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# The Fourth Amendment and the "Legitimate Expectation of Privacy"

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## I. INTRODUCTION

Judicial supervision of police practices has always necessitated a rather delicate balance. To the extent societal crime control values are served, privacy and individual rights may, on balance, have to be compromised. On the other hand, effective law enforcement cannot be held absolutely sacrosanct at the expense of individual privacy interests. The dilemma thus created is one of providing the maximum possible accommodation to one interest without unduly infringing upon the other.[1]

The protection of individual privacy interests in this confrontation with crime detection practices requires either the benefit of benevolent governmental self-restraint or some superimposed legal barrier protecting citizens from government overreaching. Given the strong governmental interest in suppressing antisocial conduct, in the form of both crime and perceived subversion, governmental self-control is unlikely to be exercised. Thus, the enforcement of some formal legal mechanism generally is necessary to insulate individual privacy from unrestrained official intrusion. Fortunately, the founders of the American democratic system were aware of the need for this legal protection. The basis of our constitutional government consequently contains as one of its basic principles "[t]he right of the people to be secure . . . against unreasonable searches and seizures."[2]

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1. *See generally* Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

2. U.S. CONST. amend. IV. The full text of the fourth amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particu-

The fourth amendment to the United States Constitution provides the judiciary with the power to protect individual freedom and privacy from governmental encroachment. The trouble is, of course, that the language of the fourth amendment is far from explicit. This lack of guidance places upon the courts the sociopolitical burden of balancing the individual's interest against the governmental interest in effective and efficient law enforcement.[3] Judicial response to the dilemma has encompassed vicissitudinous movements between the political left and right—waverings that generally dictate the prevailing political climate. At no time was this problem more evident than in the 1970s, a decade in which an aroused interest in law and order, followed by a general political trend to the right, resulted in a renewed tolerance for police practices at the expense of individual rights.[4]

The United States Supreme Court under Chief Justice Warren Burger is attuned to this apparent sociopolitical sentiment.[5] Although the record of the Court in the decade of the seventies has been mixed—both generally[6] and in the area of criminal law in

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larly describing the place to be searched, and the persons or things to be seized. Although it is possible to argue that the amendment was directed at relatively identifiable historical abuses, its philosophy and function transcend history. The fourth amendment currently stands as the primary means of monitoring and controlling police behavior. *See* Olmstead v. United States, 277 U.S. 438, 471-79 (1928) (Brandeis, J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362-80, 397-402 (1974).

3. Amsterdam, *supra* note 2, at 353-55.

4. The late Professor Herbert Packer referred to this political fluctuation and the resulting dichotomy in philosophies as expressing "two models of the criminal process." Packer's crime control model favors efficiency and informal procedures, and his due process model stresses formal, adversary factfinding and individual rights. *See* Packer, *supra* note 1, at 9-23.

5. Between 1969 and 1972, President Richard M. Nixon, who held an avowed crime control philosophy, appointed four new Justices to the United States Supreme Court: Chief Justice Warren E. Burger (1969); Justice Harry A. Blackmun (1970); Justice Lewis F. Powell (1972); and Justice William H. Rehnquist (1972).

6. Compare, for example, the decisions issued during the last week of the Court's 1979-1980 term: Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (Secretary of Labor's occupational safety and health standard that limited employee exposure to benzene held invalid); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (first amendment held to provide an implicit public right of access to criminal trials); Fullilove v. Klutznick, 448 U.S. 448 (1980) (provision of the Public Works Employment Act of 1977, requiring 10% of the public construction funds disbursed under the Act to go to minority contractors held valid); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (congressional abrogation of Fort Laramie Treaty of 1868 granting the Sioux indian nation seven million acres of the Black Hills in South Dakota constituted a "taking" that required compensation under the fifth amendment); Williams v. Zbaraz, 448 U.S. 358 (1980) (state statute excluding most abortions from Medicaid coverage upheld against constitutional and statutory challenges); Harris v. McRae, 448 U.S. 297 (1980) (federal "Hyde Amendment"

particular[7]—the Court's philosophical predilection is unambiguous toward police practices under the fourth amendment.[8] In the 1975-76 term, for example, the Supreme Court reversed nine consecutive lower federal or state court decisions upholding fourth amendment claims.[9] The Court thereby validated the law enforcement activities that had been found to be illegal by those courts. In fact, except for several border patrol decisions,[10] the Supreme Court be-

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excluding most abortions from Medicaid coverage upheld against challenges based on both the Constitution and Title XIX of the Social Security Act).

7. *Compare* Rhode Island v. Innis, 446 U.S. 291 (1980) (holding that investigation within the meaning of *Miranda v. Arizona* includes any words or actions reasonably likely to elicit an incriminating response); Brewer v. Williams, 430 U.S. 387 (1977) (subtle interrogation held to violate in-custody defendant's sixth amendment right to counsel); Mullaney v. Wilbur, 421 U.S. 684 (1975) (shifting of burden of proof of essential elements of offense to defendant held impermissible); Gerstein v. Pugh, 420 U.S. 103 (1975) (pretrial restraint held to require judicial determination of probable cause); Morrissey v. Brewer, 408 U.S. 471 (1972) (parolee facing possible parole revocation held entitled to due process); Argersinger v. Hamlin, 407 U.S. 25 (1972) (indigent misdemeanants facing possible incarceration held entitled to counsel); Papachriston v. Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance held unconstitutionally vague); Coates v. Cincinnati, 402 U.S. 611 (1971) (loitering ordinance held unconstitutionally vague); *and* cases cited note 12 *infra with* Rummel v. Estelle, 445 U.S. 263 (1980) (application of habitual offender statute to nonviolent, property offenses held not to violate eighth amendment proscription against cruel and unusual punishment); Tramınel v. United States, 445 U.S. 40 (1980) (witness spouse alone held to have right to exercise privilege of refusing to testify against defendant spouse); Oregon v. Mathiason, 429 U.S. 492 (1977) *(Miranda's* "custodial interrogation" given narrow construction); United States v. Mandujano, 425 U.S. 564 (1976) (grand jury witness held not entitled to *Miranda* warnings); Ross v. Moffitt, 417 U.S. 600 (1974) (indigent state defendants' right to counsel held not applicable to discretionary appeals); Barnes v. United States, 412 U.S. 837 (1973) (instruction that knowledge can be inferred from possession of stolen property held valid); Harris v. New York, 401 U.S. 222 (1971) (statements taken in violation of *Miranda* held admissible for impeachment purposes); *and* cases cited notes 9 & 11 *infra.*

8. *See* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court,* 75 MICH. L. REV. 1319, 1366-1416 (1977); Miles, *Decline of the Fourth Amendment: Time to Overrule* Mapp v. Ohio?, 27 CATH. U.L. REV. 9, 10-12 (1977). The other area in which the Supreme Court's policy preference clearly appears is in its first amendment decisions restricting freedom of the press. *See, e.g.,* Ashdown, *Editorial Privilege and Freedom of the Press:* Herbert v. Lando *in Perspective,* 51 U. COLO. L. REV. 303, 303-12 (1980). *But see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

9. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Jams, 428 U.S. 433 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976); Andresen v. Maryland, 427 U.S. 463 (1976); United States v. Santana, 427 U.S. 38 (1976); United States v. Miller, 425 U.S. 435 (1976); United States v. Watson, 423 U.S. 411 (1976); Texas v. White, 423 U.S. 67 (1975). These decisions led Justice Brennan to exclaim in dissent in *Martinez-Fuerte* that "[t]oday's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures." 428 U.S. at 567 (Brennan, J., dissenting).

10. *See, e.g.,* Bowen v. United States, 422 U.S. 916 (1975); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Briguoni-Ponce, 422 U.S. 873 (1975); United States v. Peltier, 422 U.S. 531 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The thrust of these decisions was to impose some restrictions upon the border patrol's authority

tween 1972 and 1976 decided nineteen consecutive cases in favor of law enforcement entities and against parties asserting fourth amendment claims.[11] Even though this trend has moderated somewhat,[12] the Court remains generally unsympathetic toward parties challenging police search and seizure practices.[13]

This bent appears to be a direct result of the Court's dissatisfaction with the exclusionary rule.[14] Although unable to muster the majority required to overrule *Mapp v. Ohio*,[15] the Court consist-

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to stop automobiles coming into the country from Mexico and to search them for drugs and illegal aliens.

11. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Edwards, 415 U.S. 800 (1974); United States v. Matlock, 415 U.S. 164 (1974); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973); Cupp v. Murphy, 412 U.S. 291 (1973); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Brown v. United States, 411 U.S. 223 (1973); Adams v. Williams, 407 U.S. 143 (1972); cases cited note 9 *supra*.

12. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980) (warrant held necessary to make nonexigent arrest in private dwelling); Ybarra v. Illinois, 444 U.S. 85 (1979) (specific, articulable facts held necessary to justify weapons frisk in possible criminal situation because fourth amendment does not permit evidentiary searches of bystanders present at the execution of a search warrant); Dunaway v. New York, 442 U.S. 200 (1979) (probable cause held necessary to detain suspect for questioning); Delaware v. Prouse, 440 U.S. 648 (1979) (police officer's arbitrary, random stops of vehicles for license and registration checks held impermissible); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (provision of Occupational Safety and Health Act of 1970 authorizing warrantless inspections held violative of the fourth amendment); United States v. Chadwick, 433 U.S. 1 (1977) (warrant held necessary to search locked footlocker).

13. *See, e.g.*, United States v. Salvucci, 448 U.S. 83 (1980) (automatic standing held not available to defendant charged with possessory offense); United States v. Payner, 447 U.S. 727 (1980) (use of supervisory power held ineffective to exclude evidence seized illegally from third party who lacks standing); United States v. Havens, 446 U.S. 620 (1980) (illegally seized evidence held admissible to impeach false testimony given in response to cross-examination); United States v. Mendenball, 446 U.S. 544 (1980) (satisfaction of some characteristics of "drug courier profile" held to justify investigatory stop); United States v. Crews, 445 U.S. 463 (1980) (illegal arrest held not to taint in-court identification); Bell v. Wolfish, 441 U.S. 520 (1979) (strip searches and body cavity inspections of pretrial detainees following contact visits with outsiders held not unreasonable); Dalia v. United States, 441 U.S. 238 (1979) (covert entry to install electronic eavesdropping equipment held permissible); Smith v. Maryland, 442 U.S. 735 (1979) (fourth amendment held inapplicable to recording of phone numbers dialed from a particular telephone); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (warrant authorized search of newspaper office for evidence held permissible even though no one at newspaper suspected of wrongdoing); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (specific, articulable facts held unnecessary for police officer to order stopped motorist out of vehicle).

14. *See* Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 160, 186 (1979); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1038, 1047 (1974); McMillian, *Is There Anything Left of the Fourth Amendment?*, 24 ST. LOUIS U. L.J. 1, 3-4 (1979); Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421, 453 (1975).

15. 367 U.S. 643 (1961). Should a change in the exclusionary rule occur, it is more

ently has ruled on fourth amendment claims in a manner that thwarts the operation of the rule. The Court has utilitized two basic doctrinal devices in this effort, both of which have been applied with questionable validity. First, the Supreme Court has focused narrowly on the exclusionary rule's deterrent function as virtually its sole justification. Acknowledging only this limited rationale for the rule permits the Court to refuse to apply it in cases in which its application will provide no additional deterrent to unlawful police behavior, or when any marginal deterrent value attained is outweighed by the societal interest in admitting reliable evidence.[16] This Article does not endeavor to engage in a debate over the efficacy or deterrent effect of the exclusionary rule.[17] Nevertheless, it

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likely to be a modification similar to the "good faith" exception suggested by Justice White in Stone v. Powell, 428 U.S. 465, 536-42 (1976) (White, J., dissenting), rather than outright abolition as suggested by Chief Justice Burger in *Stone*, 428 U.S. at 496-502 (Burger, C.J., concurring), and in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting). In his *Stone* concurrence, the Chief Justice does seem willing to compromise on some modification of the exclusionary rule. *See also* Michigan v. DeFillippo, 443 U.S. 31 (1979) (evidence admissible because of arresting officer's good faith reliance on validity of city ordinance); United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (per curiam) (adopting a "good faith" exception to the exclusionary rule), *cert. denied*, 101 S. Ct. 946 (1981); Kaplan, *supra* note 14, at 1046-49 (suggesting limitation of the exclusionary rule).

16. *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980) (court's use of its supervisory power to exclude evidence held improper when defendant lacked standing to invoke fourth amendment exclusionary rule); United States v. Havens, 446 U.S. 620 (1980) (illegally obtained evidence held admissible to impeach testimony given in response to proper cross-examination); Rakas v. Illinois, 439 U.S. 128 (1978) (automobile passenger possessed no fourth amendment protection against police search of the vehicle); Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus jurisdiction limited when state provided full and fair review of fourth amendment claims); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule held inapplicable to federal civil tax suit); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule held inapplicable to grand jury proceedings); Alderman v. United States, 394 U.S. 165 (1969) (standing required to challenge admissibility of evidence obtained by electronic surveillance); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970) (consideration of illegally obtained evidence in sentencing process held not improper), *cert. denied*, 401 U.S. 983 (1971). *See also* Harris v. New York, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* held admissible for impeachment purposes); Burkoff, *supra* note 14.

17. For vigorous debate over the viability of the exclusionary rule, see Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUD. 66 (1978); McMillian, *supra* note 14; Miles, *supra* note 8; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUD. 214 (1978).

should be noted that these decisions appear questionable. It seems clear that a refusal to apply the rule in cases of particular fourth amendment transgressions will produce no incremental deterrence of unlawful police conduct, and inconsistent application of the rule arguably could diminish whatever deterrent value does exist. Therefore, if deterrence is viewed as the primary—if not only—function of the exclusionary rule, that goal should be promoted through thorough and consistent application of the rule. The Supreme Court, however, has refused to adopt this policy and instead has isolated the rule's deterrent aspect as a means to circumvent the inadmissibility of evidence obtained in violation of the fourth amendment.

The second doctrinal device upon which the Supreme Court has relied to restrict the scope of the fourth amendment and the exclusion of evidence in criminal trials ironically emanates from *Katz v. United States*.[18] In *Katz* a majority[19] of seven Justices under Chief Justice Earl Warren focused on the protection of privacy interests rather than property rights in expanding the scope of the fourth amendment to cover electronic eavesdropping.[20] The Burger Court, however, has utilized this same privacy concept to limit both the application of the fourth amendment and the operation of the exclusionary rule to those situations in which an individual's expectations of privacy are considered by the Court to be either "legitimate" or "reasonable."[21] This limitation in turn has resulted in the development of a new graduated approach to the fourth amendment that is based on the recognition of degrees of privacy expectations. Under the new approach constitutional protection decreases as the individual's privacy interests become less legitimate on the Court's hierarchy. Unfortunately, a majority of the Court has allowed either dissatisfaction with the exclusionary rule or a desire to accommodate state and local law enforcement to distort its perception of which privacy expectations are justifiable and deserving of protection. Thus, the development of a graduated approach to privacy expectations under the Burger Court concomi-

18. 389 U.S. 347 (1967).

19. Justice Black filed the only dissent. Justice Marshall did not take part in the decision.

20. The Court held that the use of a listening device placed outside the telephone booth being used by petitioner violated an area in which petitioner enjoyed a reasonable expectation of privacy. The invasion thus violated the fourth amendment, even though there was no trespass or invasion of a property interest. *Id.* at 359.

21. *See* notes 76-100 *infra* and accompanying text.

tantly has resulted in a dangerous narrowing of the fourth amendment's substantive scope. This development suggests that criminal defendants may be better off without the federal exclusionary remedy than without a viable fourth amendment to supervise police practices, assuming that the two are pragmatically separable.[22] It is with this proposition in mind that this Article examines the formulation and use of the concept of a "legitimate expectation of privacy" in fourth amendment adjudication.

## II. A Graduated Approach to the Fourth Amendment

### A. *The Supreme Court's Fourth Amendment Methodology*

Since its earliest encounters with the fourth amendment,[23] the Supreme Court rather consistently has analyzed and applied the amendment's protections from a personal, individual rights perspective rather than from a regulatory standpoint.[24] The Court, for example, acknowledges an individual's standing to raise a fourth amendment challenge only when the rights of that individual have been invaded.[25] Thus, in *Alderman v. United States*,[26] a case which dealt with standing to challenge illegal electronic surveillance, the Court stated that "Fourth Amendment rights are per-

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22. This proposition again raises the debate over the viability of the exclusionary rule. *See* note 17 *supra* and accompanying text.

