balance must be struck between the public and private interests at stake.²³⁶ An analysis of the latest Supreme Court cases will outline more clearly how the reasonable expectation of privacy test expounded in *Katz* has fared in automobile-related cases.

In *United States v. Chadwick*,²³⁷ the Court distinguished between the legitimate expectation of privacy in an automobile versus that in personal luggage. A 200-pound double-locked footlocker containing marijuana was placed in the trunk of Chadwick's car. While the trunk of the car was still open and before the car had been

233. *Id.* at 352.

234. *Id.* Justice Harlan, in his concurring opinion, formulated a two-fold requirement to determine whether a person has a constitutionally protected reasonable expectation of privacy. First, whether a person has exhibited an actual subjective expectation of privacy and second, whether the expectation is one that society is prepared to recognize as "reasonable." *Id.* at 360-61.

Professor LaFave criticizes the first requirement of a subjective expectation as a poor prerequisite to a finding that a search has taken place because it distorts and limits the *Katz* rule. Our expectations are merely a reflection of the laws in force as they shape our rules, customs and values. 1 W. LAFAVE, SEARCH AND SEIZURE 230 (1978). Justice Harlan himself rejected the first prerequisite in his dissent in *United States v. White*, 401 U.S. 745 (1971).

235. See *United States v. Chadwick*, 433 U.S. 1, 7 (1977). Just how far this expansion of the coverage of the fourth amendment has gone since *Katz* is impossible to tell. 1 W. LAFAVE, SEARCH AND SEIZURE 229 (1978).

236. Justice Harlan reached a similar conclusion in *United States v. White*, 401 U.S. 745 (1971), stating: "This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." *Id.* at 786 (Harlan, J., dissenting). It must be noted, however, that Justice Harlan did not consider *Chambers v. Maroney*, 399 U.S. 42 (1970), as a retreat from the propositions of *Katz* and *Chimel*, but noted that moving vehicles have always presented a "special fourth amendment problem." *Id.* at 784 n.20.

237. 433 U.S. 1 (1977).

started, the three respondents were arrested.²³⁸ Although the agents had probable cause to believe the trunk contained contraband,²³⁹ no search warrant was obtained. The footlocker remained under the exclusive control of the federal officers and it was opened an hour and a half after the arrests.²⁴⁰

Flying in the face of the established preference for warrants, the government argued initially that the "Fourth Amendment Warrant Clause protects only interests traditionally identified with the home."²⁴¹ Chief Justice Burger, writing for the majority, quickly rejected this argument stating that the fourth amendment protects not only "specifically designated locales. . . . [But] it protects people from unreasonable government intrusions into their legitimate expectations of privacy."²⁴² Because a warrant aids in providing this protection, the issue framed was whether under the facts of the case a warrantless search was unreasonable.²⁴³

The Court noted that by placing personal effects into a double-locked footlocker, the respondents manifested their expectation that the contents inside would remain free from public intrusion. The Court compared this to the locking of the door of one's home and held that "one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause."²⁴⁴

The government next analogized the mobility of the footlocker to that of an automobile, maintaining that warrantless searches

238. *Id.* at 4.

239. Factors giving rise to probable cause were: (1) the trunk appeared unusually heavy to railroad officials in San Diego; (2) one respondent matched a profile used to spot drug traffickers; (3) the trunk leaked talcum powder which is used often to mask the odor of marijuana; and, (4) a trained dog signalled the presence of a controlled substance inside the locker. *Id.* at 3-4.

Whether the use of the dog's sensitive nose was a search in itself was not mentioned by the Court. See Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75 (1976).

240. 433 U.S. at 4.

241. *Id.* at 6. The government contended that only homes, offices and private communications were meant to be protected by the fourth amendment warrant requirement. *Id.* at 7.

Justice Brennan, in his concurring opinion, and Justices Blackmun and Rehnquist in dissent, severely castigated the Department of Justice for attempting "to vindicate an extreme view of the Fourth Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other 'high privacy' areas." *Id.* at 17. As Justice Brennan pointed out, it appears the Justice Department temporarily forgot its primary mission of protecting the constitutional liberties of the people of the United States and put forth "extreme and dubious legal arguments." *Id.* at 16.

