GMU Law Review

VOLUME 3, NUMBER 1 SPRING 1980

Constitutional Law— Defining the Scope of Fourth Amendment Protection in Automobile Searches and Seizures: *Rakas v. Illinois*

By Michael Adam Shichman
Managing Editor

CONSTITUTIONAL LAW—DEFINING THE SCOPE OF FOURTH AMENDMENT PROTECTION IN AUTOMOBILE SEARCHES AND SEIZURES: *RAKAS V. ILLINOIS*

Does a passenger in an automobile in which he has neither a proprietary nor possessory interest have standing to challenge a police search and seizure of that automobile and its contents?[1] The Supreme Court in *Rakas v. Illinois*[2] addressed this question and declined to extend privacy rights vicariously by refusing to find that a passenger has such standing to object to the illegal search.

After having received a robbery report, police officers stopped a vehicle they suspected of having been involved as a getaway car. During the search of the vehicle the police discovered a sawed-off rifle under the passenger seat and a box of rifle shells in the locked glove compartment. In an unsuccessful motion to suppress the seized items as evidence, Rakas and King asserted that the search of the automobile and the seizure of the rifle and shells was illegal. They argued that, as passengers in the vehicle, they were "legitimately on the premises" and protected by the guarantees of the fourth amendment. Such guarantees, they contended, gave them standing to challenge the search of the automobile.[3] Subsequently, they were convicted of armed robbery at a trial in which the rifle and shells were admitted into evidence.[4] The Illinois Supreme Court[5] upheld their convictions declaring that petitioners lacked standing to object to the lawfulness of the search because they owned neither the automobile nor the seized property.

On appeal, the United States Supreme Court held that a passenger in an automobile which he neither owns nor leases has no standing to challenge the admission of the fruits of a search of that automobile as evidence against him in his criminal trial.[6] Justice Rehnquist, writ-

1. For example, the passenger neither owned nor leased such automobile.

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

3. The automobile in issue was stopped by the police subsequent to receipt of a robbery report sufficiently describing the getaway car. The existence of probable cause was not in issue and is not addressed in this note.

4. Rakas v. Illinois, 439 U.S. at 129-32.

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

6. It should be clarified that the owner of the automobile had been the driver of the vehicle at the time of the search. No charges were brought against the owner. The Illinois appellate court concluded that defendants failed to

ing for the majority, stated as a basis for the decision that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." [7]

In *Rakas v. Illinois,* the Supreme Court declined to extend fourth amendment protections by redefining the criteria for determination of an individual's standing to challenge the legality of automobile search and seizures. This note explores the effect of the decision in *Rakas* on the question of standing to challenge illegal searches and seizures, specifically delineating the possessory interest and expectation of privacy an accused must hold to have the requisite standing to invoke the protections of the fourth amendment.

I. A BRIEF HISTORY OF THE RIGHT OF PRIVACY

The right of privacy is an independent and distinct legal concept originating in tort law,[8] and found in the penumbras of the constitution.[9] It is perhaps most simply described as "the right to be let alone" and is left largely to the individual states to administer.[10] The right to privacy also affords an individual protection against unlawful governmental intrusion. While the United States Constitution makes no explicit reference to a right to privacy, the Supreme Court has declared that implicit in the guarantees of individual liberties is a fundamental right to be secure from unwarranted intrusion.[11] The protections afforded by the fourth amendment are applicable to each state by the

establish any prejudice to their own constitutional rights. The search and seizure was not directed against the defendants and they were not victims of it. *Id.* at 569, 360 N.E.2d at 1254.

7. 439 U.S. at 133-34, quoting Alderman v. United States, 394 U.S. 165, 174 (1969). *See* Brown v. United States, 411 U.S. 223, 230 (1973); Simmons v. United States, 390 U.S. 377, 389 (1968); Wong Sun v. United States, 371 U.S. 471, 492 (1963).

