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Standing Up for Fourth Amendment Rights: Salvucci, Rawlings, and the Reasonable Expectation of Privacy (Comment)

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STANDING UP FOR FOURTH AMENDMENT RIGHTS: SALVUCCI, RAWLINGS, AND THE REASONABLE EXPECTATION OF PRIVACY

The initial inquiry a court must make before considering a motion to suppress evidence based on an unreasonable search and seizure is whether the individual has standing under the fourth amendment. This Note examines the historical development of the standing doctrines leading to the reasonable expectation of privacy test adopted by the Supreme Court in Rakas v. Illinois. *The Note also identifies the problems created by the Court's far-reaching application of this test. The author concludes that the overall effect of recent decisions may be to limit the number of defendants able to assert fourth amendment claims, since suppression hearing testimony may be admissible against a defendant for impeachment purposes should a defendant choose to testify on his or her own behalf. The author's conclusion is predicated on the belief that the factors comprising the reasonable expectation of privacy test are vague and shifting and the notion that property rights have been abandoned in determining fourth amendment interests.*

INTRODUCTION

THE FOURTH amendment to the United States Constitution is the primary source for the fundamental guarantees of privacy and personal security from governmental intrusion.[1] The amendment reads in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."[2] To assert a fourth amendment claim to suppress evidence obtained through an allegedly illegal search, an individual must prove that his or her personal fourth amendment rights have been violated.[3] Traditionally, this initial inquiry has been known as standing.[4]

1. Wolf v. Colorado, 338 U.S. 25, 27 (1948). *See generally* Whalen v. Roe, 429 U.S. 589, 607 (1977); Roe v. Wade, 410 U.S. 113, 152 (1973).

2. U.S. CONST. amend. IV.

The amendment originated as a protection against the history of executive abuse of search and seizure in both the American colonies and in England before the revolution. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 3 U. RICH. L. REV. 278, 298 (1969). For a general history of the fourth amendment, see Katz, *Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States*, 3 CAN.-U.S. L.J. 103 (1980); Stengel, *supra*.

3. *See* Alderman v. United States, 394 U.S. 165 (1969).

4. In Rakas v. Illinois, 439 U.S. 128 (1978), however, the Court attempted to analyze these issues in terms of substantive fourth amendment theory rather than standing. The term "standing" will be used in this Note for purposes of clarity. *See* note 133 *infra* and accompanying text.

Standing to assert a fourth amendment claim is fundamentally different from the standing requirements of justiciability.[5] Presumably, a defendant could meet the basic justiciability requirement simply by demonstrating an interest in the incriminating nature of the evidence which the government seeks to admit.[6] Obtaining standing under the fourth amendment, however, is more burdensome. Since the historical purpose of that amendment was to protect an individual's property interests from governmental search and seizure[7] and that purpose has evolved more recently to protect primarily privacy interests,[8] a defendant seeking standing under the fourth amendment must demonstrate that these interests—property and privacy—have been invaded. In recent cases, however, the Supreme Court has recognized that the fourth amendment protects exclusively privacy interests and has abandoned its historical emphasis on property rights.[9]

The modern standing tests originated with the automatic standing rules of *Jones v. United States*.[10] In *Jones*, the Supreme Court held that an individual charged with a crime of possession automatically had standing to challenge a search and seizure of items which were essential to proving the government's case.[11] The Court held, alternatively, that anyone legitimately on the premises at the time of the search would have standing to challenge that search.[12] These rules attempted to eliminate the confusion created by the lower court's application of rules from the common law of private property to determine standing.[13]

In *Simmons v. United States*,[14] the Court expanded the rationale of *Jones* and created a procedural protection for a defendant's

5. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493, 494 n.12 (1980). The usual standard for justiciability standing is "that the litigants have sufficient stake in the outcome of a controversy to ensure that all relevant considerations will be fully aired." *Id.*, *see* Flast v. Cohen, 392 U.S. 83, 95 (1968); Doremus v. Board of Educ., 342 U.S. 429, 432–35 (1952). *See generally* Scott, *Standing in the Supreme Court—A Fundamental Analysis*, 86 HARV. L. REV. 645, 670, 675–77 (1973).

6. *See* Kuhns, *supra* note 5, at 494 n.12.

7. *See* notes 42–68 *infra* and accompanying text. *Cf.* note 2 *supra*, which provides the historical background to the amendment.

8. *See* Katz v. United States, 389 U.S. 347, 353 (1967); Rawlings v. Kentucky, 448 U.S. 98, 104 (1980).

9. *E.g.*, Rawlings v. Kentucky, 448 U.S. at 105; Rakas v. Illinois, 439 U.S. 128, 143 (1978).

10. 362 U.S. 257 (1960).

11. *Id.* at 264.

12. *Id.* at 265.

13. *See* notes 69–94 *infra* and accompanying text.

14. 390 U.S. 377 (1968).

suppression hearing testimony. This protection applies even where the defendant is not charged with a crime of possession and is not legitimately on the premises at the time of the search.[15] Under *Simmons*, a defendant's testimony at a hearing on a motion to suppress evidence obtained through an unreasonable search and seizure is inadmissible at trial in the government's case in chief.[16] The *Simmons* protection is the primary protection left to fourth amendment defendants today.[17]

In *Rakas v. Illinois*,[18] the Court overruled the second half of the *Jones* decision which provided standing to anyone legitimately on the premises at the time of a search. Instead, the Court adopted the test from *Katz v. United States*[19] which requires the defendant to show a reasonable expectation of privacy in the place searched.[20] This test, adopted from Justice Harlan's concurring opinion in *Katz*, requires the defendant to show an actual subjective expectation of privacy in the place searched which a majority of society would recognize as reasonable.[21]

With its decisions in *Salvucci v. United States*[22] and *Rawlings v. Kentucky*,[23] the Court completely reworked the fourth amendment standing doctrine established in *Jones*.[24] In *Salvucci*, the Court overruled that part of *Jones* which had given automatic standing to defendants charged with possessory crimes.[25] Instead, the Court adopted the *Rakas* approach which requires a defendant to show a reasonable expectation of privacy in the place searched.[26] In *Rawlings*, the Court held that property rights are no longer determinative of fourth amendment interests. To prevail, a defendant must establish a reasonable expectation of privacy in the place searched. If the defendant cannot demonstrate such an expectation, no unreasonable governmental intrusion has occurred.[27]

In this Note, the author will begin by discussing the historical

15. *See* notes 95–111 *infra* and accompanying text.
16. 390 U.S. at 394.
17. *See* notes 103–11 *infra* and accompanying text.
18. 439 U.S. 128 (1978).
19. 389 U.S. 347 (1967).
20. *See* notes 112–70 *infra* and accompanying text.
21. 389 U.S. 361 (Harlan, J., concurring).
22. 448 U.S. 83 (1980).
23. 448 U.S. 98 (1980).
24. *See* notes 171–209 *infra* and accompanying text.
25. 448 U.S. at 85.
26. *Id.* at 93.
27. Rawlings v. Kentucky, 448 U.S. at 106.

development of the standing doctrines which culminated in the *Jones* decision.[28] The modern standing doctrine, as represented by *Jones* and *Simmons*, then will be analyzed.[29] Furthermore, the author will discuss *Rakas*, concentrating on the Court's analysis of standing and its adaptation of the *Katz* reasonable expectation of privacy test.[30] Finally, the author will examine the extension of *Rakas* in *Salvucci*[31] and the Court's far-reaching application of the reasonable expectation of privacy test in *Rawlings*.[32]

In conclusion, the author will isolate three specific problems created by the Court's new approach to standing. First, the government may use a defendant's suppression hearing testimony to impeach his or her testimony at trial.[33] Second, the courts have adopted a mechanistic approach to the determination of fourth amendment standing because the factors comprising the reasonable expectation of privacy test are vague and shifting.[34] Finally, the Court has eliminated the historical underpinnings of previous fourth amendment analysis by abandoning property rights as determinative of fourth amendment standing.[35] If these three problems which stem from the application of the reasonable expectation of privacy tests are viewed collectively, the result is a narrowing of fourth amendment rights.

