Nebraska Law Review

Volume 58 | Issue 4 Article 6

1979

Property Law and Fourth Amendment Privacy Protection: *Rakas v. Illinois*, —U.S.—, 99 S.Ct. 421 (1978)

Ralph F. Rayburn
University of Nebraska College of Law, ralph@rayburnlawoffice.com

Note

Property Law and Fourth Amendment Privacy Protection

Rakas v. Illinois, — U.S. —, 99 S.Ct. 421 (1978).

> The great end for which men entered into society was to secure their property.
>
> *Boyd v. United States*[1]

> [T]he Fourth Amendment protects people, not places.
>
> *Katz v. United States*[2]

> The Court today holds that the Fourth Amendment protects property, not people . . . .
>
> *Rakas v. Illinois*[3]

I. INTRODUCTION

The Supreme Court has in recent years attempted to minimize the social costs[4] involved in the exclusion of illegally seized evidence by focusing solely on the deterrent aspect of the exclusionary rule when balancing societal interest in the rule against societal interest in fourth amendment[5] security or privacy interests. The movement towards limiting the application of the exclusionary rule has seen the Court reject the rule when it would not

1. 116 U.S. 616, 627 (1886) (Bradley, J., majority opinion) (quoting Lord Camden in Entick v. Carrington, 19 Howells 1029 (1765)).
2. 389 U.S. 347, 351 (1967) (Stewart, J., majority opinion).
3. — U.S. —, 99 S. Ct. 421, 437 (1978) (White, J., dissenting).
4. "Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." Id. at —, 99 S. Ct. at 427. *E.g.*, Stone v. Powell, 428 U.S. 465, 489-90 (1976); United States v. Calandra, 414 U.S. 338, 348-50 (1974). Thus, it has been urged that, "the social cost of excluding relevant evidence should be incurred only when it is likely to deter unreasonable searches." White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 338 (1970).
5. The 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 particularly describing the place to be searched, and the persons or things to be seized.

   U.S. CONST. amend. IV.

produce the desired deterrent effect,[6] create an attenuation doctrine,[7] limit collateral review,[8] and decide that some individuals lacked "standing" to raise an objection under the amendment.[9] Central to the Court's reasoning has been the notion that since fourth amendment rights are personal rights, only those individuals whose rights have been violated by an unlawful search or seizure may seek suppression of the evidence.[10]

In *Rakas v. Illinois*,[11] the Supreme Court was presented with the issue of whether passengers had "standing" to object to the warrantless search and seizure of items in an automobile in which they were lawfully riding. In a five-four decision, the Court repudiated its previous statements[12] concerning "standing" and noted that the inquiry was "more properly subsumed under substantive Fourth Amendment doctrine."[13] The Court explicitly rejected the "legitimately on the premises" test[14] expounded in *Jones v. United*

6. Harris v. United States, 401 U.S. 222, 225 (1971).
7. Wong Sun v. United States, 371 U.S. 471 (1963). The attenuation doctrine allows introduction of evidence which has been gained by illegal government activity if the means of acquiring the evidence are sufficiently removed and distinguishable from the initial illegality. The test employed by the Court is: "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488.
8. Stone v. Powell, 428 U.S. 465 (1976).
9. Brown v. United States, 411 U.S. 223 (1973). *See* Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421 (1975).
10. Alderman v. United States, 394 U.S. 165, 174 (1969). *See, e.g.*, Brown v. United States, 411 U.S. 223, 230 (1973); Simmons v. United States, 390 U.S. 377, 389 (1968); Wong Sun v. United States, 371 U.S. 471, 492 (1963). *See also* Zurcher v. Stanford Daily, — U.S. —, 98 S. Ct. 1970, 1980 n.9 (1978). The Court's early struggle with defining the scope of the amendment emphasized invasions upon personal property interests. The underlying analysis employed by the Court has been described as follows:

> [T]he amendment refers to the right of the people to be secure in 'their' persons, houses, papers, and effects. Although the word 'their' is the plural, the Court has not allowed the defendant to raise a third person's fourth amendment rights. He may only assert his rights. 'His' is a possessive word, meaning the defendant must have possessed the property being searched or seized before his interests are protected by the amendment. Possession is a property concept, so property law is controlling. The early standing litigation, therefore, involved definitions of property interests as well as the scope of the amendment.

Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 29 (1975).
11. — U.S. —, 99 S. Ct. 421 (1978).
12. *See* text accompanying notes 39-49 & 75-76 *infra*.
13. — U.S. —, 99 S. Ct. at 428.
14. *See* text accompanying note 49 *infra*.

States[15] as a test for "standing." Mr. Justice Rehnquist, writing for the majority, stated that where passengers "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized,"[16] the passengers failed to show a legitimate expectation of privacy sufficient to claim a violation of their own fourth amendment rights.[17]

The Court, by distinguishing both *Jones v. United States*[18] and *Katz v. United States*[19] on their facts,[20] implicitly shifted back in its fourth amendment analysis to the importance of property law concepts in defining the area in which an individual may legitimately hold a reasonable expectation of privacy from governmental intrusion. By so holding, the Court reopened the question of exactly when and under what circumstances an individual can properly claim fourth amendment protection.

This note will discuss the concept of standing as it relates to the fulfillment of the purposes of the exclusionary rule. It will also discuss the relationship of privacy and property interests as they are used by the Court to define the scope of fourth amendment protections.

II. THE FACTS OF *RAKAS*

On the evening of February 4, 1975, a clothing store in Bourbonnais, Illinois was robbed by two masked men. A police officer on routine patrol on a highway, four and one-half miles north of the robbery site, was given a radio description of the two men and of the getaway car.[21] After receiving this information, the police officer observed a car of similar make and model, but of a different color and bearing a different license number. The officer followed the vehicle which was being driven by a woman and which contained one female and two male passengers. The car was eventually stopped by several police officers and the occupants were ordered from the vehicle at gunpoint. The vehicle was searched by two officers who discovered a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front passenger's seat.[22] Before the search, none of the occupants were placed under arrest. Permission to conduct the search was neither sought

15. 362 U.S. 257 (1960).
16. — U.S. —, 99 S. Ct. at 433.
17. *Id.* at —, 99 S. Ct. at 434 n.17.
18. 362 U.S. 257 (1960).
19. 389 U.S. 347 (1967).
20. — U.S. —, 99 S. Ct. at 434.
21. Brief for Respondents in Opposition to Writ of Certiorari at 5, Rakas v. Illinois, — U.S. —, 99 S. Ct. 421 (1978). The actual getaway car was a vehicle taken from one of the victims of the robbery. Reply Brief for Petitioners at 5.
22. — U.S. —, 99 S. Ct. at 392.

nor given and the seized evidence was not visible outside the vehicle.[23] Upon discovering the rifle and shells, the occupants of the vehicle were placed under arrest.

Before trial, the defendant-passengers moved to suppress the rifle and shells seized on the ground that the search violated the fourth and fourteenth amendments. The defendants conceded that the woman driving the car owned the vehicle. At the suppression hearing the prosecutor made an oral motion to dismiss on the ground that the defendants lacked "standing," having failed to assert ownership of the seized items. The trial court, agreeing with the argument, denied suppression.[24] As a result, the court did not determine whether there was probable cause for the search and seizure. The gun and shells were eventually introduced into evidence at the trial and the defendants were convicted for the robbery of the clothing store.[25]

The appellate court affirmed the trial court's ruling, reasoning that "without a proprietary or other similar interest in an automobile, a mere passenger therein lacks standing to challenge the legality of the search of the vehicle."[26] The Supreme Court took the case on a writ of certiorari after the Illinois Supreme Court denied leave to appeal.[27]

III. HISTORICAL BACKGROUND

One of the early statements of the Supreme Court with regard to the scope of the protections afforded by the fourth amendment

23. Brief for Petitioners at 4.

24. Brief for Petitioners at 4-6. The discussion which was raised at the hearing and decided adversely as to the defendants proceeded in part:

> [Prosecutor]: We move to dismiss on the basis of *Alderman v. United States*, 394 U.S. 165. The Supreme Court says that as to the Fourth Amendment, there is no standing to contest its validity under these circumstances. It has to be the one whose rights are violated — the aggrieved party — by the introduction of damaging evidence. It wasn't their [Petitioners'] car. It wasn't their shells. It wasn't their rifle. I think the only one that has standing would be Janette [sic] Clontz [owner] and she isn't here.
>
> [Defense counsel]: She isn't charged in this at this time. *And I don't think they have to admit these are their items.* I think they do have a standing which they have shown.
>
> . . . .
>
> The Court: Well, I believe the law says what counsel says it says. These men have no standing to contest the validity of the search. It wasn't their car. They have no control over it. The only person that could complain would be the one who was driving it at the time or who owned the car.

