Fall 1979

Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts

Richard A. Williamson
William & Mary Law School

University of Florida Law Review

VOLUME XXXI FALL 1979 NUMBER 5

FOURTH AMENDMENT STANDING AND EXPECTATIONS OF PRIVACY: *RAKAS V. ILLINOIS* AND NEW DIRECTIONS FOR SOME OLD CONCEPTS

RICHARD A. WILLIAMSON

INTRODUCTION

Rakas v. Illinois[1] began as a relatively uncomplicated case involving the standing[2] of passengers in an automobile to object to its search. However it resulted in a decision which significantly narrowed the substantive scope[3] of fourth amendment protections. In *Rakas*, a closely divided Supreme Court held

B.B.A., Ohio University, 1965; J.D. Ohio State University 1968. Associate Dean and Professor of Law, College of William and Mary, Marshall-Wythe School of Law; Member: Ohio and Virginia Bar.

1. 439 U.S. 128 (1978). Mr. Justice Rehnquist's majority opinion was joined in by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. Justices Brennan, Marshall, and Stevens joined in Mr. Justice White's dissenting opinion.

2. The concept known as standing has always been a source of confusion. The law of standing has been described as "little more than a set of disjointed rules dealing with a common subject." Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977). Identification of the "common subject", is however, relatively easy: standing involves the question "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975).

In fourth amendment cases, the standing requirement has been articulated in more specific terms. In Jones v. United States, 362 U.S. 257 (1960), the Supreme Court stated that "one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence [must] . . . allege . . . that he himself was the victim of the invasion of privacy." *Id.* at 261. The Court has 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." Alderman v. United States, 394 U.S. 165, 171-72 (1969). *See* Association of Data Processing v. Camp, 397 U.S. 150 (1970).

3. The scope of fourth amendment protections refers to the inquiry which identifies the class of persons entitled to raise fourth amendment objection to search and seizure. Once the individuals entitled to raise fourth amendment issues have been identified, serious questions remain concerning the substantive protections and remedies afforded by the amendment. *See, e.g.*, Grano, *Forward, Supreme Court Review*, 69 J. CRIM. L. & CRIMINOLOGY 425 (1978); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974); White, *The Fourth Amendment as a Way of talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165; Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 385-427 (1978). Thus, favorable resolution of the "scope" question identifying those persons entitled to raise fourth amendment issues does not assure suppression of evidence. A court also determines that the challenged activity violated the substantive prohibitions of the fourth amendment and that suppression of the evidence constitutes the appropriate remedy.

that passengers in an automobile lacked a legitimate expectation of privacy with respect to the glove compartment and the area beneath the front seat, and therefore, could not raise fourth amendment objection to a warrantless search of these areas.[4] The decision by its very nature, provides additional evidence for those critics[5] who contend that certain members[6] of the Supreme Court are using their dissatisfaction with the exclusionary rule as a basis for reducing the scope of substantive constitutional and statutory guarantees.

Purportedly the Supreme Court eliminated, in part, the traditional distinction[7] between the concept of standing to raise fourth amendment issues and the substantive scope of the protections afforded by the amendment. The majority opinion stated that "the better analysis forthrightly focuses on the

4. *Id.* at 148-50.

5. *See* Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Yackle, *supra* note 2, at 415-27. *But see*, Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

6. The most frequently cited decisions indicating the Court's dissatisfaction with the exclusionary rule are Stone v. Powell, 428 U.S. 465 (1976), and United States v. Calandra, 414 U.S. 338 (1974). See note 166 *infra*. Judging from the division of opinion reflected in those two cases, it is clear that Chief Justice Burger along with Justices Stewart, Blackmun, Rehnquist and Powell could be characterized as among those dissatisfied with the exclusionary rule in its present form. Justices Brennan and Marshall, on the other hand, dissented in both cases and have expressed no basic disagreement with the rule or its effects. Mr. Justice White, although a critic of the rule, through his dissents in *Stone* and *Rakas*, has made it clear that he favors direct modification. See note 22 *infra*. Mr. Justice Stevens' position must be judged solely with reference to his concurrence in Justice White's dissent in *Rakas*.

7. The general concept of standing has always been viewed as a process unrelated to the merits of a controversy. In his classic work on the law of standing Professor Scott described the concept as follows: "The essential attribute of the standing determination has always been that it was a decision whether to decide—a determination of whether the validity of the challenged government action should be passed on for [the person raising the claim]. A denial of standing did not mean that the legality of the . . . [government's] action was upheld, that question was not reached. A grant of standing did not mean that . . . [the person raising the claim] would prevail on the merits, even if he sustained his factual burden; when the merits were considered, the [government's] legal position might be sustained." Scott, *Standing in the Supreme Court, A Functional Analysis*, 86 HARV. L. REV. 645, 669 (1973). *See* Flast v. Cohen, 392 U.S. 83, 99 (1968); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 474 n.13 (1976).

In fourth amendment cases, however, the "standing" question has always been viewed as a problem involving a determination of whether the challenged activity violated the rights of the accused. *See* cases cited note 1 *supra*. Resolution of the "standing" problem in fourth amendment cases, therefore, required a court to rule regarding the "scope" of the amendment by identifying the class of persons entitled to the protections provided thereunder. Previous fourth amendment standing decisions can be viewed as rulings implicating the substantive "scope" of the amendment. The *Rakas* decision did not change the basic inquiry; but merely dropped the label "standing" as description of the process involved.

Correspondingly, one branch of existing fourth amendment standing theory, the so-called "automatic standing" concept, was not based directly or indirectly on factors related to the substantive reach of the amendment. Instead, automatic standing was conferred on the basis of policy considerations relating to the administration of justice. See text accompanying notes 122-123 *infra*. *Rakas* did not directly overrule the automatic standing theory, see text accompanying note 129 *infra*, leaving uncertainties as to whether there remains a fourth amendment standing theory similar to automatic standing which might properly be viewed as unrelated to the substance of fourth amendment guarantees.

extent of a particular defendant's rights under the fourth amendment, rather than on theoretically separate, but invariably intertwined concept of standing."[8]

The *Rakas* rationale is necessarily tied to its facts. Frank Rakas and Lonnie King were convicted of armed robbery. At trial, the government introduced a sawed-off rifle and rifle shells seized from under the front seat and inside the glove compartment of an automobile in which the defendants were passengers at the time of their arrest.[9] The trial court held that the defendants lacked standing to object to the search in that "neither the car, the shells, nor the rifle belonged to them."[10] The trial court, having denied the motion to supress on standing grounds, did not address the issue of whether the officers had probable cause to make the search nor any other substantive fourth amendment issues.[11]

On appeal, defendants advanced two theories, based upon existing standing concepts, to support their position. First, defendants alleged that they were the ones against whom the search was directed, and thus entitled to standing upon a factual finding to that effect.[12] The second contention was that as passengers in a vehicle, they were entitled to standing to object to the search by analogy to the standing theory enunciated in *Jones v. United States*.[13] This theory granted standing to anyone "legitimately on the premises at the time of the search."[14]

The majority, in an opinion by Justice Rehnquist, affirmed the Court's prior decisions holding that fourth amendment rights are "personal rights" which may not be asserted vicariously, and thus is a clear reaffirmation of a prohibition against "third-party" standing in fourth amendment cases.[15] Moreover, the Court acknowledged that "misgivings" concerning the operation of the exclusionary rule justified a restrictive attitude toward any holding which would enlarge the class of persons entitled to the benefits afforded by the amendment.[16] The majority reasoned that the inquiry was not "materially

8. 439 U.S. at 139.

9. 439 U.S. at 129-30. The automobile had been stopped by an officer based upon a radio description of a getaway car. Two other persons were in the car, apparently, including the owner-driver. *Id.* at 130.

10. *Id.* at 131.

11. *Id.* The trial court's ruling was affirmed by the Illinois Appellate Court, 46 Ill. App. 3d 569, 360 N.E.2d 125 (1977), and the Illinois Supreme Court denied leave to appeal. 439 U.S. at 131-32.

12. 439 U.S. at 132. This is commonly referred to as the target theory.

13. 362 U.S. 257 (1960).

14. 439 U.S. at 132.

15. *Id.* at 133-34. The majority opinion cited as support Brown v. United States, 411 U.S. 223, 230 (1973); Alderman v. United States, 394 U.S. 165, 174 (1969); Simmons v. United States, 390 U.S. 377, 389 (1968); Wong Sun v. United States, 371 U.S. 471, 492 (1963). *See* Warth v. Seldin, 422 U.S. 490 (1975) (*Jus tertii* concept).

16. 439 U.S. at 138. Justice Rehnquist's argument was specifically made with reference to the adoption of the "target" theory. Acceptance of the target theory, he argued, would result in the conferral of third-party standing. See text accompanying note 51 *infra*. The Justice noted that the same fourth amendment "exclusionary rule" objection had been used

aided"[17] by labeling it one of standing, and proceeded to evaluate the passengers' claims in terms of whether the search and seizure "infringed an interest of the defendant[s] which the fourth amendment was designed to protect."[18] The issue for the *Rakas* majority was whether the challenged activity violated a legitimate expectation of privacy of the defendants.[19] Predicating their decision on findings that the passengers claimed "neither a property nor a possessory interest in the automobile, nor an interest in the property seized," the majority concluded that the search and seizure did not violate the defendants' fourth amendment rights.[20]

The four dissenting justices argued that the majority's conclusion that the passengers lacked a legitimate expectation of privacy with respect to the automobile necessarily reinstated property concepts as determinative of fourth amendment rights.[21] The dissenters further urged those "troubled by the practical impact of the exclusionary rule . . . [to] face the issue of that rule's

---

in Alderman v. United States, 394 U.S. 165 (1969) as justification for rejection of an absolute third-party standing theory which would permit any defendant against whom unlawfully seized evidence was introduced to object to such use at trial regardless of whether he was a target of the search. 439 U.S. at 138 n.6.

17. 439 U.S. at 133.

18. *Id.* at 140.

19. *Id.* at 143.

20. *Id.* at 148. Although Mr. Justice Rehnquist's description of the nature of the defendants' "interests" were with reference to the automobile, at a later point in the opinion he described their claim as one involving "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.* at 148-49. The opinion thus leaves open the possibility, however remote, that a passenger *qua* passenger, lacking an "interest" in the automobile and the items seized, might, nonetheless, have a legitimate expectation of privacy with respect to some undefined areas therein.

The limits of the *Rakas* decision in this respect were further obscured by the Court's recent decision in Arkansas v. Sanders, 442 U.S. 753 (1979). In *Sanders*, the police stopped a taxi cab in which the defendant was a fare-paying passenger. The taxi driver, upon request, opened the trunk of the cab and turned over the defendant's suitcase. The police opened the suitcase and discovered marijuana. The Supreme Court upheld the right of the defendant to object to the seizure and search of the suitcase on the basis of ownership of the item searched. *Id.* at 761 n.8. The Court went on to find the search unlawful on the basis of United States v. Chadwick, 433 U.S. 1 (1977). In effect, the *Sanders* case was viewed, not as an automobile search, but as a search of personal property owned by the defendant. The fact that the property was located in an automobile immediately prior to the search was deemed irrelevant. The key in the *Sanders* decision, however, was the additional finding that the suitcase was a "repository" for personal effects in which the defendant had a reasonable expectation of privacy. For a discussion of the *Chadwick* decision, see Williamson, *The Supreme Court, Warrantless Searches and Exigent Circumstances*, 31 OKLA. L. REV. 110, 139-42 (1978); Yackle, *supra* note 3, at 411-14; Note, *United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable*, 58 B.U.L. REV. 436 (1978).

21. 439 U.S. at 156-57, 164 n.14 (White, J., dissenting). "Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy — not property — the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts." *Id.* at 156-57.

continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results . . . ."[22]

Despite the division on the Court regarding the outcome, there was unanimity on several important aspects of the case. The dissenting Justices did not object to discarding the practice of viewing the question of a defendant's standing to raise fourth amendment claims as an issue fundamentally different from the question of the scope of substantive fourth amendment protections. Further, they did not object to the majority's decision to continue the prohibition on third-party standing to raise fourth amendment issues.[23] Finally, the dissenting Justices were silent with respect to Justice Rehnquist's opinion that resolution of the issue in *Rakas* should be made with reference to the extent to which the fourth amendment provides a recognizable expectation of privacy for passengers in an automobile.[24]

The significance of the *Rakas* decision is easy to understate. Rarely does a Supreme Court decision while facially correct engender such frustration. This frustration arises primarily from the Court's unwillingness or inability to develop and apply constitutional principles in a consistent fashion. *Rakas* represents the first case in which the United States Supreme Court has expressly acknowledged the close relationship between the concept of standing and the merits of substantive claims presented by litigants. To the extent the Court has been previously criticized[25] for disguising decisions on the merits by purporting to base its holdings on standing grounds, *Rakas* signals a change. *Rakas* is, therefore, important not only in the fourth amendment context, but also in other areas in which the relationship between standing and the merits

22. *Id.* at 157. Justice White referred readers to his dissenting opinion in Stone v. Powell, 428 U.S. 465, 537 (1976). In *Stone*, Justice White dissented from the holding limiting federal habeas corpus review of fourth amendment claims. The basis for his dissent was that he did not believe that the statutory predicate for federal habeas review distinguished between fourth amendment claims and other constitutional issues. *Id.*

Justice White indicated, however, that he would favor modification of the exclusionary rule "so as to prevent its application in those many circumstances where the evidence at issue was seized . . . in the good faith belief that [the seizure] comported with existing law and having reasonable grounds for that belief." *Id.* at 538. Justice White's disagreement in *Rakas*, therefore, must be understood as based on the "distortion" of other values resulting from an attempt to seek ways around the impact of the exclusionary rule, rather than any fundamental belief on his part in the virtues of the rule.

