Possession and Presumptions: The Plight of the Passenger under the Fourth Amendment

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COMMENTS

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UNDER THE FOURTH AMENDMENT

INTRODUCTION

The United States Constitution stands as the protector of the rights of all persons, both the guilty and the innocent, and the Supreme Court stands as the ultimate defender of those rights.1 Recently, however, the Court has strayed from its role by proclaiming new law with respect to the right of automobile passengers to be free from "unreasonable searches and seizures."2

In Rakas v. Illinois,3 the Court held that a guest in an automobile does not have an expectation of privacy sufficient to contest the admissibility of the fruits of a search as evidence of the crime with which he is charged, even if that search is unconstitutional.4 More recently, in County Court v. Allen,5 the Court held constitutional statutes making presence in an automobile at the time that contraband is discovered therein presumptive evidence of possession by all

2. U.S. Const. amend. IV.
4. In view of the Court's holding, the search is unconstitutional only as to the driver or owner of the vehicle. As will be developed in part III(A), the admissibility of the evidence is premised on the idea that passengers lack an expectation of privacy in the automobile and are therefore without fourth amendment protection; as to them, no fourth amendment violation in the form of an unconstitutional search has occurred. A debate on the merits of the legitimate expectation of privacy test as applied to automobile passengers is beyond the scope of this Comment. For a discussion of the validity of the Court's holding, see Comment, The Exclusionary Rule, Standing, and Expectation of Privacy for Car Passengers: A Confusion of Concepts, 31 Baylor L. Rev. 227 (1979) [hereinafter cited as The Exclusionary Rule]; Note, Standing to Raise Fourth Amendment Guarantees Against Unreasonable Searches and Seizures: Rakas v. Illinois, 15 Tulsa L.J. 85 (1979) [hereinafter cited as Fourth Amendment Guarantees].
5. 442 U.S. 140 (1979). It is noteworthy that even at first glance, the Rakas and Allen holdings are anomalous. In Rakas, the Court held that passengers have no expectation of privacy in the automobile and therefore cannot object to the seizure of most items therein, yet in Allen the Court held that passengers may be presumed to be in possession of certain items found in the vehicle by the mere fact of the passengers' presence. It would seem that to possess an item is not an act that occurs in a vacuum and it should therefore carry with it some form of privacy interest. Property law recognizes this principle by defining possession as having dominion and control over the object. See O. Browder, R. Cunningham & J. Julin, Basic Property Law 22-25 (2d ed. 1973). One who rightfully possesses holds that item to the exclusion of all other persons. Id. Language this powerful implies a right of privacy. As the Supreme Court has noted, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978). Others, however, argue that possession as used in the criminal law is not as broad a concept and should not be confused with possession sufficient to rise to an expectation of privacy. Trager & Lobenfeld, The Law of Standing Under the Fourth Amendment, 41 Brooklyn L. Rev. 421, 437-38 (1975); Brief for the United States, United States v. Salvucci, 599 F.2d 1094 (1st Cir.), cert. granted, 100 S. Ct. 519 (1979) (No. 79-244).
occupants. In light of these decisions, it is alarming that the Court in *United States v. Salvucci* is presently considering the vitality of the automatic standing rule. That rule conveys the necessary standing to contest the constitutionality of a search to any person charged with a possessory crime when the evidence of illegal possession was seized during that search. Although the cases may appear to bear only a tenuous relationship to each other, the combined effect of the three may lead to basic injustices in the area of criminal law.

If the Court rejects automatic standing as an avenue for contesting the legality of a search and seizure, it risks creating a legal loophole through which police officers, in their attempt to enforce the laws, may circumvent the restraints imposed by the fourth amendment, and necessarily infringe on the rights of all persons. This, in turn, may lead to conviction of the innocent. As envisioned by the dissent in *Rakas*, the Court has declared "'open season'" on automobiles with several occupants. The potential for abuse is heightened when presumption statutes are used as an aid to conviction, and is further compounded by the police officer's knowledge that the possession on which that conviction will rest will not automatically provide standing to contest an unconstitutional search. This Comment contends that if the Court abandons automatic standing with respect to passengers charged with possession of contraband pursuant to a presumption statute, not only will "open season" be declared, but the "hunt" may prove unjustly successful.

I. THE DEMISE OF THE AUTOMATIC STANDING RULE

The primary purpose of the United States Constitution is to limit government infringement of individual rights. One striking manifestation of this aim is the

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6. 599 F.2d 1094 (1st Cir.), cert. granted, 100 S. Ct. 519 (1979) (No. 79-244).
8. See notes 34-42 infra and accompanying text.
9. "[T]he police often do not hold the requirements of the fourth amendment itself in great esteem—in part because . . . they are so easy to evade . . . ." Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1038 (1974). All courts have the duty of guarding against "stealthy encroachments" on an individual's constitutional rights. Boyd v. United States, 116 U.S. 616, 635 (1886).
10. If automatic standing was eliminated, standing requirements as presently expressed would "merely encourage the police to search the homes [or automobiles] of people they believe to be innocent, [in the hope of gaining evidence usable against someone else] leaving the privacy of those they believe to be guilty undisturbed." White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. Pa. L. Rev. 333, 348 (1970). Moreover, because many searches undoubtedly yield no incriminating evidence, only the most flagrant abuses find redress in the courts. Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). Justice Jackson further noted: "There may be, and I am convinced that there are, many unlawful searches of . . . automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear. Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against [a person's car in violation of the fourth amendment] must be regarded as a search of the car of Everyman." *Id.*
fourth amendment, from which all persons receive the profound right of freedom from unreasonable searches and seizures. The Supreme Court created the exclusionary rule to ensure that this language is more than an empty promise. The rule renders inadmissible in either a federal or state criminal prosecution any evidence seized in violation of a defendant's constitutional rights. The exclusionary rule is perceived as a remedy that will,
through its deterrent effect, protect every person's fourth amendment rights; it is not a constitutional right enjoyed only by the wronged individual. As is suggested, the rule's central function is the discouragement of police misconduct. "[T]he exclusionary rule gives every prosecuted person an opportunity to vindicate search and seizure principles for the benefit of all, insofar as violations of these principles have resulted in the production of evidence against the accused."

overruled in part, Mapp v. Ohio, 367 U.S. 643 (1961). In Wolf, the Court held that the fourth amendment ban on unreasonable searches and seizures was applicable to the states through the due process clause of the fourteenth amendment, suggesting that state officers were confined to the strictures of the fourth amendment. 338 U.S. at 27-28. Nevertheless, the Court refused to compel the states to adopt the exclusionary rule as a means of enforcing the dictates of the fourth amendment. Id. at 33. The Court reasoned that the exclusionary remedy was not an "essential ingredient of the right" to be free from unreasonable searches and seizures. Id. at 29. Furthermore, the Court noted that most states had not independently adopted the exclusionary rule since the decision in Weeks. Id. In Mapp v. Ohio, 367 U.S. 643, 655 (1961), however, the Court overturned its decision in Wolf, finding the exclusionary rule sanction constitutionally compelled.

16. United States v. Calandra, 414 U.S. 338, 348 (1974). Treating the exclusionary rule as a remedy rather than a right is indicative of the Supreme Court's inroads into the scope of the rule. The exclusionary rule was intended to be of constitutional dimension by its creators, Weeks v. United States, 232 U.S. 383, 398 (1914), and by later Supreme Court enforcers. Mapp v. Ohio, 367 U.S. 643, 657 (1961) ("that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense"); see United States v. Calandra, 414 U.S. at 360 (Brennan, J., dissenting). Despite these pronouncements, the Supreme Court has recently begun to narrow the rule's scope. Stone v. Powell, 428 U.S. 465 (1976) (exclusionary rule held not to be basis for federal habeas corpus relief when state has provided opportunity for full and fair challenge of alleged fourth amendment violation); United States v. Peltier, 422 U.S. 531 (1975) (exclusionary rule held not to apply retroactively); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule held not applicable to grand jury proceedings); cf. California v. Minjares, 100 S. Ct. 9, 9 (1979) (Rhenquist, J., dissenting) (called for a reexamination of the exclusionary rule and the extent to which it should be retained).

17. Stone v. Powell, 428 U.S. 465, 486 (1976). It has been said that the exclusionary rule "is the most effective remedy we possess to deter police lawlessness." Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L.C. & P.S. 255, 257 (1961); accord, B. Schwartz, supra note 12, § 7.20, at 292; Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 671 (1970); Trager & Lobenfeld, supra note 5, at 453. Professor Oaks conducted a comprehensive empirical study, Oaks, supra, at 678-709, from which he concluded that the exclusionary rule is a viable deterrent of police misconduct. Id. at 709. Other theories as to the purpose underlying the exclusionary rule have been forwarded. Justice Brandeis proposed that judicial integrity is the rationale behind the exclusionary rule and therefore argued that the government should never be permitted to avail itself of fruits of illegal searches and seizures. Olmstead v. United States, 277 U.S. 438, 483-84 (1928) (Brandeis, J., dissenting) (implicitly overruled in Katz v. United States, 389 U.S. 347, 352-53 (1967)). "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Id. at 485 (Brandeis, J., dissenting). Another theory, derived from Boyd v. United States, 116 U.S. 616 (1886), is that when evidence, seized in violation of fourth amendment rights, is introduced at trial, there is a violation of one's fifth amendment right to be free from compulsory self-incrimination. Id. at 634-35; see Oaks, supra, at 668-72.

18. Paulsen, supra note 17, at 260. The application of the exclusionary rule is not limited to fourth amendment violations. Evidence will be excluded when it is obtained in contravention of any constitutional right. Specifically, evidence has been ruled inadmissible when obtained in
A criminal defendant seeking to invoke the exclusionary rule must first cross a threshold: he must show that he has standing to contest the alleged search and seizure. Without standing, the question whether a violation of the fourth amendment has occurred, resulting in the implementation of the exclusionary rule, will never be reached. Traditionally, a defendant asserting a fourth amendment claim was required to show an invasion of his property rights; specifically, he had to demonstrate a possessory or proprietary interest in the premises searched or the property seized. More recently, the concept of standing has undergone a metamorphosis, traceable to the landmark decision in Katz v. United States, in which the Supreme Court said that "the Fourth Amendment protects people, not places." Therefore, constitutional protection no longer extends to property per se, but is limited to that toward which an individual has manifested a reasonable and actual expectation of privacy. Hence, although an individual has an admitted property violation of the fifth amendment right against self-incrimination and the sixth amendment right to counsel. Brewer v. Williams, 430 U.S. 387, 404 (1977) (Court excluded incriminating statements elicited after denial of right to counsel); Gilbert v. California, 388 U.S. 263, 271-72 (1967) (Court excluded identification made at a lineup held without defendant's counsel); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (Court ruled confession inadmissible when privilege against self-incrimination was not knowingly waived). Moreover, evidence has been excluded when the methods used to obtain it are deemed so appalling that use of the evidence would violate due process. Rochin v. California, 342 U.S. 165, 172-73 (1952) (evidence obtained as a result of inducing vomiting against defendant's will excluded; such conduct "shocks the conscience").


20. Simmons v. United States, 390 U.S. 377, 389-90 (1968); Jones v. United States, 362 U.S. 257, 261 (1960); Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw. U.L. Rev. 471, 473-75 (1952); Knox, supra note 13, at 36. It has been suggested that the reason the Supreme Court initially required an individual to show a property interest in an invaded area was due to its belief that the words "secure in their persons," U.S. Const. amend. IV, connoted a possessory interest in the premises searched or the property seized. Knox, supra note 13, at 36.


22. Id. at 351. Fourth amendment protection should not depend simply on whether there has been a technical trespass, id. at 353, but rather on whether the person claiming the protection sought to preserve as private that into which the government intruded. Id. The legal significance of privacy was earlier recognized by Warren and Brandeis. They contended that "in very early times, the law gave a remedy only for physical interference with . . . property, for trespasses . . . . Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now . . . the term 'property' has grown to comprise every form of possession—intangible, as well as tangible." Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 193 (1890).

23. Warden v. Hayden, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited.").

24. Katz v. United States, 389 U.S. 361 (Harlan, J., concurring). A particular person seeking the protection of the fourth amendment must satisfy a two-fold test. He must show not only a subjective expectation of privacy, but also that the expectation was objectively reasonable. Id. This test, formulated by Justice Harlan in his concurrence in Katz, was subsequently adopted by the Supreme Court. See Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978); id. at 151 (Powell, J., concurring). Of course, no individual attempting to obtain standing would admit to not having a subjective expectation of privacy; consequently, the Court's inquiry need only focus on whether an objective expectation of privacy exists.
interest in his own home, those household items he leaves in plain view and those conversations he has without an expectation of confidentiality are not protected by the fourth amendment.25 Conversely, a private telephone call made from a public phone booth is protected from unreasonable and unlimited government intrusion.26

Consistent with this view, the Court subsequently proclaimed that fourth amendment rights may not be asserted vicariously.27 That one may not assert the fourth amendment rights of another logically follows from the idea that only those with a privacy interest in an invaded area have had their fourth amendment rights violated. Moreover, the Court's distaste for vicarious assertions of fourth amendment claims is a consequence of its apparent dislike for the broad sweep of the exclusionary rule.28 Granting standing so that an individual may raise another's fourth amendment rights would necessarily result in a more extensive use of the exclusionary rule at criminal trials.29 The Court has noted that the societal interest in ascertaining the truth to convict criminals is substantially sacrificed whenever the exclusionary rule is applied to suppress admittedly truthful and inculpating evidence.30 Therefore, "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."31

On this foundation, the Court recently concluded that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."32 The inquiry is whether the search that a

25. Katz v. United States, 389 U.S. at 351. The right of a police officer to seize incriminating objects that he observes from a vantage point where he has a legal right to be is a consequence of the plain view doctrine. Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971). Therefore, such items can be seized during a search pursuant to a warrant, Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931), during a search pursuant to one of the exceptions to the warrant requirement, such as hot pursuit, Warden v. Hayden, 387 U.S. 294, 298-300 (1967), during a search incident to arrest, Chimel v. California, 395 U.S. 752, 762-63 (1969), or when there is no ongoing search, but a police officer inadvertently discovers incriminating evidence. Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam).
27. Alderman v. United States, 394 U.S. 165, 174 (1969). "[I]t is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." Jones v. United States, 362 U.S. 257, 261 (1960).
28. See Rakas v. Illinois, 439 U.S. 128, 137-38 (1978). "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." Id. at 137 (citations omitted); see note 16 supra.
31. Id. at 138 (footnote omitted).
32. Id. at 139. Standing to raise a fourth amendment claim means simply that the government intruded into an individual's own fourth amendment protective sphere. See id. at 140. To view standing as a separate and distinct concept from substantive fourth amendment rights is to confuse the issue of whether a violation occurred. The Supreme Court in Jones v. United States,
particular criminal defendant seeks to challenge and the seizure of the evidence he seeks to suppress violated his personal fourth amendment rights. In short, if a defendant's fourth amendment rights were violated, he has standing; if he has standing, by definition, his fourth amendment rights were violated.

