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## Standing to Raise Fourth Amendment Guarantees against Unreasonable Searches and Seizures: *Rakas v. Illinois*

Jefferson Davis Sellers

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# NOTES AND COMMENTS

## STANDING TO RAISE FOURTH AMENDMENT GUARANTEES AGAINST UNREASONABLE SEARCHES AND SEIZURES: *RAKAS V.* *ILLINOIS*

### I. INTRODUCTION

The recent decision of the United States Supreme Court in *Rakas v. Illinois*<sup>1</sup> has dispelled impressions created by earlier decisions as to the breadth of standing to assert a violation of the fourth amendment guarantee against unreasonable searches and seizures. In the wake of *Rakas*, standing no longer is a distinctly separate inquiry in fourth amendment analysis. With this decision the Court elects to treat a person's ability to assert the fourth amendment guarantee as part of the substantive question of whether that person's fourth amendment rights were violated. Yet, *Rakas* represents more than a mere change in fourth amendment methodology. The decision departs from earlier cases which indicated that some degree of fourth amendment protection was due even the passenger in an automobile. *Rakas* represents a break with earlier case law regarding the freedom from governmental intrusion which a passenger is entitled to expect in the automobile in which he is riding. In light of the *Rakas* decision, the passenger in a private automobile has no right to demand reasonable governmental action as to search of the vehicle in which he is riding.

### II. STATEMENT OF THE CASE

#### A. *The Facts of the Case*

Frank Rakas and Lonnie King were passengers in an automobile driven and owned by one of their two female companions. Shortly before Rakas and company were stopped by police, an armed robbery had occurred in the vicinity. In this robbery two masked males had escaped in a similar automobile. A police officer on patrol spotted the car in which Rakas and the others were riding and followed it, initially believing it to be the stolen getaway car. The officer soon realized the car was a different color and had a different license number, but he

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1. 439 U.S. 128 (1978).

continued to follow. When the vehicle stopped at a lounge and its occupants went inside, the officer phoned in a description of the suspects and was told one of the descriptions matched that of one of the robbers. By radio the officer summoned assistance. After the suspects were again in their car and on the highway they were stopped. All four occupants were removed from the car at gunpoint. Two officers then searched the car with neither warrant nor consent and found rifle ammunition in the locked glove compartment and a sawed-off rifle under the front passenger seat. Rakas and King were arrested and subsequently charged with the robbery.<sup>2</sup>

Prior to trial in the Illinois state courts on armed robbery charges, Rakas and King moved to suppress the rifle and ammunition seized in the search of the vehicle.<sup>3</sup> They argued that the seizure of those items violated the fourth amendment. The Circuit Court of Kankakee County, Illinois, denied a pre-trial motion to suppress this evidence. The court reasoned that Rakas and King lacked standing to raise the search and seizure question because they neither owned the car nor had control over it.<sup>4</sup> At trial the sawed-off rifle was identified by a victim of the robbery as one of the weapons used by the masked robbers.<sup>5</sup> Rakas and King were convicted of armed robbery.<sup>6</sup>

On appeal the Appellate Court of Illinois reiterated the view of the trial court as to the standing issue and 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."<sup>7</sup> After the Illinois Supreme Court denied leave to appeal, Rakas and King petitioned for and were granted certiorari by the United States

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2. *Id.* at 130.

3. The text of the motion to suppress, as well as the record of the subsequent hearing on that motion, is given in Appendix to the Petition for Certiorari at 4-24.

4. Appendix to the Petition for Certiorari at 23-24; Brief for Petitioners at 5-6. It can also be argued that part of the grounds for denial of the motion was that petitioners had not asserted an interest in the rifle and shells seized. The prosecutor in his oral motion to dismiss stated that no such interest had been asserted. It is plain from the record that counsel for Rakas and King did not feel it necessary to assert such an interest in order to contest the validity of the search. The language of the trial judge speaks only to the petitioners' lack of interest in the car itself: "These men have no standing to contest the validity of the search. It wasn't their car. They had no control over it. The only person that could complain would be the one who was driving it at the time or who owned the car." *Id.*

5. Petition for Certiorari at 2.

6. 439 U.S. 129. The decision of the Illinois Appellate Court affirming the conviction is reported at 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977). The standing issue was raised in this appeal, but was not considered meritorious. Petition for Certiorari at 4.

7. 46 Ill. App. 3d 569, 571, 360 N.E.2d 1252, 1253 (1977).

Supreme Court.<sup>8</sup>

### B. *The Issues Presented to the Supreme Court*

The issues presented by the defendants in their petition for certiorari were:

(1) whether passengers who are legitimately present in an automobile when it is stopped by police have standing to challenge the constitutionality of a warrantless search of that automobile; and

(2) whether persons against whom a search is directed have standing to contest the search independent of the other recognized criteria for establishment of such standing.<sup>9</sup>

### III. THE DOCTRINE OF STANDING PRIOR TO *RAKAS v. ILLINOIS*

The illegality of a search or seizure cannot be contested by everyone. To determine whether a particular person is a proper party to assert this illegality and claim the remedy of exclusion of the evidence so obtained is to decide whether that person has "standing" to raise the fourth amendment issues. To appreciate the *Rakas* decision, prior case law must be examined to determine what attributes were earlier required for standing to raise a fourth amendment contention.<sup>10</sup>

#### A. *Standing on the Promises of Jones*

In the 1960 case of *Jones v. United States*,<sup>11</sup> the Supreme Court, for the first time, scrutinized standing as it relates to searches and seizures.<sup>12</sup> The *Rakas* defendants postulated two arguments to support their standing to assert the constitutional guarantee. Both were grounded in the language of *Jones*.

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8. *Rakas v. Illinois*, 435 U.S. 922 (1978).

9. Petitioners' Brief for Certiorari at 2.

10. For a general history of the doctrine of standing as it relates to unreasonable searches and seizures see Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U.L. REV. 471 (1952); Weeks, *Standing to Object in the Field of Search and Seizure*, 6 ARIZ. L. REV. 65 (1964). A recent, in-depth analysis of fourth amendment jurisprudence is provided in W. LAFAVE, *SEARCH AND SEIZURE* (1978), a three volume treatise.

11. 362 U.S. 257 (1960).

12. The Court had encountered questions of standing in fourth amendment cases before *Jones* but the issue was never extensively discussed. See, e.g., *United States v. Jeffers*, 342 U.S. 48 (1951); *McDonald v. United States*, 335 U.S. 451 (1948); *Agnello v. United States*, 269 U.S. 20 (1925). Cases prior to *Jones* strictly keyed standing to the possessory or proprietary interest in the property seized or the premises searched. If a defendant could show neither, he could not raise the fourth amendment issue. See Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 35-36 n.238 (1975).

Jones had been staying at a friend's apartment while the friend was out of town. Federal agents executed a search warrant for narcotics in the apartment while Jones was there. Narcotics were found and Jones was arrested on charges relating to his possession.<sup>13</sup> Jones moved to suppress the evidence of the apartment search on the ground that the warrant had been defective. Suppression was denied. The government's argument at the hearing on the motion was twofold: Jones had been a mere guest in his friend's apartment and therefore had no proprietary interest in the premises sufficient to have rendered him a "victim" of the search; in addition, Jones had vehemently denied ownership of the seized narcotics and thus could not claim an interest in them which would make him a victim of the seizure. Jones was convicted and the conviction was upheld by the District of Columbia Court of Appeals.<sup>14</sup>

Reversing the conviction of Jones, the Supreme Court expanded fourth amendment standing by rejecting the standard which had been followed by many lower courts.<sup>15</sup> This standard was based on the subtle distinctions of traditional property law.<sup>16</sup> The Court recognized that the fourth amendment was obviously designed for protection against official invasion of privacy as well as for the security of property.<sup>17</sup> It therefore held that anyone "legitimately on [the] premises" had a sufficient interest in the premises, the invasion of which would be a significant injury giving rise to standing to object to a search of those premises.<sup>18</sup>

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13. 362 U.S. at 258-59.

14. *Jones v. United States*, 262 F.2d 234 (D.C. Cir. 1958).

15. 362 U.S. 257. The *Jones* opinion was written by Justice Frankfurter and subscribed to by all nine members of the Court. Justice Douglas dissented as to the issue of probable cause to issue the search warrant, but joined the Court's opinion as to the standing issue. *Id.* at 273.

