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Unreasonable Searches under the Fourth Amendment: The Rule Becomes Curiouser and Curiouser

Martin J. McClain

UNREASONABLE SEARCHES UNDER THE FOURTH AMENDMENT: "THE RULE BECOMES 'CURIOUSER AND CURIOUSER'"[1]

In 1967, the United States Supreme Court handed down its opinion in *Katz v. United States.*[2] The opinion reflected an attempt by the Court to extract from the Constitution the values of its drafters and apply those values to electronic eavesdropping.[3] Concluding that the drafters would have intended to protect an individual from such surveilance techniques, the Court decided to free the Fourth Amendment's protection against unreasonable searches from its dependency upon notions of property and trespass. That decision has been widely viewed as a landmark in the judicial development of the Constitution.[4]

Of necessity, the opinion in *Katz* overturned the old standards by which alleged Fourth Amendment violations were reviewed. To file the void, the opinion alluded to a new approach that focused upon a notion of privacy.[5] Commentators, though favoring the abandonment of the old approach, expressed concern over the vagueness of the new one.[6] They feared that the lack of substance in the new approach would make it difficult for lower courts to apply with any consistency.[7]

Now, 12 years later, the Court has been given sufficient opportunity to clarify the rule announced in *Katz.* In fact, four Supreme Court cases were decided under *Katz* during

1. Delaware v. Prouse, ... U.S. ....., 99 S.Ct. 1391, 1402 (1979) (Rehnquist, J., dissenting).
2. Katz v. United States, 389 U.S. 347 (1967).
3. Strict constructionalists were most annoyed by this approach. *See* Mr. Justice Black's dissenting opinion, 389 U.S. at 364.
4. Note, *Electronic Recording and Listening Devices,* C LAND & WATER L. REV. 619 (1968); Note, *Search and Seizure—Katz v. United States,* a SUFFOLK U. L. REV. 337 (1968).
5. Katz v. United States, *supra* note 2, at 351.
6. Note, *Electronic Eavesdropping under the Fourth Amendment—After Berger and Katz,* 17 BUFFALO L. REV. 455, 470 (1968); Note, *The Fourth Amendment and Electronic Eavesdropping: Katz v. United States,* 5 HOUS. L. REV. 990, 1011 (1968).
7. Kitch, *Katz v. United States: The Limits of the Fourth Amendment,* 68 SUP. CT. REV. 133, 137 and 152 (1968); Note, *The Supreme Court 1967 Term,* 82 HARV. L. REV. 63, 187-196 (1968).

the 1978-79 term.[8] Unfortunately, the opinions in those cases seem to espouse several different versions of the *Katz* standard. This comment will examine *Katz* and the opinions in those four cases in order to determine the nature and scope of the rule to be applied to Fourth Amendment claims.[9]

I. KATZ

Katz v. United States dealt with the conviction of the petitioner for violations of federal statutes making unlawful the "transmitting [of] wagering information by telephone."[10] At trial, evidence of certain telephone conversations had been introduced; the evidence had been obtained "by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which [Katz] had placed his calls."[11] The defendant appealed, claiming the evidence was the product of an unconstitutional search, and therefore inadmissible. After granting certiorari, the Supreme Court was asked to determine 1) whether a public phone booth was a constitutionally protected area; and 2) whether physical penetration of a constitutionally protected area was necessary for a search to be unconstitutional.[12]

This phrasing of the issues had been dictated by *Olmstead v. United States*[13] and its progeny.[14] In *Olmstead* the Court had stated:

> Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual

8. There were several other decisions involving the Fourth Amendment; however, the four referred to here completely cover the various aspects of 'the rule' and will be discussed at length later in this comment.
9. For other recent analysis of *Katz*, *see* Amersterdam, *Perspectives of the Fourth Amendment*, 58 MINN. L. REV. 348 (1974); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977).
10. Katz v. United States, *supra* note 2, at 348.
11. *Id.*
12. *Id.* at 349-350.
13. Olmstead v. United States, 277 U.S. 438 (1928).
14. Note, *supra* note 7, at 188.