23. *See* Boyd v. United Stetes, 116 U.S. 616 (1886) (invalidating subpeona duces tecum for the delivery of private documents); *Ex parte* Jackson, 96 U.S. 727 (1878) (invalidating postal regulations that permitted the warrantless inspection of letters and packages). This Article makes no attempt to trace the history and development of the fourth amendment; the task has been amply and aptly done by others. *See, e.g.*, Amsterdam, *supra* note 2; Israel, *supra* note 8; Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1 (1975); Miles, *supra* note 8; Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173; Trager & Lobenfeld, *supra* note 14.

24. *See* Amsterdam, *supra* note 2, at 367-69. Professor Amsterdam characterizes the prevailing view of the fourth amendment as "a collection of protections of atemistic spheres of interest of individual citizens" rather than "a regulation of governmental conduct," *id.* at 367, and uses a rather effective example to illustrate the difference. For an illustration of the use of the regulatory approach in relation to the fifth and sixth amendments, see Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436 (1966).

25. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963); Jones v. United States, 362 U.S. 257 (1960). Also worthy of note is the case of Hatch v. Reardon, 204 U.S. 152 (1907), in which the Court stated that remedies for violations of constitutional rights would only be provided to a person who "belongs to the class for whose sake the constitutional protection is given." *Id.* at 160. In *Jones v. United States* the Court held this principle applicable in determining the availability of the exclusionary rule to redress fourth amendment violations. 362 U.S. at 261.

26. 394 U.S. 165 (1969).

sonal rights which . . . may not be vicariously asserted."[27] Since the regulatory view focuses on the police practice in question rather than on whether a particular individual's rights have been violated, it would seem apropos for the Court to shift to a regulatory perspective at a time when the deterrent aspects of the exclusionary rule are being emphasized. Instead, the Court has reaffirmed its position that fourth amendment interests are personal,[28] and it thus has restricted the amendment's protection to those cases in which the defendant's own rights are violated.[29]

Moreover, an additional jurisprudential dichotomy exists within this personal rights view. It is possible to conceptualize the fourth amendment either as a hard-and-fast, monolithic proposition or as a variable and flexible provision that operates in degrees.[30] Under the former view the amendment applies wholesale or not at all; the latter approach, on the other hand, utilizes a sliding scale of protection based on the personal interest and law enforcement practice involved.

The Supreme Court has employed, at least to some extent, both models. Generally, the Court has held the full extent of the fourth amendment, including the warrant requirement, to be applicable[31] subject to a few recognized exceptions.[32] In an approach that originated in *Camara v. Municipal Court*[33] in 1967 and matured a year later in *Terry v. Ohio*,[34] however, the Court began to look upon the fourth amendment as a more flexible provision capable of being applied on a graduated basis. In *Camara* the Court utilized the reasonableness clause to alter the probable cause re-

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27. *Id.* at 174. *See also* Brown v. United States, 411 U.S. 223, 230 (1973).

28. *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 85 (1980); Rakas v. Illinois, 439 U.S. 128, 133-34 (1978).

29. *See* note 28 *supra*. *See also* Rawlings v. Kentucky, 448 U.S. 98 (1980); Arkansas v. Sanders, 442 U.S. 753 (1979). Indeed, it can be argued that the Supreme Court's narrow conception of personal rights and expectations of privacy actually has undermined the deterrent effect of the exclusionary rule. *See* text accompanying notes 269-71 *infra*.

30. *See* Amsterdam, *supra* note 2, at 388-95.

31. The cases in which the Supreme Court has held that the fourth amendment does not apply at all are those in which it concluded that no search or seizure had occurred. *See* Smith v. Maryland, 442 U.S. 735, 745-46 (1979); United States v. Russell, 411 U.S. 423, 431-32 (1973); United States v. Dionisio, 410 U.S. 1, 15 (1973); Hoffa v. United States, 385 U.S. 293, 310-12 (1966).

32. The established exceptions to the warrant requirements include the following: stop-and-frisk; search incident to arrest; plain view; hot pursuit; exigent circumstances; and consent.

33. 387 U.S. 523 (1967).

34. 392 U.S. 1 (1968).

quirement for the issuance of an administrative search warrant,[35] and in *Terry* the majority focused exclusively on the reasonableness language of the amendment to validate a warrantless stop-and-frisk on less than probable clause.[36] Since *Camara* and *Terry* the Court has relied on the reasonableness provision of the fourth amendment to limit search and seizure protection in cases of traffic arrests[37] and border patrol practices,[38] to permit warrantless administrative inspections,[39] to permit detention without probable cause of persons found at the scene of a search warrant's execution,[40] and otherwise to validate various law enforcement activities.[41]

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35. 387 U.S. at 539. *See also* Michigan v. Tyler, 436 U.S. 499 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); See v. Seattle, 387 U.S. 541 (1967).

36. In *Terry* the Supreme Court for the first time clearly separated the warrant clause of the fourth amendment from the provision proscribing unreasonable searches and seizures. 392 U.S. at 20-27.

37. *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106 (1977) (authorizing police officer to order motorist stopped for traffic violation out of the vehicle without the necessity of any suspicion whatsoever); Gustafson v. Florida, 414 U.S. 260 (1973) (permitting a full search of a person after a lawful custodial traffic arrest); United States v. Robinson, 414 U.S. 218 (1973) (permitting a full search of a person after a lawful custodial traffic arrest). A contrary holding can be found in Delaware v. Prouse, 440 U.S. 648 (1979), in which the Supreme Court held that random vehicle stops for license and registration checks violate the fourth amendment. It is significant to note, however, that the Court did not intond to invalidate fixed checkpoint inspectious when all vehicles are stopped. 440 U.S. at 663; *accord*, United States v. Martinez-Fuerte, 428 U.S. 543, 557-60 (1976).

38. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (authorizing the border patrol's routine stopping of a vehicle at a permanent checkpoint without the necessity of individualized suspicion that the particular vehicle contains illegal aliens); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (validating roving border patrol stops without the necessity of probable cause when specific, articulable facts exist indicating that a vehicle may contain illegal aliens). For decisions that restrict the border patrol's authority to make a full automobile search without probable cause, see United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 226 (1973).

39. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499 (1978) (investigation by fire chief during or soon after fire's extinguishment); United States v. Biswell, 406 U.S. 311 (1972) (inspection by federal treasury agent of prenises owned by licensed gun dealers); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (inspection by federal treasury agent of premises owned by licensed liquor dealers); *cf.* Wyman v. James, 400 U.S. 309 (1971) (home visitation by caseworker of welfare recipients). *But see* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (invalidating inspections of work areas by Occupational Safety and Health Administration officials made without an administrative warrant). *See also* Marshall v. Nolichuckey Sand Co., 606 F.2d 693 (6th Cir. 1979) (routine warrantless inspections held reasonable in mining industry), *cert. denied*, 446 U.S. 908 (1980); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979) (warrantless inspections of mines held reasonable in coal industry), *cert. denied*, 444 U.S. 1015 (1980).

40. Michigan v. Summers, 101 S. Ct. 2587 (1981).

41. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980) (implicitly legitimizing FAA "hijacking profile"); Dalia v. United States, 441 U.S. 238 (1979) (authorizing covert entry to install electronic bugging equipment); South Dakota v. Opperman, 428 U.S. 364

Until fairly recently this flexible approach had been utilized rather narrowly to define and delimit police activity that was permissible within the scope of the fourth amendment. In other words, the Supreme Court used the graduated model to establish a level of acceptable police practices that were consistent with the language and oversight of the Constitution. With the 1978 decision in *Rakas v. Illinois*,[42] however, a new and much broader graduated theory of the fourth amendment began to crystallize, the application of which determines the actual scope of the amendment itself as a control on police behavior. Instead of merely determining the legality of particular police practices within the confines of the fourth amendment, this emergent theory effectively frees law enforcement personnel in certain situations from any fourth amendment control, or at least substantially reduces the amendment's supervisory value. That is to say, whereas the Supreme Court formerly had applied the sliding scale approach only to establish permissible police conduct within the bounds of fourth amendment requirements, the new approach works to determine the scope—and therefore the application—of the fourth amendment itself as a control on this conduct.

The new theory takes *Katz v. United States*[43] as its foundation and thus relies on the rubric of privacy to determine the reach of the fourth amendment as a check on the conduct of law enforcement officials. It will be recalled that it was in *Katz* that the Supreme Court developed the notion that the fourth amendment protects privacy rather than property, and it was this "expectation of privacy" concept that the Court utilized during the 1970s to formulate a graduated scope of fourth amendment protection.

### *B. Formulation of the Privacy Model*

Although commentators credit *Katz* with having clearly established the shift from a property to a privacy model of the fourth

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(1976) (validating police inventory searches of impounded vehicles); United States v. Edwards, 415 U.S. 800 (1974) (extending permissible time frame for search incident to arrest); Cupp v. Murphy, 412 U.S. 291 (1973) (validating physical examination of murder suspect prior to arrest).

Recently, several lower courts have also relied upon the fourth amendment's reasonableness clause. *See* United States v. Benjamin, 29 CRIM. L. REP. (BNA) 2090 (7th Cir. Mar. 26, 1981) (reasonable suspicion justifies seizure and detention of suspect's briefcase until a warrant can be obtained); United States v. West, 29 CRIM. L. REP. (BNA) 2322 (1st Cir. June 16, 1981) (reasonable suspicion supports detention of traveler's suitcase).

42. 439 U.S. 128 (1978).

43. 389 U.S. 347 (1967).

amendment, the privacy concept actually has a more detailed and complex history. In the 1961 decision in *Silverman v. United States*[44] the Supreme Court expressed dissatisfaction with the views espoused in *Olmstead v. United States*[45] and *Goldman v. United States*,[46] cases in which fourth amendment protection was limited to property interests.[47] In *Silverman* the Court held testimony about conversations overheard through a foot-long spike mike installed in an adjoining wall to be inadmissible. The microphone made contact with a heating duct, which permitted officers to overhear conversations taking place throughout the premises. There was certainly no effective infringement of a property interest under these facts, and even though there may have been a technical violation of a property right, the Court nevertheless stated that the "decision [did] not turn upon the technicality of a trespass upon a party wall as a matter of local law,"[48] and that "Fourth Amendment rights [were] not inevitably measurable in terms of ancient niceties of tort or real property law."[49] A few years later in *Clinton v. Virginia*,[50] the Court, in a per curiam opinion citing *Silverman*, reversed a conviction in which a listening device has been tacked onto an adjoining wall but did not penetrate the defendant's premises. Thus, *Silverman* and *Clinton* clearly foreshadowed the demise of the property rationale.[51]

The actual death knell came in 1967 when the Court in *Warden v. Hayden*[52] rejected the notion that the government could be prohibited from seizing "mere evidence," items which are not contraband or instrumentalities of crime, because of a superior personal property interest. The Court stated in unambiguous language that "the principal object of the Fourth Amendment is the protec-

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44. 365 U.S. 505 (1961).

45. 277 U.S. 438 (1928).

46. 316 U.S. 129 (1942).

47. The decisions in *Olmstead* and *Goldman* generally are regarded as the archetypes of the property-oriented view of the fourth amendment. The Court held in both cases that the fourth amendment did not apply to electronic surveillance since there was no physical trespass and, therefore, no search.

48. Silverman v. United States, 365 U.S. 505, 512 (1961).

49. *Id.* at 511.

50. 377 U.S. 158 (1964) (per curiam).

51. It is possible to interpret the Supreme Court's earliest encounters with the fourth amendment as attempts to protect privacy as well as property interests. The Court's fourth amendment decisions thus can be seen as a pendulum swinging between privacy and property perspectives. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886).

52. 387 U.S. 294 (1967).

tion of privacy rather than property,"[53] and that "[p]rivacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband."[54] Early the following term, the Court overruled *Olmstead* and *Goldman,* holding in *Katz* that the fourth amendment protects people and not merely places. Justice Stewart's majority opinion, which focused on the existence of a justifiable expectation of privacy,[55] was to become the benchmark of fourth amendment adjudication in the 1970s.

At the same time that substantive fourth amendment law was developing into a privacy model, the Supreme Court also began to view the procedural notion of standing from a privacy perspective. In 1960 the Court in *Jones v. United States*[56] rejected the government's argument that the petitioner lacked standing to challenge the admissibility of evidence because he had failed to allege either ownership of the seized articles or an interest greater than that of a guest in the apartment searched. Although the prevailing view in the lower courts had been that some property interest was necessary to confer standing, Justice Frankfurter's opinion stated that the "Fourth Amendment [was] a means for making effective the protection of privacy,"[57] and that it was

> unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of the law, had been shaped by distinctions whose validity [was] largely historical.[58]

The Court then held that anyone legitimately on premises where a search occurs has standing to invoke the privacy of the premises searched.[59]

In the years following the *Jones* decision, the Supreme Court approached subsequent standing cases from a privacy perspec-

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53. *Id.* at 304.

54. *Id.* at 301-02.

55. Katz v. United States, 389 U.S. 347, 353 (1967). *See also id.* at 360-62 (Harlan, J., concurring).

56. 362 U.S. 257 (1960).

57. *Id.* at 261.

58. *Id.* at 266.

59. *Id.* at 267. Interestingly, the Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), relied on a privacy analysis to limit this aspect of the *Jones* holding. The other basis on which standing was granted in *Jones*—automatic standing in the case of possessory offenses—was rejected in the recent case of United States v. Salvucci, 448 U.S. 83 (1980).

tive.[60] In *Mancusi v. DeForte*,[61] for example, the Court granted standing to a union official to challenge the seizure of union records from an office he shared with several other persons. The Court stated that the "capacity to claim the protection of the [fourth] [a]mendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[62]

In addition to applying a privacy formula to questions of standing, the Supreme Court, in the ten years after *Katz*, continued to apply the same concept to determine the substantive scope of the fourth amendment.[63] This parallel development of substantive and procedural fourth amendment law under the same jurisprudential mold finally coalesced in 1978 in *Rakas v. Illinois*.[64] In *Rakas* a passenger challenged the warrantless search of the automobile in which he was riding. The car was stopped following a radio report describing the getaway car used in a robbery. The search produced a box of rifle shells found in the locked glove compartment and a sawed-off rifle found under the front passenger seat. The Illinois courts denied standing to the petitioners, who had not claimed an interest in either the searched automobile or the seized items,[65] on the ground that a mere passenger "without a proprietary or other similar interest in an automobile . . . lacks standing to challenge the legality of the search of the vehicle."[66]

In the United States Supreme Court the petitioners argued that they had standing under *Jones* "since they were 'legitimately on the premises' at the time of the search."[67] Justice Rehnquist's

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60. *See, e.g.*, Combs v. United States, 408 U.S. 224, 227 (1972); Alderman v. United States, 394 U.S. 165, 179 n.11 (1969); Mancusi v. DeForte, 392 U.S. 364, 368 (1968); *cf.* Brown v. United States, 411 U.S. 223 (1973) (petitioners lacked standing because they failed to allege or prove a legitimate privacy interest in the stere of a coconspirator).

61. 392 U.S. 364 (1968).

62. *Id.* at 368.

63. *See, e.g.*, United States v. Chadwick, 433 U.S. 1 (1977); South Dakota v. Opperman, 428 U.S. 364 (1976); United States v. Santana, 427 U.S. 38 (1976); United States v. Miller, 425 U.S. 435 (1976); United States v. Watson, 423 U.S. 411 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973); Couch v. United States, 409 U.S. 322 (1973); United States v. White, 401 U.S. 745 (1971); Terry v. Ohio, 392 U.S. 1 (1968).

64. 439 U.S. 128 (1978).

65. *See id.* at 130. *See also* notes 164-214 *infra* and accompanying text.

66. People v. Rakas, 46 Ill. App. 3d 569, 571, 360 N.E.2d 1252, 1253 (1977), *aff'd*, 439 U.S. 128 (1978).

67. Rakas v. Illinois, 439 U.S. 128, 132 (1978). *See also id.* at 140-41. Rakas also

majority opinion, which rejected the *Jones* standard as too broad, questioned "whether it serve[d] any useful analytical purpose to consider [the] principle . . . of standing . . . distinct from the merits of a defendant's Fourth Amendment claim."[68] The majority 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,"[69] and that the "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."[70] The Court then relied on *Katz* to hold that the proper inquiry for delimiting the scope of fourth amendment protection is whether the defendant has a "legitimate expectation of privacy" in the place searched. The majority went on to conclude, somewhat surprisingly, that passengers in an automobile enjoy no legitimate expectation of privacy in the vehicle;[71] therefore, a search of the car did not violate any rights of the petitioners.