Id. (emphasis added).

25. People v. Rakas, 46 Ill. App.3d 569, 360 N.E.2d 1252 (1977).

26. *Id.* at 571, 360 N.E.2d at 1253.

27. 435 U.S. 922 (1977).

was made in *Boyd v. United States*.[28] The Court in *Boyd*, held unconstitutional a statute which permitted the government to order an accused to produce shipping invoices of alleged illegally imported goods.[29] The majority opinion effectively tied the assertion of a fourth amendment protection to the fifth amendment's privilege against compelled testimony.[30] The Court noted that the fourth amendment was to "apply to all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life."[31]

While the *Boyd* Court recognized a privacy interest, that interest was defined in terms of personal property. In line with this reasoning the Court in a subsequent decision, held that the government could seize only contraband articles in which a person could not assert a legitimate interest.[32] Property law concepts during this period were often used by the Court to define the parameters of that legitimate interest.[33]

The scope of the protection of "persons, houses, papers and effects"[34] was later determined on an area-by-area basis.[35] With the development of the exclusionary rule,[36] the question became whether the place searched was recognized as a constitutionally

28. 116 U.S. 616 (1886).
29. *Id.*
30. *Id.* at 630, 633.
31. *Id.* at 630.
32. Gouled v. United States, 255 U.S. 298, 308-09 (1921).
33. *See* O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy*, 13 NEW ENG. L. REV. 662, 672-85 (1978); Comment, *The Relationship Between Trespass and Fourth Amendment Protection After* Katz v. United States, 38 OHIO ST. L.J. 709 (1977); Note, *From Private Places to Personal Privacy; A Post Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968 (1968).
34. *See* note 5 *supra.*
35. *See* O'Brien, *supra* note 33, at 672-94.
36. The exclusionary rule was created by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914), where the Court broke with common law tradition and inquired into the source of evidence used at trial. The rule prevents the government from using evidence which it has gained through unlawful means. It was developed from the common law suit in replevin as a remedy for an illegal search or seizure. The plaintiff in the replevin action had to show that his right to present possession of the seized items was superior to that of the government. The government was at that time strictly limited to seizure of contraband or the instrumentalities of the crime. This "mere evidence" rule was abandoned by the Court in Warden v. Hayden, 387 U.S. 294, 300-10 (1967), when the Court began to redefine the scope of the amendment in terms of privacy interests. The exclusionary rule was not applied to the states until after the Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961). *See generally* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Knox, *supra* note 10.

protected area.[37] The legacy of *Boyd* was therefore twofold. First, by connecting the fourth amendment right to the fifth amendment privilege, the Court limited the broad language of the former to only those individuals who directly suffered the indignity of a governmental intrusion. The development of an ancillary rule of standing to assert an objection came as a logical adjunct to that analysis.[38] Secondly, although a privacy interest was recognized it was implicitly limited by property law concepts.

A major turning point in the Court's fourth amendment analysis came with the decision of *Jones v. United States*.[39] Jones had been a guest in the apartment of a friend who had entrusted him with a key to the apartment. He had kept a suit and shirt at the apartment, but did not stay there regularly.[40] He did not pay for the use of the apartment. Pursuant to a search warrant naming Jones and a woman as the occupants, the police searched the apartment and discovered illegal narcotics. The lower courts denied Jones's motion to suppress, solely on the grounds that he lacked standing. The Court, determined that Jones had standing as defined with reference to Rule 41(e) of the Federal Rules of Criminal Procedure.[41] The test that the court employed, based on the rule, was that:

> In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a *victim* of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.[42]

The court noted that in cases like *Jones*, where the defendant was charged with a possessory offense, a dilemma existed if traditional standing rules applied.[43] The general requirement for standing was that the person seeking suppression claim either ownership or possession of the property or a "substantial posses-