> physical invasion of his house 'or curtilage' for the purpose of making a seizure.[15]

From this language, a sort of "trespass and tangibles only" rule emerged. That is, the Constitution was henceforth viewed as protecting individuals against trespassory searches of material objects only.[16]

As a result, courts formulated a two step analysis of alleged Fourth Amendment violations.[17] First, an inquiry was made into the nature of the thing searched, in order to ascertain if it was within the scope of the constitutional protection. Second, if constitutional protection existed, the courts would determine whether the government's conduct had been trespassory, or at least intrusive in nature.[18] If intrusive or trespassory, the conclusion was reached that the government's conduct amounted to a search under the Fourth Amendment.

As recently as 1962, the *Olmstead* approach was reaffirmed by the Court in *Lanza v. New York*.[19] The principal issues raised in that case were 1) whether a visitor's room in a public jail was a constitutionally protected area; and 2) whether the planting of a surreptitious electronic eavesdropping device in a constitutionally protected area was an unreasonable search under the Fourth Amendment.[20] The Court first answered the second question in the affirmative.[21] Then turning to the first question, the Court commented:

15. Olmstead v. United States, *supra* note 13 at 466. The *Olmstead* approach resulted from the Court's view that its proper role was to merely construe the Constitution as the drafters had actually intended. Since electronic eavesdropping had been unknown to the drafters, the Court concluded that they could not possibly have intended to prohibit it. Thus, any decision to limit the use of such surveillance techniques would have to be legislatively made.
16. Note, *supra* note 7, at 188.
17. *Id.* at 189-190.
18. In Silverman v. United States, 366 U.S. 505 (1961), the Court for the first time held that evidence procured by electronic eavesdropping had been obtained in violation of the Fourth Amendment. The basis for the result was the fact that the electronic device used, a 'spike mike,' physically penetrated into the defendant's house, a constitutionally protected area. Further, the Court ruled that it was not necessary for a trespass under local law to have occurred in order for an unconstitutional search to have resulted; an invasion or an intrusion upon an individual's property may be sufficient.
19. Lanza v. New York, 370 U.S. 139 (1962).
20. *Id.* at 142.
21. The Court cited Silverman, *supra* note 18, for its cursory response. 370 U.S. at 142.

> [T]o say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's 'house,' and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.[22]

However, the Court ultimately disposed of the case on other grounds.[23]

In *Katz*, the Court's opinion[24] rejected the *Olmstead* and *Lanza* approach, and declined to accept the formulation of the issues presented by the parties in the case.[25] The opinion stated that "this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by the facts of this case. For the Fourth Amendment protects people, not places."[26] Moreover, the Court concluded that "the underpinnings of *Olmstead* [and its progeny] have been so eroded . . . that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."[27]

Despite discarding that doctrine and, thereby, the generally accepted approach to Fourth Amendment claims, the Court's opinion failed to provide much guidance as to

22. *Id.* at 143.
23. *Id.* at 147.
24. The Court's opinion in Katz was written by Mr. Justice Stewart, who had also authorized the Court's opinions in Silverman, *supra* note 18, and Lanza.
25. Katz v. United States. *supra* note 2, at 350.
26. *Id.* at 351. In a footnote following this statement the opinion acknowledged that previously the Court had "occasionally described its conclusions in terms of 'constitutionally protected areas;' [however, it had] never suggested that this concept [could] serve as a talismanic solution to every Fourth Amendment problem." *Id.* n. 9.
27. *Id.* at 353.

how similar claims would be handled in future cases.[28] What little guidance was afforded stemmed from the Court's statement that the electronic tapping of Katz's phone conversation "violated the privacy upon which he justifiably relied while using the telephone booth,"[29] and that as a result, a search within the meaning of Fourth Amendment had occurred.[30] From this language it appeared the Court was actually employing a two-pronged test: first, it was determining whether the governmental activity violated the privacy of an individual; secondly, it was questioning whether the individual had been justifiably relying upon that privacy.[31]

Unfortunately, key terms such as 'privacy' and 'justifiably relied' were not defined in the opinion.[32] The extent of the Court's aid in explaining its ultimate intent was the statement that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . [However] what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[33]

The opinion did proceed to spell out clearly that once the determination had been reached that a search had been conducted, the search was, in the absence of a warrant, *"per se* unreasonable under the Fourth Amendment."[34] This, the Court noted, was "subject only to a few specifically established and well-delineated exceptions."[35] For these, the Court cited *Carroll v. United States*,[36] *McDonald v. United States*,[37]

28. Note, *supra* note 6, 5 HOUS. L. REV. at 997.
29. Katz v. United States, *supra* note 2, at 353.
30. *Id.* at 354.
31. Kitch, *supra* note 7, at 139.
32. Note, *supra* note 7, at 191.
33. Katz v. United States, *supra* note 2, at 351.
34. *Id.* at 354.
35. *Id.*
36. Carroll v. United States, 267 U.S. 132 (1925). This case held that the warrantless search of an automobile was constitutionally permissible, so long as probable cause was present.
37. McDonald v. United States, 335 U.S. 451 (1948). Here the Court recognized that in an emergency police are allowed to conduct a warrantless search; however, it found such exigent circumstances to be lacking in the facts before it.