In his concurring opinion, Justice Powell responded to Justice White's criticism by arguing that even if a fourth amendment violation was found in *Rakas* the evidence seized would have been admissible under the modification of the exclusionary rule he had proposed in *Stone*. 439 U.S. at 156 n.5 (Powell, J., concurring).

23. *Id.* at 161 (White, J., dissenting). The dissenting opinion also associated itself "[f]or the most part" with the majority opinion's rejection of "target" theory. *Id.* at 156 n.1.

24. *Id.* at 161 (White, J., dissenting).

25. Tushnet, *supra* note 2, at 663. "Decisions on questions of standing are concealed decisions on the merits of underlying constitutional claim. The Court finds standing when it wishes to sustain a claim on the merits and denies standing when the claim would be rejected were the merits reached." *Id. Also see* Justice Brennan's dissenting opinion in Warth v. Seldin, 422 U.S. 490, 519 (1975) "While the Court gives lip-service to the principle, oft-repeated in recent years, that 'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," in fact the [majority] opinion . . . can be explained only by an indefensible hostility to the claim on the merits." *Id.* at 520.

of particular claims for relief have been blurred.[26] Additionally, despite Justice Rehnquist's protest to the contrary, the decision does depend, if only by implication, on property based concepts to conclude that the appellant-passengers lacked a legitimate expectation of privacy in the automobile. While contemporary fourth amendment cases[27] often involve the question of what ex-

26. The principal benefit to be derived from the *Rakas* decision may be the recognition that many so-called "standing" problems are, in reality, problems implicating the substantive meaning of constitutional provisions upon which claims for relief are based. Understanding would be facilitated if the Court ceased viewing such substantive problems as resolvable with reference to "standing" concepts altogether. Several examples may be proferred. In Flast v. Cohen, 392 U.S. 83 (1968), a federal taxpayer challenged a federal spending program as violative of the first amendment establishment clause. The Court in *Flast* held that the taxpayer would have "standing" to challenge a federal spending program if he or she could demonstrate, *inter alia*, that the program exceeded some specific constitutional limitation of the taxing and spending power. *Id.* at 103-04. The Court's conclusion in *Flast* that the establishment clause was such a specific limitation was essentially a decision concerning the substantive scope of the first amendment, rather than a decision having anything to do with the litigant's "stake" in the outcome. Justice Harlan's dissent in *Flast* recognized the weakness of the logic: "The absence of any connection between the Court's standard for determination of standing and its criteria for the satisfaction of that standard is . . . a logical ellipsis." *Id.* at 124 (Harlan, J., dissenting).

Another major standing decision, Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974), involved a constitutional challenge under article I, §6, cl. 2 of the United States Constitution (the "incompatibility clause") to the practice of permitting members of Congress to hold commissions in the Armed Forces Reserve. The Court held that the plaintiffs lacked standing to sue as citizens since the claimed injury implicated only the "generalized interest of all citizens" and thus constituted an "abstract injury." *Id.* at 217. Although the Court continues to view *Schlesinger* as a standing decision, a strong case can be made that it would be more properly viewed as a substantive declaration construing article I, §6, cl. 2 of the Constitution to present "non-justiciable" issues. *See* Baker v. Carr, 369 U.S. 186 (1962).

Finally, in United States v. Richardson, 418 U.S. 166 (1974), the Court rejected a federal taxpayer challenge, under article I, §9, cl. 7 of the Constitution, to a federal statute allowing the Central Intelligence Agency to account for its expenditures solely on the certificate of the Director. The Court held that the plaintiffs lacked standing finding that article I, §9, cl. 7 did not constitute a specific limitations on federal spending programs thus precluding satisfaction of the *Flast* nexus. Again, one might argue that *Richardson* should be viewed as a decision holding claims under article I, §9, cl. 7 to be non-justiciable. *Richardson* itself contains the following statement: "It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." *Id.* at 179.

The foregoing analysis does not completely negate the legitimacy of the concept of standing. Situations will continue to arise in which the injury-in-fact and causation prerequisites will constitute legitimate barriers under the article III case or controversy requirement. See text accompanying notes 178-186 *infra*. In addition, questions concerning third-party standing will continue to arise. See text accompanying notes 177-199 *infra*. The majority opinion in *Rakas* mentioned a motion to suppress by a person not a defendant but whose rights were violated by the seizure of evidence as an example of the continued viability of standing concepts in fourth amendment cases. Such a person would not have standing to invoke the exclusionary rule presumably because of the fact that the relief sought would not remedy the injury suffered. 435 U.S. at 132 n.2.

27. *See, e.g.*, United States v. Edwards, 577 F.2d 883 (5th Cir. 1978) (en banc); United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969).

pectations of privacy will be recognized as within the scope of fourth amendment protections, many involve no possible basis upon which a person challenging the legality of a search and seizure could allege a traditional property interest in the area searched.[28] Whether the majority opinion in *Rakas* represents a "reintroduction" of property concepts as a relevant consideration for determining the scope of fourth amendment protections, or whether property concepts had ever been submerged in previous decisions, are questions which have been discussed elsewhere and will not be discussed at length herein.[29]

The manner in which property concepts were utilized in the majority opinion does, however, represent a new threshold analysis for fourth amendment decisions. The majority opinion in *Rakas* presumes that individuals who lack a property-type interest in the area or place searched will generally be denied the rights to raise fourth amendment issues. For the majority, the relationship between the individual asserting fourth amendment claims and the area or place searched clearly constitutes an essential inquiry. Thus, *Rakas* requires that a court, when determining the applicability of the fourth amendment, must go beyond the question of whether the activity challenged constitutes an unreasonable intrusion or search. It must also ask the question, with respect to whom? It may not be enough to find that the individual asserting fourth amendment claims "[shut] the door behind him;"[30] it may also be necessary to determine specifically whose door was shut.

The *Rakas* decision is troublesome with respect to the "privacy" question in at least two other respects. First, neither the majority nor the dissent were able to articulate justifications for their respective positions other than in conclusory terms[31] or by attempting to point out the deficiencies in the position taken by the other side.[32] In the eleven years since the expectations of privacy concept first emerged in *Katz v. United States*,[33] the Court has neglected to deliniate a workable substantive definition of the scope of fourth amendment protections. *Rakas*, therefore, raises serious questions concerning the viability of the current touchstone for determining the scope of the amendment's protection. Second, there is language in both the majority and concurring opinions[34] which suggests that a philosophic bias toward limiting substantive fourth amendment protections in automobile search cases sig-

28. The most common fourth amendment standing problem in which defendants will have difficulty establishing a property interest in the area or place searched are cases involving the search of the person of someone other than the accused. *See, e.g.*, United States v. York, 578 F.2d 1036 (5th Cir. 1978); United States v. Riguelmy, 572 F.2d 947 (2d Cir. 1978); United States v. Oates, 560 F.2d 45 (2d Cir. 1977).

29. *See, e.g.*, Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. L. REV. 1 (1971); Yackle, *supra* note 3, at 369-84; Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 MICH. L. REV. 154, 171-75 (1977).

30. Katz v. United States, 389 U.S. 347, 352 (1967).

31. See text accompanying notes 56, 69, 112-115 *infra*.

32. See text accompanying notes 61-63, 77-78 *infra*.

33. 389 U.S. 347 (1967).

34. See text accompanying notes 91-92 *infra*.

nificantly affected the outcome of the case. *Rakas* should thus be viewed as simply the latest in a series of decisions[35] continuing the inexorable movement toward eliminating the fourth amendment in automobile searches.

The third significant aspect of the *Rakas* decision concerns the status of alternative theories previously utilized by the Court to determine the standing of defendants to raise fourth amendment issues. As the majority opinion conceded,[36] standing theories, other than those discussed in the opinion, have been previously promulgated and accepted. The Court has, for example, approved automatic standing for defendants charged with an offense in which possession of the items seized constituted an essential element of the offense charged[37] when the defendant is alleged to have possessed the items at the time of the seizure.[38] The Court has also recognized that a proprietary or possessory interest in the items seized may constitute a sufficient basis upon which to confer standing.[39] Both theories may grant standing where it would be difficult, under traditional modes of analysis, to find that the search leading to seizure violated the reasonable expectations of privacy of those challenging the search.[40] Whether these standing concepts are viable following *Rakas* appear to be very much in doubt even though none of the opinions address the question.[41] Finally, although no member of the Court expressed dissatisfaction with the decision to discard the concept of standing to raise fourth amendment issues as an issue distinct from the question of the scope of substantive fourth amendment protections, significant questions are left unresolved.

Resolution of standing in fourth amendment cases implicates fundamental policy considerations not present in most other standing cases because it arises in the context of a defense to a pending criminal charge, and because the remedy sought is the exclusion of reliable and probative evidence of guilt. While the concept of standing developed as a limitation on the power of the federal Courts,[42] state courts must also frequently determine fourth amendment issues at the threshold. Thus, further consideration of the impact of *Rakas* on the state courts would be appropriate.

Finally there is the problem of third party standing. The majority, however, simply dismissed the possibility of third-party standing to raise fourth amendment issues by characterizing fourth amendment rights as "personal" in nature.[43] The Court's failure to assimilate *Rakas* into the existing body of standing principles, most specifically those principles derived from the third-

35. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973). *But see*, Delaware v. Prouse, 440 U.S. 648 (1979). See text accompanying notes 93-96 *infra*.

36. 439 U.S. at 130 n.1, 135.

37. Jones v. United States, 362 U.S. 257, 264, 267 (1960). See text accompanying notes 121-123 *infra*.

38. Brown v. United States, 411 U.S. 223, 228 (1973). See note 124 *infra*.

39. United States v. Jeffers, 342 U.S. 48 (1951). See text accompanying notes 142-154 *infra*.

40. Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 BROOKLYN L. REV. 421, 435-36, 439 (1975).

41. See text accompanying notes 129, 156-165 *infra*.

42. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

43. 439 U.S. at 133 (*quoting* Alderman v. United States, 394 U.S. 165, 174 (1969)).

party standing cases, and the failure to deal directly with the extent to which judicial attitudes toward the exclusionary rule influence their position on substantive fourth amendment issues, are perhaps the chief deficiencies in the decision. This Article will consider each of these major problems following a discussion of the respective positions advanced by the three *Rakas* opinions.

THE RAKAS DECISION

The majority expressly rejected the defendents' so-called "target" theory.[44] While unclear, the specific nature of the target concept urged by the defendants may be assumed to include situations in which the search was a product of subjective police intent to secure evidence against particular defendants.[45] The majority conceded that language in *Jones v. United States*[46] and other cases[47] suggested the target theory as an independent basis for conferring standing to raise fourth amendment issues. The majority, however, found the precedent argument weak, and the theory to be unsound in light of the protections afforded by the fourth amendment and the underlying justification for the exclusionary rule. Justice Rehnquist, writing for the majority, pointed to the fact that in *Jones* and in a number of cases decided thereafter[48] the standing question had been resolved with reference to specific standing theories other than the one now urged by the defendants, thus rendering it dicta. The majority opinion conceded that the defendant in *Jones* was clearly the target of the search in that the search warrant named Jones as an occupant of the premises.[49] But they argued that had the Court in *Jones* intended that theory to be an independent basis for the grant of standing, neither the automatic standing theory nor the theory granting standing to anyone legitimately on the premises, both of which were used in *Jones*, would have been necessary.[50]

44. 439 U.S. at 133.

45. It has been suggested that the "target" concept should not be determined solely with reference to the subjective intent of the police. Instead, the relevant question should be: "against whom would a reasonable man in the position of the officer primarily want to obtain evidence?" *See* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 353 (1970). *But see* United States v. Canada, 527 F.2d 1374 (9th Cir. 1975), *cert. denied*, 429 U.S. 867 (1976) (the state of mind of the officer regarding possession or ownership of items seized is irrelevant).

Justice Fortas, concurring in part and dissenting in part in Alderman v. United States, 394 U.S. 165 .(1969), would have expanded the "target" or "victim" concept even further. He argued that anyone "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." *Id.* at 205-06. Justice Fortas based his conclusion on the following proposition: "The Fourth Amendment is not merely a privilege accorded to him whose domain has been lawlessly invaded. It grants the individual a personal right, not to privacy, but to insist that the state utilize only lawful means of proceeding against him." *Id.* at 206.

46. 362 U.S. 257 (1960).

47. Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Jeffers, 342 U.S. 48 (1951).

48. Alderman v. United States, 394 U.S. 165 (1969); Mancusi v. DeForte, 392 U.S. 364 (1968); Simmons v. United States, 390 U.S. 377 (1968).

49. 439 U.S. at 135 n.5.

50. *Id. See* 362 U.S. at 264, 267.

The majority also rejected the target theory on more general grounds. Initially they assumed that acceptance of the target theory would necessarily result in permitting defendants whose fourth amendment rights were not directly infringed to object to a search and seizure which would be tantamount to acceptance of third-party standing to assert fourth amendment violations.[51] This process would, as a necessary corollary, result in extending the benefits of the exclusionary rule to parties whose fourth amendment rights were not personally infringed upon. The majority was thus in a position to utilize personal misgivings concerning the effect of the exclusionary rule as support for rejection of any theory which would necessarily expand the number of cases where "[r]elevant and reliable evidence [would be excluded] and the search for truth . . . deflected."[52] Therefore, the majority determined that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."[53] Finally, with respect to the target theory, the majority noted the practical difficulties which would result if it were accepted.[54] Presumably, they referred to the absence of a workable definition, and the concomitant factual inquiry which would necessarily follow to resolve such questions.