I. STANDING

The preliminary inquiry which a court must make before it will consider a motion to suppress evidence based on an unreasonable search and seizure is whether the individual filing the motion has standing.[36] In the federal courts, this inquiry begins by ascertaining whether the defendant is a "person aggrieved" by an unreasonable search or seizure.[37] It generally is accepted that:

> In order to qualify as a 'person aggrieved by an unlawful

28. *See* notes 36–68 *infra* and accompanying text.
29. *See* notes 69–111 *infra* and accompanying text.
30. *See* notes 112–70 *infra* and accompanying text.
31. *See* notes 171–92 *infra* and accompanying text.
32. *See* notes 193–210 *infra* and accompanying text.
33. *See* notes 211–28 *infra* and accompanying text.
34. *See* notes 229–40 *infra* and accompanying text.
35. *See* notes 241–51 *infra* and accompanying text.
36. *But see* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). California requires only a modified version of the standing tests used in the federal courts. For a discussion of the California standard, see Note, *The Vicarious Exclusionary Rule in California*, 24 STAN. L. REV. 947 (1972).
37. *See* Rakas v. Illinois, 439 U.S. at 128 n.2.
An individual may raise the reasonableness of a search and/or seizure in a motion to

> search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else.[38]

Standing confers the right *to challenge* unreasonable government conduct under the fourth amendment. The illegality of the search and subsequent suppression of evidence are factual determinations made after standing is decided.[39] Standing, therefore, acts as a gatekeeper for challenges of searches and seizures.[40] This preliminary inquiry into standing prevents individuals who have not been harmed by a search from questioning the reasonableness of the search. Standing thus becomes the courts' most important tool for controlling and limiting the number of individuals eligible to assert fourth amendment claims.[41]

A. *The Historical Background of Standing*

The earliest standing tests—collectively known as the trespass doctrine—were based solely on the relative strength of one's possessory or property interest in the items seized or the property searched.[42] Many of the subtle distinctions of property law were imported to standing analysis.[43] These distinctions, which developed as a means of determining an individual's interests in property as compared to the interests of other individuals, proved cumbersome and confusing when applied to an individual's right to avoid unreasonable search and seizure. Under the trespass doctrine, possession, not title, was the most important factor in determining standing.[44]

In its purest form, the trespass doctrine stands for the proposition that an unreasonable search and seizure only can be chal-

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suppress the evidence before trial. The court may direct a hearing on the issues before trial or defer determination of the issues until the trial. FED. R. CRIM. PRO. 41(f) and 12(b).

38. Jones v. United States, 362 U.S. 257, 261 (1960).

39. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360–61 (1974).

40. *See generally* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970).

41. *See* Brown v. United States, 411 U.S. 223, 227–30 (1973); Alderman v. United States, 394 U.S. 165, 171–74 (1969); Duntile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1, 29–30 (1971); White & Greenspan, *supra* note 40, at 335.

42. *See generally* Olmstead v. United States, 277 U.S. 438 (1928); Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952).

43. Jones v. United States, 362 U.S. at 265–66.

44. Edwards, *supra* note 42, at 490.

lenged by the "owner, lessee, or lawful occupant of the premises searched."[45] The doctrine's name originated from the concept that fourth amendment protections are triggered by a government official or law enforcement officer's physical trespass onto a person's real property.[46] This rule was interpreted strictly in *Coon v. United States*[47] where the defendant leased a small building which he used as both a home and a whiskey distillery. Prohibition officers searched the building without a warrant and discovered containers of whiskey.[48] Holding that the defendant lacked standing to challenge the legality of the search, the court denied his motion to suppress the testimony of the prohibition officers involved in the search. The Court reasoned that although the defendant leased the building, his occupancy was "merely incident" to the manufacture of intoxicating liquor, and therefore, the building could not be regarded as his home.[49] Thus, the defendant could not challenge the legality of the search because his rights had not been invaded.

Contrary to the strict view taken in *Coon*, other courts have adopted rather broad interpretations of the trespass doctrine. In *United States v. Stappenback*,[50] for example, papers were taken from the defendant's coat during a prohibition raid while the coat was hanging in a building owned by another individual. The defendant was not on the premises at the time of the search.[51] Applying a theory of constructive possession, the court reasoned that the coat remained in defendant's possession because he was its owner, even though he was absent from the premises at the time of the search.[52]

Although *Coon* and *Stappenback* are not in direct conflict, the divergence in the breadth of their respective interpretations indicates the application of two separate rules. In *Stappenback*, constructive possession alone was deemed sufficient to confer standing; whereas in *Coon*, the defendant was denied standing even though he had possession through a valid lease and was present at the time of the search. In addition to these broad differ-

45. Coon v. United States, 36 F.2d 164, 165 (10th Cir. 1929).

46. Comment, *The Relationship Between Trespass and the Fourth Amendment Protection after* Katz v. United States, 38 OHIO ST. L.J. 709 (1977).

47. 36 F.2d at 164.

48. *Id.* at 165.

49. *Id.*

50. 61 F.2d 955 (2d Cir. 1932).

51. *Id.* at 956.

52. *Id.* at 957.

ences in interpretation, the courts also evidence many directly conflicting interpretations of the trespass doctrine. While standing was allowed for constructive possession in *Stappenback*, for example, other courts have held that the owners of premises occupied by another do not have standing to challenge a search of those premises.[53] As a result of these contrarieties, it became possible that if neither the owner[54] nor the lessee[55] had standing, no one would have standing to challenge a clearly unreasonable search.[56] Such distinctions led to confusion for both the courts and law enforcement officials.

To alleviate the confusion which eventually surrounded the trespass doctrine, courts began to apply a constitutionally protected areas test.[57] This test recognized that certain areas presumptively were protected from government intrusion[58] unless the plain view doctrine applied.[59] The constitutionally protected areas test, like the trespass doctrine, also was difficult to apply because of its idiosyncrasies. Although it was certain that a home constituted a constitutionally protected area,[60] whereas an open field did not,[61] there were few other areas which clearly were constitutionally protected. To determine whether an area was deserving of such protection, it was compared to areas which already had been declared protected by the courts. In determining that a telephone booth was a constitutionally protected area, for example, one court compared it to a taxi and an apartment.[62] Another court compared a telephone booth to a home, an office and a taxi and held that it was not a constitutionally protected area.[63]

The Supreme Court flatly rejected the constitutionally pro-

53. *See, e.g.*, Schnitzer v. United States, 77 F.2d 233 (8th Cir. 1935); Cantrell v. United States, 15 F.2d 953 (5th Cir. 1926).

54. *See* note 53 *supra* and accompanying text.

55. Coon v. United States, 36 F.2d at 165.

56. For a catalogue of the many variations in the trespass doctrine, see Edwards, *supra* note 42, at 472–80.

57. *See* Scoular, *Wiretapping and Eavesdropping: Constitutional Development from Olmstead to Katz*, 12 ST. LOUIS U.L.J. 513, 516, 523–26 (1968). The courts developed the concept of constitutionally protected areas to avoid overruling previous trespass cases. *Id.*

58. Weeks v. United States, 232 U.S. 383 (1914).

59. Rawlings v. Kentucky, 448 U.S. 98 (1980); Hester v. United States, 265 U.S. 57, 58 (1924). Under the plain view doctrine, items clearly visible to government officials are not protected from search and seizure since the actions of officials in seizing plainly visible objects would not be unreasonable. 265 U.S. at 59.

60. Weeks v. United States, 232 U.S. at 390.

61. Hester v. United States, 265 U.S. at 59.

62. United States v. Stone, 232 F. Supp. 396, 398 (N.D. Tex. 1964).

63. United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964).

tected areas test in *Katz v. United States*.[64] The Court noted: "The correct solution [to] Fourth Amendment problems is not necessarily promoted by the incantation of the phrase 'constitutionally protected area.' "[65] Justice Stewart, writing for the Court, reasoned that "the Fourth Amendment protects people, not places,"[66] and that the doctrine is not a "talismanic solution to . . . Fourth Amendment problem[s]."[67] The Court in *Katz* noted by example that if a person knowingly exposes objects to the public, even within the confines of a private home, that individual may not claim fourth amendment protection.[68] Before it was rejected, however, the constitutionally protected areas doctrine fueled the confusion already created by the trespass doctrine.

