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RECENT DEVELOPMENT

Criminal Law and Procedure—Search and Seizure—Standing to Invoke the Exclusionary Rule Narrowed by New Use of Privacy Expectation Standard

Rakas v. Illinois,
99 S. Ct. 421 (1978)

Like a gardener pruning an unruly shrub, the Supreme Court recently trimmed twenty years of growth from the controversial fourth amendment exclusionary rule. Since 1960, criminal defendants have successfully invoked the protection of the rule upon a showing that they were “legitimately on premises” where an improper search took place. In Rakas v. Illinois, however, the Court has sharply limited the categories of persons who may invoke fourth amendment protection. The Court abandoned the “legitimately on premises” standard and applied instead a test that requires the defendant to show a “legitimate expectation of privacy.” This Note examines the theoretical coherence and practical implications of Rakas, and argues that the Court should return to the “legitimately on premises” standard.

1 The exclusionary rule, simply stated, bars the use of the fruits of an improper police search as evidence in a criminal prosecution. See note 8 infra.

2 See Jones v. United States, 362 U.S. 257, 267 (1960). Jones involved alternative holdings: in addition to the “legitimately on premises” standard, the Court established the “automatic standing” rule. This rule grants standing to seek suppression where possession of the evidence is an essential element of the crime charged; it thus rescues defendants from the dilemma of having to claim possession to establish standing at a suppression hearing and then being faced with the admission at trial. Id. at 264-65. The importance of the “automatic standing” rule was reduced by Simmons v. United States, 390 U.S. 377 (1968), which held that the prosecution could not use the defendant’s suppression hearing testimony against him at trial. “Automatic standing” was not at issue in Rakas v. Illinois, 99 S. Ct. 421 (1978), because the defendants were charged with armed robbery, not illegal weapons possession. The Court noted that it had “not yet had occasion to decide whether the automatic standing rule of Jones survives our decision in Simmons.” Id. at 426 n.4.


4 Id. at 429-33. Prior cases had limited the application of the exclusionary rule without restricting the categories of persons who could invoke fourth amendment protection. See Stone v. Powell, 428 U.S. 465, 482 (1976) (rule does not require federal habeas corpus relief where defendant had opportunity to fully and fairly litigate fourth amendment claim in state court); United States v. Calandra, 414 U.S. 338, 354-55 (1974) (rule does not preclude questions, in grand jury proceedings, based on illegally obtained evidence); Walder v. United States, 347 U.S. 62, 65 (1954) (prosecution can sometimes use illegally seized evidence to impeach the credibility of a testifying defendant). In addition, see note 38 infra for a discussion of the “automobile exception” to that rule.

5 99 S. Ct. at 433.
The fourth amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Beginning with the Supreme Court's decision in Weeks v. United States, federal courts have sought to implement this protection by barring the use at trial of evidence acquired through violations of the defendant's fourth amendment rights. The rationale for this "exclusionary rule" is simple: police will not engage in unconstitutional searches and seizures if the product of such misconduct is inadmissible in court. Critics of the rule, however, often echo Justice (then Judge) Cardozo's lament that the "criminal [goes] free because the

6 The fourth amendment states:

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.

7 232 U.S. 383 (1914).

8 The exclusionary rule was first applied in Weeks v. United States, 232 U.S. 383 (1914), to suppress evidence discovered in an improper search. The Weeks Court warned that if the prosecution can offer evidence obtained through illegal searches, "the protection of the Fourth Amendment declaring [the defendant's] right to be secure against such searches is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Id. at 393. Weeks held only that the exclusionary rule barred the use of evidence obtained illegally by federal officials against criminal defendants in federal courts. In Wolf v. Colorado, 338 U.S. 25, 28-33 (1949), the Court held that, while the fourteenth amendment fully incorporated the fourth amendment, states need not adopt a similar rule. The Court reversed itself in 1961, however, and mandated state adoption of the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643, 655 (1961). The Mapp Court noted that states had been unable to develop any satisfactory alternative remedy for fourth amendment violations, and observed that many states had adopted the exclusionary rule on their own initiative. Id. at 651-52. The Court observed in Rakas that "the exclusionary rule is an attempt to effectuate the guaranties of the Fourth Amendment." 99 S. Ct. at 425. The rule is not "a personal constitutional right," but a court-devised means of protecting fourth amendment rights. United States v. Calandra, 414 U.S. 338, 348 (1974). For an analysis of the theoretical foundations of the court-devised rule, see Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 3-10 (1975).

