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Capacity to Contest a Search and Seizure: the Passing of Old Rules and Some Suggestions for New Ones

CHRISTOPHER SLOBOGIN*

Professor Slobogin examines recent Supreme Court decisions involving standing to challenge search and seizure violations, and argues that the Court's commitment to a "totality of the circumstances" approach has permitted erosion of fourth amendment protections. After concluding that these decisions provide little guidance to lower courts, Professor Slobogin offers a set of principles which will aid in analyzing the Court's direction.

I. INTRODUCTION

Illegally obtained evidence may be suppressed under the exclusionary principle of *Mapp v. Ohio*¹ only by those individuals who "belong to the class for whose sake the constitutional protection is given."² Until recently, the Supreme Court phrased its analysis of this issue in terms of the defendant's "standing" to contest a search and seizure, and relied on a number of fairly concrete standing rules to define the class of individuals who could seek fourth amendment protection. In *Rakas v. Illinois*,³ however, the Court substantially altered both the form and the substance of this inquiry. It first indicated that it would no longer resort to standing terminology in discussing who can contest a search and seizure. The majority stated that reference to this language only served to obscure the fact that a person's capacity to challenge police illegality should depend entirely upon the scope of his fourth amendment right.⁴ It then defined that right as the product solely of a person's "legitimate expectations of privacy."⁵ Without such an expectation in the place invaded by government agents, the Court concluded, one could not contest a search of that place.⁶

It is difficult to quibble with *Rakas's* rejection of standing terminology in favor of an "analysis forthrightly focus[ing] on the extent of a particular defendant's rights under the Fourth Amendment;"⁷ this holding merely substitutes one label for another. Under article III of the Constitution,⁸ a litigant has standing to bring a constitutional claim if he can show that the government caused him to suffer "an injury to himself that is likely to be redressed by a favorable decision."⁹

* Assistant Professor of Law, University of Virginia; B.A., 1973, Princeton University; J.D., 1977, LL.M., 1978, University of Virginia. The author wishes to thank Professors Charles H. Whitebread and John Calvin Jefferies, Jr., of the University of Virginia Law School, as well as Jeff Gleason and Susann Gill, for their valuable assistance on this article.

1. 367 U.S. 643, 654-55 (1961). Evidence procured through an unlawful search and seizure may be excluded from evidence at trial. *Id.* *Weeks v. United States*, 232 U.S. 383, 398 (1914), applied this rule to the federal courts. *Mapp* extended its application to the state courts. 367 U.S. at 655.

2. *Hatch v. Reardon*, 204 U.S. 152, 160 (1907).

3. 439 U.S. 128 (1978).

4. *Id.* at 138-40; see text accompanying notes 70 through 71 *infra*.

5. *Rakas v. Illinois*, 439 U.S. at 142.

6. *Id.* at 143, 148; see text accompanying notes 77 through 80 *infra*.

7. *Rakas v. Illinois*, 439 U.S. at 139.

8. Article III permits the federal courts to try only certain "cases" and "controversies." The Court has construed this clause to limit the authority of the courts as defined by, *inter alia*, notions of justiciability, mootness, and standing. See generally C. WRIGHT, FEDERAL COURTS 38-52 (3d ed. 1976).

9. See *Simon v. Eastern Kentucky Welfare Rights*, 426 U.S. 26, 38 (1976). The Court continues on to

In many areas involving constitutional issues, before the litigant can be deemed to have standing, he must also prove that his claim is based on an alleged violation of his own constitutional rights, rather than those of a third party.¹⁰ This requirement is strictly observed in the fourth amendment context. The Court has consistently held that "Fourth Amendment rights . . . may not be vicariously asserted;"¹¹ the defendant must show he was "a victim of a search and seizure,"¹² one whose own protection was infringed.¹³ For instance, the Court has held that a defendant generally does not have standing to contest an electronic eavesdrop of a conversation in which he did not participate, even when the state seeks to use information garnered from that conversation against him.¹⁴ *Rakas* merely recognized that the Court's "long history of insistence that Fourth Amendment rights are personal in nature has already answered many of [the] traditional standing inquiries, [and thus] the definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."¹⁵

Of far greater significance than this conceptual modification is *Rakas's* redefinition of the protection afforded each citizen by the fourth amendment. Relying heavily on the expectation of privacy rubric adopted in *Rakas*, the Court's decision in *Rakas* itself and in two cases decided last term, *Rawlings v. Kentucky*¹⁶ and *United States v. Salvucci*,¹⁷ discarded the old standing rules and reduced the class of individuals who can contest a search and seizure. With these decisions, the Court has opened up yet another front in its assault on the fourth amendment. In other recent opinions, the Court has broadened the types of state action that are con-

say that "[a]bsent such a showing, exercise of its power by a federal court would be gratuitous, and thus inconsistent with the Article III limitation." *Id.* See also *Baker v. Carr*, 369 U.S. 186, 204 (1962) (to have constitutional standing one must have "a personal stake in the outcome of the controversy [so] as to assure that concrete adverseness which sharpens the presentation of the issues"). Obviously, any criminal defendant could easily satisfy this criterion. See Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831, 865 (1979)[hereinafter cited as Williamson].

10. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("the [party] generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *Couch v. United States*, 409 U.S. 322, 328 (1973) (privilege against self-incrimination is a "personal right"); *Tiles v. Ullman*, 318 U.S. 44, 46 (1943) ("[n]o question is raised in the record with respect to the deprivation of appellant's liberty or property in contravention of the Fourteenth Amendment"). *But cf.* *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (physicians criminally convicted for dispensing contraceptives have standing to challenge state statute prohibiting use of contraceptives).

11. *Alderman v. United States*, 394 U.S. 165, 174 (1969) (no fourth amendment right to suppress evidence obtained through electronic surveillance which violated another party's rights).

12. This language was first used by the Supreme Court in *Jones v. United States*, 362 U.S. 257, 261 (1960).

13. *Rakas v. Illinois*, 439 U.S. at 133.

14. *Alderman v. United States*, 394 U.S. at 174-75. *Alderman* excepted from this restriction individuals who own the tapped premises. *Id.* at 176-80. See also text accompanying notes 59 through 60 *infra*.

15. *Rakas v. Illinois*, 439 U.S. at 140. It could be argued that because the fourth amendment guarantees "the right of the people to be secure . . . against unreasonable searches and seizures" (emphasis added), the exclusionary rule should be available to every citizen, even a person not a party to a prosecution. More reasonably, the fourth amendment could be seen as granting every criminal defendant "a personal right . . . to insist that the state utilize only lawful means of proceeding against him." *Alderman v. United States*, 394 U.S. at 206 (Fortas, J., dissenting). As implied by the above discussion, the Court has never seriously considered either of these alternatives, see *id.* at 206-07, nor has it been willing to adopt the so-called "target theory" of standing, which could confer fourth amendment protection on anyone against whom the search was directed. See *Rakas v. Illinois*, 439 U.S. at 133-38. See also note 71 *infra*.

16. 100 S. Ct. 2556, 2561-62 (1980) (owner of drugs found in police search of third party's purse had no standing to challenge search).

17. 100 S. Ct. 2547, 2552-53 (1980) (no "automatic standing" for defendants charged with possessory crimes).

sidered "reasonable" under that amendment,¹⁸ and has restricted state defendants' access to federal court collateral review of fourth amendment claims.¹⁹ With *Rakas*, *Rawlings*, and *Salvucci*, it has revamped the standing inquiry in a manner which, in effect, narrows the scope of the fourth amendment itself.

This article will not, however, engage in detailed criticism of the Court's reasoning on this issue or suggest alternative approaches to the standing inquiry. Both of these tasks have been ably undertaken elsewhere.²⁰ Instead, this article will examine the Court's current stance on the scope of the fourth amendment, as elucidated by the above decisions. This article's primary objective, therefore, is to define a set of principles that might replace the rules recently abandoned by the Court. After briefly describing the Court's most important decisions concerning the capacity of a defendant to contest a search and seizure, it argues how these decisions can and should be interpreted.

II. FROM *JONES* TO *SALVUCCI*: PROPERTY, PRESENCE, AND PRIVACY

While the Court has consistently held that a defendant asserting a fourth amendment claim must prove he was a "victim" of the challenged police action,²¹ it has vacillated in its attempts to delineate the scope of a defendant's capacity to contest the legality of a search and seizure. Originally, the Court measured this capacity according to the defendant's proprietary interest in either the premises searched or the property seized.²² In *Jones v. United States*,²³ however, the Court departed from a strict property analysis by granting standing to anyone "legitimately on the premises" at the time of the search. *Jones* also created what was later called "automatic standing" for those charged with possessory offenses.²⁴ In *Mancusi v. DeForte*,²⁵

18. See, e.g., *Michigan v. DeFillippo*, 443 U.S. 31, 39-40 (1979) (police search of individual pursuant to arrest under city ordinance, later found unconstitutional, reasonable because ordinance was "presumptively valid"); *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (body-cavity searches of pretrial detainees justified on security grounds); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (full body search of person arrested for traffic violation permissible).

19. See, e.g., *Stone v. Powell*, 428 U.S. 465, 494 (1976) (no right to federal habeas corpus relief in search and seizure cases when state courts have accorded defendant a "full and fair hearing"); *Palmigiano v. Houle*, 618 F.2d 877, 882 (1st Cir. 1980) ("opportunity for full and fair litigation" of illegal arrest claim provided in state habeas proceeding even where state misallocated burden of proof because misallocation was harmless error); *Moore v. Lane*, 612 F.2d 1046, 1047 (7th Cir. 1980) (per curiam) (relitigation of fourth amendment challenge to identification arising from photo evidence obtained during illegal stop barred under *Stone*); *Faulisi v. Pinkney*, 611 F.2d 176, 178 (7th Cir. 1979) (per curiam) (relitigation of fourth amendment challenge to identification produced after 24-hour pre-arrest detention and after previous unsuccessful lineup barred under *Stone*); *Sanders v. Oliver*, 611 F.2d 804, 808 (10th Cir. 1979) ("opportunity for full and fair litigation" provided by suppression hearing even though only affiant could testify and petitioner limited to cross-examination when review possible by state courts), cert. denied, 49 U.S.L.W. 3219 (Oct. 7, 1980).

20. See Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on Its Last Leg*, 18 CATH. U.L. REV. 150 (1968) [hereinafter cited as Grove]; Gutterman, "A Person Aggrieved": *Standing to Suppress Illegally Seized Evidence in Transition*, 23 EMORY L.J. 111 (1974) [hereinafter cited as Gutterman]; White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970) [hereinafter cited as White & Greenspan]; Williamson, *supra* note 9; *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 171 (1979).

21. See note 12 *supra*.

22. See *Wong Sun v. United States*, 371 U.S. 471, 492 (1963) (narcotics taken from co-defendant admissible against defendant whose right of privacy in person and premises not violated during seizure). It appears that before *Jones*, this standard was followed by the lower courts. See generally Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471, 472 (1952).

23. 362 U.S. 257 (1960).

24. *Id.* at 264.

25. 392 U.S. 364 (1968) (union official had reasonable expectation of freedom from governmental in-

the Court further expanded the scope of the fourth amendment by holding that a defendant has standing to challenge the admissibility of evidence obtained by any police conduct that violates his reasonable expectation of privacy, a concept originally developed by Justice Harlan in *Katz v. United States*.²⁶ Beginning with *Rakas*, however, the Court utilized the expectation-of-privacy rationale to curtail substantive fourth amendment protection. In *Rakas* itself, the Court used the privacy rationale to justify overruling that part of *Jones* which adopted the legitimate presence test; in *Rawlings*, the Court held that proof of possession of the seized evidence, by itself, does not establish the requisite legitimate expectation of privacy; and, in *Salvucci*, the Court relied partially on the privacy rationale to abolish "automatic standing."

A. ABANDONING PROPERTY-BASED STANDING: *JONES*

In *Jones v. United States*,²⁷ the Court, for the first time, explicitly eschewed a property-based analysis of fourth amendment standing.²⁸ Police found the narcotics used to convict Jones while he was in the apartment of his friend Evans.²⁹ Jones neither owned nor leased the premises, but Evans had given him a key to the apartment and had been away for five days when police conducted the search in question.³⁰ Reversing the lower court,³¹ Justice Frankfurter first defined a "person aggrieved by an unlawful search and seizure"³² as one who is "a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."³³ Thus, "ordinarily . . . one who seeks to challenge the legality of a search [must prove] . . . that he himself was the victim of an invasion of privacy."³⁴

Justice Frankfurter immediately created an exception to this rule, however, for cases involving possessory offenses. He noted that the existing property-based standing rule created a dilemma for defendants charged with such crimes by forcing them to choose at the suppression hearing between conceding the primary element of the charge against them—possession—and foregoing a challenge of the search altogether for fear of providing the state with

trusion in office shared with other union officials).

26. 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring) (majority held warrantless placement of electronic listening device on outside of public telephone booth violated defendant's fourth amendment rights).

27. 362 U.S. 257 (1960).

28. In *United States v. Jeffers*, 342 U.S. 48 (1951), the Court granted standing to a defendant whose property was seized by police from a hotel room rented by his aunts and in which he did not live. The Court's decision seemed to rely on his possessory interest in the seized goods as the grounds for the Court's decision, *id.* at 54, though the present Court has held that the conclusion in *Jeffers* was based on the defendant's interest in the searched premises as well. *Rakas v. Illinois*, 439 U.S. at 128; *see* text accompanying notes 152 through 158 *infra*. To the extent the former interpretation is correct, *Jeffers* presaged *Jones's* explicit holding that one who does not have a property interest in the searched premises can still have standing to contest its search.