B. *The Modern Standing Doctrine*

The Supreme Court first considered the standing doctrines in *Jones v. United States*.[69] The defendant, Jones, was staying at a friend's apartment when officials searched the apartment and seized narcotics. Jones sought to prevent the introduction of the seized narcotics into evidence, arguing that the warrant lacked a showing of probable cause.[70] Jones testified that the apartment belonged to a friend, that he had the friend's permission to stay there and that he slept there "maybe a night."[71] In addition, Jones had a key to the apartment and kept clothing there.[72]

At the suppression hearing, the government questioned the defendant's standing to challenge the legality of the search because

64. 389 U.S. 347 (1967).

65. *Id.* at 350.

66. *Id.* at 351.

67. *Id.* n.9.

68. *Id.* at 351 (citing Lewis v. United States, 385 U.S. 206, 210 (1966) and United States v. Lee, 274 U.S. 559, 563 (1927)).

69. 362 U.S. 257 (1960). Justice Frankfurter delivered the majority opinion and was joined by Chief Justice Warren and Justices Black, Clark, Harlan, Brennan, Whittaker, and Stewart. Justice Douglas joined in the Court's standing decision but dissented from the determination that the warrant was supported by probable cause.

70. *Id.* at 258–59. The fourth amendment requires a showing of probable cause to support a warrant. In Brinegar v. United States, 338 U.S. 160 (1949), the seminal decision defining probable cause, the Supreme Court stated that if police had "reasonable cause to believe" that criminally related objects are in a given location, they have grounds to obtain a warrant to search that place, or under special circumstances, to search without a warrant. *Id.* at 175. *See generally* Amsterdam, *supra* note 39, at 358–60; *see also* United States v. Ventresca, 380 U.S. 102, 108 (1965).

71. 362 U.S. at 259.

72. *Id.*

he had no possessory interest in the apartment.[73] Since Jones failed to admit possession of the narcotics and did not have a sufficient possessory interest in the place searched, his motion to suppress the evidence was denied for lack of standing.[74] Jones subsequently was convicted on charges of possession of narcotics.[75] Although the court of appeals upheld the lower court's conviction,[76] the Supreme Court vacated the decision and remanded the case for proceedings in conformity with its newly enunciated standing rules.[77]

These rules reflected a two-pronged standing test: Standing would be conferred automatically either when the defendant was charged with a crime of possession[78] or when the defendant was legitimately on the searched premises.[79] In a multi-step analysis, the court noted that the standing requirements formerly used by the lower courts placed the defendant charged with a crime of possession in a dilemma. The defendant either had to admit possession to gain standing, in which case the admission could be used against him or her at trial, or the defendant could choose not to suppress the evidence and forego his or her fourth amendment rights.[80] Where possession is the major element of a crime, this admission requirement forced a defendant to commit perjury by testifying that he or she did in fact have possession in order to present a defense. Such an admission, however, most likely would be sufficient evidence to result in a conviction.[81]

The Court also reasoned that the old standing tests allowed the

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73. *Id.*

74. *Id.* at 258.

75. *Id.* Jones was convicted under the specific provisions of the Act of Jan. 17, 1914, ch. 9, 38 Stat. 275 (formerly 21 U.S.C. § 174), and the Act of Aug. 16, 1954, ch. 736, 68A Stat. 3 (formerly 26 U.S.C. § 4704(a)).

76. Jones v. United States, 262 F.2d 234 (D.C. Cir. 1959).

77. 362 U.S. at 273.

78. *Id.* at 264.

79. *Id.* at 265.

80. *Id.* at 263–64. Instances where standing admissions were used against a defendant at trial include the following: Accardo v. United States, 247 F.2d 568, 569–70 (D.C. Cir. 1957); United States v. Eversole, 209 F.2d 766, 768 (7th Cir. 1954); Scoggins v. United States, 202 F.2d 211, 212 (D.C. Cir. 1953); Grainger v. United States, 158 F.2d 236, 238 (4th Cir. 1946). *Contra* United States v. Dean, 50 F.2d 905, 906 (D. Mass. 1931) (motion to suppress allowed where defendant could not claim possession because he only leased the premises).

81. 362 U.S. at 261–62. The Court apparently thought that when an allegation of possession was not involved, there was no harm in forcing a defendant to claim possession of a seized object to gain standing. This aspect of the earlier test, therefore, presumably was not affected by the decision.

government to engage in an untenable contradiction. While the government's case in chief rested on the defendant's possession of narcotics at the time of his arrest, "[t]he fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that [the defendant] did not have possession of the narcotics at that time."[82] The Court stated that this type of contradiction was highly inconsistent with fair standards for the administration of criminal justice.[83] Thus, the Court concluded that in cases where the indictment alleged possession, the defendant was automatically "revealed as 'a person aggrieved by an unlawful search and seizure.' "[84]

Finally, the Court in *Jones* disregarded what it classified as "subtle distinctions, developed . . . by the common law . . . of private property."[85] The Court noted that these rules were shaped by distinctions "whose validity is largely historical"[86] and that these property rules were not formed with reference to the constitutional safeguards they were meant to protect.[87] An individual's rights vis-à-vis those of others are not comparable to such rights vis-à-vis the government. An individual never has the right to trespass on another's property, but the government may trespass if its agents act reasonably.[88] Furthermore, the fact that the Court had rejected property distinctions in other areas of the law, such as admiralty,[89] indicated that there was no overwhelming reason to retain such distinctions in the area of search and seizure. Apparently the Court thought that these property concepts were not so embedded jurisprudentially to withstand a conflict with the fair administration of justice.

The *Jones* decision represented a breakthrough in the law of fourth amendment standing because it eliminated much of the confusion created by the early property doctrines.[90] While it was unclear how the rules in *Jones* should be applied in subsequent situations,[91] lower courts interpreted the decision very broadly.[92]

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82. *Id.* at 263.

83. *Id.*

84. *Id.* at 264, quoting FED. R. CRIM. PRO 41(e).

85. 362 U.S. at 266.

86. *Id.*

87. *Id.*

88. Amsterdam, *supra* note 39, at 388.

89. 362 U.S. at 266.

90. *See* Note, *Standing to Suppress Unreasonably Seized Evidence*, 14 SW. L. REV. 521, 525 (1960); Note, *Lawful Presence on Illegally Searched Premises as Sufficient Basis for Motion to Suppress Evidence Seized Thereon*, 14 VAND. L. REV. 418, 421 (1960).

91. *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 95, 151–53 (1960).

92. *See, e.g.*, Niro v. United States, 388 F.2d 535, 537 (1st Cir. 1968); United States v.

Several contingencies, for example, such as the standing of an absentee owner or the owner of property seized from a third party, were left open for interpretation.[93] It was not until almost two decades after its formulation, however, that the *Jones* test came under fire as being too broad a test for fourth amendment rights.[94]

The next major case in which the Court considered standing was *Simmons v. United States*.[95] The factual circumstances of *Simmons* involved the investigation of an armed robbery during which police conducted a warrantless search of a suspect's mother's house. During that search, the police discovered two suitcases belonging to the defendant who was another suspect. One of the suitcases contained a gun holster, a sack similar to the one used in the robbery, and bill wrappers from the bank which had been robbed.[96] At trial, the defendant sought to suppress this evidence. The *Jones* test arguably did not apply since the defendant was neither charged with a crime of possession nor legitimately present on the premises at the time of the search.[97] As the Court observed, "[t]he only . . . way in which he could [have] found standing to object to the admission of the suitcase was to testify that he was its owner."[98]

The Court recognized that the defendant in this case faced the same dilemma as that faced by the defendant in *Jones*—admit possession and incriminate himself or forego his fourth amendment rights.[99] Although the defendant was not charged with a crime of possession, admitting possession of the suitcase would

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Thomas, 216 F. Supp. 942, 944–45 (N.D. Cal. 1963). *But see* United States v. Konigsberg, 336 F.2d 844, 847 (3d Cir.), *cert. denied*, 379 U.S. 933 (1964) (*Jones* held applicable only where mere possession is sufficient to convict).