9 Mapp v. Ohio, 367 U.S. 643, 660 (1961) (rule promotes "honest law enforcement" and "judicial integrity"); Elkins v. United States, 364 U.S. 206, 217 (1960) (rule's purpose "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").
constable has blundered." Moreover, they contend that civil actions for damages provide a more effective and less costly means of discouraging police misconduct.

The Supreme Court first considered the issue of standing to invoke the exclusionary rule in *Olmstead v. United States.* Over a strong dissent by Justice Brandeis, the Court tied fourth amendment protection to the property interest asserted by the aggrieved party. Unless the defendant could claim such an in-

10 People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). See also Irvine v. California, 347 U.S. 128 (1954). The Irvine plurality observed that "[r]ejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant." *Id.* at 136.

Chief Justice Burger has labeled the deterrence rationale for the exclusionary rule "hardly more than a wistful dream," calling it "conceptually sterile and practically ineffective." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 415 (1971) (dissenting opinion, Burger, C.J.). The rule fails, Chief Justice Burger contends, because police do not understand court rulings defining the proper standard of conduct, prosecutors have no direct control over police, and no direct sanction is imposed on the offending officer. *Id.* at 416-17.

11 In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971), the Court held that a private citizen was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." *Id.* at 397. Chief Justice Burger, in dissent, urged replacement of the exclusionary rule with a more "workable remedy" for such violations; he predicted that private tort actions against individual officials would not work because jurors "may well refuse to penalize a police officer at the behest of a person they believe to be a 'criminal.'" *Id.* at 422 (dissenting opinion, Burger, C.J.). The Chief Justice proposed a legislatively created system by which injured parties could sue the federal government directly in federal tribunals. *Id.* at 422-24 (dissenting opinion, Burger, C.J.).

Chief Justice Burger's prediction was accurate; the *Bivens* remedy has proven to be ineffective. See Note, "Damages or Nothing"—The Efficacy of the Bivens-Type Remedy, 64 CORNELL L. REV. 667 (1979).

12 277 U.S. 438 (1928).

13 The Bill of Rights, Justice Brandeis said, "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 (dissenting opinion, Brandeis, J.).

14 The Court held that the use of telephone wiretaps did not violate the defendant's fourth amendment rights because there had been no trespass against his person or property. Chief Justice Taft, speaking for the Court, said that a defendant's rights were not violated "unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." *Id.* at 466. Lower courts followed the *Olmstead* majority's position for nearly thirty years. See, e.g., Gaskins v. United States, 218 F.2d 47, 48 (D.C. Cir. 1955) (per curiam) (defendant has no standing to seek suppression of results of warrantless search where she was "merely a guest" in another's apartment); *In re Nassetta,* 125 F.2d 924, 925 (2d Cir. 1942) (per curiam) ("one who has no proprietary or possessory interest in the premises searched or property seized may not suppress" evidence).
Olmstead's narrow view of standing underwent dramatic expansion in 1960. In Jones v. United States, the Court held that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." The lower court had reasoned that, because Jones was a "guest" or "invitee" in a friend's apartment, he had no right to object to the introduction into evidence of drugs seized in a warrantless search of the apartment. The Court reversed, warning against importing "subtle distinctions . . . of private property law" into the discussion of constitutionally protected rights. Such historical distinctions were "often only of gossamer strength" and were frequently outdated concepts within property law itself. Rather than struggle with such arcane distinctions, the Court drew a line between those whose presence on the searched premises was "legitimate" and those whose presence was "wrongful."

In Katz v. United States, however, the Court faced a fact situation in which the "legitimately on premises" test offered little guidance. Police had tapped a public telephone booth, without a warrant, to record defendant's bookmaking transactions. The prosecution and the defendant disputed whether the telephone booth was a "constitutionally protected area" such as a home, office, or friend's apartment. The Court found no "talismanic solution to every Fourth Amendment problem" in abstract characterizations of the area searched; rather, the Court looked to the defendant's expectation of privacy. The Court declared that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." By

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16 Id. at 267.
18 362 U.S. at 266.
19 Id.
20 "This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched." Id. at 267.
22 Id. at 349-51.
23 Id. at 351 n.9.
24 Id. at 351-52.
closing the door to the telephone booth, Katz had shown an intention to keep his conversations private.