8. Warren and Brandeis, *The Right to Privacy,* HARV. L. REV. 193 (1890). The theory of the "right to privacy" was traced to this article by the New York Court of Appeals in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). *See also* Larremore, *The Law of Privacy,* 12 COLUM. L. REV. 693 (1912).

9. Griswold v. Connecticut, 381 U.S. 479 (1965).

10. Katz v. United States, 389 U.S. 347, 350-51 (1967), quoting from Warren and Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

11. Roe v. Wade, 410 U.S. 113, 152 (1973), *reh. denied,* 410 U.S. 959 (1973); Harris v. United States, 331 U.S. 145 (1947), *reh. denied,* 331 U.S. 867 (1947) (overruled on other grounds Chimel v. California, 395 U.S. 752 (1969), *reh. denied,* 396 U.S. 869 (1969)); Griswold v. Connecticut, 381 U.S. 479 (1965) (referring to the right of privacy as a right older than the Bill of Rights); Stanley v. Georgia, 394 U.S. 557 (1969) (except in very limited circumstances, the right to be free from unwanted governmental intrusions into one's privacy is a fundamental constitutional right).

fourteenth amendment.[12] Thus, evidence obtained in violation of the amendment is subject to exclusion in the state courts.[13] Although the right of personal privacy is fundamental, its scope is not unqualified or absolute. An individual's right to privacy must be balanced with various state interests in promoting peace and harmony with the community. Therefore, a state may limit the right only where justified by a "compelling state interest."

Although the right of privacy is a penumbral right, "zones of privacy" have been established within the meaning of particular constitutional provisions.[14] This right has been extended to activities relating to marriage,[15] procreation,[16] contraception,[17] family relationships,[18] and child rearing and education.[19]

---

12. U. S. CONST. amend. XIV.

13. Mapp v. Ohio, 367 U.S. 643 (1961). The same standards of reasonableness and probable cause govern both federal and state activities. Kerr v. California, 374 U.S. 23 (1963); Aguilar v. Texas, 378 U.S. 108 (1964).

14. The roots of this right have been traced to the first amendment. Stanley v. Georgia, 394 U.S. 557, 564 (1969); to the fourth and fifth amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); to the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 484, 485; to the ninth amendment, *Id.* at 486 (Goldberg, J., concurring); and to the concept of liberty guaranteed by the first section of the fourteenth amendment; Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* note 53, *infra.*

15. Loving v. Virginia, 388 U.S. 112 (1967). Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications was held violative of the equal protection and due process clauses of the fourteenth amendment. The freedom to marry or not to marry a person of another race resides with the individual and cannot be infringed upon by the state.

16. Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942). Marriage and procreation being so fundamental to the very existence and survival of our race, and one of our basic civil rights, that a state statute providing for the sterilization of "habitual criminals" convicted of certain offenses held in violation of the equal protection clause of the fourteenth amendment.

17. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972). The constitutionally protected right of privacy inheres in the individual, not the marital couple and hence, a state statute providing dissimilar treatment for married and unmarried persons as regards the distribution of contraceptives violates the equal protection clause.

18. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. There is no denial of equal protection in excluding certain children from doing what no other children may do.

19. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Parents authority to provide religious and secular schooling, and the child's right to receive it

A basic, well recognized aim of the fourth amendment is to protect the privacy and security of individuals against arbitrary invasions by government.[20] This protection has been described as "basic to a free society," [21] and "implicit in the concept of ordered liberty." [22] Stated alternatively, the fourth amendment is intended to protect the sanctity of a person's home and his personal life from invasions and searches under indiscriminate authority.[23] The fourth amendment has been held to permit intrusions only upon showing of probable cause [24] as determined by a "neutral and detached magistrate." [25] The individual's right of privacy must yield to the state's right to search when a judicial officer independent of the police reasonably determines that there is probable cause to believe a crime has been committed and a necessity to investigate for evidence thereof.[26]

> It is not sufficient that the police think there is cause for an invasion of the privacy of the home. The judicial officer must also be convinced; and to him the police must go except for emergency situations.

