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Reasonable Expectations of Privacy in Bank Records: A Reappraisal of United States v. Miller and Bank Depositor Privacy Rights

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REASONABLE EXPECTATIONS OF PRIVACY IN BANK RECORDS: A REAPPRAISAL OF *UNITED STATES v. MILLER* AND BANK DEPOSITOR PRIVACY RIGHTS

The banking industry today bears little resemblance to that which serviced customers ten years ago. Increasingly, customers are using such modern technology as electronic fund transfer systems, outdoor teller machines, and wire transfers to conduct their financial transactions. In this time of electronic banking, it is ironic that commercial channels now carry more customer banking documents than ever before. In America, "[m]ost of the dollar volume of transactions under $10,000 continues to be generated by check."[1] One study has estimated that by 1983 customers will be writing 45.8 billion checks a year, nearly a 100% increase over the 1973 check volume level.[2]

As the volume of check usage increases, so does the likelihood that confrontations will develop between customers, who expect their financial transactions to be private, and law enforcement officials attempting to gain access to customer bank records. This increasing conflict warrants a reassessment of the Supreme Court's decision in *United States v. Miller*,[3] where the Court held that bank customers possess no standing to contest the validity of a government subpoena duces tecum requesting access to customer records in the bank's possession. Most commentators on the *Miller* decision have concluded that the Court incorrectly applied fourth amendment principles to the standing issue.[4]

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[1] Electronic Banking, Inc., Checking Account Usage in the United States No. 632—A Research and Literature Survey xiii (Sept. 1979) (prepared for Bank Administration Institute, Park Ridge, Illinois).

[2] *Id.* at 6.

[3] 425 U.S. 435 (1976).

[4] 3 W. LAFAVE, SEARCH AND SEIZURE § 11.3 (1978); Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587 (1977); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Palmer & Palmer, *Complying with the Right to Financial Privacy Act of 1978*, 96 BANKING L.J. 196 (1979); Trubow & Hudson, *The Right to Financial Privacy Act of 1978: New Protection From Federal Intrusion*, 12 J. MAR. J. PRAC. & PROC. 487 (1979); Comment, *Government Access to Bank Records in the Aftermath of United States v. Miller and the Tax Reform Act of 1976*, 14

Additionally, the response to *Miller* by Congress, state legislatures, and state courts compels further inquiry as to whether depositors should have standing to contest government requests for bank documents.

Several factors justify reappraisal of the *Miller* rule. First, the Supreme Court inadequately analyzed Miller's constitutional standing claim. In considering whether the defendant had standing to contest the seizure of his bank records, the Court ignored valid proprietary and possessory claims of bank depositors. More importantly, the Court failed to apply properly the two components of the legitimate expectation of privacy test first enunciated in *Katz v. United States*[5] to the *Miller* facts. This failure denies bank depositors the protection of the fourth amendment.

Second, congressional legislation enacted in response to the *Miller* decision now provides bank customers with privacy protections denied them by the Supreme Court. By controverting the *Miller* Court's reading of congressional intent, these statutes undercut the substance of *Miller*.

Third, state reaction to the *Miller* holding indicates dissatisfaction with the Court's analysis and conclusion. State legislatures statutorily have conferred standing on depositors to challenge government access requests. State courts have interpreted their state constitutions as recognizing that bank customers have sufficient legitimate expectations of privacy to warrant standing to contest document disclosure.

Thus, state courts, state legislatures, and Congress have employed legislative or judicial means to circumvent *Miller*. Examination of these federal and state responses will demonstrate that under the *Katz* test, which requires defendants to possess an actual expectation of privacy that society considers reasonable, bank depositors deserve fourth amendment protection. Since these statutes and court decisions give depositors actual privacy expectations and indicate that society has determined these expectations to be reasonable, depositors today possess a privacy interest protected by the fourth amendment. The Supreme Court should acknowledge that society today sanctions depositor privacy pro-

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HOUS. L. REV. 636 (1977) [hereinafter cited as *Government Access*]; Comment, *A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. Miller*, 14 SAN DIEGO L. REV. 414 (1977) [hereinafter cited as *No Expectation*]; Note, *No Expectation of Privacy in Bank Records—United States v. Miller*, 26 DE PAUL L. REV. 146 (1976); Note, *IRS Access to Bank Records: Proposed Modifications in Administrative Subpoena Procedure*, 28 HASTINGS L.J. 247 (1976) [hereinafter cited as *IRS Access*]; Note, *United States v. Miller: Without a Right to Informational Privacy, Who Will Watch the Watchers?*, 10 J. MAR. J. PRAC. & PROC. 629 (1977); Note, *Is There a Right to Financial Privacy in Bank Records? Different Answers to the Same Question: California v. Federal Law*, 10 LOY. L.A.L. REV. 378 (1977); Note, *IRS Use of John Doe Administrative Summonses*, 30 OKLA. L. REV. 465 (1977) [hereinafter cited as *IRS Use*].

[5] 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

tection by reevaluating the *Miller* rationale.[6]

FACTUAL BACKGROUND OF *MILLER*

The defendant Miller was charged with conspiring to defraud the United States government of tax revenues in violation of federal statutes[7] after sheriff's deputies, who were investigating a warehouse fire, found whiskey and a large distillery.[8] Government agents thereafter delivered a grand jury subpoena duces tecum requesting two bank presidents to appear and produce documents relating to Miller's accounts.[9] Miller was not notified that the subpoenas had been issued. Copies of his checks were removed from the banks and were introduced at trial, enabling the government to establish at least three of the overt acts charged against Miller in furtherance of the conspiracy.[10]

The trial court denied the defendant's motion to suppress microfilm copies of his bank records, and Miller appealed on two grounds. First, he contended that the provision of the Bank Secrecy Act[11] of 1970 requiring banks to microfilm all checks processed through their channels constituted a violation of a depositor's fourth amendment right to be free from unreasonable searches and seizures. Second, since the subpoenas were issued by a United States attorney rather than a judge, were not returned to the court, and were issued for a return date when the grand jury would not be in session, Miller argued that the subpoenas were themselves defective. Therefore, since the evidence was obtained unconstitutionally and by means of illegal subpoenas, Miller contended that the bank documents should have been inadmissible.

The Fifth Circuit found that Miller's first argument was foreclosed by the intervening decision in *California Bankers Association v. Schultz*,[12] in which the Supreme Court upheld the constitutionality of the Bank Secrecy Act. However, the Fifth Circuit did agree with Miller's second contention[13] and therefore excluded the evidence that had been ob-

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6 The Supreme Court continues to cite *Miller* as valid caselaw. *See* United States v. Payner, 100 S. Ct. 2439, 2444 (1980); Smith v. Maryland, 442 U.S. 735 (1979).

7 26 U.S.C. §§ 5179, 5205, 5601, *et seq.* (1976); 18 U.S.C. § 371 (1976).

8 United States v. Miller, 500 F.2d 751, 753 (5th Cir. 1974).

9 *Id.* at 756.

10 *Id.*

11 12 U.S.C. § 1829b(d) (1976).

12 416 U.S. 21 (1974).

13 United States v. Miller, 500 F.2d at 756. The Court stated:

> [I]n view of the long recognized inclusion of private papers and records within the scope of Fourth Amendment protections, reinforced by the Court's reasoning in *California Bankers*, we hold that obtaining copies of Miller's bank checks by means of a faulty subpoena duces tecum constituted an unlawful invasion of Miller's privacy, and that any evidence so obtained should have been suppressed.

Id.

tained through use of the invalid subpoenas. The Supreme Court reversed, finding that the fourth amendment did not protect Miller's checks and bank records in the possession of the bank.

Justice Powell,[14] writing for the majority, first found that since bank documents were business records, individual depositors had no fourth amendment privacy interest in the documents. Justice Powell rejected Miller's contention that the photocopying of customer checks required by the Bank Secrecy Act allowed the government to examine his bank records without legal process. The Court declined to recognize that a fourth amendment interest inheres in a bank depositor simply because of the intervention of the recordkeeping requirements of the Bank Secrecy Act.[15]

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[14] It is ironic that Justice Powell wrote the majority opinion in *Miller* in light of his concurrence in California Bankers Ass'n v. Schultz, 416 U.S. at 78 (Powell, J., concurring). In that opinion Justice Powell stressed that the requirements of the Bank Secrecy Act violated no constitutional protections because their scope was limited by the implementing regulations. *Id.* However, he expressed doubt about the constitutionality of the Act if the scope of the implementing regulations were expanded:

> In . . . [the regulation's reporting requirements] full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. . . . At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.

Id. at 78-79 (citation omitted).

Justice Powell's fears were realized in *Miller*. The provisions of the Bank Secrecy Act allowed the Treasury Department agents to use an invalid subpoena, issued by a United States attorney, not by a judge, thereby leaving Miller's rights to be safeguarded by "unreviewed executive discretion, rather than the scrutiny of a neutral magistrate." California Bankers Ass'n v. Schultz, 416 U.S. at 78 (Powell, J., concurring). This governmental violation of a depositor's legitimate privacy expectations without compliance with judicial process seems to be exactly the result Justice Powell was attempting to prevent in *California Bankers. But see* Justice Powell's attempt to distinguish his *California Bankers* opinion. United States v. Miller, 425 U.S. at 444 n.6.

[15] 425 U.S. at 441.

The subpoena duces tecum issued to the bank was invalid and therefore had the agents attempted to obtain the records directly from Miller, they would have been unsuccessful. In Andresen v. Maryland, 427 U.S. 463 (1976), the Court addressed the question of whether a search and seizure of the defendant's personal business records violated the protections guaranteed by the fourth and fifth amendments. *Id.* at 465. The Court reasoned that since the defendant was "not required to aid in the discovery, production, or authentication of incriminating evidence," *id.* at 474, his fifth amendment protection against self-incrimination had not been violated. The Court stated that this question had been specifically reserved in *Miller*. *See* Andresen v. Maryland, 427 U.S. at 471 (citing United States v. Miller, 425 U.S. at 441 n.3). Thus, a depositor presumably could not today succeed by claiming that his fifth amendment rights had been violated by a government search of his bank records.

The *Andresen* Court also held that the defendant's fourth amendment rights had not been violated because it found the warrant was sufficiently specific in its request and that the information sought was relevant to the charge being investigated. *Id.* at 480-84. Therefore, it seems clear that a valid warrant issued to a depositor seeking his financial records would be

The majority also rejected Miller's contention that *Katz v. United States*[16] warranted the recognition of a depositor's privacy interest. In *Katz*, the Court held that a search and seizure becomes unreasonable when the government's activities violate a person's legitimate expectation of privacy. Relying on the language in *Katz* that "[W]hat a person knowingly exposes to the public . . . is not a subject of fourth amendment protection,"[17] the *Miller* majority found that banking records were exposed to bank employees and therefore were not entitled to fourth amendment protection.

Focusing upon the expressed purpose of the Bank Secrecy Act to require records to be maintained for use in criminal, tax, and regulatory investigations and proceedings, the *Miller* Court also asserted that the depositor, when transacting business with banking institutions, takes the risk that his financial information will thereafter be turned over to government officials. The majority went so far as to say that, even if the banks were found to be serving their customers in an agency capacity, no fourth amendment right would be violated when banks conveyed information requested by subpoena to the government.[18]

The Court stated that bank disclosure of customer documents was not uncommon since it long had been settled law that IRS summonses served upon a third-party bank did not violate any depositor's fourth amendment rights. Therefore, the *Miller* majority concluded that "the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the subpoena is issued."[19] Justice Powell also rejected Miller's contention that judicial scrutiny equivalent to that required for the issuance of search warrants is necessary when a subpoena is directed at bank records, saying the existing legal process[20] only requires a level of judicial scrutiny normally applied to subpoenas.[21]

Justice Brennan dissented from the majority's rejection of Miller's fourth amendment claim. Quoting extensively from *Burrows v. Superior*

upheld if it was not "a general, exploratory rummaging in a person's belongings," Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (citations omitted), and if the information sought was relevant to the criminal investigation.

16 389 U.S. 347.

17 *Id.* at 351.

18 United States v. Miller, 425 U.S. at 443.

19 *Id.* at 444 (citing California Bankers Ass'n v. Schultz, 416 U.S. at 53; Donaldson v. United States, 400 U.S. 517, 537 (1971) (Douglas, J., concurring)).

20 Existing legal process is the requisite standard enunciated by the Court in California Bankers Ass'n v. Schultz, 416 U.S. 21, for obtaining records under the Bank Secrecy Act. For a comparison of different judicial interpretations of the definition of legal process, *see* note 229 *infra*.

21 425 U.S. at 446.

Court,[22] in which the California Supreme Court held that bank depositors have a reasonable expectation of privacy in their bank records, Justice Brennan stated that *Burrows* was a prime example of "the emerging trend among high state courts of relying upon state constitutional protections of individual liberties—protections pervading counterpart provisions of the United States Constitution, but increasingly being ignored by decisions of this Court."[23]

Relying on different grounds, Justice Marshall also dissented. He succinctly stated that "[b]ecause the recordkeeping requirements of the [Bank Secrecy] Act order the seizure of customers' bank records without a warrant and probable cause, I believe the Act is unconstitutional and that respondent has standing to raise that claim."[24] Justice Marshall thus concluded that the government's reliance on the records obtained under the unconstitutional statute was improper.[25]

FOURTH AMENDMENT STANDING

The Supreme Court has long required a litigant to satisfy standing requirements[26] before he is able to contest searches of his property or

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22 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). Because it found that depositors possess a reasonable expectation of privacy in their bank records, the *Burrows* court held that the search was unreasonable and therefore in violation of the California Constitution.

23 United States v. Miller, 425 U.S. at 454-55 (Brennan, J., dissenting) (footnote omitted).

24 *Id.* at 456 (Marshall, J., dissenting).

25 *Id.* Justice Brennan also stated that the reporting and recordkeeping requirements of the Bank Secrecy Act were unconstitutional. *Id.* at 452 n.3 (Brennan, J., dissenting) (citing California Bankers Ass'n v. Schultz, 416 U.S. at 91 (Brennan, J., dissenting)).

26 The Court has defined standing as the requirement that "a party ha[ve] a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Sierra Club v. Morton, 405 U.S. 727, 731 (1972). For general purposes, there are three basic requirements for standing. First, the party must suffer an injury in fact—a concrete or factual injury. Second, the litigant must show that the challenged governmental action caused his injury. Third, the party must demonstrate a "logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102 (1968). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-17 to -23 (1978).

The standing inquiry under the fourth amendment differs somewhat from that utilized for other constitutional questions. *See generally* Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421 (1975); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970). *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). In Rakas v. Illinois, 439 U.S. 128 (1978), the Court reiterated that a litigant must allege injury in fact and must assert his own rights and not those of a third party. *Id.* at 139-40 (citing Singleton v. Wulff, 428 U.S. 106, 112 (1976); Warth v. Seldin, 422 U.S. 490, 499 (1975); Data Processing Service v. Camp, 397 U.S. 150, 152-53 (1970)). Justice Rehnquist stated his discomfort, though, with retaining the standing and fourth amendment questions as separate analytical inquiries: "But this Court's long history of insistence that fourth amendment rights are personal in nature has already answered many of these traditional standing inquiries, and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." Rakas v. Illinois, 439 U.S. at 140.