242. *Id.* at 7.

243. *Id.*

244. *Id.* at 11.

based on probable cause should be permitted.²⁴⁵ The Chief Justice refused to accept the analogy finding that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile."²⁴⁶ The Court made it clear that the diminished expectation of privacy in automobiles simply did not apply to double-locked footlockers—luggage contents are not open to the continuous public and official scrutiny to which automobiles are subject.²⁴⁷ The majority also harkened back to the primary purpose of cars, getting from point A to point B, noting that a footlocker is intended primarily as a repository for personal items.²⁴⁸ In addition, the footlocker in *Chadwick* had no mobility factor since it was under the exclusive control of federal agents with no danger that it could be removed before a search warrant could be obtained.²⁴⁹ The Court found that the defendants were entitled to a determination by a neutral magistrate as to whether a warrant should have issued "before their privacy interests in the contents of the footlocker were invaded."²⁵⁰

245. *Id.* at 12.

246. *Id.* at 13.

247. *Id.*

248. *Id.*

249. In distinguishing the situation where police have an automobile secured and it is considered mobile, the Court noted that secure storage facilities may not be available and its size and inherent mobility makes it particularly susceptible to theft or vandalism. *Id.* at 13 n.7.

250. *Id.* at 15-16. In addition, the Court rejected the government's third argument that the search had been incident to arrest under *Chimel*, since the search did not take place until an hour and a half after arrest. *Id.* at 14-15.

In *Chadwick* it was merely a coincidence that the footlocker was in the trunk of a parked automobile. The obvious question arises, what if the connection was more than coincidental and the car had been mobile when the arrest was made? Could the footlocker have been legitimately searched pursuant to the automobile exception? The majority did not touch upon this question but Justice Brennan in his concurring opinion left this query open and said it was by no means clear whether this locked container could have been searched under this exception. 433 U.S. at 17 n.1. Nor did he feel it could have been searched under the *Chimel* rationale since even though the defendants were seated on the locked trunk, in his view, it was not within their immediate control, meaning they could not obtain a weapon from it or destroy evidence within it. *Id.* at n.2; cf. *Husty v. United States*, 282 U.S. 694 (1931) (Court found exigent circumstances in a potentially mobile car).

The dissenters, Justices Blackmun and Rehnquist, agreed that under the automobile exception, once the respondents started to drive away, the car could have been seized and the footlocker and any other contents searched without a warrant. 433 U.S. at 22-23. The dissenters also question the distinction between a footlocker and an auto for mobility purposes, feeling that both items, if legitimately seized, can be later searched without the necessity of obtaining a warrant. In addition, the dissent would have found the instant search valid under *Chimel* and also under *South Dakota v. Opperman*, 428 U.S. 364 (1976). If the car had properly been impounded, the contents could have been inventoried without any showing of probable cause. See Comment, *Automobile Inventories and the Fourth Amendment: South Dakota v. Opperman*, 38 Ohio St. L.J. 177 (1977).

This question was recently answered by the Court in *Arkansas v. Sanders*, 47

It appeared from *Chadwick* that the Court regarded highly the preference for warrants which is a foundation of the fourth amendment. At the same time, however, the Justices cited *Lewis* with favor, judicially reaffirming the concept of diminished expectations of privacy in automobiles.²⁵¹ Unfortunately, the Court chose not to delineate specifically the origins of the expectation of privacy in a footlocker. As a result, it cannot be gleaned from the opinion whether the greater privacy expectation comes from the fact that the footlocker was locked or that it was generally an item which contains personal goods, or both. Surely, an automobile often contains personal items and can also be locked. If the Court in *Chadwick* really intended to establish a preference for warrants wherever possible, the search of a seized automobile arguably would require a neutral magistrate's evaluation whenever not greatly impractical.²⁵²