In addition to combining the notion of standing with substantive fourth amendment law under the "legitimate expectation of privacy" formula, the Court in *Rakas* also reaffirmed that such expectations—and thus the scope of fourth amendment rights—are dependent upon what a majority of the Court chooses to recognize as constitutionally legitimate.[72] This approach has permitted the Court to develop a new graduated view of fourth amendment rights in which some expectations of privacy are less legitimate—and thus less entitled to protection—than others. While finding privacy expectations to be clearly legitimate in some situa-

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claimed standing on the ground that he was the "target" of the search. The Supreme Court rejected this so-called "target theory," reasoning that it was inconsistent with the personal rights view of the fourth amendment, *see* text accompanying notes 23-29 *supra*, and that it would not further the deterrent function of the exclusionary rule. 439 U.S. at 133-38.

68. 439 U.S. at 138-39.

69. *Id.* at 139.

70. *Id.* at 140.

71. Justice Rehnquist, writing for the majority, actually concluded that petitioners had no legitimate expectation of privacy in the particular areas of the car searched in that case—the glove compartment and the area under the front passenger seat. He also indicated that a passenger would have no privacy interest in the trunk. *Id.* at 148-49. If a passenger in an automobile does not enjoy a reasonable expectation of privacy in these areas, however, it is difficult to imagine any part of a vehicle where such an expectation would exist.

72. *See id.* at 142-49. *See also* United States v. White, 401 U.S. 745, 751-52 (1971); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan was the first to suggest that for an expectation of privacy to be protected, it must "be one that society is prepared to recognize as 'reasonable.'" *Id.*

tions[73] and completely absent in others,[74] the Court also has chosen to recognize a middle ground, predominantly in cases that deal with automobiles, in which privacy expectations are diminished and fourth amendment protection is concomitantly reduced.[75] Thus, the Burger Court's view of the fourth amendment, although perhaps still in its incipient stages, appears to be reducible to a three-tiered hierarchical scheme, with protection being dependent upon the Court's willingness to recognize asserted privacy interests as either legitimate, diminished, or altogether nonexistent.

When the Court is willing to recognize a claimed privacy interest as legitimate, full fourth amendment safegnards, including both the probable cause and warrant requirements, are applicable. In other words, the Court demands strict compliance with the fourth amendment's warrant clause in these cases. In *United States v. Chadwick*,[76] for example, the government argued that the fourth amendment warrant clause protected only those interests traditionally associated with the home. Chief Justice Burger's majority opinion, however, stated that "a fundamental purpose of the Fourth Amendment [was] to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home."[77] The Chief Justice concluded that the users of a locked footlocker, which was characterized as a repository of personal effects, enjoyed a legitimate expectation of privacy in the contents of the locker, and that the warrant clause therefore applied. In a later case the Court held that the same privacy expectations and warrant requirement applied to an unlocked suitcase found in an automobile, even though automobiles themselves traditionally had been provided with less fourth amendment protection.[78] Recently, a plurality of the Court in *Robbins v. California*[79] expanded these holdings to apply to any closed, opaque container.[80] Other privacy interests that the Court has found to be legitimate and thus governed by the warrant clause include those associated with the home,[81] packaged

73. *See* notes 76-83 *infra* and accompanying text.

74. *See* notes 103-16 *infra* and accompanying text.

75. *See* notes 84-100 *infra* and accompanying text.

76. 433 U.S. 1 (1977).

77. *Id.* at 11 (footnote omitted).

78. Arkansas v. Sanders, 442 U.S. 753 (1979).

79. 101 S. Ct. 2841 (1981).

80. The containers in *Robbins* were two packages wrapped in green opaque plastic, each of which contained 15 pounds of marijuana. *Id.* at 2844.

81. Payton v. New York, 445 U.S. 573 (1980); Steagald v. United States, 101 S. Ct.

films,[82] and telephone booths.[83]

The second level in the new hierarchy of fourth amendment interests comprises those cases in which the Court has concluded that the privacy expectation in question is diminished or reduced. This category apparently is governed by the fourth amendment's reasonableness clause rather than its warrant clause. Thus, in a relatively recent line of cases, the Court has held warrantless searches of automobiles to be reasonable on the ground that any expectation of privacy in a car is diminished.[84] The Court has justified this conclusion in a variety of ways, reasoning that automobiles, unlike houses, are constantly used in plain view for transportation,[85] are extensively regulated by the state,[86] are often subject to official inspection, and are frequently taken into police custody.[87]

Another area of police activity to which the Court applies this second category of diminished privacy expectations is public arrests. Although it was not specifically stated in *Watson v. United States*,[88] a case upholding the validity of warrantless public arrests, a majority of the Justices apparently felt that privacy expectations are diminished when a person is in public.[89] Juxtaposing

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1642 (1981).

82. Walter v. United States, 447 U.S. 649 (1980).

83. Katz v. United States, 389 U.S. 347 (1967).

84. The original justification for warrantless automobile searches was the inherent mobility of cars and the potential loss of evidence. *See* Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925); *cf.* Coolidge v. New Hampshire, 403 U.S. 443, 459-60 (1971) (holding warrantless search unreasonable because police had ample opportunity to obtain a warrant for the search of the automobile). Later decisions by the Supreme Court, which validated these warrantless searches even when vehicles were under police control and thus immobilized, required a shift to the new rationale based on a diminished privacy interest in an automobile. *See* United States v. Chadwick, 433 U.S. 1, 12-13 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976); Texas v. White, 423 U.S. 67 (1975); Cardwell v. Lewis, 417 U.S. 583, 591-92 (1974); Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973); Chambers v. Maroney, 399 U.S. 42 (1970); Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967); *cf.* Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979) (reasons supporting the warrantless search of an automobile are inapplicable to searches of personal luggage taken from that automobile).

85. Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

86. Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

87. South Dakota v. Opperman, 428 U.S. 364, 368-69 (1976). *See also* United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (listing all of these factors).

88. 423 U.S. 411 (1976).

89. The precedential and historical justification for warrantless public arrests, coupled with congressional approval of such arrests, was the actual articulated basis of the *Watson* decision. As Justice Marshall asserts in dissent, however, the precedential and histerical foundations of the holding are tenuous at best. He states that the correct constitutional

*United States v. Santana*[90] with *Payton v. New York*[91] makes it even more clear that this was the implication intended by the Court in *Watson*. In *Santana* the Court upheld the warrantless arrest of a defendant who had been standing in the doorway to her home. The majority concluded that since the defendant was not in an area where she had any expectation of privacy, the situation was governed by *Watson*. The *Payton* Court, on the other hand, stressed individual privacy to invalidate a warrantless arrest made in a private dwelling, declaring that in no setting "is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."[92] Although Justice Rehnquist's majority opinion in *Santana* stated that the defendant lacked an expectation of privacy while in the doorway of her home, he undoubtedly meant that her expectation of privacy merely was diminished, since public arrests, unlike other situations in which the Court has found a complete absence of privacy interests,[93] are governed by the fourth amendment probable cause requirement.[94] That a person retains some privacy interest in his person when he appears in public was indicated in *Terry v. Ohio*,[95]

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approach in such cases is and has been to balance the privacy interest in question against the law enforcement interest. *Id.* at 436-45. This approach in all likelihood, is the unarticulated analysis that underlies the majority's decision in *Watson*, namely that the privacy interest was insufficient to be entitled to the protection of the warrant clause.

90. 427 U.S. 38 (1976).

91. 445 U.S. 573 (1980).

92. *Id.* at 589. The Court reaffirmed the sanctity of the home this past term in Steagald v. United States, 101 S. Ct. 1642 (1981), holding that both a search warrant and an arrest warrant are necessary to enter the home of a third party and make an arrest. The Court stressed the different kinds of probable cause necessary to support a search warrant as opposed to an arrest warrant. It concluded that the former determination is sufficient to secure the privacy of a home that belongs to an individual not named in any arrest warrant from official abuse.

Two things should be noted about the *Steagald* decision. First, it provides no additional protection to an arrested party, since he has no expectation of privacy in the home of another. *See* Rawlings v. Kentucky, 448 U.S. 98, 106-10 (1980); notes 222-23 *infra*. In *Steagald* it was the actual homeowner who was objecting to the entry and search. Second, the decision might not provide much protection even for the property owner because the Court in *Steagald* specifically relied upon the exigent circumstances exception to the search warrant requirement. 101 S. Ct. at 1649.

93. *See* notes 103-16 *infra* and accompanying text.

94. Although it did not deal with the question specifically, the Court upheld the warrantless arrests in both *Watson* and *Santana* because of the existence of probable cause. Probable cause has been recognized both historically and consistently as a necessary prerequisite to a full custodial arrest. *See, e.g.*, Dunaway v. New York, 442 U.S. 200 (1979); McCray v. Illinois, 386 U.S. 300 (1967); Beck v. Ohio, 379 U.S. 89 (1964); Draper v. United States, 358 U.S. 307 (1959).

95. 392 U.S. 1 (1968).

in which the Court noted that the fourth amendment applies whenever an individual harbors a reasonable expectation of privacy. "Unquestionably," the Court stated, "petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland."[96]

It can be seen from the Court's treatment of public arrests and vehicular searches that in those cases in which the new notion of diminished privacy expectations applies, generally only probable cause, and not a warrant, is required. In a few instances, however, the Supreme Court has relied on its diminished expectations rationale to justify a law enforcement practice even when probable cause was absent. Examples of this can be found in *South Dakota v. Opperman*[97] and *Bell v. Wolfish.*[98] In *Opperman* the Court relied on the diminished expectation of privacy in a vehicle to hold that a police inventory search without probable cause of an automobile that had been impounded for multiple parking violations was not "unreasonable." Similarly, in *Bell* the Court found that any privacy expectation of pretrial detainees necessarily is diminished—and thus outweighed—by the need of the institution to conduct strip searches following contact visits. The Court concluded that these searches, including body cavity inspections, are reasonable under the fourth amendment even though conducted on less than probable cause.[99]

More recently, a majority of the Court upheld the detention without probable cause of persons found at the scene of the execution of a search warrant.[100] The Court reasoned that only a limited interest in personal security was involved, that sufficient law enforcement interests were present, and that the issuance of a search warrant provided sufficient articulable suspicion to support the detention. The majority thus held that the officer's actions met the standard of reasonableness embodied in the fourth amendment.[101]

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96. *Id.* at 9.

97. 428 U.S. 364 (1976).

98. 441 U.S. 520 (1979).

99. *Id.* at 558-60. *See also* Delaware v. Prouse, 440 U.S. 648 (1979) (invalidating random vehicle stops for license and registration checks, but intimating the validity of fixed checkpoints where all vehicles are stopped); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (upholding an officer's right to order arbitrarily a motorist stopped for a traffic violation out of the vehicle); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding probable cause, or even reasonable suspicion, unnecessary for checkpoint stops).

100. Michigan v. Summers, 101 S. Ct. 2587 (1981).

101. In a dissenting opinion joined by Justices Brennan and Marshall, Justice Stewart argued, *inter alia,* that the intrusion in question was not necessarily limited, since "a detention 'while a proper search is being conducted' can mean a detention of several hours." *Id.*

The Supreme Court thus has subsumed the *Camara/Terry* reasonableness analysis under its second category of fourth amendment interests in which the expectations of privacy concerned are of reduced significance.[102] With privacy interests diminished, they easily are outweighed by the law enforcement interests in question; the amount of fourth amendment protection in this category is then dependent upon how the Court strikes the reasonableness balance. Although application of the reasonableness clause to this classification generally has resulted in probable cause—but not warrants—being required, the Supreme Court occasionally has viewed the privacy interests at issue to be of such reduced importance in comparison to law enforcement needs that it has justified dispensing with the necessity of probable cause as a prerequisite for particular police conduct.

The third and final classification under the Supreme Court's current vision of the fourth amendment comprises those cases in which the Court has found an absence of any privacy expectation whatsoever. This category is the most problematic of the three, since the conclusion that no legitimate expectation of privacy exists at all excludes the particular interest or activity from fourth amendment protection and frees the police practice concerned from either constitutional or judicial control. Because the fourth amendment has been geared to the protection of privacy interests, if the Court is able to conclude that no privacy expectation exists, the fourth amendment affords no protection against the activities of the police regardless of their general contravention of fourth amendment principles. This conclusion in essence means that the commands of the fourth amendment—both the warrant and reasonableness clauses—do not apply in such cases. In other words, the police simply are not required to justify their actions by either

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at 2598 (footnote omitted). The dissenters thus felt that the majority's position was inconsistent with Dunaway v. New York, 442 U.S. 200 (1979), which prohibited custodial detention unless probable cause is shown.

102. See, for example, Donovan v. Dewey, 101 S. Ct. 2534 (1981), upholding a warrantless administrative search under the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, §§ 102(a), 102(b), 201, 91 Stat. 1290 (codified at 30 U.S.C. §§ 801-802, 811, 813(a) (Supp. III 1979)). The Court concluded that the expectation of privacy in commercial property is significantly different from that accorded the home and that certain regulatory schemes authorizing warrantless inspections can adequately protect commercial privacy interests. The search was thus found reasonable under the fourth amendment. In United States v. Cortez, 101 S. Ct. 690 (1981), the Court held a border patrol stop of a vehicle based on particularized suspicion to be reasonable, partly on the ground that only a limited privacy intrusion was involved. *See also* Pennsylvania v. Mimms, 434 U.S. 106 (1977); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

probable cause or reasonable suspicion, since, according to the Supreme Court, the object of the fourth amendment—privacy—is not implicated in these cases.

This branch of the new expectation of privacy triad was the first to develop after *Katz* firmly shifted the focus of search and seizure law to privacy interests. Although prior to *Katz* the Court had upheld the use of secret agents on the grounds of assumption of the risk and the sacrifice of privacy when one freely communicates with a police agent,[103] as well as on the ground of the inherent reliability of a simultaneous electronic recording,[104] it also upheld this practice because of the absence of either a trespass or an unlawful invasion of a constitutionally protected area.[105] As a result of this traditional reliance on the trespass rationale, when the Court in *Katz* changed the focus of the fourth amendment from property to privacy it left the continued permissibility of law enforcement use of wired informants in doubt. As a consequence, the Court in *United States v. White*[106] was forced to reconsider the issue under the new privacy formula. *White* dealt with the admissibility of testimony of federal agents who had overheard conversations between the defendant and a government informant carrying a concealed radio transmitter. Justice White's plurality opinion addressed the question squarely, discounting the former trespass rationale and stressing that an individual enjoys no "constitutionally justifiable" privacy expectation that his associates will not be police informants or will not otherwise turn to the police. He then stated that neither the risk assumed nor the relative sense of security is substantially different when the police informant is also wired for sound.[107] Therefore, the Court concluded, the fourth amendment provides no protection against electronically equipped police agents because of the absence of a legitimate privacy expec-

103. *See* Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

104. *See* Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963).

105. *See* Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952). *See also* Osborn v. United States, 385 U.S. 323 (1966); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Silverman v. United States, 365 U.S. 505 (1961); Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928).

106. 401 U.S. 745 (1971).

107. *Id.* at 751. Justice White's plurality opinion also stressed the accuracy and reliability of an electronic recording in comparison to the unaided memory of a police agent. *Id.* at 753.

tation that one's associates will not be recording conversations for the police.

Since establishing the concept of a complete absence of any privacy expectation, the Supreme Court has decided seven cases in which it has found no fourth amendment interests to be implicated. Thus, a majority of the Court found no privacy interest involved either in the summons of business records from a taxpayer's accountant[108] or in the subpoenaing of bank records from a depositor's bank.[109] Likewise, the Court found no expectation of privacy in voice exemplars[110] or handwriting samples.[111] More recently, the Court refused to recognize any privacy interest in phone numbers dialed from a particular telephone,[112] in an automobile from the standpoint of a passenger,[113] or in the purse of a companion, even though the defendant owned the items seized therefrom.[114] These cases and the Supreme Court's new fourth amendment jurisprudence make it clear that privacy interests will be scrutinized carefully and construed narrowly. Most significantly, they indicate that when no privacy expectation is found, the fourth amendment will provide no control over police investigatory practices. Whether it is articulated outright[115] or is justified by the conclusion that no search has taken place since no privacy interest exists,[116] the result is the same: the fourth amendment is unavailable to regulate law enforcement activity in these cases.