The Court established a two-fold standing inquiry: whether the search or seizure vio-

possessions. The Court has found that a defendant's "proprietary or possessory interest in the premises"[27] or his property interest in the item seized confers standing upon the defendant.[28] Although it has disavowed strict adherence to these proprietary standing determinants,[29] the Court has normally accorded standing to a defendant who does show such an interest.[30]

The Court radically departed from reliance on these proprietary determinants in *Katz v. United States*.[31] In *Katz*, the government electronically eavesdropped, without a warrant, on the defendant's conversation in a public phone booth. Agreeing that " '[t]he premise that property interests control the right of the Government to search and seizure has been discredited,' "[32] the Court developed the expectation of privacy doctrine as a vehicle for circumventing the unduly restrictive ownership and possession requirements necessary to establish a protectable fourth amendment interest. Since the defendant neither owned the

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lated the fourth amendment rights of the person seeking to exclude evidence and whether the search violated an interest that the fourth amendment seeks to protect. *Id.* While the Court acknowledged that this transfiguration of traditional standing analysis would not in the future simplify its inquiry, it concluded that subsuming standing under the fourth amendment ensures that "the decision of this issue will rest on sounder logical footing." *Id.*

27 Brown v. United States, 411 U.S. 223, 229 (1973).

28 Proprietary and possessory interests are traditional standing determinants. *See, e.g.*, Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952). A proprietary interest is essentially a property interest in the seized items or area searched.

One characteristic of ownership is the right to exclude others, and "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Rakas v. Illinois, 439 U.S. at 144 n.12 (citing 2 W. BLACKSTONE, COMMENTARIES, *ch. 1). Therefore, if a defendant claims ownership of the seized item or area searched, he will likely be entitled to contest a violation of his fourth amendment rights. *See* United States v. Jeffers, 342 U.S. 48, 54 (1951). *But see* Rawlings v. Kentucky, 100 S. Ct. 2556, 2561 (1980) ("Petitioner contends . . . because he claimed ownership of the drugs, he should be entitled to challenge the search regardless of his expectation of privacy. We do not agree."). However, "[w]hile property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, . . . property rights are neither the beginning nor the end of this Court's inquiry." United States v. Salvucci, 100 S. Ct. 2547, 2553 (1980). The Court in *Salvucci* held that the owner of the item in addition must demonstrate a legitimate expectation of privacy in the area searched. *Id.*

An alternative standing basis is the defendant's legal possession of the item without also having an ownership interest. However, like the proprietary determinant, possession of the seized item may not ensure standing for the defendant: "The person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation." *Id.* at 2552.

29 Rakas v. Illinois, 439 U.S. at 143 ("[W]e adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law . . . ought not to control.") *See also* Rawlings v. Kentucky, 100 S. Ct. 2556; United States v. Salvucci, 100 S. Ct. 2547.

30 3 W. LAFAVE, *supra* note 4, at 565.

31 389 U.S. 347.

32 *Id.* at 353 (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)).

phone nor claimed possessory rights, the Court could not utilize the proprietary or possessory interest tests to protect the defendant. Therefore, the Court focused upon the privacy expectation of the defendant to determine a fourth amendment violation.

Because the Court relied upon neither a property nor a possessory interest in holding that the fourth amendment protected the defendant, commentators generally have applauded the *Katz* reasoning.[33] Most writers predicted that *Katz* would serve as the genesis for a more expansive reading of the fourth amendment. However, the Supreme Court has never interpreted *Katz* as a radical expansion of the fourth amendment.

While the Court continues to rely upon the legitimate expectation of privacy concept, such reliance has not broadened the class or number of litigants protected by the fourth amendment. The Court first restricted the fourth amendment's scope in *Rakas v. Illinois*,[34] where it modified the standing inquiry by asking "whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of the defendant's Fourth Amendment claim."[35] Reiterating that fourth amendment rights are personal, the Court concluded that "the 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."[36] Thus, *Rakas* modified *Katz* by asking not only whether the defendant had a reasonable expectation of freedom from governmental intrusion, but also whether that defendant's fourth amendment rights were violated. Therefore, while asserting that *Katz* "provides guidance in defining the scope of the interest protected by the Fourth Amend-

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33 *See* Amsterdam, *supra* note 26; Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1 (1971); Comment, *Government Access to Bank Records*, 83 YALE L.J. 1439, 1459-65 (1974); Note, *The Reasonable Expectation of Privacy—Katz v. U.S.—A Postscriptum*, 9 IND. L. REV. 468 (1976); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977) [hereinafter cited as *A Reconsideration*]; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protections*, 43 N.Y.U.L. REV. 968 (1968) [hereinafter cited as *Post-Katz Study*].

34 439 U.S. 128. In *Rakas*, the petitioners were convicted of armed robbery. The prosecution introduced into evidence a rifle and shells found in the car in which the petitioners were riding. The Illinois Appellate Court held that the petitioners, who neither owned the car nor asserted ownership of the rifle and shells, lacked the requisite standing to contest the search of the automobile and the seizure of the evidence. In upholding the Illinois Appellate Court's decision, the Court held that the petitioners' standing claim failed because "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Id.* at 148. For a detailed discussion of *Rakas*, *see* Note, *Fourth Amendment—Reasonable Expectations of Privacy in Automobile Searches*, 70 J. CRIM. L. & C. 498 (1979).

35 Rakas v. Illinois, 439 U.S. at 138-39.

36 *Id.* at 139.

ment,"[37] the *Rakas* Court relied upon the absence of the defendants' property or possessory interests to deny their standing claims.[38]

The Court has continued its restrictive interpretation of the *Katz* expectation of privacy test in its two most recent standing decisions, *Rawlings v. Kentucky*[39] and *United States v. Salvucci*.[40] In *Rawlings*, the defendant had been convicted of possession with intent to sell various controlled substances.[41] Honoring *Katz's* declaration that "arcane distinctions developed in property . . . law . . . ought not to control,"[42] the Court rejected the petitioner's assertion that mere ownership of the seized goods was sufficient to raise fourth amendment rights,[43] but acknowledged that ownership was a factor in answering the ultimate inquiry "whether government officials violated any legitimate expectation of privacy held by petitioner."[44]

In a dissent joined by Justice Brennan, Justice Marshall criticized the Court for focusing solely upon the defendant's privacy interest in the searched items. Citing the historical underpinnings of the fourth amendment as authority, Justice Marshall asserted that a property interest in the seized items is sufficient to confer standing to contest their seizure.[45] Thus, either a property interest in the items seized or a privacy interest in the premises searched should satisfy the fourth amendment standing requirement.

Implicitly rejecting Justice Marshall's thesis that ownership should confer standing upon a defendant, the Court in *United States v. Salvucci*[46]

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37 *Id.* at 143.

38 *Id.* at 148.

39 100 S. Ct. 2556 (1980). The case is examined in Note, *Fourth Amendment—The Court Further Limits Standing*, 71 J. CRIM. L. & C. 567 (1980).

40 100 S. Ct. 2547 (1980). *See* Note, *supra* note 39.

41 Rawlings v. Kentucky, 100 S. Ct. at 2561. Petitioner Rawlings was a house guest and placed the illegal drugs in the purse of another guest immediately before the police entered the house. Justice Rehnquist noted that the petitioner had known the holder of the drugs only for several days, had no power to exclude others from the purse and had not taken precautions designed to protect any privacy interest he might have possessed in the area searched. *Id.*

42 Rakas v. Illinois, 439 U.S. at 149-50 n.17.

43 Rawlings v. Kentucky, 100 S. Ct. at 2562.

44 *Id.*

45 *Id.* at 2568.

46 100 S. Ct. 2547. The Court in *Salvucci* overturned the rule first enunciated in Jones v. United States, 362 U.S. 257 (1960), that defendants charged with crimes of possession had "automatic standing" to contest the search and seizure.

Justice Rehnquist, writing for the majority, concluded that the reasons underlying the "automatic standing" rule were no longer tenable. The first reason supporting the establishment of the automatic standing rule is that a defendant was required to allege ownership of the seized goods to possess standing to contest their illegal seizure. However, at trial the defendant had to deny ownership of the goods in order to avoid conviction for the possessory crime. Automatic standing eliminated the need for the defendants to allege ownership to

stated that "property rights are neither the beginning nor the end of the Court's inquiry."[47] While recognizing that legal possession of the seized good may in some circumstances entitle the defendant to fourth amendment protection, the Court held that the defendant must still demonstrate a legitimate expectation of privacy in the area searched. Thus, *Salvucci* fashioned a two-pronged inquiry "by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched."[48] Although *Katz* "purported to clean house on outmoded fourth amendment principles,"[49] both *Salvucci* and *Rawlings* relied upon *Katz's* rejection of property concepts to support denial of standing to defendants who would have had standing under the traditional proprietary determinants. Both Courts examined the defendant's possessory and proprietary claims and emphasized the lack of such interests as support for their conclusion that the defendants possessed no legitimate expectation of privacy in the area searched. Thus, the Court has relied upon property concepts supposedly rejected in *Katz* to narrow the applicability of the *Katz* expectation of privacy test.

While possessory or property interests still play some role, the fourth amendment today primarily focuses on whether a depositor has a legitimate expectation of privacy in the area searched. Since many factors which determine the legitimacy of a defendant's standing claim have been enunciated by the Court subsequent to its *Miller* decision, the *Miller* Court's analysis is less viable today in light of the development of fourth amendment caselaw. Yet, even those factors cited by the *Miller* Court to justify its denial of depositor standing are unsound. Thus, it is

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attain the requisite standing. Second, the government's position regarding the admissibility of the seized evidence was also inconsistent since the government had to assert that the defendant possessed the goods for purposes of criminal liability, but did not possess them for the purposes of fourth amendment standing.

The *Salvucci* Court stated that more recent caselaw and changing circumstances have rendered these justifications invalid. In Simmons v. United States, 390 U.S. 377 (1968), the Court held that testimony offered by a defendant in support of his motion to suppress cannot later be used against him for purposes of proving criminal liability. Thus, the majority observed that the *Simmons* rule obviated the need for the *Jones* rule because "*Simmons* . . . not only extends protection against this risk of self-incrimination in all of the cases covered by *Jones*, but also grants a form of 'use' immunity to those defendants charged with nonpossessory crimes. In this respect, the protection of *Simmons* is therefore broader than that of *Jones*." United States v. Salvucci, 100 S. Ct. at 2553.

The majority stated that the second *Jones* justification similarly was antiquated because subsequent decisions have established "[t]hat a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction." United States v. Salvucci, 100 S. Ct. at 2552.

47 100 S. Ct. at 2553.

48 *Id.*

49 Note, *Post-Katz Study*, *supra* note 33, at 975.

appropriate to analyze the arguments raised by the *Miller* Court to justify its conclusion. Thereafter the merits of a bank customer evidentiary privilege will be examined. Finally, the additional indicia of a legitimate fourth amendment privacy expectation explicated in *Rakas* will be applied to the *Miller* facts. Both the examination of the *Miller* Court's reasoning and the fourth amendment determinants established subsequent to *Miller* will demonstrate that depositors do possess a legitimate expectation of privacy in their bank records.

ANALYSIS OF *MILLER*

The *Miller* Court raised five reasons for refusing to acknowledge any legitimate expectation of depositor privacy. First, the Court characterized checks as negotiable instruments and not as confidential communications.[50] While checks are negotiable instruments, the asserted depositor privacy interest derives not from the check as an instrument, but from the information which the check conveys.[51] While the *Miller* Court ignored the privacy of check information, previous Court decisions have more flexibly interpreted defendant privacy expectations.

In *Mancusi v. DeForte*,[52] district attorneys charged a union official with conspiracy and extortion and searched his office desk without a warrant. The Court looked beyond the communal office area and held that DeForte could legitimately expect no one to obtain his records from the office without his permission or without a lawful warrant. Similarly, a depositor legitimately expects no one but bank employees to view records of his banking transactions unless authorized by lawful means or by his authority.[53] Thus, the *Miller* Court erroneously emphasized the function of the defendant's check and ignored its earlier admonition in *Mancusi* "that capacity to claim the protection of the [Fourth] Amendment depends not on a property right . . . but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[54] A check is not just commercial paper, but

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50 United States v. Miller, 425 U.S. at 442.

51 "In a sense, a person is defined by the check he writes. By examining them, the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on *ad infinitum*." California Bankers Ass'n v. Schultz, 416 U.S. at 85 (Douglas, J., dissenting). *See also* Note, *IRS Access, supra* note 4, at 249; Note, *IRS Use, supra* note 4, at 471. For a discussion of check information constituting a property interest, *see* notes 130-33 & accompanying text *infra*.

52 392 U.S. 364 (1968).

53 Justice Marshall has articulated this distinction: "Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes." Smith v. Maryland, 442 U.S. at 749 (Marshall, J., dissenting).

54 392 U.S. at 368.

"provides a virtual current biography"[55] of the life of the bank customer and therefore legitimately warrants privacy protection.

The *Miller* Court further buttressed its denial of standing by emphasizing that Miller had voluntarily made public his banking information by placing his checks in commercial channels. While this may be technically accurate, financial reality contradicts the Court's finding of voluntariness: "For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in economic life of contemporary society without maintaining a bank account."[56] Commentators have also questioned the validity of the Court's characterization that checking account usage is a purely voluntary act,[57] especially when it is estimated that over 80% of American families maintain a checking account.[58]

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[55] Burrows v. Superior Court, 13 Cal. 3d 244, 247, 118 Cal. Rptr. 166, 172, 529 P.2d 590, 596 (1974).

[56] *Id.*

[57] 1 W. LAFAVE, *supra* note 4, § 2.7, at 415; Comment, *Government Access, supra* note 4, at 644 n.64; Comment, *No Expectation, supra* note 4, at 431.

[58] A 1977 study conducted by the Federal Reserve Board estimated that 81.4% of families in 1977 had a checking account. T. Durkin & G. Elliehausen, 1977 Consumer Credit Survey (Board of Governors of the Federal Reserve System 1978), *cited in* Electronic Banking, Inc., *supra* note 1, at 12-14. While this figure is supported by a 1978 report that 80.8% of U.S. households had a checking account and 90.9% used at least one service at a financial institution, *see* Payment Systems, Inc. & Darden Research Corp., Payment Systems Perspectives '78 (1978), *cited in* Electronic Banking, Inc., *supra* note 1, at 14, several other studies conducted by telephone indicated the figure may be even higher. In 1974, a survey of 1,724 households found 92% of the respondents maintained a checking account. Unidex, The Unidex Report: Checking (Sept. 1974), *cited in* Electronic Banking, Inc., *supra* note 1, at 12. A similar study in 1977 of 2,012 households indicated that 93% of the respondents maintained a checking account. Unidex, The Unidex Report: Customer Service Usage—Part I 1 (May 1977), *cited in* Electronic Banking, Inc., *supra* note 1, at 12-14.

These studies demonstrate that checking accounts are widely used and relied upon by consumers to conduct their financial transactions. The minority of Americans who do not use checking accounts fall into four categories: indigents, people oriented to their local neighborhoods who have incomes in the $3,000-5,000 range, skilled and unskilled workers earning $7,000-15,000, and well educated and high income individuals who choose for lifestyle reasons not to use financial services offered by banks. R. SCHLAX & S. LEVY, A QUANTITATIVE ANALYSIS OF WHY PEOPLE DO NOT HAVE CHECKING ACCOUNTS, (Bank Marketing Ass'n 1971), *cited in* Electronic Banking, Inc., *supra* note 1, at 35, 37. Among the major reasons cited for customer avoidance of checking accounts were: use of a checking account would change their money management habits, would take away their tangible reward for work, would reduce their feeling of financial control over their own affairs, would be too difficult to learn how to use, and would not be worth the trouble for their own small amounts of money. *Id.*

While these figures indicate that not all Americans have a checking account, they also establish that a majority of Americans do maintain checking accounts. Furthermore, the studies indicate that those who do not maintain checking accounts are not average consumers—they tend to be poor, to restrict their movement to within the confines of their own neighborhood, to fear the perceived complexity of using a checking account or to refrain on principle from using banking services at all. The high percentage of use of checking accounts

As support for its conclusion that depositors lose privacy protection when using commercial channels, the *Miller* court cited language from *Katz v. United States*[59] that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[60] In *Katz*, the Court held that governmental tapping of the defendant's phone call in a public telephone booth violated his legitimate expectation of privacy. Reliance by *Miller* on the *Katz* language proves too much. When Katz made his phone call, he spoke over a telephone company system which is a publicly-used communication medium. While voluntarily using a telephone to convey his information, his expectation was that the information would be transmitted neutrally to its intended destination. Miller similarly used his bank as a financial medium, with the corollary expectation that the bank without interruption would complete the requirements of the transaction. Thus, while both Katz and Miller voluntarily chose public communication vehicles, they did not intend government agents to intercept the information.

