Fourth Amendment Privacy and Standing: Wherever the Twain Shall Meet

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FOURTH AMENDMENT PRIVACY AND STANDING: "WHEREVER THE TWAIN SHALL MEET"

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The fourth amendment refers to the "right of the people" to be free from unreasonable searches and seizures. The exclusionary doctrine has been the principal method used by the Supreme Court to protect "the people" against unwarranted governmental intrusions. In recent years this exclusionary rule has come under mounting judicial attack, and the Court has seized upon the fourth amendment standing concept as a means of limiting its harsh effects. In this Article Professor Gutterman analyzes the Court's emerging doctrinal approach to fourth amendment privacy in four areas: privacy rights in papers, misplaced confidences, required confidences, and privacy expectations in cars and other containers. Professor Gutterman argues that the ultimate issue in evaluating fourth amendment privacy interests is what governmental conduct we, as "the people" of a free society, are entitled to expect. Professor Gutterman concludes that fourth amendment privacy issues are best resolved by pursuing separate analyses regarding what privacy interests are important enough to "the people" to be protected by the fourth amendment and what persons are entitled under the circumstances to that protection. By merging the questions of what interests are protected and who is entitled to that protection, the Court has cut back on the effectiveness of the exclusionary rule and narrowed "the people's" reasonable expectations of privacy.

INTRODUCTION

The core value of the fourth amendment[1] is to safeguard the privacy and security of "the people" against arbitrary invasions by the government.[2] The fourth amendment speaks collectively of "the right of the people,"[3] embodying the belief of our Nation's forefathers that the value of the "people's" privacy in their homes and persons would not be invaded except upon strong

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1. 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 persons or things to be seized.

U.S. Const. amend. IV.

2. See United States v. Chadwick, 433 U.S. 1 (1977); Camara v. Municipal Court, 387 U.S. 523 (1967); Warden v. Hayden, 387 U.S. 294 (1967).

3. Cf. U.S. Const. amend. III ("without the consent of the Owner"); U.S. Const. amend. V ("[n]o person shall"); U.S. Const. amend. VI ("the accused shall").

government need and under strict procedural safeguards.[4]

Early Supreme Court decisions placed privacy in an exalted position within the hierarchy of constitutionally protected values[5] and provided a strong foundation for the Court's continued concern with its protection.[6] Although the Court has never articulated clearly the specific doctrinal perspective under which it operates in developing the scope of fourth amendment privacy protections,[7] Justice Brandeis eloquently summarized the essence of the amendment in observing that the makers of the constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[8] Justice Brandeis' enunciation of the importance of regulating government conduct transcends individual privacy rights and focuses upon the "collective nature" of fourth amendment protections,[9] that is, the "people's right" to be protected from unlimited governmental intrusion into the privacies protected by the fourth amendment.

The exclusionary doctrine is the principal method developed by the Court to protect against arbitrary privacy intrusions by the government. In imposing the exclusionary rule on state courts in *Mapp v. Ohio*,[10] the Court emphasized the basic deterrent purpose of the doctrine, but the majority recognized that the rule also serves the purpose of ensuring "the imperative of judicial integrity."[11] Building on Justice Brandeis' thesis that the government is the "omnipresent teacher" that "teaches the whole people by its example,"[12] the *Mapp* majority believed that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[13]

While the " 'prime purpose' " of the exclusionary doctrine " 'is to deter future unlawful police conduct,' "[14] continued recognition of the judicial integrity goal will keep the rule operating in tandem with the developing basic

4. See generally J. Landynski, Search and Seizure and The Supreme Court (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1970); T. Taylor, Two Studies in Constitutional Interpretation (1969).

5. See Boyd v. United States, 116 U.S. 616 (1886).

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

7. Professor Amsterdam has indicated that "the Supreme Court is operating on the atomistic view, although it has never discussed the issue." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 367 (1974). Professor Bacigal addresses the question whether "the fourth amendment should be viewed from an individual perspective, which emphasizes protection of the interests of individual citizens, or from a limitation perspective, which emphasizes the regulation of governmental conduct." Bacigal, Some Observations and Proposals on the Nature of the Fourth Amendment, 46 Geo. Wash. L. Rev. 529, 529-30 (1978).

8. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

9. Justice Brandeis stated that the framers "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." Id. at 478.

10. 367 U.S. 643 (1961).

11. Id. at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

12. 367 U.S. at 659 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

13. 367 U.S. at 659.

14. United States v. Janis, 428 U.S. 433, 446 (1976) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)).

core of fourth amendment rights, "assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[15] The exclusionary doctrine is under increasing attack, and recent decisions have attempted to ameliorate its harsh effects.[16] The fourth amendment standing doctrine has provided the Court a significant method for judicial limitation of the operation of the exclusionary concept,[17] but in developing the doctrine the Court has severely diminished the privacy protections embodied within the fourth amendment.

The standing doctrine assuredly operates from an atomistic perspective, requiring the individual to establish that he was a "person aggrieved" by a search.[18] Although a personal injury resulting from a privacy invasion is a necessary component of the determination that an individual's protected right has been violated, the doctrine of standing is in a transitional period and is becoming more closely interwoven with the developing concepts of substantive fourth amendment privacy rights.[19] In *Rakas v. Illinois*,[20] the Court determined that no useful purpose would be served by considering standing distinct from the merits of fourth amendment coverage, and that the better analysis would focus forthrightly on the extent of the individual's rights under the fourth "rather than on any theoretically separate, but invariably intertwined concept of standing."[21]

The Supreme Court has recently begun to develop a specific doctrinal approach to fourth amendment privacy in four principal areas: privacy rights in papers, misplaced confidences, required confidences, and privacy expectations in cars and other containers. This article examines privacy rights in these contexts and concludes that although accommodation between the collective and individualistic perspectives is desirable when determining fourth amendment standing, the ultimate issue in evaluating the nature of fourth amendment privacy interests must be what we collectively, as members of a free society, are entitled to expect from our government.[22]

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15. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). Cf. Stone v. Powell, 428 U.S. 465, 485 (1976) ("While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."); United States v. Janis, 428 U.S. 433, 458 n.35 (1976) ("The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution.").

16. See, e.g., United States v. Haven, 446 U.S. 620 (1980); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974).

17. See, e.g., Rawlings v. Kentucky, 448 U.S. 98 (1980), discussed at notes 341-53 and accompanying text infra; United States v. Payner, 447 U.S. 727 (1980), discussed at notes 360-63 and accompanying text infra; Rakas v. Illinois, 439 U.S. 128 (1978), discussed at notes 323-40 and accompanying text infra.

18. Rakas v. Illinois, 439 U.S. 128 (1978); Jones v. United States, 362 U.S. 257, 265 (1960).

19. See Gutterman, "A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, 23 Emory L.J. 111 (1974).

20. 439 U.S. 128 (1978).

21. Id. at 139.

22. See Amsterdam, supra note 7, at 367.

Katz v. United States[23] represents an extension of fourth amendment protections beyond the limits of electronic surveillance involved in that case. In *Katz*, government officials without a search warrant installed an electronic listening and recording device to the outside of a public telephone booth and overheard Katz's side of a conversation relating to an illegal wagering transaction. The *Katz* Court declared that a privacy-oriented analysis should replace the traditional property approach. After first warning that the fourth amendment cannot be translated into a general privacy right, the Court noted that "[t]he Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches" and further "that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[24] The Court focused upon Katz's conduct and determined that by paying his toll and shutting the telephone door behind him, Katz was surely "*entitled*" to expect privacy.[25] The government's conduct directed at Katz therefore "violated the privacy upon which he justifiably relied"[26] and thus constituted a search and seizure within the "new" fourth amendment parlance. The police activities were condemned as unreasonable in the absence of a warrant.

By reshaping the contours of privacy expectations, *Katz* has become the basis for determining the parameters of the fourth amendment's protections.[27] The "privacy concept" it enunciated was not, however, a monumental shift in fourth amendment jurisprudence. The fourth's "privacy" roots are deeply embedded in English and American history,[28] and *Katz*'s spirit was captured by the Court long ago in *Boyd v. United States*.[29] The *Boyd* decision emphasized that the inherent nature of a free society and its citizens requires security against all invasions of the government upon the privacies of life.[30] The *Boyd* Court acknowledged the imperative of broadly interpreting the fourth and fifth amendments' protections since a close and literal construction would lead to a gradual erosion of the rights protected.[31]

Although *Katz* declared that a privacy-oriented analysis should replace the traditional property approach, the majority opinion provides only minimum guidance in capturing the essence of this new doctrinal focus[32] beyond

23. 389 U.S. 347 (1967).

24. Id. at 353.

25. Id. at 352 (emphasis added).

26. Id. at 353.

27. See Amsterdam, supra note 7, at 382; Kitch, *Katz v. United States*: The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev. 133.

28. See generally books cited note 4 supra.

29. 116 U.S. 616 (1886).

30. Id. at 630.

31. Id. at 635.

32. As Professor Amsterdam has noted, "An opinion which sets aside prior formulas with the observation that they cannot 'serve as a talismanic solution to every Fourth Amendment problem' should hardly be read as intended to replace them with a new talisman." Amsterdam, supra note 7, at 385 (quoting Katz v. United States, 389 U.S. at 351 at n.9).

the Court's pronouncement that the government's activities in electronically eavesdropping on Katz's conversation violated his justifiable privacy expectation in the private use of the public telephone. Justice Harlan's concurring opinion, to which subsequent courts have turned for guidance, articulates the subjective nature of the test in a more comprehensive form. Justice Harlan stated that his understanding of prior decisions and the "new rule" required a two-fold analysis: "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.' "[33] For Justice Harlan, the critical factor in *Katz* was Katz's actions in "protecting his privacy," which made his expectations "reasonable."[34] By highlighting the means employed by Katz to preserve his privacy, the *Katz* Court gave notice that in the absence of an individual actively protecting his privacy, a person's privacy expectations may not be "reasonable"[35] no matter how highly intrusive or offensive the police conduct.

Katz's major flaw is apparent: the determination whether the governmental activity constitutes a search and seizure may depend not upon the government's conduct, but rather upon the conduct of the person subjected to the government's activity. By focusing the analysis upon the person's justifiable expectations as manifested by his conduct, the Court has effectively immunized from judicial control a broad range of otherwise very intrusive privacy invasions.[36] Although the "normal precautions" that an individual does or does not take to secure his privacy may manifest the "reasonableness" of his conduct and evidence a desire to maintain his privacy, these precautions do not add to or detract from the "unreasonableness" of the government activity or the nature of the privacies protected by the fourth amendment.

The appropriate perspective must be much broader—a collective one based on "society's generally shared [privacy] expectations."[37] This interpretation complies with the spirit of the fourth, for it is "the people" who are to be secure from intrusive police conduct; this security is not limited by or dependent upon the means an individual employs to protect his privacy from government overreaching. The fundamental inquiry must be whether the police practice jeopardizes our "sense of security, which is the paramount concern of Fourth Amendment liberties."[38] Justice Harlan, returning to *Katz* in his dis-

33. 389 U.S. at 361 (Harlan, J., concurring).

34. Id.

35. See Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. L.J. 329, 336 (1973).

36. See, e.g., Rawlings v. Kentucky, 448 U.S. 98 (1980), discussed at notes 341-53 and accompanying text infra; Smith v. Maryland, 442 U.S. 735 (1979), discussed at notes 205-11 and accompanying text infra; Rakas v. Illinois, 439 U.S. 128 (1978) discussed at notes 323-40 and accompanying text infra; United States v. Miller, 425 U.S. 435 (1976), discussed at notes 177-204, 371-72 and accompanying text infra; Caldwell v. Lewis, 417 U.S. 583 (1974), discussed at notes 235-57 and accompanying text infra; United States v. White, 401 U.S. 745 (1971), discussed at notes 141-48, 167-71 and accompanying text infra; Hoffa v. United States, 385 U.S. 293 (1966), discussed at notes 122-40 and accompanying text infra. See Dworkin, supra note 35, at 335.

37. Kitch, supra note 27, at 137. See also Amsterdam, supra note 7, at 403.

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

sent in *United States v. White*,[39] altered his previous analysis by asserting that the proper analysis must "transcend the search for subjective expectations," for "[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."[40] Deciding which interests in our shared security expectations are protected by the fourth amendment is, of course, a value judgment about which "we" may differ. The Court's task in discerning these interests and in determining whether to gather within the fourth's protective shield the specific privacy interests involved is not merely to "mirror and reflect" the past, but to "form and project" for the future, mindful that it is our "sense of security" that is jeopardized when a particular police practice is left totally unregulated.[41]

PRIVACY RIGHTS IN PAPERS

The unique nature of private papers historically gave them a paramount position in the hierarchy of constitutionally protected privacy interests.[42] In *Boyd v. United States*,[43] Justice Bradley imaginatively created an "intimate relationship" linking the fourth and fifth amendments. The Justice construed liberally the privacy interests protected by these amendments, concluding that there was no substantial difference between compelling a person to be a witness against himself through the forced production of his books and papers and through the seizure of these books and papers by the government.[44]

Justice Bradley asserted that the privacy interests protected by the fourth and fifth amendments affect the very essence of constitutional liberty and security. Relying on *Entick v. Carrington*,[45] he argued vigorously that the amendments' protections "reach farther than the concrete form of the case" and "apply to all invasions on the part of the government and its employe's of the sanctity of a man's home and the privacies of life."[46]

Justice Bradley further charted the course that elevated the protected privacies to an exalted position by declaring firmly that

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of

39. 401 U.S. 745 (1970).
40. Id. at 786 (Harlan, J., dissenting).
41. Id.
42. See McKenna, The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment, 53 Ind. L.J. 55 (1977-78).
43. 116 U.S. 616 (1886).
44. Id. at 633.
45. 19 How. St. Tr. 1029 (C.P. 1765).
46. 116 U.S. at 630.

> a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.[47]

The Court thus created a zone of privacy encompassing a person's private papers into which the government could not enter either by compulsion under subpoena or by seizure for use at a criminal trial. *Boyd* embraced an absolutist view, establishing that any governmental intrusion into private papers is "unreasonable" regardless of the manner in which they are obtained. *Boyd*'s absolute fourth and fifth amendments' safeguard for books and private papers was a result of common law property principles justifying these protections.[48] With the changing concepts of property/privacy and societal ideas of privacy, *Boyd*'s absolute safeguard has given way to a more realistic view of the protections provided by these amendments.[49]

Katz v. United States[50] "marks a watershed"[51] in the development of fourth amendment privacy concepts. *Katz* sharply altered *Boyd*'s perspective which had determined the validity of a search and seizure by primary reference to an individual's property rights. The Court in *Katz* developed its privacy doctrine by detaching fourth amendment rights from traditional property concepts. In bringing electronic eavesdropping within the scope of fourth amendment protection, the Court focused its inquiry on Katz's privacy expectations in using a public telephone rather than on whether the public telephone was a "constitutionally protected area."[52] Since "the Fourth Amendment protects people, not places,"[53] the Government's activities in electronically listening to and recording Katz's words violated his "justifiable expectation of privacy" in the use of the telephone booth and thereby constituted a search and seizure within the meaning of the fourth amendment.[54] The eavesdropping, conducted without a warrant, was unreasonable, and, therefore, the evidence obtained was inadmissible.[55]

The *Katz* Court in reviewing the eavesdropping maintained that the constitutional defect was not Katz's failure to receive absolute protection from government intrusion upon his private conversation but rather the agent's fail-

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47. Id.

48. See Note, The Life and Times of *Boyd v. United States* (1886-1976), 76 Mich. L. Rev. 184, 189 (1977).

49. See Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945 (1977).

50. 389 U.S. 347 (1967).

51. Amsterdam, supra note 7, at 382; see also 1 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 2.1, at 228 (1978).

52. 389 U.S. at 351.

53. Id.

54. The fact that the electronic device employed did not penetrate the wall of the booth had for the Court "no constitutional significance", id. at 353, thus ending the severely criticized trespass doctrine which the Court had developed in Olmstead v. United States, 277 U.S. 438 (1928). For criticism of the trespass doctrine, see King, Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration, 66 Dick. L. Rev. 17 (1961); Sullivan, Wiretapping and Eavesdropping: A Review of the Current Law, 18 Hastings L.J. 59 (1966-67).

55. 389 U.S. at 359.

ure to obtain a warrant.[56] This sharp contrast between *Boyd*'s vision of the fourth and fifth amendments and the more modernistic *Katz* viewpoint that narrows *Boyd*'s absolute privacy protection has major significance in the protections accorded an individual's private papers. This difference is strikingly presented in a trilogy of cases beginning with *Couch v. United States*.[57]

In *Couch*, the Court determined that the fifth amendment rights of a taxpayer were not violated by enforcement of a documentary summons directed to the taxpayer's accountant demanding the production of the taxpayer's records then in the accountant's possession. The Court asserted that the fifth amendment privilege is designed to prevent the exertion of "physical or moral compulsion" upon the accused and concluded that the personal nature of the privilege applies only when the accused himself is compelled to produce the evidence.[58] The Court reasoned that the necessary ingredient of personal compusion was absent,[59] and distinguished *Boyd* on the ground that the Boyds *both owned and possessed* the invoices ordered, while Couch had *neither actual nor constructive possession* of the documents subpoenaed.[60]

The Court, in deciding Couch's fourth amendment claim, found that she lacked a legitimate expectation of privacy in the contents of the records handed to her accountant because mandatory disclosure of much of the same information was required on her income tax return. Since the "expectation of privacy" in the contents of the papers necessary to launch a valid fourth amendment claim under *Katz* did not exist and the summons had satisfied constitutional requirements, Couch's constitutional claim was dismissed summarily.[61]

By treating Couch's fourth and fifth amendment rights as basically unrelated, the Court began the separation of the "intimate" relationship that Justice Bradley had envisioned in *Boyd*.[62] In a strongly worded dissent, Justice Douglas faulted the majority for "ignoring the interplay of the fundamental values protected by the Fourth and Fifth amendments,"[63] declaring, as he had in *Warden v. Hayden*,[64] his constitutional philosophy that the boundaries of the right to privacy make an individual's personal effects and possessions sacrosanct from governmental intrusion. Although the subpoena in *Boyd* was directed to the person asserting the privileges, for Justice Douglas this fact would not obscure the basic thrust of *Boyd*'s reasoning that "the Fourth and Fifth Amendments delineate a 'sphere of privacy' which must be protected

56. Id.

57. 409 U.S. 322 (1973).