The majority, after rejecting third-party standing to assert fourth amendment rights, questioned whether the analysis should be continued under the guise of a standing problem, rather than as a question implicating substantive fourth amendment concepts. They concluded that the inquiry under either approach would be the same,[55] and that the type of standing analysis used in *Jones*, which held that anyone legitimately on the premises at the time of the search could object to its search, would be more properly "subsumed under substantive fourth amendment" concepts.[56] The majority then analyzed the *Jones* decision, exclusive of standing, as one defining the substantive scope of fourth amendment protections afforded persons present when a search and seizure occurs.

---

51. 435 U.S. at 132-38. Justice Rehnquist assumed that an individual could be the "target" of a search in situations where the actual search violated no personal expectation of privacy. *See* White & Greenspan, *supra* note 45 at 349-56.

52. 439 U.S. at 137. According to Justice Rehnquist, "[w]hen we are urged to grant standing to a criminal defendant to assert a violation, not of his own constitutional rights but of someone else's, we cannot but give weight to practical difficulties . . . ." *Id.*

53. 439 U.S. at 134 (*citing* Alderman v. United States, 394 U.S. 165, 174 (1969)).

54. *Id.* Justice Rehnquist cited Justice Harlan's concurring in part and dissenting in part opinion in Alderman v. United States, 394 U.S. 165, 188 n.1. Justice Harlan's view of the "target" theory apparently was one of identifying the specific person thought to be involved in criminal activity, and finding that the police decision to conduct the search was motivated by an effort to obtain information against that specific individual. *Id.* See note 45 *supra.*

55. 439 U.S. at 139.

56. *Id.* Justice Rehnquist stated that abandonment of the standing inquiry "will produce no additional situations in which evidence must be excluded." *Id.* He did not assert, of course, that the new standard would result in additional situations in which evidence would be admissible; judged by the result in *Rakas*, however, it would appear that such will be the case.

Justice Rehnquist described the issue presented by the defendants in *Rakas* as involving "passengers occupying a car which they neither owned nor leased."[57] Defendants sought to analogize their position to that of the defendant in *Jones*, who Justice Rehnquist noted was "present at the time of the search of an apartment which was owned by a friend," had been given a key and permission to use the apartment, had a few items of clothing present in the apartment, and had slept there "maybe a night."[58] The holding in *Jones* granting standing to anyone legitimately on the premises was viewed by the majority as advancing nothing more than 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."[59] Henceforth, according to the majority, the statement in *Jones* that a person legitimately on the premises has standing to challenge the validity of a search of a dwelling place will not be "taken in its full sweep beyond the facts of that case."[60]

Finally, the majority attempted to refute the argument raised by the dissenting Justices that the new standard would create a great deal of uncertainty, at least when compared to a standard which would permit anyone legitimately on the premises to raise fourth amendment issues. The majority first rejected the contention that the new standard was any less a "bright line" than that urged by the dissent. They pointed to many divergent lower court decisions utilizing the anyone legitimately on the premises standard.[61] The majority also noted that the dissent itself had introduced potentially complicating qualifications on the *Jones* standard, such as the statement appearing in the dissenting opinion that "perhaps the Constitution provides some degree less protection . . . when one does not have a possessory interest in the invaded private place."[62] Even conceding the superficial clarity of the pre-existing standard, the majority found that a conscientious effort to apply legitimate fourth amendment standards will in any event require difficult case-by-case analysis.[63]

The Dissenting Opinion

The dissenting Justices summarily accepted[64] the proposition that the issues

57. *Id.* at 140.

58. *Id.* at 141.

59. *Id.* at 142.

60. *Id.* at 143. Justice Rehnquist attempted to explain why it would still be appropriate to view the defendant in *Jones* as having a legitimate expectation of privacy in the apartment even though he possessed no property interest therein. The Justice rejected the notion that property interests define the contours of legitimate privacy. *Id.* at 143 n.12. He also indicated that the defendant in *Jones* had, "[e]xcept with respect to his friend, . . . complete dominion and control over the apartment and could exclude others from it." *Id.* at 149. Why such conclusions could not be drawn with respect to the position of the defendants in *Rakas* was not explained.

61. *Id.* at 143 n.12.

62. *Id.* at 146-47 (*quoting* from the dissenting opinion at 166).

63. *Id.* at 147.

64. See text accompanying note 23 *supra*.

raised by the defendants in *Rakas* should be resolved by focusing directly on the question of the extent of fourth amendment protection for automobile passengers.[65] The dissent simply concluded that passengers in automobiles do have a legitimate expectation to be free from unreasonable government intrusions which the Court should openly recognize and protect.

Their analysis was premised on the assertion that the critical inquiry in cases of this nature must focus on the relationship between the area or place searched and the individual seeking to assert fourth amendment rights.[66] According to the dissent, it is the very quality of this relationship which should determine the scope of fourth amendment protections. Essential to this analysis was the premise that fourth amendment protections do not disappear in the context of an automobile search.[67] The dissent argued that limitations based upon the assertion of property rights had been previously rejected,[68] thus necessitating a search for some other method which would establish the requisite relationship between the area searched and the individual. Such relationship was argued to exist, albeit under the guise of finding standing, based upon the analysis utilized in prior cases. Specifically, they argued that the requisite relationship should be found to exist by analogy to holdings permitting anyone legitimately present at the time of a search to assert fourth amendment protections.[69]

The dissent then examined the majority's attempt to distinguish the interest in the premises searched, asserted by the defendants in *Jones*, from the interest in the automobile asserted by the defendants in *Rakas*. Factually they were similar cases. The defendant in *Jones*, the dissent noted, had permission to use the apartment, had slept in it, had a key, had clothing stored in it, and was present at the time of the search.[70] Similarly the defendants in *Rakas* also had permission to be in the car and were present at the time of the search.[71] The relevance of the key was discounted because the car owner was present in *Rakas*.[72] By shutting the doors, the *Rakas* defendants had also arguably manifested a desire to exclude others from the automobile.[73]

The dissent also questioned the relevance of an ownership interest in personal property seized when the true issue was the scope of an individual's fourth amendment protections, arguing that the Court had "never before

65. See text accompanying note 21 *supra*.

66. 439 U.S. at 161 (dissenting opinion).

67. *Id.* at 157-58.

68. *Id.* at 161-62 (*citing* Alderman v. United States, 394 U.S. 165, 196 (1969); Katz v. United States, 389 U.S. 347, 351-52 (1967)).

69. *Id.* at 162-63. The dissenters relied primarily on language appearing in numerous decisions rejecting the notion that property interests determine fourth amendment rights. Relying on language in *Katz* that a person in a telephone booth may rely on protection of the fourth amendment "[n]o less than an individual in a business office, in a friend's apartment, or in a taxicab," they concluded that "surely a person riding in an automobile next to his friend the owner, or a child or wife with the father or spouse, must have some protection as well." *Id.* at 163 (*quoting* Katz v. United States, 389 U.S. 347, 352 (1967)).

70. 439 U.S. 165 n.15 (White, J., dissenting).

71. *Id.*

72. *Id.*

73. *Id.*

limited . . . concern for a person's privacy to those situations in which he is in possession of personal property."[74] Therefore, finding no basis for distinguishing *Jones*, the dissent could envision nothing short of a traditional property interest in the automobile which would have satisfied the majority.[75] However, after making those points they were willing to concede that perhaps the fourth amendment provides a lower degree of protection when the individual does not have a cognizable property interest in the area searched.[76]

They also contended that the majority's position was contrary to the concept of fourth amendment protections developed in decisions concerning consent searches, pointing to a line of cases in which the Court had upheld the authority of nonowners, joint user or occupants, to consent to a search of property.[77] The dissent saw no basis upon which to hold that the scope of authority to consent could be broader than the contours of protected privacy. Thus, if the occupant *qua* occupant may give lawful consent to a search of property owned or possessed by another, then the occupant *qua* occupant should be entitled to fourth amendment protections.[78]

The dissenting Justices also found the majority's analysis to be lacking in ease of application. They specifically referred to instances where, because of an existing relationship between owner and passenger or because of a specially constructed relationship, the property-based rationale could provide no satisfactory answer.[79] To the minority, the majority's apparent focus on the relationship between or among private parties misconstrued the essence of the fourth amendment: the relationship of people to government.[80]

Finally, the dissenting Justices argued that the majority's decision undermined the exclusionary rule in the one area in which it is "most certainly justified — the deterrence of bad-faith violations of the Fourth Amendment."[81] The majority opinion was characterized as a declaration of open season on automobile searches every time the automobile contains more than one occupant. Especially so if the government attempted to make a case only against passengers.[82]

The Concurring Opinion

Justice Powell's concurring opinion focused primarily on the dissent's argument that the majority had effectively tied interpretation of the fourth amendment to property concepts. Justice Powell relied heavily on Justice Harlan's concurring opinion in *Katz v. United States*,[83] suggesting that only those ex-

74. *Id.* at 164 n.14.
75. *Id.* at 165.
76. *Id.* at 166.
77. 439 U.S. at 163 (*citing* Frazier v. Culp, 394 U.S. 731 (1969), and United States v. Matlock, 415 U.S. 164 (1974)).
78. 439 U.S. at 164 (White, J., dissenting).
79. *Id.* at 167-68.
80. *Id.*
81. *Id.* at 168.
82. *Id.* at 157, 168-69 (White, J., dissenting).
83. 389 U.S. 347 (1967).

pectations of privacy which society is prepared to recognize as reasonable are entitled to the protection provided by the fourth amendment.[84] The proper focus of the inquiry, Justice Powell argued, should be whether a claim to privacy is "reasonable in light of all the surrounding circumstances."[85] He argued that no single factor could provide an answer; instead, the inquiry should consider factors such as: (1) whether the individual took normal precautions to maintain privacy; (2) the manner in which the individual used the location; (3) the manner in which the Framers might have viewed the particular type of intrusion; and (4) the extent and nature of a property right as indicative of society's recognition of a person's authority to act as he wishes in certain areas.[86]

Justice Powell then analyzed the nature of the defendants' claim in *Rakas*. Initially he noted the absence of a property interest.[87] Second, he argued that fourth amendment decisions have traditionally maintained a distinction between expectations of privacy in an automobile and those in other locations.[88] Finally, he noted the absence of a claim of "exclusive control of an automobile or of its locked compartments."[89] The net result of such analysis, he argued, produced only a "minimal privacy" interest not comparable to the interest of the defendants in *Jones* or *Katz*.[90]

Rakas AS AN "AUTOMOBILE SEARCH" CASE

One unclear factor in *Rakas* is the significance attributed to the area searched. Language in both the majority and concurring opinions suggests that resolution of the "scope" question in *Rakas* was influenced by acceptance of limited or diminished fourth amendment protection in automobile search cases. For example, Justice Rehnquist stated that:

> It is unnecessary for us to decide here whether the same expectations of privacy are warranted in a car as would be justified in a dwelling place in analogous circumstances. We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes.[91]

Justice Powell in his concurring opinion appeared to place even greater emphasis on the diminished expectations of privacy which will be recognized

84. *Id.* at 361 (Douglas, J., concurring).

85. 439 U.S. at 152 (Powell, J., concurring).

86. *Id.* at 152-53. See text accompanying notes 136-137 *infra*.

87. *Id.* at 153.

88. *Id.* at 153-54.

89. *Id.* at 154.

90. *Id.* at 155. While the dissenting Justices' contended that when the defendants in *Rakas* closed the doors to the automobile they took the same step to preserve their privacy that was taken by the defendant in *Katz*, Justice Powell argued that Pennsylvania v. Mimms, 434 U.S. 106 (1977), which held that passengers in an automobile have no fourth amendment right not to be ordered from their vehicle, effectively distinguished *Rakas* from *Katz*. Justice Powell stated that "the closing of the doors of a vehicle . . . cannot have the same significance as it might in other contexts." 439 U.S. at 155 n.4 (Powell, J., concurring).

91. *Id.* at 148.

in automobile searches: "We are concerned here with an automobile search. Nothing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in an automobile and one's expectation when in other locations."[92]

The history of the Court's apparently ambivalent attitude toward application of fourth amendment principles in automobile search cases has been adequately demonstrated elsewhere.[93] For present purposes it is sufficient to note that the Court's prior fourth amendment automobile search cases demonstrate that differing standards are pervasive.[94] Therefore, reliance on the capacity question in *Rakas* might be viewed as a result, at least in part, of the fact that an automobile was the object of the search. The two opinions clearly suggest that the standard under which the capacity question will be resolved depends on the nature of the area searched, not in a physical sense, but in terms of its characterization as a high or low privacy area.[95] Presumably, a search of a high privacy area, such as a dwelling, would dictate a less rigorous application of the property-based requirement in resolving the capacity question. Conversely, searches of low privacy areas, such as automobiles, would be judged by the more rigorous property-based standard.

In seeking a plausible method by which to distinguish the outcomes of *Rakas* and *Jones*,[96] the fact that an automobile was searched in *Rakas* as opposed to a dwelling in *Jones* would be most nearly dispositive. Viewed in this fashion, *Rakas* is simply the latest in a series of decisions which denigrates the significance of fourth amendment protections in automobile search cases. However, such a limited view would ignore the case's implication regarding the interrelationship between privacy and property concepts.