29. *Jones v. United States*, 362 U.S. at 258-59.

30. *Id.* at 259. Jones also stated that he kept a suit and shirt at the apartment and that he had slept there "maybe a night." He lived elsewhere, however, and did not pay Evans for use of the room.

31. The D.C. Circuit held that Jones lacked standing to challenge the adequacy of the search warrant because he disclaimed ownership of the seized property and alleged an interest in the apartment no greater than that of an invitee or guest. *Jones v. United States*, 262 F.2d 234, 236 (D.C. Cir. 1958).

32. In *Jones*, 362 U.S. at 260, the Court was actually construing rule 41(e) of the *Federal Rules of Criminal Procedure*, which details the grounds upon which "[a] person aggrieved by an unlawful search and seizure may move . . . to suppress for use as evidence anything so obtained." Fed. R. Crim. P. 41(e), 362 U.S. at 260.

33. *Jones v. United States*, 362 U.S. at 261.

34. *Id.*

incriminating evidence.³⁵ He also pointed out that the existing rule encouraged the Government to contend at the pretrial stage that the defendant did not possess the alleged contraband and to argue at trial that he was its owner. As Justice Frankfurter put it, “[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the government.”³⁶ Given the self-incrimination dilemma and the potential for governmental contradiction, the Court held that in cases where the indictment charges possession, the defendant should be able to challenge the legality of a search and seizure without having first to prove he has standing to do so.³⁷ Because Jones was charged with such an offense, he benefited from this “automatic standing” rule.

In addition, the Court identified a second independent ground that conferred standing on Jones. The Court found existing property-based guidelines to be artificial; it held the distinctions between “lessee,” “licensee,” “invitee,” and “guest” to be only of “gossamer” strength. Accordingly, the Court repudiated the framework utilizing these concepts in favor of granting standing to “anyone legitimately on the premises where a search occurs.”³⁸ While exposing the inadequacy of relying on a property-based standard, the Court made no explicit connection between the new legitimate presence test and privacy concepts.

B. EXPECTATIONS OF PRIVACY: *KATZ*, *DEFORTE*, AND *ALDERMAN*

The beginning of the end for *Jones* came in 1967 with the Court’s decision in *Katz v. United States*.³⁹ While the Court did not utilize standing terminology in *Katz*, the case ultimately became the cornerstone of the Court’s approach to standing, and figured significantly in the demise of both tests set out in *Jones*. In *Katz*, FBI agents obtained incriminating information through use of an electronic eavesdropping device attached to a public phone booth from which Katz often placed his calls concerning illegal gambling activity.⁴⁰ The Court’s primary interest was whether the agents’ action constituted a search under the fourth amendment. The Court stated that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁴¹ The bugging device infringed upon the privacy Katz expected to flow from “occupy[ing] the booth, shut[ting] the door behind him, and pay[ing] the toll that permit[ted] him to place a call.”⁴²

The Government contended in *Katz* that a telephone booth was not a “constitutionally protected area,” such as the home,⁴³ and that, even if it were, there had been no physical penetration of the booth and thus no trespass on Katz’s privacy.⁴⁴ Justice Stewart’s majority opinion,

35. *Jones v. United States*, 362 U.S. at 261-63.

36. *Id.* at 263-64.

37. *Id.* at 264.

38. *Id.* at 266-67. Justice Frankfurter weakly linked this new standard with the substantive protection of the fourth amendment by noting that it was:

unnecessary and ill-advised to comport 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 brand of law, has been shaped by distinctions whose validity is largely historical.

Id. at 266.

39. 389 U.S. 352 (1967).

40. *Id.* at 354.

41. *Id.* at 351-52 (footnotes omitted).

42. *Id.* at 352.

43. *Id.* at 351 & n.8.

44. *Id.* at 352.

however, held that “the Fourth Amendment protects people, not places,”⁴⁵ implying that, in defining whether a search has occurred, property interests are secondary to the individual’s expectation of privacy in the premises from which the evidence is seized. Stewart explicitly overruled prior eavesdropping cases which required that a physical trespass occur before fourth amendment protection is implicated.⁴⁶

The expectation of privacy language made its first appearance in Justice Harlan’s concurrence. Justice Harlan took the majority opinion to mean, *inter alia*, “that an enclosed phone booth is an area where, like a house . . . a person has a constitutionally protected reasonable expectation of privacy.”⁴⁷ He noted that while the fourth amendment may protect people and not places, determining who has a reasonable expectation of privacy “requires reference to a ‘place.’”⁴⁸ Thus, he stated, “a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.”⁴⁹

The following year the Court applied the expectation of privacy rationale in a manner that put the continued vitality of the “legitimately on the premises” test in doubt. In *Mancusi v. DeForte*,⁵⁰ the Court could easily have used the *Jones* rule to support the defendant’s standing but instead applied *Katz*’s language to the standing issue.⁵¹ In *DeForte*, state officials searched a large, one-room office shared by DeForte and other union officials in the presence of DeForte and without his or his colleague’s consent.⁵² Union records seized from DeForte’s custody during this search were used to convict him of conspiracy and extortion.⁵³ In holding that DeForte had standing to challenge the search and seizure, the Court cited both *Jones* and *Katz*, but emphasized DeForte’s privacy interest as opposed to his presence on the premises.⁵⁴ The Court stated that in a “private” office,

DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors. It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups.⁵⁵

The Court applied *DeForte* in *Alderman v. United States*,⁵⁶ which, like *Katz*, involved the admissibility of evidence procured through electronic surveillance. The Court dealt with the standing issue as it concerned three classes of individuals. It reiterated that parties to an overheard conversation may challenge the use of material obtained through eavesdropping.⁵⁷

45. *Katz v. United States*, 389 U.S. at 351.

46. *Id.* at 353. Justice Stewart stated that *Olmstead v. United States*, 277 U.S. 438, 466 (1928), and *Goldman v. United States*, 316 U.S. 129, 135 (1942), both requiring physical penetration of the searched premises, “can no longer be regarded as controlling.” *Id.*

47. *Id.* at 360 (Harlan, J., concurring).

48. *Id.* at 361.

49. *Id.*

50. 392 U.S. 364 (1968).

51. *Id.* at 368.

52. *Id.* at 365.

53. *Id.*

54. *Id.* at 368.

55. *Id.* at 369.

56. 394 U.S. 165 (1969).

57. *Id.* at 176.

It also held that those who are not parties to such a conversation generally lack standing because, under *Jones*, they are not the "victims" of a search and seizure.⁵⁸

The Court carved an exception out of this latter group, however, by holding that the owner of the tapped premises does have standing, even if he is not a party to the seized conversation or was not present at the time it took place.⁵⁹ Citing *DeForte*, the Court emphasized that the invasion of a person's house, in itself, is enough to give the homeowner standing to contest the seizure of property from it, based on his right to enjoy the privacy of his home.⁶⁰ With the adoption of the expectation of privacy analysis in *Katz*, *DeForte*, and *Alderman*, the Court seemed to expand the scope of the fourth amendment; it conferred constitutional protection on the occupant of a phone booth, a business official who shared his office with several colleagues and did not own the papers seized from it, and a person absent at the time of a search of his house that resulted in the seizure of property belonging to someone else. It is doubtful whether any of these individuals could have asserted a fourth amendment claim prior to *Katz*.⁶¹

Yet the Court's subsequent application of the expectation of privacy rationale revealed that it could be utilized to reduce, as well as expand, the scope of fourth amendment protection.

C. EXPECTATION OF PRIVACY: *RAKAS* AND *RAWLINGS*

*Rakas v. Illinois*⁶² and *Rawlings v. Kentucky*⁶³ firmly established the expectation-of-privacy

58. *Alderman v. United States*, 394 U.S. at 174-75. The Court stated:

There is no necessity to exclude evidence against one defendant in order to protect the rights of another. . . .

. . . [W]e think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.

Id. at 174.

59. *Id.* at 176. Justice Harlan's dissent argued that a conversation overheard in a house when its owner is not present cannot possibly be an invasion of the owner's right to engage in private conversation. *Id.* at 189-94. But, the majority countered, because "[n]othing seen or found on the premises [during an unwarranted search of a house] may legally form the basis for an arrest or search warrant or for testimony at the homeowner's trial," *id.* at 177, nothing *heard* on those premises during such a search should be admissible during his trial. *Id.* at 180.

60. *Id.* at 179 n.11. By subjecting one's home to electronic surveillance, "officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because his own were. . . . Cf. *Mancusi v. DeForte*, 392 U.S. 364, 367-370 (1968)." *Id.*

61. *Katz* obviously had no proprietary interest in the place searched. While he was legitimately on the premises searched, it is unlikely that *Jones*, which involved the search of a house, would have been applied in such a situation; the Court did not refer to *Jones* in *Katz*. In *DeForte*, as mentioned in the text accompanying note 50 *supra*, the Court seemed reluctant to apply *Jones*. While it had previously held that one could have standing to object to a search of his private office, *United States v. Lefkowitz*, 285 U.S. 452, 463 (1932) (arrest no pretext for search for evidence in office); *Gouled v. United States*, 255 U.S. 298, 305 (1921) (secret taking of evidence whether from defendant's house or office by government representative violated fourth amendment), the Court would have been hard-pressed, before *Katz*, to grant standing to someone who shared his office and files with several others. The fact that the papers seized belonged to the union would have made it impossible for *DeForte* to contest the search on the ground that he possessed an interest in them. In *Alderman*, although it is unclear from the opinion whether there was an actual physical trespass by the electronic surveillance device, 394 U.S. at 170 n.3, the absence of such an intrusion would have foreclosed a fourth amendment challenge before *Katz*, which reversed earlier cases requiring a physical intrusion. See note 46 *supra*. Moreover, without the *Katz* expectation-of-privacy rationale to justify the homeowner's interest in the privacy of his invitees, see note 41 *supra*, it is doubtful that an absent homeowner could have contested the seizure of someone else's property from his home. See *Alderman v. United States*, 394 U.S. at 190 (Harlan, J., dissenting).

62. 439 U.S. 128 (1978).

63. 100 S. Ct. 2556 (1980).

test for analyzing the scope of the fourth amendment and used it to modify significantly the Court's previous fourth amendment jurisprudence.

Rakas involved the search of a car which police stopped after linking it to a description of the getaway car used in a recent robbery.⁶⁴ They found the vehicle occupied by the two petitioners and two women, one of whom owned the car and was driving it at the time of the stop.⁶⁵ After ordering the occupants out of the car, the police found a shotgun under the front passenger seat and rifle shells in the locked glove compartment.⁶⁶ At their suppression hearing, the petitioners did not claim a possessory interest in the car, the gun, or the shells.⁶⁷ The petitioners were denied standing to contest the search and the latter two items were introduced into evidence at their trial.⁶⁸ On appeal, the Illinois Appellate Court held 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."⁶⁹

In affirming the Illinois courts, Justice Rehnquist's majority opinion began by recasting the standing inquiry. He correctly noted that traditional standing analysis did not differ in practical effect from the analysis courts undertook in determining when a search had taken place.⁷⁰ "[T]he better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."⁷¹

Justice Rehnquist then illustrated the breadth of this conceptually new approach in considering the petitioners' argument that they should be able to contest the search because they were legitimately in the automobile when the officers confronted them. He held that "the phrase 'legitimately on premises' coined in *Jones* creates too broad a gauge for measurement of fourth amendment rights;"⁷² it advanced no purpose served by the fourth amendment to extend to every casual visitor the capacity to object to a search.⁷³ *Jones*, he concluded, "on its

64. *Rakas v. Illinois*, 439 U.S. at 130.

65. *Id.*

66. *Id.*

67. *Id.* & n.1.

68. *Id.* at 131.

69. 46 Ill. App. 3d 569, 571 360 N.E.2d 1252, 1253 (1977).

70. 439 U.S. at 139. Justice Rehnquist illustrated this point by noting that *Katz* and *DeForte* involved the same expectation of privacy inquiry even though the first opinion focused on the defendant's fourth amendment rights and the second concentrated on the standing issue. *Id.* at n.7.

71. *Id.* at 139. Before Justice Rehnquist could reach this conclusion, he had to dispose of petitioners' contention that they should be able to assert the fourth amendment because the search in *Rakas* was directed at them. As support for this "target theory" of standing, petitioners pointed to the language in *Jones* stating that standing could be asserted by one who was "a victim of search and seizure, one against whom the search was directed." 362 U.S. 257, 261. Justice Rehnquist pointed out that this theory had been "impliedly repudiated" by the Court in *Alderman* when it held that persons who are not parties to an unlawfully heard conversation (and who do not own the tapped premises) can never have standing. See 394 U.S. at 165. The majority in *Alderman* also ignored Justice Fortas's argument that the target theory should be adopted. *Id.* at 207-09 (Fortas, J., dissenting).

Commentators argue that the target approach to standing would most effectively realize the deterrent purpose of the exclusionary rule by letting police know that anyone who they are "after" at the time of the search will have standing to contest their actions. White & Greenspan, *supra* note 20, at 349-54. Justice Rehnquist felt, however, that this approach would permit too many defendants to exclude evidence, thereby "enact[ing] a substantial cost for the vindication of the Fourth Amendment and keeping . . . reliable evidence . . . from the trier of fact." *Rakas v. Illinois*, 439 U.S. at 137. Of course, adopting the target approach would create standing for persons whose substantive fourth amendment rights have not been directly violated, thereby making it impossible to equate the standing inquiry and traditional fourth amendment jurisprudence as Justice Rehnquist equated them. See text accompanying notes 4 through 15 *supra*.

72. *Rakas v. Illinois*, 439 U.S. at 142.