58. Id. at 334-36.

59. However, the Court did concede that "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." Id. at 333.

60. Id. at 330-31.

61. Id. at 336 n.19.

62. See text accompanying notes 43-48 supra and notes 375-77 infra.

63. 409 U.S. at 338-39 (Douglas, J., dissenting).

64. 387 U.S. 294, 325 (1967) (Douglas, J., dissenting).

against governmental intrusion."[65]

Further separation of the "intimate relationship" occurred in both *Fisher v. United States*[66] and *Andresen v. Maryland*.[67] In the former case, after the Internal Revenue Service (I.R.S.) had begun an investigation into possible civil and criminal liability, the taxpayer, Fisher, obtained various work papers prepared by his accountant for income tax purposes and then gave them to his attorney. The Court upheld subpoenas directed to the taxpayer's attorney to surrender the accountant's work papers on the ground that the subpoenas would have been valid even if directed at Fisher.[68]

Justice White, writing for the majority, began by analyzing separately the fifth and fourth amendment rights, the former concerned primarily with personal compulsion[69] and the latter with privacy interests.[70] Severing the intimate relationship, Justice White asserted that no fifth amendment general right to privacy exists apart from the right against compelled self-incrimination. Personal privacy, asserted Justice White, is addressed directly in the fourth amendment and subject to the safeguards incorporated in that amendment.[71] It was only by invoking the attorney-client privilege that Fisher was permitted to assert his fifth amendment claim.

Comparing Fisher's fifth amendment claim to Boyd's, Justice White recognized that as a result of its pronouncements, *Boyd* was understood to declare that the seizure of purely evidentiary materials, including private papers taken from an individual under warrant or subpoena, violated the fourth amendment and thus rendered these materials inadmissible under the fifth.[72] But he argued that *Warden v. Hayden*,[73] which permitted under proper circumstances the search for and seizure of purely evidentiary materials, washed away the foundations of the *Boyd* rule. Consequently, "the prohibition against forcing the production of private papers has long been a rule searching for a rationale."[74] By applying the *Schmerber v. California*[75] principle "that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the ac-

65. 409 U.S. at 339-40 (Douglas, J., dissenting).
66. 425 U.S. 391 (1976).
67. 427 U.S. 463 (1976).
68. 425 U.S. at 414.
69. Id. at 398.
70. Id. at 400.
71. Id.
72. Id. at 407.
73. 387 U.S. 294 (1967). *Hayden* overruled the "mere evidence rule" announced in Gouled v. United States, 255 U.S. 298, 305-06, 309-11 (1921), which concluded that items not illegal but of only evidentiary value to prove the guilt of the defendant could not be seized pursuant to a warrant.
74. 425 U.S. at 409.
75. 384 U.S. 757 (1966). In *Schmerber*, the Court upheld the taking of a blood sample by a doctor in a hospital from a person accused of driving while intoxicated. The Court held that the practice did not violate the defendant's fifth amendment rights since he was not being "compelled" to testify against himself. There was no fourth amendment violation since the "search" was incident to a valid arrest and the exigencies of the situation (alcohol would dissipate from the blood stream) permitted the warrantless search.

cused is compelled to make a *testimonial* communication that is incriminating,"[76] Justice White was able to assert that the production of the accountant's work papers was neither sufficiently testimonial nor sufficiently incriminating to require its invocation. He reasoned that however incriminating the contents of the accountant's work papers might have been, production of the papers was the only act the taxpayer was compelled to do, and this did not in and of itself involve testimonial self-incrimination. Because the government already knew the papers were in the taxpayer's possession, "the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."[77] Having determined that by producing the accountant's work papers the taxpayer vouches for neither their accuracy nor authenticity, Justice White concluded that compliance with the summons involved no incriminating testimony protected indirectly through the attorney-client privilege or directly by the fifth amendment.[78]

The Court in *Andresen* addressed the question which it specifically left open in *Hayden*: "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."[79] In *Andresen*, detectives of a bi-county fraud unit investigating a land fraud scheme, obtained a search warrant for and seized the business records which Andresen had maintained as part of that fraudulent scheme. Following the *Fisher* rule that the fifth amendment is not violated when an individual is not "compelled" to do anything, the Court held that the fifth amendment provides no protection against a search and seizure of an individual's office for his business records.[80] Misapplying *Boyd*'s concept of the "intimate relation" between the fourth and fifth amendments,[81] Justice Blackmun, writing for the Court, stated that the legal predicate for the inadmissibility of the evidence in *Boyd* was a violation of the fourth amendment; the unlawfulness of the search was necessary to supply the compulsion essential to invoke the fifth amendment.[82] Because there was no fourth amendment violation, *Boyd*'s "convergence theory" was held inapplicable.

Boyd's principle, recast in *Fisher-Andresen* terms, is that no material receives absolute protection under the fifth amendment and privacy protections are limited to the fourth amendment's procedural safeguards. The zone of privacy created by Justice Bradley in *Boyd* and vigorously espoused by Justice Douglas in *Couch* now may be breached by the government either pursuant to

76. 425 U.S. at 408.

77. Id. at 411.

78. Id. at 414.

79. 387 U.S. at 303.

80. 427 U.S. at 477.

81. See Note, supra note 48, at 210.

82. 427 U.S. at 472. In fact *Boyd* did not decide that a fourth amendment violation was a prerequisite to activating fifth amendment safeguards. *Boyd* held that the fourth and fifth amendments coalesced to produce a zone of privacy around one's papers and indicated that even if the mandates of the fourth were complied with, the government still could not compel a man to produce evidence against himself, by search warrant or subpoena, in violation of the fifth amendment. 116 U.S. at 637-38.

a valid subpoena or by a search under a lawful warrant. Almost a century after its birth, the *Boyd* absolutist privacy-content doctrine has been lost, although it has not been given a suitable burial.

The papers seized in *Andresen*, as the Court repeatedly stressed, were "business records," possibly permitting a distinction from the evaluation of the privacy expectation attached to purely personal documents such as private diaries. The theoretical underpinnings of *Andresen*, however, leave little doubt that even the most private and personal of papers are subject to fourth amendment seizure.[83] Thus, the question left open in *Hayden* whether there are some items which are so personal in nature that a reasonable search and seizure of them would never lie, appears to have been answered negatively.[84] *Andresen* makes it abundantly clear that it is not the contents but the manner in which documents are obtained that is determinative of the constitutional claims and, therefore, that the procedural requirements of the warrant clause are the sole means of protecting personal privacy.

Clearly, the *Andresen* Court rejected the "content approach" for business records, and neither the majority nor dissenting opinions discussed the possibility that the reasonableness clause of the fourth amendment might have some independent significance on the content doctrine when the search is for purely private documents. Subsequently, in *Zurcher v. Stanford Daily*,[85] the Court held that the fourth amendment reasonableness clause did not forbid the states from issuing a warrant to search for evidence simply because the owner or possessor of the place to be searched is not reasonably suspected of criminal involvement.[86] Justice White, writing for the majority, implied that in some circumstances the reasonableness clause may be a limitation on searches even when probable cause does exist.[87]

In *Zurcher*, the *Stanford Daily*, a campus newspaper, published articles and photographs of a clash between demonstrators and police at a hospital. A search warrant was issued on the basis of probable cause to believe that the newspaper, whose staff members had not been involved in the clash, possessed

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83. One commentator has stated that, "No zone of privacy now exists that the government cannot enter to take an individual's property for the purpose of obtaining incriminating information. In most cases, the zone can be entered by the issuance of a subpoena; in the rest, it can be breached by a search warrant." Note, supra note 48, at 211 (footnote omitted). But cf. 1 W. LaFave, supra note 51, § 2.6 at 395. (There may be an absolute immunity against seizure of diaries and very private papers because society's interest in seeing the papers will never outweigh the individual's interest in the sanctity of his highly personal effects; "[t]his question was neither raised nor resolved in *Andresen*." Id.)

84. It has been postulated that,

> Conjecturally, if as *Andresen* holds, the fifth amendment privilege is unavailable when evidence is acquired by search and seizure, as compulsion would be lacking, then even the most private, and probably most testimonial, written matter—the diary—would be amenable to seizure, assuming that the warrant could meet the probable cause and specificity criteria of the fourth amendment.

Comment, A Paper Chase: The Search and Seizure of Personal Business Records, 43 Brooklyn L. Rev. 489, 501 (1976).

85. 436 U.S. 547 (1978).

86. Id. at 560.

87. Id. at 559-60.

photographs and negatives of the demonstrators who had assaulted a police officer. A search pursuant to the warrant was conducted by four police officers in the presence of several members of the *Daily* staff. The *Daily*'s photographic laboratories, filing cabinets, desks and wastepaper baskets were searched, but no locked drawers or rooms were opened.[88] The search revealed only the published photographs, and no materials were removed from the *Daily* office.

One month later, the *Daily* brought a civil action in United States District Court seeking declaratory and injunctive relief,[89] alleging that the search of the offices violated its constitutional rights guaranteed by the first, fourth and fourteenth amendments. The district court granted declaratory relief, holding 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 is probable cause to believe that a subpoena duces tecum would be impractical.[90]

The Supreme Court rejected the district court's ruling, declaring that the critical element in any reasonable search is not that the owner of the property area to be searched is suspected of committing a crime but rather that there is probable cause to believe the related items to be searched for and seized are located on the property.[91] Once it determined that "[t]he fourth amendment itself has struck the balance between privacy and public need,"[92] the Court deemed it unnecessary to factor in any additional considerations involving innocent-third-party searches.

Noting that the state interest in enforcing the criminal laws and in recovering evidence is the same whether or not the third party is suspected of criminal conduct, the Court was not persuaded that requiring the state's investigation to proceed by the less intrusive subpoena duces tecum "would substantially further privacy interests without seriously undermining law enforcement efforts."[93] In support of the Court's conclusion that a subpoena might have adverse effects on criminal investigation, Justice White noted that search warrants often are employed early in an investigation and that "[t]he seemingly blameless third party in possession of the fruits or evidence may not be innocent at all"; if he is, he may still be sympathetic to those culpable so that he cannot be trusted to preserve the evidence or to resist notifying those who may wish to destroy it.[94] Because search warrants generally are more

88. Id. at 551 n.2. The District Court found it unnecessary to resolve the issue whether the officers, who apparently had an opportunity to read notes and correspondence during the search, had exceeded the bounds of the warrant. Id.

89. The relief was sought under 42 U.S.C. § 1983 (1976).

90. 353 F. Supp. 124 (N.D. Cal. 1972). The district court further held that where the search is of a newspaper, first amendment considerations make the search constitutionally permissible only in the rare circumstance where there is a clear showing that a subpoena would be impractical because the materials would be destroyed or removed from the jurisdiction, and where a restraining order would be futile. Id. at 135. The Court of Appeals for the Ninth Circuit affirmed in a per curiam opinion. 550 F.2d 464 (9th Cir. 1977).

91. 436 U.S. at 556.

92. Id. at 559.

93. Id. at 560.

94. Id. at 561.

difficult to obtain than are subpoenas, Justice White reasoned that the rational prosecutor, if given the choice, would proceed by subpoena unless he determined that a search by warrant was necessary to avoid the destruction of evidence. Viewing the choice in this manner, the Court was not convinced that the net gain to privacy interests by generally requiring subpoenas in true third-party searches "would be worth the candle."[95]

Justice Stevens, in dissent, was concerned with the type of showing that should be required to conduct a search for documentary evidence in the private files of persons not suspected of criminal involvement.[96] He recognized that *Warden v. Hayden* expanded not only the category of objects which may be seized, but also the category of persons and the character of the privacy interests affected by an unannounced police search, and determined that a showing of probable cause to justify a warrant in pre-*Hayden* days may not satisfy the new dimensions of fourth amendment privacy in the post-*Hayden* era.[97]

Zurcher's most dangerous consequence is that it condones the most intrusive of fourth amendment privacy invasions, that of totally innocent third parties' private documents, without appropriate consideration of competing fourth amendment privacy interests. Numerous law-abiding citizens have documents in their possession which may aid the government in its criminal investigations, but to subject these citizens to unannounced police searches would involve a serious intrusion upon their privacy. Surely these innocent members of our society are entitled to some extra dimension in protecting their privacy and reasonably can expect the courts to compel the government to use the least intrusive method when their privacy interests must be invaded.[98] As

95. Id. at 562. The district court noted that in fact the innocent third party is unlikely to receive protection of his privacy interests since the exclusionary rule will provide little deterrent, as to him, against unreasonable searches and seizures. The court stated, "Unlike one suspected of a crime, the third party has no meaningful remedy or protection against an unlawful search, with or without a warrant, and an additional safeguard is necessary to assure that his Fourth Amendment rights are not trampled." 353 F. Supp. at 132. The Supreme Court did not find it necessary, in protecting the first amendment free press interest, to impose the less intrusive subpoena duces tecum method in obtaining evidence. Although acknowledging the long struggle between the crown and the press, the Court determined that when "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." 436 U.S. at 565.

Justice Stewart, in dissent, noted that the practice of searching a newspaper, even upon warrant, would cause many confidential "sources" to fear that their identities would be revealed and, therefore, to cease communicating with journalists. He concluded that the practice in question was prohibited by the first and fourth amendments. Id. at 571-72 (Stewart, J., dissenting).

Congress responded to *Zurcher* by passing the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C.A. §§ 2000aa, 2000aa-5 to -7, -11, -12 (West Supp. 1980)) which provides that government officers must use the lesser intrusive subpoena duces tecum to obtain materials from persons engaged in disseminating information to the public. Only under certain limited exceptions may the more intrusive search warrant be used. See 42 U.S.C.A. § 2000aa (West Supp. 1980).

96. 436 U.S. at 577 (Stevens, J., dissenting).

97. Id. at 582.

98. Clearly Congress has expressed its preference for the subpoena method by mandating the Attorney General to develop guidelines which would require federal officers to use the least intrusive method of obtaining documentary evidence from innocent third persons, especially from

Justice Stevens proposed, since "[m]ere possession of documentary evidence, however, is much less likely to demonstrate that the custodian is guilty of any wrongdoing or that he will not honor a subpoena or informal request to produce it," and because "[t]he only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search,"[99] the probable cause showing must demonstrate that there is a need for the unannounced search to prevent the destruction of evidence. In the absence of an expanded probable cause showing, the standard of reasonableness embodied in the first clause of the fourth amendment does not justify this degree of privacy intrusion.[100]

Amidst the interplay of these competing policy considerations there is a specific danger unique to the search of private papers. History shows that the abuse of the general warrant or writ of assistance was a primary concern of the colonists and a motivating force behind the inclusion of the fourth amendment.[101] As noted by the House of Commons in its debate on general warrants:

> Even a particular warrant to seize seditious papers alone, without mentioning the titles of them, may prove highly detrimental, since in that case, all a man's papers must be indiscriminately examined, and such examination may bring things to light which it may not concern the public to know, and which yet it may prove highly detrimental to the owner to have made public. . . .[102]

The search for private papers, even those particularly described in a warrant, necessarily involves "rummaging" through the contents of all the personal papers to isolate those subject to seizure.[103] A private papers search, even if limited by the particularity clause of the fourth amendment, still must partake of some of the same general characteristics and dangers of the general warrant.

Although a search for tangible physical items may involve some "rummaging," it does not necessitate the same degree of searching as required in a search for particular papers. As one scholar has observed, "documentary

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those involved in professional confidential relationships. See Privacy Protection Act of 1980, 42 U.S.C.A. §§ 2000aa-11 to -12 (West Supp. 1980). However, under the Act a federal officer's failure to comply with the Attorney General's guidelines is not an issue which may be litigated, nor may it be used to invoke the exclusionary rule.

99. Id. at 581-82 (Stevens, J., dissenting).

100. Justice Stewart noted in Berger v. New York, 388 U.S. 41 (1966) (Stewart, J., concurring), that "[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." Id. at 69. In *Zurcher*, Justice Powell commented that the Court's opinion makes clear that "the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interest of the owner or occupant." 436 U.S. at 570 (Powell, J., concurring). In a footnote Justice Powell noted that the magnitude of the search together with the nature and significance of the material sought are also factors that properly must be considered as bearing on the reasonableness of the search and the particularity requirement of the fourth amendment. Id. at 570 n.2.

101. For historical development, see books cited at note 4 supra.

102. 16 Parl. Hist. Eng. 10 (1765).

103. As Learned Hand noted, "the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him." United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930).

searches involve deeper inroads on personal security than searches for the traditional fruits and instrumentalities of crime."[104]

Justice Blackmun, in *Andresen*, acknowledged the grave danger inherent in executing a warrant authorizing the search of a person's papers and noted that the same risks are not necessarily present in the search for physical objects whose relevancy is easily ascertainable.[105] But after stating that similar dangers are present in executing a warrant for the seizure of telephone conversations, he felt it sufficient merely to warn the responsible judicial officials that they must take care to assure that both kinds of searches are conducted in a manner that minimizes the unwarranted intrusion upon privacy.[106]

In *Boyd*, the Court held that all government attempts to secure an individual's private papers by subpoena or search are unconstitutional under both the fifth amendment self-incrimination clause and the reasonableness clause of the fourth amendment.[107] The *Boyd* Court concluded that the intimate relationship linking these two amendments created a barrier between the government and the individual's inviolate property rights in the privacy of his books and papers such that the search and seizure of his private papers would be "unreasonable" even if conducted pursuant to subpoena or a warrant satisfying the procedural requirements of the fourth amendment.[108] The central issue that the majority of the Court has refused to address in the post-*Katz* cases dealing with the government's obtaining private papers is the wisdom and practicality of maintaining a "private enclave" of individual privacy as a "fundamental value" protected by these amendments.[109] As a commentator has noted, "The conclusion that the fourth and fifth amendments should protect absolutely a core of one's expressions and effects is impelled by the moral and symbolic need to recognize and defend the private aspect of personality."[110]

Just as the Court has resisted attempts by the legislative branch to control private behavior,[111] a continued recognition of the fundamental value of an absolute privacy protection to purely "personal documents" such as diaries and private papers[112] justifies a return to *Boyd*'s creative intertwining of the

104. Taylor, supra note 4, at 68. As stated in State v. Bisaccia, 45 N.J. 504, 515, 213 A.2d 185, 191 (1965), "even a search for a specific, identified paper may involve the same rude intrusion [of a general search] if the quest for it leads to an examination of all of a man's private papers." See McKenna, supra note 42, at 69, where he suggests that an additional consideration relating to the search of private papers is not merely its highly intrusive nature in fourth amendment terms but the values protected by the first amendment and the generalized right of privacy.