Brinegar v. United States,[38] *Cooper v. California*,[39] and *Warden v. Hayden*.[40]

Thus, the Court's analysis in *Katz* of Fourth Amendment claims required at the outset a determination as to whether a search had taken place. This presumably was accomplished by ascertaining that the government had violated the individual's privacy and that he had been justifiably relying on his privacy at the time. Once the conclusion was reached that a search had occurred, it was deemed *per se* unreasonable under the Fourth Amendment, unless either the search had been authorized by a warrant or one of the 'well-delineated exceptions' was applicable.

The main problem under the *Katz* analysis was ascertaining when a search had occurred. In answer to this, the Court seemed to do little more than throw about empty phrases.[41] As one commentator stated:

> Although the rejection of such a particularized formula as the trespass rule will be lauded by those who favor a more functional approach to the fourth amendment, there is little in the Court's opinion to satisfy those who look for guidance concerning the new standard now being employed in its stead. The applicability of the fourth amendment to other means of investigation hereto left unregulated because of the absence of the required physical invasion will remain unclear until the Court explains

38. Brinegar v. United States, 338 U.S. 160 (1949). The Court reaffirmed the automobile exemption established in Carroll v. United States, *supra* note 36.
39. Cooper v. California, 386 U.S. 58 (1967). In an unusual case, the Court ruled that a car seized pursuant to a forfeiture statute could be searched without a search warrant, because the search of the car "was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." *Id.* at 61.
40. Warden v. Hayden, 387 U.S. 294 (1967). In this case, the Court found that police while in hot pursuit of a suspect may conduct warrantless searches in order to locate him. *See* McDonald v. United States, *supra* note 37. Not noted by Mr. Justice Stewart's opinion were United States v. Rabinowitz, 339 U.S. 56 (1950), and Camara v. Municipal Court, 387 U.S. 523 (1967). These cases provide two other exceptions to the *per se* unreasonable rule. First, Rabinowitz as modified by Chimel v. California, 395 U.S. 752 (1969), permits police when making arrests to conduct warrantless searches of the arrestee's person as well as the immediate area under the arrestee's control. Camara, on the other hand, establishes a balancing test by which the reasonableness of a search may be measured. Here, the need for the search is weighed against the objectionable nature of the resulting invasion. If the former outweighs the latter, then the search is reasonable; however, a search warrant may still be required.
41. Kitch, *supra* note 7, at 152.

> more fully what it means by "privacy"—apparently now the key to this range of search and seizure problems.[42]

An alternative approach was, in fact, outlined in *Katz* by Mr. Justice Harlan in a concurrence, which has frequently been cited as establishing the standard by which Fourth Amendment claims are measured—as will be seen later in this comment.[43] Perhaps disenchanted with the majority opinion for its ambiguity,[44] Mr. Justice Harlan outlined what he considered to be the more appropriate analysis.[45] Under his approach, the concept of a 'constitutionally protected area' was retained. However, in order for an area to be so designated, the individual asserting the constitutional claim must have had a reasonable expectation of privacy as to the area. This, in turn, meant "first that [the] person [had] exhibited an actual (subjective) expectation of privacy and, second, that the expectation [was] one that society [was] prepared to recognize as 'reasonable.' "[46] If the conclusion was reached that an area was constitutionally protected, then any physical or electronic intrusion which violated the reasonable expectation of privacy constituted a search within the meaning of the Fourth Amendment—and was "presumptively unreasonable in the absence of a search warrant."[47] Thus, Mr. Justice Harlan attempted to identify more clearly the considerations involved when resolving Fourth Amendment claims.