THE CONCEPT OF PRIVACY — PROPERTY INTERESTS AND "CAPACITY"

Analysis reveals that the Court has adopted the position that the descriptive phrase, expectations of privacy, embodies two separate but related concepts which are implicated in the attempt to define the fourth amendment's scope. One such concept involves use of the phrase in connection with the creation of the class of persons entitled to raise fourth amendment issues; that is, the focus on capacity of the individual to assert the claim. This concept, in effect, concedes that an invasion of privacy has occurred and is therefore only

92. *Id.* at 153-54 (Powell, J., concurring).

93. See Williamson, *supra* note 20, at 128-38; Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974); Yackle, *supra* note 3, at 404-15.

94. Thus, the relaxation of standards has appeared in the form of exceptions to the warrant requirement, Chambers v. Maroney, 399 U.S. 42 (1970), less rigorous scrutiny of the probable cause mandate, Cady v. Dombrowski, 413 U.S. 433 (1973), *but see*, Delaware v. Prouse, 440 U.S. 648 (1979), and classification of certain forms of intrusions as activities not constituting a search, South Dakota v. Opperman, 428 U.S. 364 (1976).

95. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 12-13 (1977); South Dakota v. Opperman, 428 U.S. 364, 368 (1976); Cardwell v. Lewis, 417 U.S. 583, 590 (1974). The distinction apparently drawn depends on the Court's perceptions of the extent to which various items of real or personal property constitute areas in which the public expects to be able to maintain a certain degree of privacy. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753 (1979).

96. See text accompanying notes 44-63 *supra*.

concerned with the process of linking the invasion of one or more persons. Privacy upon this predicate has meaning only when linked to specific individual expectations. The phrase, expectations of privacy, in this regard becomes a euphemism for the process of seeking to establish a nexus between the area searched and the individual seeking to raise fourth amendment issues. *Rakas* thus gives substance to the proposition that the fourth amendment protects people, not places, because only certain people in the place searched may assert fourth amendment claims.

The second concept implicated by recent privacy decisions involves the determination of whether the challenged activity constituted an invasion of privacy, i.e., a search. This function, assumes that the government activity may be challenged on fourth amendment grounds by the person asserting the claim, but questions, initially, whether an invasion of constitutionally protected privacy occurred. The phrase expectations of privacy thus also defines the process of determining the types of evidence gathering activities which constitute searches subject to the limitations of the fourth amendment.

The distinction between the two concepts is subtle, but clearly the considerations which govern the resolution of each will be different if the focus is on the relevance of the property interest in the area searched. *Rakas* effectively assigns great significance to the assertion of a property-type right when numerous searched individuals have a tenable right to raise fourth amendment issues. Determination of the existence of a property-type right in the area searched, however, will not necessarily resolve the question of whether the challenged activity constituted an invasion of constitutionally protected privacy.

Examination of prior Supreme Court decisions interpreting the phrase reveals that failure to recognize the distinction between the two lines of inquiry is a potential source of confusion. Some of the cases demonstrably involve both the question of capacity to assert and the question of whether an invasion of privacy occurred. Other cases, however, involve only one concept. Clarity, therefore, demands specific identification of the particular issue presented; capacity *or* invasion of privacy. Following *Rakas*, the extent to which property concepts are relevant may largely depend upon which question is raised.

In *United States v. Katz*,[97] the capacity or privacy question arose in the context of a warrantless interception of a telephone conversation in a public telephone booth. One of the issues considered in *Katz* was whether a nontrespassory electronic surveillance of a public phone booth constituted a "search" within the meaning of the fourth amendment.[98] The Court in *Katz* rejected the notion that the fourth amendment protects only places or property and held that appropriate inquiry instead should be whether there

97. 389 U.S. 347 (1967).

98. The other major issue involved in *Katz* concerned the problem whether conversations constituted "effects" within the meaning of the fourth amendment. The Court in *Katz* overruled Olmstead v. United States, 277 U.S. 438 (1928), thus making it clear that the fourth amendment was not limited to the seizure of "tangible" items, 389 U.S. at 353.

had been an interference with "the privacy upon which [the individual] . . . justifiably relied."[99]

The *Katz* opinion was unclear regarding the defendant's capacity to raise fourth amendment objections to the invasion of privacy.[100] The Court could have determined that an invasion of privacy had occurred, but that only the telephone company, as owner of the area searched, had the requisite capacity to raise objection. However, even prior to *Katz*, individuals lacking an ownership interest in the area searched were clearly permitted to raise fourth amendment objections once it was determined that a "search" had occurred.[101] Therefore, rejection of the property-based analysis in *Katz* was with reference to the abstract question of whether a search within the meaning of the fourth amendment had occurred. The problem is that the defendant Katz did not own the telephone booth, and only in a very strained sense, could he be said to have been in "possession" of the area at the time of the search.[102] In a case such as *Katz*, it would therefore be proper to conclude that both aspects of the inquiry embodied within the concept, expectations of privacy, were implicated.

Shortly after the decision in *Katz*, the Supreme Court decided *Mancusi v. DeForte*,[103] which has generally been viewed as a standing decision addressing the defendant's capacity to assert a fourth amendment claim. In *DeForte*, the Court confronted the question of the right of a union official to object to a search of his work area in union headquarters.[104] The Court focused on whether the defendant had a relationship to the area searched sufficient to raise fourth amendment objections.[105] *Katz*, under a *DeForte* rationale, is

---

99. 389 U.S. at 353.

100. The majority opinion in *Katz* did not directly discuss the capacity question apart from whether the electronic surveillance constituted a "search." It is possible, however, to read the *Katz* statement on the capacity question as based on the premise that it was a combination of the nature of the area or place searched and the actions taken by defendant Katz which established his right to object to the search. Justice Rehnquist's *Rakas* opinion stated that "in *Katz*, the defendant occupied the telephone booth, shut the door behind him to exclude all others and paid the toll, which entitled [him] to assume that the words he utter[ed] into the mouthpiece would not be broadcast to the world." 439 U.S. at 149 (*quoting* Katz v. United States, 389 U.S. 347, 352 (1967)).

101. *See, e.g.*, Jones v. United States, 362 U.S. 257 (1960); McDonald v. United States, 335 U.S. 451, 461 (1948).

102. The dissenting opinion described the situation in *Katz* as follows: "Katz had no possessory interest in the public telephone booth, at least no more than [the] petitioners [in *Rakas*] had in their friend's car; Katz was simply legitimately present." 439 U.S. at 166 (White, J., dissenting).

103. 392 U.S. 364 (1968).

104. DeForte shared the office searched with several other union officials and was present at the time of the search. 392 U.S. at 365-67.

105. The Court in *DeForte* noted that if he occupied a private office he clearly had standing under the *Jones* standard, conferring standing to anyone "legitimately on the premise" at the time of the search, but the Court also notes that: "[t]he Court's recent decision in [*Katz*] also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion [citation omitted]. The crucial issue therefore, is whether, in light of all the circumstances,

reduced to a question of whether the defendant whose conversations were intercepted had the requisite relationship to the telephone booth so as to be entitled to raise fourth amendment issues. To argue, as Justice Rehnquist did in *Rakas*,[106] that *Katz* and *DeForte* involved the same basic question masquerading under different terminology is quite remarkable. The two cases obviously involve distinct issues even though it might be appropriate to label each as involving the scope of the fourth amendment protections, and to consider the issues presented in each case as implicating the general concept of expectations of privacy.

In other cases, however, capacity to raise fourth amendment issues was not involved, and the sole focus was on whether an invasion of constitutionally protected privacy occurred. In *United States v. Santana*[107] a police undercover agent had arranged for a heroin purchase from a go-between. The agent and the contact drove to defendant's house where the contact took the money, went into defendant's house, and returned with the heroin. After the sale was consummated, the go-between was arrested. He then told the officer that the defendant had the money. The police returned to her home and observed the defendant standing in the doorway holding a brown bag. When they identified themselves, she retreated into the house, whereupon the officers entered and arrested her in the vestibule.[108] The Court conceded that the doorway would, at common law, have been considered private, but went on to hold that:

> She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection" . . . . She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.[109]

Obviously the Court's reference to an expectation of privacy was made in connection with the determination that the actions of the officers did not constitute an illegal invasion of privacy, rather than with reference to Santana's capacity to raise fourth amendment objections. Santana lost because there was no invasion of privacy protected by the fourth amendment, not because she was an inappropriate party to raise the claim.

Likewise, in *United States v. Miller*,[110] the Court rejected an argument that the record keeping requirements of the Bank Secrecy Act and the issuance of a government subpoena to obtain records violated the fourth amendment. The Court held that the depositor had no expectation of privacy as to the

---

DeForte's office was such a place." 392 U.S. 364, 368-69 (1968). In one sense, *DeForte* foreshadowed the ruling in *Rakas*, that is, the focus was on expectations of privacy rather than on the mechanical *Jones* standard granting standing to anyone legitimately on the premises. On the other hand, *DeForte* also made it clear that the assertion of a property interest in the area or place searched was *not* determinitive of the "privacy" issue.

106. 439 U.S. at 139 n.7.

107. 427 U.S. 38 (1976).

108. *Id.* at 42.

109. *Id.*

110. 425 U.S. 435 (1976).

records which had been voluntarily conveyed to the banks and exposed to the bank's employees.[111] Therefore, it should be apparent that *Santana* and *Miller* did not involve the capacity of the parties to raise the fourth amendment claim. In both cases, the parties raising the claim possessed a property-type interest in the area searched, or in the items seized. In *Santana*, the claim was brought by the owner of the premises where the alleged invasion of privacy occurred. In *Miller*, the nature of the customer's privacy interest in the records is more obscure, but at least the records were very clearly generated by and through the activities of the customer.

Rakas and prior decisions under the guise of standing, on the other hand, all focus on the question of capacity. In each of the standing cases the existence of an invasion of privacy, in the abstract, may be conceded. *Rakas*, and each of the prior standing cases, involve the determination of whose privacy expectations were infringed by the particular search in question. Thus, when the *Rakas* majority described the inquiry as requiring an assessment of the privacy expectations of automobile passengers, rather than of standing, the Court was simply recognizing that the fundamental question which must be resolved is one of identifying the particular individuals possessing fourth amendment rights under a given set of facts. Resolution of this question, in turn, involves consideration of the nature of the relationship which must exist between the individual and the place searched.

What the *Rakas* majority did hold with respect to the nature of relationship required, however, is unclear. Obviously as the majority concedes, the assertion of a property-type interest in the area searched should not be viewed as the sole basis upon which to judge the capacity to claim the protections of the fourth amendment.[112] The assertion of a property-type interest in the area searched may additionally be insufficient.[113] The majority's deficiency thus lies not in rejection of the standing inquiry to resolve the question, but rather in the absence of a foundation for the judgment. The same defect coincidentally appears in the dissenting opinion. Unfortunately, no prior expectation of privacy cases provide any guidance, other than standing decisions such as *Jones* and *DeForte*, which, following *Rakas*, must now be assimilated into the *Rakas* method of analysis. Even more unfortunate is that the *Rakas* rationale offers no explanation for why the defendant in *Katz*, when he occupied the phone booth, was determined to have established the requisite interest to trigger fourth amendment protections.[114] Likewise, it is impossible to state with certainty why the defendant in *DeForte* was viewed as possessing the requisite expectation of privacy in the union office.[115] Further, the majority's new analysis of *Jones* provides little insight into the nature of the

111. *Id.* at 442.

112. 439 U.S. at 143.

113. *See, e.g.*, Mancusi v. DeForte, 392 U.S. 364 (1968); Simmons v. United States, 390 establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Id.*

114. See note 100 *supra.*

115. See note 105 *supra.*

factors which were viewed, in that case, as sufficient to establish the required relationship.

The most one can say for *Rakas* is that it substituted one ill-defined and theoretically misdirected standing inquiry in favor of a theoretically correct, but equally ill-defined expectation of privacy concept. If one views the Court's prior fourth amendment standing decisions in the context of the *Rakas* majority opinion, potential areas for future conflict come into focus.

Rakas AND THE EXISTING STANDING THEORIES

Consideration of the impact of *Rakas* on past fourth amendment standing theories must begin with a realization that most search and seizure cases do not present standing problems.[116] Prior to *Rakas*, the Supreme Court had recognized *sub silentio* that a search of the person or property of an accused would be sufficient to confer standing.[117] Earlier fourth amendment standing cases have been concerned with the limited class of cases in which the accused lacked a traditional property-type interest in the area searched.[118] The standing theories developed in such cases, with the exception of *DeForte*,[119] did not purport to deal with standing as an aspect of substantive fourth amendment principles.[120] As a result of *Rakas*, the task becomes to discard a separate inquiry into standing and to focus instead directly on the scope of individual fourth amendment privacy protections.

Prior decisions have recognized the right of defendants to challenge the legality of a search solely due to the nature of the charge against them rather than as a result of the violation of individual fourth amendment rights. The automatic standing concept, which permits a defendant to raise fourth amendment objections to a search whenever charged with an offense involving possession of the items seized,[121] is not predicated on the showing of a direct infringement upon the fourth amendment rights of the person seeking to suppress such items. Instead, the automatic standing concept is based on the proposition that the government should not be permitted to adopt the inconsistent position of denying for purposes of standing, a defendant's connection with the items seized while, for guilt purposes taking the opposite position.[122] This would place a defendant in the untenable position of having

116. *See, e.g.*, United States v. Chadwick, 433 U.S. 1 (1977); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973).

117. *Id.*

118. *See, e.g.*, Mancusi v. DeForte, 392 U.S. 364 (1968); Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960). The exception is Alderman v. United States, 394 U.S. 165 (1969), wherein the court was primarily concerned with the question of the standing of the owner of the premises to suppress conversations in which he had not been a party but which were seized electronically from his home.