93. *The Supreme Court*, *supra* note 91, at 151. These situations have created some of the subsequent interpretive problems of *Jones*. Another interpretive problem is illustrated by Simmons v. United States, 390 U.S. 377 (1968), which examined the standing of the owner of property seized from a third party. For a discussion of *Simmons*, see notes 95–111 *infra* and accompanying text.

94. *See* text accompanying note 113 *infra*.

95. 390 U.S. 377 (1968). Justice Harlan delivered the majority opinion and was joined by Chief Justice Warren and Justices Douglas, Harlan, Brennan, Stewart, and Fortas. Justice Black filed a separate opinion dissenting from the Court's standing decision. Justice White joined portions of the majority opinion but also joined the dissenting portions of Justice Black's opinion.

96. *Id.* at 380.

97. *Id.* at 390–91.

98. *Id.* at 391.

99. *See* notes 78–84 *supra* and accompanying text.

place him at the scene of an armed robbery.[100] The Court reasoned that the defendant would be deterred from asserting his fourth amendment claim if his testimony at the suppression hearing were admissible against him at trial.[101]

The Supreme Court noted, alternatively, that forcing the defendant to choose between his fourth amendment rights and self-incrimination violated his fifth amendment right against such self-incrimination. The Court stated that a defendant's testimony at a suppression hearing arguably may be voluntary, since the defendant would be forced to forfeit only the benefit of testifying in his own behalf; when the benefit is one conferred by the Bill of Rights, however, an "undeniable tension is created."[102] To avoid forcing the defendant to trade one constitutional right for another, the Court held that a defendant's standing testimony at a suppression hearing is not admissible against him or her at trial.[103]

On its face, *Simmons* appears to eliminate the dilemma confronting the Court in *Jones*[104] since it offers the defendant complete protection from the use of his or her suppression hearing testimony in the government's case-in-chief.[105] In the absence of the protection offered by *Jones*, however, the *Simmons* protection could be potentially meaningless. Since *Simmons* only provides a use immunity for a defendant's suppression hearing testimony, the government still could defeat the defendant's standing by denying him or her a possessory interest for purposes of the search. At

100. 390 U.S. at 391. The Court acknowledged that because an admission would not prove an element of the crime, as with possession, a serious dilemma was not presented. *Id.*

101. *Id.* at 392–93.

102. *Id.* at 394.

103. *Id.* Justice Black stated in a dissenting opinion that only a few defendants would be deterred from asserting a fourth amendment claim. *Id.* at 395–97. This small risk is outweighed by the value of allowing the government to use such testimony at trial. Justice Black's argument rests on the assumption that in these "marginal" cases the defendant is almost always guilty. *Id.* at 397. This position, however, ignores the fact that even guilty defendants should be afforded due process. Moreover, the assumption of guilt seems unfounded since the defendant has not been convicted at this stage of the proceeding.

Concerning the majority's fifth amendment rationale, Justice Black stated that the privilege against self-incrimination is waived by the defendant's voluntary testimony at the suppression hearing. *Id.* at 397–98 (Black, J., dissenting).

104. White & Greenspan, *supra* note 40, at 338–44. *See also* Steps, *Standing to Object to Unreasonable Search and Seizure*, 34 MO. L. REV. 575, 585 (1969); Note, *Testimony Given in Support of a Motion to Suppress Evidence Not Admissible at Trial*, 18 AM. U.L. REV. 208 (1968).

105. 390 U.S. at 390.

trial, however, the prosecution could assert that the defendant possessed the seized items to prove the defendant's guilt.

The only protection offered by *Simmons* is that a defendant's testimony at the suppression hearing will not be admissible against him or her at trial on the issue of guilt or innocence. Under *Jones*, however, a defendant charged by the government with possession would have automatic standing to challenge the unreasonable government conduct, and the government would not have the opportunity to deny the fact of possession. Even if the government did not succeed in defeating the suppression motion under *Simmons*, the possibility that a defendant's suppression testimony could reveal incriminating evidence that would aid the prosecution in the preparation of its case or that the defendant's testimony could be used at trial for impeachment purposes is not accounted for in the decision.[106] A defendant, however, would not be committing perjury by relying on the *Jones* automatic standing test since it is the government's assertion of possession, not the defendant's, that results in automatic standing.[107]

The *Simmons* Court did not appear to be overruling or limiting *Jones*.[108] Rather, the Court stated that it was expanding the rationale of *Jones* to apply to defendants not charged with crimes of possession.[109] Since the government does not allege possession as an element of the crime in such a situation, the dilemma is not as severe and the protection afforded need not be as complete as when such possession is alleged.[110] The *Simmons* decision should be read as augmenting the *Jones* decision. *Simmons*, therefore, does not offer a basis for rejecting the dilemma rationale of *Jones* but rather strengthens and adds credibility to that reasoning.[111]

C. *The Recent Reevaluation of Standing*

The *Jones* decision came under close scrutiny in the late 1970's. In *Rakas v. Illinois*,[112] the Court specifically overruled the test in *Jones* which granted standing to anyone legitimately on the

106. *Id.*

107. 362 U.S. at 263.

108. 390 U.S. at 390–91.

109. *Id.* at 391–92.

110. *Id.*

111. Subsequently, in Brown v. United States, 411 U.S. 223, 228 (1973), the Court indicated that *Simmons* might undercut *Jones*.

112. 439 U.S. 128 (1978). Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger and Justices Stewart, Powell, and Blackmun joined. Justice Powell, joined by Chief Justice Burger, filed a separate concurring opinion to stress that the

searched premises.[113] The defendants in *Rakas*, while fleeing from the scene of an armed robbery, were stopped by police and ordered out of the car in which they were passengers.[114] Two police officers searched the vehicle and discovered a sawed-off shotgun under the front seat and a box of rifle shells in the locked glove compartment. Although the defendants did not own the car, and the owner was not present at the time of the search, the defendants sought to suppress this evidence on the grounds that the search violated the fourth amendment.[115] At the suppression hearing, the defendants did not assert that they owned the shotgun or the shells.[116] Consequently, the Court denied those individuals standing to suppress the evidence.[117]

The defendants attempted to invoke the "legitimately on the premises" standard enunciated in *Jones* by analogizing their presence in the automobile to Jones' presence in his friend's apartment.[118] The Court, however, limiting *Jones* to its facts, concluded that *Jones* "stands for the unremarkable position 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."[119] According to the Court, the grant of standing under the *Jones* test was "too broad a gauge for measurement of Fourth Amendment rights" since *Jones* conceivably would confer standing upon an individual who arrives on the premises one minute before a search and leaves one minute after the search.[120] The Court's argument is somewhat tenuous, however, because it is difficult to imagine how anything seized by the police in such circumstances could be connected to a stranger or casual visitor to the premises. The existence of some additional contact with the premises could pro-

expectation of privacy standard should not be tied to property concepts. Justice White filed a dissenting opinion in which Justices Brennan, Marshall, and Stevens joined.

113. *Id.* at 142. The alternative rule of *Jones*, granting standing to defendants charged with possessory offenses, was not overruled. For an examination of that test, see notes 82–84 *supra* and accompanying text.

114. For an analysis of the impact of *Rakas* on automobile search cases, see Allen & Schaefer, *Great Expectations: Privacy Rights and Automobiles*, 34 U. MIAMI L. REV. 99 (1979); Comment, *Possession and Presumptions: The Plight of the Passenger Under the Fourth Amendment*, 48 FORDHAM L. REV. 1027 (1980); Comment, Rakas v. Illinois: *The Fourth Amendment and Standing Revisited*, 40 LA. L. REV. 962 (1980).

115. 439 U.S. at 130.

116. *Id.*

117. *Id.* at 131.

118. *Id.* at 140–41.

119. *Id.* at 142.