In *Rakas*, the Supreme Court directly addressed the expectations of privacy in automobiles. The majority attempted to justify its holding by stating that traditionally "cars are not to be treated identically with houses or apartments for Fourth Amendment purposes."²⁵³ Careful inspection, however, will reveal that this statement is unresponsive to the Court's rephrased inquiry. No support whatever was given by the majority for their bland conclusion that there are simply no privacy rights in a locked glove compartment or under the front passenger seat of an automobile.²⁵⁴

In his concurring opinion, Justice Powell engaged in a bit more

U.S.L.W. 4783 (U.S. June 20, 1979). There, the Court, faced with this very issue, held that in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an auto properly stopped and searched for contraband. Justices Blackmun and Rehnquist dissented.

251. 433 U.S. at 12; see notes 203-09 and accompanying text *supra*.

252. On its face the warrant clause does not distinguish between a requirement for "persons, houses, papers and effects," much less a distinction between different effects. Of course, the "automobile exception" is presently established law. 433 U.S. at 8.

For a look at problems with warrant requirements and prior judicial approval, see Yackle, *supra* note 198; 1 W. LAFAVE, SEARCH AND SEIZURE 233 (1978). See also Note, *Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items*, 58 IOWA L. REV. 1134, 1156 (1973).

253. 439 U.S. at 148 (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)).

Justice Powell, in the concurring opinion, enumerated reasons for the distinction: "Automobiles operate on public streets, they are served in public places, they stop frequently, they are usually parked in public places, their interiors are highly visible, and they are subject to extensive regulation and inspection." *Id.* at 154 n.2.

254. *Id.* The defendants had made no claim that they had any expectation of privacy in the areas of the auto searched, but had argued that they were legitimately on the premises and thus had standing to contest the search. This argument was rejected as the Court severely limited the *Jones* holding. *Id.* at 147-48.

analysis before rejecting the defendants' privacy interest claim. As he saw it, the issue was: "[W]hether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances."²⁵⁵ In determining the reasonableness of the defendants' claim, Justice Powell relied heavily on the historical fourth amendment treatment afforded automobiles, emphasizing that the defendants here had no "control" over the car or its compartments.²⁵⁶ The concurring opinion thus makes a bald value judgment as to the degree of privacy passengers expect while riding in a car.²⁵⁷ Obviously, Justice Powell believes that they expect little, "as the shared experience of us all bears witness."²⁵⁸

The four dissenters in *Rakas* took the opposite approach to the privacy aspect, noting that any search, *including an automobile search*, was a substantial invasion of privacy.²⁵⁹ The relevant inquiry, according to the dissent, was "[w]hether petitioner had a reasonable expectation [on his part] of freedom from governmental intrusion upon those premises."²⁶⁰ Finding precisely such a reasonable expectation, the dissenters would have upheld *Jones* and afforded the passengers standing. The divergence in the values of the justices in this volatile area is illustrated by the dissent's perception that "[t]he Court's holding is contrary not only to our past decisions and the logic of the Fourth Amendment, but also to the *everyday expectations of privacy that we all share*."²⁶¹

In striking contrast to *Rakas*' effective emasculation of the privacy rights of automobile passengers, the Court, in a case decided less than four months later, went to great pains to articulate that the fourth amendment *does* attach to an individual operating or traveling in an automobile.

In *Delaware v. Prouse*,²⁶² a patrolman stopped an automobile occupied by the respondent²⁶³ and seized marijuana in plain view on

255. *Id.* at 152.

256. *Id.* at 154. He admits that a closer case would be presented if one of the defendants had a key to the glove compartment. *Id.* at 155 n.4. Of course this does absolutely nothing to establish any standards for policemen to guide their conduct and reverts back to property/ownership concepts which the majority "tells us" have been rejected.

257. See notes 203-09 and accompanying text *supra*.

258. 439 U.S. at 155.

259. *Id.* at 157. The dissenting opinion, as well as the concurrence, looked to past Supreme Court decisions and found that mere passengers in automobiles were entitled to reach the merits when contesting a search and seizure. *Id.* at 158-59.