119. See text accompanying note 103 *supra*.

120. See text at notes 121-124 *infra*.

121. Jones v. United States, 362 U.S. 257 (1960). *See also* United States v. Brown, 411 U.S. 223 (1973); Simmons v. United States, 390 U.S. 377 (1968).

122. 362 U.S. 257, 264 (1960). Justice Frankfurter, the author of the majority opinion in *Jones*, described the "contradiction" in the government's position as "not consonant with the amenities, to put it mildly, of the administration of criminal justice . . . ." *Id.* The

to establish the requisite connection with the items seized at the suppression hearing, thereby presenting the government with probative, perhaps conclusive, evidence of guilt at trial.[123] Automatic standing was, therefore, a concept evolved from considerations unrelated to the proposition that standing should be viewed as a statement of the scope of individual fourth amendment protection.[124]

The premise upon which the automatic standing concept evolved has been undermined recently on grounds unrelated to the developments in *Rakas*; it was not unrealistic to assume that automatic standing was going to be dis-

---

government, he argued, was seeking "[to subject] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." *Id.*

The contradiction rationale in *Jones* has been criticized on the grounds that it improperly equated "fourth amendment possession" and "criminal possession" for standing purposes, and "necessarily implied that a defendant may have a protectable fourth amendment interest in contraband." *See* Trager & Lobenfeld, *supra* note 40, at 436.

123. Justice Frankfurter quoted Learned Hand's description of the problem: "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemna." Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932).

124. Two major problems developed in the application of the "automatic" standing concept. First, lower courts divided on the question whether automatic standing should be afforded only those defendants charged with a "possessory crime" as opposed to situations in which possession may have constituted only one element of the crime. *Compare* Sendejas v. United States, 428 F.2d 1040 (9th Cir. 1970) (denying automatic standing for defendant prosecuted for conspiracy to possess) *with* United States v. Mapp, 476 F.2d 67 (2d Cir. 1973) (granting automatic standing for defendant charged with conspiracy to distribute and possess).

The second problem which divided lower courts was whether automatic standing should be limited to cases where the offense charged the defendant with possession at the time of the seizure. The argument limiting automatic standing to situations where the offense, or an essential element thereof, could be established by proof of possession at the time of the seizure, was based on the proposition that since the government was not asserting that the defendant had possession at the time of the seizure, the government was not adopting a contradictory position. Presumably, the defendant could freely admit or contend that he was in actual or constructive possession at the time of the seizure without supplying the government with a prima facie case of guilt, since the government's case would be predicated on showing possession at some earlier point. *See* United States v. Cowan, 396 F.2d 83 (2d Cir. 1968).

These problems have apparently been resolved. In Simmons v. United States, 390 U.S. 377 (1968), and again in Brown v. United States, 411 U.S. 223 (1973), the Court held that automatic standing should be given any time possession is "an *essential element* of the offense . . . charged." 390 U.S. at 390; 411 U.S. at 229 (emphasis added). The *Brown* decision likewise made it clear that automatic standing should be granted only where possession at the time of the contested search and seizure constitutes an essential element. 411 U.S. at 229. Thus, in a case such as *Brown* where the defendants have been charged with transporting stolen goods and conspiracy, automatic standing should be denied if the goods have been transported and "sold" by defendants prior to the seizure. The Court in *Brown* noted that the conspiracy and transportation alleged by the indictment were "carefully limited to the period before the day of the search." *Id.*

carded without regard to the shift approved in *Rakas*. The Court in *Simmons v. United States*[125] eliminated the "Hobson's choice" aspect of the predicate for automatic standing,[126] and *Brown v. United States*[127] further undermined the impact of automatic standing by making it clear that the doctrine was limited to cases in which the defendant had actual possession of the items at the time of the seizure. More practically, the development of additional standing theories which involved an inquiry into the relationship between the area searched or the items seized and the persons seeking to raise fourth amendment objections, created doubts concerning the need for the automatic standing concept. In reality, most defendants had other theories to support their standing to raise fourth amendment issues, thus rendering the automatic standing theory superfluous.[128]

At first blush it would appear that *Rakas* signals the total demise of automatic standing. Regardless of the merits of preexisting objections to the automatic standing concept, the *Rakas* rationale submerges the standing inquiry and favors an inquiry directed to the scope of individual fourth amendment protections, and thus appears to undermine the basis of the automatic standing theory. It must be recalled, however, that automatic standing developed, in part, because of the belief that it was simply not fair to permit the government to deny the fact of possession at an earlier stage of the prosecution while maintaining it at the trial. Although such a philosophy has been criticized as insufficient upon which to base a right to raise fourth amendment issues,[129] nothing in the *Rakas* decision would appear to resolve this problem.

The second standing concept not directly dealt with in *Rakas* is whether the assertion of a possessory or proprietary interest in the *items seized* would be sufficient to establish a defendant's right to challenge the legality of the search leading to seizure. The defendants in *Rakas*, of course, made no such claim regarding their relationship to the items seized.[130] The majority in *Rakas* simply noted that prior cases did give reason to believe that the allegation of a possessory or proprietary interest in the items seized would have been sufficient to establish the right to raise a fourth amendment objection to the search of the automobile.[131] The dissent likewise did not confront the

125. 390 U.S. 377 (1968). The Court in *Simmons* held that a defendant's pre-trial statements, made at a suppression hearing in order to establish standing, could not be used against him at trial. *Id.* at 394.

126. *Id.* at 391.

127 411 U.S. 223 (1973). See note 124 *supra*. *See also* 439 U.S. at 135 n.4.

128. If defendants are given standing based upon the assertion of property-type interest in the area or place searched or in the items seized, together with the limited use immunity conferred in *Simmons*, the need for automatic standing should not be great.

129. Trager & Lobenfeld, *supra* note 40, at 434-44.

130. The defendants in *Rakas* claimed that they were never asked whether they owned the items seized, and argued in the Supreme Court that if the Court determined that ownership of the items seized would be sufficient to confer standing, the case should be remanded. 435 U.S. at 130 n.1. The Court rejected the argument on the ground the government had asserted that the defendants did not own the items seized and such assertion was not contested by the defendants. *Id.*

131. "Judged by the foregoing analysis, [the defendants'] claims must fail. They asserted

question directly, but did, however, note that acceptance of such a theory would create a novel approach to the question of the scope of the fourth amendment protection — the notion that individual privacy might be defined with reference to situations involving claims of interference with an interest in personal property.[132]

The question is clearly more complex than otherwise indicated by *Rakas'* several opinions. Analysis must begin with the proposition that a large number of cases involve allegations of unlawful invasions of privacy — the search — together with interference with property — the seizure. The fourth amendment speaks to both concepts.[133] Although existing examples of differing treatment of the concepts are easy to locate,[134] it would not be irrational to suggest that challenges to government activity in routine search and seizure cases should result in parity of treatment. The individual asserting the requisite relationship to the items seized should be entitled to object to the government activity, including the right to object to the invasion leading to seizure. Likewise, the individual owner or possessor of the area searched should be entitled to suppress the items seized without regard to the need to show any additional relationship to the items seized. Such an interpretation of the fourth amendment, at least in the *Rakas* situation, has appeal even though it may once again raise the question of the relevance of property concepts, albeit in the context of the relationship to the items seized rather than to the area searched. In any event, *Rakas* suggests that the Court must resolve whether the assertion of a proprietary or possessory interest in items seized constitutes a relevant factor in contemplating the questions of the existence of a "privacy" interest in the area searched.[135]

Resolution of these questions implicates fundamental fourth amendment values. The first line of analysis should attempt to work within the standard utilized in *Rakas*. The assertion of a proprietary or possessory interest in the items seized would constitute a relevant, perhaps determinative, factor in resolving whether an intrusion leading to discovery of particular items violated a reasonable expectation of privacy which the owner-possessor of such items had in the area searched. A second line of analysis, though not addressed in

---

neither a property nor a possessory interest in the automobile, *nor an interest in the property seized.*" *Id.* at 148 (emphasis added). *See also* Arkansas v. Sanders, 442 U.S. 753 (1979). See note 20 *supra.*

132. 439 U.S. at 164 n.14 (White, J., dissenting).

133. The fourth amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches and seizures,* shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." (emphasis added).

134. See text accompanying notes 156-165 *infra. See also* Chambers v. Maroney, 399 U.S. 42, 51-52, 64 (1970).

135. Likewise, the Court must also resolve the question whether the establishment of a "privacy interest" in the area searched constitutes the only basis upon which to identify the class of persons entitled to fourth amendment protections, or whether, for example, the assertion of proprietary or possessory interest in items seized, standing alone, and without an additional finding of an invasion of a privacy interest, would constitute an additional method of identifying the class of persons entitled to full fourth amendment protections.

Rakas, would reason that the determination of whether particular government activity violated a reasonable privacy expectation of the asserting individual does not constitute the only method for identifying the class of persons entitled to assert fourth amendment protections. Instead, an unreasonable interference with items owned or possessed by an individual in an area not otherwise viewed as accessible to the public would constitute a fourth amendment violation sufficient to allow the individual to challenge the search leading to the seizure.

The first theory has substantial appeal if it is recognized that the question of a legitimate expectation of privacy involves a subjective element. If the determination of which expectations of privacy will be protected by the fourth amendment is based in part on establishment of a nexus between the person asserting the privacy claim and the area searched further, and if the assertion of a proprietary or possessory interest in the area searched is not the only method by which such nexus is established, then assertion of a proprietary or possessory interest in items or personal effects seized might reasonably serve as the basis upon which to establish the required nexus, especially if placed there by, or under the direction of, the person asserting fourth amendment rights. Unfortunately, nothing in the majority opinion directly indicates that the subjective expectations of one seeking fourth amendment protections should be considered. In his concurring opinion, Justice Powell did, however, suggest that actions of the individual may play an important role. Justice Powell indicated that one relevant inquiry is whether the person invoking fourth amendment protections "took normal precautions to maintain . . . privacy."[136] He also stated that the manner in which the area searched is used would be relevant.[137] The question thus becomes whether the act of placing personal effects in an area otherwise thought to be protected from unreasonable intrusions, such as those areas not generally accessible to the public,[138] may constitute a basis upon which to grant full fourth amendment protection. Viewed solely from the perspective of ease of application, the use of such a standard as an identification device for an additional class of persons entitled to assert fourth amendment protections would appear as simple as the process of identifying those persons having the direct nexus by virtue of a proprietary or possessory interest in the area searched.

There are, however, substantial problems with the suggested analysis. A practical problem is identifying the types of interests in personal effects sufficient to trigger a full range of fourth amendment protections. Suppose the personal effects involved were illegally possessed. Should a court nevertheless

---

136. 439 U.S. at 152 (Powell, J., concurring).

137. *Id.* at 153.

138. Obviously there must be a "search" leading to the discovery of the items seized. What one "knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). Such a theory would, of course, be subject to the right of the owner of the premises to "consent" to a search of the property. See text accompanying note 156 *infra.*

recognize the assertion of a valid interest in such goods?[139] Would the assertion of a possessory interest be sufficient?[140] Also, would the manner by which the goods were placed in the area be relevant? Suppose items of personal property owned by one person were placed on the property of another without the knowledge of the owner of the personal effects.

On a theoretical level is the question of whether the nature of the area in which the personal effects are placed should be relevant. It might be persuasively argued that locating personal effects in a private dwelling owned by another person constitutes an act sufficient to establish a privacy interest, but that the act of placing personal effects in the automobile of another, given the lesser fourth amendment protections provided for automobiles, would be unreasonable and thus insufficient to establish the requisite privacy interest.[141] Additionally, the theory maintains the importance of property concepts as determinative of fourth amendment protections, albeit in the form of a property interest in the items rather than in the area searched. One might reasonably question the theoretical basis of any standard which provides fourth amendment protection for a person not present at the time of a search but who owned the area searched or the personal items discovered, while denying protection for a person lawfully on the premises at the time of the search who can establish no property-based interest in the premises searched or the items seized.

Several Supreme Court decisions contain language which supports the view that the assertion of a proprietary or possessory interest in the items seized constitutes a sufficient basis upon which to permit the person claiming such interest to challenge the search. The most frequently cited decision is *United States v. Jeffers*.[142] In *Jeffers*, narcotics were seized from a hotel room occupied by relatives of the defendant. The defendant, however, had been given a key and frequently entered the room for various purposes. The government challenged the defendant's standing. With limited discussion, the Court held that "[i]t being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence in his trial."[143] Notably, the defendant's relationship to the premises searched in *Jeffers* provides grounds upon which to argue that it was a combination of interest in the premises searched and the items seized which justified the decision to grant standing.[144] Likewise, similar arguments can be made that the grant of standing to challenge the search in *Bumpers v. North Carolina*[145] was based on a combination of a possessory interest in the area searched and items

---

139. *See* Trager & Lobenfeld, *supra* note 40, at 445-51.

140. One problem with the concept of "possession" is whether constructive possession would suffice. *See* Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 U. Mo. L. Rev. 1, 48 n.311 (1975).

141. See text accompanying notes 91-96 *supra*.

142. 342 U.S. 48 (1951).

143. *Id.* at 54.

144. The majority opinion in *Rakas* described *Jeffers* as a case conferring standing based upon the defendant's "possessory interest in both the premises searched and the property seized." 439 U.S. at 136. *See* Trager & Lobenfeld, *supra* note 40, at 447-48.