105. 427 U.S. at 482 n.11.

106. Id.

107. 116 U.S. at 633.

108. Id. at 630. See Note, supra note 49; Note, supra note 48.

109. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1963); Note, supra note 49, at 986 n.246. See generally Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

110. Note, supra note 49, at 985.

111. Id. at 986 n.249.

112. Justice Brandeis, in Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting), observed that this recognition is the core of the fourth amendment.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and

fourth and fifth amendments to protect "the sanctity of a man's home and the privacies of life."[113] Samuel D. Warren and Louis D. Brandeis, in their eloquent article on privacy, acknowledged that "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others . . . and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them."[114]

MISPLACED CONFIDENCES: THE RIGHT TO CONVERSATIONAL PRIVACY

The fourth amendment exists to protect "the people"—criminals and non-criminals alike—from government overreaching and intrusion into their privacy. The amendment addresses its limits to the government and, thus, the proper analytical framework for determining when a particular police practice is to go unregulated by constitutional restraints must be based upon the nature of the police activities and their relationship to the amendment's broad privacy coverage.

To consider the "reasonableness" of privacy expectations from the criminal perspective can only seriously weaken the *Katz* privacy analysis. The ultimate question, whether "the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society,"[115] must not be guided by any theory of "risk assumption" or "subjective privacy expectation" that a criminal may possess. This perspective, however, is precisely the analytical framework that has dominated the Court's analysis in the "misplaced confidences" cases.

The "misplaced confidence" seed was planted by the Court in *Lewis v. United States*,[116] flowered in *Hoffa v. United States*[117] and came to full fruition in *United States v. White*.[118] In this area the Court has declined to impose restraints on the government's use of its secret agents or informants. In fact, it has broadened and diversified the applicable situations of this "misplaced doctrine."[119]

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satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478.

By failing to recognize the paramount nature of the fourth and fifth amendment privacy values, the Court, in *Andresen*, serves "to confine the dominion of privacy to the mind." 427 U.S. 463, 487 (Brennan, J., dissenting).

113. 116 U.S. at 630.

114. Warren & Brandeis, supra note 109, at 198.

115. Amsterdam, supra note 7, at 403.

116. 385 U.S. 206 (1966).

117. 385 U.S. 293 (1966).

118. 401 U.S. 745 (1971).

119. See, e.g., Weatherford v. Bursey, 429 U.S. 545 (1977) (An undercover agent who had been "arrested" with Bursey was asked by the defense to attend pretrial strategy meetings. He did not reveal his true identity as a federal agent and at the trial, over the objection of Bursey's sixth

In *Lewis*, a federal narcotics agent, misrepresenting his identity, telephoned Lewis and asked him about the possibility of purchasing narcotics. He was invited to Lewis' home, where, after a brief conversation, an unlawful narcotics transaction took place. At trial Lewis objected to the admission of the agent's testimony about what had occurred at the home regarding the narcotics sale, claiming that absent a warrant, the agent's intrusion upon the privacy of his home constituted a fourth amendment violation. Furthermore, he claimed that the fact that he may have invited the agent could not be considered a waiver of his rights because the invitation was induced by the agent's fraud and deception.[120]

Chief Justice Warren, expressing the view of the majority, determined that Lewis' invitation to the agent to participate in an illegal commercial activity at his home did in fact constitute a limited waiver of his fourth amendment rights. The agent, having entered upon invitation for that specific and limited purpose, had heard, seen and taken only what was necessary for the illegal sale, thereby enabling the Chief Justice to conclude that "[t]he pretense resulted in no breach of privacy; it merely encouraged [Lewis] to say things which he was willing and anxious to say to anyone who would be interested in purchasing marihuana."[121]

The *Lewis* "misplaced confidence" rationale was extended in *Hoffa v. United States*,[122] a case decided during the same term. Teamster President James Hoffa was tried in Nashville, Tennessee for violating a criminal provision of the Taft-Hartley Act. That trial, referred to as the "Test Fleet Trial," ended in a hung jury. Hoffa and three of his associates subsequently were convicted for endeavoring to bribe members of the Test Fleet jury.[123] The Government obtained much of the evidence enabling those convictions from Edward Partin, a Teamster local official and an associate of Hoffa.

According to the facts as assumed by the Court, Partin, who had been in prison on state charges and under federal indictment for embezzling union funds, was released on bail and by means of his long-time association with Hoffa, was able to insinuate himself into Hoffa's entourage.[124] As a "faithful"

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and fourteenth amendment claims, the agent was allowed to testify for the prosecution regarding matters occurring prior to the arrest.). See also United States v. Caceres, 440 U.S. 741 (1979), discussed at note 145 infra. But see United States v. Henry, 447 U.S. 264 (1980), discussed at notes 149-158 and accompanying text infra.

120. 385 U.S. at 208.

121. Id. at 212 (quoting from respondent's brief). The Court distinguished the facts in *Lewis* where the agent did not exceed the bounds of his invitation, from those in Gouled v. United States, 255 U.S. 298 (1921), where the "friend," acting under the orders of federal agents, was allowed to enter the petitioner's office for the limited purpose of a social visit and then secretly ransacked the office and seized incriminating papers. 385 U.S. at 209-10. In *Gouled*, the Court held that the materials were unconstitutionally seized in that the government should have secured a warrant before searching the premises. 255 U.S. at 309.

122. 385 U.S. 293 (1966). For a perceptive discussion of *Hoffa*, see Kitch, supra note 27, at 150-53.

123. Petitioners Hoffa, Parks and Campbell were convicted under 18 U.S.C. § 1503 (1964) which made attempting to influence or injure a juror a crime.

124. For the purposes of deciding the constitutional issues, the Court assumed that Partin was in fact a government informer from the time he first arrived in Nashville. 385 U.S. at 299.

servant of Hoffa's defense camp during the Test Fleet case, he was in a position to overhear conversations, many of which were between Hoffa and his attorneys and prospective defense witnesses. Pursuant to the general instructions he received from the federal government, Partin reported everything he saw and heard, much of which he ultimately testified to at Hoffa's bribery trial.

Hoffa's fourth amendment claim was that the incriminating admissions overheard by Partin, a government agent placed in Hoffa's hotel suite, resulted from unlawful invasions of Hoffa's privacy in his hotel room and of the security of his communications.

The *Hoffa* Court initially reaffirmed that fourth amendment protections are not linked solely to tangibles but can extend to oral statements, and that fourth amendment privacy certainly can be violated by deception[125] as well as by forcible intrusions into a constitutionally protected area such as a hotel room. The Court, however, rejected Hoffa's claim and determined that "misplaced confidences," disclosed in front of his friend and close associate Partin, were not protected by the fourth amendment.[126] In analyzing Hoffa's claim, the Court reasoned that Hoffa's argument fell on "its misapprehension of the fundamental nature and scope of Fourth Amendment protection."[127] The fourth amendment, which protects "the security a man relies upon when he places himself or his property in a constitutionally protected area," did not provide a safeguard for Hoffa, because he did not rely on the security of the hotel room but rather on his "misplaced confidence" in his friend Partin.[128] The Court thereby concluded that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[129] In fact, the *Hoffa* Court reasoned, being betrayed by an informer or deceived as to an informer's identity is "probably inherent" in the condition of human society and is a risk necessarily assumed whenever one speaks.[130]

By its characterization as a "misplaced confidence" case, *Hoffa* was directly assimilated into *Lewis* without addressing the fundamental distinctions between the two decisions. Lewis' contention that the agent's deception invaded his privacy was rejected because Lewis had invited the agent into his home for the specific purpose of making the unlawful sale, and in fact the agent did not see, hear or take anything that was not contemplated by the illegal transaction.[131] *Lewis* was a very limited and specific intrusion. By comparison, Partin's intrusion was more extensive. Once admitted to Hoffa's entourage, Partin was privileged to conversations, both as directed to him and

125. Id. at 301 (citing Silverman v. United States, 365 U.S. 505 (1961), and Gouled v. United States, 255 U.S. 298 (1921)).

126. 385 U.S. at 301-02.

127. Id. at 301.

128. Id. at 301-03.

129. Id. at 302.

130. Id. at 303.

131. Lewis v. United States, 385 U.S. at 210.

as between Hoffa and his attorney and other witnesses. Partin was "the equivalent of a bugging device" which moved with Hoffa.[132] Chief Justice Warren, the author of the majority opinion in *Lewis*, was clearly repulsed by the "unconscionable activities" in *Hoffa*, and in a separate dissent attacked the government's actions of procuring and using the unreliable informer in this manner as an "affront to the quality and fairness of federal law enforcement" and as an instance deserving of the exercise of the Court's supervisory powers.[133]

An additional critical distinction, and a very compelling one, was that unlike the agent in *Lewis*, who was invited into the home to conduct the unlawful sale, Hoffa had not opened his hotel suite for the transaction of any business. The Court reasoned, however, that Hoffa was not relying on the security of the hotel room but upon his misplaced confidence in his friend Partin. The Court dropped a cryptic footnote, hinting that if Partin had been a stranger to Hoffa, as was the agent in *Lewis*, the result might have been different.[134] The Court seemed to suggest that if Partin had been a secret agent who wormed his way into Hoffa's confidence, the degree of government deception would be greater and that this would not be a risk that Hoffa need assume. But there are no constitutional policy considerations regarding privacy interests that would support this suggestion. The government's deception and privacy intrusion is not any different, regardless of the prior relationship between Hoffa and Partin, for the informer was, the Court assumed, working for the government at the moment he made initial contact with Hoffa in Nashville.[135] Partin was not a friend who later revealed wrongdoing to the government—a risk that all friends must take—but was recruited by the government to secure admittance to Hoffa's secret councils for the very purpose of reporting everything to the government.[136] Partin's actions from the beginning were the equivalent of the government's creating a risk that Hoffa neither assumed nor, in the *Katz* parlance, "reasonably expected."[137]

The *Hoffa* Court's main argument was based upon the premise that whenever one speaks it is possible that he will be overheard by an eavesdropper, or that the person to whom he is speaking may have misrepresented his identity or will not maintain the confidentiality of the conversation. These

132. Hoffa v. United States, 385 U.S. at 319 (Warren, C.J., dissenting). But unlike a bugging device that accurately relates the overheard conversation, Partin was viewed by the Chief Justice as a "jailbird" and the type of informer who poses "a serious potential for undermining the integrity of the truth-finding process in the federal courts." Id. at 320.

133. Id.

134. The Court stated, "The applicability of the Fourth Amendment if Partin had been a stranger to the petitioner is a question we do not decide. *Cf.* Lewis v. United States." Id. at 302 n.6.

135. See note 124 supra.

136. "[A] person may take the risk that a friend will turn on him and report to the police. But that is far different from the Government's 'planting' a friend in a person's entourage so that he can secure incriminating evidence." Osborn v. United States, 385 U.S. 323, 347 (1966) (Douglas, J., dissenting). Cf. Gouled v. United States, 255 U.S. 298, 306 (1921) (government intrusion by stealth or social acquaintance is prohibited by the fourth amendment as an intrusion by force).

137. See Kitch, supra note 27, at 150-51.

risks, the Court concluded, are incidental to life in a conversational society.[138] But this argument is specious as applied to government agents. The risk of betrayal by one's friends who may later relate wrongdoing to the government cannot be regulated by the fourth's safeguards, but the fourth amendment can and does regulate government actions, especially by its agents. The government has significantly altered the perceived risks by purposefully introducing spies into the home and other protected areas.[139] Furthermore, the focus of the analysis is incorrect. Rather than asking whether criminal confederates must assume certain risks, the question should be whether this is the type of governmental intrusion into the privacy rights of citizens of a free society that should be allowed to occur without procedural safeguards. The Court makes no concession to our collective security, criminal and innocent alike, seeming to reason that since ordinary social intercourse imposes certain risks, "the government is constitutionally unconstrained in adding to those risks."[140]

The compatibility of the privacy doctrine formulated in *Katz*, with the authority of law enforcement officials to electronically equip their secret agents with bugging devices without the benefit of a warrant was tested in *United States v. White*.[141] White's conversations with an informer, concerning the sale of heroin, took place in both White's and the informer's homes and in the informer's car.[142] These conversations were monitored by means of a miniature radio transmitter, concealed on the informer, which enabled federal narcotics agents to overhear the conversations. The prosecution was unable to locate the informer at the time of the trial, but the incriminating exchanges were related by the federal agents at trial as direct evidence of White's guilt.

The *White* Court conceded that *Katz* reconstructed the scope of fourth amendment protection and cut the amendment free from the necessity of a physical intrusion requirement, but in the process the Court recognized that *Katz* itself never provided a meaningful key to the nature of the privacy to be protected.[143] The *White* opinion is posited on the risk assumption approach postulated in *Hoffa*, with only passing reference to White's privacy expectations.[144] The *White* Court reasoned, as had the *Hoffa* Court, that the fourth amendment does not protect the individual from "misplaced confidences" in a friend-turned-informer, and concluded that the fourth need not protect him

138. 385 U.S. at 303.

139. See Stone, The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers, 1976 Am. B. Foundation Research J. 1193, 1240.

140. Amsterdam, supra note 7, at 406. Justice Harlan was disturbed that widespread participant monitoring "might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life." United States v. White, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting). See note 136 supra.

141. 401 U.S. 745 (1971).

142. Four of the conversations took place in the informer's home and were overheard by an agent hiding in the closet and by another agent who was stationed outside and heard the conversation via a radio receiver. Four other conversations were overheard through the use of radio equipment: one in a restaurant, two in the informer's car and the last at White's home. Id. at 747.

143. Justice White indicated that the question remaining after *Katz* was what privacy expectations are "constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant." Id. at 752. See Amsterdam, supra note 7, at 357-58.

144. 401 U.S. at 751-52.

when the same informant has recorded or simultaneously transmitted the conversations to the government.[145] To capsulate *White*'s theory: Since an individual must assume the risk of betrayal by his friends, he must now also run the risk that the government will foist upon him in the privacy of his home secret agents in the guise of friends, equipped with bugging devices.[146] Recast in the *Katz* privacy-expectation orientation: Since an individual contemplating illegal activity must realize the risk that his companions may be reporting to the police, this revelation to the government by the informer does not invade the criminal's justifiable expectations of privacy and neither does the simultaneous recording or transmission of this conversation.[147]

Therefore, where *Hoffa* gave the government constitutional permission to use its secret agents as a passport to intrude upon a suspect's privacy, *White* increased the privacy invasion by extending authority to the government, without a warrant, to monitor its agents electronically. This judicially unsupervised privacy invasion is difficult to reconcile with *Katz*'s promised principles of protected constitutional privacies.[148]

The majority of the Court, however, has refused to apply the "misplaced confidence" rationale to the government's use of an undercover informant who "deliberately elicits" incriminating statements from an accused *after* formal criminal proceedings have commenced. In *United States v. Henry*,[149] a paid government informant confined in the same jail cell block as the defendant Henry, "stimulated" conversations with him regarding the defendant's bank robbery charges. Although the informant was instructed by a government agent not to question Henry but merely to be alert to any statements made by federal prisoners, the Court had little difficulty in finding that the agent must have known that the informant, who was paid on a "contingent fee basis," would "deliberately elicit" incriminating statements.[150]

The *Henry* Court determined that *Massiah v. United States*,[151] a *pre-misplaced confidence case*, directly controlled its decision.[152] By relying on the *Massiah* doctrine that once formal criminal proceedings have begun any surreptitious questioning by an undercover agent intended to elicit incriminating

145. The Court perceived no difference between the privacy invasion of a secret recording and that of a friend-turned-State's-evidence. In United States v. Caceres, 440 U.S. 741, 750 (1979), the Court reaffirmed *White* in holding that an I.R.S. agent's consent to have his conversation with a taxpayer recorded vitiated any invasion on the taxpayer's privacy since he assumed the risk that the agent would not keep their conversation private. But Justice Marshall, in dissent, recognized that the use of electronic devices in violation of I.R.S. regulations may undercut privacy and security interests. Id. at 760 (Marshall, J., dissenting). But cf. Berger v. New York, 388 U.S. 41, 63 (1967) (White, J., dissenting) (electronic eavesdropping is serious risk to privacy and security); Alaska v. Glass, 583 P.2d 872, 877 (Alaska 1978) (difference between assuming risk of a gossip and being recorded).

146. 401 U.S. at 777 (Harlan, J., dissenting).

147. Id. at 752-53.

148. See Comment, Electronic Eavesdropping and the Right to Privacy, 52 B.U.L. Rev. 831 (1972).

149. 447 U.S. 264 (1980).

150. Id. at 270-71.

151. 377 U.S. 201 (1964).

152. 447 U.S. at 270.

statements impermissibly interferes with the accused's sixth amendment right to counsel,[153] the *Henry* Court concluded that defendant Henry's statement to the informant should not have been admitted at trial.[154]

Chief Justice Burger, for the majority Court, determined, although his reasons for so doing are not readily apparent,[155] that there is a substantial difference in the use of secret informers in investigating a crime prior to, as in *Hoffa*, as opposed to after, as in *Henry*, formal proceedings have commenced.[156] He noted that in *Hoffa*, no legitimate interest protected by the fourth was involved, because " 'the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' "[157] But once the formal proceedings have begun, the use of secret informers to elicit deliberately incriminatory remarks impermissibly interferes with the accused's sixth amendment right to counsel.

Henry, by directly reaffirming the *Hoffa-White* misplaced confidence doctrine,[158] creates a paradox, since during a continuing covert operation the government initially is unconstrained by the fourth's procedural safeguards in its use of a government informant masquerading as a friend who secretly listens to or bugs conversations. Once formal criminal proceedings have begun, however, any further dealings an individual has with the informant are absolutely protected by the sixth amendment. In *Harris v. United States*,[159] Justice Frankfurter counseled that "[a] decision [of a Fourth Amendment claim] may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime."[160] The Surpeme Court's disillusionment with the exclusionary doctrine has placed the fourth in a disfavored position.