73. *Id.*

facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home.⁷⁴ While one's legitimate presence on the premises would not be irrelevant after *Rakas*, it would no longer be "controlling."⁷⁵

In defining the scope of fourth amendment protection after this repudiation of *Jones*, Justice Rehnquist found guidance in *Katz's* reference to expectations of privacy.⁷⁶ In a footnote, he explained that legitimate expectations of privacy "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."⁷⁷ He found that *Jones's* fourth amendment right was more properly analyzed as a legitimate expectation that the searched property was his private domain than as a privilege arising out of his mere presence there:

Jones not only had permission to use the apartment of his friend, but had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment. Except with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it.⁷⁸

Justice Rehnquist noted that *Katz* likewise shut the door of the phone booth "to exclude all others."⁷⁹ He concluded that the passenger of a car, "*qua* passenger," possesses a lower expectation of privacy.⁸⁰

In his concurring opinion, Justice Powell suggested that the result in *Rakas* was largely dependent upon the fact that it involved the search of a car, in which there is significantly less of a privacy interest than in a house.⁸¹ Yet none of the reasons Justice Powell gave for affording the car a lessened degree of privacy—its visible interior, its constant use in public places, and its highly regulated nature⁸²—explains why the contents of a locked glove compartment would not be protected.⁸³ In *Rawlings v. Kentucky*,⁸⁴ the Court cemented the position of the legitimate expectation of privacy rationale as the sole determinant of one's capacity to contest a search and seizure.⁸⁵ The search in *Rawlings* occurred when six police officers entered the house of Marquess with a warrant for his arrest.⁸⁶ Inside the house, they were unable to find Marquess but did find five others, including Rawlings; they also smelled marijuana smoke and saw marijuana seeds on the mantel in one of the house's bedrooms.⁸⁷ The officers decided to

74. *Rakas v. Illinois*, 439 U.S. at 142.

75. *Id.* at 148.

76. *Id.* at 143.

77. *Id.* at 143 n.12.

78. *Id.* at 149.

79. *Id.*

80. *Id.* at 148-49.

81. *Id.* at 153-54. The Court stated in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Id.* at 561.

82. *Rakas v. Illinois*, 439 U.S. at 154 n.2.

83. Moreover, Justice Rehnquist stated that the petitioners' claim would fail "even in an analogous situation in a dwelling place." *Id.* at 148. The trunk and glove compartment of a car, *id.* at 148-49, and the basement of a home, *id.* at 142, are areas where a mere passenger and a casual visitor in the kitchen of a home, respectively, have no legitimate expectation of privacy.

84. 100 S. Ct. 2556 (1980).

85. *Id. Rawlings* involved three fourth amendment issues. The two issues not involving standing concerned whether petitioner's admission of ownership of the drugs was the fruit of an illegal detention and whether the post-admission search of petitioner's person was illegal. *Id.* at 2560-61.

86. *Id.* at 2559.

87. *Id.*

obtain a search warrant prior to searching the house and its occupants.⁸⁸ While two of them went to obtain the warrant, the other four detained the five occupants, informing them that they could leave only if they consented to a body search.⁸⁹ Two did so, although Saddler, a roommate in the house, and Rawlings and Cox, both visitors, remained.⁹⁰ The officers returned with a warrant authorizing a search of the house (but not its occupants) forty-five minutes later.⁹¹ At the time, Cox and Rawlings were seated on a couch with Cox's purse between them.⁹² One officer ordered Cox to empty her purse onto the table in front of the couch; out came a jar of LSD and a number of smaller vials containing other illicit drugs.⁹³ Cox turned to Rawlings and told him "to take what was his," at which time Rawlings claimed ownership of the drugs.⁹⁴

At the suppression hearing prior to his trial on narcotics charges, Rawlings claimed that the search of the purse was the fruit of an illegal detention and an invalid search warrant.⁹⁵ He admitted that he dumped the drugs into Cox's purse just prior to the police's arrival, but he claimed that upon doing so, he asked her "if she would carry this for me, and she said 'yes.'"⁹⁶ Cox claimed, however, that when she saw Rawlings put drugs into her purse, she said "would you please take this. I do not want this is my purse," to which Rawlings replied "Okay, just a minute, I will."⁹⁷ Both Rawlings and Cox agreed that he left the room immediately after putting the drugs into her purse.⁹⁸ Upon his return, the police had arrived.⁹⁹

The Kentucky Supreme Court held that Rawlings did not have standing to challenge the search of Cox's purse because he had no "legitimate or reasonable expectation of freedom from governmental intrusion" into Cox's purse.¹⁰⁰ Justice Rehnquist, writing the majority opinion, agreed. Assuming that Cox had accepted the drugs, he found that the "precipitous nature" of the bailment precluded a finding that Rawlings had a legitimate expectation of privacy in the purse.¹⁰¹ Rejecting Rawlings's assertion of standing based on ownership of the drugs, Justice Rehnquist stated:

While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment. . . . Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy.¹⁰²

88. *Rawlings v. Kentucky*, 100 S. Ct. at 2559.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 2560.

96. *Id.*

97. *Id.* at 2560 n.1.

98. *Id.*

99. *Id.* at 2560.

100. *Rawlings v. Commonwealth*, 581 S.W.2d 348, 350 (Ky. 1979) (considering the totality of the circumstances, Rawlings made an insufficient showing that his legitimate or reasonable expectations of privacy were violated).

101. *Rawlings v. Kentucky*, at 2561. Justice Rehnquist actually listed four reasons why the defendant did not have a legitimate expectation of privacy in the purse. For further discussion, see text accompanying notes 121 through 124 *infra*.

102. *Id.* at 2562 (although petitioner might have had standing prior to *Rakas*, claim on merits would likely have failed).

Thus, *Rawlings* emphasized that a party's privacy interest in the searched area—whether it be a house or a purse—would be the primary determinant of a party's fourth amendment interest.

Note the subtle shift in the expectation of privacy analysis in *Rakas* and *Rawlings*. As the test was initially articulated, the "capacity to claim the protection of the [Fourth] Amendment depends not only 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."¹⁰³ Justice White's most telling point in his *Rakas* dissent was his perception that "the distinctions the [*Rakas* majority] would draw are based on relationships between private parties, but the Fourth Amendment is concerned with the relationship of one of those parties to the government."¹⁰⁴ Expectations of privacy that are unreasonable with respect to ordinary citizens are not necessarily unreasonable with respect to intrusions by the government. *Deforte* had very little privacy with respect to his colleagues or their guests, but the Court still found his "expectation . . . defeated by the entrance of the state officials."¹⁰⁵ The defendants in *Rakas* and *Rawlings* did not have complete control over who would have access to the property seized, but that fact should not necessarily defeat an expectation that the property would be free from governmental intrusion. To require complete control of one's property before one can reasonably expect the protection of the fourth amendment would dramatically diminish a person's freedom to interact with others and would destroy a vital element of our social structure. To avoid this result the holdings in *Rakas* and *Rawlings* should be tied to the peculiar facts of those cases—the seizure of property not claimed by defendants from a car in which they were passengers and the seizure of property claimed by the defendant which had been hastily shoved into someone else's purse—rather than given broad scope.

D. AUTOMATIC STANDING: *SALVUCCI*

Even before the expectation of privacy rationale was adopted as the standard for determining one's capacity to challenge a search, the automatic standing rule established in *Jones* had a dim future. In *Jones*, as described earlier, the Court identified two reasons for creating "automatic standing" for those charged with possessory offenses: the dilemma of self-incrimination and the "vice" of prosecutorial contradiction.¹⁰⁶

The Court weakened the first underpinning of the doctrine when it held in *Simmons v. United States*¹⁰⁷ that testimony given by a defendant at a pretrial hearing to establish standing may not be used against him at trial, regardless of his offense. The Court found that petitioner's testimony in *Simmons*, to the effect that he owned a suitcase and the clothing inside it, was "[t]he only, or at least the most natural, way in which he could have found standing to object to the admission of the suitcase" and was "an integral part of his Fourth Amendment claim."¹⁰⁸ Yet, noted the Court, if petitioner was unsuccessful in suppressing the evidence, the testimony would probably also play a large role in his conviction. *Simmons* rejected as "intolerable" the forcing of a defendant to choose between his fourth and fifth amendment rights.¹⁰⁹

103. *Mancusi v. DeForte*, 392 U.S. at 368 (emphasis added).

104. *Rakas v. Illinois*, 439 U.S. at 167-68.

105. *Mancusi v. DeForte*, 392 U.S. at 369.

106. See text accompanying notes 35 through 37 *supra*.

107. 390 U.S. 377, 393 (1968).

108. *Id.* at 391; see note 213 *infra* (discussing degree of possessory interest required).

109. 390 U.S. at 394. The defendant was:

obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional

The Court teetered on the edge of abolishing the automatic standing rule in *Brown v. United States*.¹¹⁰ Although it found no need to reach the question in *Brown*, the Court stated “we do not decide that [the] vice of prosecutorial self-contradiction warrants the continued survival of *Jones*’s ‘automatic standing’ now that our decision in *Simmons* has removed the danger of coerced self-incrimination.”¹¹¹ Justice Rehnquist, once again, stood ready to deal the final blow to the automatic standing rule. In *United States v. Salvucci*,¹¹² Justice Rehnquist held that *Simmons* had “eliminated” the self-incrimination dilemma,¹¹³ despite the petitioners’ claim that, even after *Simmons*, pretrial suppression hearing testimony could be used by the prosecution both to impeach the defendant and to prepare its case. Justice Rehnquist responded that the impeachment argument “more aptly relates to the proper breadth of the *Simmons* privilege” and did not need to be resolved in *Salvucci*.¹¹⁴ Addressing the second contention, he noted that the prosecutor could obtain helpful information during any suppression hearing, whether it involved a possessory or nonpossessory offense; therefore, maintaining automatic standing as a special rule merely to protect defendants charged with a possessory offense made no sense.¹¹⁵

Justice Rehnquist further held that, although the self-incrimination rationale was the “cornerstone” of *Jones*, *Rakas*’s adoption of the expectation-of-privacy analysis had also appreciably diminished the “vice of prosecutorial contradiction” that *Jones* had identified as a second underpinning for the automatic standing rule.¹¹⁶ Echoing *Rawlings*, he stated, “[we] simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.”¹¹⁷ Thus, a prosecutor can, without contradiction, assert that the defendant does not have “standing” to contest a search resulting in the seizure of his property and at the same time contend at trial that the defendant owns that property.¹¹⁸

right should have to be surrendered in order to assert another.

110. 411 U.S. 223, 228 (1973) (no automatic standing because case did not depend on possession of seized evidence at time of alleged fourth amendment violation).

111. *Id.* at 229.

112. 100 S. Ct. 2547 (1980).

113. *Id.* at 2551.

114. *Id.* at 2554.

115. *Id.*

116. See text accompanying notes 35 through 37 *supra*.

117. *Rawlings v. Kentucky*, 100 S. Ct. at 2553.

118. Although Justice Rehnquist correctly notes that the automatic standing rule is not consonant with the Court’s stance on the scope of the fourth amendment, a troublesome aspect of *Salvucci* is its intimation that the defendant’s pretrial statements may be used to impeach him at trial. See 100 S. Ct. at 2554 nn.8 & 9. If the Court so holds, it will create the same “intolerable” tension between the fourth and fifth amendments that the Court identified in *Simmons*. The defendant could be forced to choose between testifying at the suppression hearing and testifying during trial.

Whether the Court will in fact permit suppression hearing statements to be used to impeach the defendant at trial is not clear. In *Harris v. New York*, 401 U.S. 222, 225-26 (1971), the Court held that statements by the defendant that were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), could be used to impeach the defendant’s trial testimony if the statements were otherwise voluntarily made. In *United States v. Havens*, 100 S. Ct. at 1917 (1980), the Court implied that the defendant’s statements to police about evidence that is subsequently suppressed as illegally seized could also be used to impeach him. In *New Jersey v. Portash*, 440 U.S. 450 (1979), however, the Court held that testimony given at a grand jury proceeding pursuant to a grant of immunity could not be used to impeach the defendant at trial. The Court stated:

Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant’s will; the witness is told to talk or face the government’s coercive

III. AN INTERPRETATION OF THE COURT'S STANCE ON THE SCOPE OF THE FOURTH AMENDMENT

With its decisions in *Rakas*, *Rawlings*, and *Salvucci*, the Court has eliminated the set of rules that once governed the standing inquiry. Automatic standing is, of course, gone completely. The other standards—the individual's interest in the property searched, his interest in the property seized, and whether he was legitimately present on the searched property at the time of the search—have been downgraded from dispositive rules to mere factors to be considered in the aggregate when assessing whether a fourth amendment violation has occurred. Undoubtedly, the Court has substantially reduced the scope of the fourth amendment.

A close examination of the Court's recent decisions, however, reveals that there is still a large area of fourth amendment protection remaining. The Court has not only retained the old standards as variables in the expectation of privacy analysis but suggested that additional factors may be relevant to that inquiry. In his concurring opinion in *Rakas*, for example, Justice Powell noted that on previous occasions when the Court was concerned with the reasonableness of a defendant's privacy expectations, it examined whether he "took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy."¹¹⁹ Citing *Jones*, Justice Powell also pointed out that the Court had "looked to the way a person has used a location to determine whether the Fourth Amendment should protect his expectations of privacy."¹²⁰ In *Rawlings*, Justice Rehnquist paraphrased Justice Powell's factors and added some of his own in examining the defendant's privacy interest in the searched purse. First, he noted that *Rawlings* never had access to the purse prior to his sudden bailment.¹²¹ Second, he stated that the defendant had no "right to exclude other persons" from the searched area.¹²² He also felt that the precipitous nature of the bailment "hardly support[ed]

sanctions, notably, a conviction for contempt. . . . Balancing of interests was thought to be necessary in *Harris* . . . when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

Id. at 459.

