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Rakas v. Illinois: The Fourth Amendment and Standing Revisited

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cient attention to the great constitutional protection of privacy traditionally afforded. Hopefully, methods sanctioned in *Dalia* will be strictly limited to those situations in which resort to the twentieth century technology of electronic surveillance is the only way to provide any measure of adequate law enforcement.[94] The reasonableness clause of the fourth amendment[95] should be the overriding concern, and, in light of the protections historically embodied in the fourth amendment against unreasonable searches and seizures, the Supreme Court should strictly and explicitly limit constitutional authorization for covert entry to highly scrutinized electronic surveillance orders.

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Rakas v. Illinois: THE FOURTH AMENDMENT AND STANDING REVISITED

Defendants were convicted of armed robbery in an Illinois state court. At trial the prosecution was allowed to offer into evidence a sawed-off rifle and shells that had been seized without a warrant from under the seat and from the glove compartment of an automobile in which the defendants had been passengers. Neither defendant asserted ownership of the rifle and shells. The Illinois appellate court affirmed the lower court's denial of a motion to suppress the evidence, holding that the defendants lacked standing to object to the alleged unlawful search and seizure.[1] Affirming the convictions, the United States Supreme Court for the first time subsumed standing into the fourth amendment inquiry, determined that the defendants "made no showing that they had . . . [the necessary] legitimate expectation of privacy"[2] in the areas searched and items seized, and thus *held* that the search "did not violate any rights of these petitioners."[3] *Rakas v. Illinois*, 99 S. Ct. 421 (1978).

The fourth amendment expressly guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In delineating the pro-

94. 441 U.S. at 270 n.20 (Stevens, J., dissenting).
95. See note 2, *supra*.

1. People v. Rakas, 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977).
2. Rakas v. Illinois, 99 S. Ct. 421, 433 (1978).
3. *Id.* at 434.

tection thus afforded, the Supreme Court at one time relied upon the concepts of property rights and trespass for guidance.[4] But even those cases decided prior to the abandonment of this approach in the 1960's[5] evidenced an awareness of the need for a broader interpretation of the guarantees secured by the fourth amendment. Significantly, in an 1886 case, *Boyd v. United States*,[6] the Court in dicta gave judicial recognition to the need for protection of the rights of "personal security [and] personal liberty [as well as] private property,"[7] stressing that "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy . . . ."[8] Nonetheless, the Court based its holding upon an interpretation of the fourth amendment tied to property rights[9] and not personal rights unrelated to property. With its decision in the 1928 case of *Olmstead v. United States*,[10] the Court again did not go beyond the tangible property rights interpretation of the fourth amendment. Federal officials had tapped the defendant's telephone wires and thereby obtained information which led to the discovery of a criminal conspiracy to import, possess, and sell liquor. The Court, holding that there was no fourth amendment violation because the wiretapping did not amount to a search and seizure within the literal meaning of the fourth amendment,[11] emphasized that no tangible effect was seized, nor was there a physical invasion of the house.[12]

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4. *See* Olmstead v. United States, 277 U.S. 438 (1928); Boyd v. United States, 116 U.S. 616 (1886); 1 J. VARON, SEARCHES, SEIZURES, AND IMMUNITIES 9-10 (2d ed. 1974).

5. See text at notes 22-31, *infra*.

6. 116 U.S. 616 (1886).

7. *Id.* at 630.

8. *Id.* at 635.

9. In *Boyd* the Court, relying upon both the fourth and fifth amendments, held that a statute ordering production of an invoice in an import and duties case was "unconstitutional and void, . . . and admission [of the invoice] in evidence by the court, [was] erroneous and unconstitutional." *Id.* at 638. In discussing the fourth amendment protection, the Court's rationale focused upon a property rights analysis: "The great end for which men enter into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole." *Id.* at 627.

The Court based its interpretation of the fourth amendment upon its understanding of the history of the right in England and the United States. *Id.* at 624-29.

10. 277 U.S. 438, 466 (1928).