Justice Harlan, concurring in Katz, expressed the question of fourth amendment protection as a two-stage analysis. First, the defendant must show "an actual (subjective) expectation of privacy." 25 Second, that expectation must be reasonable by the objective standards of society, and "place" is relevant to this determination. 26 For instance, a person generally has reasonable expectation of privacy in his home or an enclosed telephone booth, but not in an open field. 27 The Court, in reaffirming Katz in later decisions, used Justice Harlan's terminology. 28

II

RAKAS V. ILLINOIS

On the night of February 4, 1975, police received a report of a robbery at a clothing store in Bourbonnais, Illinois. A short time later, they stopped an automobile matching the description of the get-away car and ordered the occupants—the woman owner and driver, and one female and two male passengers—to get out. An immediate, warrantless search of the car revealed a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front seat. The two male passengers, Frank Rakas and Lonnie King, were eventually convicted of armed robbery. The Illinois courts denied defendants' motion to suppress the rifle and shells obtained in the search. The Supreme Court affirmed.

Justice Rehnquist, writing for the majority, rejected the Jones standard of "legitimate presence" on the searched premises as "too broad a gauge for measurement of Fourth Amendment rights." 29 He restricted Jones to its facts, asserting that it "merely stands for the unremarkable proposition that a person can have a

25 Id. at 361 (concurring opinion, Harlan, J.).
26 Id. (concurring opinion, Harlan, J.).
27 Id. at 360-61 (concurring opinion, Harlan, J.).
28 See Mancusi v. DeForte, 392 U.S. 364, 369 (1968) (defendant had standing to seek suppression of evidence because his office was a place where he had "reasonable expectation of freedom from government intrusion"); Combs v. United States, 408 U.S. 224, 227 (1972) (dictum) (remanded for determination of whether defendant had a "reasonable expectation" of freedom from search). In United States v. Chadwick, 433 U.S. 1 (1977), the Court used the catch phrase "legitimate expectations of privacy" in holding that a police search of a locked footlocker was a violation of the defendants' fourth amendment rights. Id. at 7.
legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." In place of the Jones standard, Justice Rehnquist substituted a test that requires defendants to show a legitimate expectation of privacy in the searched area. In order to determine whether a privacy expectation is legitimate, courts must consider either "concepts of real or personal property law" or "understandings that are recognized and permitted by society." One relevant consideration, for example, is the degree of access which the defendant had to the searched area. Thus, Justice Rehnquist implied, the Rakas defendants would have been in a stronger position if they had possessed keys to the locked glove compartment. Courts should also consider whether the defendant could exclude others from the searched area, he said, observing that this was "[o]ne of the main rights attaching to property."

At first glance, Justice Rehnquist's opinion seems to be a straightforward application of Katz. Closer inspection reveals that despite Justice Rehnquist's adoption of the Katz "expectation of privacy" language, the standard he applied in Rakas is quite different. By focusing on possessory and property interests, Justice Rehnquist took a position much more restrictive than that of Justice Harlan in his Katz concurrence. Justice Harlan asked only whether the defendant's expectation of privacy was reasonable. Justice Rehnquist, however, insisted that the defendant must have a "legally sufficient interest" in the searched premises or seized property, cutting away fourth amendment protection from many persons protected by Jones.

The facts of Rakas did not force the Court to abandon Jones. As Justice Rehnquist noted, an automobile by its very nature carries with it a decreased expectation of privacy. The Court could have limited its discussion to the so-called "automobile ex-

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30 Id. at 430.
31 Id.
32 Id. at 430-31 n.12. Justice Rehnquist did not explain what constitutes a socially recognized "understanding" for fourth amendment purposes but focused instead on property-related factors.
33 Id. at 433.
34 Id.
35 Id. at 431 n.12.
36 Id. at 430. Justice Rehnquist used the term in discussing how the facts of Jones would be handled under the Rakas test.
37 Id. at 433.
ception.” The majority, however, expressed discomfort with a generous reading of fourth amendment standing and chose to attack Jones broadly.