37. *See* O'Brien, *supra* note 33, at 693-701.
38. The "standing" concept in the fourth amendment area was first mentioned with approval by the Court in Goldstein v. United States, 316 U.S. 114, 121 (1942). *See* J. LANDYNSKI, *supra* note 36, at 74.
39. 362 U.S. 257 (1960).
40. In his cross-examination at trial, Jones testified that he had slept there "maybe a night." *Id.* at 259.
41. *Id.* at 264. "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained. . . ." FED. R. CRIM. P. 41(e). The Court later held that Rule 41(e) conformed to and was not broader than the general constitutional standard. Alderman v. United States, 394 U.S. 165, 173 n.6 (1969).
42. 362 U.S. 257, 261 (emphasis added). *See generally* Gutterman, *"A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition*, 23 EMORY L.J. 111 (1974).
43. 362 U.S. at 263.

sory interest in the premises searched."[44] At that time, however, if the defendant asserted ownership at the suppression hearing and his claim was denied, his testimony at the hearing could be used at trial to prove the charge of possession.[45] To avoid this dilemma the Court held that where the same element in the prosecution, *i.e.* possession, served to both convict and confer standing, the defendant would have "automatic standing."[46]

More importantly, as a second reason for conferring standing, the Court held that Jones's connection with the apartment had satisfied the legally requisite interest in the premises.[47] The Court explicitly discredited the theory urged by the government that property concepts were definitive of protected privacy interests when it stated that: "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law . . . ."[48] The Court vastly broadened the scope of standing and concluded that:

> No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that *anyone legitimately on premises where a search occurs may challenge its legality* by way of a motion to suppress, when its fruits are proposed to be used against him.[49]

The Supreme Court's holding in *Jones* was the forerunner of a broadened interpretation of the fourth amendment.

Jones was followed by a line of cases which further eroded prior notions that property law concepts defined the scope of the privacy interest protected by the fourth amendment.[50] These cases were highlighted by the decision in *Katz v. United States*.[51] In *Katz*, the Court held that the government's activities in electronically monitoring the defendant's half of a conversation in a public phone booth constituted a search and seizure and violated the privacy

44. *Id.* at 261.
45. The Court noted that it was "by no means an inevitable holding" that the defendant's hearing testimony could later be used. *Id.* at 262. The Court eventually held, in Simmons v. United States, 390 U.S. 377, 394 (1968), that the defendant's testimony given at the hearing could not be used against him at trial on the issue of guilt unless the defendant made no objection. As a result of *Simmons*, the continuing validity of automatic standing has been placed in question. *See* Brown v. United States, 411 U.S. 223, 229-30 (1973).
46. 362 U.S. at 263. *See* Brown v. United States, 411 U.S. 226, 228 (1973).
47. 362 U.S. at 263.
48. *Id.* at 266.
49. *Id.* at 267 (emphasis added).
50. *E.g.*, Mancusi v. DeForte, 392 U.S. 364 (1968); Katz v. United States, 389 U.S. 347 (1967); Warden v. Hayden, 387 U.S. 294 (1967); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961).
51. 389 U.S. 347 (1967).

upon which the defendant justifiably relied.[52] Justice Harlan, concurring, agreed with the Court's opinion that " 'the Fourth Amendment protects people, not places,' "[53] but suggested that the answer as to what protection the amendment afforded those people often required reference to a place.[54] Harlan translated the justifiable reliance test of the majority into a two-pronged test.[55] For Harlan, the expectation of privacy which was sought to be covered under the amendment had to reach a level that "society is prepared to recognize as 'reasonable.' "[56] The reasonable or legitimate expectation of privacy test which Harlan formulated in *Katz* has since been the paradigm for fourth amendment analysis.[57]

IV. ANALYSIS OF THE DECISION

A. The Fall of Standing

The relief sought in *Rakas* was an order requiring the state court to determine the ultimate question of whether the search was lawful.[58] Several lower courts, faced with similar claims, granted standing to automobile passengers.[59] Significantly, the defendants failed to allege either ownership or a possessory interest in the seized property.[60] It has been suggested that the Court could have treated this as a waiver of a known right and thus a