The Court's new privacy hierarchy thus stretches from full fourth amendment warrant protection to an absolute void of fourth amendment regulation. It is precisely this elasticity that makes the approach troublesome. Regardless of whether the privacy triad is the result of haphazard lawmaking, careful efforts to balance individual and law enforcement interests, or preconceived catering to the police side of the scale, the Court's scheme has cre-

108. Couch v. United States, 409 U.S. 322 (1973).
109. United States v. Miller, 425 U.S. 435 (1976).
110. United States v. Dionisio, 410 U.S. 1 (1973).
111. United States v. Mara, 410 U.S. 19 (1973).
112. Smith v. Maryland, 442 U.S. 735 (1979).
113. Rakas v. Illinois, 439 U.S. 128 (1978).
114. Rawlings v. Kentucky, 448 U.S. 98 (1980).
115. The cases of Rakas v. Illinois, 439 U.S. 128 (1978), and Rawlings v. Kentucky, 448 U.S. 98 (1980), in which the Court held that the *police searches* in question did not violate any rights of the petitioners, are examples of this straightforwardness.
116. *Compare* Rawlings v. Kentucky, 448 U.S. 98 (1980) *and* Rakas v. Illinois, 439 U.S. 128 (1978) *with* Smith v. Maryland, 442 U.S. 735 (1979). The Court in *Smith* reasoned that since no legitimate expectation of privacy existed in a pen register device that recorded numbers dialed from a particular telephone, no "search" had occurred.

ated substantial jurisprudential and pragmatic problems. The approach is at best confusing and at worst exhibits infidelity to the privacy notions expressed in *Katz*. To the extent that some individual expectations of privacy are found to be constitutionally illegitimate and police practices that infringe upon them go unrestrained, the fourth amendment is eviscerated. In addition, the lack of clarity and predictability inherent in the inquiry of which privacy expectations are constitutionally legitimate leaves the police and the courts without standards to guide their conduct and decisions; this uncertainty, in turn, further exacerbates the diminished protection available to complainants under the Supreme Court's view of fourth amendment privacy.

The Supreme Court's new privacy formulation appears to be an effort to accommodate local law enforcement and amounts to an abdication to state judges on fourth amendment issues.[117] It must be hoped that state courts either will take a broad view of privacy under the fourth amendment or will apply their own constitutional search and seizure provisions to protect privacy interests. In the absence of these developments, it might be better to do without the federal exclusionary remedy provided in *Mapp v. Ohio* than to witness the continuing evisceration of substantive fourth amendment protection in an effort to circumvent application of the exclusionary rule.

## III. Inadequacies of the Court's Privacy Model

### A. *Infidelity to* Katz

In 1967 the Supreme Court under Chief Justice Earl Warren decided *Katz v. United States* with the intent of expanding the scope of fourth amendment protection. The thrust of the opinion and its privacy language were desigued to force law enforcement agencies to comply with fourth amendment requirements in cases in which they formerly would have been unconstrained by the Constitution. The shift in emphasis from "places" to "people" was simply a realization that fourth amendment interests extend beyond constitutionally protected areas. Thus, the Court in *Katz* held that anytime police activity violates a privacy interest, it is

117. As long as the states provide an opportunity for full and fair determination of fourth amendment claims, there is no longer a right to federal habeas corpus. *See* Stone v. Powell, 428 U.S. 465 (1976). Regardless of whether this full and fair opportunity includes a state appeal, state convictions now are insulated from federal court reversal on fourth amendment grounds. *See* note 275 *infra* and accompanying text.

governed by the fourth amendment. This holding clearly was intended to broaden judicial control over police practices to all cases in which a reasonable privacy expectation is implicated.

Unfortunately, the Court in *Katz* did not—and of course could not—explicate the full range of interests and expectations to be protected. The fluidity and amorphous nature of the privacy model make it impossible to delineate its contours and parameters prospectively. This indeterminancy allows the concept to be molded and manipulated in individual cases to accommodate a particular policy perspective. Consequently, the Supreme Court under Chief Justice Warren Burger has utilized the privacy formula to restrict rather than expand fourth amendment supervision of police practices. Moreover, in addition to taking a narrow view of privacy interests, the Court has limited fourth amendment protection of property interests as well.[118]

### 1. Privacy Interests

The Court struck the first note of disharmony with *Katz* in *United States v. White*[119] when it utilized the privacy notion in a negative fashion to deny fourth amendment protection, holding that there was no justifiable expectation of privacy in voluntary conversations. The Court's rationale in *White* was that when one voluntarily converses with another party, he or she assumes the risk that the other party will divulge the information to the government. The Court also reasoned that the risk assumed is not appreciably greater when the informant simultaneously transmits or records the defendant's comments.[120] From a true privacy perspective, this argument is inapposite for two reasons. First, while an individual who speaks to another person cannot be assured that his remarks will remain absolutely confidential, it is unlikely that he appreciates the risk of their disclosure to the government, or that he assumes this risk has been multiplied by the government's encouragement of his associates to divulge their information to public officials. This proposition unreasonably extends beyond the risks and realities of oral communication in a free society. Second, even assuming that the use of secret agents and informants who report back and testify is not an unfair crime detection practice, the issue

118. In applying the fourth amendment to privacy interests in *Katz*, the Court did not intend to withdraw its protection from property interests. *See* text accompanying notes 170-79 *infra*.

119. 401 U.S. 745 (1971).

120. *Id.* at 751-53.

is altered considerably from a privacy perspective when a participant who is cooperating with the police electronically transmits or records his conversations with the defendant. As Justice Brennan pointed out in his dissent in *Lopez v. United States,*

> [T]here is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. . . . But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy. . . .
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> . . . Electronic aids add a wholly new dimension to eavesdroping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society.[121]

Four years after *Lopez,* a majority of the Court in *Katz* recognized the evils of electronic surveillance and cast doubt on the uncontrolled use of electronically equipped agents.[122] The membership of the Court soon changed, however, and in *White* four justices (plus Justice Black, who concurred for the reasons expressed in his dissent in *Katz*) ruled that the fourth amendment did not apply to participant monitoring because privacy is compromised when one voluntarily carries on a conversation. In a strong dissent, Justice Harlan delineated the threats to privacy and communication that electronic monitoring creates. He emphasized that an additional intrusion upon a person's privacy occurs when a conversation, which is either overheard by others unfamiliar with the situation or later analyzed from a cold, formal recording, is fully disclosed without the benefit of human interpretation and editing.[123] He also stressed that the plurality's position had the potential to inhibit communication and destroy the spontaneity of exchange in daily life, since one could no longer count on either the obscurity of his remarks or the security in speaking to a limited audience.[124]

It is surprising that the Court did not take a different view of electronically equipped agents. From the standpoint of a privacy analysis, the facts in *United States v. White* are virtually equivalent to those in *Katz.* It is doubtful that the defendant in *Katz* would have felt his privacy any less invaded if his call had been monitored and disclosed by the party with whom he was com-

121. 373 U.S. 427, 465-66 (1963) (Brennan, J., dissenting).
122. *See* notes 103-07 *supra* and accompanying text.
123. 401 U.S. at 790 (Harlan, J., dissenting).
124. *Id.* at 787-88 (Harlan, J., dissenting).

municating, rather than electronically intercepted by the government. Viewed from Katz' perspective, the infringement on his privacy is the same. It is strange, then, that the Supreme Court would conclude that the fourth amendment's warrant requirement applies in one case but not in the other. After all—and this point deserves emphasis—the Court in *White* was not asked to outlaw participant monitoring absolutely as a police detection practice; it simply was asked to impose judicial supervision over these methods by requiring compliance with fourth amendment standards.

A similar sacrifice of privacy expectations has been found in other selective disclosure situations. In *United States v. Miller,*[125] for example, the Court held that the petitioner could not challenge a subpeona duces tecum that had been issued for his bank records, which were kept pursuant to the Bank Secrecy Act of 1970.[126] The majority reasoned that the situation was akin to the one in *White* in the sense that by voluntarily conveying the information contained in the financial documents to the bank and its employees, petitioner had forfeited his expectation of privacy and had assumed the risk that the information would be conveyed to the government.[127] The majority's conclusion is perplexing when it is considered that an individual discloses financial information to a bank with the reasonable expectation that the information will not be released except to the bank's immediate employees. As a unanimous California Supreme Court stated in reaching a conclusion contrary to the one in *Miller,*

> It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable. . . . Representatives of several banks testified at the suppression hearing that information in their possession regarding a customer's account is deemed by them to be confidential.
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> . . . .
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> . . . 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 only for internal banking purposes. Thus, we hold petitioner had a reasonable expectation that the bank would maintain the confidentiality of those

125. 425 U.S. 435 (1976).

126. Pub. L. No. 91-508, § 101, 84 Stat. 1114 (1970) (codified at 12 U.S.C. § 1829b(d) (1976)).

127. 425 U.S. at 442-43. *See also* Couch v. United States, 409 U.S. 322 (1973). In *Couch* the Supreme Court held in part that petitioner had no legitimate expectation of privacy in business records, which he voluntarily gave to an accountant, since much of the information bad to be disclosed to the Internal Revenue Service in petitioner's income tax return. The Court thus concluded that the fourth or fifth amendments would not bar production.

> 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 bank practice.[128]

In fact, it cannot be said that financial disclosures to a bank are truly voluntary, since it is a virtual necessity to maintain a bank account in order to participate economically in contemporary society. Indeed, it would seem that the only sensible conclusion to be drawn in these cases is that a bank customer should enjoy a reasonable expectation of privacy in the confidential financial information that he discloses to his bank. Thus, the Court's holding in *Miller* can only be indicative of an attempt to emasculate the *Katz* privacy formula in the interest of lessening judicial supervision over law enforcement activities.[129]

Another example of the Court's attitude toward fourth amendment privacy expectations in the area of selective disclosures is *Smith v. Maryland*.[130] In *Smith* a five-to-three majority held that the fourth amendment did not apply to a pen register, which is a device that records the numbers dialed from a particular telephone. The Court concluded that petitioner in all probability had no actual expectation of privacy in the phone numbers he dialed, and that in any event, such an expectation would not be a legitimate one. While the majority's statements about what petitioner's subjective expectations might have been are questionable, the real import of the case lies in its reliance on *Miller* and the participant monitoring cases for the conclusion that since Smith had voluntarily conveyed the numerical information to the telephone company, he assumed the risk that the company would disclose the numbers he dialed to the government.[131]

Actually, the holding in *Smith* is even more misguided than the decision in *Miller* because the use of the telephone is even less voluntary than the use of bank services. In our transient and scattered society, the telephone is virtually a communications necessity. Although it is true that telephone usage itself is in some sense voluntary, the conclusion that a person assumes the risk of the

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128. Burrows v. Superior Court, 13 Cal. 3d 238, 243, 529 P.2d 590, 593, 118 Cal. Rptr. 166, 169 (1974) (applying CAL. CONST. art. I, § 13, which is virtually identical to the fourth amendment of the United States Constitution).

129. In response to *Miller*, Congress enacted the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (Supp. III 1979), which requires that the bank customer be notified of any federal subpoena or summons for financial records, and generally provides for the right to challenge the subpoena or summons prior to its execution.

130. 442 U.S. 735 (1979).

131. *Id.* at 743-45.

numbers he dials being disclosed ignores both subjective and objective notions of privacy. It is not generally believed, nor is it true in fact,[132] that telephone companies record local calls,[133] and irrespective of mechanical capacity and practice, telephone patrons undoubtedly would be shocked to learn that records of their calls either were available for third parties or were being distributed outside the telephone system. Beyond the necessary internal business practices of the telephone company, people expect their use of the telephone to be absolutely private, and it is reasonable for them to believe that the numbers dialed from private telephones are as free from uncontrolled government seizure as are their telephone conversations. It would be unreasonable to assume that the defendant in *Katz* would have had less of an expectation of privacy in the numbers he dialed from his own private telephone than he did in the content of a conversation in a public telephone booth. Thus, the exclusion of the fourth amendment probable cause and warrant requirements from the former type of seizure cannot be supported by a distinction drawn on privacy grounds. The Court's reliance on the privacy formula in *Smith,* therefore, was both misleading and misplaced.

The selective disclosure cases are a prime example of the Supreme Court's use of the privacy concept, which originally was designed to expand the scope of fourth amendment protection, to draw unrealistic distinctions in favor of law enforcement. Extrapolating a complete forfeiture of privacy from a minor voluntary disclosure for a specific, limited purpose is indicative of a complete lack of appreciation for the notion of relativity. Privacy is not an all or nothing phenomenon; rather, it is a relative concept centering around the right to limit the access of others to our personal and private lives.[134] The foundation for such a privacy concept rests in a person's ability to circumscribe the disclosure of information about himself. Of necessity, privacy must be viewed and defined at least in part as the control over acquaintanceships and disclosures,[135] for absolute privacy in modern society is simply un-

132. *See generally id.* at 745.

133. The calls made by the petitioner in *Smith v. Maryland* were local calls. *Id.* at 745.

134. Gavison, *Privacy and the Limits of Law,* 89 YALE L.J. 421 (1980). The author notes that pure privacy, in the sense of absolute inaccessibility, is unattainable in any society.

135. *Id.* at 426-27. *See also* Gross, *Privacy and Autonomy,* NOMOS XIII, PRIVACY 169 (R. Pennock & J. Chapman eds. 1971) (Yearbook of the American Society for Political and Legal Philosophy).

attainable unless one lives the life of a recluse.

In a related vein, Professor Weinreb presents a rather effective example to illustrate this concept of the relativity of privacy. He suggests that when people are moving about in public—on the streets, in parks, or wherever—they retain an element of privacy in the form of anonymity, which he describes as the "privacy of presence."[136] Although people generally expose themselves voluntarily to personal observation, their assumption is that this observation is both ephemeral and unrecorded, and not subject to the wholesale televised or videotaped monitoring of their every action and acquaintance.[137] Unquestionably, this kind of monitoring of people's daily lives would alter drastically the nature of our society.[138]

Whether walking in public, using the telephone, or disclosing personal information to accountants, bankers, doctors, or lawyers, people do not intend to sacrifice entirely the sphere of privacy that surrounds their daily affairs. They merely make a choice, forced by the necessities of contemporary life, to reveal private information about themselves selectively for a narrow and limited purpose.[139] Indeed, in a different context, the Supreme Court itself has recognized that limited disclosure does not destroy privacy interests. In

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136. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52 (1974). Weinreb poses the hypothetical, *see id.* at 81-82, of monitoring on television every person and occurrence in New York City's Central Park—"put[ting] the whole park 'on television' from dusk to dawn." He observes that

> [t]he park might [then] be abandoned not only by the muggers, but also by lovers holding hands in secret or just in private, friends wanting to talk intimately with one another, an artist wanting to paint or think to himself, people doing all sorts of innocent things they would not do on television.

*Id.* at 82. If this monitoring were extended to other public places, there is no question that people would suffer an equivalent loss of privacy while in public.

The cases which hold that electronic tracking invades legitimate privacy expectations are an illustration of Professor Weinreb's point. *See* United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd en banc*, 537 F.2d 227 (5th Cir. 1976) (per curiam); United States v. Bobisink, 415 F. Supp. 1334 (D. Mass. 1976).

137. Weinreb, *supra* note 136, at 81-82.

138. *Id.* at 82-83. The videotapings in the Abscam cases are examples of the kinds of intrusions that would lead us to be a more circumspect and secretive society. Although this type of electronic and video monitoring of private conversations and transactions generally is prohibited when no one involved consents, televised intrusions upon our public activities might be permissible if the notion of the relativity of privacy were not recognized.

139. Recognition of the relativity of privacy concept also calls into question those cases that validate a third party's consent to be searched. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (holding that petitioner had no privacy interest in items he placed in companion's purse); United States v. Matlock, 415 U.S. 164 (1974) (holding that petitioner had no privacy interest in items found in shared living quarters).

*Whalen v. Roe*[140] the Court upheld the constitutionality of a state statute that required records to be kept of the identity of persons for whom certain lawful but dangerous drugs were prescribed. The Court rejected the invasion of privacy claim in part because the statute limited disclosure of the information to the state health agency's employees.[141] If it were in fact true that a limited disclosure results in a complete forfeiture of any expectation of privacy, it would seem to follow that the Court in *Whalen* would have been led to declare the statute unconstitutional on the ground that it required the defendant to forfeit a privacy right.

To hold in the fourth amendment context that a narrow, selective disclosure completely destroys any legitimate expectation of privacy is completely incompatible with the privacy concept. Such a holding—whether it is viewed commonsensically or constitutionally—can only be analyzed as part of an adjudicative model that favors police practices and simultaneously distorts the notion of privacy.[142] This is unfortunate, since it makes the scope of constitutional privacy narrower than that reasonably available in everyday life. Fourth amendment privacy interests should be at least coextensive with the privacy society has been able to achieve or retain for itself without the aid of the courts. The language Justice Black used in his *Katz* dissent about the Court's "clever word juggling" to get beyond the narrow trespass rationale[143] has never been more apropos. He would be content, perhaps, to learn that the words are now being juggled back.