16. Under this standard followed by many lower courts, distinctions among categories such as lessee, licensee, invitee, and guest determined the amount of fourth amendment protection awarded an individual. *Id.* at 266. *E.g.*, *Jones v. United States*, 262 F.2d 234 (D.C. Cir. 1959) (mere guest or invitee in apartment lacks required standing); *Gaskins v. United States*, 218 F.2d 47 (D.C. Cir. 1955) (defendant, guest in apartment, had no standing to contend entry and subsequent seizure were unlawful); *Stieber v. United States*, 198 F.2d 615 (10th Cir. 1952) (lessee of farm has requisite interest to contest search of premises); *Gibson v. United States*, 149 F.2d 381 (D.C. Cir. 1945) (fourth amendment may be raised only by one who claims ownership in or right to possession of the premises searched or property seized); *Daddio v. United States*, 125 F.2d 924 (2d Cir. 1942) (casual and temporary visitor or guest in home does not have standing to assert unreasonable search of that home); *United States v. DeBousi*, 32 F.2d 902 (D. Mass. 1929) (lessee or licensee of dwelling place has requisite interest).

17. 362 U.S. at 264.

18. *Id.* at 266-67. In *Rakas* the Court effectively limited *Jones* to its facts as to the "legitimately on the premises" standard. "*Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his home so that the

*Jones* contained an alternative rationale for granting standing to assert fourth amendment rights. Jones could have had standing had he only claimed to own or possess the seized property. Under then existing law, however, this might well have put Jones in a worse position.<sup>19</sup> He could testify at the suppression hearing that the narcotics belonged to him. In so doing, he would assert a property interest sufficient for standing under the then existing law. Assuming the search or seizure was found improper, the evidence would be suppressed. The narcotics would no longer be necessary, however, because Jones would have already admitted possession, the major element of the offense. To avoid this dilemma the Court provided for automatic standing in such cases. "The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception . . . ."<sup>20</sup> Under this second rationale, a defendant need not claim a possessory interest in the illegally seized item to raise the fourth amendment question if his possession was a substantive element of the offense charged.

Although *Jones* set forth these two new rationales for standing, it did not reject the two traditional bases. The owner or possessor of the seized property still had standing to raise the issue, as did the owner of the searched premises.<sup>21</sup> Thus, after *Jones*, standing to contest the validity of a search or seizure could be demonstrated in any one of four ways. If the party was (1) the owner of the searched premises, (2) legitimately on the premises at the time of the search, (3) the owner or possessor of the seized property, or (4) charged with a crime, at least one element of which was possession of the seized property, then standing would exist.<sup>22</sup>

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Fourth Amendment protects him from unreasonable government intrusion into that place." 439 U.S. at 142. See notes 83-85 *infra* and accompanying text.

19. To a certain extent, the dilemma no longer exists. In *Simmons v. United States*, 390 U.S. 377 (1968), the Supreme Court held that when a defendant testifies in support of a motion to suppress, his testimony may not be used thereafter against him at trial on the issue of guilt, unless he makes no objection. *Id.* at 389-94. The holding in *Simmons*, however, would not prevent the prosecution from using the defendant's suppression hearing testimony for impeachment purposes at trial. See *People v. Sturgis*, 58 Ill. 2d 211, 317 N.E.2d 545 (1974). See also *United States v. Kahn*, 415 U.S. 239 (1974) (the protective shield of *Simmons* is not a license for false representations). Cf. *Harris v. New York*, 401 U.S. 222 (1971) (statement obtained in violation of defendant's *Miranda* rights may be used against him for impeachment purposes).

20. 362 U.S. at 264.

21. Either of these two interests would meet the traditional standing requirements the Court gave. *Id.* at 261.

22. See *Brown v. United States*, 411 U.S. 223, 225-27, 229 (1972). In *Brown* the defendants had been convicted on charges relating to transportation of stolen goods in interstate commerce. Part of the evidence used to convict them resulted from a search of a co-conspirator's place of

Justice Frankfurter's opinion in *Jones* did not abandon the traditional proposition<sup>23</sup> that fourth amendment rights are personal in nature and may not be asserted vicariously.

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of the search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.<sup>24</sup>

The four enumerated ways of achieving standing were guidelines in determining who was a victim of a search or seizure.

### B. *Grafting on the Legitimate Expectation of Privacy Standard*

In *Mancusi v. DeForte*,<sup>25</sup> the Court initiated a shift from a rigid application of the *Jones* standard of legitimate presence. *Mancusi* followed closely in time the landmark fourth amendment decision of *Katz v. United States*.<sup>26</sup> Although the Court recognized in *Mancusi* that the defendant clearly had standing under the "legitimately on the premises" test of *Jones*, it went on to apply the "reasonable expectation of

business made under a defective warrant. None of the defendants were present at the time of the search. The defendants, other than the store owner, asserted no interest in the premises searched or the items seized, but sought to achieve standing to contest the unlawful search and seizure on the automatic standing ground of *Jones*. The Supreme Court refused automatic standing on the basis that the defendants were not charged with an offense that had as an essential element possession of the seized evidence at the time of the contested search and seizure. *Id.* at 229.

23. See, e.g., *id.* at 230; *Alderman v. United States*, 394 U.S. 165, 174 (1969). For a discussion of *Alderman* see notes 47-53 *infra* and accompanying text.

24. 362 U.S. at 261. The language quoted by Justice Frankfurter is from Rule 41(e) of the Federal Rules of Criminal Procedure, the federal statutory exclusionary rule at the time. The exclusionary rule has since been given constitutional status in *Mapp v. Ohio*, 367 U.S. 643 (1961). Although *Jones* involved an interpretation of Rule 41(e), the decision is commonly recognized and accepted as laying the parameters of the constitutional standing requirement in fourth amendment cases. See *Alderman v. United States*, 394 U.S. 165, 173 n.6 (1969). See also *United States v. Calandra*, 414 U.S. 338, 348-49 n.6 (1974).

25. 392 U.S. 364 (1968).

26. 389 U.S. 347 (1967). In *Katz* government agents electronically eavesdropped on a public telephone booth. *Katz* was overheard placing gambling bets in violation of federal law. The Supreme Court held that *Katz* "justifiably relied" on privacy while using the phone booth thus indicating that privacy was at the heart of the interests protected by the fourth amendment. *Id.* at 353. As interpreted by subsequent decisions, *Katz* stands for the proposition that the fourth amendment "protects people from unreasonable government intrusions into their legitimate expectation of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977).

An in-depth analysis of *Katz* and its ramifications for fourth amendment jurisprudence is beyond the scope of this note. Myriad commentaries have been written on *Katz*. E.g., *Kitch, Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133. LAFAYE, *supra* note 10, in his three volumes is particularly good in relating *Katz* to the whole of the fourth amendment.

privacy" test of *Katz* to the issue of standing.<sup>27</sup>

Frank DeForte, a local teamsters' union official, was convicted by the use of evidence seized by police without a warrant from a union office shared by DeForte and several other union officials.<sup>28</sup> DeForte, present in the office at the time of the search, protested the government action at his trial on charges of conspiracy, coercion, and extortion.<sup>29</sup> DeForte's claim of fourth amendment violation was rejected throughout his direct state appeal of the conviction and at the first stage of federal habeas corpus review.<sup>30</sup> The Court of Appeals for the Second Circuit granted the writ based on DeForte's fourth amendment claim.<sup>31</sup>

The Supreme Court, specifically addressing the issue of DeForte's standing to assert the violation of his rights, overturned the conviction and affirmed the Court of Appeals decision granting habeas corpus. While the Court found the standing inquiry properly to be "whether the area [searched] was one in which there was a reasonable expectation of freedom from governmental intrusion,"<sup>32</sup> it emphasized the vitality of the "legitimately on the premises" *Jones* standard.<sup>33</sup> Applying the *Katz* standard in *Mancusi*, the Supreme Court found that, although DeForte had little expectation of absolute privacy in the shared office, he did have a reasonable expectation of freedom from governmental intrusion by search.<sup>34</sup> Having determined that DeForte had standing to raise the fourth amendment question, the Supreme Court went on to find the search and seizure unlawful.<sup>35</sup>

27. 392 U.S. at 368-69.

28. *Id.* at 365.