As a third basis for denying standing to Miller, the Court further relied upon this notion of voluntariness in stating that the depositor assumes the risk that information conveyed to a bank will be turned over to government officials.[61] In *Smith v. Maryland*,[62] Justice Marshall exposed the fallacy of this risk analysis. In *Smith*, the Court held that a caller has no reasonable expectation of privacy in the phone numbers that he dials, and the government's use of a pen register[63] did not consti-

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is not conclusive proof that consumers are compelled to use them by the demands of today's financial world. These studies establish that an overwhelming majority of Americans maintain checking accounts, and that those who do not use them do so primarily because they do not understand how they work or because they do not have sufficient financial resources to make their use practical. Thus, for most Americans "the personal checking account is an integral part of a consumer's way of life . . . . The check is the primary means by which consumers pay their bills and manage their financial affairs." Electronic Checking, Inc., *supra* note 1, at 137.

59 Katz v. United States, 389 U.S. at 351.

60 United States v. Miller, 425 U.S. at 442 (quoting Katz v. United States, 389 U.S. at 351).

61 425 U.S. at 443. The flaw in this component of the Court's analysis is that while each defendant voluntarily used certain public means, they in no way voluntarily made what they conveyed by these means public. Katz intended and reasonably expected the information solely to reach the person he called. Miller intended and reasonably expected the check to be processed and thereafter sent back to him. Therefore, neither of these defendants assumed the risk that the information would fall into government hands.

62 442 U.S. 735 (1979). For a thorough discussion of *Smith v. Maryland*, see Note, *Fourth Amendment—Pen Register Surveillance*, 70 J. CRIM. L. & C. 433 (1979).

63 "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." A pen register is "usually installed at a central telephone facility [and] records on a paper tape all numbers dialed from [the] line" to which it is attached.

tute a search in violation of the fourth amendment. Criticizing the majority's assumption that the caller assumed the risk of financial record disclosure, Justice Marshall reasoned that "[i]mplicit in the concept of assumption of risk is some notion of choice. . . . [U]nless a person is prepared to forego use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative."[64]

As with phone services, banking services are indispensable in today's society. In light of the overwhelming majority of citizens who have bank accounts, reliance upon risk analysis to deny bank depositors fourth amendment protection is unsound. For "whether privacy expectations are legitimate . . . depends not on the risks an individual can be presumed to expect when imparting information to third parties, but on the risks he should be forced to assume in a free and open society."[65] Depositors should not be forced to assume the risk of record disclosure because the danger in using risk analysis is its unlimited scope. Only a narrow assumption of risk exception to fourth amendment coverage will adequately protect defendants in phone booths, office areas, and common areas of dwellings.

The Court derived its fourth basis for denying standing from the legislative history of the Bank Secrecy Act.[66] The purpose of the Act, the Court stated, was to require the keeping of records because of their value in "criminal, tax and regulatory investigations and proceedings."[67] Indeed, in examining the legislative history of the Bank Secrecy Act, the Court reiterated its conclusions in *California Bankers Association v. Schultz*.[68] In that case the Court set forth two problems which moti-

442 U.S. at 736 n.1 (quoting United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977); United States v. Giordano, 416 U.S. 505, 549 n.1 (1974)).

64 442 U.S. at 749-50 (Marshall, J., dissenting).

65 *Id.* at 750. Therefore, neither of these defendants assumed the risk that the information would reach government hands.

66 United States v. Miller, 425 U.S. at 442-43.

67 *Id.* at 443 (quoting 12 U.S.C. § 1829b(a)(1)). Subsequent legislation has undercut this expansive reading of the purpose of the Bank Secrecy Act. The Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, §§ 1100-22, 92 Stat. 3697-710 (1978) (codified as 12 U.S.C. §§ 3401-22 (Supps. III & IV 1979-80)), was enacted partially in response to congressional disapproval of the Court's interpretation of the purpose of the Bank Secrecy Act. The *Miller* Court stated that Congress intended to deny customers any legitimate privacy interest in their bank records. Congress responded by legislatively mandating all the protection a customer would have received if the Court had found Miller warranting fourth amendment protection. Customers today under federal law are granted a reasonable expectation that their records will not be divulged unless legal process is employed and the customer is given adequate notice of the access request. For a thorough discussion of the provisions of the Right to Financial Privacy Act of 1978, *see* notes 174-80 & accompanying text *infra*.

68 416 U.S. 21.

vated Congress to pass the Bank Secrecy Act: the need to ensure that banks maintain adequate records of the financial transactions of their customers and the need to curtail the use by customers of "foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax and regulatory enactments."[69] The intent of the Act, therefore, was to preclude customers from using their banking intermediaries to facilitate covert financial transactions.

This purpose is distinguishable from the widespread examination of customer records authorized by the *Miller* Court. The typical bank customer has no deceptive intention when conducting his banking business. Even Miller, who was engaged in an illegal distillery operation, was not disguising his operations through his commercial transactions. While Miller was convicted of defrauding the government of tax revenues, his use of his bank account to purchase the distillery parts was not an element of the offense. Miller could have avoided use of the bank by paying cash for the parts. However, the intent of the Bank Secrecy Act is to uncover crimes such as sheltering unreported taxable income in foreign banks where the defendant's use of the banking facilities is integral to the commission of the crime. Without the use of a bank, large sums of money cannot be disguised, either profitably or practically. Because Miller's banking transactions were not integral to the tax fraud charge, the purpose of the Bank Secrecy Act to uncover fraud perpetrated by means of banking is not germane in the *Miller* context. Thus, the *Miller* Court's broad reading of the purpose of the Bank Secrecy Act is inappropriate when applied to common consumer transactions.

The fifth basis for questioning the *Miller* Court's denial of depositor standing is its reliance on the "false friend" cases: *Hoffa v. United States*,[70] *Lopez v. United States*,[71] and *United States v. White*.[72] The Court cited these cases for the proposition that the fourth amendment will not protect "information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[73]

The Court's reliance upon this judicial trilogy has been criticized in two respects.[74] First, the *Hoffa* case emphasizes that when one voluntarily discusses his wrongful actions with another, the fourth amendment

69 *Id.* at 27.
70 385 U.S. 293 (1966).
71 373 U.S. 427 (1963).
72 401 U.S. 745 (1971).
73 United States v. Miller, 425 U.S. at 443.
74 1 W. LAFAVE, *supra* note 4, § 2.7, at 415.

is not available to protect him against later ramifications of his disclosures. As noted above, however,[75] an individual does not exercise the same degree of voluntariness over the decision to use a banking system as a person uses in choosing to whom to speak:

> Even if it may be said that the risk which Hoffa took 'is the kind of risk we necessarily assume whenever we speak,' it by no means follows that the Fourth Amendment likewise leaves the potential bank customer with 'the unsavory dilemma of either not using the banking system or using it and waiving his protectable privacy interest.'[76]

Furthermore, the information voluntarily given up by the false friend defendants is distinguishable from that given up by bank customers. In making statements in the presence of a friend, Hoffa was fully aware of the incriminating nature of the information he was divulging. However, an analogy to *Miller* cannot fairly be drawn. In writing checks paid by his bank, Miller was not cognizant of the incriminating nature of the information contained on the checks even if he was aware that such bank information might be made public. In fact, bank record information alone rarely is incriminating so the bank customer cannot be said to waive his privacy interest if he is unaware of the relevance and the significance the information will later possess. The differences in the degree to which disclosure of the information is truly voluntary and to which the defendants comprehend the disclosed information's incriminating potential render the *Miller* Court's reliance on the false friend cases unwarranted.[77]

The five bases advanced by the Court for refusing to acknowledge customer standing are unpersuasive. Thus, the Court's reasoning does not fairly support its denial of Miller's constitutional claims. Perhaps anticipating such a constitutional result, Miller further asserted that his bank information was protected by a bank-customer evidentiary privilege.

A. BANK-CUSTOMER EVIDENTIARY PRIVILEGE

In denying Miller's constitutional argument, the Court disregarded his assertion that his documents were protected by a bank-customer evidentiary privilege,[78] by expressly refusing to consider the question of evidentiary privileges.[79] Nevertheless, judicial creation of a bank-customer evidentiary privilege may be a viable means of protecting customer con-

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75 *See* notes 56-60 & accompanying text *supra*.

76 1 W. LAFAVE, *supra* note 4, at 415 (quoting Hoffa v. United States, 385 U.S. at 303; Comment, *No Expectation, supra* note 4, at 431).

77 1 W. LAFAVE, *supra* note 4, at 415-16.

78 Brief for Appellee at 6-7, United States v. Miller, 425 U.S. 435.

79 425 U.S. at 443 n.4.

fidentiality. A bank-customer evidentiary privilege should therefore be examined in relation to the *Katz* balance between the benefits to customer privacy and the effect upon law enforcement efficiency.

While privileges between attorney and client, doctor and patient, husband and wife, clergyman and penitent, and journalist and source have long been recognized,[80] an evidentiary privilege between bank customer and his bank never has developed.[81] The earliest of these testimonial privileges to be established was between lawyer and client.[82] At common law, this privilege initially was conceived as a device for avoiding the embarrassing situation of a lawyer testifying against his own fee-paying client. The rationale underlying the attorney-client privilege today is that such a privilege encourages clients to disclose all relevant information that affects the lawyer's preparation of the client's case, thereby promoting justice.[83]

Another evidentiary privilege, which has statutory rather than common law origins, is that between doctor and patient.[84] States have enacted this privilege to encourage the patient to disclose freely information pertinent to the doctor's diagnosis.[85] The scope of the privilege encompasses all information obtained by the doctor in examination or observation which is relevant and necessary to the treatment of the pa-

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80 J. WALTZ, CRIMINAL EVIDENCE 242-54 (1975).

81 LeValley & Lancy, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers*, 89 BANKING L.J. 979 (1972). Nevertheless, banks have been held liable on theories of implied breach of contract, agency, and property for customer record disclosure to private third parties. *See, e.g.*, Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936), *rev'd*, 105 F.2d 583 (3d Cir. 1939) (agency); Milohnich v. First Nat'l Bank, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969) (implied contract); Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (1961) (agency); Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34 (Ch. 1929) (property); Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962) (implied contract); Tournier v. National Provincial & Union Bank, [1924] 1 K.B. 461 (implied contract). Courts have also employed tort principles to prohibit banks from divulging customer information. *See* Sewall v. Catlin, 3 Wend. 291, 294-95 (N.Y. Sup. Ct. 1829).

Evidence of fiduciary duties that can be enforced by implied contract principles does not prove the existence of an evidentiary privilege: "[T]he mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." 8 J. WIGMORE, EVIDENCE § 2286, at 528 (J. McNaughton rev. 1961).

82 J. WALTZ, *supra* note 80, at 242. The privilege was developed under common law, but has been codified in some jurisdictions. *Id.* The rule has been stated as follows:

> *(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from permanent disclosure by himself or by the legal advisor, (8) except the protection be waived.*

8 J. WIGMORE, *supra* note 81, § 2292, at 554 (footnote omitted) (emphasis in original).

83 J. WALTZ, *supra* note 80, at 242.

84 *Id.* at 247. *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 98-99, at 212-13 (E. Cleary 2d ed. 1972).

85 C. MCCORMICK, *supra* note 84, § 98, at 213. Without the privilege, patients might also be discouraged from consulting a doctor if disclosure of information were not protected.

tient.[86] Almost every state has enacted statutes relating to medical record confidentiality.[87] State legislatures have determined that promoting patient-doctor interaction is a sufficiently valuable goal so as to exclude testimony from evidence even though it is often valuable to the resolution of the case.

The extensive statutory protection of the doctor-patient relationship has not provided an impetus for statutory protection of the bank-customer relationship. While many states have restricted bank document disclosure either by caselaw[88] or through legislative enactments,[89] no state has codified a bank-customer evidentiary privilege. The difficulty in creating such a privilege is to avoid overbroad protection. Obviously, many customer documents are invaluable for determining whether the tax laws or other statutes have been violated. Accordingly, the public interest is not best served by totally excluding this information from government inquiry.[90]

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[86] *Id.* § 100, at 215.

[87] *See* R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS, 1978-79 10-12 (1978), for a listing of laws governing medical record disclosure. For a representative sampling of medical record confidentiality statutes, *see* ALA. CODE §§ 22-16-2, -12, -20 (1975) (physicians must file confidential venereal disease reports with the state); ALASKA STAT. § 47.30.260 (1979) (mental health patient records can be disclosed only when patient or the court authorizes disclosure); ARIZ. REV. STAT. ANN. § 12-2235 (1956) (physicians subject to a privilege in most circumstances); ARK. STAT. ANN. § 28-1001, Rule 503 (1947) (privilege applies to physicians, surgeons, trained nurses, and psychiatrists); CAL. EVID. CODE § 992 (West 1966) (recognizes doctor-patient privilege); COLO. REV. STAT. § 25-1-801 (1973) (provides for disclosure to patient of his records); CONN. GEN. STAT. ANN. § 17-295c (West 1958) (state institution can only release information to third parties in order to obtain funding); DEL. CODE ANN. tit. 16, § 702 (1974) (venereal disease reports are to be treated with strict confidentiality); and DEL. CODE ANN. tit. 16, § 907 (1974) (physician-patient privilege does not apply in child abuse cases).

[88] Milohnich v. First Nat'l Bank of Miami Springs, 224 So. 2d 759; Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 367 P.2d 284; Brex v. Smith, 104 N.J. Eq. 386, 146 A. 34; Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365.

[89] ALA. CODE § 5-3A-3 (1975) (unlawful to make or report any list of names of depositors or to disclose any depositor information); ALASKA STAT. §§ 06.05.175, 06.30.120 (1978) (all account information is confidential and cannot be disclosed unless under court order, and the depositor must be notified unless disclosure is made under a search warrant issued by or at the behest of a grand jury); CAL. GOV'T CODE § 7470 (West 1980) (bank customer is entitled to ten-day notice to move to quash subpoena before government agents can obtain bank customer records); ILL. REV. STAT. ch. 16 1/2, § 148.1 (1979) (banks may not disclose customer information without customer authorization, subpoena, or request by a regulatory agency); IOWA CODE ANN. § 527.10 (West 1970) (data processing center cannot obtain customer information unless essential to the completion of the transaction); LA. REV. STAT. ANN. § 9:3571 (West 1980) (financial institution or credit card company may release customer information under subpoena only upon advance notice to customer); MD. FIN. INST. CODE ANN. § 1-302 (1980) (financial institutions may disclose customer information under subpoena which gives advance notice to the customer or if the customer authorizes such disclosure).

[90] Indeed, this potential for overinclusivity has been noted by authors in analyzing the medical evidentiary privilege: "[One problem is] [t]he suppression of what is ordinarily the best source of proof, namely, the physician who examined and treated the patient, upon what

For instance, an absolute evidentiary privilege would have denied the grand jury in *Miller* access to the information even if a valid search warrant had been issued. Therefore, the optimal balance is best obtained through a statute that establishes as a general rule that customer documents are confidential and may only be disclosed according to legal process. The government should be required to be specific in the documents it requests and to prove the relevancy of the documents sought before the confidential bank-customer relationship can be invaded.[91]

While the protection of bank-customer confidence is a laudable goal, the creation of a bank-customer evidentiary privilege is an improper method for effectuating that goal. One reason for the inadvisability of a bank-customer evidentiary privilege is that the rationale for the creation of most privileges—encouragement of free and open disclosure of information so that the best resolution of the problem is ensured—is less applicable to banking services than to legal or medical services. Clients would forego an attorney's services if the subject matter of their discussions was not kept confidential. Patients might minimize their use of medical services if their discussions became part of the courtroom record. Yet few banking customers are aware of the customer document disclosure policies of their banks and therefore are not likely to be dissuaded from utilizing banking services for fear of record disclosure.