One situation in which a form of vicarious standing has thus far been preserved is the automatic standing rule. The Court adopted this rule in Jones v. United States, the first case to deal extensively with the relationship between standing and an alleged infringement of fourth amendment rights. The defendant had been charged with illegal possession of narcotics. The Court recognized that to implement the then property-oriented standing test would create two dilemmas. First, the defendant would need to incriminate himself by admitting possession of the narcotics at a suppression hearing. To reap the benefits of the fourth amendment, he would have to sacrifice the benefits of the fifth amendment. Second, the prosecution would be placed in the awkward position of contradicting itself. At the preliminary hearing, the government would have to assert that the defendant did not have a sufficient possessory interest to merit standing to challenge the admissibility of the evidence; at trial, however, it would have to argue that the defendant was in fact in possession of the contraband so as to convict. The Court stated that "[i]t is not consonant with the amenities of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."

To alleviate the problems of the defendant's self-incrimination and the prosecution's self-contradiction, the Jones Court developed the automatic

362 U.S. 257 (1960), exhibited discomfort in using the word standing by repeatedly bracketing it with quotation marks. Id. at 261, 263, 265. This fact was later recognized and commented upon by the Rakas Court as an indication of the "artificiality" of concentrating on the defendant's standing, rather than on the extent of his rights, when analyzing whether a fourth amendment violation has occurred. Rakas v. Illinois, 439 U.S. at 139.


34. Id. at 135 n.4 (the automatic standing rule is "one which may allow a defendant to assert the Fourth Amendment rights of another").


36. See note 20 supra and accompanying text. The Jones Court did not eliminate the prior concept that standing may be premised solely on property right violations. See Knox, supra note 13, at 36.

37. 362 U.S. at 261-62. Judge Learned Hand eloquently described the futility inherent in the defendant's situation: "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma." Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932).

38. The fifth amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.

39. 362 U.S. at 263.

40. Id. at 263-64. To discourage prosecutorial self-contradiction is to help preserve judicial integrity, a concern that found expression in the rationale for the exclusionary rule. See note 17 supra; notes 206-11 infra and accompanying text.
standing rule. "The same element . . . which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." Once a person is charged with a possessory crime, that fact alone allows him to contest the constitutionality of the search that led to the seizure of the incriminating evidence. The automatic standing rule permits an individual to hide behind

41. 362 U.S. at 263.
42. Id. at 264. Technically, Jones was charged both with possession of narcotics and other activities that stemmed from possession. See id. at 258. Implicit in the Jones holding is that automatic standing is granted not only to persons charged with possessory crimes, but also to those charged with nonpossessory crimes of which an essential element is possession. This fact was explicitly recognized by the Court in Simmons v. United States, 390 U.S. 377, 390 (1968). The Supreme Court later declared, however, that the automatic standing rule applies only when possession of the seized evidence "at the time of the contested search and seizure" is an essential element of the crime charged. Brown v. United States, 411 U.S. 223, 229 (1973). Many lower courts presently rely on the Brown rationale to thwart the defendant's efforts to gain standing when charged with a crime of conspiracy to possess, distribute, transport or smuggle contraband, claiming that possession at the time of the contested search and seizure is not an essential element of the conspiracy crime. See, e.g., United States v. Powell, 587 F.2d 443, 446 (9th Cir. 1978) (defendant denied automatic standing to challenge search because he had been acquitted of possession charge and was appealing only his conviction on the conspiracy count); United States v. Anderson, 552 F.2d 1296, 1299 n.3 (8th Cir. 1977) (defendant charged with both possession of, and conspiracy to possess, stolen goods, given automatic standing only as to the possessory count); United States v. Balsamo, 468 F. Supp. 1363, 1379 (D. Me. 1979) (defendant charged with conspiracy to distribute marijuana and possession of marijuana not granted automatic standing once latter charge dismissed); United States v. Westerbann-Martinez, 435 F. Supp. 690, 694-95 (E.D.N.Y. 1977) (no automatic standing when charged with conspiracy to distribute and possess or transport controlled substances in interstate commerce). It is of some significance that these courts have ignored the true facts of Jones. In United States v. Prueitt, 540 F.2d 995, 1004 (9th Cir. 1976), cert. denied, 429 U.S. 1053 (1977), the defendant was denied automatic standing because, although charged with conspiring to possess marijuana and possession of marijuana, the possessory count was later dismissed. The dissent noted that an individual should meet the threshold requirement of Brown if he was "'charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.' " Id. at 1009 (Hufstedler, J., dissenting) (quoting Brown v. United States, 411 U.S. at 229). The dissent pointed out that the majority incorrectly denied automatic standing because it erroneously interpreted "charged" to mean "convicted." Id.; see United States v. Oates, 560 F.2d 45, 54 (2d Cir. 1977) (majority focusing on the crime charged rather than the crime convicted when determining the issue of standing). "If standing is predicated upon one count of the indictment that charges an offense that contains possession as an ingredient, the defendant's automatic standing permeates the remaining counts based on similar facts, even if none of them has a possession element." 540 F.2d at 1009 (Hufstedler, J., dissenting). This conclusion is premised on the Jones Court's reversal of both the possessory and nonpossessory counts because of the prosecution's need to "'choose between opposing a motion to suppress made before trial [on standing grounds] and basing the case upon possession.' " Id. (quoting Jones v. United States, 362 U.S. 257, 265 n.1 (1960)). Because the arguments of the Prueitt dissent have not been adopted by most courts, see, e.g., United States v. Powell, 587 F.2d 443, 446 & n.1 (9th Cir. 1978) (court said defendant should be granted automatic standing because he was charged with a possessory crime, but felt constrained to follow its Prueitt holding as the law of the circuit); United States v. Balsamo, 468 F. Supp. 1363, 1379 (D. Me. 1979), a number of problems still persist. First, police misconduct is not deterred in accordance with the
another's fourth amendment protective shield by dispensing with an examination of whether the defendant had an expectation of privacy in the area searched. This inevitably opens the door to vicarious fourth amendment claims and widespread recourse to the exclusionary rule.

Eight years after the *Jones* decision, the Supreme Court recognized that a person charged with a nonpossessory crime could face a predicament similar to that presented in *Jones*. In *Simmons v. United States*, the petitioner sought to challenge the admissibility in evidence of a suitcase that implicated him as a participant in a bank robbery. This case differed from *Jones* in that possession did not both convict and confer standing, and therefore the rationale of the automatic standing rule was inapposite. To prove successfully that his fourth amendment rights were violated and that he had standing, however, the defendant in *Simmons* had to incriminate himself by admitting ownership of the suitcase. In effect, he, like his counterpart in *Jones*, had to prove an essential element of the government's case. Recognizing this, the Court held that unless the defendant makes no objection, his testimony in support of a motion to suppress may not later be used at trial "on the issue of guilt."

Arguably, this holding eliminates the dilemma of self-incrimination for a person charged with either possessory or nonpossessory crimes when admitting possession of the crucial evidence is his sole avenue to standing. To the extent that a defendant's testimony at a preliminary hearing may be used against him at trial for purposes other than proving guilt, however, the self-incrimination dilemma is regenerated. If a defendant asserts a possessory interest in incriminating evidence at a suppression hearing and elects to take the stand on his own behalf at trial, the earlier statements may be used for impeachment.

**aims of the exclusionary rule** because evidence seized in violation of a defendant's constitutional rights would be admissible at trial if a sharp prosecutor charges him with conspiring to distribute contraband, forsaking prosecution on the additional crime of possession. At least one court has "express[ed] consternation" over why the defendant was not himself indicted for the possessory offense rather than only the conspiracy offense. United States v. Gates, 560 F.2d 45, 55 n.6 (2d Cir. 1977) (discussing the court's prior decision in *United States v. Scandifia*, 390 F.2d 244 (2d Cir. 1968), *vacated and remanded on other grounds sub nom. Giodano v. United States*, 394 U.S. 310 (1969)). Second, "[a] difficult problem in the administration of criminal justice would arise if on a multi-count indictment, the Court were to deny standing on some counts and grant suppression on others. The prejudice to a defendant in such a situation could be substantial." United States v. Galante, 547 F.2d 733, 740 n.13 (2d Cir. 1976), *cert. denied*, 431 U.S. 969 (1977).

44. *Id.* at 394.
45. The Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), was concerned with the use of incriminating statements at trial. Freedom from self-incrimination attaches only if the statements may later be used against the defendant during a criminal prosecution. United States v. Mandujano, 452 U.S. 564, 571-76 (1976); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). Thus, a defendant may not invoke the fifth amendment privilege if he is granted immunity from prosecution. United States v. Mandujano, 425 U.S. at 576; Ullmann v. United States, 350 U.S. 422, 439 (1956).
46. *See Oregon v. Hass*, 420 U.S. 714, 720-24 (1975); *Harris v. New York*, 401 U.S. 222, 224-26 (1971). It may be argued that, to the extent *Simmons* permits a defendant's testimony at a suppression hearing to be used for impeachment purposes at trial, the automatic standing rule
Nevertheless, the Court stated in Brown v. United States\(^7\) that "[t]he self-incrimination dilemma, so central to the Jones decision, can no longer occur under the prevailing interpretation of the Constitution."\(^8\) Furthermore, be-

should be retained. 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 11.3, at 588-89 (1978). Professor LaFave points out that if a defendant, in considering whether to contest the search and seizure, were forced to weigh the adverse consequences that may result if the testimony he would give at the suppression hearing were used to impeach him at trial, then he would in effect be compelled to elect between his fourth amendment and fifth amendment rights. \(^9\) at 589. This is precisely the dilemma the Supreme Court sought to avoid by its holding in Jones. "The most important reason for retaining the Jones automatic standing rule, therefore, is to prevent that situation from arising in those cases where defendant's testimony at the motion to suppress would be most destructive if usable to impeach his testimony at trial." \(^10\) It is not inevitable that this result would be a certainty if the automatic standing rule were replaced with the Simmons rule. Unfortunately, several cases lend support to Professor LaFave's concern. See, e.g., People v. Sturgis, 58 Ill. 2d 211, 216, 317 N.E.2d 545, 548 (1974) (defendant's testimony in support of a motion to suppress may be used to impeach if the defendant chooses to testify at trial), cert. denied, 420 U.S. 936 (1975); cf. Oregon v. Hass, 420 U.S. 714, 721-22 (1975) (statements made by a defendant, when compliance with the Miranda warnings is lacking, may be used for purposes of impeachment at trial); Harris v. New York, 401 U.S. 222, 224-25 (1971) (same). But see New Jersey v. Portash, 440 U.S. 450 (1979). In Portash, the Court held that statements made to a grand jury after being given a use immunity could not later be used at a trial for impeachment purposes. The Court reasoned that "[t]estimony given in response to a grant of legislative immunity is the essence of coerced testimony." \(^11\) at 459. Hass and Harris were distinguished on the ground that no claim was advanced in either case that the statements in question were in any way coerced or involuntary; the Court noted that fact was central to the Portash decision. \(^12\) at 458; see Mincey v. Arizona, 437 U.S. 385, 398 (1978) (Hass and Harris inapplicable if the statements were in fact involuntary). Professor LaFave advocates that testimony at a fourth amendment suppression hearing should not later be used to impeach because it is also coerced in the same sense. 3 W. LaFave, supra, § 11.2, at 53-54 (Supp. 1980). It should be noted that in Hass and Harris the Court, after balancing the need to deter police misconduct with the strong policy against encouraging perjury, concluded that the interest in preventing perjury should prevail. 420 U.S. at 722; 401 U.S. at 226. In determining whether incriminating statements made by a defendant in an effort to gain standing to contest an alleged illegal search and seizure are admissible for impeachment purposes, the same analysis will probably be applied. If the Court adopts the view that the preliminary hearing testimony is only subjectively compelled, it could easily decide, based on the precedent of Hass and Harris, that that testimony could be used at trial for impeachment purposes. It may be argued that, after Simmons, the self-incrimination dilemma arises only when the defendant intends to perjure himself in making his defense, in other words, admit possession at the suppression hearing and deny possession at trial. Therefore, any trial use of defendant's statements may be said to be justified; a person under oath has testified that he will speak "truthfully and accurately." Harris v. New York, 401 U.S. at 225; Brief for Petitioner at 21 n.14, United States v. Salvucci, 599 F.2d 1094 (1st Cir.), cert. granted, 100 S. Ct. 519 (1979) (No. 79-244). This argument fails, however, because it is premised on the assumption that the defendant is guilty. The truly innocent defendant may also commit perjury, not by way of defense, but to vindicate his constitutional rights at the suppression hearing. Thus the government's argument leads to an anomaly. The innocent defendant is coerced into committing perjury merely to have the opportunity to contest the unconstitutional search and seizure. As the Simmons Court noted, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394.