29. *Id.*

30. The state appeals culminated in a petition for certiorari to the Supreme Court which was denied *sub nom.* De Grandis v. New York, 375 U.S. 868 (1963). Federal habeas corpus relief was initially sought in the Western District of New York. 261 F. Supp. 579 (1966).

31. 379 F.2d 897 (2d Cir. 1967).

32. 392 U.S. at 368.

33. *Id.* at n.5.

The petitioner contends that this holding was not intended to have general application, but that it was devised solely to solve the particular dilemma presented in *Jones*: 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. However, this limited reading of *Jones* overlooks the fact that in *Jones* standing was held to exist on two distinct grounds: "(1) [The circumstance that] possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized. . . . (2) *Even were this not a prosecution turning on illicit possession*, the legally requisite interest in the premises was here satisfied. . . ." Thus, the second branch of the holding, with which we are here concerned, was explicitly stated to be of general effect.

*Id.* (emphasis in original) (citation omitted).

34. *Id.* at 369-70.

35. *Id.* at 370-72.



Commentators perceived that the Court's opinion in *Mancusi* indicated a shift in focus as to standing.<sup>36</sup> Nevertheless, legitimate presence on the premises searched continued to be mentioned, at least as a relevant factor to the issue of standing, in both commentary<sup>37</sup> and later Supreme Court cases.<sup>38</sup>

#### IV. CONTENTIONS OF RAKAS AND KING

Rakas and King, relying heavily on the standing doctrine enunciated in *Jones*, offered two bases for their standing to contest the search and seizure. They sought a broadening of the *Jones* rule to allow a criminal defendant to gain standing if the contested search was "directed at" him, that is, if he was the "target" of the search and seizure.<sup>39</sup> In the alternative they urged the Supreme Court to decide the issue of standing on the basis of the *Jones* "legitimate presence" standard.<sup>40</sup>

#### V. DECISION OF THE SUPREME COURT

The Court in *Rakas v. Illinois* divided five to four. Justice Rehnquist wrote the majority opinion in which Chief Justice Burger and Justices Stewart, Powell, and Blackmun joined. Justice Powell also wrote a separate concurring opinion and was joined in it by the Chief Justice. Justices Brennan, Marshall, and Stevens joined in the dissent of Justice White.

##### A. *Rejection of the Target Standard*

The essence of the petitioners' "directed at" or "target" theory of standing was derived from the language of the *Jones* opinion: "[O]ne must have been a victim of a search or seizure, *one against whom the search was directed*."<sup>41</sup> Rakas and King argued that they were the ac-

36. *E.g.*, 3 LAFAYE, *supra* note 10, § 11.3, at 543-45; Gutterman, "A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, 23 EMORY L.J. 111, 116-17 (1974); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 345 (1970).

37. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 361 (1973); Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1, 36 (1975); Trager & Lobenfled, *Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421, 446-48 (1975).

38. *See, e.g.*, *Brown v. United States*, 411 U.S. 223, 227 n.2 (1973); *Combs v. United States*, 408 U.S. 224 n.3 (1972); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); *Simmons v. United States*, 390 U.S. 377, 390 (1968).

39. 439 U.S. at 132; Brief for Petitioners at 14-17.

40. Brief for Petitioners at 8-14.

41. 362 U.S. at 261 (emphasis added).

tual targets of the search. The police were hunting two men who shortly before had committed an armed robbery. There was no reason to suspect the involvement of other people.<sup>42</sup> The car was stopped and searched to determine if Rakas and King were the robbers. Therefore, they were the targets against whom the search was directed. As such, under this "target theory," they argued they should have standing to contest the search.

This directed at or target theory of standing had never expressly been held an independent basis for standing by the Supreme Court, but the language had continued to appear after *Jones*.<sup>43</sup> While case law support for this theory was sparse, legal commentators had endorsed it.<sup>44</sup> All nine members of the Court in *Rakas* rejected the target theory of standing in search and seizure matters.<sup>45</sup> Both the majority and the dissent cited *Alderman v. United States*<sup>46</sup> as dispositive of "target" standing.

In *Alderman*, three co-conspirators attempted to suppress evidence

42. Brief for Petitioners at 15. Arguably, under this "target" theory if the robbery had involved women robbers the search could have been directed at only the two women in the car stopped.

43. "[T]here can be no question of the petitioner's standing to challenge the lawfulness of the search. He was the 'one against whom the search was directed,' *Jones v. United States*, 362 U.S. 257, 261 . . ." *Bumper v. North Carolina*, 391 U.S. 543, 548 n.11 (1968). A case prior to *Jones* had also indicated a possibility of target standing.

The Government argues, however, that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. . . . We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right.

*United States v. Jeffers*, 342 U.S. 48, 52 (1951). The *Rakas* majority dismissed both *Bumper* and *Jeffers* as not indicative of an independent target theory of standing because both claimants had substantial possessory interests in the premises searched and articles seized. 439 U.S. at 135-36. In *Bumper* the search was of the house where Bumper lived with relatives and the seizure was of a rifle used by all members of the household. 391 U.S. at 548 n.11. In *Jeffers* the search was of the defendant's aunt's apartment to which he had a key and her permission to use the room at will. The items seized were narcotics placed there apparently by the defendant. 342 U.S. at 50.

44. *E.g.*, White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 349-56 (1970); GEO. L.J. 1187, 1193-95 (1976). These and other commentators have argued that the target rule would be most consistent with the purposes of the exclusionary rule, in that unlawful police conduct is best deterred when the purpose of that conduct is thwarted. The argument is that, if an unlawful search is directed at getting evidence against an individual, to allow that person to assert the fourth amendment guarantee will make such searches fruitless for the police.

45. Justice Rehnquist, for the majority, dealt with the target theory basis of standing in part II A of his opinion. 439 U.S. at 132-38. Justice White in his dissent admitted agreement with the majority on this point. *Id.* at 156 n.1.

46. 394 U.S. 165 (1969). Justice White, who wrote the dissent in *Rakas*, wrote the *Alderman* opinion.

gained by illegal electronic surveillance of one co-conspirator's place of business.<sup>47</sup> They urged the Court to adopt a rule such that if evidence was inadmissible against one co-conspirator because of illegal search or seizure, it would be inadmissible against other co-conspirators. This result was urged regardless of whether the other co-conspirators had had their fourth amendment rights violated.<sup>48</sup> The *Alderman* Court rejected this contention, characterizing it as an overly expansive reading of the fourth amendment and the exclusionary rule.<sup>49</sup> Quoting the same language *Rakas* and *King* would later offer in support of their target theory of standing,<sup>50</sup> the *Alderman* Court held that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."<sup>51</sup> In addition, the Court denied the existence of any independent constitutional right to exclude relevant evidence because it was seized from another in violation of the fourth amendment.<sup>52</sup> Thus, the *Alderman* Court adhered to the general rule that fourth amendment rights are personal and may not be vicariously asserted.<sup>53</sup> The Supreme Court in *Rakas* found that the language of *Alderman* implicitly rejected any target theory of standing.<sup>54</sup> A target theory would allow vicarious assertion of fourth amendment rights.<sup>55</sup>

Perhaps the simplest explanation offered by the *Rakas* majority to dismiss target standing was a brief analysis of the language in *Jones*

47. *Id.* at 167-70.

48. *Id.* at 171.

49. *Id.* "This expansive reading of the fourth amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases and we reject it." *Id.*

50. 394 U.S. at 173. The language involved is that of *Jones*:

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

362 U.S. at 261.

51. 394 U.S. at 171-73.

52. *Id.* at 174.

53. *Id.* See *Brown v. United States*, 411 U.S. 223, 230 (1973); *Mancusi v. DeForte*, 392 U.S. 364, 366 (1968); *Simmons v. United States*, 390 U.S. 377, 389 (1968); *Jones v. United States*, 362 U.S. 257, 261 (1960).

54. 439 U.S. at 136.

The [*Alderman* Court] . . . left no doubt that it rejected this theory by holding that persons who were not parties to unlawfully overheard conversations or who did not own the premises on which such conversations took place did not have standing to contend the legality of the surveillance, regardless of whether or not they were the "targets" of the surveillance.