One problem with Harlan's opinion was his failure to give any real guidance for determining whether society was prepared to recognize an individual's subjective expectation as reasonable.[48] This failure, much the same as the failure of the majority to define 'justifiably relied,' was an open

42. Note, *supra* note 7, at 191.
43. Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L. J. 1461, 1472 (1977).
44. In his article, Kitch concluded that the presence of Mr. Justice Harlan's concurring opinion indicated that the Court had been intentionally vague in drafting the new Fourth Amendment standard. This he believed was to allow the Court room to retreat in the event it became necessary. *Supra* note 7, at 138.
45. Katz v. United States, 389 U.S. at 360-361.
46. *Id.* at 361.
47. *Id.*
48. Note, *supra* note 43, at 1473-1475.

invitation to courts to act legislatively, or even arbitrarily, in deciding what society would and would not recognize as reasonable.[49]

II. THE OCTOBER 1978 TERM OF THE U. S. SUPREME COURT

In its most recent term, the Supreme Court decided four cases of particular note in light of *Katz*. Each of the opinions discussed unreasonable searches under the Fourth Amendment. However, while all four opinions cited *Katz* as controlling, each offered a different version of the standard announced in that decision.

A. Rakas

The first of the four decisions to be handed down was *Rakas v. Illinois*.[50] The case stemmed from the conviction of Frank Rakas and Lonnie King for armed robbery. At their trial, a gun obtained from a search of the car in which they were passengers had been introduced into evidence, but the defendants objected, asserting that the search was unconstitutional. Further, they claimed that automatic standing to object to the search should be extended to them under *Jones v. United States*,[51] because they had been legitimately on the premises at the time of the search.[52]

The Court, in an opinion authorized by Mr. Justice Rehnquist, reexamined and rejected the notion of automatic standing developed in *Jones*. It explained that "the type of standing requirement discussed in *Jones* . . . is more properly subsumed under substantive Fourth Amendment doctrine."[53] Therefore, the petitioners would not receive automatic

49. In determining whether a particular expectation is reasonable, courts are generally free to balance the needs of law enforcement against what they see as the value of the privacy interest in a particular case. This approach may result in "a fourth amendment with all of the character and consistency of a Rorschach blot." Amersterdam, *supra* note 9, at 375.
50. Rakas v. Illinois, ... U.S. ....., 99 S.Ct. 421 (Dec. 5, 1978). The Court was split 5-4, with White, Brennan, Marshall, and Stevens dissenting.
51. Jones v. United States, 362 U.S. 257 (1960).
52. The Court in Jones provided that where possession or ownership of the item seized constituted the crime with which the defendant was or will be charged, or where the defendant was legitimately on the premises at the time of the search, the defendant would have automatic standing to challenge the constitutionality of the search and/or seizure.
53. Rakas v. Illinois, *supra* note 50, at 428.

standing to object to a search merely because they had been legitimately on the premises. Instead they would have to show that under *Katz* their own Fourth Amendment rights had been violated by the search.[54]

The Court's opinion then turned to the question of whether the petitioners' Fourth Amendment rights had in fact been violated. Citing *Katz*, the opinion pointed out "that capacity to claim the protection of the Fourth Amendment depend[ed] not upon a property right in the invaded place but upon whether the person who claim[ed] the protection of the Amendment [had had] a legitimate expectation of privacy in the invaded place."[55]

At this point in the opinion, Mr. Justice Rehnquist noted his understanding of the term 'legitimate expectation of privacy':

> [It] by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence, in the words of *Jones* . . . is "wrongful"; his expectation is not "one that society is prepared to recognize as 'reasonable.' " [Citing Harlan's opinion in *Katz*.][56]

Mr. Justice Rehnquist further commented that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue

54. The dissent, in an opinion authored by Mr. Justice White, criticized the majority for abandoning a thoroughly workable rule and in effect cutting back on the Fourth Amendment protection afforded the populace, in order to limit the application of the exclusionary rule. "If the Court is troubled by the practicable impact of the exclusionary rule, it should face the issue of the 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 437.

55. *Id.* at 430.