11. *Id.*

12. The Court reasoned:

> Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such seizure of his papers or his tangible material effects, or an actual physical

In 1960 the Court addressed the particular issue of standing[13] to raise an alleged fourth amendment violation in *Jones v. United States*.[14] The majority broadened the interpretation of standing to raise an alleged fourth amendment violation from protection of tangible property rights only to an interpretation keyed to one's legitimate presence on the premises.[15] The petitioner alleged no possessory interest in the seized narcotics and narcotic paraphernalia found in a bird's nest in an awning outside an apartment window, nor did he allege an interest in the apartment greater than the property law interest of an "*invitee* or guest."[16] The government argued,[17] and the lower courts had held, that a showing of ownership of the premises was necessary in order to have standing to raise the issue of an alleged fourth amendment violation.[18] Nonetheless, the Court refused to import the common law property concepts into fourth amendment inquiries,[19] thereby indicating a possible depar-

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invasion of his house or "curtilage" for the purpose of making a seizure.

Id.

However, Justice Brandeis in dissent foreshadowed the future by pointing out that " '[t]ime works changes,' brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." 277 U.S. at 473 (Brandeis, J., dissenting).

Justice Brandeis further argued that the makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness, recognizing the significance of man's spiritual nature and that only a part of the

> pain, pleasure and satisfactions of life are to be found in tangible things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. at 478.

13. The Supreme Court earlier had addressed the issue of standing and the fourth amendment. *See, e.g.*, United States v. Jeffers, 342 U.S. 48 (1951); Goldstein v. United States, 316 U.S. 114 (1942). However, these cases did not have the lasting impact that *Jones v. United States*, 362 U.S. 257 (1960), has had. See note 57 & text at notes 14-21, *infra*.

14. 362 U.S. 257 (1960).

15. Although in *Jones* the issue of standing was decided upon statutory rather than constitutional grounds, *see* FED. R. CRIM. P. 41(e), it has been viewed as dispositive of the constitutional issue, *see* Alderman v. United States, 394 U.S. 165, 173 n.6 (1969) (*Jones* "rule" cited as applicable to fourth amendment standing questions); Warden v. Hayden, 387 U.S. 294, 304 (1967) (*Jones* cited as a case in which the Court "recognized that the principle object of the Fourth Amendment is the protection of privacy rather than property"). *See also* Alderman v. United States, 394 U.S. 165, 189 (1969) (Harlan, J., concurring).

16. 362 U.S. at 259 (emphasis in original).

17. *Id.* at 265.

18. *Id.* at 261 & 272.

19. *Id.* at 266. "We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right . . . subtle distinctions, developed and refined by the common law." *Id.*

ture from the rationale underlying both *Olmstead* and *Boyd*, which was limited to a property rights analysis. With *Jones*, the Court chose through standing to broaden the scope of protection afforded by the substantive right, and thus declined to continue to judge the constitutional right to be free from unreasonable searches and seizures by the confining, subtle distinctions of property law.[20] With this action, the Court effectively broadened the scope of protection of the fourth amendment inasmuch as a property interest as owner was no longer necessary to obtain standing; rather, the newer and broader standard would recognize standing in "anyone legitimately on the premises where the search occurred."[21]

In 1967, with *Katz v. United States*,[22] the Court focused its inquiry directly on the substantive right guaranteed by the fourth amendment. Faced with governmental intrusion by electronic surveillance (a wiretap) involving no trespass or physical invasion, the Court purported to break away from the property rights rationale of the fourth amendment. Justice Stewart, writing for a majority of the Court, stated that

> the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[23]

The Court, overruling *Olmstead*, pointed out that, although a physical property interest in an area was once thought necessary for fourth amendment protection, *Warden v. Hayden*,[24] decided earlier that same year, had discredited the premise that the classifications of property rights determine the government's right to search and seize.[25] Also, earlier in the decade, *Silverman v. United States*[26] had expressly held that the fourth amendment governs not only the seizure of tangible items, but also recordings of oral statements overheard without a "technical trespass."[27] Thus, the Court in *Katz* dealt a stunning blow to the physical property rights rationale which had been eroded by *Hayden* and *Silverman* and asserted that "wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[28]

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20. *Id.* at 259-60.
21. *Id.* at 267.
22. 389 U.S. 347 (1967).
23. *Id.* at 351-52.
24. 387 U.S. 294 (1967).
25. *Id.* at 304.
26. 365 U.S. 505 (1960).
27. *Id.* at 511.
28. 389 U.S. at 359.