---

held valid as against the power of the state to require attendance at public schools. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). State law forbidding the teaching of any modern language other than English to any child who has not passed the eighth grade, invades the liberty guaranteed by the fourteenth amendment and exceeds the power of the state.

20. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); and Olmstead v. United States, 227 U.S. 438 (1928).

21. Wolf v. Colorado, 338 U.S. 25, 27 (1949); Mapp v. Ohio, 367 U.S. 643 (1961), *reh. denied*, 368 U.S. 871 (1961).

22. 338 U.S. at 27, quoting, Palko v. Connecticut, 302 U.S. 319, 325 (1937).

23. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 301 (1967); Katz v. United States, 389 U.S. 347 (1967).

24. U.S. CONST. amend. IV.

25. Warden, Maryland Penitentiary v. Hayden, 387 U.S. at 301.

26. While intervention of a neutral magistrate is the general requirement, there have been a few carefully delineated exceptions to the warrant requirement. Chimel v. California, 395 U.S. 752 (1969) (An arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, where the search is confined to the area within the immediate control of the person arrested or from which he might gain possession of a weapon or destructible evidence); Terry v. Ohio, 392 U.S. 1 (1968) (An officer warranted in believing that his safety or that of others is endangered may make a reasonable search for weapons of the person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest); Carroll v. United States, 267 U.S. 132 (1925) (A seizure is legal if the officer, in stopping and searching the vehicle, has reasonable or probable cause for believing that contraband is being transported).

Even in light of the aforementioned exceptions, the principle that the "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," remains the standard. Terry v. Ohio, 392 U.S. at 20; Chimel v. California, 395 U.S. at 762.

> The magistrate should know the evidence on which the police propose to act. Unless that is the requirement, unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interests. Though the police are honest and their aims worthy, history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects.[27]

II. DEFINING THE INTEREST PROTECTED

In order to implement the fourth amendment's guarantee of freedom from unreasonable search and seizure, the Supreme Court conferred upon defendants in both federal and state criminal prosecutions the right, upon motion and proof, to have excluded from trial evidence which has been acquired in an unlawful search or seizure.[28] The exclusion of evidence otherwise admissible but obtained in violation of the fourth amendment is a procedural device to discourage the invasion of the individual's privacy by such a search or seizure without regard to proof of a superior property interest.[29]

The established principle regarding standing is that suppression of the product of a search violative of the fourth amendment can be urged successfully only by those whose rights were violated by the search, not by those who are aggrieved solely by the introduction of damaging evidence.[30] However, this principle remains subject to judicial construction. In *Jones v. United States*,[31] the Supreme Court most liberally interpreted the principle as requiring that an individual merely be legitimately on the premises where the illegal search occurs to enjoy the protection of the amendment. However, the Court also has indicated that an individual must have a proprietary or possessory interest in the items illegally seized to invoke the exclusionary rule.[32]

---

27. Jones v. United States, 362 U.S. 257, 273 (1960) (Douglas, J., dissenting in part, concurring in part).

28. Weeks v. United States, 232 U.S. 383 (1914). The fourth amendment's right of privacy is enforceable against the states through the due process clause of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25 (1949), *overruled on other grounds*, Mapp v. Ohio, 367 U.S. 643 (1961). Hence, this right of privacy is enforceable against the states by the same sanction of exclusion of evidence obtained by an illegal search as is used against the Federal Government. Mapp v. Ohio, *supra*.

29. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967).

30. Alderman v. United States, 394 U.S. 165, 172 (1969).

31. Jones v. United States, 362 U.S. 257 (1960).

32. Hall v. United States, 150 F.2d 281 (5th Cir. 1945), *cert. den.*, 326 U.S. 741; McDonald v. United States, 83 App. D.C. 96, 166 F.2d 957 (1948), *rev'd on other grounds*, 335 U.S. 451; MacDaniel v. United States, 294 F. 769 (6th Cir. 1924), *cert. den.*, 264 U.S. 593; United States v. Zafrin, 22 F. Supp. 601 (D.C. N.Y. 1938), *aff'd*, 95 F.2d 1022 (2d Cir. 1938) (Mem.).