\(^7\) 411 U.S. 223 (1973).

\(^8\) Id. at 228.
cause Simmons requires the defendant to demonstrate his own privacy interest, that decision also eliminates the possibility under Jones of a vicarious assertion of fourth amendment rights. Both considerations foreshadow an eventual abandonment of the automatic standing rule. Indeed, the Brown Court expressly postponed deciding whether the holding in Simmons renders the automatic standing rule unnecessary, reserving that question for a case with facts analogous to those in Jones, in which possession at the time of the challenged search and seizure is the crucial element of the crime.

49. Simmons v. United States, 390 U.S. 377, 389-90 (1968). The Simmons route to standing only eliminates vicarious assertions of fourth amendment rights provided the problem of prosecutorial self-contradiction is permitted to continue. If the government is not allowed to challenge defendant's claim of possession at the preliminary hearing, to the extent that possession of seized items is sufficient to confer standing the possibility of vicarious assertions still exists. Of course, only an innocent defendant could be said to be asserting the fourth amendment rights of another under those circumstances. As to the guilty defendant, he is truthfully claiming his possessory interest in the seized items, and unless the government adopts the ludicrous position of contesting defendant's possession of those items, in effect, establishing the defendant's defense, he may have standing. Even in the latter case, however, a possessory interest may be insufficient to obtain standing. In United States v. Jeffers, 342 U.S. 48 (1951), the Court said the defendant "unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein." Id. at 52. The Jeffers Court concluded that the contraband "being his property, . . . he was entitled on motion to have it suppressed as evidence on his trial." Id. at 54. If assertion of a possessory interest is all that is required to obtain standing, there is no real difference between automatic standing and the Simmons requirement. A defendant, aware that the advantages of the automatic standing rule are no longer available, will merely assert a possessory interest in the contraband as a ground for standing, provided he is not fearful of later impeachment should he take the stand for his defense at trial. See note 46 supra. In United States v. Lisk, 522 F.2d 228, (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976), however, the court stated that "[t]he Supreme Court has never cited Jeffers as adopting [the theory that defendant's interest in seized property gave him standing to challenge the search that led to the seizure] and we are persuaded that it is not a correct reading of the Jeffers opinion itself." Id. at 233 (footnote omitted). In United States v. Alewelt, 532 F.2d 1165 (7th Cir.), cert. denied, 429 U.S. 840 (1976), the court noted that the teaching of Alderman v. United States, 394 U.S. 165, 174 (1969)—that only those whose own fourth amendment rights have been violated by a search may seek suppression of the fruits of that search—may erode the Jeffers holding. 532 F.2d at 1167. In contrast, the court in State v. Sanders, 282 N.W.2d 770 (Iowa Ct. App. 1979), reasoned that Rakas v. Illinois, 439 U.S. 128 (1978), confirmed the viability of Jeffers to the extent Jeffers stands for the proposition that "a possessory or proprietary interest in the property seized is sufficient to invoke Fourth Amendment protection." 282 N.W.2d at 772 n.2 (citation omitted). The Supreme Court in Rakas, however, stated that "[s]tanding in Jeffers was based on Jeffers' possessory interest in both the premises searched and the property seized." 439 U.S. at 136 (emphasis added) (citations omitted). The controlling factor is whether the defendant has a legitimate expectation of privacy in the area searched. Id. at 146-48; Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

50. Brown v. United States, 411 U.S. 223, 228 (1973). Some lower federal courts have not waited for the Supreme Court to rule on the continued viability of the automatic standing rule. See, e.g., United States v. Grunsfeld, 558 F.2d 1231, 1241-42 (6th Cir.) (Simmons eliminated the automatic standing rule), cert. denied, 434 U.S. 872 (1977); United States v. Smith, 493 F.2d 668, 670 (10th Cir. 1974) (Simmons and Brown repudiate the automatic standing rule); cf. United States v. Salvucci, 599 F.2d 1094, 1097-98 (1st Cir.) (Supreme Court must resolve whether Simmons implicitly overruled Jones), cert. granted, 100 S. Ct. 519 (1979) (No. 79-244); United
A case such as the one alluded to in *Brown* is now before the Supreme Court. In *United States v. Salvucci*,51 the two defendants were charged with unlawful possession of checks stolen from the United States mails. The police seized the checks during a search of an apartment rented by the mother of one defendant.52 The defendants moved to suppress the seized checks on the ground that the warrant authorizing the search was issued without sufficient probable cause.53 The district court granted the motion and affirmed itself on reconsideration, rejecting the government’s argument that the defendants lacked standing to contest the constitutionality of the search and seizure.54 The First Circuit upheld the lower court’s order.55 As to the issue of standing,

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52. *Id.* at 1094. The affidavit submitted in support of the application for a search warrant identified the premises to be searched as those of one defendant’s wife, not of his mother. It was established at the pretrial hearing that the apartment was in fact rented by that defendant’s mother. Brief for the United States at 2 n.1, United States v. Salvucci, 599 F.2d 1094 (1st Cir.), *cert. granted*, 100 S. Ct. 519 (1979) (No. 79-244). Nevertheless, the court of appeals repeated the error in its opinion. See *Id.* The error as to the lessee of the premises did not render the warrant void. The criterion is whether the premises are described with sufficient particularity so that a stranger would be able to locate them. See *Id.*

53. 599 F.2d at 1094-95. The defendants contended that probable cause was lacking because the affidavit in support of the search warrant failed to give the date on which the police learned that contraband was present on the premises they desired to search. *Id.* at 1095-96. Unless the magistrate knew the date, there was no way he could determine the timeliness of the information and the warrant. *Id.* at 1096.

54. *Id.* at 1094-95.

55. *Id.* at 1098.
the court of appeals noted that although the defendants did not have actual standing because their own fourth amendment rights were not violated, they nevertheless had automatic standing to contest the search.\(^{56}\)

Acknowledging that the self-incrimination dilemma had been eliminated by Simmons, the court said:

'[t]he Supreme Court itself has questioned, but unfortunately not decided, whether the second prong of the Jones rationale, prosecutorial self-contradiction, alone justifies the continued vitality of the doctrine of automatic standing. . . . Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of Jones has been implicitly overruled by Simmons. That is an issue which the Supreme Court must resolve.\(^{57}\)

To predict accurately the Supreme Court's decision on this issue, the analysis must focus on the changes that have occurred in the concept of standing since the Court's major pronouncement in Jones. The self-incrimination dilemma has, at least in the Court's view, been eliminated by the Simmons holding.\(^{58}\)

It is not simply the substitution of the Simmons rule, however, that will gracefully permit the Court to discard the automatic standing rule; rather, it is the evolving concept of standing and the Court's growing distaste for the exclusionary rule that can no longer coherently subsume the rule. Because the automatic standing rule can protect an individual under another's fourth amendment rights, it enlarges the class of people for whom the exclusionary

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56. Id. at 1097. Defendants did not have actual standing because they did not establish an expectation of privacy in the premises searched or the property seized, nor did they claim any proprietary interest in those premises or property. Id.

57. Id. at 1097-98 (citations omitted). Other circuit courts have not so willingly deferred judgment to the Supreme Court on the continued survival of the automatic standing rule. See note 50 supra. The potential for prosecutorial self-contradiction may no longer be a viable concern. The current test for standing to contest a search and suppress the evidence seized is whether the movant had a legitimate expectation of privacy in the area searched. See note 49 supra and accompanying text. "In light of Rakas . . . I presume that the Government would now contend that its motion to strike is based not on a standing argument but on an argument that [the defendant] did not have a 'legitimate expectation of privacy.'" In re 2029 Hering St., Bronx, N.Y., 464 F. Supp. 164, 172 n.9 (S.D.N.Y. 1979). Therefore, at the suppression hearing the issue is simply whether the defendant had a reasonable expectation of privacy; not until trial will the argument center around defendant's possession of the seized contraband. As the Court said in Rakas v. Illinois, 439 U.S. 128 (1978), "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises." Id. at 144 n.12. Thus, the defendant may assert a possessory interest in the contraband seized at the suppression hearing but still be denied standing because, "[i]n considering the reasonableness of asserted privacy expectations, the Court has recognized that no single factor invariably will be determinative." Id. at 152 (Powell, J., concurring). Indeed, "[i]t is not in any way inconsistent with [the principle against prosecutorial self-contradiction] for the government to charge a defendant with a possessory offense defined in the criminal law and, at the same time, to contend that no legitimate privacy expectation of the defendant's under the Fourth Amendment was implicated in the search and seizure that uncovered the items illegally possessed. The provisions of the penal code regarding possessory offenses are premised on different considerations and are directed at different ends from the privacy protections of the Fourth Amendment." Brief for the United States at 24, United States v. Salvucci, 599 F.2d 1094 (1st Cir.), cert. granted, 100 S. Ct. 519 (1979) (No. 79-244).

58. See notes 43-48 supra and accompanying text.
rule is an available remedy. If one accepts standing as a mere convenient term that triggers an analysis into whether the contested search and seizure violated the defendant's personal fourth amendment rights, the automatic standing rule becomes no more than a relic that is not adaptable to modern practices, and whose survival is no longer warranted or desirable.

In Salvucci, the Court is presently faced with resolving several of the foregoing arguments advanced in opposition to the automatic standing rule. In view of the Court's own language, it appears likely that it will expressly terminate, after twenty years, the existence of automatic standing. Nevertheless, although the arguments in favor of its demise are well reasoned in most situations, the automatic standing rule and its attendant interrelationship with the exclusionary rule are necessary to avoid an unwarranted invasion of constitutional rights in particular situations.

II. THE CONSTITUTIONAL VALIDITY OF PRESUMPTION STATUTES

A. The Applicable Tests

The constitutionality of statutory presumptions is subject to attack on due process grounds. The power of legislatures to create presumptions is itself limited by a fundamental presumption, the presumption of innocence which acts in favor of all criminal defendants. Therefore, presumption statutes must comport with the due process requirement that the government prove guilt beyond a reasonable doubt. The Supreme Court has set forth various tests for measuring the compliance of criminal statutory presumptions with constitutional due process requirements. The tests have not, however, met with complete approval.

1. The "Rational Connection" Test

In Tot v. United States, the Court reasoned that a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common

59. Brief for the United States at 13-28, United States v Salvucci, 599 F.2d 1094 (1st Cir.), cert. granted, 100 S. Ct. 519 (1979) (No. 79-244). The question presented for the Court's review, as phrased by the government, is "whether a defendant whose constitutional rights were not violated by an unlawful search may nevertheless obtain suppression of an item seized during the search solely because the indictment charges him, as an essential element of the offense, with unlawful possession of that item at the time of the search." Id. at 2.

60. The Supreme Court itself has recognized that its present view of standing is on a collision course with the automatic standing rule. Rakas v. Illinois, 439 U.S. 128, 135-38 & 135 n.4 (1978); Brown v. United States, 411 U.S. 223, 228-29 (1973).

61. U.S. Const. amends. V, XIV. Both amendments guarantee that no person shall be deprived "of life, liberty, or property, without due process of law."


63. Id. at 272-73. The Supreme Court recognized as early as 1895 that the Constitution permits a criminal conviction only if guilt is proved beyond a reasonable doubt. Davis v. United States, 160 U.S. 469, 493 (1895); accord, In re Winship, 397 U.S. 358, 363 (1970).

64. 319 U.S. 463 (1943).
experience." If a reasonable person could be convinced that the crime was committed, not by direct proof, but by proof of some related fact, then proof of that fact would be sufficient proof of the crime. The jury must not be strained by the terms of the statute to make the connection; the inference must be consistent with arguments drawn from reason and experience.

The Tot test was accompanied by a "corollary," mandating that the relative convenience of coming forward with the evidence be considered in determining the constitutionality of presumption statutes. If the defendant has clear access to proof of the existence or nonexistence of the ultimate fact, the courts should be inclined to find the questioned presumption valid. Nevertheless, merely because the critical information is more accessible to the defendant should not, alone, justify the creation of presumptions.