The majority opinion in *Katz* seemingly severed the fourth amendment protection from property rights classifications, but left for later definition the scope of the protection afforded. Justice Harlan, in a concurring opinion which is now the accepted reading of *Katz*,[29] clarified the scope of protection to be afforded by noting the dual inquiry required in determining if protection is available. First, it must be determined whether the person wishing to invoke the protection exhibited an actual subjective expectation of privacy, and, second, whether the expectation is one society is prepared to recognize as legitimate.[30] The latter determination served to temper the strength of the individual's subjective expectation of privacy by requiring that it be reasonable.[31]

With the *Katz* decision, the Court seemed to have completed a shift from an interpretation of the substantive fourth amendment guarantee based on property rights classifications to one based upon a "legitimate expectation of privacy." However, in the area of standing to raise an alleged fourth amendment violation, the Court had not yet abandoned the property rights analysis. Just two years after *Katz*, the Court's holding in *Alderman v. United States*[32] denied standing to criminal co-conspirators because they lacked the necessary property rights interest in the area violated.[33] However, in dicta, the Court recognized the property rights interest of the absent homeowner in the violated area, declaring that

> any petitioner would be entitled to the suppression of government evidence . . . violative of his own Fourth Amendment right . . . Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations.[34]

Justice Harlan, concurring in part and dissenting in part, criticized the majority's treatment of standing due to its inappropriate

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29. The Court has lifted Justice Harlan's language for use in subsequent opinions. *See, e.g.*, Smith v. Maryland, 99 S. Ct. 2577, 2580 (1979); Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Terry v. Ohio, 392 U.S. 1, 9 (1968).

30. 389 U.S. at 361 (Harlan, J., concurring).

31. In his explanation of the standard, Justice Harlan did not advocate total abandonment of the concept of property rights as he indicated that the place where one manifests his expectation of privacy is a strong factor in determining if the expectation is reasonable and thus legitimate. *Id.* A similar view is espoused in a concurring opinion in *Rakas*. See text at note 47, *infra*.

32. 394 U.S. 165 (1969).

33. *Id.* at 171. In so doing the Court rejected the defendant's argument that if evidence is tainted due to a fourth amendment violation, it is inadmissible against anyone who wishes to raise the issue of taint. *Id.*

34. *Id.* at 176.

reliance on property rights and, citing the Court's recent treatment of the substantive right, wrote:

> [W]e have not buried *Olmstead*, so far as it dealt with the substance of Fourth Amendment rights, only to give it new life in the law of standing. Instead, we should reject traditional property concepts entirely, and reinterpret standing law in the light of the substantive principles developed in *Katz*.[35]

A majority of the Court in *Alderman* either was unwilling or thought it unnecessary to reconcile the rationale supporting standing with the then modified rationale outlining the substantive right and, therefore, did not draw from the *Katz* analysis of the substantive right a parallel development in the law of standing. Yet, in ironic contrast to the hesitancy found in *Alderman* to commingle the rationale of standing and the substantive right, the Court had been willing to use the direction of its analysis of standing found in *Jones* to influence its interpretation of the substantive right in *Katz*.[36]

The issue in *Jones* had been couched in terms of standing to object to an alleged fourth amendment violation. Prior to *Jones*, the petititoner had to claim and prove a proprietary or possessory interest in the object seized or in the premises searched.[37] In *Jones*, the Court determined that the petitioner, a visitor to the premises, had a sufficient interest in the searched premises to establish himself as a "person aggrieved."[38] In doing so, the Court chose a new standard no longer based on property rights classifications by which to determine standing: "anyone legitimately on the premises where the search was conducted."[39] Following the logic of the proclaimed stan-

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35. 394 U.S. at 191 (Harlan, J., concurring).

36. In *Katz*, the Court had cited *Jones* for the proposition that "searches conducted outside the judicial process are *per se* unreasonable under the Fourth Amendment." 389 U.S. at 357 n.18.

37. "To establish 'standing,' Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." 362 U.S. at 261.

38. The petitioner was using the apartment with the occupant's consent. He had slept in the apartment, kept extra clothes in the apartment, and had a key to the apartment. *Id.* at 259. Although these facts may not have been sufficient to constitute a substantial property interest, the Court, under its new standard, found them sufficient to establish the petitioner as a person aggrieved.