In more moderate construction of the principle, the Court has required that an individual need only possess a reasonable expectation of privacy in the place illegally searched or the items illegally seized to have the evidence excluded at trial.[33]

In *Jones*[34] the Supreme Court for the first time directly confronted the issue of standing as it relates to the exclusionary rule. Jones, the occupant of a friend's apartment, was charged with possession of narcotics in violation of federal laws permitting conviction merely upon a showing by the government that the defendant had possession of the proscribed narcotics.[35] His motion to suppress the evidence, which was found in the apartment and seized by federal officers, was denied on the basis that he lacked standing to challenge the illegal search and seizure because he did not own the seized articles nor did he have an interest in the apartment greater than that of an "invitee or guest."[36] On appeal, the Supreme Court vacated the conviction and remanded the case finding that Jones had a fourth amendment privacy interest in the apartment and was, therefore, a "person aggrieved" within the meaning of Rule 41(e) of the Federal Rules of Criminal Procedure.[37] Rule 41(e), which implements the fourth amendment, is a procedure by which a person aggrieved can, by timely application to the court, move to exclude or suppress evidence obtained through an illegal search.

In *Jones*, Justice Frankfurter, writing for a unanimous Court, stated that Rule 41(e) "applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.'"[38] He also observed that "[o]rdinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be

---

Generally, as to the interest in property as a requisite of an accused's standing to raise the question of the constitutionality of a search and seizure, *see* the annotations at 96 L.Ed. 66 and 4 L.Ed.2d 1999.

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

34. 362 U.S. 257 (1960).

35. 26 U.S.C. 4704(a) (1976).

36. 104 U.S. App. D.C. 345, 347, 262 F.2d 234, 236 (1958).

37. 362 U.S. 260-67; 18 U.S.C., Appendix, FED. R. OF CRIM. P. 41(e), which reads, in part: "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property. . . . If the motion is granted the property . . . shall not be admissible in evidence at any hearing or trial.

38. 362 U.S. at 261, *quoting* Hatch v. Reardon, 204 U.S. 152, 160 (1907).

on [the] premises where a search occurs may challenge its legality . . . , when its fruits are proposed to be used against him." [45] *Katz v. United States* [46] makes it clear that capacity to claim the protection of the fourth amendment does not depend solely upon a property right in the invaded place, but can be based upon a reasonable expectation of freedom from governmental intrusion.[47] In *Katz*, the occupant of a public telephone booth challenged the admission of evidence obtained by an electronic listening recording device attached to the booth. He sought to characterize a public telephone booth as a constitutionally protected area so that the method by which the evidence was obtained constituted a violation of his right to privacy. In refusing to consider the issue couched in terms of a general constitutional "right to privacy," the Supreme Court pointed out that although individual privacy is protected against certain kinds of governmental intrusion, the protections of the fourth amendment go further and often have nothing to do with privacy at all. The Court reversed Katz's conviction on procedural grounds (failure to obtain prior judicial authorization for the "seizure") but took the occasion to promulgate more moderate and subjective guidelines for adjudicating claims of fourth amendment violations. The *Katz* test focused on the reasonableness of an expectation of privacy in a given setting rather than the degree of possessory or proprietary interest involved.

A. Rakas: Limiting Application of the Exclusionary Rule

Petitioners in *Rakas* argued that their occupancy of the automobile in question was comparable to that of Jones in the apartment, and that they, therefore, had standing to contest the legality of the search which, they contended, infringed upon their fourth amendment rights.[48] Furthermore, petitioners urged the Court to relax or even broaden the rule of standing enunciated in *Jones* so that any criminal defendant at whom a search is directed would have standing to contest the legality

---

45. Jones v. United States, 362 U.S. 257, 267 (1960).

46. 389 U.S. 347, 349-50 (1967). Petitioner sought to exclude from evidence telephone conversations overheard by government agents who had attached an electronic listening and recording device to the outside of a public telephone booth from which petitioner had placed his calls. Although the inside of the booth was perfectly visible to the public eye, the interest that was protected was against the uninvited ear.