260. See note 113 *supra*.

261. 439 U.S. at 167 (emphasis added).

262. 440 U.S. 648 (1979).

263. In its opinion, the Supreme Court of Delaware referred to respondent as the operator of the vehicle. *State v. Prouse*, 382 A.2d 1359, 1361 (1978). There is, however, testimony and

the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marijuana seized as a result of the stop, the patrolman testified that he had not observed any traffic or equipment violations nor any suspicious activity, and that he had made the stop only to check the driver's license and registration.²⁶⁴ The police officer characterized the stop as "routine" and explained, "I saw the car in the area and was not answering any complaints so I decided to pull them off."²⁶⁵ The trial court granted the motion to suppress, finding the stop to be violative of the fourth amendment²⁶⁶ and the Supreme Court of Delaware affirmed.²⁶⁷ The Supreme Court of the United States granted certiorari to resolve a conflict between the jurisdictions.²⁶⁸ In an eight-to-one decision²⁶⁹ delivered by Justice White, the Court held that such discretionary spot checks are repugnant to the fourth amendment as unreasonable intrusions and exercises of state discretion.²⁷⁰ Even though the purpose of the stop is limited to a license check and the resulting detention is quite brief, the Court reasoned that the stop nonetheless constitutes a seizure within the meaning of the amendment.²⁷¹ The majority then balanced the intrusion involved in such a seizure against the interest of the state in promoting public safety upon its highways.²⁷² In determining that the state's interest must give way to the rights of those who travel on public roads, the majority decision relied upon the privacy expectations of automobile passengers to strike down

evidence which brings into question this label; see 440 U.S. at 650 n.1.

264. 440 U.S. at 650.

265. *Id.* at 650-51.

266. *Id.* at 651.

267. *State v. Prouse*, 382 A.2d 1359 (1978).

268. Five jurisdictions were in accord with Delaware: *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977); *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971); *State v. Ochoa*, 23 Ariz. App. 510, 534 P.2d 441 (1975), *rev'd on other grounds*, 112 Ariz. 582, 544 P.2d 1097 (1976); *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975); *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973). Six other jurisdictions held to the contrary: *United States v. Jenkins*, 528 F.2d 713 (10th Cir. 1975); *Myricks v. United States*, 370 F.2d 901 (5th Cir.), *cert. dismissed*, 386 U.S. 1015 (1967); *Palmore v. United States*, 290 A.2d 573 (D.C. 1972), *aff'd on jurisdictional grounds only*, 411 U.S. 389 (1973); *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975); *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973); *Leonard v. State*, 496 S.W.2d 576 (Tex. Cr. App. 1973).

269. Justice White delivered the opinion of the Court in which Chief Justice Burger and Justices Brennan, Stewart, Marshall, Blackmun, Powell and Stevens joined. Justice Rehnquist filed the lone dissenting opinion.

270. 440 U.S. at 663.

271. *Id.* at 653 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

272. *Id.* at 658-61.

government intrusions inside the doors and windows of motor vehicles.

Citing *Marshall v. Barlow's, Inc.*²⁷³ and *Camera v. Municipal Court*,²⁷⁴ the Court stated that an individual operating or traveling in an automobile does not lose all reasonable expectations of privacy simply because the automobile and its use are subject to government regulation.²⁷⁵

Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security granted by the Fourth Amendment would be seriously circumscribed.²⁷⁶

Although the Court in *Rakas* distinguished an automobile from a dwelling place, holding that the petitioners had no "legitimate expectation of privacy,"²⁷⁷ in *Prouse* the majority analogized the privacy rights of automobile passengers to people in their homes or in public places. "[P]eople," Justice White wrote, "are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles."²⁷⁸ It is clearly inconsistent that in one instance the Court relied upon the unique nature of an automobile to deny occupants the protection of the fourth amendment, and yet, in another instance some fifteen weeks later, the same Court emphasized that one's privacy rights are not denied merely because he is an automobile occupant!