52. *Id.* at 353.
53. 389 U.S. at 361 (Harlan, J., concurring).
54. *Id.*
55. *Id.* "[T]here is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 MICH. L. REV. 154, 157 (1977). Harlan's reworking of the majority's test has received heated criticism. Professor Amsterdam has stated that "justifiable reliance" might be considered equivalent to a claim of right, whereas the "expectations" test makes an individual's privacy vulnerable to government usurpation. Amsterdam, *supra* note 36, at 382-85.
56. 389 U.S. at 361.
57. United States v. Dionisio, 410 U.S. 1 (1973); Couch v. United States, 409 U.S. 322 (1973); Combs v. United States, 408 U.S. 224 (1972); United States v. White, 401 U.S. 745 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968); Terry v. Ohio, 392 U.S. 1 (1968).
58. Brief for Petitioners at 8.
59. *See* United States v. Holmes, 521 F.2d 859, 867 (5th Cir. 1975), *aff'd in relevant part on rehearing en banc*, 537 F.2d 227 (5th Cir. 1976); Bustamonte v. Schneckloth, 448 F.2d 699, 700 n.1 (9th Cir. 1971), *rev'd on other grounds*, 412 U.S. 218 (1973); United States v. Peisner, 311 F.2d 94, 105 (4th Cir. 1962); Mullins v. State, 35 Md. App. 605, 609, 371 A.2d 713, 716 (1977); State v. Bresolin, 13 Wash. App. 386, 398, 534 P.2d 1394, 1402 (1975). *But see* State v. Heath, 222 Kan. 50, 52, 563 P.2d 418, 420 (1977); State v. Perkins, 543 S.W.2d 805, 807-08 (Mo. App. 1976).
60. — U.S. —, 99 S. Ct. at 423-24 n.1.

pleading error.[61] Instead, the Court considered the defendants' two arguments for standing, one based on a "directed at" or target theory and the other based on the passengers "legitimate presence" in the automobile at the time of the stop and search.

1. Rejection of a Target Theory of Standing

Defendants urged that the Court's definition in *Jones*, of a victim of an illegal search as "one against whom the search was directed"[62] provided support for the target theory. This theory was originally asserted by Justice Fortas in his opinion in *Alderman v. United States*.[63] Fortas had viewed the fourth amendment and the exclusionary rule as a general prohibition of a type of police conduct rather than a limited protection of an individual's right to privacy.[64] Applying the reasoning of the Court in *Jones*, Fortas argued that the Court should "include within the category of those who may object to the introduction of illegal evidence 'one against whom the search was directed.' "[65] Speaking of the aggrieved person, Fortas argued: "The Government violates his rights when it seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation of him and using it against him at trial."[66]

Justice Harlan in a separate opinion answered Fortas by noting that such a broadened standing rule would only marginally affect the impact of the exclusionary rule on unconstitutional police conduct and would impose substantial administrative difficulties.[67] The majority opinion in *Alderman* reflected Harlan's concerns and stated: "[W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[68]

Shortly after the Court's decision in *Alderman*, its perceived effect on the deterrence of illegal police conduct was the subject of criticism. It was suggested that:

61. Kramer, *Standing to Challenge Illegal Searches After* Rakas v. Illinois, 6 SEARCH AND SEIZURE L. REP. 1, 3 (1979).
62. *See* text accompanying note 42 *supra*.
63. 394 U.S. 165, 200 (1969) (Fortas, J., concurring in part and dissenting in part).
64. *Id.* at 205-06.
65. *Id.* at 208.
66. *Id.* at 209.
67. *Id.* at 188 n.1 (Harlan, J., concurring in part and dissenting in part).
68. *Id.* at 174-75. This does not prevent a state from abolishing the standing requirement in the fourth amendment area. *See* Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971), *appeal dismissed*, 407 U.S. 917 (1972).

> If standing is to be retained, the reason for retention will be that the rule bears a reasonable relation to the deterrent objective of the exclusionary rule. In its present form it merely encourages the police to search the homes of people they believe to be innocent, leaving the privacy of those they believe to be guilty undisturbed. This encouragement is certainly not consistent with the purpose underlying exclusion.[69]

To conform to the purposes of the exclusionary rule the authors of this argument recommended an objective target theory which would assess the officer's probable intent at the time of the search and determine from this whether an unlawful search was intended.[70] The administrative problems suggested by Justice Harlan would be solved by creating an irrebuttable presumption that police intend to obtain evidence against those they search or those who own or possess property searched.[71] This proposed solution has not as yet found popular acceptance by a majority of the Court.

Despite the Supreme Court's holding in *Alderman*, several lower courts have applied a target analysis when granting or denying standing.[72] The Court in *Rakas*, however, found the reasoning of the *Alderman* Court which prevented the vicarious assertion of fourth amendment privacy rights persuasive, and rejected the defendants' claim for standing.[73] Thus, the Court held true to the ancient precedent of *Boyd v. United States*[74] and retained the notion of personal rather than societal fourth amendment protection.