It would be impossible to complete a discussion of the Supreme Court's current infidelity to the *Katz* privacy standard without some mention of the Court's automobile cases. The Court has concluded in a series of cases[144] that the driver of an automobile

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140. 429 U.S. 589 (1977).

141. *Id.* at 602.

142. Although the privacy concept may have a rather broad constitutional base, *see* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965), the fourth amendment is its source in the search and seizure context. *See* Katz v. United States, 389 U.S. 347 (1967).

143. Katz v. United States, 389 U.S. 347, 373 (Black, J., dissenting).

144. *See* United States v. Chadwick, 433 U.S. 1, 12-13 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976); Texas v. White, 423 U.S. 67 (1975); Cardwell v. Lewis, 417 U.S. 583, 591-92 (1974); Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973); Chambers v. Maroney, 399 U.S. 42 (1970); Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967); *cf.* Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979) (holding that police must obtain a warrant before searching luggage taken from an automobile that was properly stepped and searched).

has only a diminished expectation of privacy in his vehicle, and that, consequently, if the police have probable cause they can search it without a warrant. This reduction in privacy expectations is justified on the grounds that automobiles constantly are exposed to the public and frequently are subject to extensive official regulation and monitoring.[145] While this rationale might justify stopping a vehicle without a warrant—or on less than probable cause—and cursorily surveying that part of the interior which is within the officer's view, it hardly justifies a thorough, warrantless search of the glove compartment and trunk. It is axiomatic that the trunk of a vehicle serves the same function as a briefcase, suitcase, or footlocker—to transport personal items from one place to another. The Court's rationale in the automobile cases, therefore, conflicts with its own analysis in *United States v. Chadwick*[146] and *Arkansas v. Sanders*,[147] cases in which a majority held that a legitimate expectation of privacy exists in a footlocker and a suitcase, respectively. In *Sanders* the police found the suitcase in a vehicle's trunk; nevertheless, the Court found the privacy interest intact. One must contemplate carefully the difference between a traveller's trunk, a motorist's trunk, and a "trunk within a trunk" to find a workable distinction among them.[148]

The concept of a diminished expectation of privacy in an automobile has not altered the result in fourth amendment adjudication concerning owner-drivers; it has simply moved the focus from one questionable analysis—mobility—to another—diminished privacy.[149] The Supreme Court has virtually eliminated fourth amendment protection of passengers, however, by concluding in *Rakas v. Illinois*[150] that they have no expectation of privacy in the vehicles in which they are riding. This holding is considerably more problematic than the diminished privacy notion because it means, somewhat surprisingly, that the police are practically un-

145. *See* notes 82-85 *supra* and accompanying text.

146. 433 U.S. 1 (1977).

147. 442 U.S. 753 (1979).

148. Some courts have rejected the view that a motorist's expectation of privacy in his automobile trunk is diminished. These courts consequently have required a warrant as a prerequisite to a search. *See* Wimberly v. Superior Court, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976); Commonwealth v. Long, 489 Pa. 369, 414 A.2d 113 (1980) (relying on *Chadwick*). In a similar vein, the cases refusing to recognize police authority to conduct inventory searches following the impoundment of a vehicle are also noteworthy. *See* State v. Rome, 354 So. 2d 504 (La. 1978); State v. Goodrich, 256 N.W.2d 506 (Minn. 1977); State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

149. *See* note 84 *supra*.

150. 439 U.S. 128 (1978).

controlled by fourth amendment requirements when dealing with passengers. Presumably, then, the police now can stop and search a vehicle without probable cause at will, and passengers cannot complain because their fourth amendment rights have not been invaded.

The decision in *Rakas* is unsatisfactory for two major reasons. First, the *Rakas* majority of five Justices neither convincingly distinguishes previous cases in the area nor adequately explains why a person lawfully present in a vehicle should not be able to rely on the established standard of privacy and security in the place searched.[151] Speaking for the Court, Justice Rehnquist recognized that privacy interests are not restricted to one's own home and that the sphere of privacy moves with the person.[152] Thus, it would seem to follow that when an owner invites someone to share the benefits of his private property, the invitee should enjoy any concomitant privacy expectation that the property will be free from unwarranted official intrusion. Indeed, it is unclear why a legitimate presence on private property[153] is not equivalent to a legitimate expectation of privacy.[154] Nevertheless, the majority in *Rakas* rejected outright the "legitimately on the premises" standard of *Jones v. United States*.[155] Moreover, Justice Rehnquist suggested that regardless of the Court's repudiation of this standard from *Jones*, that case was factually distinguishable from *Rakas* on a privacy basis, since Jones had permission and the key to use his friend's apartment, kept possessions there, and was present at the

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151. Rakas argued that his fourth amendment rights had been implicated because his occupancy of the vehicle satisfied the "legitimately on the premises" standard for fourth amendment standing that was established in Jones v. United States, 362 U.S. 257 (1960). The Supreme Court, however, rejected the approach used in *Jones* for an inquiry based on whether petitioner had a legitimate expectation of privacy in the place searched. 439 U.S. at 140-43.

152. 439 U.S. at 142. *See also* Weinreb, *supra* note 136.

153. *See* notes 67-71 & 151 *supra* and accompanying text.

154. Justice Rehnquist's majority opinion, in an attempt to illustrate the difference between presence and privacy, uses two extreme examples: (1) a visitor in the kitchen of a home when the basement is searched; and (2) a visitor who enters a home immediately before and leaves immediately after a search. He concludes that in neither case would the visitor have a legitimate expectation of privacy warranting constitutional protection. 439 U.S. at 142. If in both cases, however, the visitor on the private property has a sufficient interest in articles located in the place searched, and the articles are sought to be introduced against him as evidence of guilt, then it would seem that he has a legitimato expectation of privacy in the place where the articles were left, regardless of whether the visitor was on the premises during the search. *See* notes 191-214 *infra* and accompanying text.

155. 362 U.S. 257 (1960). *See* notes 67-71 & 151 *supra* and accompanying text.

time of the search.[156] The only real factual distinction between *Jones* and *Rakas,* however, is that the defendant in *Jones* had a key; yet, a key was irrelevant to the defendant in *Rakas* because the owner was present and voluntarily allowed him to enter the vehicle.[157]

The Court in *Rakas* also failed to distinguish convincingly the communicative privacy of a phone booth, which was protected in *Katz,* from the physical privacy of an automobile.[158] Justice Powell, in a concurring opinion joined by the Chief Justice, suggested that an important factor in determining fourth amendment protection is whether a person takes normal precautions to protect his privacy. To support this proposition, the Justice cited *Chadwick,* in which the Court held that the petitioner had a legitimate expectation of privacy in a locked footlocker.[159] Again, it is difficult to grasp the difference between the precautionary measures taken with a locked footlocker and those taken with a locked glove compartment in an automobile. In fact, it seems completely illogical to conclude that a passenger in an automobile has no expectation of privacy in the articles he places in the vehicle's trunk.[160]

The second major defect in the Court's view of the interests of a passenger in an automobile is that it conflicts with the Court's own deterrence justification for the exclusionary rule. Law enforcement officers now know that as long as it is a passenger who is prosecuted, they can stop a vehicle without probable cause, search it, and be entirely unsanctioned by the exclusionary rule. The rule thus loses its deterrent effect upon this type of lawless police behavior. This is not to say, however, that *Rakas* grants the police a carte blanche against passengers in vehicles, since a passenger does retain some personal privacy interests. He enjoys an expectation of privacy in his person, for example, as well as in items such as a suitcase or briefcase that he uses to carry his personal ef-

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156. 439 U.S. at 149 (1978).

157. *See id.* at 165 (White, J., dissenting).

158. The majority opinion attempts to distinguish *Katz* on the ground that Katz entered the telephone booth, shut the door behind him, and paid the toll. *Id.* at 149.

159. *Id.* at 152-53 (Powell, J., concurring); *see* notes 146-47 *supra* and accompanying text. Note also the majority's reliance on this factor in Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

160. *See* 439 U.S. at 148 (1978). Justice Powell's statement that "the shared experience of us all bears witness" that passengers have no reasonable expectation that a car in which they had been riding will not be searched, *id.* at 155, is equally implausible and assumes too much.

fects—regardless of where they might be located in the vehicle.[161] In addition, a stop of the vehicle in which he is riding at least must be justified under the reasonableness standard embodied in *Terry v. Ohio*;[162] otherwise, evidence discovered in a subsequent search of the vehicle would be the fruit of his illegal detention. Notwithstanding these protections, however, when an automobile is legally stopped—for example, for a traffic infraction—under *Rakas* the police are free to search the car thoroughly without complying with constitutional requirements, and the passenger cannot complain. This lack of constraint presents a framework in which there may be nothing to lose and something to gain by the illegal search of a car that carries more than one occupant. If officers lack probable cause, theoretically under the fourth amendment they cannot conduct a legal search; however, if there are persons in the car other than the driver-owner, the legality of the search is irrelevant because, according to *Rakas*, the passengers have no expectation of privacy and thus cannot invoke the fourth amendment.[163]

### 2. Property Interests

This Article has emphasized that the Supreme Court's recent decisions applying the *Katz* privacy formula appear to be somewhat illogical and unrealistic, in addition to being a clear aid to law enforcement agencies. Not surprisingly, however, privacy interests have not been the only victim of the Court's current infidelity to *Katz*, since property interests also have suffered. Moreover, in a process similar to the one witnessed in the privacy cases, the erosion of protection for property interests has resulted in a constric-

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161. *See* United States v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 422 U.S. 753 (1979). *But see* New York v. Belton, 101 S. Ct. 2860 (1981). The Court in *Belton* held in the 1980-81 term that following a custodial arrest of the occupants of a vehicle, the vehicle's entire passenger compartment—including any open or closed containers found therein—could be searched without a warrant incident to the arrest. The majority relied on Chimel v. California, 395 U.S. 752 (1969), to conclude that the lawful custodial arrest justified the invasion of any privacy interests. This expansion of the *Chimel* search-incident-to-arrest doctrine dealing with automobiles provides a fairly clear picture of the Court's current attitude toward vehicular searches.

162. 392 U.S. 1 (1968). *See* notes 34-41 *supra* and accompanying text. *See also* Brown v. Texas, 443 U.S. 47 (1979); Adams v. Williams, 407 U.S. 143 (1972). If at least a reasonable suspicion were not necessary to "stop" a passenger, the Court's decision in *Rakas* would directly conflict with Delaware v. Prouse, 440 U.S. 648 (1979), in which the Court held arbitrary vehicular stops for license and registration checks to be unconstitutional.

163. For an example of the government affirmatively counseling its agents that the fourth amendment standing limitation permits them to conduct illegal searches and seizures to gain evidence against third parties, see United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977), *aff'd per curiam*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980).

tion of prior fourth amendment doctrine.

The fourth amendment, of course, speaks of "papers and effects" in addition to "persons" and "houses."[164] The United States Supreme Court in 1951 recognized the clear import of this language in *United States v. Jeffers*[165] when it held that a property interest in narcotics that had been seized was sufficient to establish standing to challenge the police search in question.[166] In addition, other cases decided prior to *Katz* relied on property interests to confer standing to raise fourth amendment claims. The "automatic standing" notion adopted in *Jones v. United States,*[167] for example, was motivated by an appreciation of the dilemma that the same "possession both convicts and confers standing."[168] To avoid placing the defendant in the unenviable position of having to admit possession of narcotics to establish standing and then be faced with the introduction of the same testimony against him at a trial on the merits, the Court in *Jones* held that a person charged with a possessory offense has automatic standing to challenge the relevant search and seizure.[169]

The decision in *Katz v. United States,*[170] which relies on privacy expectations rather than property interests, was not intended to alter completely the fourth amendment focus. Although *Katz* admittedly can be read either as a displacement of the property analysis by one based on privacy or as merely an adjunct to the protection of property interests, Justice Stewart's remark to the

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164. *See* note 2 *supra.*

165. 342 U.S. 48 (1951).

166. Although Justice Rehnquist's majority opinions in *Rakas* and United States v. Salvucci, 448 U.S. 83 (1980), attempt to explain the defendant's standing in *Jeffers* on the ground that he claimed a "possessory interest in both the premises searched and the property seized," *id.* at 91 n.5, the crux of the *Jeffers* decision clearly is its emphasis on the defendant's property interest in the narcotics. United States v. Jeffers, 342 U.S. 48, 52-54 (1951).

167. 362 U.S. 257 (1960).

168. *Id.* at 263.

169. In addition to the conflict between the fourth and fifth amendments, the Court recognized that requiring a defendant to establish standing in a possessory offense case allowed the government to take advantage of contradictory positions—claiming an absence of possession in the suppression hearing while arguing sufficient possession to establish guilt at trial. *Id.* The Supreme Court recently held, in United States v. Salvucci, 448 U.S. 83 (1980) (overruling *Jones*), that the fourth and fifth amendments dilemma had been eliminated by Simmons v. United States, 390 U.S. 377 (1968), a case in which the Court held testimony given in a suppression hearing to establish standing inadmissible at trial. The Court also stated in *Salvucci* that the contradictory positions problem had been eliminated by *Rakas,* which placed the fourth amendment focus clearly and exclusively on privacy. *See* 448 U.S. at 90; text accompanying notes 180-85 *infra.*

170. 389 U.S. 347 (1967).

effect that the "[fourth] [a]mendment protects individual privacy against certain kinds of governmental intrusion but its protections go further, and often have nothing to do with privacy at all,"[171] seems to indicate that the Court intended the latter. *Katz* thus can be seen as part of an effort both to expand the fourth amendment beyond the confines of trespass law[172] and to provide protection for conversational privacy when there might be no real or personal property interest involved. Simply put, *Katz* represents the Supreme Court's response to the new technological intrusiveness of an advanced society. Indeed, the Court made clear that it did not intend to disavow property interests in subsequent cases such as *Alderman v. United States*,[173] in which it held that a homeowner had standing to challenge the admissibility of electronically seized conversations occurring on his premises regardless of whether he was present or a party to these conversations. In spite of Justice Harlan's strong dissent arguing that an absent homeowner who has no property interest in the conversations seized can have no privacy interest at all in such cases, the majority concluded that the homeowner nevertheless may object because the fourth amendment expressly protects the house itself.[174]

Other Supreme Court[175] and lower court decisions[176] since *Katz* likewise have recognized that a defendant could raise a fourth amendment challenge by claiming a possessory interest in the items seized. It is not surprising, then, that Justice Rehnquist continually suggested in *Rakas* that the situation would have been different if Rakas had claimed a property interest in the rifle or shells seized from the vehicle.[177] In fact, after the *Rakas* decision,

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171. *Id.* at 350. *See* Amsterdam, *supra* note 2, at 385; Trager & Lobenfeld, *supra* note 14, at 451; Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 172-82 (1977).

172. *See* text accompanying notes 44-51 *supra*.

173. 394 U.S. 165 (1969).

174. *Id.* at 176-77.

175. In Brown v. United States, 411 U.S. 223 (1973), for example, the Court denied the petitioners standing because they did not "allege any legitimate interest of any kind in the premises searched *or the merchandise seized*." *Id.* at 229 (emphasis added). In Arkansas v. Sanders, 442 U.S. 753 (1979), the Court stated that "[r]espondent concedes that the suitcase was in his property . . . and so there is no question of his standing to challenge the search." *Id.* at 761 n.8.

176. *See* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRETRIAL RIGHTS § 77 (1972 & Supp. 1980) (collecting cases).

177. Rakas v. Illinois, 439 U.S. 128, 129, 130, 142 n.11, 144 n.12, 148 (1978). Justice Rehnquist's strongest statement about property interests is made when he says,

> 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

it seemed that the simple solution for a defendant was to claim an interest in the property seized and rely on *Simmons v. United States*[178] for the assurance that this testimony could not be introduced later by the prosecution at trial.[179]

The Supreme Court, as well, must have recognized this simple solution because in two cases handed down during the final week of the 1979-80 term a majority held, for the first time, that a possessory interest in the items seized in an illegal search does not necessarily establish a violation of a fourth amendment interest. Thus, in *United States v. Salvucci*[180] the Court overruled the automatic standing rule of *Jones*. The majority first concluded that *Simmons* had eliminated the fourth and fifth amendment dilemma by its holding that testimony given in a suppression hearing to establish standing is not admissible at trial.[181] In examining the other rationale underlying automatic standing—prosecutorial contradiction—Justice Rehnquist, again writing for the majority, indicated that *Rakas* had solved this problem when it placed the fourth amendment focus clearly and exclusively on privacy.[182] He then stated that the underlying assumption in *Jones* that a possessory interest in property seized is sufficient to establish fourth amendment standing had been discredited. For this proposition

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to the understandings that are recognized and permitted by society. One of the main rights attaching to property 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.