Another reason for the inadvisability of a bank-customer evidentiary privilege is that while the attorney-client relationship promotes the interests of justice and the doctor-patient relationship promotes the saving of lives, the bank-depositor relationship promotes only the free flow of capital. This seemingly less weighty social goal could be better achieved by protecting customer privacy through a statute that would require government officials to use a valid search warrant, subpoena, or summons and by granting standing to the depositor to contest the validity of the access request.

Considering these difficulties with the bank-customer evidentiary privilege, it is unlikely that the Supreme Court will recognize such a privilege.[92] The Court had occasion to address the scope of the attorney-client evidentiary privilege in *Fisher v. United States*.[93] The defendant taxpayers were being investigated for possible violation of the income tax laws. They compiled papers which had been prepared by

is usually a crucial issue, namely, the physical or mental condition of the patient." C. MCCORMICK, *supra* note 84, at 226.

91 *See* CAL. GOV'T CODE §§ 7470-90 (West 1980); ILL. REV. STAT. ch. 16 1/2, § 148.1 (1979); MD. FIN. INST. CODE ANN. 1-302 (1980).

92 Federal courts refuse to recognize a bank-customer evidentiary privilege. *See* United States v. Nelson, 486 F. Supp. 464 (W.D. Mich. 1980); Rosenblatt v. Northwest Airlines, Inc., 54 F.R.D. 21, 22 (S.D.N.Y. 1971).

93 425 U.S. 391 (1976).

their accountants and then transferred these documents to their attorneys. When the attorneys refused to give up the documents after receiving IRS summonses, the government brought enforcement actions to compel disclosure. In response to the government's action, the taxpayers asserted that the attorney-client privilege prevented the disclosure of the documents.

The *Fisher* Court stated initially that the privilege applied only in situations where the client would not have consulted with the attorney but for the privilege.[94] Furthermore, the Court established that if the documents were unobtainable directly from the client then the transfer of the documents to the attorney would still be protected by the attorney-client privilege.[95] However, the Court concluded that the fifth amendment protection against self-incrimination was not violated because the disclosure of the accountant's workpapers then in the possession of the attorney would not require the taxpayer to "restate, repeat, or affirm the truth of the contents of the documents sought."[96] Since the Court stated that the taxpayer could not defeat a governmental subpoena directly based upon the incriminating nature of the evidence,[97] it concluded that the information conveyed through the production of the documents did not rise to the level of testimonial self-incrimination.[98] Therefore, the Court held that compliance with the summons ordering the taxpayer to produce the accountant's documents would involve no incriminating evidence and accordingly no violation of the fifth amendment.

The analysis of the *Fischer* Court arguably could deny evidentiary protection to a depositor. Many documents compiled by a bank, such as statements and deposit slips, are owned by the bank and are utilized for internal banking purposes. If the IRS were examining the potential civil or criminal liability of a customer, and the customer retained an attorney and ordered the bank to send the documents to aid the attorney in preparation of the customer's defense, then conceivably if the IRS subpoenaed the documents from the attorney, the Court could rely on *Fisher* to deny the customer the protection of the attorney-client privilege. While the *Miller* Court specifically chose not to decide this evidentiary privilege issue, examination of its benefits, other available alternatives, and previous Court decisions in the privilege area compel the conclusion that a bank-customer privilege would neither be desirable nor realistically obtainable.

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94 *Id.* at 403.
95 *Id.* at 405.
96 *Id.* at 409.
97 *Id.* at 409-10.
98 *Id.* at 411.

THE CURRENT FOURTH AMENDMENT TEST

While the Court's handling of Miller's constitutional and evidentiary claims indicates that the Court developed an unsound rule of law, the *Miller* decision must be analyzed with the standing tests used by the Supreme Court today. Subsequent to *Miller*, the Court has cited four factors[99] which determine whether an interest is protected by the fourth amendment. Justice Powell enunciated these four factors in *Rakas v. Illinois*. In his concurring opinion in *Rakas*,[100] Justice Powell stated that "the ultimate question . . . is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances."[101]

Justice Powell's first factor is whether the defendant has taken precautions to protect his privacy interest from governmental intrusion.[102] The *Miller* Court implicitly faulted the depositor for failure to protect his privacy interest.[103] One commentator has noted, however, that this

99 An additional factor developed by the Court to determine reasonable privacy expectations is not germane to the privacy claims of bank depositors. In several cases, the Court relied upon the power of the defendant to exclude others from the premises searched as indicative of the presence of a fourth amendment interest. For instance, in Jones v. United States, 362 U.S. 257, the Court determined that the defendant who was staying in the apartment of a friend had a legitimate expectation of privacy in the apartment. The Court emphasized that Jones had a key to the apartment and with the exception of his friend, "Jones had complete dominion and control over the apartment and could exclude others from it." Rakas v. Illinois, 439 U.S. at 149.

Like the power to exclude others from living premises, the caller's power to exclude others from a public telephone booth indicates a legitimate privacy expectation. In Katz v. United States, 389 U.S. 347, the defendant occupied the phone booth and shut the door to exclude other callers, thereby evidencing legitimate privacy expectations. Thus, "Katz and Jones could legitimately expect privacy in the areas which were the subject of the search and seizure each sought to contest." Rakas v. Illinois, 439 U.S. at 149. Conversely, the Court has determined that a defendant's inability to exclude others indicates an unreasonable privacy expectation. In Rawlings v. Kentucky, 100 S. Ct. 2556, the Court emphasized Rawlings' inability to exclude others from the purse in which he had placed drugs as proof of his unreasonable privacy expectation.

The common element in these three cases is that the defendant's ability to protect the privacy of the searched premises determined the legitimacy of the privacy expectation. This analysis cannot properly be applied to bank records for the customer is not concerned about excluding agents from the premises of the bank, but rather from the information contained in his bank statements and checks. Even if the premises are defined as file cabinets or computer tapes, a depositor's inability to exclude others is not proof of an unreasonable privacy expectation. The distinction is that the defendants in *Jones* and *Katz* had the possibility to exclude others from the area searched. A bank depositor has no legal right and no practical means to restrict access to a public bank or to the files owned by the bank. Therefore, because a bank customer has no legal or practical basis upon which to protect his bank record privacy, his inability to do so does not evidence an unreasonable privacy expectation.

100 439 U.S. at 150-56 (Powell, J., concurring).

101 *Id.* at 152.

102 *Id.*

103 United States v. Miller, 425 U.S. at 442 (citing Katz v. United States, 389 U.S. at 351).

assumption of risk basis for denying standing to bank depositors would invalidate other instances in which the Court has found a legitimate privacy expectation.[104]

Following Justice Powell's test, some courts have attempted to evaluate the reasonableness of an expectation in terms of the precautions the individual could have taken to prevent such intrusions.[105] One author has suggested that only reasonable precautions be required and that reasonableness be defined on an individual case-by-case basis in light of the area being searched.

While a depositor might take some precautions to protect his financial privacy, none are reasonable. First, he might shield his financial affairs by conducting all his commercial transactions in cash. This alternative has been disregarded as unrealistic for "it is impossible

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[104] 3 W. LAFAVE, *supra* note 4, § 11.3, at 569. LaFave argues that in Jones v. United States, 362 U.S. 257, the defendant could be characterized as having taken that risk by stashing the narcotics in his friend's apartment. The logical response, however, is that a friend's apartment is more private than a commercial bank, and therefore arguably the defendant in *Jones* did not assume the risk of public disclosure to the same degree that the defendant did in *Miller*.

LaFave also contends that the assumption of risk analysis could upset the result reached in Bumper v. North Carolina, 391 U.S. 543 (1968). The defendant in *Bumper* was convicted of rape. A rifle used as evidence to convict him was found in the kitchen of his grandmother's house and was seized by police with an invalid consent from the defendant's grandmother. The evidence was suppressed, but LaFave argues that the defendant could be viewed as having assumed the risk of public disclosure by leaving the gun in the common area of the house.

This again can be distinguished from *Miller* because even common areas of a home deserve more privacy protection than a bank. The Court has often found the home worthy of fourth amendment protection. *See* Lanza v. New York, 370 U.S. 139, 143 nn.8-9 (1962), which cites cases in which the explicit protection of homes within the language of the fourth amendment has been liberally construed. *See, e.g.*, Davis v. United States, 328 U.S. 582 (1946) (store); Amos v. United States, 255 U.S. 313 (1921) (store); Gouled v. United States, 255 U.S. 298 (1921) (business office); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (business office).

LaFave's application of the assumption of risk rationale to the facts in Mancusi v. DeForte, 392 U.S. 364 (1968) is more persuasive. In *Mancusi*, the state officials without a warrant seized records from a union office which was shared by several workers. The Court held that DeForte, one of the office workers, had standing to contest the seizure because he could legitimately expect records in the office to be kept safe. Yet, it could be argued that DeForte knowingly exposed these papers to public view. He shared the office and he did not allege that the papers were taken from an area he exclusively used. Mancusi v. DeForte, 392 U.S. at 368. Therefore, conceivably DeForte assumed the risk that these papers would be made public and, thus, under the *Miller* assumption of risk analysis, he would not have been granted standing to contest the invalid search.

[105] Commonwealth v. Hernley, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971) (the court held that an F.B.I. agent standing on a ladder using binoculars to see in defendant's window was not performing an unreasonable search because the defendant could have curtained the window), and United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd in part and rev'd in part on rehearing*, 537 F.2d 227 (5th Cir. 1976) (per curiam) (the circuit court rejected arguments by narcotics agents that marijuana found on rural farm property was legally obtained because the defendant had failed to fence the property and to post private property signs), *cited in* Note, *A Reconsideration, supra* note 33, at 169-70.

to participate in the economic life of contemporary society without maintaining a checking account."[106]

With the majority of Americans maintaining at least one checking account, "the check is firmly established as a major component of the U.S. payments mechanism."[107] Most customers would resist conducting their financial affairs in cash. The check is a proven tool which satisfies consumer functional requirements of a safe medium of exchange while also satisfying consumer needs by providing physical evidence that the financial transaction has been completed.[108] Thus, requiring consumers to use cash for all commercial transactions in order to protect their privacy interests is unreasonable and economically unfeasible.

A depositor might also attempt to contract with his bank to ensure no disclosure of his banking information without authorization by the depositor. The American Civil Liberties Union has recommended that a depositor enter into a contract that would require his bank to notify the depositor if attempts are made to secure his records and which would prohibit the release of bank information absent depositor consent or a judicially enforced subpoena.[109] The difficulty with this precautionary measure is that the expectation of privacy test only requires that reasonable measures be taken to prevent invasive searches and seizures. It seems unreasonable to require a depositor to contract with his bank to ensure privacy protection when most depositors believe their records are already confidential. Since neither customer avoidance of checking accounts nor contractual arrangements between bank and customer are realistic alternatives, a depositor like Miller has no reasonable precautionary measures available to him.

A second factor cited by Justice Powell in *Rakas* is whether the history of the fourth amendment sheds light on whether or not the area searched was within the scope of the amendment's protection.[110] While the authority Justice Powell cites for the historical factor does not directly address bank customer privacy, it does indicate that traditionally the warrant clause of the fourth amendment was intended to protect against invasions of one's person, house, papers, and effects.[111] In concluding that a person's footlocker was entitled to privacy protection, the

106 Burrows v. Superior Court, 13 Cal. 3d at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

107 Electronic Banking, Inc., *supra* note 1, at 138.

108 *Id.* "Consumers use checks to pay bills, to make purchases at the point-of-sale and to obtain cash. Most payroll checks are deposited in a checking account. It is obvious that the check is seen by consumers as the most satisfying means by which to conduct their financial affairs." *Id.*

109 *See* CIVIL LIBERTIES, Oct. 1972, at 3, *cited in* Comment, *supra* note 33, at 1442 n.15.

110 Rakas v. Illinois, 439 U.S. at 153 (Powell, J., concurring) (citing United States v. Chadwick, 433 U.S. 1, 7-9 (1977)).

111 United States v. Chadwick, 433 U.S. at 8.

Court in *United States v. Chadwick* acknowledged that the framers intended to extend fourth amendment protection beyond governmental invasions existing in the colonial era: "What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."[112]

Privacy is the fundamental value deserving protection within the flexible parameters of the fourth amendment. In wording the fourth amendment to encompass a citizen's person, home, papers, and effects, the framers sought to protect the privacy interests of citizens in those areas and items. While a footlocker is not enumerated as a protected fourth amendment area, and thus would not deserve protection under a literal reading of the fourth amendment, the *Chadwick* Court recognized that the defendant reasonably expected his locker to be opened only with his consent. His reasonable privacy expectation created the privacy interest that triggered the protection of the fourth amendment.

Similarly, bank depositors reasonably expect their bank documents to remain private: "The disclosure by the depositor to the bank is made for the limited purpose of facilitating the conduct of his financial affairs; it seems evident that his expectation of privacy is not diminished by the bank's retention of a record of such disclosures."[113] Thus, the depositor's privacy expectation in his bank records creates the privacy interest protected by the fourth amendment.

In addition to protecting the changing legitimate privacy expectations of citizens, the fourth amendment must also encompass the changing methods used by government to invade the privacy of citizens. In 1890, Samuel Warren and Louis Brandeis recognized the danger to privacy of new technology:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'[114]

Similarly, today's commentators recognize that new technology increases the potential for privacy invasion: "The insidious, far-reaching and indiscriminate nature of electronic surveillance . . . makes it almost, although not quite, as destructive of liberty, as 'the kicked-in

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[112] *Id.* at 9.

[113] Burrows v. Superior Court, 15 Cal. 3d at 244, 529 P.2d at 596, 118 Cal. Rptr. at 172.

[114] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

door.' "[115] The continuing development of methods and vehicles for invading the privacy of citizens, such as the photocopying of all customer banking transactions necessitates that "judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices."[116] Failure to expand fourth amendment protection "opens the door to a vast and unlimited range of very real abuses of police power."[117] Thus, reference to the historical underpinnings of the fourth amendment fortifies the conclusion that bank documents should be entitled to privacy protection within the "persons, houses, papers and effects"[118] clause which defines its scope.

A third factor enumerated by Justice Powell for determining the existence of a legitimate privacy expectation is the manner in which the claimant used the premises searched.[119] Justice Powell cited *Jones v. United States*[120] as an example of use of the premises creating a legitimate privacy expectation. In *Jones*, the defendant was a guest in an apartment that was unlawfully searched. In concluding that the defendant possessed a reasonable privacy expectation, the Court focused upon the facts that he had been staying in the apartment and had stored his belongings there.

The manner in which a depositor uses a bank account will likely determine the legitimacy of his privacy expectation. Joint or corporate accounts arguably might diminish an individual depositor's privacy expectation because of the additional persons entitled to oversee the management of these accounts. However, individual depositor accounts are necessarily opened, managed, and ultimately closed with the sole participation of the depositor and the bank officer. As such, the depositor legitimately utilizes his account with the expectation that his transactions will be known only to the bank.

Powell's fourth indicator of a legitimate privacy expectation is whether the defendant can claim a proprietary or possessory interest in the items seized. While ownership of the seized evidence will not give the defendant automatic standing, the Court has stated that that "property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated."[121]

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115 Amsterdam, *supra* note 26, at 389.