The Supreme Court applied the rational connection test in two subsequent cases. In United States v. Gainey, the challenged statute made unexplained presence at a still presumptive evidence of the crime of carrying on the business of a distiller without a bond. The Court declared that "[t]he process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." Deferring to the congressional determination, the Court held that there was a rational connection, sufficient to sustain the statute, between unexplained presence at a still and the comprehensive crime of participation in the illegal

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65. Id. at 467-68 (footnote omitted). The rational connection test was first stated in Mobile, Jackson & K.L.R.R. v. Turnipseed, 219 U.S. 35; 43 (1910), a civil case.
66. 319 U.S. at 469. The statute in question made possession of a firearm by an individual previously convicted of a violent crime, presumptive evidence that the firearm was received by him in interstate commerce. Relying on the rational connection test, the Court reversed the possession conviction. Id. at 468.
67. Id. at 467-68.
68. Id. at 467. The corollary was originally a test in itself. Morrison v. California, 291 U.S. 82, 88-89 (1934); see Comment, The Constitutionality of Statutory Criminal Presumptions, 34 U. Chi. L. Rev. 141, 142-43 (1960) [hereinafter cited as Criminal Presumptions]. This terminology has been criticized because a true corollary is a "necessary inference from a stated principle or rule," and therefore, by definition, a corollary may not reach a result different from the rule from which it is derived. Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 168 n.9 (1969). Although the Supreme Court has applied the corollary several times, see, e.g., United States v. Fleischman, 339 U.S. 349, 360-64 (1950); Rossi v. United States, 289 U.S. 89, 91-92 (1933), little guidance has been furnished in determining the relative weight it should be accorded in the rational connection test. Despite the Tot Court's explicit reduction of the comparative convenience test to a corollary, the Supreme Court later remarked that the comparative convenience test was implicitly abandoned in Tot. Leary v. United States, 395 U.S. 6, 45 (1969).
69. See 319 U.S. at 469; Ashford & Risinger, supra note 68, at 168.
70. 319 U.S. at 469. To hold otherwise would place the burden of going forward on the defendant, thereby alleviating the government's heavy burden of proof; this could only be done if the defendant were not subject to "unfairness or hardship." Id. at 469-70 (footnote omitted).
71. 380 U.S. 63 (1965).
72. I.R.C. 5601(b).
73. 380 U.S. at 67.
distilling operation. In contrast, in United States v. Romano, the statute
created presumption of possession, custody, and control of a still arising
from mere presence at the site of the still was held unconstitutional under the
rational connection test. The Court distinguished Gainey, acknowledging
that, as in Gainey, presence at a still does suggest some role in the illegal
enterprise. Absent greater proof, however, presence alone does not indicate
participation in the "specialized functions" associated with possession—the
inference of the one from proof of the other is arbitrary . . . ."

2. The "More Likely Than Not" Test

In Leary v. United States, the Court set forth a test that, although derived
from the rationales of Tot, Gainey, and Romano, requires a deeper inquiry into
the empirical foundation of a statutory presumption. The challenged statute
made possession of marijuana sufficient evidence of the crime of knowing
illegal importation unless the defendant explains his possession to the satis-
faction of the jury. The Court held the presumption unconstitutional, reasoning
that "a criminal statutory presumption must be regarded as 'irrational' or
'arbitrary,' and hence unconstitutional, unless it can at least be said with
substantial assurance that the presumed fact is more likely than not to flow
from the proved fact on which it is made to depend."

The Court noted that before it could determine the constitutionality of
inferring knowledge from possession, it was necessary to consider data regarding
the beliefs of marijuana users concerning the source of the drug they
consume. The Court reviewed statistics derived from several exhaustive
studies as to the amount of and frequency with which marijuana is used, how
much marijuana in use is imported, and from where most marijuana is im-
ported. The challenged presumption was invalidated because there was no
actual proof that at least a majority of marijuana possessors were cognizant of
the origin of their marijuana. Thus, it was no longer sufficient to merely look
at "common experience" and a rational connection.

74. Id. at 67-68. The Court noted that Congress was undoubtedly aware that a prerequisite to
manufacturing illegal liquor is locating an obscure site. "Legislative recognition of the implications of seclusion only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of secrecy." Id. (footnote omitted).
75. 382 U.S. 136 (1965).
76. Id. at 144.
77. Id. at 139-41.
78. Id. at 141 (quoting Tot v. United States, 319 U.S. 463, 467 (1943)). "Presence is relevant
and admissible evidence in a trial on a possession charge; but absent some showing of the
defendant's function at the still, its connection with possession is too tenuous to permit a reasonable
inference of guilt . . . ." Id.
80. Id. at 36 (footnote omitted).
81. Id. at 37-38.
82. Id. at 39-43.
83. Id. at 53.
84. Some commentators have noted that a rational connection is present even though the
presumed fact follows from the basic fact only 50.0001% of the time. Ashford & Risgener, supra
note 68, at 185. The connotation of the more likely than not test is that a percentage much greater
than half must be shown. See Leary v. United States, 395 U.S. at 52.
3. The "Reasonable Doubt" Test

The Leary Court held that when proof of the crime charged or an essential element thereof depends on the use of a presumption, the presumed fact must at least be more likely than not to flow from the proved fact. The Court declined to decide whether a criminal presumption that satisfies the more likely than not test must also comply with the proof beyond a reasonable doubt standard. Thus, the Court left unclear whether it must be beyond a reasonable doubt that proof of the basic fact is proof of the ultimate fact.

In Turner v. United States, the Court upheld a statutory presumption that made possession of heroin sufficient evidence for conviction of the crime of knowing illegal importation. The Court stated that it had no reasonable doubt that heroin is not domestically produced and, therefore, "[t]o possess heroin is to possess imported heroin." Holding the statute satisfied both the standards of the more likely than not test and the reasonable doubt test, the Court, again, did not decide the question of which test should control in criminal cases.

In Barnes v. United States, the Court determined the constitutionality of a jury instruction that permits a conviction for knowingly possessing stolen property based on unexplained possession of recently stolen property. The Court reasoned:

To the extent that the "rational connection," "more likely than not," and "reasonable doubt" standard bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.

In Barnes, the evidence established that the petitioner possessed stolen checks payable to people he did not know, and there was no evidence from which a believable explanation of innocence could be deduced. Such proof was sufficient for any jury to find beyond a reasonable doubt that the petitioner knowingly possessed the stolen checks. Therefore, because the inference satisfied the most stringent standard of reasonable doubt, the Court concluded that it comported with the requirements of due process and proper allocation of the burden of proof. Although the Court laid down the reasonable doubt

85. 395 U.S. at 36 n.64.
87. Id. at 416. The Court considered substantial statistical information showing that only approximately two percent of the heroin illegally used was covertly produced in the United States. Id. at 414 n.26. The statute was held invalid as it applied to cocaine because more of that drug is produced within the United States than is illegally imported. Id. at 418-19 & 418 n.36.
88. Id. at 416; see Barnes v. United States, 412 U.S. 837, 843 (1973).
89. 412 U.S. 837 (1973).
90. Id. at 843.
91. Id. at 845-46.
92. Id. at 846. The adversary system requires that the government "shoulder the entire load" during the "contest" of trial. 8 J. Wigmore, Evidence § 2251, at 317 (rev. ed. J. McNaughton 1961).
standard, it again failed to establish whether that test was constitutionally compelled.93

4. The “Allen” Test

County Court v. Allen94 contains the latest Supreme Court pronouncement on statutory presumptions. In Allen, the respondents were convicted of illegal possession of two handguns that were seized by police officers after they had stopped a speeding automobile in which the respondents and Jane Doe were passengers. The guns allegedly protruded from Jane Doe’s handbag, which was positioned near her on the front seat or floor on the passenger side of the vehicle.95 At trial, the prosecution relied on a New York presumption statute that made mere presence in a vehicle in which illegal firearms are discovered presumptive proof of possession by all occupants.96 The trial judge instructed the jury that they could, in accordance with the statute, infer possession from respondents’ presence.97 The district court granted the respondents habeas corpus relief and

95. Id. at 143. Respondents were acquitted on a charge of possession of a machine gun and heroin found in the trunk of the automobile.
96. N.Y. Penal Law § 265.15(3) (McKinney 1980). This statute provides: “The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver, or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.” Other states have enacted similar statutes: Ark. Stat. Ann. § 41-3161 (1977) (applies to machine guns only; no exceptions); Conn. Gen. Stat. Ann. § 29-38 (West 1975) (presence is “prima facie” evidence of possession; no exceptions); Ill. Crim. Ann. Stat. ch. 38, § 24-1(c) (Smith-Hurd 1977); Mont. Code Ann. § 45-8-306 (1979) (applies to machine guns only; possession is “evidence” of possession; no exceptions); Neb. Rev. Stat. § 28-1011.19 (1975) (presence is “prima facie” evidence of possession); N.J. Stat. Ann. § 2C:39-2(a) (West Spec. Pamphlet 1979) (presence is presumptive evidence of possession); N.D. Cent. Code § 62-01-02 (1960) (applies to pistols only; presence is “sufficient” evidence of possession); Va. Code § 18.2-292 (1950) (applies to machine guns only; presence is “prima facie” evidence of possession; no exceptions). At least one of these statutes has been held unconstitutional, although it has not been repealed. See State v. Watson, 165 Conn. 577, 597, 345 A.2d 532, 543 (1973); cf. State v. Humphreys, 54 N.J. 406, 415-16, 235 A.2d 273, 278-79 (1969) (predecessor statute held constitutional, but its use in jury instructions disallowed). The Model Penal Code contains a presumption resembling the New York statute. Model Penal Code § 5.06(3) (1961). In addition, an identical statute exists in New York and Vermont in regard to controlled substances. N.Y. Penal Law § 220.25(1) (McKinney 1980); Vt. Stat. Ann. tit. 18, § 4221(b) (1968). See generally 9 Unif. Laws Ann. 187-94 (Master Ed. 1979).
97. See 442 U.S. at 160-61 & n.20. The jury convicted Jane Doe and the three respondents. The convictions were affirmed. People v. Lemmons, 49 A.D.2d 639, 370 N.Y.S.2d 243 (3d Dep’t 1975), aff’d, 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976). The appellate division affirmed without opinion. Two judges dissented in part, reasoning that the statute should not apply to the passengers, because the statute excepts those situations in which the weapon is found on the person
reversed the convictions, holding that the statute was unconstitutional as applied to the facts of the case. The Second Circuit affirmed, holding the statute unconstitutional on its face because it lacked “the requisite empirical connection between proved and presumed facts in the class of cases to which the legislature made it applicable.” The Supreme Court reversed.

At the outset of its opinion, the Court stated that “in criminal cases, the ultimate test of any device’s constitutional validity in a given case remains constant: the device must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” This suggests that the reasonable doubt test should be used in the determination of a presumption’s constitutionality. The Court, however, distinguished a permissive presumption or inference from a mandatory presumption. The former only allows the trier of fact to infer the ultimate fact from proof of the basic fact, whereas the latter requires the trier of fact to find the ultimate fact on proof of the basic fact.

A mandatory presumption may not only relieve the prosecution of the burden of proving all the elements of a crime beyond a reasonable doubt, but may also compel the defendant to prove his innocence. Recognizing this, the Court said that to pass constitutional scrutiny, a mandatory presumption must be examined “on its face,” devoid of any evaluation of its application to specific circumstances. Because the trier of fact cannot circumvent the binding effect of the presumption by according greater weight to particular facts, any other evidence presented by the prosecution is irrelevant to this.

of one of the occupants. 49 A.D.2d at 640-41, 370 N.Y.S.2d at 245-46; see note 96 supra. In the Court of Appeals, two judges also dissented in part on the same grounds. 40 N.Y.2d at 513-16, 354 N.E.2d at 841-44, 387 N.Y.S.2d at 102-04.

98. The district court decision is unreported. See Allen v. County Court, 568 F 2d 998, 1001 (2d Cir. 1977), rev’d, 442 U.S. 140 (1979).

99. Id. at 1011.

100. 442 U.S. 140 (1979).

101. Id. at 156. The Court derived support for its conclusion from In re Winship, 397 U.S. 358 (1970), wherein the Court held that proof at a juvenile proceeding must be beyond a reasonable doubt: “‘No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.’” Id. at 363 (quoting Davis v. United States, 160 U.S. 469, 493 (1895)); see 442 U.S. at 156.

102. 442 U.S. at 157. The dissent correctly points out that, prior to Allen, the Court had never recognized the mandatory/permissive distinction as important when analyzing presumptions used in criminal cases. Id. at 176 (Powell, J., dissenting).

103. Id. at 157.

104. Id. The Court further classified mandatory presumptions into two categories, one in which the burden of going forward with the evidence is shifted to the defendant, the other in which the entire burden of proof is shifted to the defendant. Id. at 157 n.16. The Court noted that the presumptions involved in the earlier cases of Turner, Leary, Romano and Tot “never totally removed the ultimate burden of proof beyond a reasonable doubt from the prosecution.” Id. Although the Court has not addressed whether mandatory presumptions must meet the beyond a reasonable doubt standard, the above language suggests that if a presumption does shift the burden of proof, it must comply with the reasonable doubt test formulated in Barnes. See notes 85-93 supra and accompanying text.

105. 442 U.S. at 158.
analysis—the key criterion is the presumption’s accuracy. With a mandatory presumption, “since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt.” A permissive presumption, however, does not shift the burden of proof to the defendant. It will affect “the ‘beyond a reasonable doubt’ standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.” A permissive presumption can be used together with other government evidence to prove guilt beyond a reasonable doubt. It is but one element of proof, to be treated in the same manner as other evidence, and therefore need only meet the Leary test rather than the reasonable doubt standard.

After reviewing the trial judge’s instructions to the jury, the Court concluded that the New York statute created a permissive presumption; the presumption was only part of the prosecution’s case, and the jury was free to reject it regardless of whether any proof was offered in rebuttal. The Court therefore held that it was improper to decide the constitutionality of the presumption on its face, an analysis strictly reserved for mandatory presumptions.