39. *Id.* at 267. The Court in *Jones* also granted automatic standing to object to an alleged fourth amendment violation when the crime is a possessory offense. This was done in order to address the dilemma of defendants who might want to raise a challenge to the search and seizure but who, in order to have standing to object, would have to claim ownership or possession of the item seized or a substantial possessory interest in the area searched. If the motion to suppress failed, the petitioner would have in effect incriminated himself by claiming possession of the property. *Id.* at 261-64.

It should be noted that a similar dilemma was addressed by the Court in 1968 in

dard of *Jones*, the Court in *Katz* moved away from property rights classifications as determinative in an inquiry into the substantive fourth amendment right. Both new standards broadened the scope of protection afforded, with the *Jones* standard increasing the number of defendants who could invoke the protection, and the *Katz* standard increasing the scope of expectations which would be protected. Thus, the Court was moving in the same direction but along two different paths. It was not until its decision in *Rakas* that the Court followed the urging of Justice Harlan in *Alderman* and merged the two inquiries.

In *Rakas*, a majority of the Court viewed the procedural change of subsuming standing into the substantive inquiry[40] as a "better analysis forthrightly focus[ing] on the extent of a particular defendant's rights . . . rather than on any theoretically separate, but invariably intertwined concept of standing."[41] By its matter-of-fact treatment of standing, the Court pronounced that only one standard and inquiry need be considered in search and seizure situations: that of the existence of "a legitimate expectation of privacy."[42]

The language used in the Court's proclaimed standard is not new and is most visible in *Katz*, particularly in Justice Harlan's con-

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Simmons v. United States, 390 U.S. 377 (1968), with a different result. In *Simmons* the offense was a nonpossessory one. However, the defendant faced the same problem because the evidence of the crime seized was in a suitcase alleged to be his. In order for the defendant to obtain standing to suppress the evidence, he would have had to claim a possessory interest in the suitcase. He was thus forced to either give up a seemingly valid fourth amendment claim or in effect waive his fifth amendment privilege against self-incrimination. The Court felt this situation intolerable and held that when a defendant testifies in support of a motion to suppress evidence on fourth amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. *Id.* at 394. Whether or not the automatic standing holding of *Jones* survives *Simmons* in light of *Rakas* is an open question. *See* 99 S. Ct. at 426 n.4.

40. Neither Justice White's dissenting opinion, joined by Justices Brennan, Marshall, and Stevens, 99 S. Ct. at 437-44, nor Justice Powell's concurring opinion, joined by the Chief Justice, 99 S. Ct. at 434-37, addressed this change.

41. 99 S. Ct. at 428. "The question necessarily arises whether it serves any useful analytical purpose to consider . . . a matter of standing distinct from the merits of a defendant's Fourth Amendment right." *Id.*

42. To Justice White's charge that the Court was abandoning an "easily applied" legitimately on the premises standard with a rule difficult to administer, 99 S. Ct. at 443 (White, J., dissenting), the Court responded that the fourth amendment analysis embraced in *Rakas* is one which in application will involve "all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment," and that "fine lines" will have to be "drawn in Fourth Amendment cases as in other areas of the law." 99 S. Ct. at 432. The Court further conceded that these lines must separate "one shade of gray from another." *Id.*

curring opinion;[43] nonetheless, its present interpretation is unclear. It was in the *Katz* majority opinion that the Court most clearly broke away from property rights classifications in determining fourth amendment protection; however, the dissent in *Rakas* adamantly charged that the majority opinion in *Rakas* "holds that the Fourth Amendment protects property, not people . . . [and that one] may not . . . challenge a search . . . unless he happens to own or have a possessory interest."[44]

Justice Rehnquist, writing for the majority, countered in a footnote: "[O]ur dissenting Brethren repeatedly criticize our 'holding' . . . . We have rendered no such 'holding' . . . [that the fourth amendment protects property, not people]. To the contrary, we have taken pains to reaffirm the statements in *Jones* and *Katz* that 'arcane distinctions developed in property . . . law . . . ought not to control.' "[45] Also in footnote, the majority further addressed the role of property rights in establishing a legitimate expectation of privacy:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society . . . Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property or on the invasion of such an interest . . . . [T]he Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment . . . . [E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.[46]