145. 391 U.S. 543 (1968).

seized.[146] Another example, *Simmons v. United States*,[147] involved the seizure of a suitcase from the home of a codefendant. The defendant was not present at the time of the seizure but alleged ownership of the suitcase as the basis for standing to object to the search of the codefendant's home.[148] Justice Harlan stated, in dictum, that the "only, or at least the most natural, way in which . . . [the defendant] could [have] found standing to object to the admission of the suitcase was to testify that he was its owner."[149] Finally, in *Brown v. United States*,[150] involving a seizure of stolen goods pursuant to defective warrant, the Court, in denying the defendants' standing to challenge the legality of a search and seizure, stated *inter alia* that they "failed to allege any legitimate interest of any kind in the premises searched *or the merchandise seized.*"[151]

A significant case on proprietary or possessory interest relevancy in the items seized, however, is one which is not normally associated with the concept. In *Alderman v. United States*,[152] the question presented involved standing in the context of the illegal seizure of telephone conversations. The Court's discussion centered on the standing of the owner of the premises to suppress conversations of third persons which took place on his premises even though the owner was not present and did not take part in the conversations.[153] The *Alderman* decision apparently accepts the premise that any party to a conversation would have standing to challenge the seizure regardless of the necessity of establishing an independent privacy interest in the area from which the conversation was seized. If such analysis properly assesses the scope of fourth amendment protections then *Alderman* can only stand as precedent for granting fourth amendment protections to the owner of the items seized from an area inaccessible to the public. This is true unless the Court is pre-

---

146. The defendant lived in a home owned by his grandmother. The police illegally searched the premises and seized a rifle, also owned by the grandmother. The rifle was used by all members of the household and was found in a "common" area. *Id.* at 548 n.11. The majority opinion in *Rakas* described *Bumper* as a case in which "the defendant had a substantial possessory interest in both the house searched and the rifle seized." 435 U.S. at 136.

147. 390 U.S. 377 (1968) (holding a defendant's pre-trial statements made at a suppression hearing in order to establish standing inadmissible at trial). See text accompanying note 125 *supra*.

148. *Id.* at 389-91.

149. *Id.* at 391.

150. 411 U.S. 223 (1973). In *Brown*, the defendants had been charged with transportation of stolen goods. They claimed "automatic standing" to challenge the search of a warehouse owned by an accomplice. They claimed no "possessory" interest in the goods at the time of the seizure.

151. *Id.* at 229 (emphasis added). The significance to be attached to the quoted statement is questionable in view of other statements made by the Court in *Brown*. For example, in rejecting the defendants' claim, the Court stated that: "it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises, and (c) were not charged with an offense that includes . . . possession of the seized evidence . . . ." *Id.*

152. 394 U.S. 165 (1969).

153. *Id.* at 176-77.

pared to distinguish cases on the basis of the nature of the items seized, or on the nature of the intrusion which led to the seizure.[154]

The attempt to establish an alternative basis for identifying persons entitled to assert fourth amendment protections which is not dependent upon showing violation of a reasonable expectation of privacy presents substantial analytical problems. The most compelling theoretical argument in favor of providing full fourth amendment protection for the owner or possessor of personal property seized is based simply on the textual parity of treatment for the two triggering devices within the fourth amendment – the search and seizure.[155] A simple hypothetical situation sets out the parity argument. If person A owns the premises searched, traditional analysis would enable A to suppress the items seized without the necessity of showing any specific relationships to the items seized. This analysis would stand even though the items seized were owned by person B. Thus, the finding of an unlawful invasion of privacy in the form of a *search* carries with it the right to suppress the items *seized.* If, however, B attempted to challenge the legality of the search and seizure solely on the basis of ownership of the items seized, B would be foreclosed unless ownership of the items seized was deemed sufficient to establish the requisite privacy interest in the area searched. If ownership of items seized is alone insufficient, then the fourth amendment constitutes a one-way street. That is the amendment would be interpreted as affording independent value to the concept of seizure only when the individual asserting the fourth amendment claim has been found to have a right to challenge the search leading to the seizure.

Prior Supreme Court decisions suggest that the parity argument is without merit. The consent search paradigm is, arguably, contrary to such analysis. Current consent search cases suggest that once it is established that a person purporting to give consent is a person with joint access or control over the premises searched, the inquiry is complete.[156] It is apparently unnecessary for the person giving consent to establish an independent relationship to the items seized. It also appears irrelevant that the person objecting to the search had an independent interest in the items seized. The consent search cases, therefore, focus on the lawfulness of the invasion of privacy which, once established, eliminates the need for additional constitutional questions.

The plain view paradigm likewise undermines the theory. Under the plain view concept,[157] the question of invasion of a protected privacy interest is separated from the act of seizing personal effects. Once it is established that there has been no unlawful intrusion into a constitutionally protected area, seizure of items found in plain view presents no substantial fourth amendment question.[158] Applying the plain view analysis to the *Rakas* circumstances

154. It has been suggested that electronic surveillance cases may warrant an exception to general "standing" rules. *See* White & Greenspan, *supra* note 45, at 360-65.

155. See note 133 *supra* and accompanying text.

156. *See, e.g.*, United States v. Matlock, 415 U.S. 164, 169, 171 n.7 (1974).

157. For discussion of the "plain view" doctrine, see Lewis & Mannle, *Warrantless Searches and the "Plain View" Doctrine: Current Perspective*, 12 CRIM. L. BULL. 5 (1976).

158. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). The only apparent limitations

demonstrates the weakness of the theory which attempts to rely on creation of an important fourth amendment value other than privacy. Once it is established that the search of the automobile violated no expectation of privacy, the plain view analysis would suggest that no additional significant fourth amendment value is implicated by the seizure, *qua* seizure, of the items in the automobile. The theory of plain view seizures thus rests, in part, on the view that the fourth amendment provides little or no protection for the property or possessory interest in items seized. The 1975 Seventh Circuit decision in *United States v. Lisk*[159] classically illustrates the point. In *Lisk*, the defendant had asserted no property-type interest in the automobile searched, but did claim an interest in a bomb seized from the trunk. The defendant argued that such interest was sufficient to permit him to challenge the search. The *Lisk* court conceded the defendant's right to challenge the seizure, but denied his right to challenge the search. The court, by characterizing the discovery of the bomb as equivalent to the discovery of an item in "plain view,"[160] allowed the defendant standing to challenge the seizure. This, however, became insignificant when the court determined that on the merits there was little argument to be made.[161]

Finally, there are the cases involving the seizure of conversations through the use of undercover agents. In a series of decisions,[162] the most notable of which is *Hoffa v. United States*,[163] the Supreme Court held that no interest protected by the fourth amendment is infringed when a party to a conversation with the accused is in reality a government agent regularly reporting to the authorities.[164] This result is unaffected by the nature of the place from which such conversations are seized.[165] In short, since there has been no invasion of privacy when an undercover agent simply reports or records conversations, no fourth amendment question is presented. However, the seizure of effects is clearly involved.

Such cases clearly indicate that the concept of privacy has a central, if not all encompassing role, in the interpretation of the values protected by the fourth amendment. Although substantial questions remain in determining

---

on the right to seize are in the form of requirements that there be reason to believe that the items are connected with criminal activity and, perhaps, limitations flowing from the fifth amendment privilege against self-incrimination. *Id.* at 466-67. *See also* Warden v. Hayden, 387 U.S. 294, 302-03, 307 (1967).

159. 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976).

160. *Id.* at 230. The court in *Lisk* also noted that it was as if the codefendant (owner) had consented to the search of his car. *Id.* at 230 n.5.

161. Yackle, *supra* note 3, at 379-80. The rationale of the *Lisk* decision was followed in United States v. Jackson, 585 F.2d 653 (4th Cir. 1978).

162. United States v. White, 401 U.S. 745 (1971); United States v. Hoffa, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963).

163. 385 U.S. 293 (1966).

164. *Id.* at 302.

165. The conversations for the most part were "seized" from Hoffa's hotel suite, a location described by the Court as one which may "be the object of Fourth Amendment protection as much as a home or an office." *Id.* at 301.

how the privacy concept is established, the line of decisions culminating with *Rakas* has relegated the seizure concept to an insignificant status.

Rakas AND GENERAL STANDING CONCEPTS

Unfortunately the standing problem as it reached the Supreme Court in *Rakas*, was tainted by a substantial body of standing principles of general application. Due to the unique and controversial nature of the remedy imposed for a fourth amendment violation and the fact that most fourth amendment problems originate in the state courts, finding their way into federal courts by way of collateral attack[166] or by way of direct review in the Supreme Court,[167] consideration of the standing problem in fourth amendment cases may well have been better served if viewed as *sui generis*. Some method, however, had to be devised to limit the class of persons entitled to assert fourth amendment protections. Otherwise, the "ideological plaintiff,"[168] alleging psychic injury from an alleged fourth amendment violation totally unrelated to his personal situation, would theoretically have a claim for relief. This claim could be either monetary or injunctive against those responsible.[169]

It is thus apparent that the Court must first delineate the reach of the constitutional guarantee involved. This requires identifying those individuals deemed within the class of persons the constitutional guarantee was designed to protect. Second, the Court must identify the circumstances in which he will be permitted to litigate a constitutional claim even though such claims may

---

166. The normal method of collateral attack is by way of a petition for writ of habeas corpus under 28 U.S.C. §§2241-54 (1970). The efficacy of federal habeas corpus as a means of reviewing fourth amendment claims was greatly reduced by the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976). In *Stone*, the Court held that "where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494.

167. Direct review from final judgments of the highest court of a state are authorized by 28 U.S.C. §1257 (Supp. 1979). The *Rakas* decision came to the Supreme Court by way of direct review under §1257. 435 U.S. at 922.

168. *See generally* Jaffe, *The Citizen as a Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). The "ideological" plaintiff might also be referred to as a "non-Hohfeldian" plaintiff. The terms are normally applied to the litigant bringing a "public" or "citizen" action, one in which the litigant's interest in the outcome cannot be differentiated from that of the public at large, and who, under normal standards, would have difficulty demonstrating a "personal stake" in the outcome of the case. *See* Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863 (1977); Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

169. An analogous problem is found in the first amendment area: should an individual be permitted to challenge a law or practice on first amendment grounds when such activity infringed no right of the claimant but might chill the rights of hypothetical third parties? *See, e.g.*, Gooding v. Wilson, 403 U.S. 518 (1972); United States v. Robel, 389 U.S. 258 (1967); Thornhill v. Alabama, 310 U.S. 88 (1940). *See generally*, Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973); Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972); United States v. Raines, 362 U.S. 17, 21-23 (1960); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 438-41 (1974); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

involve the abrogation of rights of persons not parties to the litigation. Whether resolution of these questions in fourth amendment cases is considered an aspect of standing or part of substantive fourth amendment principles, the end result is the same because the Court will in both ways be defining the class of persons entitled to the protections afforded by the exclusionary rule.

The broad standing concept has been concerned, in part, with resolution of these questions. For example, in the first of the modern Supreme Court decisions concerning standing the Court stated that "the question [of standing] is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . . ."[170] Likewise, the standing concept has been viewed as embodying a principle which involves an indirect link to the merits of a claim for relief. The Court has long held that a litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties";[171] thus, a necessary corollary of the general standing inquiry requires initial determination of the class of persons deemed to be directly protected by the constitutional provision asserted as the ground for relief. Finally, the traditional standing inquiry has had a certain mechanical or procedural meaning attached to it by which it has been repeatedly found to be unrelated to the merits of the underlying claim for relief.[172]

An examination of the Supreme Court decisions dealing with the concept of standing as a pervasive theory in constitutional litigation discloses the magnitude of the problem confronting the Court in *Rakas*. This examination leads to the conclusion that the problem was resolved in an unsatisfactory manner. Several factors suggest that the fourth amendment standing problem would not fit neatly within a general standing theory. Nevertheless, the Court has continued to approach the dilemma as if fourth amendment standing problems were simply part of a cohesive and all encompassing standing theory.

We have been warned by the Supreme Court that generalizations about standing are largely worthless.[173] Despite this warning, consideration of general standing principles has been successfully undertaken elsewhere;[174] and no in-depth consideration will be undertaken herein. A brief summary of the fundamental policies and major components of standing would, however, be instructive.

---

170. Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

171. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975). See text accompanying notes 187-202 *infra*. The term "third-party standing," also known as *jus tertii*, will be used for the remainder of the article to refer to the theory which would permit a litigant to base a claim for relief upon the violation of the rights of a third person not a party to the litigation.

172. See note 7 *supra*. It should be noted, however, that nothing in the standing concept, as such, assisted a court in defining the scope of constitutional guarantees in the sense of identifying the class of persons entitled to their direct protections. The "standing" concept, or rather the finding of lack of standing, was simply a term used when a court concluded that the person asserting the claim was not a proper party to request adjudication of the issue.

173. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970).

174. *See* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Scott, *supra* note 7; Sedler, *supra* note 168; Tushnet, *supra* note 1.

STANDING IN OTHER CONTEXTS

In the early sixties, standing was described as an inquiry into whether the party seeking relief had "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . ."[175] In *Flast v. Cohen*,[176] the Supreme Court's first major contemporary decision, standing concepts were couched in terms of Article III limitations on federal court jurisdiction: "[T]he question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[177] The focus was on the adversary nature of the litigant as a means of reaching the most efficient results. The source of the doctrine was the Article III mandate for the federal courts. However, the concept has undergone significant refinement since *Flast*. Therefore, recent Court pronouncements not only demonstrate the change which has occurred, but are more helpful in analyzing the *Rakas* decision.