116 Burrows v. Superior Court, 15 Cal. 3d at 244, 529 P.2d at 596, 118 Cal. Rptr. at 172.

117 *Id.* at 244, 529 P.2d at 596, 118 Cal. Rptr. at 172.

118 U.S. CONST. amend. IV.

119 Rakas v. Illinois, 439 U.S. at 153 (Powell, J., concurring).

120 362 U.S. 257.

121 United States v. Salvucci, 100 S. Ct. at 2553.

The *Miller* majority refused the depositor standing because he could not claim either ownership or possession of his bank records.[122] In reaching this conclusion, the Court declined to adopt the common law precept that cancelled checks were the property of the depositor.[123] Banks were required to return the cancelled checks to the depositor for he was thought to possess a superior right to them.[124] Therefore, arguably a bank customer can assert standing on ownership of at least his cancelled checks.[125] To the extent that a defendant like Miller can establish ownership of his bank documents, he can contest the validity of subpoenas issued to gain access to those documents.

The second vehicle for upholding a depositor's property right to contest seizure of his bank records is to conceptualize information as property. *Brex v. Smith*[126] and *Zimmerman v. Wilson*[127] held that depositors possessed a right to contest government subpoenas issued for their bank records. The courts based their conclusion upon the theory that: "It is the information the bankers' books contain, and not the books in which that information is recorded, that is the property right of these taxpayers, a property right this court protects by injunctive relief."[128]

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122 425 U.S. at 440.

123 2 J. MOORE, A TREATISE ON THE LAW OF BANKS AND BANKING § 460 (1928).

124 *Id.*

125 Under the Uniform Commercial Code, a bank depositor owns his checks. Section 4-201 states: "(1) Unless a contrary intent clearly appears . . . the bank is an agent or subagent of the owner of the item . . . ." In the official comment to § 4-201, the commentators state that the practical result of the agency status is that the "risk of loss continues in the owner of the item rather than the agent bank."

Relying upon the direction of the Code, courts have also acknowledged that the customer owns his checks. *See* Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., 161 F. Supp. 790 (D. Mass. 1958) (where a bank received checks endorsed without restriction, the rights of the depositor as owner of the checks were subject to the bank's rights resulting from the outstanding advances on the checks); Mercantile Bank & Trust Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972) (where the payee of a check endorsed it and deposited it to his account in the plaintiff bank, the payee remained the owner of the check and the plaintiff bank was an agent for collection.

The argument that a property interest springs from a depositor's bank statements and other banking records provided by the bank is more tenuous. However, the California Supreme Court in Burrows v. Superior Court, 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169, refused to be restricted by a narrow property concept to determine privacy protection:

> [A]lthough the record establishes that copies of petitioner's bank statements rather than of his checks were provided to the officer, the distinction is not significant with relation to petitioner's expectation of privacy. That the bank alters the form in which it records the information transmitted to it by the depositor to show the receipt and disbursement of money on a bank statement does not diminish the depositor's anticipation of privacy in the matters in which he confides to the bank.

Id.

126 104 N.J. Eq. 386, 146 A. 34.

127 81 F.2d 847 (3d Cir. 1936), however the case's holding concerning the brokerage records was reversed in Zimmerman v. Wilson, 105 F.2d 583 (3d Cir. 1939).

128 81 F.2d at 849. Support for this informational property concept can be found in the

Thus, the information contained in the documents constituted the fourth amendment protected interest.[129]

While not expressly relying upon the concept of information as property, two decisions of the California Supreme Court have found that information contained in customer bank and credit card records constituted a protected privacy interest. In *Burrows v. Superior Court*,[130] the court held that a bank depositor possesses a reasonable expectation of privacy in his bank records and stressed that the bank record information created the reasonable privacy expectation. In a more recent privacy decision, the California Supreme Court extended the reasonable expectation analysis to credit card holders. In *People v. Blair*,[131] the court defined the proper inquiry as "whether there is an expectation of privacy in the information sought; such an expectation may exist even in the briefest encounter between the persons who impart and receive the information."[132] In concluding that society adjudges as reasonable customer privacy expectations in credit card information, the court focused upon the revealing nature of credit records:

> As with bank statements, a person who uses a credit card may reveal his habits, his opinions, his tastes, and political views, as well as his movements and financial affairs. No less than a bank statement, the charges made on a credit card may provide 'a virtual current biography' of an individual.[133]

In finding a protectable privacy interest, both the *Blair* and *Burrows* courts emphasized the information being sought, not the instrument in which it was conveyed. While Burrows had an arguable property right in his checks, Blair could claim no proprietary interest in his credit statement, yet both defendants possessed privacy rights protected under the California Constitution. Similarly, the *Miller* Court should have looked beyond proprietary and possessory interests in the bank documents and focused primarily on whether the defendant possessed a legitimate expectation of privacy in the seized information.

Uniform Commercial Code. Section 3-804 provides that the owner of a check which is lost may still recover from a party liable thereon upon proof of his ownership. The import of this section is that the owner's rights inhere not in the piece of paper, but in the information contained in the check. Under this analysis then, whether the information is contained on a customer's check or in his bank statement prepared by the bank is irrelevant. Both instruments reveal the same customer information and therefore both warrant fourth amendment privacy protection.

129 "In other words, the privacy interest has in fact followed the information, while the law has followed the material records as tangible objects of possession. It is this discordance between fact and law which undermines the reasoning used in cases such as *United States v. Miller*." Comment, *No Expectation, supra* note 4, at 424.

130 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166.

131 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979).

132 *Id.* at 654, 602 P.2d at 738, 159 Cal. Rptr. at 827.

133 *Id.* at 652, 602 P.2d at 745, 159 Cal. Rptr. at 825.

As an alternative to the actual ownership basis for entitlement to fourth amendment standing the defendant might assert a possessory interest in the item seized under the constructive possession doctrine first formulated in *Schwimmer v. United States*.[134] In *Schwimmer*, the Eighth Circuit concluded that while a taxpayer had released possession of his personal records by placing them with a storage company, nevertheless he could assert his fourth amendment rights against a government subpoena of the documents. The court depicted the storage company as a "naked possessor of the documents"[135] and said that the government should not be allowed to employ a third party to procure the records.

Similarly, a bank depositor releases possession of his checks to the bank with the understanding that the customer maintains a possessory interest in the checks. The bank functions as a financial intermediary, and like a storage company, retains no permanent possessory interest in the items deposited in it. Both stored goods and cancelled checks eventually are returned to the customer. Thus, the *Miller* Court could have employed constructive possession principles to imbue the seized checks with a depositor possessory interest in the seized bank documents. This possessory interest would then provide the basis upon which a bank depositor could claim that "he himself was the victim of an invasion of privacy."[136] Whether asserting a property interest based upon the bank documents or upon the information contained therein, or a possessory interest stemming from the constructive possession doctrine, a depositor legitimately should be entitled to contest invalid seizures of his bank documents.

THE *KATZ* REASONABLE EXPECTATION OF PRIVACY TEST

While the Court often relies upon the factors developed in *Rakas* to determine the legitimacy of privacy expectations, these factors are only aides in answering the ultimate question whether the defendant possessed any reasonable expectation of privacy. The appropriate test of a reasonable expectation originated in the Court's seminal standing decision in *Katz v. United States*.[137] The *Katz* test requires that the defendant possess an actual expectation of privacy that society considers reasonable. Although *Katz* predated *Miller*, and the Supreme Court has since established additional indicia of a fourth amendment privacy interest, examination of claims to fourth amendment protection under the *Katz* two-pronged test is essential. In determining whether government con-

134 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 883 (1956). *See also* Brown v. United States, 411 U.S. at 230 n.4.

135 232 F.2d at 861.

136 Jones v. United States, 362 U.S. at 261.

137 389 U.S. 347.

duct constitutes an unreasonable search in contravention of the fourth amendment, the Court has indicated that "our lodestar is Katz"[138] and has consistently invoked the *Katz* expectation of privacy test to analyze alleged governmental encroachment on fourth amendment freedoms.[139]

Because the Court consistently relies upon *Katz* to determine the existence of reasonable privacy expectations, in order to assert protection of the fourth amendment bank depositors must actually expect their bank records to be private and society must adjudge their expectations reasonable. The passage of federal and state legislation protecting depositors against unrestricted government access to their bank records and state court decisions granting depositors state constitutional privacy protection today create actual depositor privacy expectations. These actual expectations conform with society's norms as expressed through its legislatures and courts. Thus, under the *Katz* test, depositors possess a reasonable privacy expectation protected by the fourth amendment.

In light of the Court's repeated reliance on the *Katz* decision as the proper fourth amendment interest test, the *Miller* Court's summary rejection of the *Katz* analysis is puzzling. Although the defendant argued that the records maintained by the bank in accordance with the Bank Secrecy Act were ones in which he possessed a reasonable privacy expectation, Justice Powell rejected the application of the *Katz* expectation of privacy analysis by citing the competing *Katz* concept that when one exposes to the public that which was initially private, fourth amendment interests are thereafter waived.[140]

Instead of carefully analyzing the case in light of the *Katz* expectation of privacy test, the *Miller* Court ignored the components of the legitimate expectation of privacy test enunciated by Justice Harlan[141] and abruptly concluded that Miller had no standing to challenge government subpoenas. Had the Court faithfully analyzed *Miller* in light of the broad expectation of privacy analysis of *Katz*, it might first have attempted to fashion a reasonable basis for deciding which customer information is public and which is sufficiently personal so as to warrant fourth amendment protection.

In *People v. Elder*,[142] the California Court of Appeals for the Fourth District faced a similar task in holding that telephone and gas compa-

138 Smith v. Maryland, 442 U.S. at 739.

139 *See, e.g.*, Rawlings v. Kentucky, 100 S. Ct. at 2561; Smith v. Maryland, 442 U.S. at 739; Rakas v. Illinois, 439 U.S. at 143; United States v. Chadwick, 433 U.S. at 7; United States v. Dionisio, 410 U.S. at 14; Couch v. United States, 409 U.S. 322, 335-36 (1973); United States v. White, 401 U.S. at 752 (plurality opinion); Mancusi v. DeForte, 392 U.S. at 368; Terry v. Ohio, 392 U.S. 1, 9 (1968).

140 United States v. Miller, 425 U.S. at 442.

141 Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

142 63 Cal. App. 3d 731, 134 Cal. Rptr. 212 (1976).

nies did not violate a customer's right to privacy by releasing their names and addresses. In so holding, the court distinguished between the privacy interest accorded to general descriptive information and to information that reveals the customer's beliefs, associations, and activities:[143]

> Name and address relate to identification rather than disclosure of private, personal affairs. It is virtually impossible to live in our current society without repeated disclosure of name and address, both privately and to the government. While a myriad of reasons motivate some to reduce the degree of their identity before the public eye which includes, for example, subscribing to an unlisted telephone number, this quest for anonymity does not compel the conclusion that a reasonable expectation of privacy existed on the facts before us.[144]

In *Burrows v. Superior Court*,[145] the California Supreme Court applied the distinction drawn in *Elder* to records of bank transactions. The court stated: "In the course of such dealings [with a bank], a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography."[146] Because banks record such specific personal information, the court held that such records deserve greater protection than general descriptive information. Thus, bank records contain information which warrants reasonable privacy expectations whereas privacy expectations concerning customer names and addresses, in most cases, would be unreasonable. Recognition of this distinction could have freed the *Miller* court to extend the *Katz* logic to embrace private documents while retaining sufficient flexibility to deny extension of privacy to unwarranted cases.

In addition to failing to recognize the public/private distinction, the *Miller* Court neglected to divide the *Katz* test into its component parts:[147] "[F]irst that a person have exhibited an actual (subjective) ex-

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143 *Id.* at 737-38, 134 Cal. Rptr. at 215.

144 *Id.* at 737-38.

145 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166.

146 *Id.* at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

147 Justice Harlan's breakdown of the *Katz* expectation of privacy test has been relied upon by the courts in later decisions, *see* Rakas v. Illinois, 439 U.S. at 142-43 n.12; Terry v. Ohio, 392 U.S. at 9; United States v. Agapito, 620 F.2d 324, 329 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3246 (Oct. 6, 1980); United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); Government of Virgin Islands v. Berne, 412 F.2d 1055, 1061 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); Stark v. Connally, 347 F. Supp. 1242, 1247 (N.D. Cal. 1972), *aff'd in part, rev'd in part sub nom.*, California Bankers Ass'n v. Schultz, 416 U.S. 21; People v. Berutko, 71 Cal. 2d 84, 93 n.8, 453 P.2d 721, 726, 77 Cal. Rptr. 217, 222 (1969), and has been cited by legal commentators, *see* 1 W. LAFAVE, *supra* note 4, § 2.1, at 227; Amsterdam, *supra* note 26, at 384; Note, *supra* note 34, at 504 n.88; Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REF. 154, 179-80 (1972).

Nevertheless, Justice Harlan later retreated somewhat from his initial formulation of the *Katz* test: "The analysis must, in my view, transcend the search for subjective expectations or

pectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[148] Subsequent to *Katz*, lower courts have generally applied this bifurcated analysis.[149]

In discussing the actual expectation component, Justice Harlan stated that for a given governmental intrusion to be held unreasonable, an individual actually must expect his action to be private. Yet defining reasonableness in terms of actual knowledge can potentially deny to individuals traditional fourth amendment protection.[150] For instance, society could be conditioned to possess no actual expectations of privacy and therefore no searches conducted under this standard could be determined unreasonable: "[T]he government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance."[151]

The Supreme Court has recognized the inadequacy of measuring fourth amendment interests based upon actual expectations. Because of the ephemeral nature of such expectations, the Court has stated that "where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining . . . the scope of the Fourth Amendment protection . . . ."[152] Under circumstances[153] in which governmental action de-

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legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." United States v. White, 401 U.S. at 786 (Harlan, J., dissenting).

Justice Harlan's de-emphasis of the subjective expectation component of the *Katz* test has been commended, *see* Amsterdam, *supra* note 26, at 384, as having recognized that subjective expectations can be eliminated by governmental declaration that such expectations are no longer reasonable. While the subjective expectation inquiry has not been totally disregarded, *see* Rakas v. Illinois, 439 U.S. at 143 n.12, the Court is increasingly seeking to determine in fourth amendment privacy cases whether the interest asserted is one that society is currently prepared to acknowledge as reasonable.

148 Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

149 1 W. LAFAVE, *supra* note 4, § 2.7, at 413 n.54. LaFave has criticized the Court for not having employed these two components of the *Katz* privacy test in arriving at its *Miller* holding. *Id.* at 413-14.

150 *See* Note, *A Reconsideration, supra* note 33, at 157.

151 Amsterdam, *supra* note 26, at 384.

152 Smith v. Maryland, 442 U.S. at 740 n.5.

153 The Court described two such circumstances:

> [I]f the government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that the police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well.

stroyed actual expectations, the Court said that "a normative inquiry will be proper."[154] Thus, the difficulty in defining fourth amendment interests based upon actual customer expectations is that such expectations can be erased by governmental actions.[155] Because the purpose of the fourth amendment is to protect private citizens from unlawful government searches, reliance on the actual expectation criterion alone would be anomalous in that it allows government officials to defeat the salutary purposes of the fourth amendment by increasing the frequency of their unlawful practices.

However, total disregard of the actual expectation criterion is as illogical as total reliance on this criterion. One commentator has postulated a situation in which a citizen would possess an actual expectation which would be adjudged unreasonable by society.