47. *Id.* at 353. *See* United States v. Chadwick, 433 U.S. 1, 7 (1977); United States v. White, 401 U.S. 745, 752 (1971).

48. 439 U.S. at 140-41.

of that search and object to the admission at trial of evidence obtained as a result of the search.[49]

The Court distinguished *Jones*, although admitting that "a person can have a legally sufficient interest in a place other than his own home so that the fourth amendment protects him." [50] The Court in *Rakas* restricted *Jones* to its facts [51] and declared that arcane distinctions which originated in property and tort law among guests, licensees, invitees and the like ought not to control the scope of fourth amendment interests protected. The Court concluded that the phrase "legitimately on premises" coined in *Jones* created "too broad a gauge" for measurement of the scope of fourth amendment searches.[52] The holding in *Jones* was not intended to have general application, but rather, was devised solely to solve the particular dilemma presented in *Jones*.[53]

In refusing to extend application of the exclusionary rule to petitioners in *Rakas*, the Court adopted a phrase from *Alderman v. United States* [54] which had been recited in numerous prior decisions: "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." [55] In *Alderman*, the Court was "not convinced that the additional benefits of extending the exclusionary rule would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." [56]

---

49. *Id.* at 132.

50. *Id.* at 142. *See* Jones v. United States, 362 U.S. at 265 (noting denial standing to "guests" and "invitees" to maintain a motion to suppress).

51. 439 U.S. at 142-43; Jones v. United States, 362 U.S. at 266. *See also* Mancusi v. DeForte, 392 U.S. 364 (1968); Silverman v. United States, 365 U.S. 505 (1961).

52. 439 U.S. at 142. In Mancusi v. DeForte, 392 U.S. 364 (1968), the Court came to the same conclusion regarding the *Jones* phrase, refusing to literally apply its "legitimately on premises" test. Instead, the Court in *Mancusi* inquired into whether a union official's office was an area in which there was a reasonable expectation of freedom from governmental intrusion. 392 U.S. at 368, 376 (Black, J., dissenting).

53. 439 U.S. at 141-43. The dilemma referred to in *Jones* was, in part, that of a defendant who was charged with a possessory offense and consequently might have to concede his guilt in order to establish standing in the usual way, *i.e.*, that possession both convicts and confers standing; the placing of an unconstitutional burden on a constitutional right. 362 U.S. at 261-62.

54. 394 U.S. 165 (1969).

55. 394 U.S. at 174. *See also* Brown v. United States, 411 U.S. at 230; Simmons v. United States, 390 U.S. 377, 389 (1968); Wong Sun v. United States, 371 U.S. at 492; Silverman v. United States, 365 U.S. 505, 511 (1961); Gouled v. United States, 255 U.S. 298, 304 (1921).

56. 439 U.S. at 137, *citing* 394 U.S. at 174-75.

The *Rakas* majority gave much credence to the rationale set forth in *Alderman*, further quoting that far-reaching decision: "[t]he deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed."[57] However, application of the exclusionary rule results in the withholding of relevant and reliable evidence from the trier of fact and impedes the truth seeking process. The Court, recognizing the high cost to society, expressed in *Rakas* its misgivings as to the benefit of enlarging the class of persons who may invoke the rule.[58]

B. Legitimate Expectation of Privacy

By focusing on legitimate expectation of privacy, the Court in *Rakas* did not abandon the use of property concepts in determining the presence or absence of privacy interests protected by the fourth amendment. The Court merely emphasized that fourth amendment expectation of privacy need not be based solely on a common law interest in real or personal property, or on the invasion of such an interest, but that such expectation may also be found in society's understanding of the right.[59]

Even though the doctrine of "legitimately on premises," as promulgated in *Jones* was deemed insufficient and hence abandoned by the Court in *Rakas*, the Court did hold that the test has some relevance in determining one's expectation of privacy.[60] The Court noted that the *Jones* rule by itself proved unworkable and had produced inconsistent results when applied.[61]

---

57. 439 U.S. at 137. *See also* United States v. Ceccolini, 435 U.S. 268, 275 (1978); Stone v. Powell, 428 U.S. 465, 489-90 (1976); Brown v. United States, 414 U.S. at 348-52.