56. *Id.* n. 12. This hypothetical is troubling. Apparently Rehnquist is concluding that the expectation is unreasonable because the presence is wrongful. But is the presence wrongful because the burglar is not legitimately on the premises—the Jones standard which Rehnquist rejected, or because the burglar's conduct is illegal—which would indicate that an individual may lose the protection of the Fourth Amendment by performing an illegal act. If the latter is what Rehnquist had in mind then the question as to the permissibility of a search would depend upon the defendant's guilt. Such an approach would not deter the police from conducting searches that are within the constitutional prohibition, the stated objective of the exclusionary rule. *See Id.* at 429, n. 9.

of [his] right to exclude."[57] But, "[o]n the other hand, 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 or activity conducted thereon."[58]

Under this analysis the opinion concluded that "petitioners' claims must fail."[59] The reasons given in support of this conclusion were: 1) that the petitioners "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized,"[60] 2) that their being "legitimately on the premises in the sense that they were in the car with the permission of its owner [was] not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched,"[61] and 3) that "they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers."[62]

Reviewing the standard employed by Mr. Justice Rehnquist in the maojrity opinion, only the first half of the *Katz* analysis (whether within the meaning of the Fourth Amendment there had been a search) was discussed. However, as to it, the opinion in *Rakas* indicated that an unconstitutional search resulted only when the individual claiming its occurrence had possessed a legitimate expectation of privacy in the invaded area. Mr. Justice Rehnquist seemed to break this requirement down into two components in a manner similar to Mr. Justice Harlan's approach in *Katz*: 1) the individual must have had an expectation of privacy, and 2)

57. *Id.* at 431 n. 12.
58. *Id.*
59. *Id.* at 433.
60. It should be noted that petitioners claimed they were never asked if the seized rifle was theirs, and that under Jones, the controlling law up until Rakas was decided, there was no reason for petitioners to assert such a property interest. However, despite a request by petitioners for a remand if the Court determined that an ownership interest in the rifle was an adequate basis for standing to object to the search, the Court concluded that the petitioners had failed to carry their burden on the issue and rejected their request. *Id.* at 423 n. 1.
61. *Id.* at 433.
62. *Id.* Again up until Rakas was handed down, the petitioners had no reason to believe that under Jones such a showing was necessary.

society, or perhaps more correctly, the Court must have been willing to recognize the expectation as legitimate.[63]

In order for the two part test to be satisfied, Mr. Justice Rehnquist indicated that the presence of a property right in the invaded area was usually necessary. But this did not reflect a necessary link between the Fourth Amendment and property rights. Instead, it reflected the fact that the property right to exclude others fostered the development of an expectation of privacy. Thus, under Mr. Justice Rehnquist's view, the presence of a legitimate expectation of privacy was tied to the amount of dominion and/or control an individual exercised over the invaded area.[64]

Perhaps some further guidane as to how the test should be applied appeared in Mr. Justice Rehnquist's hypothetical about the 'burglar in the summer cabin.' There, by connecting the wrongfulness of the burglar's presence with the determination that the burglar's expectation was not legitimate, the opinion indicated that the morality or legality of the claimant's conduct would directly affect the legitimacy of his expectation of privacy.[65]

In any event, Mr. Justice Rehnquist's opinion imposed upon the claimants the burden of "showing that they had [had a] legitimate expectation of privacy."[66] Thus, presumably each claimant had the difficult task of establishing to the Court's satisfaction that they had in fact possessed an expectation of privacy in the invaded area, as well as the legitimacy of that expectation.[67]

63. *Id.* at 430 n. 12.
64. This view can be seen in Mr. Justice Rehnquist's explanation of the result in Katz. There, "the defendant shut the door behind him to exclude all others and paid the toll." *Id.* at 433.
65. Because of the split of the Court in this case, particular attention should be paid to Mr. Justice Powell's concurring opinion in order to determine whether a majority of the Court would accept this propsition. *See* note 70 *infra.*
66. Rakas v. Illinois, *supra* note 50, at 433.
67. From the number and type of obstacles the opinion raises in opposition to petitioners' Fourth Amendment claims, the conclusion inevitable follows that the dissent is correct in its view that the majority is covertly attacking the exclusionary rule, *see supra* note 54. In fact, Mr. Justice Rehnquist as much as admits it when he states: "Conferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary . . . Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. . . . [M]isgivings as to the benefit of enlarging the

In a concurring opinion, Mr. Justice Powell outlined his approach to determining whether a search had occurred within the meaning of the Fourth Amendment. Under it, "[t]he ultimate question [was] whether [the] claim to privacy from government intrusion [was] reasonable in light of all the surrounding circumstances."[68]