> If two narcotics peddlers were to rely on the privacy of a desolate corner of Central Park in the middle of the night to carry out an illegal transaction, this would be a reasonable expectation of privacy; there would be virtually no risk of discovery. Yet if by extraordinary good luck a patrolman were to illuminate the desolate spot with his flashlight, the criminals would be unable to suppress the officer's testimony as a violation of their rights under the fourth amendment. . . . [I]n order for an expectation to be considered justified it is not sufficient that it be merely reasonable; it must be based on something in addition to a high probability of freedom from intrusion. The premise upon which the hypothetical criminals in Central Park based their activities was realistic and involved little risk, but there expectation was not "justified."[156]

Thus, a citizen can possess an actual expectation, but not deserve fourth amendment protection because the expectation is unreasonable.

Perhaps recognizing the deficiency of absolute reliance upon or rejection of the actual expectation criterion, the *Katz* Court required not only that a depositor possess an actual privacy expectation, but also that

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Id. at 740-41 n.5.

154 *Id.* at 741.

155 Cases in which privacy interests have been denied because no actual expectation was found to exist can be separated into four categories: where prior frequent searches vitiate an individual's privacy expectations in later searches; where the defendant was specifically notified by contract, regulation, or posted notice that the search was being conducted; where the defendant's special status and knowledge about the search reduced his privacy expectation; and where the court viewed the defendant's advance notice coupled with the later search as an implied consent to the search. Note, *A Reconsideration, supra* note 33, at 157-64.

All four categories illustrate the potentially destructive scope of the actual expectation criterion. The government could make abusive searches legal simply by conducting them often enough to make the defendant aware of such procedures, could pass regulations or enter into contracts allowing invasive searches, could specifically abuse groups who possess extraordinary knowledge about police operations (i.e., parolees and probationers) and could imply consent from those who, while cognizant of the upcoming search, did not for various reasons object.

156 Note, *Post-Katz Study, supra* note 33, at 983.

it be one that society recognizes as reasonable.[157] However, the components of the bifurcated *Katz* test often ask the same question: did the governmental action violate a citizen's reasonable expectation of privacy? Separate application of each component to privacy questions generates circular reasoning because most citizens have actual privacy expectations only in areas society has adjudged as worthy of privacy protection.

Justice Harlan has recognized the need to acknowledge the interrelation of the two tests: "Our expectations . . . are in large part reflections of laws that translate into rules the customs and values of the past and present."[158] Thus, society's reasonable expectations create actual customer privacy expectations. Conversely, most citizens have actual expectations concerning interests generally protected by society. In the majority of cases, the components will converge, thereby creating a situation in which actual expectations are ones which under a normative inquiry, society has judged reasonable. These two components converge in analyzing the question of bank customer privacy. Examination of court decisions and statutes discussing bank customer privacy will demonstrate this convergence.

To determine whether a depositor's expectation is reasonable, courts normally examine the declarations of other courts and of legislatures. Several recent state courts have merged the two *Katz* components and have acknowledged that bank depositors possess reasonable privacy expectations. Utilizing *Katz*, the California Supreme Court in *Burrows v. Superior Court*[159] framed a two-fold test for determining possible customer privacy interests: whether the person has exhibited a reasonable expectation of privacy and whether that expectation has been violated by a reasonable governmental intrusion.[160] The first component of the *Burrows* test subsumes the bifurcated *Katz* test and the second *Burrows* component examines whether the government complied with the requirements of legal process in conducting the search.

Applying this test to the facts of the case, the *Burrows* court stated that "[a] bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank for internal banking purposes."[161] In holding that the petitioner's reliance on the confidentiality of his checks was justified, the *Burrows* court found that the bank's ownership and possession of the bank records did not vitiate the depositor's reasonable privacy expecta-

157 Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).
158 United States v. White, 401 U.S. at 786 (Harlan, J., dissenting).
159 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166.
160 *Id.* at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169.
161 *Id.*

tion in the records. By providing protection for bank depositors the *Burrows* court recognized that because of new banking technologies, courts must expand constitutional protection to ensure customer privacy:

> Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.[162]

Agreeing with California that depositors possess reasonable privacy expectations, the Maryland Court of Special Appeals in *Suburban Trust Co. v. Waller*[163] said:

> We think that a bank depositor in this State has a right to expect that the bank will, to the extent permitted by law, treat as confidential, all information regarding his account and any transaction relating thereto. Accordingly, we hold that, absent compulsion by law, a bank may not make any disclosures concerning a depositor's account without the express or implied consent of the depositor.[164]

In holding that the depositor possessed a privacy right, the court reviewed early English law[165] and American precedent[166] and concurred with the California Supreme Court that a bank customer has a reasonable expectation that his records will be used by the bank for internal banking purposes. The Maryland court buttressed its conclusion that bank depositors have reasonable privacy expectations by citing the legislative efforts of the Maryland General Assembly to provide customer protection.[167]

While these courts have accorded depositors substantial privacy protection, legislatures have been far more active in recognizing that customer privacy expectations are reasonable. The most recent example

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162 *Id.* at 248, 529 P.2d at 596, 118 Cal. Rptr. at 172.

163 44 Md. App. 335, 408 A.2d 758 (1979).

164 *Id.* at 341, 408 A.2d at 764.

165 *See* Tournier v. National Provincial and Union Bank, [1924] 1 K.B. 461, in which a three-judge panel held that a bank had breached its implied contractual duty of nondisclosure by commenting on the plaintiff's bank transactions to his employer.

166 *See* Peterson v. Idaho First Nat'l Bank, 83 Idaho at 588, 367 P.2d at 290. The Court found that the American rule was accurately described by the *Peterson* court:

> It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors. This high ethical standard is recognized by the defendant bank in the instant case . . . .
>
> It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account.

Id.

167 The Maryland legislature has stated the goal of the bank customer privacy legislation is that "the confidential relationships between fiduciary institutions and their customers must be preserved and protected." MD. FIN. INST. CODE ANN. § 1-302 (1980).

of society's willingness to recognize depositor privacy rights is the Right to Financial Privacy Act of 1978.[168] The importance of this Act becomes clear upon examination of previous banking statutes. The *Miller* decision was predicated upon the Bank Secrecy Act,[169] which authorizes the Secretary of the Treasury to require financial institutions to maintain duplicate records of virtually all transactions involving their customers.[170] The government was able to request Miller's checks because the banks had photocopies of them in accordance with the provisions of the Act.

In the 1960s, banks commonly microfilmed customer checks to facilitate the operation of the bank recordkeeping systems. Microfilming soon became costly and many banks discontinued this practice.[171] In response to this decline in microfilming, Congress enacted the Bank Secrecy Act requiring banks to maintain copies of customer transactions since these records possess "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings."[172] Therefore, because federal law required Miller's banks to maintain copies of all his checks, the agents were able to obtain them directly from the bank without having to request the original cancelled checks from Miller.

Prior to *Miller*, Congress considered numerous bills which were designed to protect bank customer financial information from unrestrained government access.[173] Yet, the *Miller* decision provided the

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168 12 U.S.C. §§ 3401-22 (Supps. III & IV 1979-80).

169 12 U.S.C. § 1829(b) (1970) (retention of records by insured banks); *id.* § 1730(d) (retention of records by insured savings and loans); *id.* §§ 1951-59 (retention of records by uninsured financial institutions); 31 U.S.C. §§ 1051-122 (1970) (reporting of domestic and foreign currency transactions).

170 Section 1829b(d) of the Bank Secrecy Act provides in pertinent part:

> Each insured bank shall make, to the extent that the regulation of the Secretary so require (1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and (2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

12 U.S.C. § 1829b(d) (Supp. IV 1980).

171 California Bankers Ass'n v. Schultz, 416 U.S. at 27.

172 United States v. Miller, 425 U.S. at 443 (quoting 12 U.S.C. 1829b(a)(1)); United States v. White, 401 U.S. at 786 (1970) (Harlan, J., dissenting).

173 *See, e.g.*, S. 3814, 92d Cong., 1st Sess. (1971) (prohibiting a financial institution from disclosing to any government representative copies of or information contained in financial records of any account holder unless: (1) the account holder gave written consent; (2) the government representative presented the financial institution with a customer authorization card; and (3) the bank thereafter notified the customer of the request); S. 3828, 92d Cong., 1st Sess. (1971) (introduced to preserve the confidential relationship between fiduciary institutions and customers and to allow customer record disclosure only by customer written authorization or by court order); S. 2200, 93d Cong., 1st Sess. (1973) (introduced to ensure that customers have the right to protection against unwarranted disclosure of their records and to allow customer record disclosure only by customer authorization, administrative summons or

final impetus for the enactment of banking privacy legislation embodied in the Right to Financial Privacy Act of 1978 (RFPA).[174] The final report of the Privacy Protection Study Commission indicates that the RFPA was passed to address problems created by the *Miller* Court's denial of standing to depositors who wished to contest governmental seizures of their bank records.[175]

The RFPA confers upon depositors much of the protection they would have possessed had the *Miller* Court found a protectable privacy interest in customer bank records. Under the RFPA, to secure posses-

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subpoena, court order or judicial subpoena); H.R. 214, 94th Cong., 1st Sess. (1975) (prohibited the search of private, medical, or business records except as authorized by law); H.R. 8024, 94th Cong., 1st Sess. (1975) (prohibited federal regulatory agencies of financial institutions from approving the establishment or expansion of electronic funds transfers for a delay period and authorized a commission to review use of such systems); S. 1343, 94th Cong., 1st Sess. (1975) (prescribed standards and procedures for governing the disclosure of certain customer financial records by financial institutions to government agencies).

174 The Act is entitled The Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630 (1978), Title XI of which is named the Right to Financial Privacy Act of 1978, Pub. L. 95-630 §§ 1100-22 (1978). The RFPA is the product of various legislative committees:

> The legislative history of RFPA is somewhat complicated. It was originally introduced as H.R. 8133 on June 30, 1977. It then was incorporated as Title XI in H.R. 13088, which was then amended and reintroduced as H.R. 13471. H.R. 13471 was favorably reported out of committee on July 18, 1978. H.R. Rep. No. 1383, 95th Cong., 2d Sess. 3 (1978). Unfortunately, H.R. 13471 could not be acted on prior to the end of the session. 165 Cong. Rec. H12,335 (daily ed. Oct. 11, 1978) (remarks of Rep. St. Germain). The one-sentence H.R. 14279, however, was passed by the House and subsequently amended in the Senate to include the provisions of H.R. 13471. 166 Cong. Rec. S18,476 (daily ed. Oct. 12, 1978). It then returned to the House and was passed by resolution. 168 Cong. Rec. H13,078 (daily ed. Oct. 14, 1978). The most useful legislative history document, therefore, is the House Report No. 1383, which pertains to H.R. 13471.

Palmer & Palmer, *supra* note 4, at 198 n.18.

175 We were discussing the significance of the *Miller* decision and the very disturbing consequences which that decision has, not just for banking, but for all other areas in the private sector.

> To resume, it demonstrated two important problems that the Commission has sought to address: First, that the bank was under no obligation to withhold a depositor's records or to advise him of its policy with respect to record disclosure; and, second, that even when the depositor sought to challenge the Government's demand for his bank records, he had no assertible interest in those records that would allow him to make such a challenge. Existing law does not provide an individual with the tools he needs to protect his legitimate interests in the records many organizations keep about him. . . . [T]he Commission recommends that Government agencies be required to use legal process whenever they seek access to records other organizations hold about an individual, and that the individual be given an assertible interest in the records so that he may challenge the grounds and procedures for any disclosure.

Final Report of the Privacy Protection Study Commission: Joint Hearing Before the Senate Comm. on Governmental Affairs and a Subcomm. of the House Comm. on Government Operations, 95th Cong., 1st Sess. 12 (1977) (statement of Chairman Linowes of the Privacy Protection Study Commission). The legislative history also indicates that the RFPA was passed because of congressional dissatisfaction with the *Miller* decision. *See* H.R. REP. NO. 1383, 95th Cong., 2d Sess. 34 (1978). Courts recognize that the RFPA was passed to restrict the *Miller* rule. *See* Hancock v. Marshall, 86 F.R.D. 209, 210 (1980) ("This Act is designed to limit the holding in United States v. Miller").

sion of a customer's records, the government must reasonably describe the documents[176] and must employ one of the five legal means authorized by the RFPA for record requests.[177] The Act requires the government to notify the customer of its request within ten to fourteen days after it contacts the bank.[178] The customer has the right to challenge the validity of the government's request. Thus, Congress legislatively granted customers protection similar to that guaranteed by the warrant requirement of the fourth amendment.

The passage of the RFPA benefits depositors in several ways.[179] First, it is the only federal statute which delineates the rights of the de-

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176 12 U.S.C. § 3402 (Supp. III 1979). The RFPA leaves untouched traditional rights of banks to challenge government record requests as either overbroad or unduly burdensome. *See id.* § 3410(f).

177 The government can properly request customer records through five means: customer authorization, *id.* § 3404, administrative summons or subpoena, *id.* § 3405, search warrant, *id.* § 3406, judicial subpoena, *id.* § 3407, or formal written request, *id.* § 3408. The method of formal written request may only be used when the agency requesting the information has no power to issue administrative summons or subpoenas. Furthermore, it does not empower an agency to issue such requests and a banking institution may ignore the requests if it desires.

178 *Id.* §§ 3405-08. Notice may be delayed under § 3409 if authorized by the federal district court under limited circumstances and under § 3414(b) in emergency situations (physical injury, property damage or flight to avoid prosecution).

179 Ironically, while the RFPA was enacted to remedy the problems created by *Miller*, some authors have suggested that even under the RFPA Miller could not have prevented his indictment. Palmer & Palmer, *supra* note 4, at 223. The authors contend that notice of the access request could have been delayed until after the records had been obtained, presumably relying on § 3414(b)(1)(C) which allows delay of customer notification if it is feared that notice will motivate the suspect to flee to avoid prosecution. Therefore, they concluded that once the fruits of the search were used to indict Miller, he could not move to suppress the documents.

Alternatively, the authors may have based their conclusion on the fact that the subpoenas in *Miller* were issued by a grand jury and the RFPA protections do not apply to grand jury access requests, *see* 12 U.S.C. § 3413(i) (Supp. III 1979), although the RFPA does attempt to limit further dissemination of the customer information derived from the access request, *see id.* § 3420. Here again Miller would enjoy a right but no remedy, for while the RFPA ostensibly protects bank customer confidentiality, Miller would not be able to demand the fruits of the search be excluded. *See* Palmer & Palmer, *supra* note 4, at 223 n.116. "The Section [3418] injunctive remedies, if they applied at all, would at most seem to allow nothing more than the return or destruction of the records themselves, and not their fruits, where RFPA noncompliance was shown." *Id.*

Nevertheless, the RFPA could arguably apply to *Miller* if the United States attorney who supervised the issuance of *Miller* subpoenas was classified as an employee of the Department of Justice. It could then be argued that an employee of a government agency was requesting the documents. Since the RFPA applies to all federal government access requests, Miller would be entitled to the protections under the RFPA. Under application of the RFPA, Miller would be entitled to notice of the document request and would then file a motion to quash, *see id.* at 219 n.105, in the appropriate federal district court. *See* 12 U.S.C. § 3410(a) (Supp. III 1979) (the appropriate court being the one which issued the subpoena). The court would then make a determination as to whether the customer challenge was justified. If Miller were successful, the court would deny the government access to his records. If the court concluded the customer challenge was unwarranted, Miller would have to wait until "the entry of a final order in . . . [the] legal proceeding initiated against him which arises out

positor and the privacy protections he can expect when conducting his banking transactions. Second, banks and government agencies will understand what procedures must be complied with before a customer's private documents can be released. Finally, in relation to the *Katz* test, the passage of the RFPA indicates that society recognizes that customer protection is reasonable. Before the RFPA was enacted, the Supreme Court in *Miller* perceived the legislature's views on depositor privacy rights in these terms: "The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act . . . ."[180] The passage of the RFPA establishes that such are not the views of Congress and society today. Instead, society has chosen, as indicated by congressional action, to accord depositors a financial privacy right.