58. For these same prudential reasons, the Court in *Alderman* rejected the argument that any defendant should be enabled to apprise the Court of unconstitutional searches and seizures and to exclude all such unlawfully seized evidence from trial, regardless of whether his fourth amendment rights were violated by the search or whether he was the "target" of the search. This expansive reading of the fourth amendment also was advanced by the petitioner in *Jones* and was implicitly rejected by the Court.

59. 439 U.S. at 143-44n.12. The Court refers to and distinguishes its prior decision in *Alderman*, wherein an "individual's property interest in his home was so great as to allow him to object to electronic surveillance of conversations emanating from his home, even though he himself was not a party to the conversations," and *Katz*, where "a property interest in the premises [was not] necessarily sufficient to establish a legitimate expectation of privacy. . . ." *Id.*

60. 439 U.S. at 147-48.

61. *Id.* at 147n.14. Similar dissatisfaction has been expressed and confusion has resulted from reliance on the "legitimate presence" test of *Jones* to

Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.[62] In *Rakas*, the Court placed great emphasis on its earlier decision in *Katz*. In *Katz*, Justice Stewart, writing the majority opinion, stated that: "[t]he correct solution of Fourth Amendment problems is not necessarily promoted by [the] incantation of the phrase 'constitutionally protected area.'" [63] "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." [64]

Petitioners Katz and Jones both could legitimately expect privacy in the areas which were the subject of the searches that they respectively sought to contest. In *Rakas*, however, petitioners made no showing that they had any legitimate expectation of privacy in the contents of the automobile in which they were merely passengers. It was upon this determination that petitioners' convictions were affirmed.

Mr. Justice Powell and Mr. Chief Justice Burger, in their concurring opinion, expressed the principal issue in *Rakas* somewhat differently than did the majority: Is a claim to privacy from government intrusion reasonable in light of all the surrounding circumstances? [65] The majority opinion relied on *Katz* in suggesting that a sounder standard for determining the scope of a citizen's fourth amendment

---

resolve such fourth amendment questions as whether a search violated a defendant's "reasonable expectation of freedom from governmental intrusion." *See* Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421, 448 (1975); White and Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 344-45 (1970); Mancusi v. DeForte, 392 U.S. 364, 368 (1968).

As an example of the disparity resulting from literal application of the language in *Jones*, *see, e.g.*, Garza-Fuentes v. United States, 400 F.2d 219 (5th Cir. 1968); State v. Bresolin, 13 Wash. App. 386, 534 P.2d. 1394 (1975). *See also* 439 U.S. at 145-46n.13.

62. Katz v. United States, 389 U.S. at 350n.5. Reference is made to the right of privacy existing in the penumbras of various specific constitutional provisions, such as the first amendment's guarantee of free speech and press and of association, the fifth amendment's privilege against self-incrimination. The right of privacy is protected by the third amendment's prohibition of peacetime quartering of soldiers in any house without the owner's consent, and has also been based on the ninth amendment's reservation to the people of rights not enumerated in the Constitution.

63. 389 U.S. at 350.

64. *Id.* at 351. *See* Lewis v. United States, 385 U.S. 206, 210 (1966); United States v. Lee, 274 U.S. 559, 563 (1927).