120. *Id.*

vide adequate grounds for a defendant to challenge the legality of the search.[121]

In place of the *Jones* test, the Court in *Rakas* held that to establish standing a defendant must prove he or she had a reasonable expectation of privacy in the place searched.[122] This reasonable expectation of privacy test first was developed in *Katz v. United States*.[123] In *Katz*, police had attached an electronic listening and recording device to the outside of a public telephone booth from which the defendant placed calls relaying gambling information.[124] When the defendant attempted to suppress the tapes of his conversations, the government argued that there had been no violation of the fourth amendment because " '[t]here was no physical entrance *into* the area occupied by [the petitioner].' "[125] In addition to rejecting the constitutionally protected areas test,[126] the Court dealt with the scope of the right of privacy under the fourth amendment. The Court refused to recognize that the fourth amendment encompasses a general right to privacy;[127] instead, it stated that the fourth amendment only protects privacy in relation to certain kinds of governmental intrusion.[128] The Court noted, however, that the amendment protects not only this specific privacy interest, but also property interests and personal security.[129]

121. For an example of additional contact, see *id.* at 142 n.11 (seizure of personal property). The fact that additional contact with the searched premises will give rise to standing to challenge the search is especially true because the Court did not expressly overrule *Jones* and posited that the factual determination of standing in *Jones* was correct. *Id.* at 141. The defendants in *Rakas* argued that since they were the object or target of the search, they should be allowed to establish standing. *Id.* at 132–33. Although this theory has been presented on previous occasions—United States v. Lisk, 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976); United States v. Cobb, 432 F.2d 716 (4th Cir. 1970); United States v. Rosenberg, 416 F.2d 680 (7th Cir. 1969)—it never has been generally accepted by the Court. The theory was rejected expressly in *Rakas* and in Alderman v. United States, 394 U.S. 165 (1969) (Harlan, J., concurring and dissenting). For a discussion of the target theory, see Gutterman, *"A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition*, 23 EMORY L.J. 111 (1974).

122. 439 U.S. at 143.

123. 389 U.S. 347 (1967).

124. *Id.* at 348.

125. *Id.* at 349 (quoting the decision of the court of appeals, 369 F.2d 130, 134 (9th Cir. 1966) (emphasis added). Although the Court does not call *Katz* a standing case, its analysis of the constitutionally protected areas test and the privacy issues indicates that the substantive issues are the same as in standing cases.

126. For a discussion of this aspect of *Katz*, see notes 64–68 *supra* and accompanying text.

127. 389 U.S. at 350.

128. *Id.*

129. *Id.* "[The fourth amendment's] protections go further [than individual privacy]

In a concurring opinion, Justice Harlan enunciated what subsequently would become the rule of *Katz*. According to Justice Harlan, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[130] It is important to note, however, that Justice Harlan's statement of the reasonable expectation of privacy standard is couched in references to property.[131] Thus, while *Katz* established a privacy standard for the protection of fourth amendment rights, it was not formulated to the exclusion of property interests.

Before applying the privacy test of *Katz* to the facts of *Rakas*, the Court addressed the procedural posture of the *Rakas* defendants' standing claim.[132] In making that inquiry, the Court reasoned that the tests to determine standing under the fourth amendment related to the scope of an individual's rights under that amendment.[133] The Court also noted that by discussing these issues in a substantive setting, it could avoid confusing fourth amendment standing concepts with standing for justiciability, a foreseeable problem since the term "standing" traditionally refers to justiciability issues under Article III of the Constitution.[134] Because an individual raising a motion to suppress evidence under the fourth amendment invariably satisfies even the strictest justiciability standing test,[135] the additional fourth amendment inquiry is superflous from a traditional standing point of view. The issue of whether an individual has a claim which is cognizable under the fourth amendment, therefore, is largely one of substantive fourth amendment law and is unrelated to standing in the traditional sense.[136]

The decision to abandon the rubric of standing transformed what was formerly a procedural issue into the primary substantive

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and often have nothing to do with privacy at all." *Id.* *See* Amsterdam, *supra* note 39, at 385.

130. 389 U.S. at 361 (Harlan, J., concurring).

131. *Id.*

132. 439 U.S. at 138.

133. *Id.* at 139. Although the Court discarded the term "standing" in fourth amendment cases, it subsequently has readopted the language because lower courts continued to use the word. *See, e.g.*, United States v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980).

134. *See* note 5 *supra* and accompanying text.

135. *See* note 6 *supra* and accompanying text.

136. 439 U.S. at 139.

element of the fourth amendment claim.[137] The Court acknowledged that although this change should not have a significant impact on the analysis of the issues since the same tests would be applied, the quality of such analysis would be improved. Dealing with the issues under the guise of standing undercut their importance and belied their substantive impact. Thus, the Court recognized that there was an artificiality in analyzing the issues in terms of standing[138] and concluded that "by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing we think the decision of the issue will rest on sounder logical footing."[139]

The defendants in *Rakas* were found not to have a "legitimate" expectation of privacy for several reasons.[140] First, they failed to assert a "property" or "possessory" interest in either the automobile in which they were travelling or the seized items.[141] Second, their "legitimate presence" in the auto was inconsequential since the "legitimately on the premises" test was rejected as being too broad a test of fourth amendment rights.[142] Using the example of the "casual visitor,"[143] the Court concluded that the legitimately on the premises test, much like the constitutionally protected areas test, was merely "a label placed by the courts on results which have not been subjected to careful analysis."[144]

Finally, in determining that the defendants did not have a legitimate expectation of privacy in the automobile, the Court referred to previous automobile cases.[145] Since the *Katz* decision, the Court has found a decreased expectation of privacy in automobiles for a variety of reasons. In *United States v. Chadwick*,[146] for example, the Court listed such factors as the registration and publicly mandated inspection of automobiles as well as

137. Bell, *Raising Fourth Amendment Claims After Rakas, Salvucci and Rawlings*, 7 SEARCH AND SEIZURE L. REP. 61, 62 (1980).

138. 439 U.S. at 139.

139. *Id.* at 140.

140. In *Rakas*, the Court consistently used the term "legitimate" rather than "reasonable." This rubric also is used in *Smith*, *Salvucci*, and *Rawlings*.

141. 439 U.S. at 148. The defendants claimed that they were not asked whether they had an interest of this type in the seized property and consequently requested a remand for further proceedings on this matter. *Id.* at 130–31 n.1.

142. *Id.* at 148.

143. *See* notes 120–21 *supra* and accompanying text.

144. 439 U.S. at 148.

145. *Id.*

146. 433 U.S. 1 (1976).

the licensing of drivers as some of the factors contributing to the decreased expectation of privacy in such vehciles.[147] In *Cardwell v. Lewis*,[148] the Court stated: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository of personal effects . . . . It travels public thoroughfares where both its occupants and its contents are in plain view."[149] Viewing these cases as controlling, the Court in *Rakas* concluded that the decreased expectation of privacy and the absence of automobile ownership were sufficient to defeat the defendants' expectation of privacy.[150]

Although the Court reaffirmed the rejection of subtle property concepts announced in *Jones*, the majority seemed to define a reasonable expectation of privacy in terms of property interests.[151] In applying the expectation of privacy test to the facts in *Rakas*, the Court noted that the defendants "asserted neither a property or possessory interest . . . [and,] . . . cars are not to be treated identically with houses or apartments."[152] The Court also stated that while "a passenger *qua* passenger would not normally have a legitimate expectation of privacy,"[153] visitors might be able to "contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search."[154] The opinion seems self-contradictory because of this emphasis on property interests; while the Court rejected the property tests as a measure of fourth amendment rights, it relied heavily on the lack of a possessory right in deciding *Rakas*.[155] In *Jones* and *Katz*, the Court rejected the property tests because they created confusion regarding fourth amendment standing.[156] The *Rakas* court, however, appears to revive these tests and add another factor—the "legitimate" expectation of privacy—to the confusion.

In adopting the expectation of privacy test, the Court placed emphasis on Justice Harlan's requirement of a subjective expectation of privacy that society is prepared to recognize as legiti-

147. *Id.* at 12–15.

148. 417 U.S. 583 (1974).

149. *Id.* at 590.

150. 439 U.S. at 148–49. The Court apparently analogized the defendants to the casual visitor discussed earlier. *Id.* at 142. *See* notes 120–21 *supra* and accompanying text.