It has been suggested that the defendant facing the choice between testifying at a suppression hearing and at a trial more closely resembles the defendant in *Portash* than the defendant in *Harris*. See 3 W. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 53 (Supp. 1978) [hereinafter cited as 3 LAFAYE]. In the fourth amendment *Portash* situation, the defendant must talk, and perhaps incriminate himself, in order to protect the fourth amendment rights to which he is entitled. The defendant in a fifth amendment *Harris* situation, however, does not have to talk in order to receive a constitutional benefit and, in fact, is constitutionally protected from punishment for remaining silent. In the first case, the State is coercing, before trial, the generation of possibly incriminating information; in the latter case the State is explicitly required to prove that the confession is voluntary before it can use the confession to impeach.

If the impeachment issue is resolved in the manner suggested by *Portash*, there is little justification for maintaining the automatic standing rule after *Simmons* and *Rakas*. If instead, the Court relies on *Harris* in deciding this issue, *Salvucci* will have placed those charged with possessory offenses on the same "horns" that existed before *Jones* (unless, as discussed in the text accompanying note 171 *infra*, they have a right to exclude others from the searched property and do not need to show a possessory interest in the seized item to establish "standing").

119. 439 U.S. at 152 (Powell, J., concurring).

120. *Id.* at 153.

121. *Rawlings v. Kentucky*, 100 S. Ct. at 2561. Justice Rehnquist contrasted this bailment with the "bailment" in *Jones*, in which the "bailee" (*Jones*) essentially took control of the apartment containing his property.

122. *Id.* Justice Rehnquist cited *Rakas's* description of *Jones* and *Katz* to support this point, see text accompanying notes 78 through 80 *supra*, and noted that one of *Cox's* friends had previously "rummaged" through her purse. *Id.*

a reasonable inference that petitioner took normal precautions to maintain his privacy."¹²³ Finally, he pointed out that the defendant admitted to having no subjective expectation of privacy in the purse.¹²⁴

From *Rakas* and *Rawlings*, then, it is possible to extract at least four indicia of privacy, supplementing those existing before *Rakas*, that the Court will consider: the individual's authority to exclude others from the searched area, his previous access to and use of the area, his attempts to maintain privacy, and his subjective expectation of privacy. The first two factors are so closely tied to the issue of whether the individual has a sufficient interest in the searched area that they, along with the legitimate presence standard, will be discussed under the heading: Interest in the Searched Premises. The latter two factors, although also related to this issue, present special problems and will be treated separately. Finally, the issue of to what extent, if any, a possessory interest in the seized item independently confers a fourth amendment right will be discussed.

A. INTEREST IN THE SEARCHED PREMISES

Prior to *Rakas*, *Rawlings*, and *Salvucci*, it was possible for a person with no privacy interest in the area subjected to a search to contest that search.¹²⁵ Under the Court's current interpretation of the fourth amendment, a person cannot challenge the legality of governmental intrusion into any area in which he does not have a legitimate expectation of privacy. The Court has suggested at least three ways that an individual might be able to establish the requisite relationship with the searched area.¹²⁶

1. The Right to Exclude

Ownership of the searched area remains the single most important factor in establishing the degree of privacy interest necessary to sustain a fourth amendment objection. As Justice Powell stated in *Rakas*, "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable."¹²⁷ Justice Rehnquist subtly qualified this statement, however, with his comment in the majority opinion in *Rakas* that "[o]ne 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."¹²⁸ Thus, according to Justice Rehnquist, a legitimate expectation of privacy is not conferred by the property interest *per se*, but by the associated authority to bar others' access to the property. Although Justice Rehnquist noted that an owner of property generally possesses such authority,¹²⁹ he also indicated that there may be circumstances where the owner waives his right to exclude others.¹³⁰

123. *Rawlings v. Kentucky*, 100 S. Ct. at 2561. Justice Rehnquist cited *Katz* and *United States v. Chadwick*, 433 U.S. 1 (1977) at this point; see text accompanying notes 176 through 185 *infra*.

124. *Rawlings v. Kentucky*, 100 S. Ct. at 2561. At *Rawlings*'s suppression hearing, he answered "No, sir" to the following questions: "Did you feel that Vanessa Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?" *Id.* at n.3.

125. For example, before *Rakas*, neither a person with a property interest in the item seized nor a person charged with a possessory offense needed to prove such an interest in order to have "standing." See *Jones v. United States*, 362 U.S. 257, 264 (1960).

126. A fourth way might be to make a valid bailment of property to a third person. See text accompanying notes 200 through 206 *infra*.

127. 439 U.S. at 153 (Powell, J., concurring).

128. *Id.* at 143-44 n.12 (citation omitted).

129. Justice Rehnquist reaffirmed *Alderman* on this point. *Id.*

130. *Id.* He added that a homeowner might not be able to establish a legitimate expectation of

The majority opinion in *Rakas* indicated that nonowners *may* also possess a right to exclude sufficient to afford them fourth amendment protection, although the boundaries of this right are not easily discerned.¹³¹ In explaining why the defendants in *Jones* and *Katz* "could legitimately expect privacy in the areas which were the subject of the search and seizure" while the *Rakas* defendants could not, Justice Rehnquist described the facts in those cases in terms of the right to exclude: "Except with respect to his friend, Jones had complete dominion and control over the apartment and *could exclude others* from it. Likewise . . . Katz [could] *exclude all others*. . . ."¹³²

It could be argued that except with respect to the owner of the searched car, the *Rakas* defendants had complete dominion and control over the car and could exclude others from it. Practically, however, the *Rakas* defendants lacked the same degree of "dominion and control" that Jones and Katz possessed, because their authority was directly superseded by the owner's. In *Jones*, the apartment owner left the apartment for five days; in *Katz*, there was no competing "owner." In *Rakas*, of course, the owner was actually present at the time of the search and apparently had not offered to share her possessory interest with her passengers.¹³³

A narrow reading of *Rakas* would confine the fourth amendment right to exclude others to situations in which the nonowner has complete control over the premises, either actually (as in *Katz*) or constructively (as in *Jones*).¹³⁴ Such an approach, of course, fails to recognize that, more often than not, control of a given place is shared between two or more people who still expect privacy with respect to the rest of the world. Surely this fact is one of the "understandings . . . recognized and permitted by society" to which Justice Rehnquist refers in *Rakas*.¹³⁵ One must go beyond reliance on *Jones* and *Katz* to develop a conceptual model of the right to exclude that conforms with reality.

In his *Rakas* dissent, Justice White, perhaps unwittingly, suggested such a model—the jurisprudence of third party consent searches. After referring to the Court's decisions regarding the capacity of one person to consent to a search of property he shares with another, he concluded that "the scope of the authority sufficient to grant a valid consent can hardly be broader than the contours of protected privacy."¹³⁶ This comment helps delineate the boundaries of an individual's legitimate expectation of privacy, insofar as that expectation is dependent on a right to exclude others. If, for purposes of the fourth amendment, an individual has the right to admit others into a particular location, he should also possess a constitutionally significant right to exclude others from that property. After all, these rights are but converse

privacy "with respect to particular items located on the premises," citing cases in which police were able to see the "homeowner's" property from a lawful vantage point. See text accompanying notes 190 through 196 *infra*. An absentee owner, such as a landlord, may also lose this right to exclude. *But see* notes 145 through 146 *infra*, and accompanying text.

131. See *Rakas v. Illinois*, 439 U.S. at 149.

132. *Id.* (emphasis added).

133. In his dissent, Justice White noted that this fact had not been actually established at the suppression hearing. He stated:

So far as we know, the owner of the automobile in question might have expressly granted or intended to grant exactly such an interest. Apparently not contemplating today's radical change in the law, petitioners did not know at the suppression hearing that the precise form of the invitation extended by the owner to the petitioners would be dispositive of their rights against governmental intrusion.

Id. at 167 n.19 (White, J., dissenting).

134. Justice Rehnquist emphasized in *Rakas* that "[a]t the time of the search, Jones was the only occupant of the apartment because the lessee was away for a period of several days." *Id.* at 141.

135. *Id.* at 143 n.12.

136. *Id.* at 163. Justice White cited *Frazier v. Cupp*, 394 U.S. 731 (1969) and *United States v. Matlock*, 415 U.S. 164 (1974).

aspects of the same phenomenon—the effort to regulate one's privacy.

The decisions evaluating a person's capacity to give a valid third party consent are often phrased in terms of the person's degree of control over the premises that are searched pursuant to the consent. The seminal Supreme Court decision in *United States v. Matlock*¹³⁷ found consent to be valid if the third party "possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected."¹³⁸ The Court further explained:

The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.¹³⁹

Interpreting this language, lower courts have held that spouses,¹⁴⁰ lessees,¹⁴¹ co-tenants,¹⁴² and bailees¹⁴³ can usually consent to searches of property they occupy or use. Of course, in consent cases, the central issue is not the person's "classification" but his degree of joint access to or control over the searched premises. Thus, a co-tenant who has never used the searched area, even if it is within a house he inhabits, may not have the capacity to consent to the search.¹⁴⁴ By the same token, a landlord or bailor, individuals who normally cannot give a valid consent to a search of property they own but do not occupy,¹⁴⁵ may still be able to permit entrance to those areas over which they maintain a degree of control. Suppose, for example, that a landlord stores property in the attic of premises he leases. Although generally he has no capacity to consent to a search of the leased house as a whole, it is usually held that he does have such a capacity with respect to an area over which he retains some authority.¹⁴⁶ Or

137. 415 U.S. 164 (1974) (co-occupant of bedroom had sufficient authority to consent to search of that room and seizure of money stolen from third party by other occupant).

138. *Id.* at 171.

139. *Id.* at 171 n.7.

140. *See, e.g.*, *United States v. Patterson*, 554 F.2d 852, 854 (8th Cir. 1977); *Yuma County Attorney v. McGuire*, 111 Ariz. 437, 438, 532 P.2d 157, 158 (1975); *Burkham v. State*, 538 P.2d 1121, 1123 (Okla. Crim. App. 1975). In *Matlock* itself, a woman co-habiting with defendant out of wedlock was held to have the capacity to give consent. *See* note 137 *supra*.

141. *See United States v. Green*, 523 F.2d 968, 971 (9th Cir. 1975); *State v. Reagan*, 35 N.C. App. 140, 142-43, 240 S.E.2d 805, 807-08 (1978).

142. *See United States v. Richardson*, 562 F.2d 476, 479-80 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *State v. Wyatt*, 327 So. 2d 401, 404 (La. 1976).

143. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (bailee of duffel bag who kept some property in separate compartment of bag could consent to search of other compartments); *United States v. Eldridge*, 302 F.2d 463, 466 (4th Cir. 1962) (person given car and keys to trunk by owner for purpose of driving around town could consent to search of trunk, excluding anything in car that was "covered over or concealed in a package or wrapper").

144. *See Gov't of Canal Zone v. Furukawa*, 361 F. Supp. 194, 198 (D.C.Z. 1973) (co-tenant of barracks could not consent to search of defendant's dresser).

145. *See Stoner v. California*, 376 U.S. 483, 488 (1964) (hotel clerk could not consent to search of guest's room); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (landlord who could enter premises occupied by tenant to "view waste" could not consent to search of premises for illegal distillery); *People v. Smith*, 67 Cal. App. 3d 638, 647, 136 Cal. Rptr. 764, 768 (1977) (bailor of airplane could not consent to search of plane while bailee has control of it).

146. *See United States v. Cook*, 530 F.2d 145, 149 (7th Cir.) (landlady who had reserved the right to store grain in tenant's poultry house, but had never exercised it, could consent to search of latter), *cert. denied*, 426 U.S. 909 (1976); *United States v. Campanile*, 516 F.2d 288, 292 (2d Cir. 1975) (landlord could consent to search of trash receptacles used by all tenants); *Commonwealth v. Latshaw*, 242 Pa. Super.

suppose a car owner bails his car to a friend, asking him to return it to him in a few hours. The owner retains his capacity to consent to a search of its contents.¹⁴⁷ If, however, he in effect abandons it to the bailee for several months, he may lose that capacity.¹⁴⁸ Similarly, while a guest generally cannot consent to a search of a house that he occupies,¹⁴⁹ a "guest" who has considerable authority over the house may be treated differently.¹⁵⁰ In circumstances where the individual has a right to consent, he should also have a right to exclude sufficient to confer a legitimate expectation of privacy in the area searched.¹⁵¹

The "right to consent and exclude" model can be used to explain most of the Court's decisions concerning the fourth amendment "standing" of nonowners. Jones, as bailee-occupant of his friend's apartment; Katz as the sole occupant of the phone booth; and DeForte, as the "co-tenant" of the union office, all possessed a right to consent to the searches that took

233, 363 A.2d 1246, 1247 (1976) (landlady could consent to search of barn jointly used with licensee), *aff'd*, 481 Pa. 298, 392 A.2d 1301 (1978), *cert. denied*, 441 U.S. 931 (1979).

147. *Cf.* United States v. Carter, 569 F.2d 801, 804 (4th Cir. 1977) (truck owner's consent to search of truck being used by his employee held valid), *cert. denied*, 435 U.S. 973 (1978). The court noted that the owner's "dominion over the vehicle is underscored by his ability to designate its use and users." *Id.*

148. *Cf.* notes 186 through 188 *infra*, and accompanying text.

149. United States v. Harris, 534 F.2d 95, 97 (7th Cir. 1976) (guest who knew owner of apartment for only three weeks and did not possess key to premises did not share common authority over premises necessary to validly consent to warrantless search). Note, however, that a guest presumably could consent to a search of his own belongings.