Justice Powell, in his concurring opinion, addressed the interpretation to be given the new standard and pointed out that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable."[47] He argued that no single factor "invariably will be determinative."[48] "The ultimate question . . . is whether

43. See text at notes 29-35, *supra*.
44. 99 S. Ct. at 437 (White, J., dissenting).
45. 99 S. Ct. at 434 n.17.
46. *Id.* at 431 n.12.
47. 99 S. Ct. at 435 (Powell, J., concurring).
48. *Id.*

one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances."[49]

In attempting to reconcile the proclaimed *Rakas* standard with the jurisprudence, the Court looked to the surrounding circumstances found in *Jones* to limit *Jones* to its facts rather than to expressly overrule it.[50] In thus limiting *Jones*, the Court pointed out that "[w]e would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling."[51] Therefore, the *Jones* "legitimately on the premises" language is no longer the test to gauge fourth amendment protection,[52] but rather it has become one of many factors to be considered in the inquiry into the existence of a legitimate expectation of privacy. In applying the proclaimed standard, the Court in *Rakas* determined that as the petitioners asserted ownership of neither the rifle, the shells, nor the car,[53] and as they had made no showing of a legitimate expectation of privacy[54] with respect to those parts of the automobile which were searched,[55] the search and seizure "did not violate any rights of [the] petitioners."[56]

Although a determination of the ultimate impact of the Court's decision in *Rakas* will have to await future case law, some results of the opinion are apparent even now. By subsuming standing into the fourth amendment substantive right, the Court has transformed standing, which in the context of fourth amendment violations had been an outgrowth of judicial self-restraint,[57] into a constitutional

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49. *Id.* at 433.

50. 99 S. Ct. at 430. "We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his home . . . ." *Id.*

51. *Id.* at 433.

52. The Court in *Rakas* also addressed the automatic standing holding of *Jones*. See note 39, *supra*. While not expressly overruling this holding, the Court called its validity into question. *See* 99 S. Ct. at 426 n.4.

53. 99 S. Ct. at 433.

54. "Petitioners claimed only that they were 'legitimately on [the] premises' and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched." *Id.* at 434 n.17. This qualification by a majority of the Court might begin to address some of the questions raised by the dissent. "If the nonowner were the spouse or child of the owner, would the Court recognize a sufficient interest? If so, would distant relatives somehow have more of an expectation of privacy than close friends? What if the nonowner were driving with the owner's permission?" 99 S. Ct. at 443 (White, J., dissenting).

55. 99 S. Ct. at 433-34.

56. *Id.* at 434.

57. See note 15, *supra*. In *Jeffers* and *Goldstein*, the Court demanded standing as a matter of course without stating why standing was necessary. In *Jones* the Court

substantive right. Justice Rehnquist argued that this action should effect no change on *this* Court's future decisions as it is merely a shift to a "better analysis"[58] which "will produce no additional situations in which evidence must be excluded."[59] Nonetheless, the *lower* courts might be faced with certain difficulties in implementing the new analysis.

One difficulty in the routine application of the *Rakas* procedural change lies with the status of the burden of proof required in search and seizure situations. Traditionally, there were two distinct inquiries[60] each with a different burden of proof. When asserting standing the defendant had the burden of proof to show himself a person aggrieved.[61] As to the inquiry into the alleged violation of the substantive right, after standing had been proved, the prosecution had the

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directly addressed the issue of standing, saying it was "to be decided with reference to Rule 41(e) of the Federal Rules of Criminal Procedure." 362 U.S. at 260. This rule permits a motion to suppress evidence to be filed by "[a] person aggrieved by an unlawful search or seizure." FED. R. CRIM. P. 41(e). The *Jones* Court declared that "[i]n order to qualify as a 'person aggrieved by an unlawful search or seizure' one must have been a victim of a search or seizure." 362 U.S. at 261. The Court determined that "Rule 41(e) applies the *general principle* that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' " *Id.* at 261, *citing* Hatch v. Reardon, 204 U.S. 152, 160 (1907) (emphasis added). *Hatch* dealt with the commerce clause and state taxation of stock transfers. In that case the Court stated that "there is a point beyond which this court does not consider arguments . . . for the purpose of invalidating the tax laws of a state on constitutional grounds . . . unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given." 204 U.S. at 160. In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), Justice Brandeis, concurring, stated that "[t]he Court developed, for its own governance in the cases . . . within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are: . . . . The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." 297 U.S. at 346 (Brandeis, J., concurring), *citing* Hatch v. Reardon, 204 U.S. at 160-61.