Justice White’s argument for the four dissenting justices, that the majority’s new standard of legitimate expectation of privacy “protects property, not people,” is accurate. Rakas does not return to pre-Jones distinctions based on arcane property law labels, but it does exalt the possession, control and ownership of property.

By cutting back on the categories of persons who can invoke fourth amendment protection, the Rakas Court has robbed the exclusionary rule of much of its deterrent effect. Under the Jones standard, police knew that any person on the searched premises in any capacity which was not “wrongful” could object to the use against him of any improperly seized evidence. Neither the Katz majority nor Justice Harlan questioned the general soundness of this proposition. With such a high probability that a person on the premises would have standing to object, police had little incentive to conduct an improper search. Rakas tells police that persons who are legitimately on the searched premises and who may have reasonably expected privacy have no fourth amendment rights if they lack some property interest. When more than one person is present, or when police know that the person present is not the owner, they may be tempted to conduct an illegal search in the belief that they will still be able to use the seized material as evidence.

38 Under the “automobile exception,” the Court has held that warrantless searches of automobiles are permissible under circumstances that would make searches of other areas unreasonable. A major justification for this exception is the automobile’s mobile nature. See Carroll v. United States, 267 U.S. 132, 147-53 (1925). Also, an automobile’s openness to public view, its travel on public roads, and regulation by the government decrease its occupant’s expectation of privacy. Moreover, because of frequent traffic and safety inspections and impoundment of automobiles for traffic and parking violations, this decreased privacy protection may also extend to items not in general view. See South Dakota v. Opperman, 428 U.S. 364, 367-76 (1975).

39 Justice Rehnquist noted that “[e]ach time the exclusionary rule is applied it exacts a substantial cost” in loss of evidence and observed that “misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.” 99 S. Ct. at 427.

40 Id. at 437, 443 (dissenting opinion, White, J.). Justices Brennan, Marshall and Stevens joined White.

41 See notes 21-27 and accompanying text supra.

42 Justice White noted this danger in connection with automobiles, but the logic also applies to searches of other areas. 99 S. Ct. at 444 (dissenting opinion, White, J.).
Not only does Rakas open the door to police abuses, but it also confuses those police who attempt to conscientiously follow the law. The Rakas standard requires police to guess what type of interest a person has in an object or premises—something that is virtually impossible to know without detailed inquiry. As Justice White noted, "[o]nly rarely will police know whether one private party has or has not been granted a sufficient possessory or other interest by another private party." Justice Rehnquist argued that the Jones test had led to conflicting holdings among courts and had failed to establish a "bright line" of guidance. These differences, however, occurred along the fringes of the definition of "premises" or in cases where Jones was not really applicable because a "premises" as such was not involved. In its general street-level application, Jones provided a wide area of clear guidance. Rakas offers virtually none.

Conclusion

The Rakas majority, while ostensibly following the language of Katz, radically altered the concept of "expectation of privacy," tying it to a narrow range of property-related interests. By using this concept to attack Jones, the Rakas Court has sharply limited the categories of persons who can invoke fourth amendment protection against police searches. Rakas has increased the possibility of police abuses and at the same time has created problems for police wishing to comply with constitutional requirements. It is a dangerous position and should be abandoned.

Philip Hiatt Dixon

43 Id. at 443 (dissenting opinion, White, J.). Chief Justice Burger, who joined in the Rakas majority, had earlier observed that police officers "do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 417 (dissenting opinion, Burger, C. J.). Justice White's criticism in Rakas goes deeper than this. He argues that even if police memorized all the relevant appellate opinions, they still could not apply the Rakas standard because they are unable to tell what interest a person has in a particular item or property.

44 Id. at 451 n.13.

45 Id. Justice Rehnquist noted different results among circuits regarding searches of third persons' bedrooms, purses, and desks, and searches of the premises when the defendant was absent. These decisions, however, involved how far "presence" could be stretched, not whether a defendant in the room or other immediate area of the search could object to a warrantless search of that area. Justice Rehnquist conceded that "with few exceptions, lower courts have literally applied this language from Jones and have held that anyone legitimately on premises at the time of the search may contest its legality." Id. at 429-30 n.10.
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