150. United States v. Turbyfill, 525 F.2d 57, 59 (8th Cir. 1975) (occupant of indefinite duration and with unlimited access to house had authority to invite police in to search premises); Morrison v. State, 508 S.W.2d 827, 828-29 (Tex. Crim. App. 1974) (guest's consent to search of appellant's apartment lawful because consented had permission to use apartment during appellant's absence).

151. There are potentially two confusing issues connected with third party consent cases. The first is the so-called "apparent authority doctrine," which holds that consent is valid when given by any individual whom police reasonably believe has sufficient authority in the premises to consent to its search. Although this doctrine appears to be easily manipulable by the police, some jurisdictions have adopted it as a sufficient determinant of a party's capacity to give consent. See *People v. Superior Court*, 77 Cal. App. 3d 69, 80, 143 Cal. Rptr. 382, 388 (1978) (police reasonably believed that manager who unlocked shed had authority to consent to its search), *rev'd on other grounds*, 25 Cal. 3d 67, 157 Cal. Rptr. 716 (1979); *State v. Drake*, 343 So. 2d 1336, 1338 (Fla. Dist. Ct. App. 1977) (agricultural inspector reasonably believed that driver of stopped truck had authority to consent to search of back pack on truck). See also MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 55240.2 (Proposed Official Draft, 1957). The Supreme Court has not addressed the validity of the apparent authority doctrine. See *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974). To the extent this doctrine confers a capacity to consent on those who do not have actual joint access to or control over the searched area, it should not govern the analysis set forth here. It obviously is not bottomed on the privacy expectations of the defendant but rather on the reasonableness of the policeman's beliefs, which are not necessarily congruent with one's legitimate expectations of privacy.

A second issue that could prove confusing is the frequent use of expectation-of-privacy language in consent search cases. See *State v. Taggart*, 14 Or. App. 408, 417, 512 P.2d 1359, 1364 (1973) ("Whatever subjective expectation of privacy defendant may have had was not objectively reasonable under the circumstances."). In this context, when a court says a defendant has no expectation of privacy in a given area, it is not saying that the individual should not receive any fourth amendment protection under *Rakas*. If it were, the court could technically never reach the consent issue because the defendant would not have the capacity to bring it up. Rather, the court is referring to the fact that, to the extent the defendant shares his property with someone else, his expectation of privacy is diminished, and his claim that the consent of that person was invalid will be less likely to succeed. To equate the two concepts would make it impossible to contest the voluntariness of a search. Suppose, for example, that the police beats the defendant's spouse until she gives in and "consents" to a search. If the defendant is found to have a lessened expectation of privacy in his house because he shares it with his wife, and this fact prevents him from asserting a fourth amendment claim, his own fourth amendment rights have been flagrantly violated by the police with impunity. For an example of this erroneous reasoning, see note 239 *infra* (discussing *State v. List*, 166 N.J. Super. 368, 399 A.2d 1040 (1979)).

took place. All were afforded fourth amendment protection. The *Rakas* defendants, as temporary guests in a car, and Rawlings, who had no previous access to the purse, lacked the capacity to consent. They were denied fourth amendment protection. In these cases, the defendants' ability to assert the protection of the fourth amendment can be correlated with their "right to consent and exclude."

2. Previous Access

The "right to consent and exclude" model noted above should not be considered the exclusive means of establishing a legitimate expectation of privacy. Nor is it contended that this model explains all of the Court's decisions that effect the scope of the fourth amendment. In particular, the Court's grant of standing in *United States v. Jeffers*¹⁵² suggests an additional manner in which a person with no property interest in the searched premises may establish a constitutionally sufficient privacy interest in that area.

Jeffers's federal narcotics conviction was based on drugs seized from a hotel room rented by two of his aunts. Jeffers did not pay rent for the room but possessed its key and apparently enjoyed unlimited access to it.¹⁵³ Because Jeffers did not have a common law property interest in the room and was not present at the time of the search, the Government contended that he had no standing to contest the seizure. But the Court determined that the search and subsequent seizure were "bound together by one sole purpose—to locate and seize the narcotics of respondent."¹⁵⁴ The majority found that Jeffers's standing would be "unquestionabl[e] . . . unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein."¹⁵⁵ The Court held, however, that the federal statute declaring that no property rights existed in contraband property meant only that such contraband could not be returned to the possessor as his chattel. Thus, "[i]t being his property, for purpose of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on [sic] his trial."¹⁵⁶

While some lower courts understood this language to mean that Jeffers's standing was based purely on his property interest in the seized narcotics,¹⁵⁷ a majority of the present Supreme Court held, in *Rakas*, that "[s]tanding in *Jeffers* was based on Jeffers's possessory interest in both the premises searched and the property seized."¹⁵⁸ Clearly, Jeffers's interest in the premises cannot be justified on the right-to-exclude grounds alone, even if interpreted in the manner suggested below. The fact that Jeffers possessed a key to the searched hotel room does not mean that his aunts—who paid for the room—authorized him to "permit [i]ts inspection in his own right" or "assumed the risk" that he might allow their room to be searched, to use *Matlock's* terminology.¹⁵⁹ In the usual case, neither the individual conferring the key nor the person receiving it would assume that that act by itself would confer upon the donee the right to let any of his acquaintances, let alone the police, enter the donor's premises. Only if the donor also permitted the donee to live in the premises, as happened in *Jones*, could it be said that the donor assumed the risk that the donee might consent to a search of his property.

152. 342 U.S. 48 (1951).

153. *Id.* at 50.

154. *Id.* at 52.

155. *Id.*

156. *Id.* at 54.

157. *See, e.g.,* *United States v. Brown*, 300 F. Supp. 1285, 1287 (D.N.H. 1969)(standing based on possessory interest in suitcase and attache case seized from third party); *United States v. Birrell*, 242 F. Supp. 191, 199 (S.D.N.Y. 1965)(standing where defendant's business records seized from his attorney).

158. 439 U.S. at 136.

159. *United States v. Matlock*, 415 U.S. 164 (1974).

Because *Rakas* implicitly affirmed *Jeffers*,¹⁶⁰ how is the result in that case to be explained if not on the basis of the right to consent and exclude? There are two aspects of *Jeffers* that differentiate it from *Rakas* and *Rawlings*, the cases that best reflect the situations which the Court believes do not implicate the fourth amendment. First, *Jeffers* could enter the searched area "at will," according to the Court's opinion. Second *Jeffers* admitted ownership of the seized property. While the degree of the defendant's access to the car prior to the search in *Rakas* is unclear,¹⁶¹ there is no question that they disclaimed any possessory interest in the seized item. In *Rawlings*, the defendant claimed a possessory interest, but clearly had no previous access to the purse. These differences suggest that, if *Jeffers* is to maintain any validity, the Court will permit a defendant to contest a search and seizure if he can show previous, continuing access to the searched area and a possessory interest in the seized item.

It is probable that unless the defendant can show access to the premises akin to that enjoyed by *Jeffers*, plus a possessory interest in the item seized from those premises, the present Court will not view favorably his fourth amendment claim, at least under the *Jeffers* rationale.¹⁶² In light of the Court's seeming failure to distinguish sufficiently between privacy expectations with respect to others and privacy expectations with respect to the government,¹⁶³ it would probably hold that a person with only occasional access to particular premises should not be able to expect any personal privacy there. But suppose that a person who can show only limited access to certain premises is present at the time of an illegal entry onto them and that the entry results in the seizure of his property. If used against him, would he have the capacity to challenge the search that led to the seizure?

3. Legitimate Presence

It is arguable that if the fourth amendment "protects people, not places," an individual's personal privacy is infringed upon when the police unexpectedly enter a place he legitimately occupies, whether he owns that place or not. In *Rakas*, the Court declared that the petitioners could not claim the protection of the fourth amendment because their presence on the searched premises alone could not sustain a legitimate expectation of privacy. Yet because the *Rakas* defendants did not own the property seized, it would still seem to be an open question whether legitimate presence, in addition to possessory interest in the item seized, would be sufficient for fourth amendment purposes. This impression is bolstered by Justice Rehnquist's statement in *Rakas* that, while persons who are casual visitors in a house may no longer be able to contest a search of the house simply because they are legitimately present at the time of the search, "this 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."¹⁶⁴

Rawlings did nothing to contradict this perception. In *Rawlings*, the defendant was legitimately in the house that was searched and owned the drugs that were seized. The issue in that case, however, was whether the defendant had a privacy interest in the purse, not in the

160. "We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement discussed in *Jones* and reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine." *Id.* at 139.

161. One of the petitioners was the former husband of the car owner and driver and had been with her when she had purchased it. Thus, it is likely that he at one time had access to it. *Rakas v. Illinois*, 439 U.S. at 128, 167 n.20.

162. As a practical matter, most individuals with unlimited access to a given area will possess a right to consent and exclude as defined here. Moreover, a defendant who can show that the property was properly bailed to a third party might be able to assert a fourth amendment claim, even if he has incomplete access. See text accompanying notes 200 through 206 *infra*.

163. See text accompanying notes 103 through 105 *supra*.

164. *Rakas v. Illinois* 439 U.S. at 142 n.11.

house. His relationship to the house was irrelevant to the finding in that case. Had the issue been whether he could have contested an illegal entry of the house, an issue that did not arise because the entry was pursuant to a valid arrest warrant, the conclusion in *Rawlings* would presumably have been different.

Professor LaFave has suggested that because *Rakas* involved a search after a lawful stop of the car, its holding does not necessarily apply to situations in which a car is unlawfully stopped.¹⁶⁵ Under such circumstances, he argues, anyone legitimately present in the car should be able to contest not only the stopping but the “fruits” of that stopping, including the seizure of any property found in the car. He extends this reasoning to illegal entries of houses. To use his example:

If the police, without required notice or without probable cause or without a required search warrant, burst into *B*'s home and disrupt a dinner party at which *A* is present as a guest, then certainly *A* should be deemed to have standing to object—just as passengers in a car may object to its illegal stopping. Dinner guest *A* has had his freedom, privacy and solitude intruded upon by the police and thus has standing to object to that encroachment upon his rights, even if it led to the discovery of evidence in *B*'s basement, a place *A* (in Justice Rehnquist's language) ‘has never seen, or been permitted to visit.’¹⁶⁶

Professor LaFave's analysis is ingenious, but it probably would not be endorsed in its totality by a majority of the Court as he claims.¹⁶⁷ Six Justices have indicated that they do not believe that “mere legitimate presence is enough to create a Fourth Amendment right.”¹⁶⁸ Given its multi-factor approach, the Court would not consider the invasion of a person's privacy that occurs when police illegally enter a home he is visiting sufficient, in itself, to confer a legitimate expectation of privacy. Instead, it seems more likely that the Court would require casual visitors and passengers to base their fourth amendment claim on a seizure of their own property or of property placed in an area from which they have a right to exclude others.¹⁶⁹ Thus, using LaFave's example, if the police burst into *B*'s home, go to the basement that *A* has never seen and seize items that belong to *B*, the present Court would probably hold that *A* has not suffered a constitutional deprivation. But if, after an illegal entry, the police seize property belonging to *A* that *A* has placed on *B*'s table or in *B*'s purse, or seize *any* property from *A*'s purse or person, there is considerably greater chance, based on the Court's current stance, that it would accord fourth amendment protection to *A*.

These points highlight the difference between the defendant who bases his fourth amendment claim on a right to exclude others from an area the police illegally enter and the defendant who can show only unlimited access to or legitimate presence in the area. The first defendant need not prove a possessory interest in the seized item or its location within the area in order to contest the police action leading to its seizure, whereas the second defendant must do so. *Alderman* held that a person can contest the seizure of a conversation to which he is not

165. 3 LAFAVE, *supra* note 118, at 58-60.

166. *Id.* at 59-60.

167. LaFave notes that both Justice Powell's concurring opinion (joined by Chief Justice Burger) and Justice White's dissenting opinion (joined by Justices Brennan, Marshall, and Stevens) recognize that *Rakas* did not involve the constitutionality of the stop of the car in that case, but only decided the defendants' standing to contest the search after the car was stopped. He argues that two-thirds of the Court might therefore decide in his favor. *Id.* at 60.

168. *Rakas v. Illinois*, 439 U.S. at 151 (Powell, J., concurring).

169. This may be a quibbling distinction. It is probable that in most cases the property the state seeks to use against a “visitor” defendant belongs to that defendant.

a party when that conversation takes place in his home.¹⁷⁰ Unless the Court is willing to recognize a difference between a conversation and other types of “property” for purposes of the fourth amendment, *Alderman* stands for the proposition that a home owner—or anyone with a similar right to exclude¹⁷¹—should be able to contest the seizure of any property resulting from an illegal entry of that home.¹⁷² The person who cannot show that he possessed such a right with respect to the entered area cannot benefit from the *Alderman* rationale and needs to show additional indicia of privacy.¹⁷³

The above discussion is based on the assumption that the police have illegally entered the searched premises. Of course, if the police enter a house lawfully, no one, including the owner of that house, may bottom a fourth amendment claim on his privacy interest in the house. As the next section points out, however, it is still possible to contest the search of items within the house; the principles discussed above should apply whether the area illegally entered is a home or something much smaller.

B. REASONABLE PRECAUTIONS

Both Justice Powell and Justice Rehnquist suggested that the present Court will consider the precautions an individual has taken to maintain his privacy in assessing whether that individual merits fourth amendment protection.¹⁷⁴ If such precautions are “reasonable”—that is, “[if they are] customarily taken by those seeking privacy”¹⁷⁵—they may create a legitimate expectation of privacy. As will be argued below, however, relying too heavily on such an analysis would have undesirable consequences to the extent it requires individuals to take certain steps before they can expect privacy. Moreover, such reliance is, for the most part, unnecessary if one accepts the precept that a right to exclude others from a given area generally confers a legitimate expectation of privacy in that area.