The Court has not applied the same analytical analysis in business searches that it has used with spies infiltrating the inner circle of criminals. For example, in *Marshall v. Barlow's, Inc.* [161] the Court held that Occupational Safety and Health Act (OSHA) agents need a warrant to search work areas for safety hazards whenever the owner of the establishment refuses consent to the safety inspection. The Court determined that although an employee is free to report violations he observes, and the government is free to use any of this evidence, the government's scrutiny may go no further without a warrant. The employer's privacy in conducting his business is not lost because he must use employees; nor, apparently, must he assume the risk that the government will

153. 377 U.S. at 205-06.

154. 447 U.S. at 274.

155. Id. at 299 (Rehnquist, J., dissenting).

156. *Id.* at 272.

157. Id. (quoting Hoffa v. United States, 385 U.S. at 302). Chief Justice Burger also stated that prior to the filing of charges against the defendant, the fifth amendment may not be invoked against the use of undercover agents since the potentiality for compulsion was absent. Id.

158. Id. at 272.

159. 331 U.S. 145 (1947).

160. Id. at 157 (Frankfurter, J., dissenting).

161. 436 U.S. 307 (1978).

thrust upon him an employee spy.[162]

The Court assuredly would not weaken its ruling that OSHA agents must utilize the administrative warrant procedure by permitting OSHA easily to circumvent the procedure by the use of an undercover employee planted in the business free to observe or transmit pictures back to OSHA agents, on the *Hoffa-White* risk-assumption approach.[163] The *Barlow* decision demonstrates that the employer need not assume any greater risk vis-à-vis the government than that which is apparent objectively under the circumstances.[164] That the Court is prepared to limit the risk the businessman must assume regarding government activity is exemplified further by *Lo-Ji Sales, Inc. v. New York*,[165] in which Chief Justice Burger determined that although a business establishment opens its doors to the public, it still maintains privacy expectations against government intrusion. The risk that befalls the public business, in this case an adult bookstore, is minimal; it is that the government will view the magazines and films as would any other member of the public and that any additional government intrusion must conform to fourth amendment safeguards.[166]

In *United States v. White*,[167] the Court's analytical perspective was based upon the subjective expectations and assumed risks that a criminal has taken and must take in speaking to confederates. In contrast, Justice Harlan altered his subjective conception announced in *Katz*[168] and recognized that any privacy analysis must "transcend the search for subjective expectations or legal attribution of assumptions of risk."[169] The protection the fourth amendment provides to "all the people" should not be based on any imposed risk assumptions or privacy expectations of criminals. Rather, the analysis should be grounded upon a consideration of whether our sense of security, characteristic of individual relationships among citizens of a free society, is undermined by the practice of uncontrolled informer electronic bugging.[170] By molding its "risk analysis" theory exclusively in terms of the expectations and risks that wrongdoers involved in illegal activities ought to bear, the *White* Court im-

162. Id. at 315.

163. See Grano, Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement, 69 J. Crim. L. & Criminology 425, 435 (1978).

164. Id. at 436.

165. 442 U.S. 319 (1979). In *Lo-Ji*, officers searched an adult bookstore and seized massive amounts of materials. The warrant on which they had acted was defective in that it had not been issued by a detached and neutral magistrate and was too open-ended. Id. at 326-27. The evidence seized therefore was held to be inadmissable at trial. Id. at 329.

166. Id. at 329.

167. 401 U.S. 745 (1971).

168. In Justice Harlan's concurring opinion in *Katz*, he stated that the fourth amendment protects one who has "exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

169. 401 U.S. at 786 (Harlan, J., dissenting).

170. Justice Harlan noted that frequently the laws of the land become the customs and expectations of its people, and that therefore the Court must consider the societal influence of lax laws condoning electronic eavesdropping. Id. See Comment, supra note 148.

posed on *all* citizens the risk of electronic bugging without any fourth amendment safeguards.[171]

To the individual whose conversation is monitored, the privacy invasion is the same whether the government agent electronically monitors the conversation directly or does so surreptitiously through a secret agent. All citizens, especially those in fringe groups who believe their lawful but unpopular activities may make them objects of government scrutiny, take little solace in the knowledge that the government may not, without sufficient reason or close judicial supervision, directly monitor their actions electronically but may, without any cause or judicial control plant spies in their midst to gain the same information.[172] As a doctrinal matter, it is unquestioned that *Katz* was intended to broaden the boundaries of fourth amendment protection, but by using the criminal as the risk assumption model and by imposing upon him a required expectation of such risk, these boundaries are restricted for all citizens, thus jeopardizing the "people's sense of security" that is, after all, the fundamental concern of the fourth amendment.[173]

REQUIRED CONFIDENCES

In 1970, Congress enacted the Bank Secrecy Act,[174] which authorized the Secretary of the Treasury to require financial institutions to maintain duplicate records of bank transactions with their customers. The Act was based on the premise that an effective fight against crime depends in large measure on the maintenance of adequate and appropriate records by financial institutions.[175] Both the House Committee on Banking and Currency and the Senate Banking Committee noted that access to the records must be controlled, the latter stating that "[t]he legislation in no way authorizes unlimited fishing expeditions into a bank's records on the part of law enforcement officials,"[176] and insisting that the records could only be obtained through existing legal process.

In *United States v. Miller*,[177] a bank customer moved to suppress copies

171. 401 U.S. at 789 (Harlan, J., dissenting). See Holmes v. Burr, 486 F.2d 55 (9th Cir.) (Hufstedler, J., dissenting), cert. denied, 414 U.S. 1116 (1973). Justice Hufstedler stated,

> What is left of anyone's justifiable reliance on privacy . . . if everyone must realize that he will be free from warrantless electronic intrusion only so long as someone in the government does not suspect him of improper conduct or wrong thinking? . . . Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

Id. at 72.

172. Professor Amsterdam has noted that "under electronic surveillance you are afraid to talk to anybody in your office or over the phone, while under the spy system you are afraid to talk to anybody at all." Amsterdam, supra note 7, at 407.

173. See Osborn v. United States, 385 U.S. 323, 354 (1966) (Douglas, J., dissenting) ("If a man's privacy can be invaded at will, who can say he is free?").

174. Bank Secrecy Act of October 26, 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified at 12 U.S.C. §§ 1951-59 (1980)).

175. H.R. Rep. No. 975, 91st Cong., 2d Sess. 10 (1970).

176. S. Rep. No. 1139, 91st Cong., 2d Sess. 5 (1970).

177. 425 U.S. 435 (1976).

of microfilm records of his financial transactions that were maintained by the bank pursuant to the Bank Secrecy Act. The Fifth Circuit Court of Appeals noted that although the constitutionality of the record keeping requirement of the Bank Secrecy Act was upheld in *California Bankers Association v. Shultz*,[178] the Supreme Court had clearly stated that access to the records would be controlled, in accord with Congressional intent, by existing legal process.[179] The appeals court assumed that Miller had the necessary fourth amendment interest, based upon the Supreme Court's ruling in *United States v. Boyd*,[180] which had prohibited the "compulsory production of a man's private papers to establish a criminal charge against him."[181] The court further posited that "the government may not cavalierly circumvent *Boyd*'s precious protection by first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies."[182]

The broad fourth amendment protections developed in *Katz*, shearing privacy from its traditional, narrow, property-related base, were undermined by the Supreme Court's decision in *Miller*.[183] Justice Powell, for the majority, concluded that the bank depositor had no protectible fourth amendment interest in the bank records maintained by the bank in compliance with the Bank Secrecy Act, and dismissed Miller's contention that because the federal agent had obtained the records from the bank through the use of a defective subpoena duces tecum,[184] his fourth amendment rights were violated. The Court asserted that the microfilm records were the bank's and, unlike Boyd, Miller was unable to claim either ownership or possession of them.[185] Further, the Court reasoned that even if

> attention [is directed] to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, [the bank depositor had] no legitimate expectation of privacy in their contents, [since they are negotiable instruments which the customer] voluntarily conveyed to the bank and exposed to

178. 416 U.S. 21 (1974). The Court held that the required maintenance of records of customers' transactions did not violate the fourth amendment rights of depositors since the acquisition of bank records by the government was still controlled by existing legal process. Id. at 52.

179. 500 F.2d 751, 757-58 (5th Cir. 1974).

180. 116 U.S. 616 (1886). See notes 43-48 and accompanying text supra.

181. 500 F.2d at 757 (quoting *Boyd*, 116 U.S. at 622).

182. 500 F.2d at 757. Especially important in the "required documents" cases is the fact that it is the third-party institution which has the burden of deciding whether to prevent an invasion of the citizen's rights or to comply with governmental directives. Certainly the protection provided the citizen is considerably less than when he is directly in contact with the government's demands. See Comment, Government Access to Bank Records, 83 Yale L.J. 1439 (1974).

183. Accord, Pray, A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: *United States v. Miller*, 14 San Diego L. Rev. 414, 427 (1977). ("A property rights rationale may be one explanation of the possession requirement"). See 1 W. LaFave, supra note 51, § 2.7, at 412.

184. Miller claimed that the subpoenas were defective because they were not issued by a court, the date for their return was a time when the grand jury was not in session, and in fact they were not returned to the court. 425 U.S. at 438-39.

185. Id. at 440.

their employees in the ordinary course of business.[186]

The Court then applied the risk assumption analysis it had developed in *Hoffa*,[187] and concluded that the depositor, even if he reveals information on the assumption that it will be used for a limited purpose, takes the risk in revealing his affairs to another that the information will be conveyed by that person to the government.[188]

In the *Boyd* decision, the Court held that all government attempts, even by warrants or subpoenas, to procure a person's private papers are unconstitutional under both the fourth and fifth amendments.[189] The *Boyd* Court reasoned that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime"[190] is condemned by the fourth amendment as unreasonable and runs afoul of the self-incrimination clause of the fifth amendment. "In this regard the Fourth and Fifth Amendments run almost into each other."[191] The *Boyd* Court thereby established an absolutist approach to an individual's private papers, proceeding from the premise that the property interest in maintaining the privacy of an individual's papers are the very essence of constitutional liberty and security.

This view, which restricted the government from obtaining private documents, no longer commands any authority,[192] although no search can be made and no subpoena issued except in compliance with the requirements of the fourth amendment. Although traditionally linked with property concepts, the fourth amendment, as recognized in *Katz*, is designed to protect the individual's privacy interests from government abuse[193] and historically to protect the individual from the government's use of the dreaded writs of assistance and general search warrants.[194] By these yardsticks, *Miller* fails because it tolerates as a necessary incident of criminal law enforcement an abridgment of personal privacy. The Court's conclusion that there is no protected fourth amendment privacy interest in the depositor's records because the depositor is neither owner nor possessor of the microfilm is contrary to *Katz*'s revised conceptual basis for determining the existence of a fourth amendment interest.[195]

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186. Id. at 442.

187. 385 U.S. 293 (1966). See text accompanying notes 138-40 supra.

188. 425 U.S. at 443.

189. 116 U.S. at 634-38.

190. Id. at 630.

191. Id.

192. See, e.g., Andresen v. Maryland, 427 U.S. 463 (1976) (warrant was issued to search business premises and papers with self-incriminating statements were seized). Fisher v. United States, 425 U.S. 391 (1976) (taxpayer's attorney under subpoena required to relinquish workpapers prepared by taxpayer's accountant); Couch v. United States, 409 U.S. 322 (1973) (accountant, under subpoena, forced to turn over private papers of client). See Note, supra note 49; Note, supra note 48.

193. 389 U.S. at 350. See Amsterdam, supra note 7, at 357.

194. 116 U.S. at 623-33. For historical development, see generally articles cited note 4 supra.

195. See O'Brien, Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment—Protected Privacy, 13 New England L. Rev. 662 (1978) where the author observed that "[t]he Court evaded its own privacy analysis by reemphasizing proprietary concepts and, moreover, by failing to consider not only the value of such personal information per se, but also

The *Katz* Court did not focus upon any property interest in the telephone booth but, instead, held that Katz' fourth amendment rights depended upon the existence of privacy upon which he justifiably relied.[196] The *Katz* Court determined that constitutionally justified expectations of privacy are conceptually distinguishable from property concepts, and shifted primary emphasis from property controlled concepts to privacy expectations.[197]

Judicial determination respecting the boundaries of justifiable privacy expectation began after *Katz*. Although the lines continue to remain unclear, the privacy interest protected by the fourth amendment seems to have narrowed.[198] The desirability of protecting the multitude of privacy concerns in its varied contexts remains a value judgment which undoubtedly will be different for each Justice. Commenting on the constitutionality of the Bank Secrecy Act in his dissent in *California Bankers Association v. Shultz*,[199] Justice Douglas concluded that bank accounts should be within the "expectation of privacy" protected by the fourth amendment because "they mirror not only one's finances but his interests, his debts, his way of life, his family and his civic commitments."[200] By denying Miller a fourth amendment interest, the Court failed to conceptualize the privacy expectations appropriate to modern technological society as supported by both customary norms and societal interests.

The Court's reliance upon the "misplaced confidence" cases is also "misplaced." Even if *Hoffa*'s and *White*'s initial premise that a criminal must risk that his associate is a government spy, perhaps electronically wired for sound, is accepted, the manner by which the confidence was revealed and its nature is significantly different in *Miller*. Unlike White, who can forego conversing with a companion whose trustworthiness he doubts, Miller's disclosure of his financial affairs is not entirely voluntary, since current economic reality makes

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how access to that information may influence individuals' future activities and their expectations of privacy." Id. at 736. Professor LaFave has noted that "*Miller*, by resorting to a 'proprietary interest' interpretation which seemingly had been abandoned in *Katz*, fails to give protection to information which surely deserves to be characterized as private." 1 W. LaFave, supra note 51, § 2.7, at 412.

196. 389 U.S. at 350-53.

197. Id. at 352-53.

198. One commentator has stated:

> Subsequent cases indicate that legal protections remain severely curtailed by limitations inherent in the reasonableness standard. These limitations still often turn on findings of *who* possesses the allegedly private information or *where* the allegedly private act occurred. The analytical transition which occurred between *Olmstead* and *Katz* may therefore represent little more than abolition of technical trespass as per se determinative of privacy protections.

Pray, supra note 183, at 422.

199. 416 U.S. 21 (1974).

200. Id. at 89 (Douglas, J., dissenting). In a concurring opinion, Justice Powell commented that financial records can reveal much about a person's activities, associations and beliefs, and that at some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Id. at 78-79 (Powell, J., concurring). See also Burrows v. Superior Ct., 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1974), stating that "the totality of bank records provides a virtual current biography [of the depositor]. . . . to permit a police officer access to these records . . . without any judicial control . . . opens the door to a vast and unlimited range of very real abuses of police power."

the maintenance of a bank account a virtual necessity.[201] Therefore, Miller's decision to utilize his bank's facilities cannot be said to be a voluntary waiver of his privacy.

The extent of Miller's disclosure to the bank also differs from that in *White* and *Hoffa*. Hoffa's and White's risks were limited to the incriminating statements made in the presence of their false friends. The depositor's disclosure to the bank is made for a very limited purpose—"that his check will be examined for bank purposes only—to credit, debit or balance his account."[202] A bank employee sees a depositor's checks only briefly and not all at one time. But now, under *Miller*, the depositor who for the privilege of enjoying his account makes disclosures to the bank employee for the limited purpose of facilitating the conduct of his financial affairs also risks that the government, without any restraints, may gather information from the bank about all aspects of his personal affairs, opinions, habits and associations.[203]

Increasingly, individuals are losing control over the scope and use of information they are required to divulge in order to function as effective members of society. The desirability of protecting such information is ultimately a

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201. See Burrows v. Superior Ct., 13 Cal. 3d at 247, 529 P.2d at 596, 118 Cal. Rptr. at 172.

202. California Bankers Ass'n v. Shultz, 416 U.S. at 96 (Marshall, J., dissenting). Appropriately, it has been observed that,

> With the exception of a cursory inspection of the original item to insure that the check is not postdated and that signatures and endorsements are genuine, bankers rarely have any legitimate business use for the underlying transactional data. . . .
>
> The increasing mechanization of the banking industry continues to reduce the chances that any human agent would come into any direct, significant contact with the underlying transactional information.

Comment, supra note 182, at 1463 n.114.

203. See Pray, supra note 183, at 425 ("Exposing the parts to sundry unrelated people is not equivalent to exposing the whole to one's bank for limited business purposes."). See also 1 W. LaFave, supra note 51, § 2.7, at 416. Congress minimally responded to the Court's pronouncement of one's lack of a right to privacy in his bank records by passing the "Right to Financial Privacy Act of 1978" as Title XI of the "Financial Institutions Regulatory and Interest Rate Control Act of 1978," Pub. L. No. 95-630, §§ 101-2101, 92 Stat. 3641-3741 (1978) (Title XI codified at 12 U.S.C. §§ 3401-22 (Supp. III 1979)), which applies only to customers who are individuals or partnerships of five persons or less. The Act allows government access to financial records needed in connection with a legitimate law enforcement inquiry, by subpoena, search warrant or formal written requests by federal agencies which do not have administrative summons or subpoena powers. Under the latter category, the bank may refuse compliance. The customer must be given notice of the fact that the government plans to review his records and he has the right to challenge the action within 10 days before a court. Such notice is not required, however, if the government shows that it would surely hamper the investigation. To sustain an objection to the government's inquiry, the customer has the practically insurmountable burden of proving that government access is not part of a "legitimate law enforcement inquiry," which is broadly defined, or that there has not been substantial compliance with the Act. Additionally, the Act has enumerated important exceptions to its mandates: grand jury subpoenas, when the customer and the government agency are parties to a judicial or administrative proceeding, government secret service activities, the Securities and Exchange Commission, as well as others. In effect, the burden on the customer, both in filing fees and proving noncompliance by the government, is quite heavy. Additionally, since the remedies of the Act are exclusive, it is possible that if the bank patron does not file his objection, he will be barred from review at a later time. Instead of limiting government access to bank records, it seems that Congress has increased the obstacles a customer must overcome before he can claim a right to privacy. For an in-depth analysis of Congress' response to *Miller*, see Kirschner, The Right to Financial Privacy Act of 1978—The Congressional Response to *United States v. Miller*: A Procedural Right to Challenge Government Access to Financial Records, 13 U. Mich. J.L. Ref. 10 (1979).

value judgment whether this type of unregulated intrusion is of the kind that we, as individuals in a free society, are willing to tolerate. The *Miller* Court failed to entertain any analysis of the societal value in protecting privacy interests in bank accounts or the potential effect its decision may have in influencing the people's future dealings with banks.[204]

In *Smith v. Maryland*,[205] the Court used reasoning parallel to that applied in *Miller* in determining that the government's use of a telephone company's pen register device was not a "search" and furthermore was a risk that a telephone subscriber must assume.[206] Failing to acknowledge the "vital role that the public telephone has come to play in private communication"[207] and the lack of control an individual has over the telephone company's installation of a pen register, the Court proclaimed that a subscriber "in all probability" entertains no actual expectation of privacy in the phone numbers he dials and, even if he did, his expectations are not "legitimate."[208] Therefore, the Court determined that fourth amendment constitutional protections did not apply because the privacy interest in a dialed phone number was not within *Katz*'s revised parameters of fourth amendment privacy.