While the RFPA is the most comprehensive treatment of depositor privacy rights, Congress' first response to depositor privacy rights was § 1205 of the Tax Reform Act of 1976.[181] The Act provides the bank

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of or is based upon the financial records." Palmer & Palmer, *supra* note 4, at 221. Miller could then raise the record access issue along with the other arguments advanced on appeal.

[180] United States v. Miller, 425 U.S. at 442-43 (1976) (quoting 12 U.S.C. § 1829b(a)(1)). *See also* Couch v. United States, 409 U.S. at 335.

[181] Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, 91 Stat. 1702 (1976) (codified as I.R.C. § 7610). The power of the Internal Revenue Service to request customer records from third-party banks is statutory. *See* I.R.C. §§ 7601-02. The Code authorizes the IRS to employ administrative subpoenas to gain access to customer documents. *See id.* § 7603. The Supreme Court has described the subpoena power of the IRS as inherently different from subpoenas issued by courts:

> [Administrative subpoena power] is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950), *quoted in* United States v. Bisceglia, 420 U.S. 141, 148 (1975).

Administrative subpoenas are less restricted by the fourth amendment requirements of relevance and probable cause than are judicial subpoenas. The relevance requirement is violated only if the subpoena is overbroad. *See* United States v. Morton Salt Co., 338 U.S. at 651-52 (1950); Hale v. Henkel, 201 U.S. 43 (1906). The probable cause requirement is satisfied for a production request if the reviewing court determines the investigation is authorized by Congress, the purpose is one Congress has the power to order, and the requested documents are relevant to the investigation. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

Furthermore, IRS document requests are employed primarily for civil actions whereas judicial subpoenas are utilized most often in criminal investigations. In fact, use by the IRS of an administrative subpoena to obtain evidence for a criminal prosecution is improper, *see, e.g.*, United States v. Weingarden, 473 F.2d 454 (6th Cir. 1973), and courts will invalidate the subpoena if a criminal investigation is the sole purpose of the subpoena request. *See* Note, *IRS Access, supra* note 4, at 263 n.81 (citing United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969); Wild v. United States, 362 F.2d 206 (9th Cir. 1966); United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953)). The Internal Revenue Code does empower the IRS to initiate criminal actions, I.R.C. § 7302 (empowering the IRS to issue search warrants to obtain evidence relevant to violations of revenue laws). Once the taxpayer is subject to criminal suit,

customer with certain protections, including notice of the IRS summons[182] and standing to contest the validity of the summons.[183] Congress passed § 1205 to remedy three problems that existed under the previous Code: the taxpayer's lack of standing to contest summonses from IRS agents for taxpayer records, IRS control over the issuance of "John Doe subpoenas,"[184] and the excessive financial burden on banks complying with the IRS third party summonses.[185] From the perspective of the bank depositor, the most serious of the problems was the taxpayer's lack of standing.

In *Donaldson v. United States*,[186] the Supreme Court held that a taxpayer may not intervene as a matter of right[187] in an IRS summons enforcement proceeding and that he must demonstrate a significantly protectable interest to intervene.[188] In reaction to this decision Congress

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however, he is entitled to greater constitutional protection than when under civil investigation. *See* United States v. Stamp, 458 F.2d 759, 774-80 (D.C. Cir. 1971), *cert. denied*, 409 U.S. 842 (1972). *See also* FED. R. CRIM. P. 41 (warrant requirements are the same in tax investigations as they are in general criminal investigations). Thus, protections of the Tax Reform Act of 1976 were established to remedy invasions of customer privacy originating from improper use of the administrative subpoena in civil investigations. Since Miller was contesting a grand jury subpoena seeking evidence for a criminal prosecution, he would have derived little solace from the civil protections of the Tax Reform Act.

182 Once the IRS summons the third party, it must notify the taxpayer within three days, and the taxpayer then has two weeks in which to decide whether to allow the third party to release the records. I.R.C. § 7609.

183 The IRS must seek enforcement of the summons in the district court if the taxpayer refuses to consent by notifying the third-party recordkeeper in writing and sending a copy to the IRS, *id.* § 7609(b)(2), and the taxpayer is then granted automatic standing to intervene.

184 A John Doe summons is used by the IRS to obtain records or information without stating the identity of the person under investigation. In United States v. Bisceglia, 420 U.S. 141, the Supreme Court upheld the enforceability of the John Doe summons. Section 7609(f) of the Code requires the IRS to obtain judicial approval before issuing a John Doe summons. *See generally* Comment, *Government Access, supra* note 4, at 657; Note, *IRS Access, supra* note 4, at 275; Note, *IRS Use, supra* note 4.

185 *See* Comment, *Government Access, supra* note 4, at 653.

186 400 U.S. 517.

187 The Federal Rules of Civil Procedure authorize two forms of intervention: intervention as of right, FED. R. CIV. P. 24(a), and permissive intervention, FED. R. CIV. P. 24(b). Federal Rule of Civil Procedure 24(a)(2) permits the intervention as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . ." The impact of the *Donaldson* holding was to deny taxpayers an absolute intervention right, but it preserved permissive intervention when the taxpayer could assert a significantly protectable interest. 400 U.S. at 530-31. *But see* United States v. Newman, 441 F.2d 165 (5th Cir. 1971) (court relied on *Donaldson* to reject intervention on discretionary grounds).

188 400 U.S. at 530. The *Donaldson* Court recognized that proof that an administrative subpoena was issued with only a criminal investigative purpose will serve as a significant protectable interest to entitle the taxpayer to intervene. *Id.* at 530. Moreover, a taxpayer may assert a significantly protectable interest by way of evidentiary privilege or abuse of process. *Id.* at 531. The *Donaldson* Court established a strict burden of proof for taxpayers to meet in asserting protectable interests: "[I]f there is a valid civil purpose for the investigation,

enacted § 1205, which expressly overrules *Donaldson* by providing taxpayers the right to intervene in third party summons proceedings. The legislative history of § 1205 indicates that it was passed to protect personal privacy rights against invasion by administrative summonses.[189]

However, several defects in the statute militate against its use to protect the bank depositor under criminal investigation.[190] The Act does not specifically prohibit Internal Revenue Service use of informal access methods to obtain bank records. Thus, a customer will not receive notice if informal access is allowed by the banking institution.[191] Furthermore, the Tax Reform Act provides no penalties for failure to notify the customer that a summons has been issued for his bank records.[192] Finally, while the Tax Reform Act provides additional protection for taxpayers confronted with civil investigations, the Act's protections do not extend to criminal actions. Therefore, under the Act, a depositor is not allowed to contest an invalid subpoena used to obtain evidence against him for criminal prosecution.

The Act also does not provide protection against grand jury subpoenas for depositor records. Thus, if the FBI or the United States Attorney, and not the IRS, requests the subpoena, then the Tax Reform Act protections are inapplicable and *Miller* will deny the depositor standing to contest the subpoena.

Nevertheless, the Tax Reform Act of 1976 represents a strong congressional effort to revive privacy protections which the Court in *Donaldson* refused to acknowledge. If the dual components of the *Katz* expectation of privacy test determine the existence of a constitutional privacy right, then the enactment of the Tax Reform Act supports the acknowledgement of a fourth amendment depositor privacy interest. Under the first component of *Katz*, the Act gives the depositor certain actual privacy expectations concerning civil investigations: that he will

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the summons will be enforced, even though the *primary* purpose of the investigation is to uncover evidence for use in criminal prosecution." Comment, *Government Access, supra* note 4, at 654 n.124 (citing United States v. Zack, 521 F.2d 1366 (9th Cir. 1975); United States v. Moore, 485 F.2d 1165, 1167 (5th Cir. 1973); United States v. Held, 435 F.2d 1361, 1364 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971)). *See generally* Note, *Special Agent's Admission That Civil Summons Issued To Augment Prior Criminal Search Warrant Not Probative of Bad Faith*, 54 TEX. L. REV. 1147 (1976).

189 S. REP. NO. 938, 94th Cong., 2d Sess. 368 (1976).

190 *See* Comment, *Government Access, supra* note 4, at 656-57.

191 The RFPA will not aid the taxpayer either, for the RFPA provisions do not apply to "the disclosure of financial records in accordance with the procedures authorized by the Internal Revenue Code." 12 U.S.C. § 3413(c) (Supp. III 1976). The existence of this loophole underscores the conclusion that only a constitutionally rooted privacy interest can adequately safeguard customer financial records.

192 Comment, *Government Access, supra* note 4, at 657. The author recommends that the exclusionary rule apply to records obtained without compliance with the notice requirements and therefore such evidence received not be allowed into evidence at trial. *Id.* at 657 n.144.

be notified of IRS requests by administrative subpoenas for his bank records, that he can order the bank not to release the desired documents, and that he may intervene in court as a matter of right to establish why the IRS request should be denied. Under the second component of the *Katz* test, the passage of the Tax Reform Act demonstrates that society values depositor privacy rights and is sufficiently concerned about privacy incursions to statutorily protect such depositor privacy rights.

STATE PRIVACY LEGISLATION

Not only has society expressed its desire to protect depositor privacy interests through federal legislation, but through the enactment of state depositor privacy legislation, society has reiterated that depositors possess a constitutionally protected fourth amendment privacy interest. The most comprehensive state attempt to accommodate customer privacy expectations and law enforcement requirements is the California Right to Financial Privacy Act.[193] The Act acknowledges the confidential banker-customer relationship, confirms that this relationship should statutorily be protected, and recognizes that a balancing test must be employed to reconcile customer and law enforcement interests.

The Act provides that no state or local officers may obtain copies of, or the information contained in, the customer's financial records[194] unless they are particularly described, realistically within the scope of the investigation, and requested by acceptable means.[195] Customer consent to disclosure must be in writing.[196] If the requesting officer utilizes an administrative subpoena or summons, the officer must serve a copy on the bank customer.[197] Agencies[198] and grand juries[199] can also em-

193 CAL. GOV'T CODE §§ 7460-90 (West Supp. 1979). *See generally* Bloom, *Bank Records and the Right to Privacy*, 52 CAL. ST. B.J. 198 (1977).

194 The Act defines customer financial records as "any original or any copy of any record or document held by a financial institution pertaining to a customer of the financial institution." CAL. GOV'T CODE § 7465(b) (West Supp. 1979).

195 *Id.* § 7470(a). The requesting officer may employ such means as customer consent, an administrative subpoena or summons, a search warrant, a judicial subpoena, or a subpoena duces tecum. *Id.* § 7470(a)(1)-(3).

196 The disclosure authorization must be for a certain time period, must name the department seeking the information and the purpose for which the information is sought, and must identify the requested documents. The written authorization must also make clear to the customer that his authorization is revocable at any time. *Id.* § 7473(c).

197 *Id.* § 7473. The requesting agency must then wait ten days. If the customer does not inform the banking institution of his intention to quash the subpoena within this ten-day period, the agency then may obtain access to these records. Search warrants are treated somewhat differently in that the officer or agency may examine the customer's financial records once the warrant has been served on the financial institution. *Id.* § 7474(a)(1).

198 The customer first must be notified of the agency access request. *Id.* § 7475. However, nothing in this or other sections shall preclude the financial institution from giving the customer notice of the warrant's request. *Id.*

ploy judicial subpoenas or subpoenas duces tecum to obtain customer financial records. The law makes violation of the Act a misdemeanor,[200] authorizes injunctive relief,[201] and awards reasonable attorney's fees if the customer's challenge is successful.[202]

Illinois also has passed a statute that seeks to promote bank-customer confidentiality.[203] The statute prohibits a state bank from disclosing, except to the customer, any of the customer's financial records[204] unless requested through use of a lawful subpoena, warrant, or court order.[205] These access requests must be served both on the bank and the customer, although the court may waive service upon the customer for good cause.[206]

Maryland too has enacted a statute protecting bank depositor privacy. The Maryland law[207] prohibits the financial institution from releasing a customer's records to anyone other than the customer, absent both customer authorization and a valid request through lawful subpoena, summons, warrant, or court order.[208] Such requests must be served both on the customer and the financial institution.[209] Violation of the statute, either by officers attempting to gain access to records without a judicial access order or by employees or officers of the financial institution who release such information illegally, can result in a misdemeanor conviction and a fine.[210] The Maryland statute is unique in that it includes a preamble stating the public policy goal of protecting confidentiality while facilitating commercial transactions.[211]

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199 Section 7476(b)(1) requires a majority of the grand jury to demonstrate "to a judge of the superior court that there exists a reasonable inference that a crime within the jurisdiction of the grand jury has been committed and that the financial records sought are reasonably necessary to the jury's investigation of that crime . . . ."

200 *Id.* § 7485.

201 *Id.* § 7487.

202 *Id.* § 7486.

203 ILL. ANN. STAT. ch. 16 1/2, § 148.1 (Smith-Hurd Supp. 1977).

204 *Id.* § 148.1(c).

205 *Id.* § 148.1(d)(1).

206 *Id.*

207 MD. FIN. INST. CODE ANN. § 1-302 (1980).

208 *Id.*

209 *Id.* § 1-304. For good cause, the court may waive service of the subpoena, summons, warrant, or court order on the customer. *Id.*

210 *Id.* § 1-305.

211 In 1976, the General Assembly of Maryland in a preamble to the Confidential Financial Record statute declared:

> (1) Procedures and policies governing the relationship between fiduciary institutions and government agencies have in some cases developed without due regard to the constitutional rights of customers of those institutions; and
>
> (2) The confidential relationships between fiduciary institutions and their customers must be preserved and protected.
>
> (b) It is the purpose of this act to protect and preserve the confidential relationship between fiduciary institutions and their customers and to promote commerce by pre-

While California, Illinois, and Maryland statutes offer concrete, substantial protection for bank depositors, the statutes acknowledge actual customer privacy expectations in bank records. All three statutes specify the legal means available to law enforcement agents to secure customer records. The statutes require that government officials notify the customer of the access request and the California statute grants the customer standing to contest the validity of the government's access request. Therefore, under California law, a bank depositor could block an access request if a legally defective subpoena had been issued, and under Illinois and Maryland law, the bank could be fined up to $1,000 for unauthorized disclosure of records.

These protections afford a bank depositor in California, Illinois, and Maryland an actual expectation that his bank records will not be viewed by government officials without notice and a reasonable opportunity to contest the request. Under the actual expectation requirement of the *Katz* test, bank depositors qualify for fourth amendment protection. Depositors also can assert that these statutes represent society's recognition that customer privacy protections are reasonable. Thus, the legislative judgments of these three states satisfy *Katz* and entitle bank depositors to the full protections of the fourth amendment.

THE *WHITE* REASONABLE EXPECTATION BALANCING TEST

While the decisions of courts and the pronouncements of legislatures can indicate the reasonableness of privacy expectations, Justice Harlan in *United States v. White* articulated a balancing test for determining whether the challenged search invaded an interest that society has concluded is reasonably protected. He suggested that the nature of the particular police practice and its probable impact on an individual's sense of security be balanced against the utility of the practice as a law enforcement technique.[212] Applying this balancing test to the banking context, the depositor's rights should prevail. In banking, the particular police practice is an informal request for all documents pertaining to a depositor's account. The informal request is broad in scope and is circumscribed by a judicial determination that the government has cause to request material documents.

In addition to having unlimited scope, informal and unrestricted government access to a depositor's bank records has a debilitating and demonstrable effect on personal security. Most depositors believe their

scribing policies and procedures applicable to the disclosure of customer records by fiduciary institutions.

212 Note, *A Reconsideration, supra* note 33, at 171 (citing United States v. White, 401 U.S. at 786).

relationships with their bank to be confidential,[213] yet this belief is shaken when customers learn of incidents in which records are divulged without depositor authorization. The bank's unauthorized disclosure of information makes customers aware of the paucity of legal rights in this area and also injects distrust and fear into subsequent banker-customer relations.