Therefore, it is arguable that the *"general principle"* noted in *Jones* as "standing" is a Court-developed rule, which was developed in a non-criminal context, carried forward to criminal justice cases with *Jones*, and embraced as proper in the criminal justice area in *Alderman* and *Hayden*. See note 15, *supra*. Now, as a result of *Rakas* it has become a part of a required constitutional inquiry.

58. 99 S. Ct. at 428. Justice Rehnquist argued: "We can think of no decided cases from this Court that would have come out differently had we concluded . . . that the type of standing requirement discussed in *Jones* is more properly subsumed under substantive Fourth Amendment doctrine." *Id.*

59. *Id.*

60. *See id.* at 428 n.7.

61. *Id.* at 424 n.1. "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Id. See* Simmons v. United States, 390 U.S. at 389-90; Jones v. United States, 362 U.S. at 260-61.

burden of proof to establish that a warrantless search was not unreasonable.[62] Now that the Court in *Rakas* has subsumed the standing inquiry into the substantive right inquiry, who now bears the burden of proof? The Court in none of its opinions addresses this important question. The only guidance is the majority's emphasis on what the defendants did and did not assert.[63] Whether this emphasis means that the Court will look to the defendant to prove a legitimate expectation of privacy rather than to the prosecution to prove that the search was not unreasonable because of the absence of a legitimate expectation of privacy is unclear.[64] That the Court may have overlooked this consequence of its actions, believing as Justice Rehnquist argued, that no change would ensue, is also uncertain. Nonetheless, this situation brought about by the merging of the procedural and substantive inquiries does create confusion in the practical application of *Rakas*.

The Court with its decision in *Rakas* has defined the scope of access to fourth amendment protection, formerly considered under the rubric "standing," as being intimately related to the interpretation accorded the substantive right. The interpretation presently embraced by the Court is a narrower one than in the past, thus allowing less access to the afforded protection.[65] Any doubts as to

62. Chimel v. California, 395 U.S. 752, 762 (1960); United States v. Jeffers, 342 U.S. at 51. *See The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Pretrial Criminal Procedure*, 39 LA. L. REV. 917, 917-18 (1979) [hereinafter cited as *Pretrial Criminal Procedure*].

In Louisiana, article 703(c) of the Code of Criminal Procedure provides that in a motion to suppress "the burden of proof is on the defendant to prove the grounds of his motion." Notwithstanding this provision, the Louisiana Supreme Court has held in *State v. Franklin*, 353 So. 2d 1315 (La. 1977), "that once the defendant makes the initial showing at a motion to suppress hearing that a warrantless search occurred, the burden shifts to the State to affirmatively show that the search is justified." *Id.* at 1318-19.

Professor Lamonica suggested that in light of *Chimel v. California*, 395 U.S. 752 (1969), the court in *Franklin* recognized that the article 703(c) burden is met when the defendant shows that no warrant was obtained and the seizure occurred, and once this is done "the state must 'affirmatively show that the search is justified.' " *Pretrial Criminal Procedure, supra* at 918, *citing* State v. Franklin, 353 So. 2d at 1318-19.

Since Louisiana in its new constitution expands standing, and embraces a broader interpretation of the substantive right than is required by the United States Constitution, see text at notes 70-73, *infra*, then theoretically, the Court's treatment in *Rakas* of its procedural rule, "standing," should have no effect on Louisiana's treatment of standing and the right protected.

63. *See* 99 S. Ct. at 424 n.1, 425 n.2, 430 n.11 & 434 n.17. See also text at notes 53-56, *supra*.

64. In the later case of *Smith v. Maryland*, 99 S. Ct. 2577 (1979), dealing with governmental access to telephone company records containing the numbers dialed from one's home phone, the Court again did not address this question.