65. 439 U.S. at 152.

rights rests on the legitimate expectation of privacy. The concurrence, however, went further, asserting that not only must the scope of protection be determined by the scope of privacy that a free people legitimately may expect,[66] but to deserve the protection of the fourth amendment that expectation must "be one that society is prepared to recognize as 'reasonable.'" [67]

C. *Reasonableness of Expectation*

Although automobiles are "effects" within the meaning of the fourth amendment,[68] warrantless searches of automobiles have been upheld in circumstances in which a search of a home or office would not.[69] The distinction between an expectation of privacy in an automobile and an expectation in other locations is well recognized.[70] Because of the lesser expectation of privacy associated with automobiles,[71] the reasonableness of governmental intrusions should not be gauged in terms of the opportunity to procure a warrant, but rather, the reasonableness of the seizure under all the circumstances.[72]

---

66. Katz v. United States, 389 U.S. at 353.

67. 439 U.S. at 153, *quoting* 389 U.S. at 361 (Harlan, J., concurring).

68. Cady v. Dombrowski, 413 U.S. 433, 439 (1973).

69. Cardwell v. Lewis, 417 U.S. 583, 589 (1974); Cady v. Dombrowski, 413 U.S. at 439-40; Chambers v. Maroney, 399 U.S. 42, 48 (1970).

70. 439 U.S. at 148-49. *See* United States v. Chadwick, 433 U.S. 1, 12 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); Cardwell v. Lewis, 417 U.S. at 589.

71. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view." Cardwell v. Lewis, 417 U.S. at 590.

Warrants are the general rule to which the legitimate needs of law enforcement may demand specific exceptions. For a discussion of the "automobile exception" to the requirement of obtaining a search warrant, *see* Carroll v. United States, 267 U.S. 132, 149 (1925) (validity of warrantless search of car "upon a belief reasonably arising out of circumstances known to the seizing officer"); Preston v. United States, 376 U.S. 364, 366-67 (1964); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (a search of an automobile involves exigent circumstances because the car is moveable, its occupants alerted, and its contents may not be found again if warrant is required); Coolidge v. New Hampshire, 403 U.S. 443, 458-64 (1971) (limiting the exception, as in *Carroll*, to the impracticality of obtaining a search warrant); United States v. Chadwick, 433 U.S. at 11-13 (implying that diminished expectation surrounding an automobile may justify warrantless searches where government's need for search outweighs defendant's reasonable expectation).

72. South Dakota v. Opperman, 428 U.S. 364, 373 (1976), *quoting* Coolidge v. New Hampshire, 403 U.S. at 509-10 (1971) and Cooper v. California, 386 U.S. 58, 59 (1967).

In *Rakas*, the Supreme Court recognized that no single factor invariably will be determinative in ascertaining the reasonableness of asserted privacy expectations. The Court may consider (1) whether a person seeking to invoke the protection of the fourth amendment took normal precautions to maintain his privacy,[73] (2) the way a person has used a location,[74] (3) the history as to the type of governmental intrusion,[75] and (4) whether property rights represent a significant recognition of a person's authority.[76]

The concurrence distinguished between the fourth amendment rights of passengers and the rights of individuals who have exclusive control of an automobile or of its locked compartments. Considering a citizen's interest in the privacy of the contents of his automobile,[77] the concurring Justices resolved that the minimal privacy that did exist in an automobile simply was not comparable to that, for example, of a person in his place of abode,[78] or one who secludes himself in a telephone booth,[79] or the traveller who secures his belongings in a locked suitcase or footlocker.[80]

IV. CONCLUSION

The Supreme Court's holding in *Rakas* appears to be a reasonable step forward in distinguishing the interests and expectations that must necessarily be present before an accused can rightfully claim the protection of the fourth amendment. By considering the reasonableness of the expectation of privacy, the circumstances of each case and the precautionary measures taken by those asserting fourth amendment violations, the Supreme Court, in *Rakas*, has effectively restricted application of the *Jones* legitimate presence test to the factual situation of that case where possession both confers standing and convicts. The reasonable expectation test as applied by the factfinder is narrower and more definite in application and yet it is flexible enough to be

---

73. *See, e.g.*, 433 U.S. at 11 (reasonable expectation of privacy from public examination, of a double-locked footlocker); Katz v. United States, 389 U.S. at 352 (occupant of a telephone booth who shuts the door behind him and pays the toll, is entitled to assume his words will not be broadcast to the world).