Turning to whether the statute was constitutional as applied to the circumstances of the case, the Court concluded that Jane Doe, a sixteen year old girl, was unlikely to be the sole possessor of two large guns when in the company of three older men. Instead, it was more probable that, having been stopped for speeding, the respondents feared a search was imminent and consequently attempted to conceal their weapons by placing them in her handbag. “There was a ‘rational connection’ between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter was more likely than not to flow from the former.” Finding the statute satisfied the Leary test and that the record as a whole was sufficient to prove respondents’

106. Id. at 159.
107. Id. at 167.
108. Id. at 157. The Court appears inconsistent in its analysis of permissive presumptions and their relation to shifting burdens. Although it claims that “no burden of any kind” is placed on the defendant where a permissive presumption is involved, the Court notes that the basic fact may be prima facie evidence of the presumed fact. Id. When the defendant is confronted with prima facie evidence of guilt, however, he necessarily assumes the burden of producing evidence in rebuttal. See W. Richardson, Evidence § 96, at 72 (10th ed. J. Prince 1973).
109. 442 U.S. at 157. The Uniform Rules of Evidence refuse to recognize a mandatory presumption, instead adopting a rule similar to the permissive presumption defined by the Court. Uniform Rule of Evidence 303. The rule on presumptions in criminal cases says that a jury should be allowed to decide the question of guilt of a presumed fact only if a reasonable juror, on all the evidence presented, “could find . . . the presumed fact beyond a reasonable doubt.” Id. 303(b).
110. 442 U.S. at 167.
111. Id. at 160-61. The Court said that, “in deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it.” Id. at 157 n.16.
112. Id. at 160. The Court seemed surprised that the New York Court of Appeals never discussed the jury instructions. See id. at 157 n.16.
113. Id. at 163-64.
114. Id. at 165 (footnote omitted).
guilt beyond a reasonable doubt, the Court held that the jury verdict should be reinstated.

B. The Arguments in Opposition to Presumption Statutes

The opinions setting forth the Supreme Court's changing approach to presumption statutes were repeatedly met by vigorous dissents.115 Dissenting in United States v. Gainey,116 Justice Black stated that the Court had long subscribed to the idea that a presumption, even if rational or valid, could not be used to convict a person of a crime if its application would deprive the accused of a constitutional right.117 Presumptions may deprive criminal defendants of their right to due process, because the presumption may relieve the prosecution of its burden of proving the defendant's guilt beyond a reasonable doubt; of their privilege against self-incrimination, in that use of a presumption can effectively compel the defendant to testify; and of their right to a jury trial, to the extent a presumption directs the jury's verdict.118

Until the Court imposes a standard of review that is more rigorous than the rational connection test, the prosecution is able to use presumptions and inferences to secure a defendant's imprisonment even though evidence of an essential element of the crime may be totally lacking.119 For example, in Turner v. United States,120 the Court upheld a conviction despite the prose-

115. See notes 116-44 infra and accompanying text. "Once the thumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry." Casey v. United States, 276 U.S. 413, 420 (1928) (McReynolds, J., dissenting).
117. Id. at 80 (Black, J., dissenting); see Bailey v. Alabama, 219 U.S. 219, 239 (1911). Dissenting in Turner v. United States, 396 U.S. 398 (1970), Justice Black listed the constitutional rights of the criminal defendant he thought were weakened by the use of presumptions. They are: "1. His right not to be compelled to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; 2. The right to be informed of the nature and cause of the accusation against him; 3. The right not to be compelled to be a witness against himself; 4. The right not to be deprived of life, liberty, or property without due process of law; 5. The right to be confronted with the witnesses against him; 6. The right to compulsory process for obtaining witnesses for his defense; 7. The right to counsel; and 8. The right to trial by an impartial jury." Id. at 425 (Black, J., dissenting).
118. See United States v. Gainey, 380 U.S. at 79-80 (Black, J., dissenting). "Where a man's life, liberty, or property is at stake, the prosecution must prove his guilt beyond a reasonable doubt." Id. at 79. Requiring that guilt be proved "beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); see Barnes v. United States, 412 U.S. 837, 854 (1973) (Brennan, J., dissenting).
cation's failure to satisfy its burden of proof on two critical elements of the crime. Specifically, the defendant was charged with the crime of "receiv[ing], conceal[ing], [and] facilitat[ing] the transportation, concealment, or sale of a . . . narcotic drug . . . knowing the same to have been imported . . . into the United States contrary to law." To establish a prima facie case, the government, with the aid of a presumption statute, needed to show only that the defendant possessed heroin, not that the heroin was illegally imported nor that the defendant knew it was illegally imported. In the words of Justice Douglas, dissenting in Barnes v. United States, using presumptions and inferences to prove specific elements of a crime is "treacherous" and "impli-
cicates the integrity of the judicial system."

Additionally, statutory presumptions may be found constitutionally defec-
tive on the ground that they contravene the fifth amendment privilege against self-incrimination. A presumption "rob[s] the defendant of at least part of his presumed innocence and cast[s] upon him the burden of proving that he is not guilty." It forces the defendant to testify regardless of the possibility that his testimony might jeopardize his chances for acquittal, because a failure to testify in the face of a presumption will, in effect, destroy those chances. This, stated Justice Black, is in violation of the fifth amendment.

Moreover, a statutory presumption, presented as an authoritative mand-
ate, may so strongly influence a jury that it would effectively preclude the right to trial by jury. Statutory presumptions incorporated into a jury charge tend to induce "the jury to reach an inference which [it] might not otherwise have thought justified, to push some jurors to convict who might not otherwise have done so." The effect of undue influence on a jury was Justice Powell's main concern when he, joined by three Justices, dissented in County Court v. Allen. Both the majority and the dissent agreed that when analyzing presumptions, due process required two things: first, the prosecution must prove the ultimate facts beyond a reasonable doubt; and second,

122. Turner v. United States, 396 U.S. at 428-32 (Black, J., dissenting). Turner's trial reminded Justice Black of "Daniel being cast into the lion's den [rather than) of a constitutional proceeding." Id. at 430 (Black, J. dissenting).
124. Id. at 850 (Douglas, J., dissenting).
129. See id. at 79-80 (Black, J., dissenting).
130. Id. at 87 (Black, J., dissenting); see Criminal Presumptions, supra note 68, at 152 (presumption can unduly sway the jury because their use gives the prosecutor a "bonus for making out his case"). It was once the Court's view that statutory presumptions tend to influence the jury. Bailey v. Alabama, 219 U.S. 219, 237 (1911) ("The normal assumption is that the jury will follow the statute and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes.").
whenever a jury is instructed that it may infer an ultimate fact from a basic fact, the former must be more likely than not to flow from the latter.\textsuperscript{132} The dissent, however, rejected what it termed the Court's "novel approach" in distinguishing mandatory from permissive presumptions, claiming that the majority failed to examine adequately whether the presumption in question satisfied the second prong of this due process test.\textsuperscript{133} By itself, an individual's presence in an automobile cannot be said to indicate his dominion and control over everything within it.\textsuperscript{134} Because the New York penal code defines "possession" as having dominion or control,\textsuperscript{135} it is not more likely than not that persons in an automobile where weapons are found are the possessors of those weapons.\textsuperscript{136} As the Court previously acknowledged, there had been no earlier cases in which courts sustained convictions for possessory crimes merely on a showing of presence.\textsuperscript{137} "The crime remains possession, not presence, and, with all due deference to [legislative] judgment . . . , the former may not constitutionally be inferred from the latter."\textsuperscript{138} The Allen Court circumvented this apparent inconsistency by reasoning that when a presumption is categorized as permissible, its use is permitted if other sufficient evidence exists to support a finding of guilt.\textsuperscript{139} The dissent argued that this approach is not in accord with prior decisions; moreover, the majority's analysis disturbingly ignores the possibility that a jury might disbelieve all other evidence adduced at trial and reach its verdict solely on the strength of the presumption statute.\textsuperscript{140} A final argument in opposition to the constitutionality of presumption statutes, at least as they relate to presence in an automobile, may be gleaned from the legislative purpose underlying the statute challenged in Allen. Prior to the passage of the current statute's predecessor, prosecutors often found it impossible to convict passengers of automobiles in which contraband was found.\textsuperscript{141} The difficulty arose because the state was unable under such circumstances to point to and prove possession by any particular individual present in the vehicle.\textsuperscript{142} Thus, it has been argued that "[i]ronically, the

\textsuperscript{132} \textit{Id.} at 156, 166-67; \textit{id.} at 172 (Powell, J., dissenting). Justice Powell expressed his view that "factual inferences [must] be accurate reflections of what history, common sense, and experience tell us about the relations between events in our society." \textit{Id.} (Powell, J., dissenting).

\textsuperscript{133} \textit{Id.} at 172 n.6, 176 (Powell, J., dissenting).

\textsuperscript{134} \textit{See id.} at 175-76 (Powell, J., dissenting).

\textsuperscript{135} N.Y. Penal Law § 10.00(8) (McKinney 1975).

\textsuperscript{136} County Court v. Allen, 442 U.S. at 176 (Powell, J., dissenting). Some commentators criticize the use of constructive possession as a basis for conviction, reasoning that it contradicts the state's burden of "overcom[ing] all reasonable inferences of innocence." Whitebread & Stevens, \textit{Constructive Possession in Narcotic Cases: To Have and Have Not}, 58 Va. L. Rev. 751, 765 (1972).

\textsuperscript{137} United States v. Romano, 382 U.S. 136, 141 (1965).

\textsuperscript{138} \textit{Id.} at 144.

\textsuperscript{139} 442 U.S. at 160.

\textsuperscript{140} \textit{Id.} at 176 (Powell, J., dissenting).

\textsuperscript{141} People v. Logan, 94 N.Y.S.2d 681, 683 (Sup. Ct. 1949), \textit{modified}, 276 A.D. 1029, 95 N.Y.S.2d 806 (2d Dep't 1950).

\textsuperscript{142} \textit{Id.} at 683. The legislative history supports the view that the statute was enacted to help convict passengers in automobiles. When automobiles contain more than one person, "it is practi-
presumption [statute] was enacted, not because the inference authorized therein was rational, but rather because the courts and juries had uniformly rejected it as irrational." By attempting to override the juries' refusal to believe the prosecution's argument that presence in an automobile made it more likely than not that the occupant also possessed any contraband found therein, the legislature manifested a belief that state sanctioned prodding would convince a jury to reach the desired result.

III. STANDING ABSENT AUTOMATIC STANDING JUXTAPOSED WITH STATUTORY PRESUMPTIONS

A. The Impending Problem

Dispensing with automatic standing would have a significant impact on those persons accused of illegal possession of contraband when the critical evidence of the crime, the contraband itself, was seized pursuant to a search of an automobile in which the defendant was a passenger and guest. If the Supreme Court severs this approach to standing, it would essentially deny the defendant passenger any opportunity to contest the search of the vehicle in which he rode. The probative effect given to presumptions statutes compounds the potential problem.

In *Rakas v. Illinois*, the seminal case in altering fourth amendment concepts and the standing doctrine, the Supreme Court not only laid much of the groundwork in opposition to the automatic standing rule, but it created new law with respect to a passenger's right to fourth amendment protection. The defendants in *Rakas* were convicted of armed robbery. A rifle...
and shells, seized from under the front seat and from the glove compartment during a search of an automobile in which defendants were passengers, were admitted into evidence despite a motion to suppress. The defendants conceded they did not own the automobile searched; they also denied ownership of the incriminating evidence. The lower courts refused to decide the merits of the suppression motion, saying that as mere passengers, the movants did not have standing to challenge the legality of the search of the vehicle.

On appeal to the Supreme Court, the defendants contended they had standing based on an alternative holding in *Jones v. United States*, namely, that anyone "legitimately on the premises" had a sufficient interest in the area searched to be afforded the protection of the fourth amendment. The defendants drew an analogy between themselves, as passengers in a friend's automobile, and petitioner Jones, a guest in a friend's apartment. The Court rejected the comparison and confirmed its prior holdings that the range of fourth amendment protection should not be defined to embrace
those who have not had their own rights infringed. This approach guards against vicarious assertions of fourth amendment claims, thereby limiting the use of the exclusionary rule during criminal trials. As the Court noted, "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights." The implication is that the Court is primarily concerned with the frequent use of the exclusionary rule to suppress evidence that directly bears on the defendant's guilt. Without such evidence, the prosecution might be obliged to drop the charges, thereby short-circuiting society's interest in convicting lawbreakers. To limit standing is to limit the adverse effects of the exclusionary rule.

Therefore, the Court held "that the phrase 'legitimately on premises' ... creates too broad a gauge for measurement of Fourth Amendment rights." Instead, the Court ratified the test set forth in Katz v. United States, that protection of the fourth amendment depends on whether the person claiming the protection has a legitimate expectation of privacy in the place invaded, "one that society is prepared to recognize as 'reasonable.'" Relying on this objective test and recognizing that automobiles are inherently places of lessened expectations of privacy, the Rakas Court held that the defendants,

154. 439 U.S. at 133-34. " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' " Id. (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)). The Court further stated that to confer "standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials." Id. at 137.

155. Id.

156. Id. at 142 (footnote omitted). The Court also noted that the phrase was probably never intended to be so broad and was misinterpreted by lower courts in their literal application of the language. Id. at 142 n.10. The source of the lower courts' confusion is undoubtedly the Supreme Court's own language in Brown v. United States, 411 U.S. 223 (1973), wherein the Court stated that standing would be granted if defendant was on the premises at the time of the search and seizure. Id. at 227, 229 & 227 n.2; see Rakas v. Illinois, 439 U.S. 128, 157-58 (1978) (White, J., dissenting). The Rakas Court did not absolutely preclude an individual legitimately on the premises from contesting the lawfulness of the seizure of the evidence or the search when his own property was seized during the search. The petitioners in Rakas, however, did not assert ownership of the items seized. See id. at 130 n.1. Of course, absent automatic standing, an assertion of possession in accordance with Simmons v. United States, 390 U.S. 377 (1968), may lead to impeachment if ownership were subsequently denied at trial. See note 46 supra.


158. 439 U.S. at 143-49; see Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Prior to Katz, standing was mostly dependent on a property interest. See notes 20, 36 supra.

159. See note 24 supra. The dissent cogently observed that to deny passengers standing is to ignore "the everyday expectations of privacy that we all share." 439 U.S. at 167 (White, J., dissenting).