For example, one of the two cases that both Justices Powell and Rehnquist cite to illustrate the reasonable precautions principle is *Katz v. United States*.¹⁷⁶ In *Katz*, it will be remembered, the Court found that an individual who shuts the door of a phone booth and pays the toll to make a call is entitled to an expectation that the call will be private. Thus, paying for the privilege of isolation from the rest of the world, as occurs when one uses a phone booth or a taxicab,¹⁷⁷ may constitute a “reasonable” precaution to maintain one’s privacy. Yet, as *Rakas* made clear,¹⁷⁸ *Katz* can best be explained in terms of the right-to-exclude rationale.

Similarly, the Court’s holding in the second case cited by Justices Powell and Rehnquist, *United States v. Chadwick*,¹⁷⁹ is more reasonably based on the right to exclude rationale. *Chadwick* involved the validity of a warrantless search of a locked footlocker seized from a car. Because *Chadwick* was decided before *Rakas* and, like *Katz*, focused on whether

170. *Alderman v. United States*, 394 U.S. 165, 176-77; see text accompanying note 60 *supra*.

171. There is no reason why a nonowner who has sufficient control over a particular area to permit its search should not also be able to keep any property there and legitimately expect it to remain free from government intrusion. For example, a lessee, whose right of control is as great as an owner’s during the period of the lease, J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 202-03 (2d ed. 1975), should have this legitimate expectation.

172. *Alderman v. United States*, 394 U.S. at 176-77.

173. *Id.*

174. *Rakas v. Illinois*, 439 U.S. at 149 (1978) (Rehnquist, J.); *id.* at 152 (Powell, J., concurring).

175. *Id.* at 152. (Powell, J., concurring).

176. 389 U.S. 347, 352 (1967), cited in *Rakas v. Illinois*, 439 U.S. at 149, 152.

177. In *Rios v. United States*, 364 U.S. 253 (1960), the Court apparently assumed that the petitioner—who had hired a cab, sat in the back seat and put the seized package on the floor when the police stopped the car—had standing to contest the search and seizure.

178. *Rakas v. Illinois*, 439 U.S. at 149; see text accompanying notes 129 through 134 *supra*.

179. 433 U.S. 1 (1977), cited in *Rakas v. Illinois*, 439 U.S. at 148, 153.

a "search" occurred when the police opened the footlocker, it did not directly address the issue of whether the individuals who owned the footlocker had a right to contest the search. But by combining these two inquiries, *Rakas* made the *Chadwick* holding directly relevant to the issue being discussed here. In supporting its holding that once the footlocker was immobilized, police should have obtained a warrant for its search, the Court stated:

By placing personal effects inside a double locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.¹⁸⁰

Admittedly, this language focuses on the fact that the footlocker was locked, suggesting that this precaution impressed the Court. In *Arkansas v. Sanders*, however, the Court applied *Chadwick* to invalidate the warrantless search of an unlocked suitcase seized under similar circumstances. The *Sanders*¹⁸¹ opinion tacitly acknowledged that the end result of applying a reasonable-precautions analysis in the manner implied by *Chadwick* would be a society in which citizens could not expect privacy from unreasonable government intrusion unless they carried their effects in opaque, locked containers.¹⁸² Justice Blackmun's dissent in *Sanders* queried whether the majority's decision would require a warrant to search items such as an "orange crate," a "lunch bucket," and a "paper bag." He suggested that, at some point, "[t]he lines that will be drawn will not make sense in terms of the policies of the Fourth and Fourteenth Amendments."¹⁸³ Yet the majority in *Sanders* hinted that it might include these types of containers within the ambit of fourth amendment protection.¹⁸⁴

Ironically, Justice Blackmun's fellow dissenter in *Sanders*, Justice Rehnquist, suggested the appropriate approach to analyzing searches of containers when he implied, in *Rawlings*, that one can possess a legitimate expectation of privacy in a purse based merely on one's right to exclude others from it.¹⁸⁵ It would seem that if a person uses a paper bag to hold his belongings, he should be accorded the same fourth amendment protection he would have in a purse or suitcase.

Reliance on the "right to consent and exclude" model does not, however, render the reasonable-precautions analysis totally irrelevant to the fourth amendment inquiry. There are three situations in which one's capacity to contest a search or seizure may be affected by a failure to take reasonable precautions to maintain one's privacy.

1. Abandonment

The first situation triggering reasonable-precautions analysis is obvious and needs limited attention here. If the property—be it a gun, a suitcase, a car or a house—is, or appears to be,

180. *United States v. Chadwick*, 433 U.S. at 11.

181. *Arkansas v. Sanders*, 442 U.S. 753 (1979) (expectation of privacy associated with personal luggage not diminished simply because officers removed luggage from lawfully stopped vehicle).

182. *Id.* at 772 (Blackmun, J., dissenting).

183. *Id.*

184. The majority was careful to limit its decision to "personal luggage." *Id.* at 764-65 n.13. But the only examples the Court could give of containers that should not be accorded the full protection of the fourth amendment were those that revealed their contents from their outward appearance (such as a gun case or an open package). *Id.* A paper bag is just as capable of hiding its contents from direct viewing by the public as an unlocked suitcase. As discussed below, one's legitimate expectations of privacy should not depend on the size or usual use of the container, but rather its location and, as suggested by *Sanders*, the degree to which it reveals its contents.

185. *Rawlings v. Kentucky*, 100 S. Ct. at 2561.

abandoned, the owner of that property should not be permitted to assert a fourth amendment claim when it or something in it is seized by the police. The Supreme Court initially addressed this problem with its "open fields" doctrine, which permitted the warrantless seizure of anything "abandoned" in the open fields outside the curtilage of a person's home.¹⁸⁶ Similarly, a gun thrown in a vacant lot¹⁸⁷ should not be accorded the same degree of protection as a gun kept in a person's home or car, or near one's person. Unless the item is kept where a reasonable observer would conclude its owner intends to protect it from intrusion, the owner cannot be said to have exercised reasonable precautions to maintain its privacy.¹⁸⁸

2. Exposure

The reasonable-precautions analysis may also be triggered when an object is "exposed" to the public. Could it not be applied when, instead of throwing his gun in a field, the owner leaves it in the front seat of his car, where it is visible to everyone; or when a homeowner keeps drugs in a transparent vial which can be viewed through his house window from the street; or when a woman leaves her purse open beside her where any curious passerby can see contraband inside? Should any of these people be accorded a legitimate expectation of privacy or have they, in effect, abandoned their property?

In *Katz*, the Court stated that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection."¹⁸⁹ This language indicates that there may be circumstances in which a person may not be able to assert a fourth amendment claim because he did not take reasonable precautions to prevent direct viewing of his property by the public. As argued below, however, this principle should not, as a practical matter, preclude a person from contesting police intrusion onto his property. For the same reason that a person should not be required to lock up his property in order to be able to contest unreasonable governmental intrusion, a person should not have to cover up items in his car, curtain his windows, or use only tightly fastened receptacles to carry his effects in order to deserve a legitimate expectation of privacy.

186. *Hester v. United States*, 265 U.S. 57, 59 (1924) (no fourth amendment protection for illegally distilled whisky dropped in open field by defendant during pursuit by revenue officers); see *State v. Caldwell*, 20 Ariz. App. 331, 335, 512 P.2d 863, 867 (1973) (boxes containing marijuana discovered in area where general public apt to wander); *Bedell v. State*, 257 Ark. 895, 898, 521 S.W.2d 200, 201 (1975) (no fourth amendment protection for marijuana found on farm owned by defendant). Generally it is required that the item be directly visible from a place in which the police have a right to be, although evidence found after a trespass has been held admissible. See *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956) (illegal still found in hidden cave on defendant's property admissible).

Nevertheless, under *Katz*, activities in an open field might be subject to fourth amendment protection if the parties reasonably believe that such activities will remain private. See *Hendricks, Eavesdropping, Wiretapping and the Law of Search and Seizure—Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 428, 435 (1968); cf. *State v. Stanton*, 7 Or. App. 286, 294-96, 490 P.2d 1274, 1278-79 (1971) (addressing effect of *Katz* on open field doctrine; no reasonable expectation of privacy for marijuana in open field; but dictum suggests valid expectation may exist in some open field cases).

187. See *Smith v. United States*, 292 A.2d 150, 151 (D.C. App. 1972) (defendant threw revolver away when chased by police officer; defendant's claim that he intended to retrieve it, even if true, does not change fact of abandonment).

188. See, e.g., *Abel v. United States*, 362 U.S. 217, 241 (1960) (search of wastebasket in defendant's hotel room valid after defendant, having been arrested there, packed his bags, checked out of hotel, and left with police); *United States v. Gullede*, 469 F.2d 713, 715-16 (5th Cir. 1972) (defendants obtained permission to keep U-Haul trailer at service station for two to three days; no expectation of privacy in trailer when left there 10 days); *Anderson v. State*, 133 Ga. App. 45, 47, 209 S.E.2d 665, 667 (1974) (defendant abandoned margarine carton when he put it under rock on beach and went into water; nature of container may influence whether abandonment is found); *State v. Aragon*, 89 N.M. 91, 94, 547 P.2d 574, 577 (1976) (tin can of heroin found in open lot in which defendant had no reasonable expectation of privacy).

189. *Katz v. United States*, 389 U.S. at 351.

The issue of when an object is exposed to the public under the *Katz* doctrine is an extremely complex one, and cannot be dealt with fully here.¹⁹⁰ Generally, under *Katz*, if a government agent can see, hear, or smell something from a place in which he is lawfully present, he has not conducted a "search" within the meaning of the fourth amendment.¹⁹¹ By incorporating *Katz's* expectation of privacy language into the standing inquiry, *Rakas* held that an individual cannot challenge this type of government intrusion.¹⁹²

It should be obvious, however, that if the police, subsequent to seeing evidence from a lawful vantage point, physically intrude into the area that contains the evidence, they may be conducting a fourth amendment search. All that the owner should surrender by exposing his property to the public is the ability to challenge its observation by the police; if they act upon that observation in an unreasonable manner, he should still be able to exclude the evidence obtained. If *A* leaves a gun visible on the front seat of his car, he cannot claim that the police illegally espied it through the car window. If they subsequently break open the car and seize the gun, however, *A* should be able to contest the legality of the intrusion because an area from which he has the right to exclude others has been violated by the government. Whether he would win on the merits would depend upon whether the police had a search warrant, or possessed probable cause to believe that the gun was evidence of criminal activity and that it, or the entire car, would disappear before they could obtain a warrant.¹⁹³ The central point is that *Katz* does not mean that any time police can see what they think is evidence of criminal activity from a lawful vantage point their subsequent actions cannot be challenged in court.¹⁹⁴

Houses, and to a lesser extent, cars, are "containers" in which one customarily expects a certain minimum degree of privacy. Because these areas are intimately associated with one's private world,¹⁹⁵ a person should be *entitled* to expect that they will be free from governmental intrusion, even if the items in them are visible from an area accessible to the public. But

190. See generally 1 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT* 221 *et seq.* (1978) [hereinafter cited as 1 LAFAVE]; Moylan, *Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 *MERCER L. REV.* 1047 (1975); Comment, "Plain View"—Anything But Plain: Coolidge Divides the Lower Courts, 7 *LOY. L.A.L. REV.* 489 (1974).

191. *Katz v. United States*, 389 U.S. at 352. See also 1 LAFAVE, *supra* note 190, at 240.

192. *Rakas v. Illinois*, 439 U.S. at 148-49.

193. For a discussion of warrantless searches of automobiles, see generally Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 *MERCER L. REV.* 987 (1976).

194. See generally C. WHITEBREAD, *CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* 223 [hereinafter cited as WHITEBREAD]; 1 LAFAVE, *supra* note 190, at 244-46. Both sources quote the following language from *Coolidge v. New Hampshire*:

Plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even when the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

403 U.S. 443, 468 (1971).

195. It has been suggested that property concepts should be used to define the *minimum* content of the fourth amendment, so as to avoid the possible manipulation of privacy expectations by the government. Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 *MICH. L. REV.* 154, 181 (1977). See also text accompanying notes 206 through 211 *infra*. The Note suggests that "courts should decide fourth amendment issues by asking what we are *entitled* to expect from the government, rather than by asking what the government will allow us to expect." *Id.* at 183 (emphasis in original).

Certainly, the homeowner if anyone, is entitled to expect that he will not be intruded upon by the government. Given the preeminent position of the home in fourth amendment jurisprudence, recently

should the same protection be afforded the contents of a smaller container—for instance, a transparent drug vial—that reveals its contents? It is arguable that the size of the container should not make a difference for fourth amendment purposes. Even if a right to exclude others is insufficient to confer fourth amendment protection in this situation, these smaller items will generally be kept in a house, a car, or a coat pocket, all areas where one's expectations of privacy are high. The fact that police enter these areas lawfully should not act to diminish that expectation to the point where a search and seizure of anything transparent, or which otherwise reveals its contents, cannot be contested.

The present Court, however, appears to be leaning toward such a holding. In *Rawlings*, the majority opinion implied that the defendant had no legitimate expectation of privacy in the vial containing his drugs.¹⁹⁶ While the majority in *Sanders* seemed inclined to extend the search warrant requirement to most opaque containers, it specifically exempted from full fourth amendment protection containers which “by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.”¹⁹⁷ The Court cited a kit of burglar tools and a gun case as examples of such containers.¹⁹⁸ Thus, the Court's apparent rule is that one cannot possess a legitimate expectation of privacy in containers that somehow reveal what they contain. Unless a person, as a minimum protection, prevents direct viewing of these items from the premises where they are situated, police lawfully on those premises will be able to conduct a warrantless search and seizure without violating the person's expectation of privacy.