Again, the Court's assumptions are faulty. A list of phone numbers dialed, like the microfilm bank records, may reveal the most intimate details of a person's life and the government's unrestrained accessibility to this information has a substantial impact upon the values which the fourth amendment seeks to preserve.[209] The degree of control an individual has over the collection and dissemination of this information is very limited; constitutional protections should not be abrogated whenever he must apprise third party intermediaries of limited information for a restricted purpose necessary for his everyday functioning in contemporary society.[210] Although a telephone sub-

204. See O'Brien, supra note 195, at 736.

205. 442 U.S. 735 (1979).

206. Id. at 743-45.

207. Katz v. United States, 389 U.S. at 352.

208. 442 U.S. at 745. The Court concluded that the installation of the pen register did not constitute a search. Id. at 745-46. The majority opinion appears to have bypassed the issue whether or not obtaining the numbers constituted a "seizure" within the meaning of the fourth amendment. Justice Stewart, in dissent, hints that it may have been a seizure. He stated that

> The information captured by such surveillance emanates from private conduct within a person's home or office—locations that without question are entitled to Fourth and Fourteenth Amendment protection. Further, that information is an integral part of the telephonic communication that under *Katz* is entitled to constitutional protection, whether or not it is captured by a trespass into such an area.

Id. at 747-48 (Stewart, J., dissenting).

209. Justice Stewart in dissent stated that the list of numbers obtained by the use of the pen register "could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life." Id. at 748 (Stewart, J., dissenting).

210. As Justice Marshall indicated, for all practical purposes an individual has little choice in deciding whether or not to use the telephone since such communications are essential in our technological culture. Therefore, he concluded that the risk assumption analysis was faulty. Id. at 750 (Marshall, J., dissenting). Justice Stewart, in dissent, noted that for fourth amendment purposes, the difference between the content of a telephone call and the list of numbers dialed into the telephone is a difference in the degree, not the kind, of privacy invasion, for "[t]he numbers dialed from a private telephone—although certainly more prosaic than the conversation itself—are not without 'content.'" Id. at 748 (Stewart, J., dissenting). Furthermore, the law enforcement agency

scriber or bank depositor is forced by the dictates of daily living to allow limited third party intrusions into his privacy, this is no basis for permitting wholesale searches and seizures that do not conform to fourth amendment guarantees.[211]

Although the Court has used a risk assumption analysis in some cases where the voluntariness of the disclosure is questionable at best, it has recently negated the wholesale use of this doctrine as applied to a search of a public business. In *Marshall v. Barlow's, Inc.*,[212] the Court rejected the Government's argument that the owner of a business, by the use of employees, throws open to OSHA agents the warrantless scrutiny of areas that the employees alone are permitted to enter. The *Barlow* Court recognized that an OSHA agent stands in no better position than any other member of the public in intruding on Barlow's privacy interest in running his business. Barlow, although having had to utilize employees, still maintained vis-à-vis the government his full panoply of privacy rights. Also, in *Lo-Ji Sales, Inc. v. New York*,[213] a unanimous Court reasoned that simply because an individual engages in the open business of selling "adult" material to the public does not mean that he has relinquished his privacy expectations against unlawful governmental intrusions.[214] It seems ironic that the Court provides greater protection to an individual who has voluntarily exposed himself to public scrutiny while refusing to recognize the legitimate expectation of privacy of others who, for all practical pruposes, have been compelled by modern technological developments to release information to a third party.

In *Olmstead v. United States*,[215] Justice Brandeis, while condemning wiretapping, aptly observed that:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. . . . The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, *whatever the means employed*, must be deemed a violation of the

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examining bank or telephone records is viewing the records from a different perspective and with a greater interest than that of the bank employee briefly viewing a depositor's check or the telephone company using a pen register device for internal telephone business purposes. In Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), dealing with the search and seizure of pornographic books from a public bookstore, the Court noted that difference in roles does have an effect on how one views the same material. The Court stated, "[I]n examining the books and in the manner of viewing the containers in which the films were packaged for sale, [the Town Justice] was not seeing them as a customer would ordinarily see them." Id. at 329.

211. As Justice Marshall stated in Smith v. Maryland, 442 U.S. 735 (1979), "[W]hether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society." Id. at 750 (Marshall, J., dissenting).

212. 436 U.S. 307 (1978). See text accompanying notes 161-64 supra.

213. 442 U.S. 319 (1979). See text accompanying note 165 supra.

214. Id. at 329.

215. 277 U.S. 438 (1928).

Fourth Amendment.[216]

The fourth amendment leaves room for the recognition and advancement of technology in law enforcement, but unregulated access to customers' bank records, as in *Miller*, and the use of the pen register device subject only to the self-restraint of law enforcement officials, as in *Smith*, are at variance with the fourth amendment's central theme of restraining the government from intruding too easily into "the people's lives." The Court failed to assess the effect that this uncontrolled government activity will have on our daily living. Interposition of a warrant requirement or other sufficient safeguard is designed not to shield the "wrongdoers" but to secure a measure of privacy and a sense of personal security for all throughout our society.

PRIVACY EXPECTATIONS IN CARS: CONTAINERS

Police intrusions into automobiles have raised the difficult problem of trying to reconcile the connection between the exigent circumstances presented by many warrantless automobile searches and the core privacy interest surrounding a motor vehicle. The effect of *Katz*'s privacy doctrine on vehicle searches is best understood when viewed in the light of past decisions.

The "automobile exception" is a well-recognized exception to the warrant requirement. The exception was first stated in *Carroll v. United States*,[217] which arose during the prohibition era when two bootleggers transporting moonshine in their car were stopped on a highway outside of Detroit by federal prohibition agents patrolling the road. Detroit was a mecca for illegal traffic in liquor, and the agents' past experience with these moonshiners led them to believe that the men were presently engaged in transporting liquor.[218] Having stopped the car, the agents, without the benefit of a warrant, searched it and found sixty-eight bottles of whiskey stashed under the seats and behind the upholstery. The bootleggers were arrested and subsequently convicted of violating the National Prohibition Act. Chief Justice Taft, after finding the agents had "probable cause" to search the vehicle, concluded that:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in

216. Id. at 474-78 (Brandeis, J., dissenting) (emphasis added).

217. 267 U.S. 132 (1925).

218. On a previous occasion, federal officers, acting as prospective purchasers, had made arrangements with the two defendants to buy illegal alcohol. At that time, they were able to see the Oldsmobile which presumably would be used to transport the liquor from Canada. About a week later they saw the defendants driving the car on a well known prohibition route. They attempted to follow the vehicle but were unable to do so. About two months later, the federal agents spotted the automobile moving westward from Detroit to Grand Rapids, an axis regularly used by bootleggers. It was on this day that the auto was stopped by the agents. Id. at 134-36.

which the warrant must be sought.[219]

The *Carroll* doctrine therefore permits a car to be seized and searched without a warrant if there are both "exigent circumstances" and "probable cause" to believe that the car contains contraband.

The *Carroll* Court accepted the basic premise that the occupants of the vehicle could not be arrested for a misdemeanor that was not committed in the officer's presence,[220] and therefore never considered the arrest of the occupants and the immobilization of the car until a warrant was obtained as an alternative to the warrantless search of the vehicle. Instead, the Court noted that the validity of the seizure of the car and the right to search it were not dependent upon the right to arrest the occupants,[221] thus clearly distinguishing the newly announced "vehicle exception" from that of an automobile search incident to the lawful arrest of the occupants.[222]

The Court did, however, clearly recognize that the seizure and search of the vehicle infringed on the privacy interest of the "occupants" of the car[223] and placed several limitations on its new doctrine before noncompliance with the warrant clause would be excused. The Court's primary concern was to restrict the "vehicle exception" to its proper limits and emphatically stressed that in "cases where the securing of a warrant is reasonably practicable, it must be used."[224] The *Carroll* Court viewed the facts as presenting a case where the seizure of the vehicle was factually "impossible except without [a] warrant."[225] At the same time, the Court emphasized that the officers had "probable cause" to believe that the "moving vehicle" they "lawfully stopped" on the highway contained contraband,[226] and that it was "not practical" to secure a search warrant for it because the car would have been moved quickly out of the jurisdiction before the warrant could be obtained. Thus, although *Carroll* based its new exception to the warrant requirement upon the impracticability of obtaining a search warrant, it is readily apparent that the Court really gave the police an option between an immediate "probable cause search" of a moving vehicle lawfully stopped on the highway or the more "burdensome" but surely not "impractical" seizure and immobilization of the vehicle until a warrant is secured.[227]

The *Carroll* "vehicle exception" was substantially expanded in *Chambers*

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219. 267 U.S. at 153.

220. Id. at 156-58. See 2 W. LaFave, supra note 51, at 511.

221. 267 U.S. at 158-59.

222. For a discussion of search incident to a lawful arrest, see Chimel v. California, 395 U.S. 752 (1969), discussed at notes 277-81 and accompanying text infra.

223. Id. at 154.

224. Id. at 156.

225. Id. See 2 W. LaFave, supra note 51, § 7.2 at 510-14.

226. The *Carroll* decision is not limited only to searches for "contraband" since Warden v. Hayden, 387 U.S. 294 (1967) has eradicated the "mere evidence" rule. See Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835, 839 n.24 (1974); 2 W. LaFave, supra note 51, § 7.2, at 510-14.

227. See Note, supra note 226, at 845.

v. Maroney,[228] in which the Court validated a warrantless automobile search that occurred after the car and its occupants were in police custody. *Chambers* involved a late-night armed robbery of a gas station. The Supreme Court, viewing the facts developed at the state trial, had no difficulty in establishing that at the time the vehicle was stopped the police had "probable cause" to believe that the car was being driven by the robbers and was carrying their guns and the fruits of the crime. Furthermore, the officers had probable cause to arrest the occupants of the station wagon and later, at the station house, to make a search of the vehicle for guns and the stolen money. Thus, *Chambers*, like *Carroll*, began with a moving vehicle, but the search took place after the occupants' arrest while the car was immobilized in police custody. The defense challenge was apparent: There are no exigent circumstances dispensing with the warrant requirement and, therefore, the *Carroll* rationale for warrantless searches is not available. Justice White, for the Court, claimed otherwise:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to the magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[229]

Justice White then determined that since "[t]he probable-cause factor still obtained at the station house and so did the mobility of the car,"[230] the police were permitted to search it at the station house without obtaining a warrant.

The *Chambers* decision clearly contradicts the *Carroll* admonition that a warrant must be used where reasonably practical. The principal issue in *Chambers* was whether to extend the immobilization of the car for the short time needed by the police to obtain a warrant or whether to permit them to search the car without it. *Chambers* presented no exigent circumstances to justify dispensing with the warrant requirement once the occupants were arrested and the car removed to the station house. Justice White apparently recognized this and tried to interject exigencies by questioning whether the police, under the *Chambers* facts, could properly have denied use of the vehicle to anyone until they secured a search warrant.[231] Aside from the fact that in *Chambers* no request for the car had been made by anyone,[232] permission

228. 399 U.S. 42 (1970).

229. Id. at 51-52.

230. Id. at 52.

231. Id.

232. But see Coolidge v. New Hampshire, 403 U.S. 443 (1971). In *Coolidge*, after the defendant had been under investigation for murder for several weeks, he was arrested and his wife was told that she would have to spend the night away from their home. The police refused her request to use the family car. Pursuant to a search warrant the officers towed the car to the station house;

to drive the car away probably would have been denied until the police fully completed their search. The "true exigency" was eliminated when the Court permitted the police to seize the moving vehicle and immobilize it at the police station. Requiring the police to secure a warrant would have protected fully the occupants' privacy interest in the car's contents—the only privacy interest now at stake. This approach confines the "vehicle exception" within its original bounds by requiring separate justification for the subsequent search of the vehicle. While the result in *Carroll* gave the police the choice between an immediate search on the highway or what was a more burdensome and administratively costly seizure, that option had already been exercised in *Chambers*[233] and clearly the warrantless search at the station house involved the "greater" sacrifice of fourth amendment values.[234] The short delay occasioned in obtaining a warrant to search the car would not affect significantly any necessary law enforcement procedure, but would have protected all privacy rights in the vehicle by requiring judicial determination of "probable cause." This clearly is the balance struck in the fourth amendment that requires strict adherence to the warrant requirement absent exigent circumstances.

Establishment of the connecting link between the "automobile exception" and the *Katz* "privacy doctrine" was sought in *Cardwell v. Lewis*.[235] In *Cardwell*, several months after a homicide, a warrant to arrest Lewis, a murder suspect, was obtained by the police, who invited the suspect to come to the police station house. He went, and after talking to the police was arrested. Without seeking a warrant, the police towed his car from a public commercial parking lot to the police impoundment lot. The next day an "examination" was made of the tread of the right rear tire with tire tread casts made at the murder scene. Also, paint samples were taken from Lewis' car to be matched with those found on the fender of the victim's car.[236]

Cardwell's plurality opinion, by Justice Blackmun, was equivocal on the issue of fourth amendment coverage, pointing to the fact that the "search-examination" extended solely to the exterior of a car that had been parked in a

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because the warrant was defective the government later attempted to introduce evidence obtained from the search under the guise of the "automobile exception." The Court held that the evidence was inadmissible and that the "automobile exception" was inapplicable as there were no exigencies involved and the police had ample time in which to procure a valid search warrant. Id. at 462-64.

233. As one commentator has stated: "The result in *Chambers* is debatable because it reflects a willingness to let the protection of substantial individual rights turn on the practical difficulties of law enforcement." See Note, supra note 226, at 845. The Court has held that mere inconvenience is an insufficient reason to dispense with the warrant requirement. Almeida-Sanchez v. United States, 413 U.S. 266, 283 (1973).

234. 399 U.S. at 63 (Harlan, J., concurring in part and dissenting in part). As Justice Harlan said, "the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant." Id. See United States v. Van Leeuween, 397 U.S. 249 (1970) (the exigency which justified the seizure of a mailed package for 29 hours until a warrant was otained would not have supported the more intrusive warrantless search).

235. 417 U.S. 583 (1974).

236. Id. at 586-88.

public lot. The Justice commented that since nothing from the interior of the car was taken, whatever "search" had occurred was limited to the examination of the exterior, and thus, he failed to see how this "exterior examination" invaded any reasonable expectation of privacy which the fourth amendment was designed to protect.[237] In any event, he declared, "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."[238]

Although it is true that the *Carroll* opinion emphasized that for fourth amendment purposes, there was a "necessary difference" between the search of a stationary structure like a home and the search of a vehicle stopped on the open road, since the vehicle, unlike the house, can be moved quickly out of the jurisdiction prior to the procurement of a warrant, the Court clearly indicated that the fourth amendment protections extend to automobiles.[239] Rather, the distinction rested on the mobility of the automobile, which may give rise to "exigent circumstances," and not on some diminished expectation of privacy in one's car, as such a diminished expectation has never, historically,[240] been a factor in the development of the "motor vehicle exception" doctrine.

The reasons cited by Justice Blackmun, in *Cardwell*, for the lesser expectation of privacy in automobiles are not very convincing. He noted that a car seldom serves "as the repository of personal effects,"[241] yet the glove compartments and trunks of many automobiles would belie this argument, since personal items frequently are kept there for reasons of privacy. Although a car must travel public thoroughfares where its occupants and its contents are in plain view, thus subjecting them to public scrutiny, drivers and passengers do put their personal effects into those closed areas of a vehicle that are not open to public inspection.

In *South Dakota v. Opperman*,[242] the Court, in searching for an additional rationale to support its theory of a diminished privacy right in automobiles, declared that because a car is subject to various state regulations, the owner has a lessened privacy expectation in the vehicle.[243] But it is unclear how requiring annual inspection in public automotive centers or registration of a vehicle by mail or personal appearance at a motor vehicle department

237. Id. at 591. Justice Blackmun stated that the scraping of paint from the exterior of the car was not the type of governmental action which triggers the traditional considerations regarding the owner's right to privacy because such privacy historically existed only in reference to the interior of the car. Id. at 591. But cf. Mascolo, The Role of Functional Observation in the Law of Search and Seizure: A Study of Misconception, 71 Dick. L. Rev. 379, 415 (1967). ("The critical defect in these cases denying to observations the status of search is their implicit insistence upon divorcing the searcher from his mental processes.").

238. 417 U.S. at 590.

239. 267 U.S. at 153-56.

240. See generally Moylan, The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clear Label, 27 Mercer L. Rev. 987 (1976); Comment, Warrantless Searches and Seizures of Automobiles and the Supreme Court from Carroll to Cardwell: Inconsistently Through the Seamless Web, 53 N.C.L. Rev. 722 (1975).

241. 417 U.S. at 590.

242. 428 U.S. 364 (1976).