151. 439 U.S. at 143, 148. *See* Bell, *supra* note 137, at 62.

152. 439 U.S. at 148.

153. *Id.* at 148–49.

154. *Id.* at 142 n.11; *see The Supreme Court: 1979 Term*, 94 HARV. L. REV. 1, 196, 202 n.53 (1980).

155. 439 U.S. at 142 n.11; *see* Bell, *supra* note 137, at 62.

156. *See* notes 85–90 *supra* and accompanying text.

mate.[157] The majority implied that because the Court had recognized only a slight expectation of privacy in automobiles in the past, the defendants in *Rakas* could not reasonably expect to have privacy in their automobile.[158] In *Smith v. Maryland*,[159] the Court explained more fully what constitutes a "legitimate" expectation of privacy and held that while the defendant subjectively expected privacy in the phone numbers he dialed, this expectation was not " 'one that society is prepared to recognize as reasonable.' "[160] The Court reasoned that since it is common knowledge that the phone company records dialed numbers for the purposes of billing and record keeping, an individual could not legitimately expect those numbers to be private.[161] The standard, therefore, apparently requires a court to determine whether a majority of the individuals in society would hold the same expectation of privacy as the defendant.

This standard has not been easy for the courts to apply. The standard requires "a court to pinpoint a vague shifting and perhaps illusory consensus."[162] As one commentator noted, "lower courts have recently identified privacy expectations in a taped paper bag, a leather pouch, cardboard boxes, and a backpack, but not in a taped Scrabble box, a toolbox, an unlatched knapsack, or a closed but unsealed envelope."[163] Despite the difficulty of application, the requirement of a legitimate expectation of privacy could suggest that formerly private areas may no longer be classified as such due to repeated government searches.[164] This suggestion is implicit in *Rakas* since the Court examined its previous

157. 439 U.S. at 148; *see* notes 130–31 *supra* and accompanying text.

158. *See* notes 145–50 *supra* and accompanying text.

159. 442 U.S. 735 (1979).

160. *Id.* at 743 (quoting Justice Harlan's opinion in *Katz*). In *Smith*, the defendant was accused of making obscene phone calls. Police, through the phone company, placed a pen register on the defendant's line to monitor the numbers he dialed. The defendant sought to suppress the numbers obtained through the use of the pen register. *Id.* at 737.

161. *Id.* at 742.

162. *The Supreme Court*, *supra* note 154, at 202.

163. *Id.* at 202–03 (footnotes omitted). The article refers to the following cases respectively: United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), *adhered to* in 615 F.2d 10 (2d Cir. 1980); United States v. Meier, 602 F.2d 253 (10th Cir. 1979); United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978), *cert. denied*, 446 U.S. 907 (1980); United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978); Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (1977); State v. Schrier, 283 N.W.2d 338 (Iowa 1979).

164. *The Supreme Court*, *supra* note 154, at 203. The commentator also observed that "Repeated invasions by credit bureaus, employers, and the like can lead persons to discount most expectations as unreasonable, individual fears of a loss of privacy then become self-fulfilling prophesies." *Id.*

determinations of whether there existed an expectation of privacy in an automobile, rather than considering whether the defendants subjectively expected privacy from government intrusion.[165] Thus, *Smith* indicates that despite contrary subjective expectations of the defendant, the Court's consensus will prevail.[166]

The test employed in *Rakas* seems much narrower than the test developed in *Katz*. Justice Harlan noted in his concurring opinion in *Katz* that the "critical fact in this case [*Katz*] is that 'one who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted."[167] Justice Harlan stated, however, that an individual having a conversation in the open would not have an expectation of privacy.[168] Thus, by shutting the door, the phone booth temporarily became a place where the defendant could expect privacy because the Court believed a majority of the people in society would have identical expectations.[169]

In *Rakas*, the defendants had placed the items which subsequently were seized under a seat and in a locked glove compartment.[170] The items were not in plain view; they had been hidden from public scrutiny as the defendant's conversation in *Katz* had been hidden from such scrutiny. Although the Court in *Katz* judged the tapes to be a violation of the defendants' fourth amendment rights and thus properly suppressed, the search of the automobile in *Rakas* was not held violative of the defendant's constitutional rights. It is difficult, however, to distinguish the expectation of privacy in a phone booth—an enclosed public place—from that of an automobile. It can be concluded, therefore, that the expectation of privacy test was applied more strictly in *Rakas* than in *Katz*.

Recently, the Supreme Court further extended the application of the reasonable expectation of privacy test. In *United States v. Salvucci*,[171] the defendant was indicted on several counts of possession of stolen mail. The evidence supporting the indictment

165. 439 U.S. at 148.

166. *See* note 160 *supra* and accompanying text.

167. 389 U.S. at 361 (Harlan, J., concurring) (brackets in original).

168. *Id.*

169. *Id.*

170. 439 U.S. at 130.

171. 448 U.S. 83 (1980). Justice Rehnquist delivered the Court's opinion in which Chief Justice Burger and Justices Stewart, Powell, Stevens, Blackmun, and White joined. Justice Marshall dissented from the decision and was joined by Justice Brennan.

was discovered during the search of an apartment rented by the mother of defendant's alleged accomplice.[172] The defendants sought to suppress the evidence on the grounds that the warrant was not supported by a sufficient showing of probable cause.[173] The district court granted standing to challenge the search on the basis of the *Jones* automatic standing test for possessory crimes[174] and eventually granted the defendants' motion to suppress. The court of appeals affirmed this decision.[175] The Supreme Court reversed the decision below and specifically overruled the second test of *Jones* which provided automatic standing for individuals charged with crimes of possession.[176] In its place, the Court applied the *Katz* reasonable expectation of privacy test.[177]

In *Salvucci*, the Court initially observed that the dilemma faced by the defendant in *Jones* was eliminated by its decision in *Simmons* granting use immunity for a defendant's suppression hearing testimony.[178] The Court concluded that because the *Simmons* rule extended to nonpossessory defendants, it was broader than the test in *Jones* and provided equal, if not more comprehensive, protection.[179] The Court stated that because of its holding in *Rawlings v. Kentucky*,[180] proof of possession or ownership no longer would be required to obtain standing;[181] instead, the prosecutor could assert, with legal consistency, that a defendant possessed or owned seized goods but did not have a fourth amendment interest in them.[182] The Court concluded that possession alone, without a reasonable expectation of privacy in the place searched, was insufficient to establish standing.[183]

As Justice Marshall suggested in his dissent, testimony of the defendant still could be used against him or her for impeachment purposes.[184] If the defendant testified on his or her own behalf at

172. *Id.* at 85. Salvucci was charged with a violation of 18 U.S.C. § 1708 (1976). One of the principal elements of the offense is possession.

173. 448 U.S. at 85.

174. *Id.* *See* text accompanying notes 69–71 *supra*.

175. *See* United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979).

176. 448 U.S. at 90–93.

177. *Id.* at 91–92.

178. *Id.* at 89–90; *see* text accompanying notes 104–11 *supra*.

179. 448 U.S. at 90.

180. *Id.* at 91.

181. *Id.* at 85; *see The Supreme Court*, *supra* note 154, at 198; text accompanying notes 202–05 *infra*.

182. 448 U.S. at 88–89.

183. *Id.* at 91–92.