*Id.* at 144 n.12.

178. 390 U.S. 377 (1968). *See* note 169 *supra.*

179. Neither petitioner in *Rakas* asserted an interest in the rifle or shells seized from the automobile. Why they did not rely on *Simmons* is unclear. Possibly the defendants' attorney was unaware that testimony given to establish standing was not admissible at trial. The negative psychological impact of an admission of ownership also may have been a factor. The most likely reason, however, is that testimony offered in a suppression hearing to establish standing is admissible under Illinois law for impeachment at trial if the defendant takes the stand. *See* People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974), *cert. denied,* 420 U.S. 936 (1975).

Interestingly, in a current postconviction proceeding alleging ineffective assistance of counsel, both petitioners are claiming an interest in the property. King is now claiming an ownership interest in the car (the driver-owner is King's former wife, and he seems to be claiming that they brought the car together), and Rakas is asserting ownership of the rifle. Both are claiming that their counsel was ineffective because of their failure to establish these claims at the suppression hearing. *See* J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1978-1979, at 163-65 (1979).

180. 448 U.S. 83 (1980).

181. *Id.* at 89.

182. *Id.* at 92-93. *See* note 169 *supra* and accompanying text.

the Justice cited *Rawlings v. Kentucky*,[183] decided the same day, in which the Court perfunctorily rejected the petitioner's claim that his asserted ownership of drugs found in a companion's purse entitled him to challenge the search regardless of whether he had a privacy interest in the place where they were found.[184] Although Justice Rehnquist concluded that property ownership is a factor to consider, he stated that the central focus in determining whether fourth amendment rights have been violated is whether the defendant has a legitimate expectation of privacy in the invaded place.[185] Based on these considerations, a prosecutor thus could argue consistently that the defendant did not have a legitimate privacy interest in the place searched, but nevertheless was in sufficient control of the items seized to indicate evidence of guilt.

Taken together, *Salvucci* and *Rawlings* establish the proposition that property interests alone are no longer protected by the fourth amendment. The Court's cursory adoption of this position seems cavalier in light of the language of the fourth amendment and the Court's own precedents. This stance appears to be an effort by the Court to prevent circumvention of its restrictive expectation of privacy formula, a possibility left open in *Rakas* by Justice Rehnquist's continual reference to the petitioners' failure to claim an interest in the property seized.

The Court's view of property interests under the fourth amendment is difficult to accept primarily because the language of the fourth amendment directly covers these interests. The amendment expressly speaks to "seizures" of "effects;" therefore, this constitutional provision is activated whenever an individual's property is seized, irrespective of any privacy interest. A disingenuous argument might be made that an illegal search of *A's* premises violates no fourth amendment privacy interests of *B;* therefore, when *B's* property is uncovered in such a search, it is in plain view, and, assuming it is contraband or evidence of a crime, probable cause then exists to seize it. As pointed out by Justice Marshall's dissent in *Rawlings*,[186] however, this argument was squarely rejected in *United States v. Jeffers*,[187] in which the Court stated,

> The Government argues . . . that the search did not invade respondent's

183. 448 U.S. 98 (1980).

184. *Id.* at 105.

185. United States v. Salvucci, 448 U.S. 83, 91-92 (1980).

186. Rawlings v. Kentucky, 448 U.S. 98, 115-16 (1980) (Marshall, J., joined by Brennan, J., dissenting).

187. 342 U.S. 48 (1951).

> privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not helieve the events are so easily isolable. Rather they are hound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this searcli and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right.[188]

It is difficult to imagine how the seizure of a person's property can avoid the application of the protected right to be secure in one's effects.[189] As the language from the *Jeffers* opinion indicates, a search and seizure are not analytically separate events. Justice Marshall perhaps best summarized this premise in *Rawlings* when he said that "[i]f the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable."[190]

Even if property interests are not provided separate fourth amendment protection, but rather are viewed from the Court's privacy perspective, a persuasive argument can be made that this nevertheless should not affect the result in fourth amendment cases. If privacy interests are not static, as the Court recognized in *Rakas,*[191] it would seem that a person should be entitled to share the expectation of privacy associated with another's premises when he voluntarily is permitted to leave personal property there. In *Rakas* Justice Rehnquist indicated that a visitor in the kitchen of a home would not be permitted to object to a search of the basement, and that a visitor who enters immediately before and leaves immediately after the search of a home would likewise not be in a position to object.[192] It is not at all clear, however, why this result would ensue if the government seeks to use the seized evidence against the visitor. On the contrary, it seems that if a visitor on private property has personal effects located there, then he also

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188. *Id.* at 52.

189. Justice Rehnquist's comment in Rawlings v. Kentucky, 448 U.S. 98 (1980), about the fourtb amendment providing no protection for property in plain view, *id.* at 106, is somewhat misleading. Prior to *Rakas, Salvucci,* and *Rawlings,* if the defendant's property were found in another person's home, the defendant could have challenged the entry of the home. *See* United States v. Jeffers, 342 U.S. 48 (1951). As Justice Rehnquist correctly recognizes, even if an officer views property from a public place, prior to *Rakas* the defendant still had a fourth amendment interest in the protection of his property, 448 U.S. at 106; it simply is not violated when the property is plainly visible.

190. Rawlings v. Kentucky, 448 U.S. 98, 118 (1980) (Marshall, J., joined by Brennan, J., dissenting).

191. *See* Rakas v. Illinois, 439 U.S. 128, 142 (1978).

192. *Id.*

has some expectation of privacy in the place where they were left, regardless of whether he is personally present. The property interest thus creates a "legitimate expectation of privacy" in the place where the property is left, and absent consent by the homeowner, the person claiming an interest in this property should be protected by the warrant requirement. Justice Rehnquist himself seemed to recognize this premise in *Rakas* when he stated in a footnote that "[t]his is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search."[193]

Notwithstanding this recognition of property interests by Justice Rehnquist in *Rakas*,[194] the Court in *Salvucci* held that property interests are only one factor to be considered in the privacy equation. Moreover, another source of confusion emanates from the *Rakas* decision. Since the Court in its opinion indicated that the legitimate presence of the defendant was also a factor to consider in determining privacy expectations,[195] it can be argued that the result in *Rakas* would have been different if the petitioners had claimed an interest in the items seized, for then both the factors of presence and a property interest would have existed. The problem with this analysis is that both of these factors were present in *Rawlings*; the defendant was present at the time his female companion's purse was searched, and he claimed ownership of the drugs that were seized. The Court, however, concluded that the defendant enjoyed no expectation of privacy in his companion's purse.[196]

It might be argued that the contraband nature of the drugs seized in *Rawlings* was the factor that led the Court to reject the defendants' privacy claim.[197] Even though the Supreme Court suggested in a footnote to its opinion in *Brown v. United States*[198] that illegitimate property interests might not be protected[199] and even though this view would be consistent with the Court's refusal in *Jones* to grant standing to someone who was not legitimately on

193. *Id.* at n.11.

194. *See* note 177 *supra.*

195. "We 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." Rakas v. Illinois, 439 U.S. 128, 148 (1978).

196. Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980).

197. *See* Trager & Lobenfeld, *supra* note 14, at 438-44.

198. 411 U.S. 223 (1973).

199. *Id.* at 230 n.4.

the premises,[200] such an interpretation of *Rawlings* is questionable for a number of reasons. First, this argument was expressly rejected in *United States v. Jeffers*.[201] Second, *Warden v. Hayden*[202] abolished the distinction between contraband, instrumentalities, and other types of evidence for fourth amendment purposes.[203] Third, Justice Rehnquist in *Rawlings* made absolutely no mention of the contraband nature of the property seized. Last, and most important, the Supreme Court recently found that a defendant had a legitimate expectation of privacy in contraband property. In *Walter v. United States*[204] the Court held that the FBI's unauthorized viewing of pornographic films violated the owner's constitutionally protected interest in privacy, even though the content of the films was revealed by descriptive material on their containers. The recipients of the films had turned them over to the FBI after they discovered them in a package that erroneously had been delivered to them by an interstate shipper. Although it might be argued that the films in *Walter* were not pure contraband because possession of pornography in the privacy of one's own home is not illegal,[205] this distinction is tenuous for the reason that the films in *Walter* were clearly contraband in the setting in which they were discovered.[206] Consequently, it is unlikely that the contraband nature of the property seized in *Rawlings* explains the majority's refusal to find a privacy interest.

If the physical presence of the defendant, coupled with an asserted property interest in the articles seized, does not establish an expectation of privacy, it is questionable what does. The answer appears to be that a defendant also must have a property interest in the place searched,[207] or at least have the right to exclude others.[208] Not only is this further requirement included in the

200. Jones v. United States, 362 U.S. 257, 267 (1960). *See also* Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978).

201. 342 U.S. 48 (1951).

202. 387 U.S. 294 (1967).

203. *Id.* at 301-02.

204. 447 U.S. 649 (1980).

205. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

206. Petitioners in *Walter* were indicted on federal obscenity charges for the interstate transportation of the films, 18 U.S.C. §§ 371, 1462, 1465 (1976). Walter v. United States, 447 U.S. 649, 652 (1980).

207. Justice Rehnquist used this language in his majority opinions in *Salvucci* and *Rakas*. United States v. Salvucci, 448 U.S. 83, 92 (1980); Rakas v. Illinois, 439 U.S. 128, 143 (1978).

208. Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980); Rakas v. Illinois, 439 U.S. 128, 143-44 n.12, 149 (1978).

Court's articulation of its new privacy formula, but it also provides an explanation for all of the recent privacy decisions. In *Payton v. New York*[209] and *United States v. Chadwick*[210] the defendants had an interest in the invaded area—a home and a footlocker. Similarly, in *Walter* the petitioners had the right to exclude others from viewing the films without their consent.[211] The Supreme Court in the selective disclosure cases, on the other hand, has viewed the privacy interests involved somewhat more narrowly as the voluntary relinquishment of the right to exclude others from the information disclosed.[212] Although the owner-driver of an automobile has a property interest in the area to be searched, according to the Court his privacy expectation is diminished, since he does not have the absolute right to exclude others from his vehicle because of the public nature of automobile travel and state regulation. Furthermore, a passenger in a vehicle presumably has neither a property interest in the automobile nor a right to exclude others from it.[213] Likewise, in *Rawlings* Justice Rehnquist emphasized that the defendant had no right to exclude others from his companion's purse.[214] Thus, this narrow protected-place right-of-exclusion view of fourth amendment privacy interests apparently explains the Court's prior cases and clearly indicates the current Court's philosophy and intent to restrict fourth amendment protection to a shrunken core of values within the sphere of privacy interests.

### *B. Clarity and Guidance for Police and the Courts*

While there may be little doubt about the intent underlying the Court's fourth amendment cases, the new formula provides little clarity for prospective fourth amendment adjudication. Although the effort to balance individual rights with the necessities

209. 445 U.S. 573 (1980).

210. 433 U.S. 1 (1977).

211. The Court points out that the petitioners expected no one but the intended recipient to open the packages. Walter v. United States, 447 U.S. 649, 658 (1980). The intended recipient was also an employee of one of the petitioners' companies, *id.* at 651 n.1, so there was no intent at this point to make a disclosure to anyone outside the petitioners' sphere of privacy. This factor distinguishes the selective disclosure cases. *See* note 212 *infra* and accompanying text.

212. *See* notes 119-43 *supra* and accompanying text.

213. Justice Powell, concurring in *Rakas*, suggests that the case might have been different if the petitioners had shown that one of them possessed the keys to the glove compartment (and no rifle had been found under the seat). Rakas v. Illinois, 439 U.S. 128, 155 n.4 (1978) (Powell, J., joined by Burger, C.J., concurring).

214. Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

of law enforcement under the fourth amendment has never resulted in precision for either the courts or the police, the Supreme Court's application of its current three-tiered privacy model clearly has aggravated the problem. One of the first indications of contradiction and uncertainty can be found in the Court's statement in *Rakas* that it could think of no Supreme Court case which would have been decided differently under the new privacy test.[215] The focal point of this remark was the *Jones* case, the result of which the *Rakas* Court specifically indicated would not have been altered by the privacy approach.[216] This conclusion is difficult to understand under most any reasoning. In *Rakas* Justice Rehnquist focused on the particular areas of the car searched—the glove compartment and under the seat—and concluded that the petitioners, who like the defendant in *Jones* had permission to occupy the general area searched, had no legitimate expectation of privacy in these specific places. In *Jones* the evidence had been seized from a bird's nest in an awning outside of a window in the apartment of one of Jones' friends. It would seem, then, that under the Court's new privacy formula, Jones would have had no expectation of privacy in this particular area. Moreover, the difference cannot be explained under a right-of-exclusion theory to the effect that Jones could deny access to the bird's nest by shutting the apartment door and refusing entry, since the awning could have been searched from outside the apartment.[217]

The holding in *Rakas* that a passenger enjoys no expectation of privacy in the car in which he is riding is itself inconsistent with the Court's previous cases. In *Schneckloth v. Bustemonte*[218] and *Chambers v. Maroney*[219] the petitioners were occupants but not owners of the vehicles searched. Although in both cases the searches were upheld—in the former because of consent and in the latter because the Court found a warrant to be unnecessary—the decisions clearly imply that if consent or probable cause had been lacking, the searches would have been invalid. Although the ultimate outcome in those cases was the same as it would be under a *Rakas* analysis, the law clearly has been altered, for now neither

215. Rakas v. Illinois, 439 U.S. 128, 139 (1978).

216. *Id.* at 141, 149.

217. The window and awning in *Jones* were close enough to the ground that an officer was able to observe Jones placing his hand on the awning. Jones v. United States, 362 U.S. 257, 259 (1960).

218. 412 U.S. 218 (1973).

219. 399 U.S. 42 (1970).

consent nor probable cause is necessary to conduct a search in which a passenger is involved. Furthermore, there are at least two cases that struck down searches which apparently now would be valid. In *Dyke v. Taylor Implement Manufacturing Co.*[220] only one of three petitioners owned the vehicle, and in *Preston v. United States*[221] the sole petitioner was a mere occupant.

*Rawlings v. Kentucky* most certainly wonld have been decided differently if it had come before the Court prior to the decision in *Rakas*. Rawlings was legitimately on the premises at the time of the search and claimed ownership of the drugs that were seized. Thus, he would have had standing under the authority of both *Jones* and *Jeffers* to challenge the search involved. Rawlings also would have prevailed on the merits on two grounds. First, the Court in *Rawlings* admitted that the initial detention of the petitioner and his companions while a search warrant was being obtained violated the fourth amendment.[222] Therefore, the subsequent search of the purse belonging to Rawlings' female companion, Vanessa Cox, which produced the drugs introduced against him at trial, as well as the search of Rawlings himself, which produced the $4,500 in cash, would have been held to be the fruit of the initial illegal detention. Nevertheless, this was not the result reached under the Court's privacy analysis, since the illegal detention and subsequent search of Vanessa Cox was held to violate Rawlings' individual privacy interests. Moreover, Rawlings' contemporaneous admission that he owned the drugs also wonld have been inadmissible prior to the Court's decision in *Rakas* as a direct link in the poisonous chain of evidence.[223]

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220. 391 U.S. 216 (1968).

221. 376 U.S. 364 (1964).

222. Rawlings v. Kentucky, 448 U.S. 98, 106 (1980). In *Rawlings* officers entered the house of one Marquess with a warrant for his arrest. While attempting to locate Marquess, the officers smelled marijuana smoke. Two officers left to obtain a search warrant while the remaining officers detained three of the five occupants found on the premises because they refused to consent to a body search. After the officers returned with the search warrant, they gave the *Miranda* warnings to the occupants and ordered Vanessa Cox, Rawlings' female companion, to empty the contents of her purse. Among the contents were a variety of drugs that Rawlings had placed in Cox's purse a short time earlier. When petitioner claimed the drugs he was arrested and searched, and the police found $4,500 in cash on his person. *Id.* at 100-01.