160. 439 U.S. at 148; see Cardwell v. Lewis, 417 U.S. 583, 590 (1974); Carroll v. United States, 267 U.S. 132, 147 (1925). "One has a lesser expectation of privacy in a motor vehicle because its
as passengers in an automobile who claimed no possessory or proprietary interest in the automobile or the property seized, had no legitimate expectation of privacy "with respect to those portions of the automobile which were searched and from which incriminating evidence was seized." Consequently, the Supreme Court agreed with the lower court that standing to raise a fourth amendment claim did not exist; hence, the exclusionary rule was inapplicable and the evidence seized was admissible at trial.

The Court offered no explanation as to what, short of a property interest, would give passengers a sufficient expectation of privacy to warrant constitutional protection. To challenge a search, an individual must demonstrate

function is transportation and it seldom serves as one's residence or as the repository of personal effects." 417 U.S. at 590.

163. 439 U.S. at 149 (footnote omitted). The result in Rakas is not limited to automobile searches. The Rakas analysis is easily applicable to other situations, most disturbingly searches of private homes. See The Exclusionary Rule, supra note 3, at 253. In one case, United States v. Baltazar, 477 F. Supp. 236 (E.D.N.Y. 1979), the defendant was visiting a friend's apartment when the apartment was searched and cocaine found. The defendant was charged with possession of cocaine. Although the court felt "constrained to apply [the automatic standing] rule," id. at 245, it noted that defendant's status as a mere guest was insufficient to establish "any interest in the premises ... such as would support a Fourth Amendment claim." Id. at 244. It is hard to fathom how this court, under these circumstances, could conclude that defendant's expectation of privacy was not one "society is prepared to recognize as 'reasonable.' " See Katz v. United States, 389 U.S. 347, 361 (1967); cf. Johnson v. State, 583 S.W.2d 399, 404 (Tex. Crim. App. 1979) (held, citing Rakas, that defendant who worked in and had a key to building owned by his father had no standing to contest search thereof, because he had no possessory interest nor expectation of privacy due to access to the building by others); State v. Tidwell, 23 Wash. App. 506, 597 P.2d 434, 436 (Ct. App. 1979) (held, citing Rakas, that guest had no legitimate expectation of privacy in motel room, despite having key to the room, because there was no evidence that the room was registered to him or that he occupied it).

164. Mr. Justice White noted that the majority departed sharply from the Court's conclusion in Katz that property interests should not control in determining whether the government has invaded constitutionally protected regions. 439 U.S. at 162-63, 166-68 (White, J., dissenting). Although "the Court asserts that it is not limiting the Fourth Amendment bar against unreasonable searches to the protection of property rights, ... in reality it is doing exactly that." Id. at 164 (White, J., dissenting) (footnote omitted). If an individual in a business office, Mancusi v. DeForte, 392 U.S. 364, 365, 370 (1968), in a friend's apartment, Jones v. United States, 362 U.S. 257, 259, 265-67 (1960), in a taxicab, Rios v. United States, 364 U.S. 253, 255-62 (1960), or in a telephone booth, Katz v. United States, 389 U.S. 347, 348, 353 (1967), has fourth amendment protection, then certainly a person riding in an automobile next to his friend should be similarly shielded from government abuse. 439 U.S. at 163. (White, J., dissenting). The dissent suggested that "[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." Id. at 157 (White, J., dissenting).

165. 439 U.S. at 165 (White, J., dissenting) ("Insofar as the Court's rationale is concerned, no passenger in an automobile, without an ownership or possessory interest and regardless of his relationship to the owner, may claim Fourth Amendment protection against illegal stops and searches of the automobile in which he is rightfully present."). It is evident that lower courts have felt constrained by the Court's holding. Lower courts have adopted the view that Rakas stands for the proposition that property interests are necessary before a passenger may contest the lawfulness of an automobile search. See, e.g., United States v. Lopez, 474 F. Supp. 943, 946 (C.D. Cal. 1979) (an individual must assert one of three interests to challenge constitutionality of search and
only that he had a legitimate expectation of privacy in the area searched.\textsuperscript{166} In \textit{Rakas}, the search leading to the incriminating evidence was not restricted to the places where the evidence was found, the glove compartment and under the front seat. Instead, it would be correct to classify the total interior of the automobile as the area searched. A denial of standing under these circumstances necessarily means that the Court, despite its insistence to the contrary,\textsuperscript{167} in fact held that a passenger lawfully present in an automobile "may not invoke the exclusionary rule and challenge of that vehicle unless he happens to own or have a possessory interest in it."\textsuperscript{168} Furthermore, Justice White, dissenting with three Justices, argued that the \textit{Rakas} decision undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified—the deterrence of bad-faith violations of the Fourth Amendment. 

. . . The danger of such bad faith is especially high in cases such as this one where the officers are only after the passengers and can usually infer accurately that the driver is the owner. The suppression remedy for those owners in whose vehicles something is

seizure, namely, a property or possessory interest in the automobile or a property interest in the things seized); United States v. Rivera, 465 F. Supp. 402, 411 (S.D.N.Y. 1979) (passenger lacks standing to challenge search and seizure of items from automobile when he fails to demonstrate any proprietary interest in the automobile or the items seized, because he necessarily lacks reasonable expectation of privacy).


167. 439 U.S. at 149 n.17.

168. \textit{Id.} at 156 (White, J., dissenting) (footnote omitted). The Court appears to be saying that the expectation of privacy test should consider only where the incriminating evidence is found, not the area searched. See \textit{id.} at 148-49. This is in sharp contrast to the Court's interpretation of \textit{Katz}: "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." \textit{Id.} at 143 (citing \textit{Katz} v. United States, 389 U.S. 347, 353 (1967)) (emphasis added). Because the entire interior of the automobile was "invaded," the Court's holding must hinge on the exact place where the contraband was found. Such an outcome is not only contrary to precedent but can lead to absurd results. For instance, clearly unreasonable police searches could be justified simply by showing that the evidence was eventually found in an unprotected area. It appears, however, that there may be no protected areas for a passenger in an automobile. As the \textit{Rakas} Court held, the glove compartment, under the seat, and the trunk are unprotected areas as to the passenger. \textit{Id.} at 148-49. Yet if the incriminating evidence is exposed, it is subject to seizure under the plain view doctrine because, by definition, no expectation of privacy has been manifested. Coolidge v. New Hampshire, 403 U.S. 443, 464-71 (1971). The doctrine of plain view has been adopted by the lower courts to deny passengers standing. United States v. Rivera, 465 F. Supp. 402, 411 (S.D.N.Y. 1979) (defendant passenger did not have standing to contest the seizure of items from the rear of a station wagon); Pollard v. State, ___ Ind. ___, 388 N.E.2d 496, 502-03 (1979) (if defendant had been a passenger, he would not have been able to object to a search of front and rear seat and removal of items in plain view). \textit{But see} United States v. Crawford, No. F-1500-79, slip. op. at 6 (D.C. Super. Ct. Feb. 8, 1980) (despite language in \textit{Rakas}, court held passenger has legitimate expectation of privacy in automobile). One court, citing \textit{Rakas}, held that the defendant did not manifest an expectation of privacy sufficient to contest the seizure of chemicals, which were evidence of illegal drug production, from the trunk of the automobile in which he was a passenger. United States v. Taylor, 473 F. Supp. 65, 73 (E.D. Pa. 1979). What is remarkable about the \textit{Taylor} holding is that the agents who conducted the search had earlier observed the defendant buying chemicals and storing them in the trunk of the automobile. \textit{Id.} at 72. Surely, such behavior should be indicative of an expectation of privacy with respect to both the chemicals and the trunk from which they were seized.
found and who are charged with crime is small consolation for all those owners and occupants whose privacy will be needlessly invaded by officers following mistaken hunches not rising to the level of probable cause but operated on in the knowledge that someone in a crowded car will probably be unprotected if contraband or incriminating evidence happens to be found. After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person.169

Justice White’s fears cannot be dismissed as speculative. It has been observed that overzealous police officers, intent on improving their arrest record,170 will often forsake admission of evidence against some defendants to gain evidence that will be admissible against others who lack constitutional protection from the search.171 For example, it has been reported that narcotics police comprehend their job to be one of controlling drug traffic, and that they are therefore primarily interested in apprehending the drug user regardless of his actual guilt of a crime at the time of his arrest.172 Such misconduct was of concern to the Rakas dissenters, provoking them to claim that “[i]nsofar as passengers are concerned, the Court’s opinion . . . declares an ‘open season’ on automobiles.”173 To further limit access to standing by

169. 439 U.S. at 168-69 (White, J., dissenting, joined by Justices Brennan, Marshall, and Stevens) (footnotes and citations omitted). The defendant may assert a possessory interest in the contraband seized at the suppression hearing but still be denied standing. See note 57 supra. The plain view doctrine is a recognition of this principle. Although an individual may clearly be in possession of contraband, the item is subject to seizure by a police officer if it is exposed in plain view. See note 25 supra. Standing to assert a fourth amendment claim would fail because, as the plain view doctrine implies, there is no reasonable expectation of privacy toward the seized item. See note 168 supra. Under the rationale of the plain view doctrine, no search occurs when the contraband is seized. See United States v. Lisk, 522 F.2d 228 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976). In that case, the defendant was charged with possession of a firearm after a bomb was discovered during a search of the trunk of another person’s automobile. The defendant admitted a property interest in the bomb and claimed he had standing to contest the search on that ground alone. Id. at 229-30. The court reasoned that because the search did not violate the defendant’s rights, it was as if the bomb had been found in plain view in a public place and then seized. Id. at 230. This court, although correctly deciding that no illegal search occurred, mistakenly gave defendant standing to challenge the search; in view of Rakas, standing should have been denied because “the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing. . . .” 439 U.S. at 140.

Similarly, regardless of an individual’s possessory interest in things not in plain view, if there has been no showing of a reasonable expectation of privacy toward those items, the seizure and the search that led to them did not involve a search and seizure in the constitutional sense.


171. White & Greenspan, supra note 10 at 348. Professors White and Greenspan suggest that the Supreme Court, in developing privacy interests as the litmus of fourth amendment protection, has “foster[ed] cynicism in law enforcement officers by providing them with an opportunity readily to circumvent [the exclusionary rule’s] operation.” Id.

172. P. Chevigny, supra note 156, at 151-52. “[T]he policeman sees his job as one of catching criminals, not of enforcing the Constitution.” Id. at 183; see Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). (“We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.”).

173. 439 U.S. at 157 (White, J., dissenting). It should be noted that the possibility of “open season” on automobiles was somewhat curtailed in the case of Delaware v. Prouse, 440 U.S. 648
discarding the automatic standing rule is to add greater vitality to those concerns.

Moreover, presumption statutes that make presence in an automobile containing illegal firearms or narcotics sufficient evidence to convict all the occupants of unlawful possession provide police officers with additional incentive for conducting bad faith searches of automobiles carrying more than one person. Not only may they pad their arrest record, but they may procure for the prosecution a prima facie case for conviction. Desire to convict is evidenced by the willingness shown by some police officers to distort the truth to avoid the exclusionary rule sanction when they feel certain they have arrested someone that is, at least, peripherally connected with crime. Logically, in jurisdictions where similar presumption statutes have not been adopted and the prosecution must prove dominion and control of the contraband to sustain a charge of possession, the incentive for police misconduct is severely curtailed. An arrest resulting in a dismissal differs radically from

(1979). In that case, the Court held "that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment." Id. at 663. Nevertheless, one of the exceptions delineated by the Court presents the potential for police misconduct. It is safe to say that many vehicles presently driven on the public highways could be cited for some minor violation upon visual inspection, thereby affording a police officer an opportunity to stop the automobile lawfully. For example, a police officer could pull a vehicle over for a dirty license plate, N.Y. Veh. & Traf. Law § 402(1) (McKinney 1970), or if a light is out, id. § 375(2) (McKinney Supp. 1979), or if there is a crack in the windshield, id. § 375(22) (McKinney 1970). Chief Justice Burger acknowledged that automobile stops of this type are an "everyday occurrence." South Dakota v. Opperman, 428 U.S. 364, 368 (1976). Moreover, the Prouse decision stated that arbitrarily stopping an automobile is unreasonable only as to the driver, 440 U.S. at 663, thus leaving open the question of whether passengers may similarly complain. In addition, the Prouse decision does not prevent the police from setting up a roadblock, id. or from conducting "other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than. a 100% roadblock stop." Id. at 664 (Blackmun, J., concurring).

174. See note 96 supra.
175. See notes 119-28 supra and accompanying text.
176. P. Chevigny, supra note 156, at 183 (police will "vary the facts in order to comply with the legal rules"); J. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 215 (1967) (police officer "usually attempts to construct the appearance of compliance [with the law], rather than allow the offender to escape apprehension"); Kaplan, supra note 9 at 1038 ("a substantial percentage of policemen take the view that two wrongs make a right and that perjury is a permissible method of avoiding the [exclusionary rule] sanction" (footnote omitted))
177. See generally Criminal Presumption Statute, supra note 144, at 189-92. In Thomas v. State, 297 So. 2d 850, 882 (Fla. Dist. Ct. App. 1974), the court stated that only when premises are in the exclusive possession and control of a particular individual may knowledge of the presence of contraband found therein and the ability to maintain control over it be inferred. When premises are in joint possession, therefore, no such inference arises and knowledge of the contraband's presence and the ability to maintain control over it must be established by proof. Id. Based upon that rationale, the court reversed the conviction of the defendant, who was driving an automobile owned by his passenger when it was stopped and searched by police; heroin and cocaine were found in a bag on the floor between the passenger's legs. Id.; see State v. Fortes, 110
an arrest with evidence sufficient to convict.