184. *Id.* at 96 (Marshall, J., dissenting).

trial, any evidence from the suppression hearing could be used for impeachment.[185] Under this circumstance, the dilemma of self-incrimination would not be eliminated "unless he [is] prepared to relinquish his constitutional right to testify in his own defense . . . ."[186] Justice Marshall also argued that the ability to cross-examine a defendant at the suppression hearing provided a tactical advantage to the government.[187] The prosecution might elicit additional incriminating evidence from the testimony which, even if inadmissible at trial, would facilitate its strategy. Justice Marshall concluded, therefore, that "[T]he furnishing of such a tactical advantage should not be the price of asserting a Fourth Amendment claim."[188]

The majority's emphasis in *Salvucci* on the reasonable expectation of privacy in the place searched rather than on possessory interests is a crucial diversion from its opinion in *Rakas*. The dictum of the Court in *Rakas* indicated that an individual who did not have a reasonable expectation of privacy in the place searched still might have standing if he or she had a property interest in the items seized.[189] *Salvucci*, however, indicates that this possibility no longer exists and, unless an individual has a reasonable expectation of privacy in the place searched, standing will not be conferred.[190] According to *Rakas*, a reasonable expectation of privacy in the place searched still is determined largely by an individual's property or possessory interest in the place searched.[191] The effect of this anomaly is that "a bona fide possessory interest in the thing seized is negated by a lack of privacy interest in the place where the thing is located—a privacy to a large extent defined by whether a right to possession of that place exists."[192]

In a companion case to *Salvucci*, *Rawlings v. Kentucky*,[193] the Court engaged in its most restrictive interpretation of standing to date. In *Rawlings*, the defendant was arrested for trafficking in

185. *Id.* *See* notes 212–28 *infra* and accompanying text.
186. *Id.*
187. *Id.*
188. *Id.*
189. *See* notes 152–54 *supra* and accompanying text.
190. 448 U.S. at 91–92.
191. *See* note 129 *supra* and accompanying text.
192. Bell, *supra* note 137, at 63.
193. 448 U.S. 98 (1980). Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger and Justices Stevens and Powell joined. Justice Blackmun filed a separate concurring opinion. Justice White filed an opinion concurring in part and dissenting in part in which Justice Stewart joined. Justice Marshall filed a separate dissenting opinion in which Justice Brennan joined.

and possession of controlled substances under Kentucky state law. While the defendant was a guest at a friend's home, police arrived with a warrant for the arrest of the homeowner.[194] The police smelled marijuana smoke while looking for the owner and subsequently discovered marijuana seeds. The police detained the occupants at the house while one officer obtained a search warrant. After the police officer returned with a warrant, the defendant and a female companion were searched. The woman was forced to disclose the contents of her purse which contained drugs owned by the defendant. Although the defendant admitted ownership of the drugs during the search,[195] he later sought to suppress the evidence at trial, arguing that the warrant did not apply to the purse and lacked a showing of probable cause.[196] The trial court denied the motion on the grounds that the warrant applied to the purse, and, alternatively, that even if the search were illegal, the defendant lacked standing to challenge it.[197] Both the court of appeals[198] and the Kentucky Supreme Court held that the defendant lacked standing and affirmed the conviction.[199]

The United States Supreme Court upheld these decisions, concluding that Rawlings never had previous access to the purse, had no right to exclude others from an examination of the purse, and, because he had placed the drugs there hastily, had failed to take normal precautions to preserve his privacy interests.[200] Based on these facts, the Court ruled that the defendant could not have had a reasonable expectation of privacy in the purse.[201]

The Court, however, still was faced with the problem that Rawlings had admitted to possession of the seized items. In *Rakas*, the Court indicated that an individual who admitted to possession would have standing even in the absence of a reasonable expectation of privacy in the place searched.[202] The *Salvucci* court's language, although dictum, strongly suggests that even in the presence of possession, an individual has no standing without a sufficient expectation of privacy.[203] In *Rawlings*, the Court con-

194. *Id.* at 100.
195. *Id.* at 101.
196. *Id.* at 102.
197. *Id.*
198. *Id.*
199. *Id.* Rawlings v. Commonwealth, 581 S.W.2d 348 (Ky. 1979).
200. 448 U.S. at 105.
201. *Id.*
202. *See* notes 152–54 *supra* and accompanying text.
203. *See* note 189 *supra* and accompanying text.

cluded that even though the defendant owned the drugs and had admitted to possession, if there was no reasonable expectation of privacy in the place searched, the defendant did not have standing.[204] As the Court observed, "[h]ad defendant placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy."[205]

Justice Marshall dissented once again, arguing that the authority cited by the majority supported the concept that ownership or possession is sufficient to confer standing.[206] Second, and more fundamentally, Justice Marshall argued that implicit in the fourth amendment is the protection of an individual's property interests.[207] Furthermore, Justice Marshall noted that although the Court in *Jones* discarded archaic property distinctions as definitive tests for fourth amendment rights, it did not hold that property interests were irrelevant to fourth amendment rights.[208] Justice Marshall concluded that:

> [*Jones* and *Katz*] expanded our view of the protections afforded by the Fourth Amendment by recognizing that privacy interests are protected even if they do not arise from property rights. But that recognition was never intended to exclude interests that had historically been sheltered by the Fourth Amendment from its protection . . . . Rejection of these finely drawn distinctions [of private property law] as irrelevant to the concerns of the Fourth Amendment did not render property rights wholly outside its protection . . . .[209]

II. IMPLICATIONS OF THE RECENT DEVELOPMENTS IN STANDING

The *Salvucci* and *Rawlings* decisions in combination with *Rakas* constitute a complete revision of the law of fourth amendment standing.[210] The possibility of impeachment, the talismanic nature of the privacy test with its mechanistic factors and the elimination of privacy interests all contribute to the narrowing of fourth amendment rights. As a result, the effect of these changes may be to limit the number of defendants able to pursue fourth amendment claims.

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204. *See* note 122 *supra* and accompanying text.

205. 448 U.S. at 106.

206. *Id.* at 115–16 (Marshall, J., dissenting). Justice Marshall cited United States v. Jeffers, 342 U.S. 48 (1951), as well as *Jones* and *Simmons* to support this position.

207. 448 U.S. at 106. *See also* notes 42–44 *supra* and accompanying text.

208. 448 U.S. at 105.

209. *Id.* at 119 (citations omitted).

210. *See* notes 113, 176 & 205 *supra* and accompanying text.

A. *Impeachment*

The only protection now offered a defendant seeking to suppress evidence is that his or her testimony at the suppression hearing will not be admissible against him or her in the prosecution's case in chief.[211] As Justice Marshall observed in *Salvucci*, this protection is minimal since evidence still can be admitted for impeachment purposes.[212] Although the Court does not specifically admit that such admissions will result, it appears ready to make such an acknowledgement given the warning that *Simmons* may not be used as a shield for false representations.[213]

Recent Supreme Court decisions also indicate that suppression hearing testimony eventually may be admissible for impeachment purposes. In *United States v. Havens*,[214] the Court permitted the use of illegally seized evidence, which had been successfully suppressed, to impeach the defendant's testimony given in answer to a question on cross-examination.[215] In reaching its decision, the court in *Havens* relied heavily on *Harris v. New York*.[216] Although *Harris* concerned the use of a defendant's statements obtained in violation of the fifth amendment for impeachment purposes, the Court found its reasoning sufficiently analogous to be applicable in *Havens*.[217] The Court in *Havens* reasoned that "arriving at the truth is a fundamental goal of our legal system."[218] Consonant with this goal, when a defendant takes the witness stand on his or her own behalf, he or she is obligated to testify truthfully or risk a perjury prosecution.[219] As the *Harris* Court stated, "a defendant ought not to be allowed to perjure himself, while *relying* on the exclusionary rule to keep out evidence proving his lack of credibility."[220] Furthermore, in *United States*

211. The *Simmons* test was retained by the Court in *Salvucci* and *Rakas*. *See* 448 U.S. at 105; 439 U.S. at 135 n.4.

212. *See* notes 183–87 *supra* and accompanying text.

213. 448 U.S. at 96 (Marshall, J., dissenting) citing Justice Rehnquist's majority opinion, 448 U.S. at 94 n.9.

214. 446 U.S. 620 (1980). In *Havens*, the defendant was arrested for possession of narcotics upon reentering the United States from Peru. After successfully suppressing evidence obtained in a search of his luggage, Havens took the witness stand on his own behalf at trial. Statements made by Havens at the hearing on his motion to suppress were admitted to impeach this testimony. *Id.* at 622.

215. *Id.* at 622–23.

216. 401 U.S. 222 (1971).

217. 446 U.S. at 626.