223. Again, under the Court's privacy approach, Rawlings' rights were not violated by Cox's illegal detention and search. That his admission of ownership of the drugs was directly linked to a violation of Cox's privacy rights is, then, constitutionally irrelevant. Petitioner did claim, however, that his incriminating admission was the fruit of his own illegal detention. The majority rejected this argument based on an attenuated rationale found in Brown v. Illinois, 422 U.S. 590 (1975). *See* Rawlings v. Kentucky, 448 U.S. 98, 106-10 (1980).

A second basis upon which Rawlings would have prevailed on the merits of his fourth amendment claim is provided by the Court's decision in *Ybarra v. Illinois*.[224] In this recent case the Court held that a search warrant for particular premises does not authorize a search of persons not named in the warrant who are found there. Thus, *Ybarra* clearly would invalidate the search of Vanessa Cox.[225]

An examination of these cases suggests that the Court's statement in *Rakas* about the consistency between its prior cases and the new privacy perspective was misleading. Furthermore, a good many lower court decisions are now also of questionable validity.[226] The real concern, however, is with the future of fourth amendment law. At least two things seem clear about where it is headed under the Supreme Court's three-tiered version of privacy expectations and interests. First, the test and its application provide the courts and the police with little guidance with respect to fourth amendment requirements. Second, a majority of the Supreme Court has set out to restrict the fourth amendment to a narrow core of protected interests, in much the same way that it has restricted freedom of the press under the first amendment.[227] Unfortunately—or perhaps fortunately—which interests this core encompasses is less than clear under the protected-place/right-of-exclusion language.

It would seem, for example, that personal property interests in some situations deserve protection. If someone is permitted to leave clothing or other items in the home of a friend or a relative, that person expects his belongings to be free from unauthorized official inspection. *Rawlings* suggests, however, that the Constitution might not protect this interest. If the person who owns the personal effects is also present on the premises, according to the Court his privacy interest in these effects is stronger. Nevertheless,

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224. 444 U.S. 85 (1979).

225. *But see* Michigan v. Summers, 101 S. Ct. 2587 (1981). In *Summers* the Court upheld the detention of persons found at the scene of the execution of a search warrant. The Court suggested that the question whether a search warrant for premises includes the right to search persons found there may still be an open one. *Id.* at 2590 n.4. *Ybarra* concerned a search warrant for a public tavern, and it is possible that a majority of the Court at some future time might distinguish public areas from private premises when addressing this issue.

226. See, for example, the cases basing fourth amendment standing on presence at the time of the search, which Justice Rehnquist collects in a footnote to his majority opinion. Rakas v. Illinois, 439 U.S. 128, 145-46 n.13 (1978). Cases that base standing on property interests are also now of doubtful precedential value. *See* notes 175-90 *supra* and accompanying text.

227. *See generally* Ashdown, *supra* note 8.

*Rakas* and *Rawlings* suggest that even this factor might not be relevant if the property is located in the basement, a closet, or a dresser, and the owner is in the kitchen, unless the items have also been placed in a footlocker or a suitcase.[228] It is unclear why the owner of personal property left in a friend's home cannot claim a privacy expectation in that home, at least when he is present, while the homeowner, who is not present, can claim such an interest when his friend's property is seized,[229] unless "arcane property distinctions" really are the decisive considerations on fourth amendment issues.[230]

The Court's application of its new privacy formula to vehicles is even more perplexing. Although the Court has held that persons have only a diminished expectation of privacy in vehicles and therefore are not protected by the warrant requirement, this holding does not apply when the articles seized from an automobile are contained in a footlocker, suitcase, briefcase, purse, tool box, or any "closed, opaque container".[231] In these situations a full, legitimate expectation of privacy attaches.[232] Whereas the results in the privacy cases are clear, however, the distinctions among them are not. Consider, for example, a U-Haul trailer or an enclosed top carrier for a vehicle.[233] The trailer has wheels, and both the trailer and the top carrier move about in the plain view of the public. Nevertheless, a person cannot see inside either container, and neither are subject to extensive state regulation. Similarly, a per-

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228. *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

229. *See* Alderman v. United States, 394 U.S. 165 (1969). *But see* United States v. DiGregorio, 605 F.2d 1184 (1st Cir.), *cert. denied*, 444 U.S. 937 (1979) (no privacy interest in a wallet seized in plain view by agents voluntarily admitted to the home of a defendant who disclaimed any interest in the articles seized).

230. The Court has repudiated the notion that "arcane distinctions developed in property and tort law" are controlling. *See* United States v. Salvucci, 448 U.S. 83, 91 (1980); Rakas v. Illinois, 439 U.S. 128, 143 (1978).

231. In the term just concluded, the Supreme Court, in a plurality opinion written by Justice Stewart, expanded the *Chadwick* (footlocker) and *Sanders* (suitcase) holdings to apply to any closed, opaque container. Robbins v. California, 101 S. Ct. 2841 (1981). In *Robbins* the container in question consisted of two packages wrapped in green opaque plastic, each of which contained 15 pounds of marijuana. *Id.* at 2844. It should be noted, however, that if a custodial arrest of the occupants of an automobile precedes a warrantless search of a closed container—whether it be a suitcase or a wrapped package—the search is justified as incident to the arrest when the container is found anywhere in the passenger compartment of the vehicle. New York v. Belton, 101 S. Ct. 2860 (1981).

232. *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

233. These examples are suggested in Alschuler, *Burger's Failure: Trying Too Much to Lead*, NAT'L L.J., Feb. 18, 1980, at 19, col. 1.

son cannot see inside an automobile trunk or a glove compartment, and all four of these things are repositories of personal effects. In each case, the owner of the vehicle has an interest in the area searched and the right to exclude others. Notwithstanding these similarities, however, it is almost impossible to predict whether the Supreme Court would find a diminished or a fully legitimate expectation of privacy in the trailer and the top carrier. This uncertainty clearly indicates that the line of demarcation between diminished and legitimate privacy expectations is anything but definitive.

The dividing line between diminished and nonexistent privacy interests is even more ambiguous. It will be recalled that a majority of the Supreme Court in *Rakas* held that a passenger in an automobile enjoys no legitimate expectation of privacy in the vehicle in which he is riding and that, consequently, the fourth amendment does not apply to him. This conclusion may be supportable if the passenger is either a hitchhiker or a friend or associate who accompanies the driver in a trip across town. It makes little sense, however, if the riders are family members[234] or the journey is a long distance trip or vacation.[235]

The status of the nonowner-driver is at least equally uncertain. If the owner is present in the vehicle, the driving function should not alter the nonowner's status as a passenger whose rights may depend upon his relationship with the owner and the nature of their trip. If the owner is not present, however, the operator of the vehicle would seem to be in the same position as the defendant in *Jones,* whom the Court in *Rakas* suggested was entitled to an expectation of privacy equivalent to that of the owner because he had both a key and permission to use the apartment and was occupying it at the time of the search. There might be a different result, on the other hand, if the operator borrowed the car from the owner merely to run a short errand. The rights of a car thief might also depend on the tenure of his use and occupancy.[236] Moreover, if

234. *See* Pollard v. Stata, 388 N.E.2d 496 (Ind. 1979) (appellant had a privacy interest in a parked car belonging to his wife); W. LAFAVE, 3 SEARCH AND SEIZURE § 11.3, at 576-77 (1978).

235. The majority in *Rakas* does not reject the possibility that some passengers may have a privacy interest in an automobile, *see* Rakas v. Illinois, 439 U.S. 128, 148 (1978), and Justice Powell, concurring, clearly leaves open the possibility, *id.* at 152 n.1, 155 n.4 (Powell, J., joined by Burger, C.J., concurring).

236. *See, e.g.,* United States v. Pitts, 588 F.2d 102 (5th Cir.), *cert. denied,* 441 U.S. 948 (1979); Glisson v. United States, 406 F.2d 423 (5th Cir. 1969); Cotton v. United States, 371 F.2d 385 (9th Cir. 1967); Simpson v. United States, 346 F.2d 291 (10th Cir. 1965).

the nonowner-driver does acquire an interest in the vehicle sufficient to establish some expectation of privacy in it, the question then becomes whether the owner forfeits his privacy interest during this time. Analogizing to the conclusion in *Alderman* that an absent homeowner retains his fourth amendment rights when the property of another is seized,[237] it would seem that the owner does in fact retain a privacy interest. The selective disclosure cases might suggest the opposite conclusion, however, since they hold that a person loses his expectation of privacy and sacrifices his fourth amendment rights when he voluntarily discloses or conveys something to another.[238]

Still another question that emerges from *Rakas* is why a paying passenger—for example, in a taxi—is protected by the fourth amendment, whereas a gratuitous passenger is not. The proposition that the fourth amendment covers a passenger in a taxi originated in *Rios v. United States*,[239] and Justice Rehnquist's attempt in *Rakas* to distinguish *Rios* on the ground that the property seized in the latter case belonged to the petitioner[240] is contradicted by the conclusion in *Rawlings* that property interests are not controlling. Thus, it would seem that *Rakas* and *Rios* are virtually indistinguishable.

The selective disclosure cases also provide little direction for the police and the courts. Although the principle in these cases is clear enough—voluntary disclosure destroys privacy expectations—its underlying rationale and application nevertheless are perplexing. It contravenes common sense and logic to conclude that a person forfeits his expectation of privacy in information when he discloses it virtually out of necessity to a doctor, a lawyer, or a prospective employer.[241] Even if some other form of constitutional or legal protection were available to a defendant in this situation,[242] it is farfetched to argue that the fourth amendment af-

237. *See* notes 173-74 *supra* and accompanying text.

238. This rationale may offer an explanation for the cases which hold that a person has no expectation of privacy in personal property that is on someone else's premises or in someone else's control. *See* notes 180-93 *supra* and accompanying text.

239. 364 U.S. 253 (1960).

240. Rakas v. Illinois, 439 U.S. 128, 149 n.16 (1978).

241. *See* notes 119-43 *supra* and accompanying text.

242. The fifth amendment no longer provides protection. *See* Andresen v. Maryland, 427 U.S. 463 (1976); *cf.* Fisher v. United States, 425 U.S. 391, 408 (1976) (the fifth amendment applies "when the accused is compelled to make a *testimonial* communication that is incriminating"). The sixth amendment may provide some protection in cases that deal with information given to attorneys following the initiation of adversary criminal proceedings. *See* United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977);

fords no safeguards against privacy invasions once there has been a singular disclosure for a limited purpose. Furthermore, it is equally strained to assert that the police can enter the office of a doctor, a lawyer, or an employer to obtain information about a third party without complying with fourth amendment requirements.[243]

Even the Supreme Court's recent attempt to provide some clarity and consistency to its privacy decisions appears to be problematic. In *Robbins v. California*,[244] a case decided at the end of the 1980-81 term, the Court addressed the issue whether the driver of an automobile was entitled to an expectation of privacy in packages that had been wrapped in green opaque plastic and placed in the car's recessed luggage compartment. Although the packages were found following a legitimate stop and a probable cause search of the vehicle, they were unwrapped without a search warrant. Each package contained fifteen pounds of marijuana.[245]

In *United States v. Chadwick*[246] and *Arkansas v. Sanders*,[247] the Supreme Court had recognized legitimate privacy expectations in a footlocker and a suitcase, respectively, after characterizing the articles as repositories of personal effects.[248] Thus, the government quite understandably argued in *Robbins* that the fourth amendment protects only those containers used to transport personal effects.[249] A plurality of the Justices, however, rejected this argument on two grounds. First, Justice Stewart's plurality opinion concluded that there was no basis in the language or meaning of the fourth amendment to support the government's argument, since the amendment protects people and places regardless of whether they are "personal" or "impersonal."[250] Second, Justice Stewart

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Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964). The attorney-client and physician-patient evidentiary privileges also may apply. *But see* Fisher v. United States, 425 U.S. 391, 402-14 (1976). *See also* Privacy Act of 1974, § 2, 5 U.S.C. § 552a (1976).

243. Of course a warrant would be required for the search to be constitutionally valid against the doctor, lawyer, or employer. The fourth amendment does not, however, prevent such a warrant-authorized search merely because the police are seeking evidence against third parties. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The point is that a search which is invalid (*e.g.*, because of a defective warrant) against the party with an interest in the premises does not violate the fourth amendment rights of a patient, a client, or an employee.

244. 101 S. Ct. 2841 (1981).

245. *Id.* at 2844.

246. 433 U.S. 1 (1977).

247. 442 U.S. 753 (1979).

248. 433 U.S. at 13; 442 U.S. at 762, 764.

249. 101 S. Ct. at 2845-46.

250. *Id.* at 2846.

stated that it was virtually impossible to delineate any workable criteria by which to distinguish containers designed to carry personal effects from containers designed for other purposes.[251] The Court then held that a legitimate privacy expectation attaches to any closed, opaque container and that a warrant is necessary to conduct a valid search.[252]

*Robbins* is significant because a plurality of the Court apparently tried to avoid tightly drawn distinctions in favor of a clear rule of general applicability to cases in which the defendant claims an expectation of privacy in a searched container. Ironically, however, this effort may have backfired precisely because of the rule's lack of clarity. The term "closed, opaque container," although intended to delimit the parameters of protected privacy, does not provide a workable standard by which such boundaries can be delineated. For example, a paper cup, an opaque bottle, a cigarette package, a cardboard box, and a grocery bag are all opaque containers in some sense, but whether they are considered closed will depend on the circumstances in which they are found. More importantly, in a great number of the cases in which such insubstantial containers are a subject of controversy, no one will have a reasonable expectation of privacy in the containers' contents.[253] Consequently, the *Robbins* holding, although broader and more definitive than *Chadwick* and *Sanders*, suffers from the same lack of clarity and imprecision that characterizes the Court's decisions in other fourth amendment privacy cases.

In fact, the risk now exists that the failure of the *Robbins* standard eventually may lead the Court to adopt an actual "bright-line" rule that resembles the one formulated in the factually similar case of *New York v. Belton*,[254] which was decided the same day as *Robbins*. In *Belton* a majority of the Court held that the entire interior of a vehicle, including any closed container found in the passenger compartment, could be searched without a warrant incident to the custodial arrest of the driver. Justice Stewart's majority opinion specified that "the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."[255] Although

251. *Id.*
252. *Id.* at 2847.
253. *Id.* (Powell, J., concurring).
254. 101 S. Ct. 2860 (1981).
255. *Id.* at 2864.

he referred to the functional needs of the police,[256] Justice Stewart seemed concerned primarily with the need to interpret the search-incident-to-arrest standards of *Chimel v. California*[257] in a way that will provide law enforcement officials with a clear statement on the permissible scope of a search following a vehicular arrest.[258]

This interest in clarity ultimately may lead the Court to adopt a similar approach in cases concerning the so-called "automobile exception" to the warrant requirement. A bright-line rule that could be applied easily would permit the warrantless search not only of the vehicle itself but also of any containers found inside. In fact, five Justices already either favor this view or are leaning in that direction.[259] Moreover, such a rule apparently can be adopted without overruling *Chadwick* or *Sanders,* since in both of those cases probable cause existed to search only the footlocker and suitcase, respectively. The automobile exception, therefore, was not applicable.[260]

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256. Justice Stewart's majority opinion states that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.' " *Id.* The opinion then relies on United States v. Robinson, 414 U.S. 218 (1973), for the proposition that the authority to search does not depend upon what a court may later determine was the arrestee's actual ability to reach weapons or evidence.

Thus, the Court clearly has sanctioned the search of a vehicle after the arrestee has been removed therefrom and placed in custody—with no real possibility of seizing anything inside the car. Consequently, at least in cases that deal with vehicles, the Court has abandoned *Chimel*'s functional approach and now uses only its doctrinal underpinnings to define an area that may be searched in all similar cases. *See* New York v. Belton, 101 S. Ct. 2860, 2865-68 (Brennan, J., joined by Marshall, J., dissenting).

257. 395 U.S. 752 (1969).

258. The *Belton* rule itself, however, proves less than clear. A question exists, for example, about how long after the defendant's arrest and removal the car may be searched. Also, the Court's new rule permitting the post-arrest search of the interior of a vehicle—but not the trunk—cannot be easily applied in cases that deal with hatchbacks, station wagons, and vans. *See* 101 S. Ct. at 2689 (Brennan, J., joined by Marshall, J., dissenting).