*Id.*

55. *Id.* at 133-38.

from which the petitioners derived their theory. Had the *Jones* Court intended the language "one against whom the search was directed" to import the meaning urged by Rakas and King, neither of its alternative holdings would have been necessary.<sup>56</sup> Both the "automatic" standing ground and the "legitimately on the premises" ground would have been unnecessary as Jones was clearly the target of the search, one against whom it was directed.<sup>57</sup> Justice Rehnquist argued that the "directed at" language must therefore have only been meant "as a parenthetical equivalent of the previous phrase 'a victim of a search or seizure.'" <sup>58</sup> This was, therefore, a second reason for not interpreting the *Jones* language in a way abrogating the rule against vicarious assertion of fourth amendment rights.

The specter of a runaway exclusionary rule looms large in the rejection of the target standard by the *Rakas* Court. In the analysis of the Court, not only would the target theory allow vicarious assertion of fourth amendment rights, it also would lack merit in terms of social policy. The majority adopted the rationale earlier espoused by Justice Harlan in *Alderman* in dismissing arguments that the target theory was necessary for full recognition of fourth amendment rights.<sup>59</sup> Of primary concern to the Court was the exclusion of more reliable and relevant evidence, were these rights to be extended to a larger class of persons than previously allowed.<sup>60</sup> Despite the strong policy of police deterrence underlying the exclusionary rule, the majority noted that it had never been "held that unlawfully seized evidence was inadmissible

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56. 362 U.S. at 261.

57. 439 U.S. at 135. Jones was specifically named in the search warrant which federal agents were executing when they discovered narcotics. 362 U.S. at 267-68 n.2.

58. 439 U.S. at 135.

59. *Id.* at 136-38. Justice Fortas, in his opinion in *Alderman*, concurring in part and dissenting in part, had explicitly argued that the fourth amendment guarantee was directed against unreasonable governmental searches and seizures in general, and therefore, anyone should be able to raise the guarantee.

The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons. Accordingly, commentators have urged that the necessary implication of the Fourth Amendment is that any defendant against whom illegally acquired evidence is offered, whether or not it was obtained in violation of his right to privacy, may have the evidence excluded. It is also contended that this is the only means to secure the observance of the Fourth Amendment.

394 U.S. at 205-06 (footnotes omitted).

While the *Alderman* majority did not directly address Justice Fortas's point, Justice Harlan in his concurrence did. In the analysis of Justice Harlan, any marginal increase in fourth amendment protection offered by such a broadened approach would be more than offset by substantial difficulties in the administration of such a rule. *Id.* at 188-89 n.1.

60. 439 U.S. at 137-38.

in all proceedings or against all persons."<sup>61</sup> Instead, according to the majority, the rule has consistently been applied only where its remedial objectives are best served.<sup>62</sup> Weighing what it felt to be a minimal additional deterrent effect against the correlative societal costs of excluding more relevant evidence, the majority could not justify a target theory of standing.<sup>63</sup>

As noted by Justice White's dissent, the majority's fear of the expanded availability of the exclusionary rule is misplaced when the issue is not of remedy, but of standing to assert constitutional rights.<sup>64</sup> If the practical impact of the exclusionary rule was the underlying concern of the majority, the question of the rule's continuing validity should have been addressed directly, and the issue should not have been side-stepped through the device of standing.<sup>65</sup>

### B. *Demise of the Concept of Fourth Amendment Standing*

In reaffirming the principle that fourth amendment rights cannot be asserted vicariously, the majority questioned the utility of treating the standing doctrine as a concept separate and distinct from the merits of a fourth amendment claim.<sup>66</sup> Discarding the idea that the concept of standing was any broader than the substantive right itself, the majority concluded that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."<sup>67</sup>

Because the new approach requires the same inquiry as the sub-

61. *Id.* at 134 n.3.

62. *Id.*

63. *Id.* at 136-38.

64. *Id.* at 156 (White, J., dissenting).

65. *Id.* See also *Stone v. Powell*, 428 U.S. 465, 536 (1976) (White, J., dissenting). See generally Comment, *Impending "Frontal Assault" on the Citadel: The Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard*, 12 TULSA L.J. 337 (1976).

The *Rakas* Court concerned itself with the effect of exclusion of additional relevant and reliable evidence under the exclusionary rule. This approach seems backwards: to determine the issue of standing to raise fourth amendment rights, one looks not to those rights but to the effects of the judicially imposed remedy for violation of those rights. Justice White criticized the majority for using this same approach in its analysis of the legitimate expectation of privacy ground for standing. *Id.* at 437. Such criticism seems just as appropriate in this context, regardless of the merit of the Court's argument as to the vicarious assertion of these rights.

66. 439 U.S. at 138-40. See also notes 47-53 *supra* and accompanying text (discussion of *Alderman*).

67. *Id.* at 139. The Court would obviate any separate doctrine of standing and would address each challenge to search or seizure on its merits.

stantive question of violation of fourth amendment rights, the majority intimated that the abolition of the initial standing inquiry would "produce no additional situations in which evidence must be excluded."<sup>68</sup> The Court also claimed that despite its prior fourth amendment cases being analytically imprecise, none of them "would have come out differently" under the new formula.<sup>69</sup>

The concurring and dissenting opinions in *Rakas* failed to address this change in methodology. Perhaps that is a tacit admission that because fourth amendment rights can only be asserted by him whose rights were violated, the separate standing question was redundant. Regardless of the reason for this silence, it is clear that there is, after *Rakas*, no separate standing inquiry when fourth amendment claims are made.

### C. *Rejection of the Legitimate Presence Standard of Jones*

In rejecting standing in fourth amendment analysis as a separate juridical concept, the majority may have made a mere change in nomenclature. A redundant preliminary step would be subsumed in the substantive question of whether fourth amendment rights were violated. Yet, the majority of five rejected the legitimate presence standard which specifically had been announced in *Jones*.<sup>70</sup> Although the Court had indicated earlier that a strict application of the legitimate presence standard might not be the whole of the inquiry,<sup>71</sup> that standard had not specifically been repudiated. Aside from the new *Rakas* methodology, there appears to be a new substantive standard. While the Court in *Rakas* was unanimous in rejecting the target theory,<sup>72</sup> the issue of the legitimate presence standard split the Court.

The basis of the majority's rejection of the *Jones* legitimate presence standard stemmed from the substantive standard of fourth amendment rights set out in *Katz v. United States*.<sup>73</sup> Recognizing that the core of the interests protected by the fourth amendment was pri-

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68. *Id.*

69. *Id.* But see notes 117-47 *infra* and accompanying text.

70. See note 18 *supra* and accompanying text.

71. *Mancusi v. DeForte*, 392 U.S. 364, 368 (1967). See notes 25-38 *supra* and accompanying text.

72. See note 46 *supra* and accompanying text.

73. 389 U.S. 347. In the majority opinion written by Justice Stewart, the language used was to the effect that Katz had "justifiably relied" on privacy while using a telephone booth. *Id.* at 353. Subsequent decisions have referred to the language of Justice Harlan's concurrence which referred to "expectation of privacy." *Id.* at 361.

vacancy, the Court in *Katz* held that the fourth amendment protects privacy upon which we justifiably rely.<sup>74</sup> As interpreted by subsequent decisions *Katz* stands for the proposition that the fourth amendment "protects people from unreasonable governmental intrusions into their legitimate expectations of privacy."<sup>75</sup>

The majority in *Rakas* discarded the idea that standing, in relation to fourth amendment rights, was any broader than the substantive right itself.<sup>76</sup> Viewed in such a way, the proper inquiry of standing involved the same analysis as the definition of the scope of the right.<sup>77</sup> Hence, the *Katz* test was the only standard to apply: did *Rakas* and *King* have legitimate expectations of privacy as passengers in that automobile, such that their fourth amendment rights were violated by the search or seizure?<sup>78</sup>

Against this backdrop, the legitimate presence criterion announced in *Jones* was found by the *Rakas* Court to be "too broad a gauge for measurement of fourth amendment rights."<sup>79</sup> One could be legitimately on the premises when the premises were searched and yet not have a reasonable expectation of privacy.<sup>80</sup> Because under *Alderman* a

74. *Id.* at 353.

75. *E.g.*, *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person . . . has a legitimate expectation of privacy in the invaded place"); *United States v. Chadwick*, 433 U.S. 1, 7 (1977) (defendants had an expectation of privacy in a double-locked footlocker); *United States v. White*, 401 U.S. 745, 752 (1971) ("our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally 'justifiable'"); *Alderman v. United States*, 394 U.S. 165, 191 (1969) ("standing should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that *Katz* protects") (Harlan, J., concurring and dissenting); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) ("a reasonable expectation of freedom from governmental intrusion").