The chances for conviction are heightened when the defendant, lacking automatic standing, attempts to establish standing at a preliminary hearing by showing he had an expectation of privacy, or fourth amendment protection, upon which the government intruded. Conviction of the guilty is a proper societal goal. Nevertheless, following the suggestion of the Rakas Court that a possessory interest will aid substantially in proving an expectation of privacy, even an innocent defendant may assert such an interest in his efforts to obtain standing. In so doing, however, he runs the grave risk that if

R.I. 406, 409-10, 293 A.2d 506, 508-09 (1972) (held insufficient evidence for conviction where barbiturate pills were discovered on bucket seat occupied by defendant after he was ordered out of the automobile by the police; there was no showing that defendant owned or operated the vehicle, nor was there any testimony that he knew of, or exercised possession over, the illegal drugs); Reyes v. State, 575 S.W.2d 38, 39-40 (Tex. Cr. App. 1979) (660 pounds of marijuana were discovered by police in the back area of the vehicle; despite the strong smell that led the police to conduct the search, the court held defendant's status as a passenger, with no other evidence, was insufficient to convict); Presswood v. State, 548 S.W.2d 398, 400 (Tex. Cr. App. 1977) (neither the driver nor the passenger were convicted of possession of marijuana when the only evidence submitted was that the drug was discovered in the glove compartment when they were present in the vehicle); Harvey v. State, 487 S.W.2d 75, 78 (Tex. Cr. App. 1972) (mere fact that box containing marijuana was discovered on the dashboard is insufficient evidence to support conviction of possession by front seat passenger). In State v. Olsen, 113 R.I. 164, 319 A.2d 27 (1974), the court reversed the defendant's conviction for possession of marijuana when the sole evidence was that he was present in an automobile found to contain the drug. The court said that the state was required to show that defendant was in conscious possession of, and exercised intentional control over, the drug with knowledge of its nature. Id. at 166-67, 319 A.2d at 28-29; see Atkins v. State, 301 So. 2d 459, 460 (Fla. Dist. Ct. App. 1974) (proof must not only be consistent with the guilt of the accused, but also inconsistent with any reasonable hypothesis of innocence); Commonwealth v. Fortune, 456 Pa. 365, 369, 318 A.2d 327, 329 (1974) (conviction for illegal possession of narcotics was not supported by mere evidence that drugs were found in plain view strewn on the kitchen floor of a residence in which four other persons were present with the defendant). It is apparent from the foregoing examples that courts in jurisdictions lacking presumption statutes, making presence in an automobile where contraband is found sufficient evidence of possession by the occupants, are reluctant to infer possession absent a clear showing of knowing dominion and control. In fact, they find, as a matter of law, that such an inference may not be drawn, directly contrary to the legal effect presumption statutes have in the jurisdictions that have adopted them. See pt. II supra. It is doubtful whether similar results would be achieved where presumption statutes are in force.


179. It is debatable, considering the evolution that the concept of standing is undergoing, whether a possessory interest in the items seized would, alone, warrant standing. See note 49 supra. One court confessed that it "find[s] the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." Rawlings v. Commonwealth, 581 S.W.2d 348, 349 (Ky. 1979), cert. granted, 100 S. Ct. 519 (1979) (No. 79-5146). This question is muddier still when the seized evidence is contraband. As the Court said in Rakas, a legitimate expectation of privacy is not simply a subjective expectation of privacy but, by definition, "one that society is prepared to recognize as 'reasonable'." 439 U.S. at 143 n.12 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Therefore, the Rakas Court expressed consternation over a lower court holding, Cotton v. United States, 371 F.2d 385 (9th Cir. 1967), which granted standing to object to the lawfulness of a search of a stolen automobile to a person present therein at the time of the search. 439 U.S. at
standing is denied or, even if granted, the motion to suppress is denied, this admission of possession may later be used at trial for purposes of impeachment. 180

A hypothetical illustrates the impending problem. Assume that the owner of an automobile is driving with a friend. A police officer, acting merely on a hunch, stops the vehicle and conducts a search. The search reveals a small container of marijuana beneath the front seat and burnt marijuana cigarettes in the ashtray, both of which the passenger was genuinely unaware. The driver and passenger are arrested and charged with possession of a controlled substance. 181 Pursuant to Rakas, the driver, as owner of the vehicle, is able to establish a legitimate expectation of privacy in the area searched. 182 Therefore, he will be successful in suppressing the use of the marijuana as evidence against him on the ground that the stop and search were not supported by probable cause. 183 Lacking evidence, the prosecution will dismiss the charges

141 n.9. The Court reasoned that wrongful presence in an automobile could not give rise to a privacy interest that society would accept as reasonable. Id. A similar argument can be made by substituting the word “presence” for “possession.” Certainly one in possession of contraband is, by definition, in wrongful possession, and society ought not recognize that possession as sufficient to claim a legitimate expectation of privacy. It is doubtful that the Supreme Court would have supported the Cotton decision if the defendant had claimed that his possessory interest in the stolen vehicle, rather than his presence in that vehicle, was an adequate basis for standing. 180. See note 46 supra.

181. “An innocent passenger could only say he didn’t know the [drugs were present], a self-serving statement not likely to be persuasive with an officer who thought he had grounds for an arrest.” People v. Williams, 9 Cal. App. 3d 565, 568-69, 88 Cal. Rptr. 349, 351 (Ct. App. 1970).

182. It is debatable whether a driver who is not the owner of the automobile would be granted standing to contest the search. Compare State v. Emery, 41 Or. App. 35, 597 P.2d 375, 376 (1979) (denied standing after noting that case was almost identical to Rakas except that defendant was driver rather than passenger, a status that does not confer a greater expectation of privacy) with United States v. Lopez, 474 F. Supp. 943, 946-47 (C.D. Cal. 1979) (granted standing deriving support from Rakas concurrence which implied that control of the vehicle or the keys may be sufficient interest to show an expectation of privacy).

183. Normally a warrant is needed to justify a search. E. Schwartz, supra note 12, § 7.20, at 288. In addition, the fourth amendment expressly states that a warrant will not issue without probable cause. U.S. Const. amend. IV. As a general rule, a judge or magistrate must decide the question of whether there is sufficient probable cause to authorize a search. Chambers v. Maroney, 399 U.S. 42, 51 (1970). Specifically, he must determine “if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that an offense has been committed.” Carroll v. United States, 267 U.S. 132, 161 (1925) (quoting Locke v. United States, 11 U.S. (7 Cranch) 339 (1813)). Searches conducted without prior judicial approval “are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). One exception is exigent circumstances which, if present, will sustain a search solely on the judgment of the police officer on the issue of probable cause. Chambers v. Maroney, 399 U.S. 42, 51 (1970). The Supreme Court has long recognized the “automobile exception” to the warrant requirement where exigency is premised on mobility. Carroll v. United States, 267 U.S. 132 (1925). Stopping an automobile without probable cause, however, has recently been held to be a violation of the fourth amendment. Delaware v. Prouse, 440 U.S. 648, 663 (1979). “[S]topping an automobile and detaining its occupants constitute[s] a ‘seizure’ within the meaning of [the fourth and fourteenth] Amendments . . . .” Id. at 653. A
against the driver.\textsuperscript{184} The passenger, however, is unable to show an expectation of privacy in the area searched, and, absent automatic standing, the fruits of the bad faith search will be admissible against him at trial.\textsuperscript{185} Considering the role of the presumption statute in proving a crime whose central element is possession, it becomes incumbent on the defendant to take the stand for his defense.\textsuperscript{186} As some commentators have contended, a permissive presumption shifts the burden of persuasion.\textsuperscript{187} It is beyond doubt that the defendant's failure to take the stand on his own behalf will be construed by the jury as an indication of guilt.\textsuperscript{188} If he takes the stand, however, the defendant would be subject to impeachment if he made incriminating statements during his earlier effort to gain standing to contest the search.\textsuperscript{189} Furthermore, his credibility may be attacked,\textsuperscript{190} and any prior convictions he may have might be brought into evidence.\textsuperscript{191} The only possibility of avoiding conviction at this point is for the defendant to convince the jury of his innocence. The defendant, however, cannot simply say he was a passenger; that is the precise person the statute was designed to implicate.\textsuperscript{192} Nor may he merely protest that he did not know the illegal drugs were in the vehicle; that is exactly the testimony the jury expects to hear because of the defendant's strong motive to lie.\textsuperscript{193} To prove innocence, he is compelled to do more than just deny knowledge and possession of the contraband.\textsuperscript{194} He can only assert, however, the truth—that he was simply

\textsuperscript{184} P. Chevigny, \textit{supra} note 156, at 182; Allen, \textit{supra} note 156, at 249.

\textsuperscript{185} Even at this stage, regardless of whether the defendant is convicted at trial, irreversible damage may have resulted. "Arrest, temporary incarceration, the posting of bond or the purchase of bail bond, and the cost of defending oneself are undeniable hardships. Nor can we take lightly the sense of human dignity which is all too often injured in the process." Ashford & Risinger, \textit{supra} note 68, at 191. Significantly, the admissibility of the crucial evidence may prompt the defense attorney to persuade the defendant to plead guilty. J. Skolnick, \textit{supra} note 176, at 223. Therefore the exclusionary rule issue will never be addressed, a result that occurs in approximately 90\% of the cases. Kaplan, \textit{supra} note 9, at 1033.

\textsuperscript{186} United States v. Gainey, 380 U.S. 63, 87 (1965) (Black, J., dissenting); see notes 125-28 \textit{supra} and accompanying text.

\textsuperscript{187} Ashford & Risinger, \textit{supra} note 68, at 201.

\textsuperscript{188} 4 Colum. J.L. & Soc. Prob. 215, 221 (1968) (survey revealed that 71\% of persons polled believed defendant's failure to take the stand implied guilt; survey of attorneys showed that 94\% believed a jury would notice and infer guilt from defendant's silence).

\textsuperscript{189} See Fed. R. Evid. 613.

\textsuperscript{190} See id. 607, 608.

\textsuperscript{191} See id. 609; Note, \textit{Other Crimes Evidence at Trial: Of Balancing and Other Matters}, 70 Yale L.J. 763, 775 (1961).

\textsuperscript{192} See notes 141-44 \textit{supra} and accompanying text.

\textsuperscript{193} P. Chevigny, \textit{supra} note 156, at 151.

\textsuperscript{194} See People v. Hargrove, 33 A.D.2d 539, 540, 304 N.Y.S.2d 574, 575 (1st Dep't 1969) (conviction reversed because defendant was able to establish he was merely a hitchhiker); People v. Anonymous, 65 Misc. 2d 288, 288-90, 317 N.Y.S.2d 237, 238-39 (Dist. Ct. 1970) (defendant was able to establish that the narcotics found in the automobile he was driving were in fact
riding in the automobile and that he was not aware of the drugs present therein. The truth, however, may be insufficient to convince the jury of his innocence. The defendant's position is further eroded by the court's charge to the jury that it may find the defendant guilty of possession solely because of his presence in the automobile, surely an instruction that may sufficiently relieve the jury of any lingering doubts it might have had about the defendant's guilt.

It is ironic that in the above scenario the owner of the automobile, who was in fact the possessor of the narcotics, need not even face trial because he was able to acquire standing to contest the illegal search and suppress the use of the contraband as evidence against him. The injustice is acute when it is realized that the driver of the automobile is usually in possession of its contents. This conclusion was implicitly recognized by the Rakas Court when it indicated that owners have an expectation of privacy enabling them to contest a search of their automobile. If automatic standing is eliminated, however, the innocent passenger will be at the mercy of the police officer because he may not contest even a bad faith search, and he may have prescription drugs that had spilled from his mother's purse at some earlier time; cf. Schneckloth v. Bustamonte, 412 U.S. 218, 286 (1973) (Marshall, J., dissenting) (recognized defendant's difficulty in proving lack of knowledge).

195. "Presumptions of guilt are not lightly to be indulged from mere meetings." United States v. Di Re, 332 U.S. 581, 593 (1948). Nevertheless, "[i]t is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." Wilson v. United States, 149 U.S. 60, 66 (1893).

196. See Ashford & Risinger, supra note 68, at 201. The authors noted that "if only seven out of ten persons who committed A and B also committed C, and if only seven out of ten persons who have committed A and B, but who have not committed C, can successfully overcome the presumption, then . . . out of 100 prosecutions in which A and B are proved, there will be 79 convictions, nine of which will involve innocent persons. Here there is a wrongful conviction rate of approximately 11.4%. Here the presumption should be held unconstitutional." Id. at 183 (footnote omitted). The presumption cases in question here fit neatly into this model. A is defendant's presence in an automobile, B is the contraband's presence in the automobile, and C is possession of the contraband by the defendant. Today, with the proliferation of illegally possessed firearms and the widespread acceptance of drug use, even by non-users, see Rose, supra note 144, at 767, it is likely that at least seven of ten persons who committed A and B are not guilty of C, and if only seven of every ten who did not commit C are unable to rebut the presumption, the presumption should be declared unconstitutional. The Supreme Court made it clear in Leary that in determining whether a rational connection exists between the proved fact and the presumed fact, courts should not confine themselves to the data that existed at the time of the presumption statute's enactment but should readily consider more recent information to see if "the intervening years have witnessed significant changes which might bear upon the presumption's validity." Leary v. United States, 395 U.S. 6, 38 (1969) (footnote omitted). At least one commentator has suggested that such a reanalysis is in order. Rose, supra note 144, at 767-68.


198. Permitting a search of an automobile without probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice." Brinegar v. United States, 338 U.S. 160, 176 (1949). Unfortunately "few prosecutors have shown any inclination to use their public powers
insurmountable difficulties in proving his innocence at trial, particularly when the prosecution has the advantage of a presumption statute that is designed to establish his guilt.