Although the Court in *Prouse* speaks as a champion of automobile passenger privacy, its opinion only prohibits warrantless random stops of automobiles when the police officer involved lacks an articulable and reasonable suspicion that a violation of applicable

273. 436 U.S. 307 (1978) (warrant required for federal inspection under interstate commerce power of health and safety of workplace).

274. 387 U.S. 523 (1967) (warrant required for inspection of residence for municipal fire code violations).

275. 440 U.S. at 662.

276. *Id.* at 662-63.

277. 439 U.S. at 148.

278. 440 U.S. at 663. "We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes." 439 U.S. at 148.

motor vehicle law has occurred or that the car is otherwise subject to a stop. Furthermore, the holding does not preclude a state from developing less intrusive and discretionary methods for spot checks.²⁷⁹

Although the *Prouse* decision would still permit the stopping of automobiles without probable cause in a roadblock situation, it has placed limitations upon the exercise of police discretion randomly to stop and search an automobile. The opinion overrules the statutory and case law of many jurisdictions which had previously sustained random, warrantless automobile stops for the sole purpose of checking for a valid license or registration.²⁸⁰ The most significant contributions of *Prouse*, therefore, are a heightened recognition of an automobile occupant's expectation of privacy and a mandate from the Court that government entities must exercise constraint when intruding into an automobile.²⁸¹

VI. CONCLUSION

Samuel Warren and Louis Brandeis commented in 1890 that "[p]olitical, social, and economic changes entail the recognition of new rights and the common law, in its eternal youth, grows to meet the demands of society."²⁸² It is submitted that the time has come for the Court to acknowledge the modern role of the automobile in today's society and the corresponding expanded expectations of privacy of automobile occupants.

The determination of every case in which the Court seeks to

279. 440 U.S. at 663.

280. See, e.g., *United States v. Berry*, 369 F.2d 386 (3d Cir. 1966); *Rodgers v. United States*, 362 F.2d 358 (8th Cir. 1966), cert. denied 385 U.S. 993 (1966); *Welch v. United States*, 361 F.2d 214 (10th Cir. 1966), cert. denied 385 U.S. 876 (1966). In a concurring opinion, Justice Blackmun, joined by Justice Powell, emphasized the permissible nonrandom methods of stopping automobiles. For example, stopping all traffic at a roadblock-type stop is expressly authorized under this decision.

281. While *Rakas* was a five-to-four decision, the *Prouse* opinion saw eight justices siding with the majority. Justice White, the author of the *Rakas* dissent, had the opportunity in *Prouse* to write the majority opinion and vigorously assert the privacy rights of automobile passengers which had been so drastically reduced in *Rakas*. Yet, the *Prouse* decision does not overrule *Rakas*. It merely prohibits random automobile stops for the sole purpose of checking auto registration and driver licenses. Though Chief Justice Burger and Justices Stewart, Powell and Blackmun were willing in *Prouse* to protect automobile occupants from brief spot checks to enforce motor vehicle registration laws, they were unwilling in *Rakas* to allow the "victim" of an automobile search who could assert no possessory interest in the automobile to challenge the constitutionality of that search. On the other hand, Justice Rehnquist felt that "[t]he whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed." 440 U.S. at 666 (Rehnquist, J., dissenting).

282. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

decide precisely what expectations of privacy are legitimate in a free society, necessarily calls for a balancing between unduly hampering the law enforcement process and invading the privacy of individuals.²⁸³ A balance is called for, however, because expectations of privacy should not be waived automatically when one steps from a home into an automobile.