74. Jones v. United States, 362 U.S. at 263, 265 (defendant having a privacy interest in an apartment he occupied with the consent of the apartment owner).

75. United States v. Chadwick, 433 U.S. at 7.

76. Alderman v. United States, 394 U.S. at 174.

77. South Dakota v. Opperman, 428 U.S. at 379 (Powell, J., concurring).

78. *See generally* Jones v. United States, 362 U.S. 257 (1960).

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

80. United States v. Chadwick, 433 U.S. at 2, 11-13.

responsive to individual circumstances. However, there remains no black letter rule, principle or guideline which will resolutely determine questions of standing with regard to alleged fourth amendment violations. The range of variables that can be applied in situations of search and seizure is, indeed, practically infinite.[81] While the desire to formulate a universal method or test for fairly ascertaining right, wrong and reasonableness is meritorious, and while it cannot be denied that a judicial system which functions on a case-by-case basis is often time consuming, impractical and costly, there remains a point at which judicial integrity cannot be sacrificed for judicial economy.

Nevertheless, there are questions involving everyday instances of search and seizure that remain unanswered. The Court recognizes special standing rights as to property owners, yet it abstains from addressing the question of fourth amendment rights when persons with less substantial property interests are involved. The owner of an automobile has a right or expectation of privacy inside it that the police cannot invade without probable cause. The degree of protection against illegal police conduct that is offered a mere passenger, however, is virtually non-existent.

Since the touchstone for privacy is no longer ownership, as the Supreme Court has ended the tie between privacy and property years ago,[82] what interest, besides ownership, would support a claim of privacy inside a car or elsewhere? If the car had been a taxi and the passengers were paying a fare, they might be considered to have bought a privacy interest.[83] If the passengers had been the children of the driver, there is a strong possibility they would have inherited a

---

81. 439 U.S. at 155-56 (Powell, J. and Burger, Ch. J., concurring).

82. Katz v. United States, 389 U.S. at 352 (wherein the Court ruled that one is entitled to privacy in a public telephone booth).

83. Rios v. United States, 364 U.S. 253 (1960). In *Rios*, petitioner dropped a rubber contraceptive containing heroin on the floor of a taxicab after police approached the vehicle and identified themselves. The cab had been stopped at a red light. Petitioner was convicted of possession of heroin in violation of federal narcotics law and his conviction was upheld on appeal. United States v. Rios, 256 F.2d 173 (9th Cir. 1958). On appeal to the Supreme Court, *Rios* argued that the police had seized the heroin in violation of the fourth amendment. The Court refused the conviction and remanded the case to the district court for a determination of whether the search was violative of the fourth amendment. On remand, the district court held that in light of all the surrounding circumstances the search was constitutional and denied petitioner's motions to suppress the heroin and for acquittal. United States v. Rios, 192 F. Supp. 888 (S.D. Ca. 1961). Nonetheless, the Supreme Court, by reversing and remanding the case, implied that a paying rider in a taxicab could be entitled to fourth amendment protections.

right to privacy. If the driver had loaned his car keys to a friend so he could use the car, an old case suggests that the friend would have a privacy interest.[84] Therefore, when an owner grants a temporary possessory interest in a portion of his vehicle, does the passenger thereby acquire an interest sufficient to support a claim to privacy, albeit a limited claim? This claim would be understandably weaker than that of a visitor in a home because the Court has traditionally afforded more protection for the home than the car. However, what will the Court do when presented with the search of a mobile home or a van equipped with beds? Would this be considered a search of a home, or of a car, or of some hybrid.

The differing expectations of privacy in these areas remain undelineated and a continued source of confusion in the lower courts. Future litigation must determine the scope of interest that an accused must have in the "premises" to support a claim of privacy sufficient to confer standing to challenge the legality of a search and seizure threat.

Michael Adam Shichman

---

84. Jones v. United States, 362 U.S. 257 (1960).