2. *Demise of "Legitimate Presence" Test*

The Court did not need to recognize a broadened standing rule such as the target theory if it would have adhered to its previous standing tests. The "legitimately on the premises" test of *Jones* was the core of the defendants' argument and had been recently incorporated in a three-prong test in *Brown v. United States*.[75] The issue in *Brown* was whether the defendants had standing to challenge the lawfulness of the seizure of merchandise stolen by them, but stored at a co-conspirator's warehouse. The Court held that the defendants lacked standing[76] since they:

> (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises;

69. White & Greenspan, *supra* note 4, at 348.
70. *Id.* at 353-55.
71. *Id.*
72. United States v. Cobb, 432 F.2d 716, 719-20 (4th Cir. 1970); United States v. Rosenberg, 416 F.2d 680, 682 (7th Cir. 1969); State v. Hink, 6 Wash. App. 374, 375, 492 P.2d 1053, 1055 (1972).
73. — U.S. —, 99 S. Ct. at 425.
74. 116 U.S. 616 (1886).
75. 411 U.S. 223 (1973).
76. *Id.* at 229.

> and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.[77]

The three-pronged test in *Brown* recognized, in order: legitimate presence, traditional property rights, and automatic standing as sufficient grounds for a defendant to be heard on a motion to suppress.[78]

The Supreme Court in *Rakas*, nevertheless, viewed fourth amendment standing as an artificial rule and noted that none of its decided cases would have reached different results had they been decided on the merits.[79] The Court thus dispensed with a separate notion of standing and reframed the issue in terms of whether the disputed search and seizure infringed on an interest of the defendant which was protected by the amendment.

The Court was left to determine whether there had been a substantive violation of the passengers' fourth amendment rights. The *Jones* test, on its face, did not protect those wrongfully present, but in the instant case there was no question but that the defendant-passengers were properly present. The Supreme Court chose to reject the board description of the protected interest given in *Jones*, and held that legitimate presence created too broad a gauge for judging fourth amendment rights.[80]

The Court cited a series of cases which reached diametrically opposed results out of fact situations which arguably would have produced consistent holdings had the legitimately on the premises test presented a workable standard.[81] Justice Rehnquist concluded from this that, " 'legitimately on premises' has not shown to be an easily applicable measure of Fourth Amendment rights as it has proved to be simply a label placed by the courts on results which have not been subjected to careful analysis."[82] While the Court did not overrule *Jones*, it limited the holding to its facts and stated it "merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home . . . ."[83]

---

77. *Id.*
78. *Id.*
79. — U.S. —, 99 S. Ct. at 428.
80. *Id.*
81. *Id.* at —, 99 S. Ct. at 431 n.13. The best illustrations of the Court's point was the decision in United States v. Westerbann-Martinez, 435 F. Supp. 690 (E.D.N.Y. 1977), where the defendant was granted standing to object to a search of a co-defendant's *person* at an airport because of his lawful *presence* at the time of the search. *Id.* at 695.
82. — U.S. —, 99 S. Ct. at 433.
83. *Id.* at —, 99 S. Ct. at 430. *Cf.* United States v. Hunt, 505 F.2d 931 (5th Cir. 1974) (requires cognizable property interest), *cert. denied*, 421 U.S. 974 (1975).

B. "Reasonable Expectations" After *Rakas*

Justice Rehnquist did not give a clear indication of what a defendant needed to show in order to achieve a legitimate expectation of privacy. The Court suggested that a visitor, or presumably a passenger, could object to a search on the basis of his or her presence if their own property was seized during the search.[84] But it is not clear whether the assertion of a property or possessory interest alone would satisfy the Court without the additional showing of a reasonable expectation of privacy. The Court suggested that, "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."[85] While noting that common law property interests need not be the basis of an expectation of privacy, the Court stated that these interests had not been abandoned altogether when it sought to determine the scope of the amendment's protection.[86]

Two recent decisions would suggest that both a property right and a reasonable expectation of privacy are required before the Court will recognize an unlawful invasion of a protected fourth amendment interest. In *Cardwell v. Lewis*,[87] the Court held that where probable cause existed, a warrantless examination of an automobile's exterior wheel and the taking of paint scrapings from the vehicle which had been parked in a public place, was not an unreasonable search under the fourth amendment.[88] While the Court suggested that the interior of an automobile could carry some degree of protection,[89] it failed to acknowledge an expectation of privacy in the car's exterior. A property interest in the car, standing alone, was not a sufficient interest to raise a successful objection to the police conduct.[90]