259. *See* Robbins v. California, 101 S. Ct. 2841, 2851 (1981) (Blackmun, J., concurring); *id.* at 2851-55 (Rehnquist, J., dissenting); *id.* at 2855-59 (Stevens, J., dissenting); Arkansas v. Sanders, 442 U.S. 753, 766-68 (1979) (Burger, C.J., joined by Stevens, J., concurring). Although Chief Justice Burger concurred without opinion in *Robbins,* he apparently did so because the scope of the "automobile exception" was not pressed by the parties, and, more importantly, because he was unable to muster even a plurality for the view he expessed in *Sanders. Id.* Although Justice Powell expressed sympathy for an approach that would permit the warrantless search of containers found in automobiles when probable cause exists to search the vehicle, he declined to embrace it in *Robbins.* He rejected this approach not only because it had not been pressed but also because he was unwilling to nndertake sua sponte reconsideration of the scope of the automobile exception so late in the term. Powell noted, however, that some future case might provide such an opportunity. 101 S. Ct. at 2850-51.

260. *See* Rebbins v. California, 101 S. Ct. 2841, 2855-59 (1981) (Stevens, J., dissent-

The current confusing and paradoxical state of the law that is applicable to the searches of containers found in vehicles makes the eventual adoption of a bright-line rule even more probable. A suitcase found in the backseat of a car, for example, can now be searched without either a warrant or probable cause following the custodial arrest of the driver;[261] if there is not an arrest, however, no amount of probable cause will justify a search regardless of where the suitcase is found in the vehicle.[262] Thus, the recent decisions in *Robbins* and *Belton* have done little to clarify the law in this area and much to confuse it. Unfortunately, this confusion may lead to a simple, though restrictive, solution in which privacy interests are likely to be further sacrificed.

The morass created by the Supreme Court's application of its privacy formula, then, has left the police and the courts without much guidance in fourth amendment law. Although ambiguity is an inherent element in the concept of privacy, the Court's tenuous resolution of privacy issues in an effort to avoid the exclusionary rule has needlessly complicated and confused the law of search and seizure. The inconsistent results reached by lower courts in their recent attempts to deal with the issues presented by electronic tracking devices[263] and garbage searches[264] are perhaps the best ev-

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ing); Arkansas v. Sanders, 442 U.S. 753, 766-68 (1979) (Burger, C.J., joined by Stevens, J., concurring).

261. It should be noted that the Court specifically excluded the trunk of an automobile from the *Belton* holding. New York v. Belton, 101 S. Ct. 2860, 2864 n.4 (1981). Nevertheless, as Justice Stevens noted in his dissenting opinion in *Robbins*, the *Belton* rule might encourage custodial arrests when officers see something interesting inside a vehicle. *See* Robbins v. California, 101 S. Ct. 2841, 2855-59 (1981) (Stevens, J., dissenting). In this way, according to Stevens, it could conceivably grant the police greater authority to search than a magistrate has to issue a warrant. *Id.*

262. *See* New York v. Belton, 101 S. Ct. 2860, 2870 (1981) (White, J., joined by Marshall, J., dissenting).

263. Compare the cases holding the fourth amendment to apply to these devices, *e.g.*, United States v. Michael, 29 CRIM. L. REP. (BNA) 2217 (5th Cir. May 11, 1981) (en banc); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd en banc*, 537 F.2d 227 (5th Cir. 1976); United States v. Bobisink, 415 F. Supp. 1334 (D. Mass. 1976), *vacated on other grounds sub nom.* United States v. Moore, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) with cases in which no privacy expectation was recognized, *e.g.*, United States v. Bruneau, 594 F.2d 1190 (8th Cir. 1979); United States v. Hufford, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002 (1976).

264. *Compare* United States v. Alden, 576 F.2d 772 (8th Cir.) (no fourth amendment interest in trash pile), *cert. denied*, 439 U.S. 855 (1978) *and* United States v. Shelby, 573 F.2d 971 (7th Cir.) (no legitimate expectation of privacy in garbage cans behind defendant's garage), *cert. denied*, 439 U.S. 841 (1978) *with* People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) (fourth amendment applies to search of garbage cans within 2 to 3 feet of defendant's back door).

idence of this unclear state of the law.

One notion that undoubtedly will filter down to police and the courts, however, is the Supreme Court's current policy of restricting the scope of the fourth amendment to a narrow core of privacy values. To be included in this restricted sphere of privacy, a privacy interest must be almost completely insulated from the public, and precautions must be taken to maintain it.[265] If the interest is imperfect, as in the case of an automobile, or is penetrated by even minimal voluntary exposure,[266] at least some element of fourth amendment protection is sacrificed, regardless of whether the interest is in information or property.[267] Indeed, the only privacy interests currently accorded full fourth amendment protection are those that include both an interest in the area searched or the material seized and the legitimate exclusion of others.[268]

This restrictive policy and the ambiguity created by its application are sure to undermine the impact of the exclusionary rule on the police. For one thing, the new approach by its very nature is uncertain and difficult to apply. Perhaps more important, how-

265. The Court has noted the importance of taking normal precautions to protect privacy. *See* Rawlings v. Kentucky, 448 U.S. 98, 105 (1980); Rakas v. Illinois, 439 U.S. 128, 152 (1978) (Powell, J., joined by Burger, C.J., concurring); *cf.* United States v. Chadwick, 433 U.S. 1, 11 (1977) (locking personal effects in footlocker was manifestation of belief that contents would be "free from public examination").

266. Four Justices have even suggested that negligent disclosure might be sufficient to destroy privacy expectations. *See* Walter v. United States, 447 U.S. 649, 665 (1980) (Blackmun, J., joined by Burger, C.J., Powell, J., and Rehnquist, J., dissenting).

267. *See, e.g.*, United States v. Brandon, 599 F.2d 112 (6th Cir. 1979) (car lot open to public); United States v. Reyes, 595 F.2d 275 (5th Cir. 1979) (passenger in airplane); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978) (abandoned boat), *cert. denied*, 440 U.S. 958 (1979); United States v. Jackson, 588 F.2d 1046 (5th Cir.) (conversations overheard by FBI agents in adjoining motel room), *cert. denied*, 442 U.S. 941 (1979); United States v. Eisler, 567 F.2d 814 (8th Cir. 1977) (common hallways in apartment building). *See also* United States v. Humphries, 636 F.2d 1172 (9th Cir.) (driveway of home), *cert. denied*, 101 S. Ct. 2324 (1980); Northside Realty Associate, Inc. v. United States, 605 F.2d 1348 (5th Cir. 1979) (public areas of business); United States v. Dominguez, 604 F.2d 304 (4th Cir. 1979) (another person's boat); Reporter's Committee for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978) (telephone records of toll calls), *cert. denied*, 440 U.S. 949 (1979); United States v. Choate, 576 F.2d 165 (9th Cir.) (information on outside of mail), *cert. denied*, 439 U.S. 953 (1978); Marshall v. Western Waterproofing Co., 560 F.2d 947 (8th Cir. 1977) (scaffolding in public view); United States v. Carriger, 541 F.2d 545 (6th Cir. 1976) (locked hallway in apartment building); United States v. Cruz Pagon, 537 F.2d 554 (1st Cir. 1976) (garage of condominium).

268. *See, e.g.*, United States v. Meier, 602 F.2d 253 (10th Cir. 1979) (backpack); United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978) (briefcase); Gillard v. Schmidt, 579 F.2d 825 (3d Cir. 1978) (guidance counselor's desk); United States v. Diggs, 569 F.2d 1264 (3d Cir. 1977) (locked metal box left with relative); United States v. Speights, 557 F.2d 362 (3d Cir. 1977) (policeman's locker).

ever, law enforcement officials gradually will become aware that both the Supreme Court and the lower courts—the latter as a result of the filtering down process and the political climate—are inclined to resolve the ambiguities in their favor. This attitude of leniency toward police practices, as well as the uncertainty of fourth amendment application, will do little to engender respect for fourth amendment values. It is likely, for example, that despite Justice Powell's opinion to the contrary,[269] the police now will act even more aggressively toward automobiles. Even though police conduct in searches of automobiles traditionally has been treated more permissibly—formerly under the mobility theory—at least probable cause was required to search a vehicle. Now, however, as long as the police can justify a stop,[270] probable cause to search generally is unnecessary when the vehicle has more than one occupant. This new concept, of course, compromises the rights of any persons present who do have protected privacy expectations. Such a scenario in turn impairs the Court's own asserted deterrent policy[271] and, together with the restriction of the scope of the fourth amendment, raises questions about the future viability of the exclusionary rule.

## IV. CONCLUSION

In an effort to aid local law enforcement by avoiding the application of the exclusionary rule, the United States Supreme Court has developed a graduated approach to the fourth amendment based upon degrees of privacy expectations. This scheme basically consists of three categories, with fourth amendment protection increasing as privacy interests become stronger. When the Court is willing to recognize an expectation of privacy as legitimate, a warrant is required. If the Court concludes that the expectation is diminished, probable cause generally is required,[272] although a warrant is not. Most significantly, when the Court is unwilling to recognize any privacy interest whatsoever, the fourth amendment

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269. *See* Rakas v. Illinois, 439 U.S. 128, 152 n.1 (1978) (Powell, J., joined by Burger, C.J., concurring).

270. *See* note 162 *supra* and accompanying text.

271. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 134 n.3, 137 (1978); Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); United States v. Peltier, 422 U.S. 531, 536-39 (1975); United States v. Calandra, 414 U.S. 338, 348 (1974); Harris v. New York, 401 U.S. 222, 225 (1971).

272. The demands of law enforcement may permit something less than probable cause to suffice. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968).

is inapplicable to the police practice in question. This graduated standard is an obvious aid to law enforcement when the Court finds privacy expectations to be diminished or nonexistent. Moreover, the Court has made a further effort to accommodate crime control interests, and at the same time has exacerbated the administrative difficulties inherent in the privacy formula,[273] by applying its scheme in a rather dubious fashion to avoid the imposition of constitutional requirements and the exclusionary rule. In so doing the Supreme Court has restricted the substantive scope of the fourth amendment and has significantly reduced the central role that the amendment formerly played in the criminal process.[274]

While the Court was developing its restrictive privacy formula, it simultaneously gave resolution of these issues back to the states in *Stone v. Powell.*[275] In *Stone* the Court held that if the state provided the defendant with a full and fair opportunity to litigate his fourth amendment claim, then he was not entitled to federal habeas corpus review of the fourth amendment issue. This decision effectively insulated state court fourth amendment decisions from federal review. The Supreme Court thus implemented a policy of accommodating state law enforcement interests by limiting the impact of the exclusionary rule and by simultaneously relegating to the states the issue of its application.

There is, however, a much more efficient way to implement these twin goals and at the same time preserve sound fourth amendment principles. The simple solution may be to overrule *Mapp v. Ohio.*[276] This step would refer the decision on the exclusionary remedy to the states without the imposition of a federal rule. It also would alleviate the pressure on the federal courts to view fourth amendment values narrowly and thereby avoid saddling state prosecutions with inadmissible evidence.[277] The traditional federal exclusionary rule of *Weeks v. United States*[278] would remain as a control on federal law enforcement; more rigorous standards are justified not only because of the sophistication of federal agencies and the superior training of their agents, but also

273. Scholars generally have rejected the idea of a sliding scale approach to the fourth amendment as unadministrable. *See* Amsterdam, *supra* note 2, at 376-77, 390-95; Kaplan, *supra* note 14.

274. *See generally* Miles, *supra* note 8.

275. 428 U.S. 465 (1976). *See* note 117 *supra* and accompanying text.

276. 367 U.S. 643 (1961).

277. *See* Miles, *supra* note 8, at 75-80.

278. 232 U.S. 383 (1914).

because the federal government does not face the same law enforcement problems—either in magnitude or variety—as do the states. The primary reason for the recent demise in the fourth amendment is the Supreme Court's unwillingness to apply the exclusionary rule to the actions of local law enforcement agents. These officers must deal with a much higher volume of criminal behavior than federal agents, and consequently their actions necessarily tend to be reactive and spontaneous compared with the more deliberate federal investigations.[279] With the constitutional straightjacket removed from the states, the Supreme Court then would be free to return the fourth amendment to a respected and central position in the criminal process.

This desire to free the states from a constitutional handicap currently is working to undermine the policy of *Mapp*. Instead of harmonizing state law with more demanding federal constitutional standards, the uniformity dictated by *Mapp* is operating to dilute the standards applicable to the federal government. Not surprisingly, Justice Harlan's concurrence in *Williams v. Florida*,[280] in which the Court upheld Florida's use of six-person juries, stressed this very point. To the extent that the Supreme Court restricts the scope of the fourth amendment to avoid handicapping state law enforcement with the exclusionary rule, federal agents also benefit. In fact, a result entirely the opposite of that envisioned by *Mapp* is occurring in some states. In these jurisdictions the state supreme court has interpreted the state constitution to impose obligations on the police beyond those that the fourth amendment requires;[281] thus, in some states the standards ironically are more rigorous than their federal counterpart.

Retention of the exclusionary rule cannot be justified on the ground that it addresses the political problem of the substantive

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279. Justice Harlan's dissent emphasized this point in Mapp v. Ohio, 367 U.S. 643, 678-83 (1961) (Harlan, J., joined by Frankfurter, J., and Whittaker, J., dissenting).

280. 399 U.S. 78, 117-43 (Harlan, J., concurring).

281. *See, e.g.*, People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (custodial searches); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974) (custodial searches); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (consensual searches); State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (inventory searches). *See also* State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977) (statute prohibiting electronic surveillance); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather Than Federal Law*, 15 AM. CRIM. L. REV. 339 (1978).

scope of the criminal law. That the rule historically has had its greatest application in victimless crime—for example, drugs and gambling—does not mean that it significantly reduces prosecutions and convictions for these offenses. Moreover, its deterrent impact on police practices aimed at these crimes is at best doubtful,[282] and it at least encourages police perjury.[283] Drawing a distinction between serious and victimless crimes, and applying the rule only to the latter as a political compromise, is unsatisfactory.[284] Such a distinction raises serious equal protection problems and is administratively unmanageable.

Whatever its impact on victimless crime, the desire for retention of *Mapp*'s exclusionary rule currently is outweighed by its negative impact on fourth amendment values. Only by removing the constitutional straightjacket from the states will the Supreme Court free itself to return the fourth amendment to a respected and governing position in the criminal process. Furthermore, a broader view of the fourth amendment would remain applicable to the states by virtue of *Wolf v. Colorado*.[285]

It can be argued that this proposal would leave fourth amendment rights without a remedy. The states, however, would be free to adopt their own exclusionary rules, and there is no reason to suppose that most would refuse to do so.[286] Indeed, states would be more likely to adopt their own exclusionary rule than they would be to interpret their constitutional provisions inconsistently with similar federal provisions. In any event, a remedy is superfluous unless there are rights to vindicate, and that seems to be where the Supreme Court currently is headed.

It is of course difficult to predict with precision whether a majority of the Court would adopt a different attitude toward the fourth amendment if the federal exclusionary rule were eliminated.

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282. *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY 223-24 (1977); Oaks, *supra* note 17; Spiotto, *supra* note 17.

283. *See* D. HOROWITZ, *supra* note 282, at 234.

284. *See* Kaplan, *supra* note 14, at 1046-49.

285. 338 U.S. 25 (1949). The Supreme Court in *Wolf* made the fourth amendment applicable to the states through the due process clause of the fourteenth amendment. The Court stated that "we have no hesitation in saying that were a State affirmatively to sanction, such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." *Id.* at 28.

286. Prior to *Wolf*, almost two-thirds of the states were opposed to the use of the exclusionary rule. Even though the *Wolf* Court declined to extend the rule to the states, more than half of the states passing on the question between *Wolf* and *Mapp* nevertheless adopted some form of exclusionary remedy. *See* Mapp v. Ohio, 367 U.S. 643, 651 (1961) (citing Elkins v. United States, 364 U.S. 206, 224 app. (1960)).

From a more pragmatic standpoint, it is also somewhat questionable whether the Court even would review as many fourth amendment cases as it now does. Moreover, the incentive for state litigants to raise search and seizure claims in the criminal process would be reduced significantly if the particular state had not adopted its own exclusionary remedy for fourth amendment violations. Nevertheless, assuming an adequate opportunity for review—at least in federal cases—the Court may well change its perspective on search and seizure questions in the absence of a "constitutional straightjacket" that is imposed on the states.[287] If some states would then adopt either their own exclusionary provisions or some other viable remedy, the criminal process ultimately may be better off, at least in terms of overall constitutional control over police search and seizure practices.

287. Justice Rehnquist has impliedly suggested that the Court might he more favorably inclined toward fourth amendment claims if the shackles of the exclusionary rule were removed from the states. *See* Robbins v. California, 101 S. Ct. 2841, 2851-55 (1981) (Rehnquist, J., dissenting).