218. *Id.*

219. *Id.*

220. 401 U.S. 225 (emphasis supplied). The exclusionary rule is the primary means of

v. Kahan,[221] a case involving sixth amendment issues, the Court specifically concluded that "*Simmons* is not to be converted into a license for false representations . . . free from the risk that the claimant will be held accountable for his falsehood."[222]

In other recent decisions, however, the Supreme Court has not approved the use of a defendant's suppression hearing testimony for impeachment purposes. In *New Jersey v. Portash*,[223] for example, the Court held that a defendant's testimony before a grand jury under a grant of legislative immunity was not admissible to impeach his or her testimony at a later criminal trial.[224] The Court reasoned that since immunized testimony "is the essence of coerced testimony,"[225] and because the fifth and fourteenth amendments prohibit compelled self-incrimination, the grand jury testimony was not admissible for any purpose.[226] This situation arguably is analogous to a standing situation in which the defendant testifies at a suppression hearing under the implied immunity grant of *Simmons*.[227] The dictum in *Salvucci*, however, coupled with the application of *Harris* to the fourth amendment in *Havens* and the Court's specific reference to *Simmons* in *Kahan*, indicates that the "Court will eventually find that impeachment use of suppression hearing testimony is permissible."[228]

B. *Factors of the Reasonable Expectation of Privacy Test*

Both the constitutionally protected areas test and the automatic standing tests of *Jones* were rejected as overly rigid, "talismanic" solutions to fourth amendment controversies.[229] The reasonable expectation of privacy test, however, offers an equally unsatisfactory solution. After reviewing cases applying the rea-

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enforcing fourth amendment rights. When a search or seizure is found to be unreasonable, the evidence obtained through the illegal governmental behavior is inadmissible at trial. Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

221. 415 U.S. 239 (1974).

222. *Id.* at 243. In *Kahan*, the defendant attempted to invoke *Simmons* to prevent the admission of false statements he made at an arraignment concerning his ability to afford an attorney. Thus, the real issue in *Kahan* was the defendant's sixth amendment right to counsel.

223. 440 U.S. 450 (1979).

224. *Id.* at 459–60.

225. *Id.* at 459.

226. *Id.* at 459–60.

227. Y. KAMISAR, W. LA FAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 795 (5th ed. 1980).

228. Bell, *supra* note 137, at 63. The Illinois Supreme Court already has made such a determination. People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974).

229. *See* text accompanying notes 65–68 *supra*.

sonable expectation of privacy standard, one commentator recently observed: "One can only wonder if constitutional guarantees should hinge on such trivial considerations as the tightness with which a container is sealed."[230] The possibility that repeated government intrusions may further reduce the individual's legitimate subjective expectations also is evidenced by *Rakas* and *Smith*.[231] The reasonable expectation of privacy test is mechanistic primarily because the Court has yet to define its basic theoretical components. The Court's decisions have focused on the specific facts of each case, rather than on formulating an underlying rationale.

In *Katz*, both the majority and Harlan's dissent emphasized the specific activities of the defendant which evinced an intent to maintain privacy—such as closing the phone booth door.[232] In *Rakas*, the defendants manifested an intent to conceal various items from public view by placing them under the seat and in a locked glove compartment.[233] The Court held that the defendants had no reasonable expectation of privacy, however, because of the implicit lack of privacy in automobiles[234] and because they did not claim a possessory interest in the place searched.[235] Although *Salvucci* was remanded for a determination of the defendant's reasonable expectation of privacy,[236] its dicta—that possession is not dispositive of an expectation of privacy—was adopted in *Rawlings*.[237] The Court in *Rawlings* also viewed the defendant's activities as evidence of his subjective intent to maintain privacy. The Court inquired into the defendant's ability to exclude others from the hiding place[238] and his subjective expectation of whether the government would search his companion's purse.[239]

The factors culled from these cases as elements of the reasonable expectation of privacy standard form a confusing list. The list includes the defendant's activities to secure privacy, such as planning, ability to exclude third parties, and physical manifesta-

230. *The Supreme Court*, *supra* note 154, at 203.

231. *See* notes 159–65 *supra* and accompanying text.

232. 389 U.S. at 347.

233. *See* notes 115 & 170 *supra* and accompanying text.

234. *See* notes 145–50 *supra* and accompanying text.

235. *See* note 141 *supra* and accompanying text.

236. 448 U.S. at 95.

237. *Id.* at 104–05.

238. The ability to exclude also was discussed in *Katz*. *See* notes 130–31 *supra* and accompanying text.

239. 448 U.S. at 104 n.3.

tions of an intent to maintain privacy. The list also includes factors such as the defendant's subjective expectation of privacy, the generic character of the place (houses versus automobiles) and the defendant's possessory rights in the location searched. The importance of any given factor changes from case to case. It is difficult to understand the Court's distinction between the supposedly narrow degree of privacy expectations in an automobile and the apparently broad expectations in a public phone booth.[240] In both *Katz* and *Rakas*, however, the defendants physically manifested an intent to be private. At this level, the only distinction which explains the opposite result in the two cases is the Court's previous determination that there was a reduced expectation of privacy in an automobile.

C. *Elimination of Property Interests*

There is no question that even after *Rawlings*, possession will be an important factor in determining standing for fourth amendment claims. The Court in *Rawlings*, citing *Rakas* with approval,[241] stated that possession may evince an expectation of privacy.[242] *Rawlings* holds, however, that a possessory interest is merely one factor in determining an expectation of privacy.[243]

The Court has recognized historically that fourth amendment interests can be divorced totally from property rights.[244] In certain instances, however, a property right alone has been sufficient to establish a fourth amendment interest.[245] Before *Rawlings*, the Court had never precluded this latter possibility. Property interests traditionally have been considered the crux of fourth amendment interests.[246] When the Court initially recognized the strength of the privacy interests protected by the fourth amendment, it specifically endorsed the importance of property interests.[247]

240. *See* notes 123–31 *supra* and accompanying text.

241. 448 U.S. at 104–05.

242. *Id.* at 105 ("ownership of the drugs is . . . one fact to be considered.").

243. *Id.* at 105–06.

244. Katz v. United States, 389 U.S. at 350–51.

245. Jones v. United States, 362 U.S. at 259, 264. Jones' standing was based on his possession of the narcotics and his rights in the premises searched. See notes 82–84 *supra* and accompanying text.

246. *See* notes 39 & 42 *supra* and accompanying text.

247. Professor Amsterdam even has suggested that subsequent interpretations of the *Katz* decision fail to "capture" its rationale when they rely solely on its protection of privacy to the exclusion of property. Amsterdam, *supra* note 39, at 385.

The abandonment of property interests as creating a fourth amendment right has, as Justice Marshall noted, "turned the development of the law of search and seizure on its head."[248] The fourth amendment protects citizens from a particular class of government activity—unreasonable search and seizure. As the Court suggested in *Katz*, the individual's interests only are protected in the negative—that is, to the extent that the government's activities are unreasonable.[249] Thus, whether the invaded interest is property or privacy is irrelevant to the assertion of a fourth amendment claim; all that should matter is that an individual's interest is invaded. Factors such as whether the seized objects were in plain view[250] only are relevant to the reasonableness of a search, not to whether an individual's interests have been invaded.

III. CONCLUSION

The ultimate effect of *Rakas*, *Salvucci*, and *Rawlings* is to limit the number of individuals who may assert a fourth amendment claim. Empirically, this notion is accurate since possessory and property rights no longer will be considered determinative of a fourth amendment interest. The fact that suppression hearing testimony probably will be admissible against a defendant for impeachment purposes should the defendant choose to testify on his or her own behalf, also will be a likely deterrent to the assertion of fourth amendment claims. The present nature of the reasonable expectation of privacy standard—with its mechanistic factors—is undefined. None of these factors are essential to the standard, yet any of them might be essential to a fourth amendment claim, thus making standing more difficult to prove. The "talismanic" nature of the expectation of privacy test also has been criticized as obviating the need for establishing an analytic framework for standing analysis. These considerations establish that "[in] its present formulation, fourth amendment doctrine hardly constitutes a bulwark against unwarranted governmental intrusion."[251]

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248. 448 U.S. at 118–19 (Marshall, J., dissenting).
249. *See* note 2 *supra* and accompanying text.
250. *See* note 59 *supra* (plain view doctrine).
251. *The Supreme Court*, *supra* note 154, at 202.