243. Id. at 368.

diminishes one's privacy expectation regarding documents and personal belongings that thereafter may be locked in various compartments of the automobile, personal items that may touch upon the most intimate areas of an individual's private affairs.[244] For most Americans, common expectations would appear to justify privacy in their automobiles, for "[u]sing the car as a protected container, under lock and key, is general in American society."[245]

Justice Blackmun, in *Cardwell*, determined that even if a "search" had occurred, the "examination-search" of the exterior of the car invaded no reasonable privacy expectation, since it was exposed to public view.[246] But the police activity in *Cardwell* consisted not merely of viewing the exterior of the vehicle, but of towing the car to the police station for a microscopic scrutiny of paint scrapings taken from it, and an examination of the tire tread. *Marshall v. Barlow's, Inc.*[247] and *Lo-Ji Sales, Inc. v. New York*[248] have made clear that although objects may be open to public scrutiny, they are not thereby made fair game for unlimited governmental intrusion and the police have no greater authority than that accorded any other member of the public to inspect them.[249] Furthermore, in *Walter v. United States*,[250] in which misdelivered obscene films mistakenly opened by a third party were turned over to F.B.I. agents, the Court held that although the officers were in lawful possession of the film and the descriptive labels on the canisters gave the agents probable cause to believe that the films were obscene, this did not authorize their greater intrusion of viewing the film (a separate search) without the benefit of a search warrant.[251] The Court viewed the third party private search in mistakenly opening the boxes as frustrating the owner's expectation in part but not stripping altogether the remaining privacy expectations in the contents of the film vis-à-vis the government. Thus, the police still had to procure a warrant to permit the greater intrusion of actually viewing the film.[252] Similarly, while the car in *Cardwell* was involved in a serious crime, the police should have been required to comply with the fourth amendment warrant mandate before making their microscopic examination.

In *Cardwell*, regardless of whether the "examination" of the exterior of the car is characterized as a search, clearly there was a seizure of the vehicle without a warrant. However, applying the "automobile exception" as expanded by *Chambers*, the Court concluded that *Chambers* supported either an

244. Justice Powell, in his concurring opinion in *Opperman*, stated that automobile searches did not give the police the right to general searches, noting that in the course of the search, the police may come across very personal and intimate objects. However, Justice Powell dismissed this concern by stating that in the instant case there was no question of police overbreadth. 428 U.S. at 380 n.7 (Powell, J., concurring).

245. See Note, supra note 226, at 841.

246. Cardwell v. Lewis, 417 U.S. at 591.

247. 436 U.S. 307 (1978).

248. 442 U.S. 319 (1979).

249. See text accompanying notes 212-14 supra.

250. 447 U.S. 649 (1980).

251. Id. at 656.

252. Id. at 658-59.

immediate search of the automobile in the parking lot or a seizure of the car and a closer "examination" of it at the police station.[253] The *Cardwell* Court reasoned that Lewis, like Chambers, was alerted by his arrest to the possibility of the police examining his car for incriminating evidence, thus creating the exigent circumstances necessary to proceed to seize the vehicle without a warrant before his wife or family could remove or tamper with it.[254] Rather than relying on *Chambers*'s broad reading, the Court should have followed its holding in *Coolidge v. New Hampshire*[255] that requires the police to avail themselves of any ample opportunity they have to obtain a search warrant before talking with a suspect.[256] The *Cardwell* Court permitted the police to create their own fictionalized exigencies by ignoring the fact that for several weeks Cardwell was aware of the police suspicions and could have destroyed the vehicle at any time during this period. Moreover, and most importantly, once the car was in police custody and immobilized, there were no serious exigent circumstances presented for not delaying the search while a warrant was obtained.

The most disturbing feature of *Cardwell*, and from a fourth amendment jurisprudential concept the most dangerous one, is Justice Blackmun's value judgment that citizens have a diminished privacy expectation in vehicles. This assumption has no persuasive rationale and has "crept into the law by imperceptible practice,"[257] providing the framework used for subsequent judicial erosion of vehicle privacy. It is apparent that the *Cardwell* Court intended to diminish the core privacy in motor vehicles but not to eliminate it altogether.[258] Since all privacy rights are not lost when an automobile is used, the questions to be resolved are what privacy expectations do remain, and for whom.

In *United States v. Chadwick*,[259] the Government aligned itself with the automobile exception and argued that luggage taken from an automobile had the same potential mobility as the vehicle, so that a warrantless search based upon probable cause was not unreasonable. In *Chadwick*, a 200-pound double-locked footlocker containing marijuana was placed in the trunk of Chadwick's car. Federal narcotics agents, acting upon probable cause,[260] ar-

253. 417 U.S. at 593-94.

254. Id. at 594-95. Justice Stewart, in dissent, was unable to find the majority's mystical exigencies. Since the automobile was effectively immobilized during the period of interrogation, the fear that evidence might be destroyed was hardly an exigency, particularly when no such fear had prompted a seizure during all the preceding months while Lewis, though under investigation, had been in full control of the car. Id. at 598-99 (Stewart, J., dissenting).

255. 403 U.S. 443 (1971).

256. Id. at 460-61.

257. Entick v. Carrington, 19 How. St. Tr. 1030, 1067 (1765) (reference to searching for stolen goods in a house).

258. 417 U.S. at 589-91.

259. 433 U.S. 1 (1977).

260. Probable cause was established by the fact that the railroad officials in San Diego were alerted to the possibility of a drug smuggling operation when they observed talcum powder leaking from an unusually heavy footlocker. Also, one of the persons carrying the locker matched a profile of drug carriers. The railroad officials notified local federal officials, who in turn contacted the Boston officials. The locker was identified in a prior description given to Boston and so was

rested three persons who were connected with moving the trunk from the Boston railway station to the car. The arrest took place while the trunk of the car was still open and before the engine had been started. The defendants, the car, and the footlocker were taken to the Federal Building in Boston where, an hour and a half after the arrest, the agents, with neither a search warrant nor the defendants' consent, opened the footlocker and discovered large amounts of marijuana.

The Government's argument applying the automobile analogy was clear: the mobility of the footlocker is analogous to that of motor vehicles for fourth amendment purposes and therefore it should be subject to search without a warrant upon a showing of probable cause.[261] Chief Justice Burger, for the majority, refused to accept this analogy, stressing that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile."[262] For the Chief Justice, the government's comparison failed in that the factors which diminish the privacy aspects of an automobile simply do not apply to the contents of a double-locked footlocker that is not open to continuous public view nor subjected to regular inspections. Furthermore, the footlocker's mobility did not justify dispensing with a warrant, for, as the Court observed, once the footlocker was seized and safely transferred to the Federal Building, it was under the agents' exclusive control, and therefore, there was not the slightest danger that its contents would be removed before a valid search warrant could be obtained.[263]

The majority decision prompted Justice Blackmun in dissent to comment that: "[I]f the agents had postponed the arrest just a few minutes longer until the respondents started to drive away, then the car could have been seized, taken to the agent's office, and all its contents—including the footlocker—searched without a warrant."[264] Justice Brennan, aligning himself with the majority, took the opportunity in his concurring opinion to comment that it was not at all obvious that the agents could have proceeded as Justice Blackmun had suggested.[265] The issue was thus presented: Assuming that a warrantless search of an automobile is constitutionally permissible under the automobile exception, does the intrusion necessarily permit the search of closed containers found in the vehicle?

Almost this precise question was presented to the Court in *Arkansas v. Sanders*,[266] in which the police, having probable cause to believe that a taxi was carrying a suitcase containing contraband, stopped the vehicle and had the taxi driver open the trunk. Without seeking the owner's permission, the police opened the unlocked suitcase and discovered the contraband. The

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one of the men carrying it. Also, a police dog signaled that the locker contained a controlled substance. Id. at 3-4.

261. Id. at 11-12.

262. Id. at 13.

263. Id.

264. Id. at 22-23 (Blackmun, J., dissenting).

265. Id. at 16-17 (Brennan, J., concurring).

266. 442 U.S. 753 (1979).

Sanders majority, in holding that the search was unconstitutional, laid the basis for broad privacy protections of closed containers found within vehicles. The Court admitted that luggage may be as mobile as the vehicle in which it is carried, but "the exigency of mobility must be assessed at the point immediately before the search."[267] Once the police have seized the suitcase and have it within their control, the special mobility exigency is no longer applicable, and accordingly there is generally "no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places."[268]

As in *Chadwick*, the *Sanders* majority commented on the significant distinction between automobiles and other private property, noting that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property."[269] The Court again noted that the very purpose of a suitcase is to serve as a repository for personal items that people wish to transport, thereby requiring greater privacy protections than that accorded to the vehicle within which the items are transported.[270]

The Chief Justice concurred with the *Sanders* majority but forcefully argued that these facts simply did not present the precise issue whether it is permissible to intrude into a closed container found in a vehicle when there is probable cause to believe that contraband is located somewhere within the vehicle but its exact location is unknown by the officer. The Chief Justice pointed out that in *Sanders* the suspected locus of the contraband was in the luggage, and the fact that the suitcase was resting in the trunk of the automobile at the time of the seizure and search did not bring it within the "automobile exception."[271]

The Chief Justice's continued uncertainty, whether the "automobile exception" justifies the warrantless search of a closed container found during the search of an automobile, was finally ended when Justice Stewart, in *Robbins v. California*,[272] determined for the plurality Court that a closed container found in the *luggage compartment* of a station wagon is protected to the same extent as if it were found anywhere else. Relying on *Chadwick* and *Sanders*, Justice Stewart determined that a warrantless search of two green, opaque plastic packages (which turned out to contain bricks of marijuana), found during an otherwise lawful, warrantless search of an automobile violated the fourth amendment since the closed containers manifested Robbins' reasonable expectation of privacy with respect to their contents. Justice Stewart dismissed as inappropriate the government's contention that the nature of a container may

267. Id. at 763.

268. Id. at 764. The Court noted, however, that there may be some special circumstances in which it would be appropriate for the police to search luggage without a warrant. However, this would be justified by the probable cause and exigencies of the situation and not as a result of the suitcase having been found inside an automobile. Id. at 763 n.11.

269. Id. at 761.

270. Id. at 764-65.

271. Id. at 767 (Burger, C.J., concurring).

272. 101 S. Ct. 2841 (1981).

diminish its protection—"that the Fourth Amendment protects only containers commonly used to transport 'personal effects.' "[273] Appropriately the Justice observed that the fourth amendment protects people and their effects; "it protects those effects whether they are 'personal' or 'impersonal,' "[274] and when they are placed within a container, it reflects a desire to keep their contents free from public examination.

The *Chadwick-Sanders-Robbins* cases have reflected the Court's strong preference for a warrant requirement. The *Sanders* Court especially proclaimed this pro-warrant position, noting that the mere reasonableness of a search is not a substitute for the judicial warrant protection. Stressing again the prominent place the warrant requirement plays in safeguarding fourth amendment protections, the Court once more repeated its oft-quoted admonition that the exceptions to the warrant command should be few, "jealously and carefully drawn,"[275] and limited to the necessity to accommodate a specific need.[276]

It is therefore very surprising that Justice Stewart, the author of *Robbins*, felt compelled to draw a "bright line" in *New York v. Belton*[277] by deciding that when a policeman has made a "lawful custodial arrest" of the occupant of an automobile, he may, in accordance with *Chimel v. California*,[278] search the entire passenger compartment of the automobile as a search incident to that arrest. In deciding that the search of *the interior of the passenger compartment* would justify the search of the arrested person's jacket located therein, Justice Stewart, for the plurality, determined that the jacket (like any other container) may be lawfully searched without a warrant since the *"lawful custodial arrest"* justifies the infringement of whatever privacy interests the arrested person may have in it.[279]

Justice Brennan, in dissent, observed that *Chimel*, in governing the permissible scope of warrantless searches incident to a custodial arrest, was strictly tied to two principal concerns: "the safety of the arresting officer and the preservation of easily concealed or destructible evidence."[280] *Chimel*, therefore, permitted officers who have effected a custodial arrest to conduct a warrantless search " 'of the arrestee's person and the area "within his immedi-

273. Id. at 2845.

274. Id. at 2846.

275. Arkansas v. Sanders, 442 U.S. 753, 759 (1979) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

276. Id. at 760.

277. 101 S. Ct. 2860 (1981).

278. 395 U.S. 752 (1969). In *Chimel*, after the police had lawfully arrested the defendant for burglary, they made an extensive search of his home without obtaining a search warrant. The Court recognized that police face the serious danger of a suspect carrying a concealed weapon or surreptitiously destroying evidence. Therefore, the Court held that at the time of the arrest, the police had the right to search the suspect's person and areas within his "immediate control," construing that phrase to mean places where the defendant "might reach in order to grab a weapon or evidentiary items." Id. at 763. However, the Court refused to permit the search of the home, stating that the exigencies of the situation did not justify the broad exception from the fourth amendment's warrant requirement. Id.

279. 101 S. Ct. at 2864.

280. Id. at 2866 (Brennan, J., dissenting).

ate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' "[281] Since Belton and his companions were removed from the car and then placed under custodial arrest, permitting the officer then to go back and search the interior of the car, including areas and containers inaccessible to the arrested persons, the decision is both "analytically unsound" and inconsistent with the justification supporting the *Chimel* "search incident to lawful arrest" exception to the warrant requirement.

The *Chadwick-Sanders-Robbins* decisions have shown that the protected privacy interest in the contents of the article seized is the critical factor to be considered in evaluating a warrantless fourth amendment intrusion. The seizure of closed containers during an automobile stop and search does not diminish the privacy expectations in their contents. With the containers firmly secure in the government's possession, it is unreasonable for the Court to permit the additional and greater intrusion of a search without a warrant.[282]

In struggling to maintain a reasonable position to support the conclusion that a "lesser intrusion" concept does not apply to the entire automobile once the vehicle has been successfully immobilized, the *Chadwick* Court, in a footnote, suggests that absolutely secure facilities may not be available to store the vehicle and that the size and inherent mobility of a vehicle make it susceptible to theft or intrusion by vandals.[283] But this argument has no support, since the economic cost of providing secure storage facilities was not the basis for the early development of the automobile exception. Rather, it was the impracticality of immobilizing the car "on the highway" for the time required to obtain a warrant. Even if secure facilities are truly unavailable, the Court's strong commitment to a warrant requirement is such that it is not unduly burdensome to require a police officer to remain with the vehicle while another member of the force obtains a warrant for its search.[284] The *Chadwick-Sanders-Robbins* decisions reaffirm that warrants for a search must be obtained whenever practical, even if the initial seizure is valid. These decisions require the police to pursue the course of behavior which intrudes least on an individual's privacy.

In *Chambers*[285] the police seized the car and drove it to the station house where they conducted a probable cause search without a warrant. There clearly were no exigent circumstances which justified dispensing with the warrant requirement. The inherent mobility of a vehicle, as pointed out in *Coolidge v. New Hampshire*,[286] does not in itself justify a warrantless search. A

281. Id. (quoting Chimel v. California, 395 U.S. at 763).

282. *Chadwick*, 433 U.S. at 13. But see *Belton*, 101 S. Ct. at 2865 n.5.

283. 433 U.S. at 13 n.7. See also *Sanders*, 442 U.S. at 765 n.14.

284. See State v. Miles, 97 Idaho 396, 545 P.2d 484 (1976); State v. Navarro, 312 So. 2d 848 (La. 1975). Additionally, the burden on a federal agent in obtaining a warrant is minimal since Fed. R. Crim. P. 41(C)(2)(A) provides that "a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means" where the circumstances support dispensing with the requirement of a written affidavit.

285. 399 U.S. 42 (1970). See text accompanying notes 228-34 supra.

286. 403 U.S. 443, 462 (1971). See note 232 supra.

real possibility of the vehicle being moved without police authorization must be shown before the *Carroll* "exigency" doctrine should apply. And, as noted in *Chadwick* and *Sanders*, the "exigency" must be assessed immediately before the search—at the point when the police have seized the object to be searched and have it securely within their control. Although Justice White, in *Chambers*, claimed that it was questionable whether the greater intrusion is the immediate search or the indefinite seizure of an automobile until a warrant is obtained,[287] it is clear that as far as objects other than vehicles are concerned, the Court, in *Robbins*, has determined that the seizure and immobilization of the container until a warrant is obtained for its search is the lesser privacy intrusion.

The *Chadwick-Sanders-Robbins* opinions reaffirm the *Katz* pronouncement that the privacy interest in the contents of the article is the most critical factor at stake in evaluating a warrantless search. The *Chadwick* Court stressed that the footlocker had been double-locked, manifesting an expectation that its contents would remain closed to public inspection.[288] In *Sanders*, the Court again noted that luggage is a common repository for one's personal effects and, therefore, it is inevitably associated with an expectation of privacy.[289] Justice Blackmun declared in *Cardwell* that there is a lesser expectation of privacy in a vehicle because its main function is transportation and it rarely serves as a repository of personal effects.[290] But it is readily apparent, both by the judiciary's continued preoccupation with the repeated challenges to police searches of vehicles and by the need for a majority of the Court in *Belton* to draw a "bright line" to guide police in searches of the *interior of automobiles incident to a lawful arrest*, that citizens do keep personal effects in their cars. Furthermore there is no logical equation between the degrees of expectation of privacy in vehicles on the one hand and the transportation feature of a vehicle on the other. In fact, today many motor vehicles, such as recreational vans and mobile homes, have characteristics very similar to private homes. America's love affair with the automobile certainly began because of the mobility it provided, but it is also evident that the automobile has become an extension of its owner's personality. Cars are often used for private activity and owners often do put personal items in closed compartments of the vehicle to keep them secret.[291] Interestingly, in *Delaware v. Prouse*,[292] Justice White observed that "[a]utomobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. . . . Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel."[293] This heightened recognition of an

287. 399 U.S. at 51-52.
288. 433 U.S. at 11.
289. 442 U.S. at 764.
290. 417 U.S. at 590.
291. See Note, supra note 226, at 841.
292. 440 U.S. 648 (1979).
293. Id. at 662.

automobile occupant's expectation of privacy marks a shift from the Court's previous restrictive position regarding automobile privacy expectations.