In a second case, *Couch v. United States*,[91] the Court noted that a taxpayer could not reasonably claim, for either fourth or fifth amendment purposes, an expectation of privacy in documents which had been turned over to the possession of her tax accountant.[92] The defendant's inability to assert possession defeated her claim to a privacy interest where there was no recognized account-

84. — U.S. —, 99 S. Ct. at 430 n.11.
85. *Id.* at —, 99 S. Ct. at 431.
86. *Id.* at —, 99 S. Ct. at 431-32.
87. 417 U.S. 583 (1974).
88. *Id.* at 588-89.
89. *Id.* at 591.
90. *Id.* at 589.
91. 409 U.S. 322 (1973). *See* Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184, 211-12 (1977), which suggested that the significance of *Couch* was that it effectively overruled *Boyd*.
92. 409 U.S. at 335-36.

ant-client privilege. The question which *Couch* left unresolved was whether an owner of property who entrusts her property to the possession and safekeeping of another may lawfully object to an illegal search of the other's premises when that search results in the seizure of the entrusted item.

This situation arose in *United States v. Lisk*.[93] This Seventh Circuit decision offered a novel analysis of fourth amendment issues. The defendant had delivered a pipe bomb to a friend and requested that he keep the bomb in the trunk of his car until he asked for its return. The government thereupon unlawfully seized the bomb from the trunk and charged Lisk with illegal possession of a firearm. In assessing the defendant's interest the Court stated:

> There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence . . . .
>
> In sum, defendant has standing to object to the seizure, but no standing to object to the search. Having put the search to one side, he has not demonstrated that the evidence should be suppressed on the ground that *his* Fourth Amendment rights were violated by the seizure.[94]

By separating the privacy and property aspects of fourth amendment protection the court gave a unique interpretation of the amendment. The Supreme Court's decisions in *Rakas, Cardwell*, and *Couch*, however, suggest that both interests must coalesce before an individual will be deemed to have a reasonable expectation of privacy.

V. THE CONCURRENCE AND DISSENT

Justice Powell, in a concurring opinion in *Rakas*,[95] suggested three criteria for assessing a legitimate expectation of privacy: (1) whether precautions were taken to maintain privacy; (2) the way a person used a location, as in *Jones*; and (3) a common law property interest.[96] For the concurring justices, the last item would serve as the focal point for fourth amendment privacy expectations.[97]

The dissent was unable to distinguish Rakas's expectations of privacy from those found in *Jones* and *Katz*.[98] Katz had no posses-

93. 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976), *on rehearing after remand*, 559 F.2d 1108 (7th Cir. 1977). *See* Recent Developments, 64 GEO. L.J. 1187 (1976).

94. 522 F.2d at 230-31 (emphasis in original). *See generally* Knox, *supra* note 11, at 42-44.

95. — U.S. —, 99 S. Ct. at 434. (Powell, J., concurring).

96. *Id.* at —, 99 S. Ct. at 435.

97. *Id.*

98. *Id.* at —, 99 S. Ct. at 437, 442 (White, J., dissenting).

sory interest in the phone booth, unless of course that interest was created by his paying the toll. Moreover, the Court had explicitly recognized fourth amendment protection for a passenger in a taxicab.[99] In the end, the dissent viewed the Court's opinion as an evisceration of the principles which underlay the exclusionary rule—"the deterrence of bad-faith violations of the Fourth Amendment."[100]

VI. A RECOMMENDED SOLUTION

The Court should have begun its analysis by recognizing and protecting the three distinct privacy interests that Professor Weinreb has outlined.[101] These have been described as privacy of presence, privacy of place, and privacy of possession.[102] The first, privacy of presence, would require the government to recognize a protected zone or sphere which would surround and follow the individual in his or her daily life and be readily subject to definition by a reasonable expectation analysis. This would afford protection for Mr. Katz in a public phone booth. The second, privacy of place, would protect more permanent features, *e.g.*, the home. An example of this was in *Alderman v. United States*,[103] where the Court held that evidence obtained through electronic surveillance of conversations emanating from a defendant's home was constitutionally protected even though the defendant was not a party to the conversation. Lastly, a person's possessions should carry with them some protection of privacy. This protection would cover those cases where the defendant had automatic standing as well as situations analogous to *Couch*.[104] Thus, if the Court had applied this type of analysis in *Rakas*, it would have more closely considered the quality and nature of the defendant's presence.[105] Additionally, the Court could have considered as it did, property law concepts to determine whether the mere fact of ownership of the vehicle carried with it a justifiable expectation of privacy. Lack of ownership of the vehicle would not necessarily defeat a protected privacy expectation but would be one factor to consider. Finally, the person's possessory interest in the seized property should have been considered. Here the defendant's failure to claim an in-