Under Justice Harlan's balancing test, this unrestricted and informal police access to customer records and its consequent debilitating effect on banker-customer relations must be weighed against the utility of informal access requests. Government use of bank records in civil and criminal cases is a common practice which has facilitated investigations and prosecutions.[214] Analogously, informal access to citizens' homes might also facilitate police investigatory goals. Yet policemen cannot obtain such information without a showing of probable cause to obtain a search warrant.[215]

Prosecutorial convenience often must give way to superior privacy rights. Probable cause is not an insurmountable standard for law enforcement officers to attain. By imposing such a standard, officers would be forced only to pursue bank records in cases in which the likelihood of record relevance was high. This protection would therefore reduce the incidence of bank record inspections and of unrestricted invasions of personal transactions. Subpoenas based on probable cause would allow law enforcement officers to gain access to customer records under proper circumstances, but would also protect customer privacy and promote bank-customer trust. Therefore, informal government access to customer records cannot be justified under Justice Harlan's balancing test.

STATE JUDICIAL CREATION OF PRIVACY EXPECTATIONS

Evidence of society's willingness to protect depositor privacy rights appears in more than federal and state statutes. In recent years, state

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213 "It is hornbook law that bank customers may expect their banks to treat their financial affairs as confidential." Brief for Petitioner at 6, United States v. Miller, 425 U.S. 435 (citing 10 AM. JUR. 2d *Banks* § 332):

> [I]t is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by court order, the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.

Id.

214 12 U.S.C. § 1826(a)(1).

215 Furthermore, when a citizen puts something in his filing cabinet, desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search and seizure. Hoffa v. United States, 385 U.S. at 301.

courts have increasingly interpreted their state constitutions to accord greater constitutional protections to their citizens than provided by the Federal Constitution as construed by the Supreme Court.[216] One Justice has applauded this trend:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[217]

He has suggested that the impetus for the expansion of state constitutional protection derives from state court disagreement with Supreme Court analyses and direction.[218]

State courts have been exceedingly active in interpreting their state constitutions as providing greater privacy protection than that accorded to depositors by the *Miller* court.[219] One state exhibiting judicial independence in this area is Pennsylvania. In *Commonwealth v. DeJohn*,[220] the highest court in Pennsylvania expressly rejected *United States v. Miller*. In *DeJohn*, the defendant was convicted of murdering her husband. She objected to the introduction into evidence of her bank records which helped establish the motive.[221] While admitting that the subpoenas

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216 Falk, *The Supreme Court of California 1971-1972, Foreword: The State Constitution: A More than 'Adequate' Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 437-43 (1974); Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L.L. REV. 271 (1973).

217 Brennan, *supra* note 4, at 491.

218 Justice Brennan has isolated this cause of the burgeoning state courts' expansive view of the applicability of state rights:

> It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

Id. at 495.

219 Ten states explicitly mention a right to privacy in their state constitutions. *See* ALASKA CONST. art. 1, § 22; ARIZ. CONST. art. 2, § 8; CAL. CONST. art. 1, § 1; FLA. CONST. art. 1, § 12; HAWAII CONST. art. 1, § 6; ILL. CONST. art. 1, § 12; LA. CONST. art. 1, § 5; MONT. CONST. art. 2, § 10; S.C. CONST. art. 1, § 10; WASH. CONST. art. 1, § 7.

Most states recognize a right to privacy that derives from common law, however, three states have expressly refused to acknowledge such a common law right. *See* Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Henry v. Cherry, 30 R.I. 13, 73 A. 97 (1909); Milner v. Red River Valley Publishing Co., 249 S.W.2d 227 (Tex. 1952). For a generally comprehensive treatment of privacy statutes, *see* R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS (1978-79). The above constitutional provisions provide further evidence that constituents hold, and are entitled to maintain, genuine expectations of privacy.

220 486 Pa. 32, 44, 403 A.2d 1283, 1289 (1979), *cert. denied*, 100 S. Ct. 709 (1980).

221 The defendant managed the family finances, and had missed the two most recent mort-

were unlawful, the prosecution urged the court to adopt the *Miller* rationale and find that the defendant had no standing to contest the subpoenas.

The court rejected this argument, responding: "As we believe that *Miller* establishes a dangerous precedent, with great potential for abuse, we decline to follow that case when construing the state constitutional protection against unreasonable searches and seizures."[222] The court recognized the established right of state courts to augment federal constitutional rights through use of analogous state constitutional provisions and adopted the reasoning of *Burrows* as "recognizing modern electronic realities [and as] more persuasive than the simplistic proprietary analysis, supposedly rejected in *Katz v. United States*, . . . used by the court in *Miller*."[223]

California has also relied upon its state constitution to confer upon depositors greater privacy protection than that afforded under the Federal Constitution. In *Burrows v. Superior Court*, the court held that "Petitioner had a reasonable expectation that the bank would maintain the confidentiality of those papers which originated with him in check form and of the bank statements into which a record of those same checks had been transformed pursuant to internal banking practice."[224]

Justice Brennan adopted the *Burrows* decision in his dissent in *United States v. Miller*.[225] He compared the relevant portion of the Constitution[226] with the nearly identical provision in the California Constitution[227] and concluded that the language in each created identical rights. He then asserted that the California Supreme Court's interpretation of the relevant constitutional language was correct and should be

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gage payments. Furthermore, she had signed her husband's name to a loan application to obtain money for paying back a personal loan. Her husband was insured for over $200,000 and she was the primary beneficiary. *Id.* at 1285.

222 *Id.* at 44, 407 A.2d at 1289.

223 *Id.* at 47, 407 A.2d at 1290.

224 13 Cal. 3d at 243, 529 P.2d at 593, 118 Cal. Rptr. at 169. Several state courts have either approved or adopted the *Burrows* reasoning. In a concurring opinion, Judge Abrahamson of the Wisconsin Supreme Court agreed with the *Burrows* reasoning and argued that "each person has a reasonable expectation of privacy in his or her bank statement and records which is protected under . . . the Wisconsin Constitution." State v. Starke, 81 Wis. 2d 399, 421, 280 N.W.2d 739, 751 (1978). The *Miller* rule was specifically rejected by the Colorado Supreme Court in Charnes v. Digiacomo, 612 P.2d 1117 (Colo. 1980). In *Charnes*, the court held that a taxpayer possessed a reasonable expectation of privacy in his bank records and therefore could challenge the government's subpoena for the records directed at the bank. *Id.* at 1120.

225 425 U.S. at 447 (Brennan, J., dissenting).

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

227 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." CAL. CONST. art. 1, § 19.

adopted in *Miller*.[228]

The *Miller* majority distinguished the California Supreme Court's analysis by noting that in *Burrows*, no legal process[229] had been invoked to obtain the records whereas in *Miller*, the Treasury Department agents had employed a subpoena duces tecum.[230] As Justice Brennan correctly observed,[231] however, the majority held that the defendant's lack of standing was not dependent upon the validity of the subpoena duces tecum.[232] Therefore, apparently the absence of legal process is irrelevant and Miller, under the majority's view, would not have possessed a privacy interest even if the agents had informally requested the documents. Recognizing the majority's inconsistent logic, Justice Brennan admonished future counsel to assert state as well as federal privacy rights for their clients to minimize the impact of the current Supreme

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228 United States v. Miller, 425 U.S. at 448 (Brennan, J., dissenting).

229 The proper definition of legal process has been debated under California law. *See generally* Bloom, *supra* note 193. While a search warrant would satisfy the standard, subpoenas arguably might not. However, in Carlson v. Superior Court, 58 Cal. App. 3d 13, 129 Cal. Rptr. 850 (1976), the California court decided subpoenas were adequate legal process. The defendants in *Carlson* allegedly used false pretenses to illegally obtain an older woman's finances. During the investigation, a district attorney obtained two subpoenas duces tecum for the defendant's bank records. The trial court held the records were obtained with legal process. On appeal, the Court of Appeals held that a subpoena duces tecum satisfying statutory requirements constitutes sufficient legal process to empower prosecutors to obtain defendant bank records in criminal proceedings.

Curiously the *Carlson* court held that for a subpoena duces tecum to be consistent with legal process, it must satisfy an unusually high standard:

> It follows that law enforcement officials may not gain access to an accused's private papers by subpoena until there has been a judicial determination there is probable cause to believe he has committed a criminal offense and that the papers and documents described in the subpoena would be material evidence in the case. Such determinations are not and cannot be made by the clerk who issues the subpoena and may not be made by the prosecutor himself.

Id. at 22, 129 Cal. Rptr. at 855. Previous California and federal cases had not imposed such a stringent requirement covering the issuance of subpoena duces tecum. *See* United States v. Gross, 416 F.2d 1205 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970); Harris v. United States, 413 F.2d 316 (9th Cir. 1969); Galbraith v. United States, 387 F.2d 617 (10th Cir. 1968); Southern Pac. Co. v. Superior Court, 15 Cal. 2d 206, 210, 100 P.2d 302, 304 (1940).

The Supreme Court in *Miller* reached the opposite conclusion in stating that subpoenas duces tecum are not subject to the higher probable cause standard: "A subpoena *duces tecum* issued to obtain records is subject to no more stringent Fourth Amendment requirements than is the ordinary subpoena. A search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes Government officers to seize evidence without requiring enforcement through the courts." United States v. Miller, 425 U.S. at 446 n.8 (citing United States v. Dionisio, 410 U.S. 1, 9-10 (1973)). However, the California Supreme Court denied a hearing in *Carlson*, so currently a subpoena duces tecum must be issued upon a showing of probable cause before government agents can obtain customer bank records in California. 58 Cal. App. 3d 13, 129 Cal. Rptr. 850.

230 425 U.S. at 445 n.7.

231 *Id.* at 448 n.2 (Brennan, J., dissenting).

232 *Id.* at 441 n.2 (majority opinion).

Court's restrictive interpretation of fourth amendment protections.[233]

While several states have adopted the *Miller* rationale,[234] the import of the California and Pennsylvania decisions remains clear. On a basic level, these two states have declared that their residents under their state constitutions possess legitimate expectations of privacy in their bank records. Thus, these states have accorded their citizens greater protection against privacy invasion than that presently accorded under the Federal Constitution.

But these state decisions represent more than just increased depositor protection under state constitutions. The judicial expressions of the California and Pennsylvania courts evidence society's willingness to accord bank depositors privacy protection. They contradict the Supreme Court's conclusion in *Miller* that depositors lack standing and suggest that *Miller's* conclusion is now erroneous. These cases further suggest that under the *Katz* expectation of privacy test, depositors warrant fourth amendment privacy protection under the Federal Constitution. Under the first component of the *Katz* test which requires that the defendant possess an actual expectation of privacy, bank depositors in California and Pennsylvania can point to their state judicial

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233 *Id.* at 454-55 (Brennan, J., dissenting) (citing as examples of the Court's restrictive stance, Doe v. Commonwealth's Atty., 425 U.S. 901 (1976); Kelley v. Johnson, 425 U.S. 238 (1976); Paul v. Davis, 424 U.S. 693 (1976); United States v. Watson, 423 U.S. 411 (1976)).

234 Six states have adopted the position of the *Miller* Court. *See* Cox v. State, 392 N.E.2d 496 (Ind. App. 1979); State v. Fredette, 411 A.2d 65 (Me. 1979); State v. Sheetz, 265 S.E.2d 914, 919 n.2 (N.C. App. 1980); Nichols v. Council on Judicial Complaints, 615 P.2d 280 (Okla. 1980). Peters v. Sjoholm, 25 Wash. App. 39, 604 P.2d 527 (1979); Fitzgerald v. State, 599 P.2d 572 (Wyo. 1979).

Connecticut has also followed *Miller's* lead in denying a depositor standing to appear and contest the legal sufficiency of a subpoena duces tecum. CONN. L.J., vol. 41, no. 12 (1979). In *In re State's Attorney*, a Connecticut bank representative was subpoenaed to testify in Illinois and to produce the cancelled checks of the defendant. As required by the Connecticut statute, the defendant received a copy of the subpoena, but was not notified of the date of the hearing. The majority cited *Miller* as controlling and denied the defendant's request for a hearing. As stated by a concurring judge, however, the court illogically refused to infer a right to a hearing from the statute which provided the bank customer with notice. Since notice *and* the right to a hearing are the most fundamental due process safeguards, it seems unlikely that legislators would have written one safeguard into the statute while purposely deleting the other. Indeed, several statutes providing for customer notice also confer standing upon bank customers to contest the validity of the governmental search requests. *See* notes 193-211 & accompanying text *supra*.

More importantly, these cases suffer from a fundamental flaw. Each court blindly adhered to the *Miller* result without examining its analysis. Thus, these cases are subject to the same analytical criticisms that have been leveled at *Miller* over the last five years. *See* notes 27-151 & accompanying text *supra*. Thus, while these cases appear to evidence societal unwillingness to recognize depositor privacy expectations as reasonable, their reliance on *Miller* and its inadequate analysis of the privacy issue militates against the conclusion that these cases represent anything more than the application of *stare decisis*.

pronouncements as giving them concrete rights and actual privacy expectations.

Bank depositors can also utilize these decisions to satisfy the second *Katz* component which requires that a defendant's expectations be ones that society is prepared to recognize as reasonable. Clearly, California and Pennsylvania have adjudged a depositor privacy expectation as reasonable. Federal and state privacy statutes provide further evidence that depositors today possess actual expectations of privacy which society has determined are reasonable. The Supreme Court should reevaluate its decision in *United States v. Miller* in light of these changed expectations.

CONCLUSION

In the last five years, courts and legislatures have generated divergent responses to the bank-customer privacy issue. Ironically, our nation's court of last resort, the ultimate arbiter of our nation's legal issues, caused this varying state of affairs by its decision in *United States v. Miller*. Criticism of the Court's decision arose quickly and stridently. Congress reacted by enacting the Right to Financial Privacy Act conferring statutory privacy protection on bank customers and provided additional customer protection in the Tax Reform Act of 1976. States such as California, Maryland, and Illinois similarly enacted statutes creating customer protections in their transactions with state banking institutions. Finally, several state supreme courts have interpreted their state constitutions as providing greater constitutional customer protection than offered by the United States Constitution as interpreted by the *Miller* Court.

Thus, customers today can legitimately claim expectations of privacy in their bank records on the basis of federal law, state law, and state constitutional grounds. If Justice Harlan's expectation of privacy test in *Katz v. United States* is to remain viable, then the Supreme Court must be cognizant of the societal changes occurring since *Miller*, and realize that bank customers today "have exhibited an actual subjective expectation of privacy" and that bank customers' privacy expectations are "one[s] that society is prepared to recognize as 'reasonable.' "[235]

Our Constitution is not a static, inflexible document and often responds to significant societal changes.[236] The *Miller* decision should be reconsidered in light of its statutory and judicial progeny. Additionally,

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235 Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

236 *Compare* Muller v. Oregon, 208 U.S. 412 (1908), *with* Reed v. Reed, 404 U.S. 71 (1971) (women's rights). *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896), *with* Brown v. Board of Education, 349 U.S. 294 (1955) (racial equality).

states should continue to augment bank customer rights both through judicial decisions and statutory enactments. State courts should evaluate *Miller* on its own merits: "[O]pinions of the United States Supreme Court are like opinions of sister state courts or lower federal courts. While neither binding in a constitutional sense nor precedential in a jurisprudential one, they are entitled to whatever weight their reasoning and intellectual persuasiveness warrant."[237]

Our federal governmental structure must accommodate the tensions resulting from conflicting state and federal decisions. The system is viable because divergent views are accommodated. A bank customer today entertains actual expectations of bank record privacy and state constitutions should be used to demonstrate such expectations are ones society deems deserving of protection.[238]

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237 Falk, *supra* note 216, at 283-84.

238 Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms. Brennan, *supra* note 4, at 503.