The necessity that may justify the immediate seizure of a moving vehicle without a warrant does not support the more intrusive warrantless searches into the closed compartments of the vehicle. The *Carroll* automobile exception hinged on giving the police the choice between an immediate search of a moving vehicle or the more burdensome and costly administrative seizure,[294] with the former being the more frequently exercised option. The desirability of this result, permitting privacy expectations to be diminished by an administrative cost factor, is itself debatable. Perhaps this option is a realistic alternative, but if the Court places a very high value on the warrant safeguard, it should, even under the *Carroll* theory, compel the police to pursue that course of behavior which best protects privacy rights. The "automobile exception" would thereby be narrowed to validate only the initial seizure of the vehicle under truly "exigent circumstances" rather than permit the greater privacy intrusion of a search without obtaining prior judicial approval.[295] Certainly there is no justification for adhering to *Chambers* once the vehicle has been immobilized and the threat of loss or disappearance has been negated.[296]

STANDING: PRE-*RAKAS*—THE *JONES* CONCEPT

The fourth amendment standing concept, for the most part, has been an attempt to ameliorate the social cost inherent in the application of the exclusionary rule. Essentially, standing to raise an objection to a search and seizure concerns the question whether the party is entitled to have his claim to a fourth amendment protected right determined by the court. Prior to *Jones v. United States*,[297] fourth amendment standing was controlled by perplexing common law property concepts. The traditional viewpoint permitted standing if the party established either a possessory or proprietary interest in the object seized or the premises searched. Many of the subtle common law property distinctions produced a multitude of confused lower court opinions as to exactly what interests in the premises searched or property seized would be sufficient to confer standing.[298]

The Supreme Court, in *Jones*, interpreted rule 41(e) of the Federal Rules

294. See Note, supra note 226, at 845.

295. See Rosenberg, *United States v. Chadwick* and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable, 58 B.U.L. Rev. 436, 467 (1978).

296. Justice Harlan clearly expressed in *Chambers* his preference for the "lesser intrusion."

> [T]he occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure. . . . The Court's endorsement of a warrantless invasion of that privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of "adherence to judicial processes."

399 U.S. 42, 64 (Harlan, J., dissenting).

297. 362 U.S. 257 (1960).

298. See generally Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw. U.L. Rev. 471 (1952); Gutterman, supra note 19; Trager & Lobenfeld, The Law of Standing Under the Fourth Amendment, 41 Brooklyn L. Rev. 421 (1975); White & Greenspan, Standing to Object to Search and Seizure, 118 U. Pa. L. Rev. 333 (1970).

of Criminal Procedure, the provision that enforces the federal exclusionary rule. Justice Frankfurter, writing for a unanimous court, held that to qualify as a "person aggrieved by an unlawful search and seizure" under the rule, "one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[299] This recognition of a personal privacy invasion, although not deviating from prior rulings, was used in *Jones* to extend the ambit of fourth amendment protections to persons not previously covered.

Jones was a guest in an apartment that had been leased by a friend who was away for several days. Jones kept some clothing in the apartment, had been given a key to it, and had spent perhaps one night there. Federal narcotics officers, in searching the apartment pursuant to a warrant, found narcotics hidden in a bird's nest in a window awning. Jones was convicted of violating several federal narcotics laws. The Government had contended that he lacked standing to challenge the search and seizure because he had not claimed the requisite interest in either the narcotics seized or the apartment searched.

Justice Frankfurter recognized the fallibility of a standing concept based solely on property interests and began to shift the fourth amendment standing perspective away from the control of historical property law principles. After noting that property distinctions ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards,[300] he expanded the concept of "privacy interests" in the premises to permit standing for "anyone *legitimately on [the] premises* where a search occurs."[301] Jones, present in the apartment with consent of the lessee at the time of the search, was held to have standing. The *Jones* decision did not discard the historical property interests that had in the past determined standing;[302] rather, the Court added an additional category conferring standing, that of a privacy interest established by being "legitimately on the premises at the time of the search." The Court also removed the dilemma that faced a defendant who, charged with a crime involving possession and desirous of vindicating his fourth amendment rights was "forced to allege facts [at the preliminary motion] the proof of which would tend, if indeed not be sufficient, to convict him."[303] The Court determined that the standing requirement could not be employed to place a defendant in such a dilemma and fashioned an *automatic standing rule* in crimes where possession of tangible property is an essential element of the offense charged. The Court thereby eliminated any necessity for a preliminary showing of an interest in the property seized which ordinarily would be required

299. 362 U.S. at 261. Although based upon an interpretation of the Federal Rules of Criminal Procedure, *Jones* was generally viewed as establishing a minimum constitutional guideline applicable to the states. See Alderman v. United States, 394 U.S. 165, 174 (1969).

300. 362 U.S. at 266. Justice Frankfurter said that "[d]istinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." Id.

301. Id. at 267 (emphasis added).

302. See Gutterman, supra note 19, at 115.

303. 362 U.S. at 262.

when standing was based upon this premise.[304] Of course, in situations where the automatic standing rule was inapplicable, where conviction did not flow from the defendant's possession of the evidence at the time of the search, the defendant was still required to establish his privacy interest in the property seized or premises searched in order to gain standing.

In *Jones*, Justice Frankfurter observed that the exclusionary rule is "a means for making effective the protection of privacy" benefiting those search victims whose privacy has been invaded.[305] *Jones* began the movement of fourth amendment standing away from strict property concepts. In *Warden v. Hayden*,[306] the Court abandoned the "mere evidence" rule, which had limited the items subject to seizure to instrumentalities, fruits of the crime, or contraband,[307] holding that in testing the scope of fourth amendment protections, property interests do not control the government's right to search and seize evidence.[308] Just several months after *Hayden*, the Supreme Court decided *Katz*, and without inquiring into the issue of the defendant's standing, refused to admit into evidence a recorded conversation obtained through an electronic eavesdropping device, attached by federal agents without a warrant to the exterior of a telephone booth.[309] The Court declared that the fourth amendment "protects people, not places."[310] Katz, having paid his toll and shut the door, had a degree of privacy upon which he could justifiably rely while using the telephone booth.[311]

The movement towards a personal privacy rather than a property related approach to fourth amendment protections logically compelled a concomitant shift in standing from its traditional property related analysis to one reflective of *Katz*'s changing parameters of the amendment's protective shield.[312] This closer accommodation between the policies underlying fourth amendment privacy protection and the law of standing was broadly hinted at in *Mancusi v. Deforte*.[313] Deforte was a union official who shared a large office with several other union officials. Despite his protests, state officials conducted a warrant-

304. Id. at 263-65. The "automatic standing rule" announced in *Jones* was overruled by the Court in United States v. Salvucci, 448 U.S. 83 (1980). The *Salvucci* Court stated that since Simmons v. United States, 390 U.S. 377 (1968) held that the defendant's testimony at his suppression hearing could not be used as substantive evidence at his subsequent trial, the reasons supporting the creation of the automatic standing rule no longer had merit. For an analysis of the circumstances supporting the Court's development of the rule see Gutterman, supra note 19, at 120-123.

305. 362 U.S. at 261.

306. 387 U.S. 294 (1967).

307. The Court formulated the "mere evidence rule" based on property interests and rights in Gouled v. United States, 255 U.S. 298 (1921).

308. 387 U.S. at 304.

309. Katz v. United States, 389 U.S. 347, 352-53 (1967). See text accompanying notes 23-35 supra.

310. 389 U.S. at 351.

311. Id. at 352. But see Smith v. Maryland, 442 U.S. 735 (1979) (A pen register installed on a private telephone did not constitute a search since the defendant assumed the risk that the telephone company would inform the police of the numbers he dialed.). See text accompanying notes 205-11 supra.

312. See Brown v. United States, 411 U.S. 223 (1973); Combs v. United States, 408 U.S. 224 (1972); Gutterman, supra note 19.

313. 392 U.S. 364 (1968).

less search of the office and seized certain union records which were in his custody; the records subsequently being admitted at his conspiracy and extortion trial. In approaching the standing issue, the Court, while clearly recognizing that Deforte had standing under *Jones*'s "legitimately on [the] premises" test,[314] preferred to base its holding not on that rationale but rather on the newly formulated *Katz* privacy concept. In applying the privacy concept, the *Deforte* Court concluded that *Katz* "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."[315] *Deforte* provided the clear signal that the Court was prepared to shift its standing analysis away from the traditional property related rule to a *Katz* privacy approach.[316]

Rakas and Its Progeny: Privacy and Standing—The Intertwined Analysis

Although automobile travel has become a crucial and integral part of our daily life, the Court has vacillated in defining the privacy rights and the privacy expectations of the persons operating or riding within them. In *Chambers v. Maroney*,[317] the Court eliminated "exigencies" from the "vehicle exception," and declared that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars."[318] The very next term, in *Coolidge v. New Hampshire*,[319] the Court viewed the warrantless search of a vehicle as unreasonable because of the lack of "exigent circumstances," and proclaimed that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."[320] In *Delaware v. Prouse*,[321] the Court stated that "[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation."[322] In the same term the Court decided *Prouse*, however, Justice Rehnquist, writing for the majority in *Rakas v. Illinois*,[323] narrowed the group of persons whose privacy interest may be implicated by a vehicle search. The Court in *Rakas* held that the *Jones* standard for determining fourth amendment standing, if applied literally to passengers legitimately present in the vehicle, was "too broad a gauge for measurement of Fourth Amendment rights," and would not be used to determine a passenger's legitimate expectation of privacy in the

314. Id. at 370.
315. Id. at 368.
316. Gutterman, supra note 19, at 117.
317. 399 U.S. 42 (1970). See text accompanying notes 228-34 supra.
318. 399 U.S. at 52.
319. 403 U.S. 443 (1971). See note 232 supra.
320. 403 U.S. at 461-62.
321. 440 U.S. 648 (1979).
322. Id. at 662.
323. 439 U.S. 128 (1978).

vehicle.[324]

The *Rakas* decision does, however, provide the link intertwining the *Katz* privacy expectation concept with the traditional standing requirement. The events in *Rakas* began with the robbery of a clothing store. A short time after the holdup a police officer, notified of the robbery, spotted an automobile matching the description of the robbery getaway car occupied by two men and two women. The occupants were ordered out of the car and in a search of the vehicle a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front passenger seat were discovered. The defendants, passengers in the car, were arrested and tried for armed robbery. Before trial they moved to suppress the rifle and shells seized from the car but the trial judge denied the motion, ruling that the defendants had no property interest in the car nor in the objects seized and, therefore, they had no standing to challenge the validity of the search.[325]

Justice Rehnquist, writing for the Court, agreed that the defendants lacked standing and in so holding reevaluated traditional doctrines of fourth amendment standing and substantive fourth amendment protections. The Court began its analysis by eliminating the traditional standing inquiry, integrating it into the issue of substantive fourth amendment protections. Deciding that it served no useful analytical purpose to consider standing distinct from the merits of the fourth amendment challenge, the Court declared that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."[326] The Court then shifted its inquiry to a substantive fourth amendment determination rather than a separate methodical application of standing rules.

In applying its new analysis the Court announced that *Jones* merely stands for the "unremarkable" proposition that an individual can have a sufficient fourth amendment privacy interest in a place other than his own home,[327] and concluded that "legitimate presence" is not the sole test of this privacy interest.[328] The Court resolved that *Katz* provides the guidepost in determining the appropriate measure of fourth amendment substantive protections, and that under *Katz* the capacity to claim coverage depends upon whether the individual has a "legitimate expectation of privacy in the invaded place."[329] Although conceding that it was under no illusion that this test would make the cases any less difficult, the Court determined that decisions under the new approach would "rest on sounder logical footing."[330]

In focusing on the privacy expectations that "mere" passengers have in

324. Id. at 142-43.
325. The Appellate Court of Illinois affirmed in People v. Rakas, 46 Ill. App. 3d 569, 360 N.E.2d 1252 (1977).
326. 439 U.S. at 139.
327. Id. at 142.
328. Id. at 148.
329. Id. at 143.
330. Id. at 140.

the automobile in which they are riding, Justice Rehnquist reasoned that their legitimate privacy expectations "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society."[331] The Court decided that under this formulation the *Rakas* defendants lacked standing since they "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized."[332] In comparing the privacy interests of Jones and Katz to Rakas, Justice Rehnquist maintained that Jones had asserted complete dominion and control over the apartment and could exclude others; likewise Katz, having paid his "toll" and closed the door, was in a similar position to control the areas searched. Rakas, in contrast, as a "mere" passenger had no such control over the automobile and, therefore, no privacy rights in it.[333]

The *Rakas* majority can be criticized for failing to delineate those factors outside of property concepts that may give a passenger a sufficient privacy interest in the vehicle to contest the government's intrusion. Although the majority reiterated that property law concepts are not controlling, the only interests given specific approval are those based on property concepts of ownership, possession, and control.[334] While property concepts may affirmatively establish the passenger's privacy expectations, society should recognize and respect a privacy interest based upon a "special relationship" of the passenger with the vehicle. Certainly the driver-owner of a car, by expressly sharing dominion and control over specific areas of the vehicle (*e.g.*, the trunk or glove compartment) with his rider, can confer upon his companions a recognizable privacy interest in these areas. And even without this express authority, the relationship of the passenger to the vehicle (*e.g.*, spouse or child to owner) should create legitimate privacy expectations in the car.[335] In fact, contrary to the Court's understanding, the public view is probably that a passenger in a car with the owner's consent expects and should be accorded privacy in the vehicle.[336]

The majority's unsatisfactory resolution was caused by its unwillingness to develop a consistent doctrinal approach for determining what interests in the vehicle warrant judicial protection. Justice Powell, concurring in *Rakas*, was willing to make the express determination that in fourth amendment jurisprudence there is a lesser expectation of privacy in an automobile than in other locations. His "sound reasons" for this distinction are the "public" nature of the automobile and the fact that it is subject to extensive regulation and

331. Id. at 143 n.12.

332. Id. at 148.

333. Id. at 148-49.

334. Id. at 143 n.12.

335. See 439 U.S. at 163-64 (White, J., dissenting). See also Pollard v. State, 388 N.E.2d 496, 502 (Ind. 1979), in which the court held that a husband had a legitimate expectation of privacy in his wife's car.

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

inspection.[337] Despite this value judgment, his concurrence does suggest several considerations, in addition to property interests, which have been recognized as relevant in prior Court decisions: whether the person took normal precautions to maintain his privacy, the way the person used the location, and the historical basis for the fourth amendment intrusion.[338] In rejecting the defendant's privacy interest claim, however, Justice Powell failed to delineate what factors under his criteria Rakas lacked, relying instead upon traditional property concepts and his personal value judgment that privacy expectations are lessened in vehicles.

By unduly emphasizing factors of a personal nature that have in the past determined standing, the *Rakas* Court gave inappropriate weight to traditional property concepts in applying its *Katz* substantive based "privacy concept." This is not too surprising since orthodox standing decisions have concluded that deterrence is amply served by preventing incrimination of those whose rights the police have violated and these rights historically have been determined by reference to property concepts. But, had the Court started its analysis in recognition of the shared collective desire to maintain "security and privacy in traveling in an automobile,"[339] the Court may have proceeded by an alternate route to a different conclusion. It would have been reasonable and consistent with society's shared understanding for the *Rakas* Court to have concluded that the citizen's expectation is that presence in an automobile with the owner's permission constitutes a sufficient privacy interest in the vehicle to justify freedom from any unreasonable governmental intrusion.[340] By refusing to recognize this shared expectation *Rakas* granted law enforcement the prerogative to act outside the fourth amendment, thereby severely undermining the privacy values *Katz* sought to protect.

Having favored "property rights" in *Rakas*, it is surprising that Justice Rehnquist, in *Rawlings v. Kentucky*,[341] again writing for the Court, rejected all "arcane" concepts of property law and concluded that ownership of drugs is but one factor to be considered in determining a defendant's ability to claim fourth amendment protection.[342] Although the Court recognized that historically Rawlings may have been given standing to challenge the search in a bailment situation, when he "dumped" his drugs into his companion's purse just prior to a police raid, the majority opinion concluded that "the precipitous nature of the transaction hardly supports a reasonable inference that [Rawlings] took normal precautions to protect his privacy."[343] According to the Court, Rawlings' "frank admission" that he had no subjective expectations

337. 439 U.S. at 153-54 & n.2 (Powell, J., concurring). See also United States v. Chadwick, 433 U.S. 1, 7-9 (1977); Cardwell v. Lewis, 417 U.S. 583 (1974). For criticism of this perspective see text accompanying notes 241-45 supra.

338. 439 U.S. at 151-55 (Powell, J., concurring).

339. Delaware v. Prouse, 400 U.S. 648, 662 (1979). See generally Amsterdam, supra note 7.

340. See 439 U.S. at 162, 167 (White, J., dissenting).

341. 448 U.S. 98 (1980).

342. Id. at 105.

343. Id.

that his companion's "purse would remain free from government intrusion," when added to the fact that he had no right to exclude others from her purse, permitted the finding that under the "totality of the circumstances" Rawlings had failed in his burden of proving he had a legitimate expectation of privacy in the purse.[344]

The *Rawlings* Court's narrow interpretation appears contrary to the fourth amendment's guarantee of privacy in personal effects. Certainly a citizen's right of privacy from government intrusion into his personal effects does not require that he have physical control of the property. He can reasonably expect that his lawfully possessed effects will remain undisturbed upon premises where they have been placed lawfully or in the custody of a third party to whom they have lawfully been entrusted even if he does not have the exclusive right or ability to exclude others.[345] For example, the Court, in *Mancusi v. DeForte*,[346] affirmatively counseled that although an office may be shared by several persons, this fact does not indicate that any of the persons sharing the office has relinquished his privacy expectation in it from governmental intrusion.[347] Although Rawlings may not have "shared" exclusively his companion's purse, the issue of her consent to place his drugs in the pocketbook is an important one in the determination of his privacy expectations. But the Court summarily dismissed this issue by stating that even if Rawlings had her consent, the precipitous nature of the transaction hardly supported a reasonable inference that Rawlings took "normal precautions" to maintain his privacy.[348]

It is difficult to determine whether the Court has decided that the quickness of Rawlings' action showed his lack of a privacy expectation or whether his precipitous action was a "waiver" or "abandonment" of his privacy rights. Furthermore, the Court, in declaring that Rawlings did not take "normal precautions" to maintain privacy, failed to evaluate the reasonableness of alternative precautions Rawlings could have taken to preserve his privacy from the certainty that the police were going to search him. Certainly the proximity of his companion's consent to the government's activities had no place in a determination of Rawlings' desire to maintain his privacy or in judging the legitimacy of his fourth amendment claim. And clearly, when his property was seized from his companion's purse, a place where he had permission to put it, his personal privacy interest had been intruded upon. Traditional standing concepts unquestionably support the view that a property interest in the item seized from the custody of one to whom it has lawfully been entrusted is sufficient to establish the owner as a victim of a privacy invasion, thereby requiring the Court to determine the reasonableness of the police action.[349]

344. Id. at 105, 110.

345. See Simmons v. United States, 390 U.S. 377, 389-90 (1968); United States v. Jeffers, 342 U.S. 48, 54 (1951); Gutterman, supra note 19.