99. Rios v. United States, 364 U.S. 253 (1960).
100. — U.S. —, 99 S. Ct. at 443.
101. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52-68 (1974).
102. *Id.*
103. 394 U.S. 165 (1969).
104. *See* text accompanying notes 91-92.
105. "[P]hysical presence, or the lack thereof, the duration of the visit, the purpose thereof, as well as the actual place of the search or seizure, are all relevant factors . . . ." Trager & Lobenfeld, *supra* note 9, at 448.

terest in the rifle and shells tended to defeat an expectation of privacy in those items.[106] While privacy of place and possession would tend to be easily applied, the more amorphous shrouds of privacy that most of us expect follow us in our daily affairs would be the most difficult to define in legal doctrine. The privacy expectations of a passenger are just one example of where the Court's and society's views may differ.[107]

The relevant inquiry then becomes, of what significance should legitimate presence have been given in this scheme? The logical answer would be that the *Jones* test was not meant to be a definitive statement of privacy rights in all cases.[108] Physical presence should have been just one factor that might be indicative of the privacy expectations of an individual. Applying these principles and the reasoning of Justice Stevens in *Lisk*,[109] one could properly conclude that the fourth amendment interest of the passengers was violated by the initial stop of the vehicle and the subsequent seizure of their person. The search of the automobile and the seizure of the items from it would not have violated their expectations of privacy unless they asserted a possessory interest in the items, in which case they would object to the items *seized* even if they were not personally present at the time of the search. Their presence would be sufficient grounds to claim a violation as to the *search* only if they could show that by frequency of use of the vehicle they could reasonably be expected to have access to, and demand privacy for, any items which they might place in the glove compartment or under the seat. Thus, if the owner and driver of the vehicle was the wife and the passenger was her husband, it would be absurd to suggest that only the wife, by reason of her ownership and control, could assert a reasonable expectation of privacy.[110]

---

106. The majority opinion began its analysis by noting this and refused to remand the case for a consideration of the defendant's interest in the seized items. — U.S. —, 99 S. Ct. at 423-24 n.1.

107. The concurring opinion suggested that passengers could almost expect a search of the car they were riding in. "It is unrealistic—as the shared experience of us all bears witness—to suggest that these passengers had any reasonable expectation that the car in which they had been riding would not be searched after they were lawfully stopped and made to get out." — U.S. at —, 99 S. Ct. at 436 (Powell, J., concurring).

108. *See* Mancusi v. DeForte, 392 U.S. 364, 375-76 (1968) (Black, J., dissenting). *See generally* Trager & Lobenfeld, *supra* note 9, at 448.

109. *See* text accompanying notes 93-94.

110. The facts in *Rakas*, showed that the driver and owner of the vehicle was the ex-wife of one of the defendants. Petitioners' Brief for Rehearing at 3. The relation between the defendant and his ex-wife was not closely considered by the Court.

VII. CONCLUSION

The Court's analysis of the fourth amendment presented in *Rakas v. Illinois* reflects the struggle the Court has had in anchoring the amendment to recognizable constitutional principles. On the one hand, the Court has found that a "constitutionally protected area" analysis which confines itself to property concepts triggered by a trespass is too narrow a statement of the amendment's protection. The other extreme, that the amendment creates a general constitutional right to privacy, is equally unacceptable. To accommodate the need for stability in this area the reasonable expectations test has not surprisingly been closely linked to property concepts. Fourth amendment security and privacy protections, however, are not always a function of ownership rights. The Court in discarding the legitimate presence test of *Jones*, rather than clarifying its meaning, has made the evaluation of reasonable expectations of privacy more difficult. The result will probably be a more restrictive analysis of privacy interests by lower courts.

Ralph F. Rayburn '80