B. The Proposed Solution

It is widely recognized that the Supreme Court views the exclusionary rule with disfavor; it is further contended that the Court has limited the scope of fourth amendment protection, in essence by limiting standing, as a means of curtailing the invocation of the exclusionary rule by criminal defendants. Even assuming that a defendant's own fourth amendment rights were violated, and that he therefore has standing, the Court may still not automatically apply the exclusionary rule and suppress the evidence.

For example, the Court has held that the rule is not applicable in grand jury proceedings, nor can it be the basis for federal habeas corpus relief when the state has provided the opportunity for a full and fair challenge of the alleged fourth amendment violation. In addition, the Court has held that the exclusionary rule will not be applied retroactively. To achieve these results, the Court has balanced competing interests. Specifically, the public interest in finding the truth is weighed against the deterrent effect excluding the evidence will have on future police misconduct.

This test is consistent with the primary purpose underlying the exclusionary rule. Originally the rule furthered two goals: "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it;" and to maintain the integrity of the judicial process. This second consideration has recently fallen into disre-
pute despite vigorous dissents.\textsuperscript{207} The majority view is that a logical extension of the doctrine of judicial integrity is in direct conflict with the precepts espoused in \textit{Alderman v. United States},\textsuperscript{208} namely, that only those persons who have their own fourth amendment rights violated may object to an unconstitutional search.\textsuperscript{209} The argument advanced is that if judicial integrity was the essential reason for excluding unconstitutionally seized evidence, the courts would be required to suppress evidence regardless of whether the defendant was vicariously asserting fourth amendment rights.\textsuperscript{210} Hence, the Court has concluded that although judicial integrity must always be considered, it is of “limited force as a justification for the exclusion of highly probative evidence.”\textsuperscript{2211}

Despite the limits it has imposed on both the underlying purposes and the scope of the exclusionary rule, the Court has faithfully maintained that evidence gathered in violation of an individual’s constitutional rights may not be directly offered at trial to help secure a conviction. Nowhere is this more vividly apparent than in the recent case of \textit{Brewer v. Williams}.\textsuperscript{212} In Brewer, the defendant, a deeply religious former mental patient, had been arrested for abducting a ten year old girl. He was to be transported by two police officers a distance of 160 miles to stand trial. The defendant had been instructed by his lawyer not to make any statements during the ride and the police officers accompanying him had agreed not to question the defendant during the trip. Although there was no direct interrogation, one of the officers, capitalizing on the defendant’s mental infirmities and religious convictions, successfully elicited several incriminating statements from the defendant that ultimately led the officers to the girl’s body.\textsuperscript{213} The Supreme Court held that the defendant had been denied his sixth and fourteenth amendment rights to counsel and ruled that both the incriminating statements and the testimony that led the police to the body were inadmissible as evidence.\textsuperscript{214} The \textit{Brewer} Court was apparently compelled to comply with the idea that the Court “must take care to enforce the Constitution without regard to the nature of the crime or the nature of the criminal.”\textsuperscript{2215}

\begin{footnotes}
\item \textsuperscript{208} 394 U.S. 165 (1969).
\item \textsuperscript{209} \textit{Id.} at 171-72
\item \textsuperscript{210} Stone v. Powell, 428 U.S. 465, 485 (1976).
\item \textsuperscript{211} \textit{Id.} (footnote omitted). “The Court has declined to sacrifice society’s interest on the altar of judicial purity.” Trager & Lobenfeld, \textit{supra} note 5, at 452. With the concern for Judicial integrity allayed, the exclusionary rule is primarily justified by its deterrent effect on police conduct that violates fourth amendment rights. Stone v. Powell, 428 U.S. 465, 486 (1976).
\item \textsuperscript{212} 430 U.S. 387 (1977).
\item \textsuperscript{213} \textit{Id.} at 390-93.
\item \textsuperscript{214} \textit{Id.} at 406 & n.12. The exclusionary rule has traditionally been viewed as a remedy for violations of the right to counsel. \textit{See} note 18 \textit{supra}.
\item \textsuperscript{215} Abel v. United States, 362 U.S. 217, 248 (1960) (Brennan, J., dissenting). In \textit{Abel}, the Court upheld the validity of a warrantless search by federal agents of petitioner’s hotel room on the ground that the room had been abandoned. The room was “abandoned” because petitioner
\end{footnotes}
Nevertheless, there is presently much debate as to whether the exclusionary rule should receive per se application at trial once a defendant has established that evidence was seized in violation of his rights.\textsuperscript{216} In fact, some courts "often stretch and strain in serious cases to avoid applying the exclusionary rule."\textsuperscript{217} Justice Rehnquist, joined by Chief Justice Burger, advocates reconsideration of whether, and to what extent, the exclusionary rule should be retained, arguing that because adequate alternative remedies are now available for defendants that have had their constitutional rights violated,\textsuperscript{218} the

had been arrested earlier by federal authorities pursuant to an administrative warrant for deportation. \textit{Id.} at 218-19. This case is one example of the Court wavering from its firm application of the exclusionary rule in suppressing "illegally" seized evidence at trial. It has been suggested that the Court was strongly influenced by the fact that the case involved a Russian spy being tried for conspiracy to commit espionage and that, had the circumstances been different, an opposite result would have been reached. Kaplan, \textit{supra} note 9, at 1037.

\textsuperscript{216} Kaplan, \textit{supra} note 9, at 1041. Professor Kaplan argues that the rule should be abandoned in the most serious cases, namely, treason, espionage, murder, armed robbery, and kidnapping by organized groups. \textit{Id.} at 1046. As a second proposal, he argues that the rule should be inapplicable "where the police department in question has taken seriously its responsibility to adhere to the fourth amendment." \textit{Id.} at 1050. Professor Amsterdam contends that legislation or police-made rules and regulations setting forth the boundaries of search and seizure activity be drafted, and that they be subject to judicial review for reasonableness. If violated, the exclusionary rule should apply. Amsterdam, \textit{Perspectives on the Fourth Amendment}, 58 Minn. L. Rev. 349, 409-10 (1974). The American Law Institute advocates that the exclusionary rule not be applied unless the violation is "substantial." The factors to be considered in determining whether a particular violation is substantial include: (a) the extent of deviation from lawful conduct; (b) the extent to which the violation was willful; (c) the extent to which privacy was invaded; (d) the extent to which exclusion will tend to prevent violations of this Code; (e) whether, but for the violation, the thing seized would have been discovered; and (f) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him." ALI Model Code of Pre-Arraignment Procedure § SS 290.2(4) (1975). \textit{Compare} Mich. Const. art. I, § 11 (exempts narcotics and firearms "seized by a peace officer outside the curtilage of any dwelling house" from scope of exclusionary rule) \textit{with} People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (rejects the idea that defendant must have standing to object to an unlawful search and seizure). For a discussion of the exclusionary rule in foreign countries, see Symposium, \textit{The Exclusionary Rule Under Foreign Law}, 52 J. Crim. L.C. & P.S. 271 (1961).

\textsuperscript{217} Kaplan, \textit{supra} note 9, at 1037 (footnote omitted).

\textsuperscript{218} For example, 42 U.S.C. § 1983 (1976), the federal statute that confers a private cause of action for redress of constitutional violations by state officials acting under color of authority, has been suggested as a viable replacement for the exclusionary rule sanction. California v. Minjares, 100 S. Ct. 9, 14 (1979) (Rehnquist, J., dissenting). This statute has been construed to permit a finding that not only the individual officer is liable, but also, under various circumstances, that the municipal corporation that employs him may also be liable. Monell v. Department of Social Servs., 436 U.S. 658, 700-01 (1978). Furthermore, the Supreme Court has held that federal agents may be sued for damages resulting from fourth amendment violations. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971). In addition, many states have formulated avenues of relief for state sponsored constitutional infringements. \textit{See} California v. Minjares, 100 S. Ct. at 14 (Rehnquist, J., dissenting). Another proposed substitution for the exclusionary rule is a "tort remedy against the offending officer or his employer." Oaks, \textit{supra} note 17, at 756. Presumably, the various theories on which such an action could be brought would include trespass, battery, assault, mental distress, and false imprisonment. \textit{But see} Wolf v. Colorado, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting) ("The conclusion is inescapable that but one remedy
rule is no longer necessary. 219

Reluctance over broadening the scope of the exclusionary rule, however, necessarily involves two concerns. First, use of the exclusionary rule and standing are inextricably bound together. The Court has noted that the value of deterrence has "been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed." 220 The Court, however, is not persuaded that any incremental increase in the benefits of extending the exclusionary rule to defendants who have not had their own constitutional rights violated "would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." 221 The Court, when adopting this view, was not independently deciding whether the exclusionary rule applied in a specific case. Rather, it was determining whether the defendants had standing to raise a fourth amendment claim when they themselves were not the victims of an illegal search. The above language was reaffirmed in Rakas, a case that also dealt with whether the defendants had standing. 222

In addition, when determining whether standing exists to raise a fourth amendment claim, the Court should employ the same balancing test used in determining whether the exclusionary rule should be applied in other situations. 223 The Court has explicitly recognized that "[t]he balancing process at work in these cases [deciding whether illegally seized evidence must be excluded in federal habeas corpus actions or whether such evidence may be used to impeach credibility] also finds expression in the standing requirement." 224 Therefore, when faced with the issue of whether a particular class of defendants should be granted standing and afforded the protection of the exclusionary rule inherent therein, the Court must weigh the cost to society in keeping relevant and reliable evidence from the trier of fact against the strong desire to deter police misconduct. 225

The Court has apparently recognized the symbiotic relationship between standing and the exclusionary rule. If the Supreme Court elects to abolish the automatic standing rule, as its past holdings have suggested, 226 it should also recognize an exception for persons charged with illegal possession of contraband when a statute, which makes their presence in the automobile from which the contraband was seized presumptive evidence of their guilt, is to be

219. California v. Minjares, 100 S. Ct. 9, 15 (1979) (Rehnquist, J., dissenting). Justice Rehnquist is one of many who have expressed concern that "[t]he criminal is to go free because the constable has blundered." Id. at 12 (quoting People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (Cardozo, J.), cert. denied, 270 U.S. 657 (1926)).


221. Id. at 175.


223. See notes 201-11 supra and accompanying text.


225. White & Greenspan, supra note 10, at 365.

226. See pts. I, III(A) supra and accompanying text.
used against them at trial. Strict adherence to the Court's decisions compels this result.\footnote{227} Many commentators agree that if police knowingly conduct an illegal search against one party in the hopes of gaining evidence that will be admissible against another party, the latter should be granted standing even though his own fourth amendment rights were not violated.\footnote{228} Their rationale is that to confer standing to those defendants is the only way to deter police illegality in the first instance. This supports the view that when weighing the costs to society of excluding evidence against the benefits of deterring police misconduct, the scale tips sufficiently in favor of deterrence to warrant a grant of standing so that the defendant may invoke the exclusionary rule.

When presumption statutes are included in the analysis, the scale tips so heavily in support of retaining the exclusionary rule that the passengers must not be denied standing to raise a fourth amendment claim. The reasoning against retaining the remedy of exclusion is that usually the societal costs are great because the evidence sought to be excluded is "relevant and reliable"\footnote{229} or "highly probative;"\footnote{230} "often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty."\footnote{231} When the evidence is contraband seized from the interior of an automobile in which the defendant was merely a passenger, however, it does not establish the defendant's guilt to such an absolute extent that its exclusion would substantially infringe on the public interest of prosecuting and convicting those accused of a crime. In fact, the statutes making presence in a vehicle in which contraband is found presumptive evidence of possession were enacted specifically because the evidence seized was usually not of sufficient quality to prove conclusively defendant's guilt.\footnote{232}

\footnote{228. Amsterdam, supra note 216, at 434-38; Trager & Lobenfeld, supra note 5, at 456-57; White & Greenspan, supra note 10, at 352-53. Professor Amsterdam goes one step further. He argues that even if the stop is constitutional, as in the case of a nonrandom license-check stop, if probable cause is lacking, any evidence discovered as a result of that stop should be excluded—the potential for abuse in conducting such a stop on the mere suspicion that incriminating evidence will be found is high and "far outweighs the need of the police to apprehend unlicensed drivers." Amsterdam, supra note 216, at 436. He concludes by noting that not to permit exclusion of evidence seized under these circumstances is to put "the liberty of every man in the hands of every petty officer." Id. at 438 (quoting James Otis, as reported in 2 L. Wroth & H. Zobel—Legal Papers of John Adams 142 (1965)) (footnote omitted).}
\footnote{232. See notes 141-44 supra and accompanying text.}
CONCLUSION

When deterrence of police illegality is virtually nonexistent, as when passengers of an automobile do not have standing to contest a search of the vehicle in which they rode, and when the evidence seized is relevant at best but certainly not absolute evidence of guilt, the exclusionary rule becomes a necessary and important tool in the field of criminal justice.

Given the premise that the sole purpose of the exclusionary rule is to deter unlawful police conduct, the doctrine of standing can only be justified as a vehicle for preventing the operation of the exclusionary rule beyond the point of diminishing returns. Thus, the ideal rule of standing will function to exclude evidence from criminal trials only when the social value of the additional amount of deterrence gained outweighs the cost of excluding relevant evidence.233

More significantly, the exclusionary rule plays a vital role in the protection of all persons' constitutional right against unreasonable searches and seizures. The automatic standing rule provides the only opportunity for innocent passengers implicated in possessory crimes by presumption statutes to vindicate their rights and avoid unjust conviction. Therefore, when considering whether the automatic standing rule deserves preservation, the Supreme Court must feel compelled to recognize the necessity for that rule's continued life for those defendants who are charged with possessory crimes pursuant to statutes that permit one to infer their guilt from presence alone.

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233. White & Greenspan, supra note 10, at 365.