76. 439 U.S. at 138-40. The Court would do away with any separate doctrine of standing and would address each challenge to search or seizure on its merits. See notes 66-69 *supra* and accompanying text.

77. *Id.* at 139. "The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate but invariably intertwined concept of standing." *Id.* (footnote omitted).

78. *Id.* at 143.

*Katz v. United States* . . . provides guidance in defining the scope of the interest protected by the Fourth Amendment. . . . *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

*Id.* (citations omitted).

79. *Id.* at 142 (footnote omitted).

80. The Court suggested as an example the casual visitor in someone's home who has never been in a certain part of the house, and would thus have no legitimate expectation of privacy in such part of the house. *Id.* at 142.

fourth amendment violation may only be raised by a victim of that illegal search or seizure (measured by the *Katz* standard),<sup>81</sup> legitimate presence on the premises cannot be the criterion for standing, the majority reasoned.<sup>82</sup>

The *Rakas* majority limited *Jones* to its facts.<sup>83</sup> They concluded that *Jones* stood only for "the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the fourth amendment protects him from unreasonable governmental intrusion into that place."<sup>84</sup> The *Jones* holding was best explained, in the opinion of the *Rakas* Court, by the fact that Jones had a legitimate expectation of privacy in the premises he was using and could therefore claim fourth amendment protection.<sup>85</sup>

While legitimate presence on the searched premises was not to be the fundamental fourth amendment inquiry, the *Rakas* Court recognized that it is not irrelevant to one's expectation of privacy.<sup>86</sup> The Court noted that a person's wrongful presence at the scene of a search would preclude him from successfully objecting to its illegality.<sup>87</sup> As the Court found the legitimate presence criterion not controlling,<sup>88</sup> apparently there must be more than legitimate presence when a property interest in the place searched or objects seized is not asserted.

81. See notes 47-53 *supra* and accompanying text.

82. See 439 U.S. at 138-40.

83. *Id.* at 143.

[W]e adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed in property and tort law . . . ought not to control. But the *Jones* statement that a person only be "legitimately on premises" in order to challenge the validity of the search of a dwelling place cannot be taken in its full sweep beyond the facts of that case.

*Id.* (citations omitted).

84. *Id.* at 142.

85. *Id.* at 143.

86. *Id.* at 148.

87. *Id.* at 141 n.9, 143 n.12; *Jones v. United States*, 362 U.S. 257, 267 (1960).

A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence . . . is "wrongful"; his expectation is not "one that society is prepared to recognize as 'reasonable.'"

439 U.S. at 143-44 n.12. But see *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967) (purported car thief had standing to contest search of the stolen car); *Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965) (claim of possessory interest in stolen car is enough for standing to assert the fourth amendment protection); *Barr v. State*, 531 P.2d 1399 (Okla. Crim. 1975) (following the opinion of the Tenth Circuit in *Simpson* on similar facts). The federal decisions in *Cotton* and *Simpson* were criticized by the *Rakas* majority. 439 U.S. at 141 n.9.

88. 439 U.S. at 148.



#### D. *Application of the Katz Standard*

Having decided that the proper inquiry before it was whether or not Rakas and King had a legitimate expectation of privacy from unreasonable government intrusion, the Supreme Court had to apply that standard. In attempting to define and give substance to the concept of "legitimate expectation of privacy" the Court initially noted that

[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.<sup>89</sup>

While the majority severely limited the holding of *Jones*,<sup>90</sup> it embraced the view enunciated in *Jones* "that arcane distinctions developed in property and tort law . . . ought not to control" in determining the scope of the fourth amendment.<sup>91</sup> Despite the majority's disclaimers, the concept of property rights was significant, if not controlling, in determining whether Rakas and King had a legitimate expectation of privacy in the automobile in which they were riding. The majority failed to delineate what constitutes "understandings that are recognized and permitted by society"<sup>92</sup> such as would give a privacy interest in the absence of a property interest.

The legitimate expectation standard compels courts to decide the degree of social significance sufficient to raise a fourth amendment claim. Without criteria by which a victim may show that his expectation of privacy was reasonable or legitimate, however, the determination by any court is subject to fiat. The *Rakas* majority gave no such criteria, short of a property or a possessory interest in the premises searched or a similar interest in the property seized.<sup>93</sup>

Justice Powell in his concurring opinion, listed several factors which might be considered. Whether a person took normal precautions

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89. *Id.* at 143-44 n.12.

90. *See* note 83 *supra* and accompanying text.

91. 439 U.S. at 143-44 n.12, 149-50 n.17. In fact, according to the *Rakas* majority, one's expectation of privacy need not be based at all "on a common-law interest in real or personal property, or on the invasion of such an interest." *Id.* at 144 n.12.

92. *Id.*

93. *Id.* at 148-49.

to maintain his privacy was one factor for consideration.<sup>94</sup> Use of the location by the person was another.<sup>95</sup> Historical perceptions of particular types of governmental intrusions could also be relevant.<sup>96</sup> Justice Powell noted that property rights were also relevant to the determination as they "reflect society's explicit recognition of a person's authority to act as he wishes in certain areas."<sup>97</sup> Having listed all these factors considered by the Court in past decisions, Justice Powell, without further explanation, found none of them applicable to Rakas and King.<sup>98</sup>

Both Justice Rehnquist's majority opinion and the concurrence of Justice Powell found a lack of the requisite privacy interest. They based this finding on the separate treatment which automobiles had received under the fourth amendment. Both Justices noted that diminished expectations of privacy in automobiles are firmly established in fourth amendment jurisprudence.<sup>99</sup> Both are correct in that automobiles have generally been treated differently than other premises for fourth amendment purposes.<sup>100</sup> Nevertheless, these automobile

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94. *Id.* at 152. *See, e.g.*, *United States v. Chadwick*, 433 U.S. at 11 (items seized had been placed in a double-locked footlocker); *Katz v. United States*, 389 U.S. at 352 (shutting out the uninvited ear by closing the telephone booth door).

95. 439 U.S. at 153. *See, e.g.*, *Jones v. United States*, 362 U.S. at 257 (privacy interest in apartment where defendant slept and kept clothes).

96. 439 U.S. at 153. *See, e.g.*, *United States v. Chadwick*, 433 U.S. at 7-9 (while particular importance was placed on the home, the fourth amendment was intended to protect fundamental values not just to protect against specific abuses).

97. 439 U.S. at 153.

98. "The petitioners' Fourth Amendment rights were not abridged here because none of the factors relied upon by this Court on prior occasions supports petitioners' claim that their alleged expectation of privacy from government intrusion was *reasonable*." *Id.* at 153 (emphasis in original).

99. *Id.* at 148 (opinion of the Court); *id.* at 153-54 (Powell, J., concurring).

100. *See, e.g.*, *United States v. Chadwick*, 433 U.S. at 12. Those purposes for which automobiles have been treated differently have concerned the reasonableness of a particular type search in light of all the circumstances at the time. "But this Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." *Id.* "[O]ne'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. And the reasonableness of the procedure followed in making these checkpoint stops makes the resulting intrusion on the interests of the motorist minimal." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-62 (1976) (citations omitted). "This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy." *United States v. Ortiz*, 422 U.S. 891, 896 (1975). "The conjunction of these factors [involved in roving automobile searches in border areas] . . . persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause . . ." *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring). "In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office." *Chambers v. Maroney*, 399 U.S. 42, 48 (1970). The automobile distinction has been made to rationalize lesser safeguards than that of a search warrant based on probable cause when automobiles are involved in a search.

cases have recognized that some level of legitimate expectation of privacy exists even there.<sup>101</sup> Reliance on a distinction between cars and dwelling places, originally made to rationalize exceptions to the search warrant requirement, is misplaced when determining whether a person has any legitimate expectation of privacy in the searched area. Whenever an individual may be "he is entitled to know that he will remain free from unreasonable searches and seizures."<sup>102</sup> A person "operating or travelling in an automobile does not lose all reasonable expectations of privacy simply because the automobile and its use are subject to government regulation."<sup>103</sup> Just as an individual does not lose his fourth amendment rights by stepping from his home onto public sidewalks,<sup>104</sup> he likewise should not be shorn of those rights when he steps from a sidewalk into an automobile.<sup>105</sup>

Once it is determined that there is some legitimate expectation of privacy due a passenger in an automobile, the inquiry should focus on the reasonableness of the search. That the expectation of privacy in an automobile is different from that in a home should be relevant only to the issue of the reasonableness of the search under the circumstances.