As a later section of this article will discuss, however, the fact that a container reveals its contents should not preclude its owner from contesting a seizure of that item based on his property interest, as opposed to his privacy interest, in the seized item.¹⁹⁹

3. Bailments

A final situation in which the reasonable-precautions analysis is appropriate arises when a person gives his property to someone else for safekeeping. Given Justice Rehnquist's emphasis on the nature of the bailment in *Rawlings*,²⁰⁰ this issue is likely to arise frequently. When a person gives his property to another, even on a very limited basis, he increases the risk that it will be exposed to others without his knowing it. If *A* gives *B* his now familiar gun, for

affirmed by the Court in *Payton v. New York*, 100 S. Ct. 1371, 1379 (1980) (arrest warrant is required to enter the arrestee's home except in exigent circumstances), the reasonable-precautions analysis should not prevent the homeowner from asserting a fourth amendment claim based on intrusion into his home. See *Alderman v. United States*, 394 U.S. at 179 n.11. For further discussion of *Alderman*, see text accompanying notes 56 through 60 *supra*. See also *Silverman v. United States*, 365 U.S. 505, 511-12 n.4 (1961) (quoting Judge Frank's description of a man's right to freedom from unreasonable government intrusion in his home in *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (dissenting opinion), *aff'd*, 343 U.S. 747 (1952)).

By the same token, the owner of a car is entitled to expect that, except for regulatory purposes, the government will not invade his privacy there. Admitting that the car owner can claim far less privacy than can the homeowner, see note 81 *supra*, it is still plausible to argue that the car is worth protecting from encroachment. Vehicles are often “a home away from home.” Even when used solely for transportation, they represent a barrier between the owner and the world at large that should be protected.

Finally, of course, the individual's own person is fully protected by the fourth amendment, and items that he carries with him should require similar protection.

196. See 100 S. Ct. at 2562. Justice Rehnquist stated that if the seized drugs, which were contained in a jar and a number of smaller vials, had been placed in “plain view,” the defendant-owner “could not claim any legitimate expectation of privacy.” *Id.*

197. *Arkansas v. Sanders*, 442 U.S. at 764-65 n.13.

198. *Id.*

199. See text accompanying notes 212 through 228 *infra*.

200. See notes 121 through 124 *supra*, and accompanying text.

example, and tells *B* to keep it for him, *A* has surrendered direct control of his property. He has no way of guaranteeing that *B* will stick the gun in his wallsafe rather than putting it in the back seat of his car, or throwing it out the window. Even if *A* places the gun in a bag before giving it to *B*, thus giving himself a more direct right to exclude others from the gun, *B* will have access to it and may reveal it to others. Only if *A* encloses his property in a locked container and keeps the key can he be virtually sure that it will remain private.

Yet, once again, such a result would have undesirable constitutional consequences, as well as defeat the usual purpose of a bailment by denying the bailee use of the object. Conditioning the reasonableness of the bailor's precautions on his restriction of the bailee's use of, or access to, the property is an inappropriate limitation on both individuals' freedom. The degree of the bailee's access is an issue more properly related to his capacity to consent to an intrusion into the bailor's property than to the bailor's legitimate expectation of privacy.²⁰¹ To reason otherwise would be tantamount to saying that no one who shares his property with someone else can challenge a search resulting in the seizure of that property.

The focus of the reasonable-precautions analysis in the bailment situation, therefore, should be entirely on the act of bailment itself. There are essentially two requirements to a valid bailment: delivery by the bailor and intent to possess on the part of the bailee.²⁰² The first inquiry should be relatively simple. If the bailor never gives his property to the bailee or makes an incomplete transfer, or if the bailee receives it under protest, delivery has not taken place.²⁰³ The more difficult determination will probably be whether the bailee intends to possess the item in question. Implicit in this requirement is that the bailee know that he is possessing something and, if that is shown, that he know the nature of what he possesses.²⁰⁴ Thus, if *A* puts his property in *B*'s house without *B*'s knowledge, gives *B* a vial of cocaine but tells *B* it is salt, or gives *B* a suitcase without telling him there is a shotgun and stolen money inside, the bailment may fail.²⁰⁵ *A* should not have a legitimate expectation that his property will remain free from governmental intrusion in any of these cases.

Once a bailment is found to be valid, however, *A* should be entitled to the same expectation of privacy that *B* possesses with respect to the area in which he places *A*'s property. If *B* puts the property in his house or car, and it is illegally seized from there, *A* should be able to contest the search, as should *B*. If *B* abandons the property, however, neither *A* nor *B* should have "standing" to contest the search.

C. SUBJECTIVE EXPECTATIONS

None of the situations discussed above refers to the individual's personal beliefs about the privacy of his property. It would certainly be possible for a person with a right to exclude others from a particular area to have no subjective expectation that the property will remain free from governmental intrusion. Conversely, someone who can meet none of the criteria set

201. See note 151 *supra*.

202. See generally R. BROWN, *THE LAW OF PERSONAL PROPERTY* 209-23 (3d ed. 1975) [hereinafter cited as BROWN]. See also Gutterman, *supra* note 20, at 119.

203. See *Rawlings v. Kentucky*, 100 S. Ct. at 2560 n.2 (bailee testified she requested bailor to take the drugs out of her purse); see, e.g., *Wamser v. Browning, King Co.*, 187 N.Y. 87, 79 N.E. 861 (1907) (garments laid on table in store while owner tried on other clothes and clerk was absent not a bailment); *Lord v. Oklahoma State Fair Ass'n*, 95 Okla. 294, 219 P. 213 (1923) (car parked in Association's parking lot for twenty-five cent fee not bailed to Association); *Kuchinsky v. Empire Lounge*, 27 Wis. 2d 446, 134 N.W.2d 246 (1965) (coat hung near customer's seat in lounge not bailed to restaurant).

204. BROWN, *supra* note 202, at 213-14.

205. See *Dumlao v. Atlantic Garage, Inc.*, 259 A.2d 360 (D.C. 1969) (garage not bailee of articles in trunk it did not know about); *Samples v. Geary*, 292 S.W. 1066 (Mo. Ct. App. 1927) (no bailment of fur piece concealed in coat). But see *General Acc. Fire & Life Assur. Co. v. J.F.D.L., Inc.*, 148 So.2d 857 (La. Ct. App. 1963) (bailee of automobile liable for items "customarily" left in car).

out above may firmly believe his property is hidden from everyone, including the police. To the extent that courts must rely on subjective interpretations, however, there is liable to be a great degree of disparity between jurisdictions and a concomitant variation in the scope of the fourth amendment's protection. Accordingly, the principles set out in sections B and C above adopt, to as great an extent as possible, the objective approach suggested by the Court's use of the words "legitimate" and "reasonable" when discussing the scope of the fourth amendment.

Aside from avoiding confusion and inefficiency, there is an additional reason for attempting to make an objective inquiry into whether one has a legitimate expectation of privacy. To the extent fourth amendment protection is defined subjectively, it can be manipulated, not just by the defendant, but by the State. At one time Justice Harlan interpreted the *Katz* decision to mean "first, that a person must have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"²⁰⁶

Justice Harlan later rejected the first prong of that test: fourth amendment analysis "must transcend the search for subjective expectations, . . . [for] our expectations, and the risks we assume, are in large part reflections of law that translate into rules the customs and values of the past and present."²⁰⁷ Professor Amsterdam put the matter more dramatically seven years ago when he noted:

An actual, subjective expectation of privacy . . . can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.²⁰⁸

The facts of *Rawlings* illustrate the danger involved in permitting a person's own impressions to govern the scope of his fourth amendment right. During the suppression hearing in that case, the defendant stated that he had not felt Vanessa Cox's purse would be free from intrusion by the officers who had entered the house.²⁰⁹ Yet it is unlikely that anyone would feel safe from government intrusion when, as was the case in *Rawlings*, he is surrounded by four officers and told he cannot leave unless he submits to a body search. It is to be hoped that Justice Rehnquist's comment that the defendant did not expect any privacy in such a situation was merely a passing one.²¹⁰ Certainly for the reasons suggested here, it should not even be relevant to the fourth amendment inquiry, much less dispositive of it.²¹¹

D. INTEREST IN THE SEIZED ITEM

As earlier parts of this article have made clear,²¹² proof of a possessory interest in the seized evidence, even after *Rawlings* and *Salvucci*, is not totally without significance in establishing a person's capacity to contest a search. If a person can establish a possessory interest, additional proof of continuing access to or legitimate presence on the searched premises should enable him

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

207. *United States v. White*, 401 U.S. 745, 786 (1971)(Harlan, J., dissenting).

208. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974), quoted in 1 LAFAYE, *supra* note 190, at 230.

209. 100 S. Ct. at 2561 n.3.

210. *Id.* at 2562.

211. The Kentucky state courts, however, relied in part on this admission. *Id.*

212. See text accompanying notes 152 through 171 *supra*.

to claim fourth amendment protection. Here, however, emphasis will be given to what role a possessory interest in the seized item,²¹³ by itself, plays in the fourth amendment inquiry.

In his *Rawlings* dissent, Justice Marshall cited what he called "a long tradition" embodying the view that an interest in the item seized by the police enables one to contest a search and seizure.²¹⁴ Yet, no decision of the Supreme Court, as interpreted by the present Court, directly supports this stance.²¹⁵ Moreover, with respect to a party's capacity to contest a search, as opposed to a seizure, it makes no sense under the Court's current approach to grant fourth amendment protection purely on the basis of ownership of the seized item. As Justice Rehnquist stated in *Rawlings*, "[h]ad petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy."²¹⁶

This does not mean that ownership of the seized item confers no constitutionally protectable interest. In *Rawlings*, Justice Marshall rightly emphasized that the fourth amendment speaks of both searches and seizures.²¹⁷ A seizure, as defined by the Court in an early decision, "contemplates a forcible dispossession of the owner."²¹⁸

If the government proceeds unlawfully in the act of dispossessing an owner of property, the owner should be able to invoke the exclusionary rule. Both *Rakas* and *Rawlings* fail to differentiate between searches and seizures when rejecting "the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth

213. The degree of "possessory interest" one must show for fourth amendment purposes cannot be stated with certainty. It would seem, however, that if the item is in the possession of the defendant at the time of the search, he should have a sufficient possessory interest based on his expectations of privacy. If the article is not in his possession, he should have to show that his title is equal or superior to that of everyone else.

Courts have occasionally addressed the issue of whether one can have a fourth amendment possessory interest in contraband or stolen goods. In *United States v. Jeffers*, 342 U.S. 48 (1951), the Court appeared to establish that one can have a possessory interest in contraband sufficient for fourth amendment purposes when it declared that the illegally possessed narcotics seized in that case were "[the defendant's] property, for purposes of the exclusionary rule. . . ." *Id.* at 54. It has been argued that a thief should also have a sufficient possessory interest in property he has stolen because, under the common law rule, as against everyone but the true owner, he has superior title, and thus his title supercedes that of the police. *Grove*, *supra* note 20, at 170.

214. 100 S. Ct. at 2567 (Marshall, J., dissenting).

215. Justice Marshall cited *Brown v. United States*, 411 U.S. 223 (1973) (no standing to challenge warrantless search because defendant not legitimately on premises and not a possessory offense); *Simmons v. United States*, 390 U.S. 377, 389-90 (1968) (testimony given by defendant at pretrial hearing to establish standing may not be used against him at trial); *Mancusi v. DeForte*, 392 U.S. 364 (1968) (union records suppressed due to warrantless search of "private" office); *Jones v. United States*, 362 U.S. 257, 261 (1960) (narcotics suppressed due to illegal search of friend's home); and *United States v. Jeffers*, 342 U.S. 48, 52 (1951) (narcotics suppressed due to illegal search of aunts' hotel room).

Rakas, however, promulgated a different interpretation of the issue from that desired by Justice Marshall. The Court explicitly stated that the grant of standing in *Jeffers* was based on his interest in the premises as well as in the seized property, *Rakas v. Illinois*, 439 U.S. at 136. This, taken with the view expressed by the *Rawlings* majority, impliedly overrules the dicta in *Jones*, *Brown*, and *DeForte* to the effect that a possessory interest in the seized item would be sufficient to establish standing. *Simmons*, where the petitioner testified to probable ownership of the seized suitcase at a pretrial hearing, is most appropriately seen as a forerunner of *Arkansas v. Sanders*, 442 U.S. 753, 762-65 (1979) (invalidating warrantless search of unlocked suitcase), rather than supporting an inference of standing based on a possessory interest in items seized. In both cases, private sanctity of a suitcase, not the objects in it, was upheld. See text accompanying notes 181 through 184 *supra*.

216. 100 S. Ct. at 2562.

217. *Id.* at 2568.