Two recent standing decisions, *Warth v. Seldin*[178] and *Simon v. Eastern Kentucky Welfare Rights*,[179] demonstrate the multi-faceted nature of the standing doctrine. These cases demonstrate that the concept involves both constitutional and prudential limitations on federal court jurisdiction and its exercise. One aspect, the constitutional limitation arising from the Article III case or controversy mandate, is in the form of a requirement that the litigant show "an injury to himself that is likely to be redressed by a favorable decision."[180] The constitutional standing prerequisite, therefore, mandates that the litigant show that he or she personally has suffered some actual or threatened injury-in-fact, the injury was caused by the government activity challenged, and that the litigant demonstrate that the relief sought will remedy the injury suffered. Decisions both before and after *Warth* and *Simon* indicate that neither the "injury-in-fact" nor the "causation" requirement constitute substantial barriers to the invocation of federal court jurisdiction.[181]

175. Baker v. Carr, 369 U.S. 186, 204 (1961).

176. 392 U.S. 83 (1968).

177. *Id.* at 101.

178. 422 U.S. 490 (1975). *Warth* involved a challenge to zoning ordinances of the Town of Penfield, New York. The plaintiffs, various organizations and individuals, alleged that the town's zoning ordinances excluded persons of low and moderate income from living within the town, in violation of the first, ninth and fourteenth amendments. The Court held, for various reasons, that none of the plaintiffs had standing to assert the claim for relief.

179. 426 U.S. 26 (1976). In *Simon*, several individuals and organizations challenged the actions of the Secretary of the Treasury and the Internal Revenue Service extending "favorable" tax treatment to hospitals that did not serve "low income" patients. The Court in *Simon* ruled that neither the individual plaintiffs nor the organizations had standing to sue.

180. *Id.* at 38.

181. The "injury-in-fact" requirement may be satisfied by economic, environmental or aesthetic injury to the litigant, Sierra Club v. Morton, 405 U.S. 727, 734 (1972), or solely by virtue of statutes creating legal rights. Warth v. Seldin, 422 U.S. 490, 500 (1975). The "causation" limitation, although rigorously applied in both *Warth* and *Simon*, has apparently

Simon also identified the purposes served by the injury-causation standard: "Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art[icle] III limitation."[182]

The *Warth* decision clearly indicated that standing involves additional considerations, prudential in nature, beyond the minimum Article III requirements. Specifically mentioned in *Warth* as prudential aspects of standing were the ban on the assertion of "generalized grievance[s]," injuries "shared in substantially equal measure by all or a large class of citizens"[183] and the ban on third-party claims: "the[litigant] . . . generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties."[184] The prudential rules of standing were described in *Warth* as designed "to limit the role of the [federal] courts in resolving public disputes."[185] Additionally, in the case of the limitation on third-party standing, the *Warth* Court noted the connection between the theory, the nature of the claim for relief, and the discretionary component. In so doing the Court stated:

> the . . . question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the [litigants] . . . position a right to judicial relief. In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the [litigant's] . . . claim to relief rests on the legal rights of third parties.[186]

Shortly after *Warth*, the Court decided *Singleton v. Wulff*.[187] This decision expanded the general prohibition on third-party standing claims and reduced the circumstances which would justify nonapplication of the prohibition. *Singleton*'s significance is somewhat blurred by the fact that the Court was equally divided on the issue of third-party standing.[188] The disagreement in *Singleton* was one primarily of application rather than principle such that certain generalizations concerning third-party standing remain feasible.

Singleton involved the question of a physician's standing to assert the

---

lost some of its strength, *see* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978); Orr v. Orr, 440 U.S. 268 (1979).

182. 426 U.S. 26, 38 (1976). *Simon* also indicated that the requirement serves to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends [citation omitted] . . . ." *Id.*

183. 422 U.S. 440, 499 (1975). The Court cited Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974), and United States v. Richardson, 418 U.S. 166 (1974), as examples of cases asserting the ban on generalized grievances. See note 26 *supra.*

184. 422 U.S. 490, 499 (1975).

185. *Id.* at 500. The Court also noted that the "prudential" aspects of the standing concept were subject to congressional revision. *Id.* at 501. *See* Sedler, *supra* note 168, at 876-85.

186. 422 U.S. at 500-01.

187. 428 U.S. 106 (1976).

188. Justice Blackmun's opinion concerning third-party standing was joined by Justices Brennan, White and Marshall. Justice Powell's dissenting opinion was concurred in by the Chief Justice and Justices Stewart and Rehnquist. Justice Steven's concurring opinion expressed the view that the physicians had direct standing to challenge the statute; thus he found no reason to pass on the third-party standing question. *Id.* at 121-22. He did, however, express basic agreement with what was said in Justice Blackmun's opinion. *Id.*

rights of Medicaid patients in a challenge to a Missouri statute. The statute excluded from coverage by Medicaid abortions not "medically indicated." The plurality opinion began with the premise that the federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the assertion of the rights of third persons not parties to the litigation. The reasons advanced for the limitation were twofold. First, as a general rule the federal courts should not adjudicate rights unnecessarily. In the context of third-party standing claims, such policy was deemed relevant because the third party whose rights were asserted might not wish to have his rights adjudicated or alternatively would be able to enjoy his rights without regard to the outcome of the case.[189] Second, as a fundamental premise parties are generally the best proponents of their own rights. Therefore since federal courts depend so heavily on effective advocacy, rights should be adjudicated only when the most effective advocate is before the court.[190] A third consideration, though not directly linked to the two preceding justifications, which must be weighed by the Court in reaching a decision whether to permit the claim to be heard,[191] is that third parties whose rights are being adjudicated may be bound by stare decisis.

The plurality also noted that the general prohibition on third-party standing, like any prudential rule, is inapplicable when the underlying justifications are absent. A significant number of prior cases were identified as examples of legitimate exceptions to the rule.[192] From those cases it was possible for the plurality to isolate controlling factual elements which justify an exception to the general rule. First, they argued that a court should examine the relationships between the litigant and the third party whose rights are sought to be adjudicated. Thus, if the third party's enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, then a court can be assured that construction and disposition of the third party's rights will necessarily result regardless of the eventual outcome of the litigants claim.[193] The Court went to to hold that even if the relationship meets the previous standard, the rule prohibiting assertion of third-party claims should still generally apply unless it is also found that the litigant is fully, or very nearly, as effective a proponent of the right as the third party, and that there is some genuine obstacle to the third party's ability to assert the claim directly. If a genuine obstacle is found, the third party's absence will lose "its tendency to suggest that his right is not truly at stake"[194] and the party in court becomes, by default, the best proponent of the right.

---

189. *Id.* at 113.

190. *Id.*

191. *Id.*

192. The Court has decided a number of cases that might accurately be characterized as third-party standing decisions. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953). *See also* Craig v. Boren, 429 U.S. 190 (1976).

193. 428 U.S. at 114-15.

194. *Id.* at 116. In Craig v. Boren, 429 U.S. 190 (1976), the court indicated that the "prudential" objectives enhanced by the third-party standing limitation would not be

The dissenting Justices in *Singleton*, in an opinion written by Justice Powell, agreed with the proposition that the prohibition on third-party standing was subject to exceptions when specific factors were found to outweigh the policies behind the rule. The dissenters likewise agreed that the factors identified by Justice Blackmun were the relevant considerations. They would, however, discount the significance of finding the litigant to be an effective advocate.[195] The dissent strongly disagreed with the manner in which Justice Blackmun interpreted the requirement of finding a "genuine obstacle" to the direct assertion of rights by the third party. According to Justice Powell, prior cases recognized the validity of this argument only when direct assertion of the right was "in all practicable terms impossible."[196] Therefore he concluded that the required relationship should be found to exist only when the challenged government activity *directly* interfered with the relationship.[197]

Justice Powell profferred examples of the manner in which his interpretation of the controlling factors in third-party standing cases differed from that set forth by Justice Blackmun. First, he argued that only when the challenged government activity compelled a course of conduct by one person, which interfered with the enjoyment of a right possessed by a third person, should a court conclude that the necessary relationship between the parties has been met. In *Singleton*, Justice Powell found that the state did not directly interfere with the physician-patient relationship because abortions were still lawful. The only impact of the challenged statute was to cause a financial detriment to the physician.[198] In addition, Justice Powell could find no "genuine obstacle" to the maintenance of a direct suit by the third party in *Singleton*. He identified the obstacles relied on by the plurality as the desire to protect the privacy of the abortion decision and the recurring problem of mootness. Then he denied their sufficiency by pointing to the ease by which a pseudonym may be used, and the decision of *Roe v. Wade*[199] which eliminated the mootness barrier in challenges to abortion statutes.

Several generalizations concerning the standing principles emanating from the Supreme Court's contemporary decisions may be advanced. First, although there is no single, unified standing theory, the broad outlines of the concept are identifiable. For purposes of this analysis, it is sufficient to note the requirement of the injury-causation standard, and the necessity of demonstrating that the constitutional or statutory provision on which the claim for relief rests can properly be understood as granting a right to judicial relief to persons in the position of the litigant asserting the claim. Second, there will be cases in which the basis of the claim for relief is not viewed as providing direct relief for the individual asserting the claim even though the injury-causation requirement has been met, because circumstances suggest that the

---

furthered where a lower court had already decided the constitutional question over no objection by the parties. *Id.* at 193.

195. 428 U.S. 106, 124 n.3 (dissenting opinion).

196. *Id.* at 126.

197. *Id.* at 128.

198. *Id.* at 128-29.

199. 410 U.S. 113 (1973).

challenged activity may also involve violation of the rights of third persons. In these cases it will be necessary to consider the specific factors which would justify viewing the action as an exception to the general standing-based prohibition on third-party claims. The factors which should be considered include the nature of the relationship between the litigant and the third party, the existence of actual or theoretical injury to a third party arising from the challenged activity, circumstances which would suggest that the litigant seeking to assert the claim would be as effective an advocate for the claim as the third party, and the existence of obstacles which suggest circumstances which prevent vindication of the third parties' rights.[200] Finally, the principles underlying standing "all arise out of institutional concerns peculiar to the federal judiciary and its special role."[201] Thus, the Supreme Court's pronouncements concerning the standing requirement, including third-party standing limitations, are not binding on the state courts.[202]

THE PECULIAR NATURE OF FOURTH AMENDMENT STANDING QUESTIONS

An analysis of the peculiar nature of the standing question presented in fourth amendment cases must begin with recognition of the fact that it normally arises in the context of a defense to a pending criminal charge.[203] The Supreme Court has adhered to the proposition that the standing question does not vary depending upon the litigative posture of the case; thus, defendants as well as plaintiffs may incur standing problems and the analysis should not differ.[204] Nonetheless, it should be obvious that the injury – causation aspect of the standing concept should not present a barrier in fourth amendment cases when the person seeking relief is a criminal defendant. The two significant standing questions presented in fourth amendment cases, therefore, are whether the fourth amendment is properly viewed as protecting the individual defendant from the type of government activity challenged and, alternatively, whether the requisite factors exist which would allow an individual defendant to assert the rights of some third party whose rights were infringed.

Despite the apparent lack of significance attached to the litigative posture of the standing question, several unique problems are presented when the standing question arises in connection with the assertion of a fourth amendment claim. If the defendant is permitted to raise a fourth amendment claim and prevails on the merits, the normal remedy is the exclusion of what is, in all likelihood, reliable and probative evidence of guilt. Justice Rehnquist declared in *Rakas* that the "social costs" associated with the judicially created

200. *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); *see also*, Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 425 (1974).

201. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 81 (1978).

202. See text accompanying notes 211-213 *infra*.

203. The problem defining the scope of fourth amendment guarantees can arise, however, in the context of civil litigation. *See, e.g.*, Gillard v. Schmidt, 579 F.2d 825 (3rd Cir. 1978); United States v. Bunkers, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975).

204. Craig v. Boren, 429 U.S. 190, 196 n.5 (1976).

remedy, the exclusionary rule, for violations of the fourth amendment justified restraint against enlarging the class of persons entitled to its benefits. Perhaps this is so, if the determination is viewed as policy based and the question is whether to expand the class of persons entitled to assert fourth amendment claims. However, the more fundamental question is whether the nature of the remedy sought is a relevant factor in the basic standing-related inquiry, that is, whether the constitutional provision relied on as the ground for relief should be properly viewed as protecting the individual asserting the claim.

The majority made only passing reference to this question when it stated that the necessity of showing a violation of personal rights is not obviated by arguing the deterrent purpose of the exclusionary rule. Justice Rehnquist argued that the process of identifying circumstances in which deterrence of unlawful police conduct might be furthered by a judicial ruling does not define the scope of fourth amendment protections.[205] This argument, however meritorious, nevertheless will not dispel doubts that the nature of the remedy sought in *Rakas* was a very important factor.

The manner in which *Rakas* was decided brings into focus a question which has troubled the courts and commentators for years: the extent to which the exclusionary rule remedy influences substantive fourth amendment pronouncements – the rights. In any event, no other recurring standing issue involves a remedy of such a controversial nature as the exclusionary rule in fourth amendment cases. The failure of the majority to establish the clear dividing line between the scope of the constitutional issue presented and the

---

205. 439 U.S. at 137. The Court utilized an interesting variation on the same argument in Zurcher v. Stanford Daily, 436 U.S. 547 (1978). In *Zurcher*, the offices of the Stanford Daily had been searched pursuant to a validly issued search warrant. There was no reason to believe that the Stanford Daily or any of its staff were in any way involved in the alleged criminal activity under investigation. *Id.* at 551. The paper sought declaratory and injunctive relief against the officials involved in the search. The district court held that the fourth amendment forbade the issuance of a warrant to search for materials in possession of one not suspected of a crime unless there was reason to believe that a subpoena *duces tecum* would be impractical or would, even when supported by a court order, be disregarded. *Id.* at 552. The district court narrowed the standard further when a newspaper, such as Stanford Daily, was the object of the search.