The majority in *Rakas* stated that even if *Rakas* and King had been guests in a home they would have had no legitimate expectation of privacy in the types of areas searched.

But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.<sup>106</sup>

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There is a lesser degree of privacy in an automobile according to this precedent, but this distinction was never used as grounds for finding no expectation of privacy in an automobile. The bootstraps which the *Rakas* Court attempted to use simply do not reach that far.

101. 439 U.S. at 157 (White, J., dissenting). See, e.g., *United States v. Chadwick*, 433 U.S. at 12-13.

102. *Katz v. United States*, 389 U.S. 347, 359 (1967). As the *Katz* Court noted, the fourth amendment protects people, not places. *Id.* at 351.

103. *Delaware v. Prouse*, 99 S. Ct. 1391, 1400-01 (1979) (random stop of automobile for license check is unconstitutional (emphasis supplied). Justice Powell, concurring in *Rakas*, found it significant that automobiles were subject to extensive regulation. 439 U.S. at 154 n.2.

104. *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk by police on public sidewalk is reasonable under the fourth amendment).

105. See *Delaware v. Prouse*, 99 S. Ct. 1391, 1401 (1979).

106. 439 U.S. at 148-49 (footnotes and citations omitted).

By way of explanation the majority in *Rakas* offered only an analogy to a casual visitor in another's house.<sup>107</sup> The casual visitor who has never seen or been permitted to visit the basement of the house, in the view of the majority, would not be entitled to object to a search of that basement, if he were in the kitchen at the time of the search. "The . . . visitor would have absolutely no interest or legitimate expectation of privacy in the basement . . . ."<sup>108</sup>

Even accepting the premise of the example, that such a visitor would have no legitimate expectation of privacy in the basement of the house, the Court's comparison to a passenger in a motor vehicle overlooks several important factual differences in the situations. Of primary importance is the nearness of the space to the individual. Both the glove compartment and the area underneath a car seat are within arm's length of a passenger. The house visitor, on the other hand, is quite likely to be several yards, a flight of steps, and one or two doors away from the basement. For that same reason—near accessibility—the glove compartment and the area underneath the seat should be differentiated from the trunk of a car.<sup>109</sup> A more fitting analogy might be drawn to a visitor in the kitchen, who seeks to challenge a search of the kitchen itself, including all the cupboards and drawers accessible to that visitor. Had there been evidence that the owner of the car had sought to exclude Rakas and King from the areas under the seat or in the glove compartment, they might very well have had no expectations of privacy therein. In the case confronting the Court, however, there was no evidence that the owner of the car sought to exclude the passengers from either area.<sup>110</sup> While the compartmentalization of the area of a search may be useful in some instances, as an aid to analysis of the privacy interest involved, the compartments which the Court defined are unrealistic.

The Court in *Rakas* distinguished the petitioners' claims from

107. *Id.* at 142.

108. *Id.*

109. *Contra, id.* at 148-49. Justice Rehnquist offered no explanation but the flat statement to the contrary.

[T]hey made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.

*Id.*

110. While the glove compartment was locked, *id.* at 130, this is an ambiguous gesture and could be interpreted not as an attempt by the driver to exclude the passengers from that area, but as an attempt to exclude others. Justice Powell implicitly admitted that the compartment being locked would heighten the legitimate expectation of privacy. *Id.* at 155 n.4.

those in the *Jones* and *Katz* cases. The "significantly different factual circumstances"<sup>111</sup> which created a reasonable expectation of privacy in *Jones*, according to the *Rakas* majority, were that Jones had a key to his friend's apartment, kept possessions there, and had complete dominion and control over the apartment except as to his friend. The significant facts in *Katz*, for the *Rakas* Court, were that Katz had occupied the phone booth by himself, had closed the phone booth door to exclude others, and had paid the toll for the call. It was because of these facts, the *Rakas* Court stated, that Katz and Jones could legitimately expect privacy in the areas which were the subject of the contested search and seizure.<sup>112</sup> The Court found that, because Rakas and King had made no similar showing of significant facts as to the areas of the search, they had no legitimate expectation of privacy.<sup>113</sup>

Although any analogy between the situation in *Rakas* and that in *Jones* or *Katz* would be strained,<sup>114</sup> the existence of Rakas's and King's claim of legitimate expectation of privacy should not have been thereby disproved. Search and seizure claims depend heavily upon the specific facts in each case.<sup>115</sup> A fact which is significant in one factual pattern may not be given similar weight in another.<sup>116</sup> *Jones* and *Katz* dealt with factual situations which did not involve the presence of additional persons or involve an automobile as the area searched. Had the majority attempted to analyze additional cases with fact situations more similar to that before them, the *Rakas* result might have been different. The decision probably would have been more informative as to the criteria for a legitimate expectation of privacy absent a property interest in the place searched or item seized. There are decisions of the

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111. *Id.* at 149.

112. *Id.*

113. *Id.*

114. It is difficult to find in *Rakas* facts which parallel those that were relied upon to explain the *Jones* result. The area searched in *Jones* was a dwelling, not a vehicle. Except for the similarity between the closing of the car doors by Rakas and King to exclude others and the closing of the telephone booth door by the defendant in *Katz*, the facts in *Katz* are equally lacking in similar circumstances.

115. *See, e.g.,* *Simmons v. United States*, 390 U.S. 377, 393 (1968); *United States v. Rabonowitz*, 339 U.S. 56, 63 (1950).

116. For example, in *United States v. Chadwick*, 433 U.S. 1 (1977), three defendants were charged with possession of drugs with intent to distribute. Each defendant moved before trial to suppress the evidence derived from the government's search and seizure of a double-locked footlocker which had been put in the trunk of one defendant's automobile by the other two defendants. It appeared from the facts that only one of the defendants had a key to the footlocker. *Id.* at 4. Apparently this fact, possession of a key to the locked area searched, highly significant in *Jones* to show the defendant's control of an apartment, was thought inconsequential in *Chadwick*.

Court factually closer to the *Rakas* situation which should have figured into the reasoning in the *Rakas* decision.

One case in particular should have troubled the *Rakas* majority. It was glossed over.<sup>117</sup> In *Rios v. United States*,<sup>118</sup> Rios was the sole passenger in a taxicab. As the cab stopped at a traffic light, two police officers, who had been following the cab, forced him out of it. The officers observed Rios drop a package to the floor of the cab.<sup>119</sup> They recognized it as a package of narcotics. This package was subsequently used to convict Rios of a federal narcotics law violation.<sup>120</sup> Rios's conviction was vacated and remanded by the Supreme Court because the district court, in admitting the evidence, had relied on the "silver platter" doctrine which had been rejected by the Supreme Court in *Elkins v. United States*<sup>122</sup> after Rios's trial. Finding *Elkins* applicable to the facts before it, the Supreme Court specifically limited the question on remand to an inquiry into the reasonableness of the search.<sup>123</sup> Implicit in the *Rios* decision was the determination by the Supreme Court that Rios had some expectation of privacy as a passenger in a taxi, even when the package which he dropped was in plain view, else he could not have asserted the fourth amendment challenge.

The Court in *Rakas* discounted *Rios* as not controlling. "The question of Rios' right to contest the search was not presented to or addressed by the Court and the property seized appears to have belonged to Rios."<sup>124</sup> This position is untenable for four reasons.

First, the *Rios* Court held that *Elkins v. United States*<sup>125</sup> stood for the proposition that "evidence seized in an unreasonable search by state officials is to be excluded from a federal criminal trial upon the

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117. 439 U.S. at 149 n.16.

118. 364 U.S. 253 (1960).

119. *Id.* at 255-57.

120. *Id.* at 254.

121. The "silver platter" doctrine permitted evidence, illegally seized by state officials, to be used in federal criminal trials if the federal officials had not participated in the illegal act. See generally Comment, *Polishing the Tarnished Silver Platter Doctrine: The Effect of Janis v. United States on Intersovereign Fourth Amendment Violations*, 12 TULSA L.J. 357 (1976). The phrase "silver platter" originated in the opinion of *Lustig v. United States*, 338 U.S. 74, 79 (1949). *Elkins v. United States*, 364 U.S. 206, 208 n.2 (1960).