218. *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

Amendment.”²¹⁹ But, in a footnote in *Salvucci*, Justice Rehnquist stated that “[l]egal possession of the seized good may be sufficient in some circumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal.”²²⁰ Justice Rehnquist supported this proposition by citing *United States v. Lisk*,²²¹ a decision authored by Justice Stevens when he sat on the Seventh Circuit. *Lisk* not only held that an illegal seizure might entitle one to the return of the property, but also that it might permit one to exclude the illegally seized evidence.²²²

In *Lisk*, the defendant gave Hunt a bomb he owned, telling Hunt to keep it for him but to return it upon request. Hunt put the bomb in the trunk of his car, where police ultimately found it after an admittedly illegal search. Then Judge Stevens rather perfunctorily decided *Lisk* did not have a privacy interest in Hunt’s trunk and that he therefore could not contest the search.²²³ Judge Stevens also held, however, that *Lisk*’s ownership of the bomb probably entitled him to challenge its seizure. This conclusion flowed from Judge Stevens’s statement: “[T]here is a difference between a search and seizure. A search involves an invasion of privacy; a seizure is a taking of property.”²²⁴

The benefits that defendants could derive from their capacity to challenge a seizure would be limited for two reasons. First, if the defendant can contest the search, his ability to contest the seizure will usually be superfluous. In *Lisk*, the defendant did not have a right to exclude others from the trunk because he did not own the car or have the right to contest to its search.²²⁵ Nor did *Lisk* appear to have continuing access to the trunk.²²⁶ He clearly was not present at the time of the search.²²⁷ It does appear, however, that *Lisk* effected a valid bailment to Hunt.²²⁸ Thus, following the rules developed in this article, *Lisk* should have had a legitimate expectation that the government would not unreasonably intrude into the trunk and should have been able to contest the search. His right to challenge the seizure based on his ownership of the bomb would not have afforded him any extra protection.

The second limitation on the capacity to contest a seizure is the difficulty of winning on the merits. If the defendant is unable to contest the search, his only recourse is to challenge the seizure as a violation of the plain view exception to the warrant requirement. Under this doctrine, as defined by the Supreme Court in *Coolidge v. New Hampshire*,²²⁹ police may validly seize evidence if (1) they are legitimately in the area in which the evidence is located; (2) they find the evidence “inadvertently;” and (3) the evidentiary value of the item was “immediately apparent” at the time of the seizure; that is, the police could reasonably assume that it had some nexus to criminal activity.²³⁰

It is beyond the scope of this article to define fully the nuances of the plain view doctrine,

219. *Rawlings v. Kentucky*, 100 S. Ct. at 2562.

220. 100 S. Ct. at 2552 n.6.

221. 522 F.2d 228 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976)(Stevens, J.).

222. *United States v. Lisk*, 522 F.2d at 230.

223. Then Circuit Judge Stevens stated, “the invasion of Hunt’s privacy was a violation of Hunt’s Fourth Amendment rights, but this violation is clearly not available to the defendant as a basis for suppressing evidence acquired thereby.” *Id.* at 230.

224. *Id.*

225. *Id.*

226. *Id.* at 229.

227. *Id.*

228. It was stipulated that the bomb was placed in Hunt’s trunk and that *Lisk* told Hunt to hold the bomb until he asked for it. *Id.* at 229. The twin elements of delivery by the bailor and intent to possess by the bailee, see text accompanying note 202 *supra*, therefore appear to have been present.

229. 403 U.S. 443, 468-72 (1971) (plain view doctrine not applicable where location of defendant’s automobile known in advance).

230. See generally, WHITEBREAD, note 196 *supra*, at 211; Moylan, *The Plain View Doctrine: Unexpected Child of the Great “Search Incident” Geography Battle*, 26 MERCER L. REV. 1047 (1975).

which concerns substantive fourth amendment law rather than the right to invoke it in the first instance. It is sufficient to recognize here that except when the police's former knowledge of an item's existence means their discovery of it is not "inadvertant,"²³¹ or when they could not reasonably have known that the seized item was linked to criminal activity,²³² the defendant will usually be unable to exclude evidence on the basis that it was illegally seized.²³³

IV. CONCLUSION

While the Supreme Court's recent decisions on the scope of the fourth amendment have demolished the old standing rules, they also suggest parameters for a new set of principles:

(1) A person has the capacity to contest a search resulting in the seizure of any non-abandoned property

(a) that is in an area²³⁴ over which he has control, as defined by consent search jurisprudence; or

(b) in which he has a possessory interest, and that is located in an area to which he has continuing access; or

(c) in which he has a possessory interest, and that is located in an area where he is legitimately present at the time of the search or seizure; or

(d) which he validly bailed to a third person whose person or premises was searched.

(2) A person has the capacity to contest the seizure of any property in which he has a possessory interest.

These rules are not predictions of what the Court will decide when facing these issues. In addressing the scope of fourth amendment protections, the Court, as is the case in other areas of criminal procedure,²³⁵ is committed to a "totality of the circumstances" ap-

231. See *United States v. Curran*, 498 F.2d 30, 33 (9th Cir. 1974) (police smelled marijuana, entered premises on pretext with intent to seize drug; lacking inadvertance, seizure not justified on plain view theory); *McKnight v. United States*, 183 F.2d 977, 978 (D.C. Cir. 1950) (evidence excluded where police refrained from arresting defendant on public street in order to arrest in house where gambling evidence could be seized).

232. See, e.g., *United States v. Trevino*, 62 F.R.D. 74, 76 (S.D. Tex. 1974) (search of suitcase impermissible where motivated by reasons other than suspicion of its connection with bank robbery); *Eisenman v. Superior Court*, 21 Cal. App. 3d 342, 350, 98 Cal. Rptr. 342, 347 (Ct. App. 1972) (detailed perusal of bottle located across room from defendant after arrest not permissible when officer initially "saw nothing unusual"); *Nicholas v. State*, 502 S.W. 169, 172 (Tex. Crim. App. 1973) (police seizure of incriminating negatives after defendant arrested suppressed because no reason to suspect relation to criminal offense).

233. *Lisk* adequately illustrates why, in the typical case, the defendant will not prevail. Once the court held (erroneously) that, as to *Lisk*, the police were validly in Hunt's trunk, *Lisk* could make only two arguments in favor of finding the seizure illegal. He could first contend that the police knew the bomb was in the trunk before they searched it and thus could have obtained a search warrant. Failing that, he could argue that once they saw the bomb, the police had no way of knowing the device was contraband. Because the search apparently was not directed at *Lisk*, and the bomb clearly was an illegal firearm, the court found no merit to either contention. *United States v. Lisk*, 522 F.2d at 231.

234. An "area" for purposes of fourth amendment protections would include persons and houses, cars, and containers which do not reveal the nature of their contents.

235. See Justice Douglas's dissent in *Michigan v. Tucker*, 417 U.S. 433, 465-66 (Douglas, J., dissenting) indicating that the present Court appears to view the requirements regarding custodial interrogations established in *Miranda v. Arizona*, 384 U.S. 443-46 (1966), to be mere guidelines rather than constitutional standards. See also *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977) (reliability is the "linchpin" for applying totality of circumstances in out-of-court identifications); *Neil v. Biggers*, 409 U.S. 188, 192-200 (1972) (totality of circumstances test used in out-of-court identifications); *United States v. Cortez*, 442 U.S. 707, 725-26 (1979) (totality of circumstances used to determine whether waiver of right to silence was knowing and voluntary); *Dobbert v. Florida*, 432 U.S. 282, 303 (1977) (totality of circumstances failed to show pretrial publicity affected jury and denied fair trial).

proach.²³⁶ However unlikely their adoption may be, these principles are not inconsistent with the Court's current decisions and derive from concepts articulated by the Court as underlying the fourth amendment.

As compared to the Court's current case-by-case approach, these principles have several advantages. First, they recognize explicitly that a person can have a legitimate expectation of privacy in premises that he does not own and that he shares with another. Second, they recognize implicitly that a substantial difference exists between the freedom one expects from governmental intrusion and the degree of privacy one expects from the world at large. Third, they avoid equating the scope of the individual's fourth amendment protection with the merits of his fourth amendment claim, in contrast with Justice Rehnquist's attempt to meld the two issues.²³⁷ Fourth, in contrast to the Court's ill-defined approach, these principles are less likely to encourage bad faith police conduct.²³⁸ Most importantly, these principles provide a relatively succinct summary of who has the capacity to contest a search and seizure.

236. See *Rawlings v. Kentucky*, 100 S. Ct. at 2561 ("totality of circumstances" did not support showing by defendant of legitimate or reasonable expectations of privacy to challenge search of another's purse). In rejecting the *Rakas* dissenters' view that the "legitimately on the premises" test was a thoroughly workable bright line of analysis, the *Rakas* majority stated: "We are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment." 439 U.S. 128, 147 (1978).

237. In *Rakas*, Justice Rehnquist stated that it did not serve any useful analytical purpose to consider the issue of a defendant's capacity to contest a search and seizure as "a matter of standing, distinct from the merits of [his] Fourth Amendment claim." *Id.* at 138-39. In *Rawlings*, he concluded:

Prior to *Rakas*, petitioner might have been given 'standing' in such a case to challenge a 'search' that netted these drugs but probably would have lost his claim on the merits. After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by the petitioner.

100 S. Ct. at 2562.

It is not entirely clear what Justice Rehnquist means by these statements. Certainly it is possible for a homeowner to have his legitimate expectations violated by governmental officials who invade his house, but lose on the merits of a claim that their warrant was invalid or they conducted an improper plain view search. In his *Rawlings* concurrence, Justice Blackman voiced his concern over interpreting this statement literally:

I agree with the Court that these two inquiries 'merge into one,' in the sense that both are to be addressed under the principles of Fourth Amendment analysis developed in *Katz v. United States*, 389 U.S. 347 (1967), and its progeny. But I do not read today's decision, or *Rakas*, as holding that it is improper for lower courts to treat these inquiries as distinct components of a Fourth Amendment claim. Indeed, I am convinced that it would invite confusion to hold otherwise. It remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.

100 S. Ct. at 2565.

238. It could be argued that clearly defining who may assert a fourth amendment claim will enable police to engage in intentional violations of people's privacy with impunity. The facts of *United States v. Payner*, 100 S. Ct. 2439 (1980), and the Supreme Court's holding in that case, provide firm evidence of this possibility.

In *Payner*, the defendant was suspected of having falsely stated on his income tax return that he did not have a foreign bank account. A special agent for the Internal Revenue Service commissioned a private investigator to enter surreptitiously a bank officer's apartment, remove his briefcase, and deliver it to the

Indeed, the most significant drawback to the Court's multi-factor analysis is the confusion it will engender among the lower courts. *Rakas* has already spawned convoluted decisions in several jurisdictions.²³⁹ Now that the Supreme Court has made it more difficult to bring fourth amendment claims in federal court,²⁴⁰ the state courts' interpretation of decisions like *Rakas* and *Rawlings* is likely to be widely disparate. In the interests of uniformity and protecting the remaining deterrent strength of the exclusionary rule, it is crucial to provide courts with guidance concerning the scope of the fourth amendment. Without such guidance, the constitutional limitation on search and seizure may be further downgraded in importance.

agent who then copied approximately four hundred bank documents taken from it, all in admitted violation of the bank officer's fourth amendment rights. *Id.* at 2443.

The Government, however, sought to use the documents against Payner rather than the bank officer and, under *Jones* and *Alderman*, Payner did not have standing to contest the illegal entry and seizure. The federal district court suppressed the evidence, using its inherent supervisory power. It found that "the Government [had] affirmatively counsel[led] its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties." 434 F. Supp. 113, 131-33 (N.D. Ohio 1977).

The Supreme Court, while denouncing the Government's bad faith actions in the case, held that the supervisory power does not authorize a federal court to suppress evidence which the defendant himself could not suppress. 100 S. Ct. at 2447.

It is clear that *Payner* has sapped further deterrent strength from the exclusionary rule. It is unlikely, however, that most police are as legally sophisticated as the tax agent in that case. Moreover, while the rules proposed here would not have deterred the agent in *Payner*, they are ambiguous enough to require a policeman contemplating a bad faith search in other types of situations to deliberate carefully. Whether a given person has a right to consent and exclude others from a particular area, or has taken reasonable precautions to maintain the privacy of property he has bailed to another, will usually be a difficult determination. In any event, the above proposals would probably be less conducive to bad faith police actions than the Court's current, ill-defined analysis that, as Justice White points out in his *Rakas* dissent, may lead police to think they have considerable leeway in conducting searches and seizures. 439 U.S. at 168-69 (White, J., dissenting).

239. See *State v. List*, 166 N.J. Super. 368, 399 A.2d 1040 (1979) (defendants sought to suppress drugs seized in a van that they, together with owner-operator of van, jointly owned and possessed). The court stated that defendants' contention that legitimate presence plus a possessory interest in the seized items should give them a legitimate expectation of privacy in the searched van "simply runs counter to the true rationale and holding established . . . by the [*Rakas*] court." *Id.* at 370, 399 A.2d at 1042.

The court then held that because the owner of the van could have given a valid consent to the search, the search "did not violate defendant-passengers [*sic*] Fourth Amendment expectations of privacy under the United States Constitution." *Id.* at 370, 399 A.2d at 1042. As Professor LaFave notes, "[t]his result is clearly in error, as is apparent when [one] consider[s] the bizarre result it calls for: defendants *never* have standing to object to a search [of] their property if it was in such a place that some third party could have (but in fact did not) give lawful consent to search for it." 3 LAFAVE, *supra* note 118, Supplement at 67 (emphasis in original). See also *State v. Jordan*, 40 N.C. App. 412, 252 S.E.2d 857 (1979).

Probably the worst indictment of the Court's current approach, however, was unintentionally delivered by the Kentucky Supreme Court in its *Rawlings* decision. In what it termed a "confession," it stated, "[W]e find the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding. . . . We are not sure of the effect of *Rakas* although it seems to reject the theory of Jones on 'standing.'" *Rawlings v. Commonwealth*, 581 S.W.2d 348, 349-50 (Ky. 1979).

When a state's highest court has experienced such difficulty interpreting a United States Supreme Court decision, it is unlikely that lower courts will be more successful.

240. See *Stone v. Powell*, 428 U.S. 465 (1976). See also note 19 *supra*.