65. The protection afforded by the fourth amendment since *Mapp v. Ohio*, 367

the Court's intent to narrow the scope from the previously accepted standard of *Jones* were dispelled with its express statement that "[t]o the extent that the language [from *Jones*] might be read more broadly [than outlined by the Court,] . . . we now expressly reject [it]."[66]

The scope of protection embraced by the Court does not, as was speculated because of the language of *Jones*, include "standing to raise vicarious Fourth Amendment claims."[67] The Court felt this would "necessarily mean a more widespread invocation of the exclusionary rule."[68] Evidently the Court is not willing to increase the scope of the protection and thus the application of the exclusionary rule, arguing that "[we] are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime . . . on the basis of all the evidence . . . ."[69] Therefore, with its decision in *Rakas*, the Court has refused to expand access to the exclusionary rule.

The direction of the Court in search and seizure situations is particularly important to note in Louisiana as the state's new constitution heralds a much broader standing requirement than was afforded by the accepted application of *Jones* or is afforded by the composite standard of *Rakas*.[70]

> The last sentence of [article one, section five of the Louisiana Constitution of 1974] abolishes the federally developed standing requirement by which a defendant asserting a fourth amendment objection was required to show that he was the 'victim of a

U.S. 643 (1961) (state courts), and *Weeks v. United States*, 232 U.S. 383 (1914) (federal courts), has been the exclusionary rule requiring the suppression of evidence obtained from a search or seizure violative of the fourth amendment.

66. 99 S. Ct. at 426.

67. *Id.* at 427.

68. *Id.*

69. *Id.*, *quoting* Alderman v. United States, 394 U.S. at 174-75. The Court in the majority opinion went on to argue that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights." 99 S. Ct. at 427. This reasoning is reminiscent of the Court's arguments in such cases as *Stone v. Powell*, 428 U.S. 465 (1976), and *United States v. Calandra*, 414 U.S. 338 (1974), as well as *Alderman*, in which the Court weighed the benefit of enforcing the exclusionary rule against the cost to society which would be exacted by the enforcement and determined not to enforce the rule in the particular instances addressed.

70. LA. CONST. art. I, § 5 provides:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. . . . Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

> search or seizure' . . . . It provides that 'any person adversely affected' has standing . . . . The scope of the exclusionary rule is thus enlarged . . . .[71]

Therefore, while the Supreme Court through *Rakas* has reduced the class of persons having "standing," Louisiana has "expanded the class of persons having standing . . . and consequently [has] expanded the scope of [the protection of] the exclusionary rule."[72] This broad divergence between Louisiana's treatment of search and seizure cases and the Supreme Court's treatment has led Louisiana to embrace "an exclusionary rule which would not be available under *Mapp*."[73] Thus Louisiana courts and federal courts are forced even farther apart regarding the interpretation and protection afforded in search and seizure situations. This divergence will require that future Louisiana courts rely almost exclusively upon Louisiana law and jurisprudence in deciding search and seizure cases.

Rebecca F. Doherty

THE PRUDENT OPERATOR STANDARD: DOES IT INCLUDE A DUTY TO USE ENHANCED RECOVERY?

Plaintiff, successor in title to a grantor of an oil and gas lease on an eighty acre tract of land in the Bellevue Field, Bossier Parish, Louisiana, sued to cancel the lease because of the lessee's failure and refusal to put into operation a fireflood program of oil recovery, in addition to primary recovery methods previously used. The trial court cancelled the lease, finding that the lessee had not acted as a reasonable, prudent operator as required by Mineral Code article 122. The Louisiana Second Circuit Court of Appeal affirmed and *held* that a mineral lease may be cancelled for failure to use technologically current methods of enhanced recovery. *Waseco Chemical & Supply Co. v. Bayou State Oil Corp.*, 371 So. 2d 305 (La. App. 2d Cir.), *cert. denied*, 374 So. 2d 656 (La. 1979).

Virtually all oil producing states, including Louisiana, have imposed on the mineral lessee an obligation to develop and operate

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71. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 23-24 (1974).

72. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pre-Trial Criminal Procedure*, 37 LA. L. REV. 535, 543-44 (1977).

73. *Id.* at 544.