122. 364 U.S. 206 (1960).

123. *Rios v. United States*, 364 U.S. at 255. "The only questions that remains in this case therefore is whether the Los Angeles officers obtained the package of heroin 'during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment.'" *Id.* at 255.

124. 439 U.S. at 149 n.16.

125. 364 U.S. 206 (1960).

timely objection of a defendant *who has standing to complain.*"<sup>126</sup> By holding *Elkins* applicable and by narrowing the issue on remand to whether or not the search came under one of the exceptions to the warrant requirement of the fourth amendment, the *Rios* Court necessarily decided the question of *Rios's* standing to assert the fourth amendment claim.

Second, under the new methodology set forth in *Rakas* for evaluating fourth amendment claims, the issue of standing is totally subsumed by the substantive question of whether or not a defendant has a legitimate expectation of privacy.<sup>127</sup> From this proposition of *Rakas*, and the statement by the Court that no prior decisions would be decided with different results under the new rule,<sup>128</sup> it follows that every prior search and seizure case decided on its merits is controlling precedent for the legitimate expectation of privacy issue. In *Rios* the Court implicitly reached that substantive question of legitimate expectation of privacy; only the reasonableness of the search remained at issue.<sup>129</sup> *Rios* is therefore controlling precedent for the proposition that a taxi passenger may have a legitimate expectation of privacy while riding in a cab.<sup>130</sup>

Third, the decision in *Katz* specifically relied upon *Rios* to support the proposition that a person in a phone booth has a legitimate expectation of privacy in that area.<sup>131</sup> *Katz* embraced the holding in *Rios* while announcing the new standard for fourth amendment protected interests. The passenger in the taxicab in *Rios* must therefore have had a legitimate expectation of privacy.

Finally, the Court has decided cases in which the specific issue of standing was not addressed, and then later cited that same case in a subsequent decision as support for resolution of the standing issue before it.<sup>132</sup> Thus, *Rios* should not have been distinguished simply be-

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126. *Rios v. United States*, 364 U.S. at 255 (emphasis added).

127. See notes 66-69 *supra* and accompanying text.

128. 439 U.S. at 139. See note 69 *supra* and accompanying text.

129. 364 U.S. at 262. All that remained in *Rios* after the Supreme Court decision was an inquiry to resolve conflicting factual testimony and so the case was remanded.

130. See *Katz v. United States*, 389 U.S. 347, 351-52 (1968), where the Court recognized this proposition. "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." *Id.*

131. *Id.*

132. See, e.g., *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)). See also the dissenting opinion of Justice Black in *Mancusi v. DeForte*, 392 U.S. 364, 374 (1968), where he acknowledged this defect. It is interesting to note that the decision in *Katz* did

cause the issue of standing was not in name addressed therein.

As an additional factual basis for distinguishing the *Rios* opinion, the *Rakas* majority relied upon the *appearance* that the defendant in *Rios* owned the narcotics which were found on the floor of the taxi.<sup>133</sup> This appearance was never mentioned in the *Rios* Court's decision. Assuming that such an appearance would somehow be important, it would seem there was that same appearance as to the rifle and *Rakas* and *King*. The prosecutor for the State of Illinois certainly attempted to convey that appearance by introducing the rifle into evidence.

Also significant to the majority in *Rakas* was the fact that "*Rios* had hired the cab and occupied the rear passenger section."<sup>134</sup> Perhaps this was seen as important because to some extent it paralleled the apparent leasing of the phone booth by the defendant in *Katz*,<sup>135</sup> but it is left to imagination whether a different result would have obtained had the *Rakas* defendants paid or promised to pay for their ride.<sup>136</sup> Why this factor should be at all significant in fourth amendment jurisprudence is a mystery, unless of course, the majority in *Rakas* was focusing on some sort of property interest in the taxi purchased by *Rios*. This the majority staunchly denied.<sup>137</sup>

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not mention the issue of standing, but rather focused on substantive fourth amendment law. This point, however, did not deter the majority in *Rakas* from relying on *Katz* extensively.

133. *Rakas v. Illinois*, 439 U.S. at 149 n.16. Clearly there was an appearance in *Rakas* that the defendants owned or possessed the rifle and shells. Undoubtedly this was the impression the State of Illinois attempted to convey to the jury in its prosecution of the defendants.

134. *Id.*

135. *Id.* at 149.

136. See 439 U.S. at 167 (White, J., dissenting). "Why should Fourth Amendment rights be present when one pays a cabdriver for a ride but be absent when one is given a ride by a friend?" *Id.*

137. *Id.* at 149-50 n.17.

For reasons which they do not explain, our dissenting Brethren repeatedly criticize our "holding" that unless one has a common-law property interest in the premises searched, one cannot object to the search. We have rendered no such "holding," however. . . . In a similar vein, the dissenters repeatedly state or imply that we now "hold" that a passenger lawfully in an automobile "may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it. . . . The case before us involves the search of and seizure of property from the glove compartment and area under the seat of a car in which petitioners were riding as passengers. Petitioners claimed only that they were "legitimately on the premises" and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched.

*Id.* Surely the Court was not saying it was refusing the requested relief because *Rakas* and *King* failed to use the proper phraseology in their petition. Nor was the Court failing to reach the constitutional issue of whether there is a legitimate expectation of privacy for a passenger in the areas underneath the car seat or in the glove compartment. "[T]hese are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy." *Id.* at 148-49. What then might be an area in an automobile in which a passenger *qua* passenger would have a legitimate expectation of privacy? Other areas in the vehicle, such as on the seats or the



Assuming that *Rios* should have been controlling precedent as to the issue of any legitimate expectation of privacy, the relationship of the two fact situations needs examination. Any distinction between a passenger in a taxicab and one in a private vehicle with friends must be based on a comparison of the privacy expected in each.<sup>138</sup> Surely, one would expect greater privacy in the private automobile. The taxicab passenger shares the interior of the automobile not with friends, but with a stranger. If privacy is the crucial inquiry, it is difficult to understand how a taxicab passenger acquires a greater, or more legitimate, expectation of privacy when he pays for a ride than does the guest when he accepts a ride in a friend's vehicle. If the reasons offered by Justice Powell<sup>139</sup> for the distinction between privacy in automobiles and in other places are also to be used as criteria for evaluating the legitimacy of that privacy, no useful distinctions can be drawn between taxicabs and private automobiles as the Court tried to do. Both types of vehicles operate on public streets and are serviced and parked in public areas. The interiors of both are generally highly visible.<sup>140</sup> The private vehicle is subject to less or equal regulation and inspection. The majority wholly failed to explain why there was a legitimate expectation of privacy in *Rios*, but not in *Rakas*.

A second case mentioned by the dissent, but ignored by the majority, involved a factual situation almost identical to that in *Rakas*. In *Dyke v. Taylor Implement Mfg. Co.*,<sup>141</sup> decided after *Katz*, the police

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dashboard, would seem to be areas of less privacy than under the seat or in the glove compartment because these other areas are exposed to the view of any passerby who happens to look into the vehicle. The *Rakas* majority would also find no passenger privacy interest in the trunk of the vehicle. *Id.* Where then can a mere passenger have a legitimate expectation of freedom from governmental intrusion into the car in which he is riding? Absent the property interest in the vehicle or the item seized, which the *Rakas* Court claims is not necessary, it appears that the mere passenger can demand reasonable governmental action only as to search of his person. *Id.* at 154 n.2. See note 159 *infra*.

138. This stems from the Court's recognition that the protection of privacy is at the core of the fourth amendment. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974) (plurality).

139. *Rakas v. Illinois*, 439 U.S. at 154 n.2 (Powell, J., concurring). "There are sound reasons for this distinction: Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection." *Id.*

140. *Id.* Justice Powell noted that one of the reasons there was no expectation of privacy as to the rifle under the seat was that it *could* have slipped into view in the event of an accident or sudden stop. *Id.* at 439 n.4. Yet, in *Rios* there was a legitimate expectation of privacy in the floor of the back seat of the taxi, where at all times objects *would* be subject to view by someone standing outside the car. 364 U.S. at 256.