The district court based its ruling, in part, on the ground that such added fourth amendment protections were necessary because the deterrent aspect of the exclusionary rule is not present when the search is of a person who is not likely to be a defendant to a criminal charge. Stanford Daily v. Zurcher, 353 F. Supp. 124, 131-32 (N.D. Cal. 1972). Presumably, the person against whom the evidence seized was offered would lack "standing" to object to the search.

The Supreme Court rejected the argument as a basis upon which to provide fourth amendment protections, citing Alderman v. United States, 394 U.S. 165 (1969), and the philosophy stated therein that the added deterrent effect gained by permitting third-party standing was not sufficient to overcome the harm to the "public interest." Zurcher v. Stanford Daily, 436 U.S. at 562 n.9. The Court in *Zurcher* did not believe that many cases would arise in which the police, during the course of a criminal investigation, would be convinced that no criminal defendant would have standing to object so that they would feel free to ignore the fourth amendment. *Id.* The Court did, however, note that California courts recognized the concept of third-party standing so that the defendant against whom the evidence was offered could, in fact, challenge the search. *Id.*

peculiar nature of the remedy sought in fourth amendment cases was unfortunate, and necessarily led to the dissenters' assertion that Justice Rehnquist was actually using dissatisfaction with the exclusionary rule as a basis for *cutting back* the scope of substantive fourth amendment protections.[206]

It is also clear that the *Rakas* decision, rejecting a standing inquiry in favor of focusing directly on the scope of substantive fourth amendment guaranties by identifying the class of persons entitled to raise fourth amendment claims, represented no major change in policy. As previously noted,[207] the standing inquiry, when properly applied, has always involved, *sub silentio*, a determination of whether the constitutional provision relied on was properly viewed as providing direct protection for the claimant. The problem was that it has never been entirely certain that no aspect of the standing inquiry could serve as a substitute for resolving the substantive scope issue. The Court's repeated assertions that the standing inquiry was unrelated to the merits of the claim contributed to the confusion, although it is now clear that what the Court meant was that a grant of standing in fourth amendment cases did not mean that the challenge to the search and seizure was meritorious.[208] The *Rakas* decision rejecting the standing inquiry, therefore, makes it clear firstly, that fourth amendment cases require at the outset a determination of whether the amendment provides direct personal protection for the person asserting the claim, and secondly, that the process of labeling this type of inquiry as one of standing is unnecessary given the confusion which surrounds the term and the tendency to view it as a procedural inquiry unrelated to the merits.[209] Justice Rehnquist, however, could properly assert that the inquiry in either case, assuming that the standing inquiry was properly undertaken, should be the same.[210] The problem with *Rakas*' discarding of the basic standing inquiry is that it kept the need to make yet another standing decision: whether to permit the vicarious assertion of fourth amendment rights.

The majority's declaration that fourth amendment rights are "personal" in nature represents nothing more than a conclusion which does not speak directly to the question of third-party standing to raise fourth amendment claims. What the majority actually meant by the characterization of the right as "personal" in nature was that third-party standing was not going to be recognized in the context of fourth amendment claims. Having defined the scope of fourth amendment protections,[211] and having identified a limited

206. See text accompanying note 22 *supra*.

207. See text accompanying note 171 *supra*.

208. See note 2 *supra*.

209. The confusion surrounding fourth amendment standing decisions is evidenced by the Seventh Circuit's decision in United States v. Alewelt, 532 F.2d 1165 (7th Cir.), *cert. denied*, 429 U.S. 840 (1976). In *Alewelt*, the defendant's clothing was seized from the office of his mother's place of employment. The court, acknowledging that it was the defendant's clothing which was seized, held that he had standing to challenge the legality of the search. The court went on to hold, however, that the defendant had no legitimate expectation of privacy with respect to the office; therefore, the actions of the government did not violate his fourth amendment rights. Presumably the *Rakas* decision would eliminate the standing inquiry made in *Alewelt*. *See also* United States v. Shelby, 573 F.2d 971 (7th Cir. 1978).

210. 439 U.S. at 139.

211. See text accompanying notes 207-210 *supra*.

class of persons entitled to the direct protections of the amendment, it was then incumbent on the Court to analyze the case for the factors which would justify its position with respect to third-party standing. Instead, the majority's analysis begins with the unassailable declaration that the fourth amendment creates "personal" rights and concludes by suggesting that the "social costs" associated with the exclusionary rule mitigate against expanding the class of persons entitled to its benefits. This analysis hardly fits into the established scheme of third-party standing cases. This is due in part to the majority's failure to analyze fully the impact of the exclusionary rule on the third-party standing issue.

The manner in which the majority dealt with the matter leaves the impression that it was the nature of the constitutional provision involved rather than the circumstances in which the third-party claim arose which mandated the decision rejecting third-party rights. It is one thing to hold that the impact of the exclusionary rule — the deterrence factor — is an insufficient reason to enlarge the substantive scope of personal fourth amendment rights; it is quite another to consider the effect of the exclusionary rule in determining whether to recognize third-party standing.

The absence of full discussion of third-party standing principles was unfortunate in another respect. In all likelihood, defense lawyers will attempt to circumvent the holding in *Rakas* restricting the class of persons entitled to raise fourth amendment claims by urging the state courts to recognize the concept of third-party standing in fourth amendment cases.[212] The state courts, of course, may not enlarge the substantive protections afforded by the fourth amendment in the respect it was defined in *Rakas*;[213] they may, however, under existing theory, permit litigants with third-party standing to raise fourth amendment claims, and thus effectively negate the *Rakas* holding. The effect of such a process on federal habeas corpus claims and on the direct review process in the Supreme Court is, at best, uncertain.[214]

Prior to the ruling in *Rakas*, the Court had briefly considered third-party standing in fourth amendment cases in *Alderman v. United States*.[215] In *Alderman*, the Court relied on third-party standing principles of general application when passing on the issue of third-party standing to raise fourth amendment issues. The Court in *Alderman* referred to the absence, in fourth amendment third-party standing claims, of the special circumstances which

212. Third-party standing in fourth amendment cases has been available in California for a number of years. People v. Martin, 290 P.2d 855 (1955). *See also* Kaplan v. Superior Court of Orange, 98 Cal. Rptr. 649, 491 P.2d 1 (1971).

213. Oregon v. Hass, 420 U.S. 714 (1975).

214. L. TRIBE, *supra* note 201, at 81-82. In United States v. Cella, 568 F.2d 1266 (9th Cir. 1977), the defendant argued that evidence allegedly obtained by state officials in violation of the fourth amendment and turned over to federal prosecutors, which the defendant lacked standing to challenge, should not be admissible in a federal prosecution in California because of the California state court position recognizing third-party standing to raise fourth amendment issues. The Ninth Circuit rejected the argument, saying that standing in federal courts is a federal question. The court rejected as speculative the argument that its ruling might encourage state officials to carry out searches which would be contrary to the law of their own jurisdiction.

215. 394 U.S. 165 (1969). See text accompanying notes 152-154 *supra*.

existed in *Barrows v. Jackson*.[216] These were the need to exclude evidence in order to protect the rights of third parties, and the ability of the third-party to fully vindicate his or her own rights when, and if, it became necessary to do so.[217]

It is true, of course, that fourth amendment third-party standing cases do not fit neatly into the third-party standing paradigm described by Justice Blackmun in *Singleton*. The criminal defendant seeking to assert third-party standing to challenge a search and seizure is not compelled to engage in a course of conduct which threatens the constitutional rights of a third-party. Likewise, there is no direct obstacle to the assertion of the claim by the third person whether by way of a motion to suppress, if the third party is charged with a crime, or by direct civil suit against offending officials. On the other hand, it is safe to assume that the criminal defendant would be as effective a proponent of the claim as would the third party whose rights were directly involved. In fact, if the third-party is not charged with a crime, it would not be unreasonable to assume that the person seeking to assert the third-party claim by way of defense to a criminal charge would be a better advocate of the claim.

Obviously missing from this analysis is the extent to which the underlying basis for the exclusionary rule should affect the ruling on the third-party standing question. In the traditional third-party standing case, the third-party claimant seeks relief which will result in the removal of a disability imposed on some other party. The Court's prior third-party standing cases fit within this concept.[218] Success on the merits by the third-party claimant in fourth amendment cases, however, produces no such result; instead, the relief granted is exclusion of evidence in the criminal trial directly affecting only the third-party claimant. The third-party whose rights were asserted receives no direct benefit except to the extent the public in general benefits from the ruling. It must be kept in mind, however, that the exclusionary rule as a remedy for fourth amendment violations is not justified on the basis of remedying a specific wrong; instead, it is based upon the theory of deterrence of future violations with respect to unknown victims.

The question to be resolved, therefore, centers on the extent to which third-party standing may be granted to advance societal rather than individual rights. In a very real sense, resolution of the third-party standing problem requires a determination of how seriously society takes the need to deter unlawful police conduct. The grant of third-party standing in fourth amendment cases would clearly further the deterrent rationale. The dissenting opinion's reference to this possibility, however remote, of flagrant fourth amendment violations in situations such as *Rakas* is difficult to refute and cannot be lightly dismissed.[219]

---

216. 346 U.S. 249 (1953). See text accompanying note 192 *supra*.

217. 394 U.S. at 171.

218. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); Barrows v. Jackson, 346 U.S. 249 (1953).

219. See text at notes 81-82 *supra*. *Compare* White & Greenspan, *supra* note 45, at 334-38 *with* Trager & Lobenfeld, *supra* note 40, at 451-57.

The net effect of *Rakas*, therefore, is to leave in doubt the extent to which judicial attitudes concerning the effects of the exclusionary rule determine fourth amendment decisions. There is language in the majority opinion which would suggest that, to the extent that *Rakas* represents a narrowing of the substantive scope of fourth amendment protections, misgivings concerning the impact of the exclusionary rule were the controlling factors. On the other hand, it is possible to read the majority opinion as redefining the scope of fourth amendment protections without regard to the exclusionary rule and rejecting the deterrent rationale of the exclusionary rule as a reason for promulgating a more all-encompassing substantive definition of the scope of fourth amendment guarantees. Finally, one might read the majority opinion as rejecting the argument of increased deterrence as a ground for granting third-party standing. The uncertainty created by the majority opinion simply reinforces the belief that we might reasonably expect further erosion of substantive fourth amendment protections until such time as the final act involving the exclusionary rule is played out.

CONCLUSION

The impact of the *Rakas* decision is great because of its effect on the adjudicatory process and substantive fourth amendment principles. With respect to the effect on the process, it is difficult to quarrel with the decision to abandon the standing inquiry. The process of identifying the scope of constitutional guarantees in the sense of identifying the circumstances in which particular individuals will be entitled to claim the benefits of such guarantees is not materially aided by viewing it as an aspect of the standing inquiry. The concept of standing was never envisioned as a process which would aid the substantive scope inquiry. In addition, there has always been a certain arbitrariness associated with prior fourth amendment standing decisions, and *Rakas* will most probably serve as the basis for reconsideration of all such theories.

On the other hand, consideration of the problem presented in *Rakas* as a substantive scope issue did not eliminate the need to resolve the third-party standing inquiry. In one sense, *Rakas* cannot be faulted. The Court's existing third-party standing process has given rise to exceptions to the general rule forbidding third-party standing which are difficult to apply and justify. In the final analysis, no matter how one seeks to separate the substance of a claim from the non-substantive process of identifying the factors justifying a grant of third-party standing, the decision is largely one concerning the use or abuse of the judicial process as a means of advancing general societal rights as opposed to individual rights. More specifically, the problem is deciding whether the collateral effects of a decision justify a process of enlarging the class of possible claimants. The fourth amendment third-party standing issue, because of the controversy surrounding the exclusionary rule, represents the classic illustration of the forces at work.[220] Because the premise of the exclusionary rule is one of deterrence of future violations with respect to unknown victims, rather than one remedying past violations of fourth amendment rights, *Rakas* on the third-party standing issue can only be interpreted

as illustrating how seriously the Court views the objective of deterring future fourth amendment violations.

On a substantive level, *Rakas* has mandated that the already ill-defined concept of reasonable expectation of privacy shoulder an additional burden, that of personalizing the scope of substantive fourth amendment protections. The use of the standard is defensible because the concept is without meaning unless it is linked to specific individuals. Neither is it surprising that a society which gives considerable significance to the concept of private property would view the assertion of a property-type interest in the area searched as a significant, if not conclusive, method of providing the link between the concept of privacy and specific individuals. Although a violation of property rights, in the trespassory sense, may not be a necessary ingredient leading to a finding of a violation of a privacy interest, *Rakas* has the effect of limiting the reach of fourth amendment protections to those individuals with the requisite property right in the area searched. The majority in *Rakas* thus once again links the concepts of privacy and property, albeit in a form quite different from that existing prior to the *Katz* decision.

---

220. On the one hand, since the premise of the exclusionary rule is to deter future violations of constitutional rights, the collateral effects of allowing third-party standing to raise fourth amendment issues would be consistent with the objective of the rule. If the police know that illegally seized evidence is inadmissible no matter against whom it is offered, there should be even less incentive to use illegal means to gather evidence. On the other hand, the "social costs" associated with implementation of the exclusionary rule—the loss of reliable and probative evidence of guilt—are high; the costs are even higher if persons whose rights were not personally violated may also invoke the rule. In other areas of the law, the grant of third-party standing to vindicate the rights of third persons who, for whatever reason do not assert their rights directly, is a decision which implicates the more general question of what types of injuries may be redressed in the judicial forum. The "social costs" will vary, depending on the nature of the remedy sought, and must, of course, also include the costs associated with operation of the judicial system.