346. 392 U.S. 364 (1968).

347. Id. at 369.

348. 448 U.S. at 105.

349. See Jones v. United States, 362 U.S. 257, 261 (1960); United States v. Jeffers, 342 U.S. 48, 54 (1951). Although recognizing that under traditional rules Rawlings may have been given standing, Justice Rehnquist stated that he would have lost his claim on the merits. This position is

The most disturbing aspect of the majority opinion is the Court's reliance on Rawlings' "frank admissions" that he had no "subjective expectation" that his companion's purse would remain free from government inspection.[350] By crediting this admission, the Court approved the position that a "subjective belief" that the police will inevitably perform the search is a determining factor in considering the fourth amendment's privacy protections. In defining the amendment's coverage according to the perception of those individuals whose dealings with the government lead them to expect little in privacy protections from the police, the Court has "belittled" the meaning of *Katz*. By injecting a subjective, self-determining principle into fourth amendment protections, the Court permits the government by repeated privacy invasion to accustom the citizenry to adjust their expectations to the most minimal level of privacy required in a free society.[351]

Katz did not purport to restrict the interests protected by the fourth amendment and clearly the rationale of the pre-*Katz* standing cases supports privacy in this bailment relationship. In the *Rawlings* dissent, Justice Marshall firmly declared that a property interest in the item seized is enough to establish that the defendant's personal fourth amendment rights are involved, thereby construing the protective function of the fourth amendment in a much broader fashion.[352] And, as Justice Marshall further recognized, "[a] slow and steady erosion of the ability of victims of unconstitutional searches and seizures to obtain a remedy for the invasion of their rights saps the constitutional guarantee of its life just as surely as would a substantive limitation."[353]

The Court has, in the past, attempted to balance the competing purposes of the fourth amendment's privacy protections against the deterrent aspects incorporated in the exclusionary rule.[354] In seeking a proper formula, one approach that has been suggested is that "standing" need not turn exclusively upon the extent to which the complaining party's privacy is invaded, but as Justice Fortas urged in *Alderman v. United States*,[355] should also focus on the extent to which the officer intended at the time of the search to find evidence

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premised on his hypothetical that "[h]ad petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy." 448 U.S. at 106. Apparently the view is that Rawlings' "precipitous action" shows a desire not to maintain privacy and may be considered a waiver of his fourth amendment rights.

350. 448 U.S. at 105.

351. In United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1973), the court counseled against such an approach, noting that the reasonableness of a privacy expectation should not be reduced because an intrusion upon it has occurred repeatedly. See Comment, supra note 148, at 839 (even if we do become accustomed to such invasions, at least a minimum level of privacy must be preserved to maintain "a democratic spirit").

352. 448 U.S. at 117-18 (Marshall, J., dissenting). As Justice Marshall stated, "This holding cavalierly rejects the fundamental principle, unquestioned until today, that an interest in either the place searched or the property seized is sufficient to invoke the Constitution's protections against unreasonable searches and seizures." Id. at 114.

353. Id. at 121.

354. Professor Amsterdam has observed that "the [exclusionary] rule is a needed, but grudgingly taken, medicant; no more should be swallowed than is needed to combat the disease." Amsterdam, Search, Seizure and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964).

355. 394 U.S. 165, 200 (1969) (Fortas, J., concurring in part and dissenting in part).

relating to the defendant.[356] This view is very persuasive if it is conceded that for the exclusionary rule to function properly, there must be a substantial likelihood that its operation will have a significant deterrent effect, and that the maximum deterrent impact consistent with "standing" will result if illegally seized evidence is not admissible against the "target of police investigation." Justice Harlan, in *Alderman*, rejected the "target" approach, believing that the administrative burden does not justify the marginal increase in fourth amendment protection.[357] In following Justice Harlan's counsel, Justice Rehnquist, in *Rakas*, noted the substantial social cost exacted each time the exclusionary rule is applied and refused to enlarge the class of persons who may invoke the rule to include "the target of investigation."[358]

Even if it is agreed that the exclusionary rule should not operate unless there is a substantial likelihood that its operation will have a significant deterrent effect, the deterrence goal should require exclusion when the government purposefully acts illegally against one individual in order to obtain evidence against another.[359] But the Court, in *United States v. Payner*,[360] adhered to the *Alderman* rationale that the additional benefits of extending the exclusionary rule, even in these circumstances, are outweighed by the societal interest in presenting probative evidence to the jury.[361]

In *Payner*, the Court was asked to affirm the district court's use of its supervisory power to exclude tainted evidence. The district court found that the Internal Revenue Service, in a project known as "Operation Trade Winds," had launched an investigation into the financial activities of American citizens in the Bahamas. The I.R.S. had affirmatively counseled its agents that the fourth amendment limitations permitted them purposefully to conduct an unconstitutional search and seizure against a bank officer in order to obtain evidence against Payner, the real target of the governmental intrusion. The Court, in determining that Payner possessed no privacy interest in the documents unlawfully seized from the bank officer, concluded that similar societal interests are at stake when a criminal defendant invokes a court's supervisory power to suppress evidence seized in violation of a third party's constitutional rights as when the traditional "standing" rules are applied.[362]

By basing its analysis entirely on fourth amendment standing concepts and its balancing considerations, the *Payner* Court gave insufficient weight to the companion reason for exclusion, that of preserving judicial integrity. Whatever tension there is in choosing between competing social interests in applying traditional standing limitations, these competing interests *do change*[363] when the government deliberately chooses to sacrifice the constitu-

356. Id. at 208-09. See also White & Greenspan, supra note 298, at 349-54.
357. 394 U.S. at 188 n.1 (Harlan, J., concurring in part and dissenting in part).
358. 439 U.S. at 132-37.
359. See generally Trager & Lobenfeld, supra note 298.
360. 447 U.S. 727 (1980).
361. Id. at 735-36 n.8.
362. Id. at 734.
363. Compare with 447 U.S. at 736 ("The values assigned to the competing interests do not

tional rights of one individual in order to prosecute another. Once the product of this unconstitutional search is permitted to be used as evidence, the Court is not merely tolerating, but encouraging unconstitutional searches. By allowing the government deliberately to circumvent its own standing rules, the Court places its imprimatur upon such lawlessness and thereby taints its own integrity. The atomistic personal aggrievement standing concept is much too narrow when there is purposefully illegal conduct by the government to circumvent constitutional guarantees. The government's evil is generally creating an incentive for constitutional violations, and under these circumstances the standing doctrine must be broadened to include "the target theory."[364]

The Supreme Court's grudging acceptance of the exclusionary rule, with its exacting substantial social cost, has caused it misgivings as to the benefit of enlarging the group of persons who may invoke the rule.[365] Before *Rakas* two separate, analytically distinct determinations were made by the Court in developing its fourth amendment jurisprudence: first, whether the search infringed upon any interest of the complaining party which the fourth amendment was designed to protect, and second, whether that search was "reasonable." These inquiries address similar principles postulated in *Katz* and its progeny and a closer relationship will serve most effectively to harmonize the competing interests with which the Court is concerned. But to collapse them into a single formula invites confusion[366] and permits the Court

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change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment.")

364. Justice Douglas, in Wilson v. Schnettler, 365 U.S. 381 (1961), observed that "[u]nder the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be let alone," id. at 394, and that "the command of the Fourth Amendment implies a continuous supervision by the judiciary over law enforcement officers, quite different from the passive role which courts play in some spheres." Id. at 396 (Douglas, J., dissenting).

365. Rakas v. Illinois, 439 U.S. at 137-38. The *Rakas* majority expressed its misgiving by stating:

> Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. . . . [M]isgivings as to the benefit of enlarging the class of persons who may invoke the rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.

Id. (citations omitted).

366. Justice Blackmun, in his concurring opinion in *Rawlings*, continued to speak of an analysis in terms of two separate steps for the determination of standing. He stated that in order to avoid confusion two steps remained crucial to the inquiry:

> The first is "whether [a] disputed search or seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect," . . . the second is whether "the challenged search or seizure violated [that] Fourth Amendment right . . . ."

448 U.S. at 112 (Blackmun, J., concurring) (citations omitted).

Furthermore, Justice Blackmun posited that

> [i]t remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.

Id.

It is interesting to observe that in Arkansas v. Sanders, 442 U.S. 753 (1979), the Court apparently made a two-step standing merits analysis by holding that there was no question that a pas-

under what has basically been an atomistic view of standing, a concept that was developed to temper the social costs involved in the application of the exclusionary rule, to substantially diminish, as in *Rakas* and *Rawlings*, the substantive protections afforded by the fourth amendment.

Jones began, and *Katz* expanded, the parameters of the fourth amendment's coverage "by recognizing that privacy interests are protected even when they do not arise from property rights."[367] In liberalizing the standing rules to allow a broadened scope of privacy in the premises to include "legitimate presence," the Court, in *Jones*, did not discard interests that historically had been sheltered by the fourth amendment. *Katz*'s "reasonable expectations of privacy" doctrine was also not intended to contract privacy protections but rather to broaden the fourth amendment's privacy shield.[368] The *Rakas* and *Rawlings* decisions have failed to fulfill this expectation.

CONCLUSION

It is apparent that the Court has only begrudgingly accepted the exclusionary doctrine and is presently embarked on a process of limiting its effect.[369] As this Article has indicated, severe erosion of fourth amendment protections has occurred under the application of *Katz*'s "reasonable expectation of privacy" test. The relationship between an individual's reasonable privacy expectations and societal norms plays a significant role in harmonizing the dissonance between the individual entitled to claim fourth amendment protections and the scope of those rights. A defendant, under *Katz*, must show that his privacy expectations under the circumstances are reasonable, that is, that they reflect societal norms. But the importance of a particular privacy interest is a value judgment that must be assigned an appropriate weight in determining whether to bring it within the fourth amendment's protective ambit.[370]

In certain classes of cases, countervailing privacy values may be so socially significant as to require strict adherence to constitutional safeguards. In *United States v. Miller*,[371] the Court, in concluding that Miller had no protectible fourth amendment privacy interest in microfilmed copies of his records maintained by the bank, failed to evaluate the privacy interest in-

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senger had standing to challenge the search of his personal luggage taken from an automobile. Id. at 761 n.8.

367. Rawlings v. Kentucky, 448 U.S. at 119 (Marshall, J., dissenting).

368. As stated by the majority in *Katz*, the fourth amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." 389 U.S. at 350.

369. See note 365 and accompanying text supra. As Justice White in Rakas v. Illinois so aptly stated:

> [i]f the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases.

439 U.S. at 157 (White, J., dissenting).

370. See Kitch, supra note 27, at 141-42, 150-52.

371. 425 U.S. 435 (1976). See text accompanying notes 177-88 supra.

volved—that is, what value society places upon the privacy of its bank records; is it significant enough to require judicial supervision or can the government practice continue virtually unregulated? In *Miller*, instead of differentiating between activities in which an individual to function efficiently is compelled by contemporary society to yield certain privacy interests and others where he is not, the Court took the position that the individual who permits his activities to be viewed by a particular group for a limited and specific purpose must sacrifice his privacy interests vis-à-vis the government.[372] The Court does not explain satisfactorily why an individual who uses a bank's facilities and, therefore, consents to the bank teller viewing his bank activities briefly, and for a limited purpose, must surrender his privacy expectations to the government with respect to these activities.

In the misplaced confidence cases, the Court weighed the privacy expectations of an individual engaged in crime against the need for effective law enforcement.[373] By pegging the individual's conversational privacy interest in talking with his confederates at the lowest end of the sliding scale of fourth amendment privacy protections, and the government's interest in using informants at the highest level of necessary law enforcement techniques, the Court concluded that individuals engaged in criminal activities must assume the risk that persons to whom they confide may be government informants. The Court was thus able to conclude that the criminal conversations between the defendant and the government informer were not protected privacies, and the government capture of them, even by electronic means, was not a "search" protected by the fourth amendment. By casting its risk analysis in terms of criminal conduct, the *White* decision imposed on everyone the risk of uncontrolled government informer eavesdropping. Whatever the merit supporting the broad power of the government to use informants in this manner, the *White* analytical framework never considers the nature of this highly intrusive police practice and its probable impact on our basic notions of the privacy values placed upon maintaining innocent conversations. As Justice Harlan counseled, the proper analysis must go beyond the search for subjective expectations and assumption of risks. The value we place on the privacy interest is the "central element" involved in judging the reasonableness of the government intrusion.[374]

The level at which the Court places the privacy interest involved is central to the application of the fourth amendment. This is best illustrated by Justice Bradley's expansive holding in *Boyd v. United States*[375] that any compulsory production by the government of private books and papers "is contrary to the principles of a free government" and is incapable of surviving "the pure at-

372. 425 U.S. at 443. See Note, A Reconsideration of the *Katz* Expectation of Privacy Test, 76 Mich. L. Rev. 154, 166-68 (1977). The *Miller* Court additionally based its holding, that none of the defendant's fourth amendment rights had been violated, on the facts that he could claim neither a possessory nor an ownership interest in the microfilm. 425 U.S. at 440.

373. See United States v. White, 401 U.S. 745, 785-87 (1971) (Harlan, J., dissenting).

374. Id. at 786.

375. 116 U.S. 616 (1886). See text accompanying notes 30, 31, 43-48 supra.

mosphere of political liberty and personal freedom."[376] By placing a high value on the nature of a person's private papers, the *Boyd* Court looked beyond the method the government used and raised an absolute bar to government intrusion into private documents. *Boyd* creatively intertwined the fourth and fifth amendments to protect "the sanctity of a man's home and the privacies of life,"[377] thereby recognizing the fundamental value of absolute privacy protection for personal documents. The recent decisions of *Fisher* and *Andresen* never addressed *Boyd*'s main theme: the wisdom of maintaining an absolute private enclave of individual privacy as a central value protected by the fourth and fifth amendments. Instead, the Court's inquiry is focused primarily upon the method the government used to secure private documents, significantly narrowing *Boyd*'s absolute ban on the ability of the government to obtain private papers. By foregoing an analytical appraisal of the central value in protecting private papers and the place on the hierarchical value scale that private papers occupy,[378] the Court missed an opportunity to consider whether fourth amendment jurisprudence might support the theory that increasing degrees of intrusions require "increasing degrees of justification and increasingly stringent procedures for the establishment of that justification."[379] Clearly, such an analysis is warranted before the Court permits, as it did in *Zurcher v. Stanford Daily*,[380] the police to search private documents in the private files of innocent third persons.

To bring "clarity and consistency"[381] to an area that abounds with confusion and uncertainty requires separate analytical analyses of the privacy interests that the fourth amendment protects and of those individuals entitled under particular fact patterns to these protections. Whether to extend the fourth amendment's protection to include particular individuals requires a determination of the need for additional deterrence weighed against the social cost of exclusion. The importance of protecting a particular privacy right is not balanced by these competing considerations; instead, the Court must determine its value and then assign to it a weight on the sliding scale of privacy interests to determine whether the affected privacy interests are significant enough to warrant judicial protection. Indeed, once the Court does determine that the privacy interest is sufficiently weighty to bring it within the fourth amendment's orbit, then the amendment's procedural safeguards apply to *all* government intrusions. The Court's analytical perspective can then be directed to whether the particular intrusion in light of all the exigencies presented is constitutionally permissible and, further, whether a particular individual affected is to benefit from any constitutional defects. When the Court

376. Id. at 632.
377. Id. at 630.
378. See McKenna, supra note 42.
379. Amsterdam, supra note 7, at 390.
380. 436 U.S. 547 (1978).
381. Coolidge v. New Hampshire, 403 U.S. 443, 521 (1971) (White, J., concurring in part and dissenting in part). In *Coolidge*, Justice White criticized the majority for refusing to attempt to clarify the state of the law "by clinging to distinctions that are both unexplained and inexplicable." Id.

determines that a particular government practice does not undermine any of the values protected by the fourth amendment, then the government practice goes unregulated, saddled upon all of us. The question of fourth amendment privacy protections ultimately must be determined by deciding whether this type of unregulated government activity is one that we collectively, as members of a free society, are willing to accept.[382] A very close relationship exists between the rights protected by the fourth amendment, and the persons entitled under the facts to assert them; but to collapse these questions into a single formula invites confusion and unprincipled judicial analysis. Such a merger permits the Court to apply the narrowest conceivable interpretation to fourth amendment standing, justifying its conclusion, as in *Rakas* and *Rawlings*, that the specific facts of the particular case did not justify the individual's privacy expectations.[383] This close factual distinction analysis is troublesome because there are always methods to distinguish the multitude of dissimilar fact settings, and by emphasizing the complexity of the factual situation, the Court is permitted to bypass the difficult question of defining the privacy interest involved and assigning to it an appropriate value for future guidance. This factual rather than doctrinal approach has failed, in many circumstances, to provide any meaningful guidance in determining which individuals or privacy interests are protected by the fourth amendment.[384]

By limiting its inquiry to the individual's actual expectation and the efforts he has taken to preserve his privacy, the Court is able by circuitous reasoning to alter society's perception of what the "legitimate privacy interests" are and how they may be protected. By determining that the individual has failed to take "normal precautions" to preserve his privacy, the Court has been able to focus its inquiry on the subjective evaluation of the individual's perceived desire to maintain his privacy in the circumstances presented, thereby obviating the need to examine the government's activities or consider the relevant fourth amendment privacy interests. By constant repetition, as in the automobile search cases, the Court can manipulate our expectations, thereby diminishing society's collective belief that it is in fact reasonable to expect that the privacy interest in question is protected by the fourth amendment's shield. This unconfined analysis allows the Court to alter social perceptions to the point that the protections afforded by the fourth amendment begin to approach the "evaporation point."[385]

382. See Amsterdam, supra note 7, at 403.
383. See text accompanying notes 323-33, 341-44 supra.
384. See Dworkin, supra note 35.
385. Chimel v. California, 395 U.S. 752, 764-65 (1969).