141. 391 U.S. 216 (1968). At the time of the *Dyke* decision the Court was composed of Chief Justice Warren and Justices Fortas, Black, Douglas, Harlan, Brennan, Marshall, White, and Stewart. The entire *Dyke* Court agreed that evidence of the unlawful search was improperly admitted

stopped a car which resembled one involved in a shooting incident earlier that evening. All three of the occupants of the car were arrested and taken to jail. The car was parked outside the jail. While the three men were inside the jail, several officers, without warrant or consent, searched the car. They found an air rifle under the front seat which was later connected with the shooting. Over the timely objections of the three defendants, evidence of the air rifle was admitted in their joint trial. All three defendants were convicted.<sup>142</sup>

The Supreme Court, addressing the fourth amendment violation asserted by the petitioners in *Dyke*, found the warrantless search of the car not justified by any exception to the general warrant requirement of the fourth amendment.<sup>143</sup> The search was therefore unreasonable under the fourth amendment and the fruits of that search had to be suppressed under the exclusionary rule. The conviction of *each* petitioner was reversed by the Court.<sup>144</sup>

Although the issue of standing was nowhere addressed in Justice White's opinion for the Court, by directly deciding the merits of the fourth amendment claim, the Court implicitly decided that *all three* occupants of the car had a legitimate expectation of privacy in the car.<sup>145</sup> Justice White in his *Rakas* dissent interpreted the *Dyke* decision's silence as to standing as representing an assumption by the Court prior to *Rakas* that there was no question as to a passenger's legitimate expectation of privacy in an automobile.<sup>146</sup> With the *Katz* decision handed down only five months earlier,<sup>147</sup> it seems beyond question that the *Dyke* Court must have decided that the *Katz* legitimate expectation of privacy standard was met by all three of the car occupants. Yet, both the opinion of the Court in *Rakas* and Justice Powell's concurrence fail to even mention the *Dyke* case, where the area searched was

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at trial. *Id.* At the time of the *Rakas* decision, Warren had been replaced by Burger as Chief Justice; Justices Fortas, Black, Douglas, and Harlan had been replaced by Justices Blackmun, Powell, Stevens, and Rehnquist. Of these new members, only Justice Stevens dissented in *Rakas*, joining Justices White, Marshall, and Brennan, three who also dissented in *Dyke*. It is interesting to note that Justice Stewart, who specifically concurred in *Dyke*, *id.* at 222, aligned himself on the opposite side with the *Rakas* majority on facts quite similar to those in *Dyke*. 439 U.S. 128.

142. *Id.* at 219. Justice White, writing for the majority, did not specify in his statement of the facts whether the owner of the car was driving the vehicle at the time it was stopped. Similarly, the Court did not mention which defendant owned the gun.

143. *Id.* at 221-22.

144. *Id.* at 222.

145. *Id.* See notes 66-69 *supra* and accompanying text.

146. 439 U.S. at 158-59.

147. *Katz v. United States* was decided December 18, 1967. 389 U.S. 347. *Dyke v. Taylor Implement Mfg. Co.* was decided May 20, 1968. 391 U.S. 216.

the same and where mere passengers asserted a fourth amendment claim.

Aside from the *Dyke* decision, there is additional case support for the proposition that, even though a person shares an area with others and does not own that place or otherwise have a right to exclude those others, he may, nevertheless, have a legitimate expectation of privacy from unreasonable governmental intrusion. In *Mancusi v. DeForte*,<sup>148</sup> perhaps the first case to intimate a shift in the standing requirement,<sup>149</sup> DeForte shared the premises with others and did not have the right to exclude them. The office searched was shared by DeForte with others who worked there.<sup>150</sup>

The Supreme Court found these factors not detrimental to the privacy interest asserted by DeForte in determining the issue of his standing to assert the fourth amendment claim.

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. . . . It is, of course, irrelevant that the Union or some of its officials might validly have consented to a search of the area where the records were kept, regardless of DeForte's wishes, for it is not claimed that any such consent was given, either expressly or by implication.<sup>151</sup>

So too, in the context of *Rakas*, it should have been irrelevant that the driver-owner of the car could have consented to a search. So too, it should have been irrelevant that the areas in the glove compartment and under the seat were accessible to others in the car.

The dissenting Justices credited the inability of the *Rakas* majority to explain the holding that a passenger in a private automobile has no legitimate expectation of privacy to a return to the property rights conception<sup>152</sup> of the fourth amendment.<sup>153</sup> *Jones* and *Katz* had specifically

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148. 392 U.S. 364 (1968).

149. See notes 25-38 *supra* and accompanying text.

150. 392 U.S. at 365.

151. *Id.* at 369-70.

152. *Olmstead v. United States*, 277 U.S. 438 (1928), was the leading case in this view of fourth amendment guarantees. Under this view, the fourth amendment was inapplicable absent a trespass on property rights. *Id.* at 466.

153. *Rakas v. Illinois*, 439 U.S. at 164-65.

repudiated such a limited approach.<sup>154</sup> While it rejected the "legitimate presence" standard of *Jones* as overbroad,<sup>155</sup> the *Rakas* Court failed to explain why presence in a private place with the owner's permission is insufficient to meet the *Katz* standard. As the dissent pointed out,<sup>156</sup> it is difficult to conceive how, under the majority opinion, a legitimate expectation of privacy may be shown, short of a traditional property interest. The Court stated that the legitimacy of privacy expectations in law "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."<sup>157</sup> The criteria for a property interest are fairly concrete, and, up until this decision, at least one indicium of the understanding accepted by society was on solid ground. *Jones* and its progeny established the legitimate presence test as a means of addressing the question of what privacy interests were accepted by society. In *Rakas*, the Court threw out the legitimate presence on the premises standard. In its place it left nothing except the bare words of the *Katz* rationale.

Past decisions clearly intimated that there was some level of privacy in an automobile.<sup>158</sup> That alone should be enough to pass the *Katz* standard of legitimate expectation of privacy. As long as there is *some* legitimate expectation of privacy, a person is, it would seem, a "victim" of the search. Once some legitimate expectation is found, the question then should turn to the quality of the search. Was it reasonable? Perhaps the search in *Rakas* was reasonable under the fourth amendment. The issue was never resolved in *Rakas* because, no matter how unreasonable the search, passengers in the position of *Rakas* and *King* have no fourth amendment right to be free from unreasonable searches and seizures.<sup>159</sup>

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It is true that the Court asserts that it is not limiting the Fourth Amendment bar against unreasonable searches to the protection of property rights, but in reality it is doing exactly that. Petitioners were in a private place with the permission of the owner, but the Court states that that is not sufficient to establish entitlement to a legitimate expectation of privacy. But if that is not sufficient, what would be? We are not told, and it is hard to imagine anything short of a property interest that would satisfy the majority.

*Id.* (citation omitted). The Court made numerous references to the failure of *Rakas* and *King* to assert a property interest in the rifle. *Id.* at 130, 131 n.1, 148.

154. See notes 15-18 & 26 *supra* and accompanying text. See also O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment—Protected Privacy*, 13 NEW ENG. L. REV. 662, 711 (1978).

155. See notes 70-88 *supra* and accompanying text.

156. 439 U.S. at 164-65 (White, J., dissenting).

157. *Id.* at 143-44 n.12.

158. See notes 99-101 *supra* and accompanying text.

159. The *Rakas* Court, or at least Justice Powell in his concurrence, would allow the passenger

## VI. CONCLUSION

Standing no longer is an inquiry distinctly separate from the substantive question of violation of the fourth amendment right to be free from unreasonable searches and seizures. Legitimate presence on the premises searched at the time of the search does not, of itself, give that person standing to assert the unlawful search, regardless of how unreasonable the search is. Absent a property interest in the premises searched or the objects seized, one who would seek to contest a search must thread the constricting eye of the needle of legitimate expectation of privacy. The Supreme Court in *Rakas v. Illinois* offered few suggestions as to how this expectation might be proved. Even more disturbing than the lack of suggestions, is the fact that the *Rakas* holding is contrary to past decisions of the Court dealing with the privacy of those in automobiles. Apparently after *Rakas*, the passenger in a private car has no right to demand reasonable government action as to search of the vehicle in which he is riding.

*Jefferson Davis Sellers*

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a legitimate expectation of privacy as to his person. "The rationale of the automobile distinction does not apply, of course, to objects on the person of an occupant." 439 U.S. at 154 n.2 (Powell, J., concurring).