The "legitimate expectation of privacy" test utilized in *Rakas* is praiseworthy for its recognition that social values may change and for its flexibility as our institutions and expectations change. The *Rakas* Court is to be criticized, however, for failing to articulate clearly its reasons for denying privacy rights to automobile occupants. The Court's reliance upon possessory interests as a test for privacy expectations is an unrealistic sidestepping which removes from the expectation test the flexibility to recognize society's changing values. A more realistic approach would have been for the Court to have recognized the crucial role motor vehicles play in our lives²⁸⁴ and the fact that Americans often *seek* privacy in their automobiles.²⁸⁵

By hinging its decision on the standing doctrine rather than addressing the exclusionary rule, the Court in *Rakas* has denied many automobile passengers the right even to challenge the reasonableness of a search and seizure.²⁸⁶ The Court has restricted the exclusionary rule without a scintilla of discussion concerning the viability or merits of the rule. Such an approach may result in an "open season" on automobile searches and leaves unanswered vital questions concerning future applicability of the exclusionary rule in cases which go beyond the automobile.

Yet despite the *Rakas* Court's backhanded attack on the exclusionary rule, its rejection of antiquated standing tests and its at-

283. A balance must be made "between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

284. See notes 1 and 2 and accompanying text *supra*.

285. Yackle, *supra* note 198. Indeed, many modern motor vehicles have acquired the characteristics of homes, *i.e.*, mobile homes, recreational vehicles and all-purpose vans. See *United States v. Smith*, 515 F.2d 1028 (5th Cir. 1975) (court permitted a safety check of a mobile home after the suspect was in custody); see also B. MODES & G. ROBERSON, *THE LAW OF MOBILE HOMES* (3d ed. 1974). Furthermore, automobiles are often used as protected containers under lock and key. Note, *supra* note 193, at 841.

286. One legislature obviously thinks enough of the privacy interests of a passenger in an automobile to have promulgated a statute which creates a presumption that a firearm in a motor vehicle is the property of all inhabitants of the vehicle. N.Y. PENAL LAW § 265.15(3) (McKinney Supp. 1979). The statute passed constitutional muster in *County Court v. Allen*, 99 S. Ct. 2213 (1979). Because the statute was upheld, it would seem that a passenger would have a legitimate expectation of privacy with regard to a firearm located in an automobile.

tempt to address substantive fourth amendment inquiries is a step in the right direction. Courts will now focus on the petitioner's legitimate expectation of privacy in the area searched before allowing a search to be challenged. This will ensure that only those whose personal rights have been violated will be permitted to assert fourth amendment protection and thus valuable court time will be saved.

In addressing the standing of automobile passengers, however, the *Rakas* Court failed to look beyond historical notions that automobiles are afforded only a diminished expectation of privacy.²⁸⁷ The Court should break free of the view that automobiles are used merely for transportation and thus are entitled to a lesser degree of privacy than are other areas or properties. Instead, the Supreme Court should follow its own progressive lead established in *Prouse*, which recognizes that automobile occupants deserve fourth amendment protection.

The nature and use of the automobile in modern society and the common expectations of freedom from governmental intrusion demand that motor vehicles be granted a greater degree of privacy. Anyone legitimately in a home or automobile should be allowed to contest the fruits of a search and seizure in a motion to suppress. Government invasion into these two areas is a *personal* invasion into personal security. This is not to advocate a strict "legitimately on [the] premises" test for these two locations; rather, it must be judicially recognized that when one is legitimately present in either place in today's society, he expects a degree of privacy which is "one that society is prepared to recognize as reasonable."²⁸⁸

This alternative provides a "bright line"²⁸⁹ for both the police and the courts to use in assessing the constitutionality of any search taking place in these two areas. Thus, Justice White's fear in *Rakas* that the police will declare an open season on automobiles could be obviated.²⁹⁰ Under *Rakas*, police are not deterred from making an unlawful search which will invade a passenger's privacy, whether he is an innocent victim of a search or its intended target. Also, because after *Rakas* the courts no longer have the old standing pigeonholes available, judges will be forced to decide what they believe society thinks is an area where one reasonably expects privacy. In contrast

287. The reasonableness of expectation of privacy is not reduced because an intrusion upon it "has occurred often enough." *United States v. Davis*, 482 F.2d 893, 905 (9th Cir. 1973).

288. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

289. See note 114 *supra*.

290. See note 119 *supra* and accompanying text. "I can think of few issues more important to a society than the amount of power that it permits its police to use without effective control by law." Amsterdam, *supra* note 60, at 377.

to the voluminous litigation which is inevitable until this area of the law becomes settled or changed, the solution of allowing all people legitimately present in a home or motor vehicle to challenge a search will reduce the flow of litigation.

Secondly, the alternative offered herein does away with the senseless distinctions which have emerged with respect to cases dealing with legitimate expectations of privacy. For instance, in *Katz* the defendant, by closing the door of a glass public telephone booth, manifested his legitimate expectation of privacy to all the world. Because of *Rakas*, however, a passenger who, with permission of the owner, is in a car with dark tinted windows and closed, locked doors, does not have any legitimate expectations of privacy. In *Jones*, the defendant had standing because he exercised complete dominion and control over an apartment and could exclude others from it;²⁹¹ under *Rakas*, a passenger occupying a seat in a car who can likewise exclude anyone from entering the car, has no expectation of privacy. In *Chadwick*, the suspects could manifest an expectation of privacy in a locked footlocker, but now an occupant in a locked auto cannot manifest the same expectation. These confusing distinctions and difficult property concepts as they relate to one's expectation of privacy can be avoided if the courts follow the proposed suggestion.

Thirdly, the Supreme Court will be able to remain flexible in its approach to other types of premises and not be tied to a stiff "legitimately on [the] premises" test when determining what expectations of privacy modern society, as it evolves, is prepared to accept as reasonable.²⁹² Expectations of privacy in business offices, commercial warehouses, and other such locations, can develop with an eye toward realistic expectations and changing values.

Finally, the authors' suggestion allows the government to continue its necessary regulation of automobiles while still respecting individuals' right to privacy. There is an obvious need for extensive government regulation of motor vehicles: to promote safety and efficiency and to assure solvent defendants. Allowing guests in homes and automobiles to contest invasions of their privacy in no way infringes upon the government's ability to promulgate these

291. See note 9 and accompanying text *supra*; 439 U.S. at 149.

Just as DeForte reasonably expected only union employees and guests to enter the office building, a passenger expects no one to enter the car without the owner/driver's permission. See note 33 and accompanying text *supra*.

292. For example, Justice White in *Mancusi* did not wish to extend DeForte's right to privacy in his office desk to the boundaries of the office door. *Mancusi v. DeForte*, 392 U.S. 364, 377 (1968).

vital regulations.²⁹³

In addition to employing the reasoning presented above, it is hoped that the Supreme Court will be true to a citizen's expectations of privacy in his car when analyzing *Chimel* problems. Once an individual is in custody and presents no additional danger to the police, anything not within his immediate control should not be subject to a search without the safeguards provided by the proper acquisition of a warrant. As the Court stated in *Chimel*, "[W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."²⁹⁴

Katz, *Chadwick* and *Prouse* all recognize that a person's desire for privacy and freedom from unbridled government intrusion may be constitutionally protected even in a public place. It is time for the Supreme Court to recognize that the protections provided by the fourth amendment extend to certain areas around a person and that these areas move with him and change with the environment in which he finds himself.²⁹⁵ In society today one such area deserving of a legitimate expectation of privacy is the automobile.

293. Thus, an automobile will retain its public aspect in view of its use on public highways and places accessible to the public. Police will still be able to look into a vehicle to observe what is exposed to public view. See, e.g., *Connor v. Hutto*, 516 F.2d 853 (8th Cir.), cert. denied, 423 U.S. 929 (1975) (right of privacy does not extend to commission of an act of sodomy in a car parked on a public highway); *United States v. Gunn*, 428 F.2d 1057 (5th Cir. 1970) (serial numbers on tires); *State v. Cohn*, 284 So. 2d 426 (Fla. 3d DCA 1973) (vehicle identification number can be read through the windshield).

294. 394 U.S. at 766 n.12 (emphasis added).

295. *United States v. Calhoun*, 510 F.2d 861, 866 n.4 (7th Cir. 1975).