In making this determination, he pointed out several factors that, though not necessarily determinative, were to be considered. These were 1) the precautions taken by the person invoking the protection of the Fourth Amendment in order to maintain his privacy;[69] 2) the use to which the individual had put the location in which his expectation of privacy was vested;[70] 3) the likely intent of the drafters of the Constitution as to the type of governmental intrusion involved;[71] and 4) the property rights the individual had in the invaded area.[72]

Finally, Mr. Justice Powell's opinion avoided the use of any language imposing a burden of proof on the petitioners in the case. He did not dispute whether they had had an expectation of privacy. He simply concluded that any privacy expectation of mere passengers in a car was not reasonable.[73]

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class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations." *Id.* at 427.

68. *Id.* at 435.

69. For this, the opinion cited United States v. Chadwick, 433 U.S. 1 (1977) (the defendant had placed his personal effects inside a double-locked footlocker), and Katz, *supra* note 2 (the defendant, while using a public telephone booth, had shut the door and paid the toll). *Id.* at 435.

70. Here, the opinion cited Jones, *supra* note 51, noting that there the defendant obtained a privacy interest in an apartment in which he slept and in which he kept clothing. *Id.* at 435.

71. The opinion referred to Chadwick, *supra* note 69, at 7-9, in support of this statement, apparently because there personal effects were involved—the protection of which the drafters gave high priority. *Id.* at 435.

72. Here the opinion noted Alderman v. United States, 384 U.S. 165 (1969), where the Court had granted the defendant standing to object to the recording of a telephone conversation to which he had not been a party, but which had occurred on a telephone located in his house. *Id.* at 435.

73. The dissenting opinion is not discussed in the comment because it merely stated that, even if automatic standing was rejected, the petitioners had possessed a reasonable expectation of privacy. There was no discussion of why. *Id.* at 443 n. 21. (dissenting opinion)

B. Smith

The next case to be considered is *Smith v. Maryland.*[74] There, after being robbed, a woman "began receiving threatening and obscene phone calls from a man identifying himself as the robber."[75] Once, the caller asked the woman to step out on her porch; while on the porch, she saw a 1975 Monte Carlo, which she had also seen near the robbery, moving slowly past her house. Later, police spotted a 1975 Monte Carlo in the woman's neighborhood, driven by a man who fit the woman's description of the robber. "By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith."[76]

At the request of police, the telephone company then installed a pen register in order to record the numbers dialed on petitioner's telephone.[77] Shortly thereafter, the device revealed that a call was made from petitioner's phone to the woman. On the basis of this information, a warrant was obtained in order to search petitioner's residence. This search produced more evidence against petitioner, and lead to his arrest for robbery.[78]

At trial, the pen register tape which showed that a phone call had been dialed from petitioner's phone to the victim's phone was admitted into evidence over petitioner's objection. Following a conviction, petitioner appealed, claiming that the pen register tape and certain other evidence was the fruit of an unconstitutional search and therefore inadmissible. After the Maryland Court of Appeals affirmed, the United States Supreme Court granted certiorari in order to resolve whether the Fourth Amendment imposes any restrictions upon the use of pen registers.[79]

74. Smith v. Maryland, ... U.S. ....., 99 S.Ct. 2577 (1979). The Court split 6-3 in its decision with Stewart, Marshall, and Brennan dissenting.
75. *Id.* at 2578.
76. *Id.*
77. "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." United States v. New York Tel. Co., 434 U.S. 159, 161, n. 1 (1977).
In this case the pen register was installed at the phone company's central office. ..... U.S. ....., 99 S.Ct. at 2578.
78. *Id.* at 2579.
79. *Id.*

Mr. Justice Blackmun, writing for the majority, commented that "[i]n determining whether a particular form of government-initiated electronic surveillance is a 'search' within the meaning of the Fourth Amendment[80] our lodestar is *Katz v. United States*."[81] Furthermore, under *Katz*, "this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim that a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' has been invaded by government action."[82] Mr. Justice Blackmun then noted that in making this inquiry the appropriate questions to be considered were those raised by Mr. Justice Harlan in his concurrence in *Katz*: 1) whether the individual had exhibited a subjective expectation of privacy, and 2) whether this expectation was one society was prepared to recognize as reasonable.[83]

In analyzing petitioner's claim under this standard, Mr. Justice Blackmun's opinion looked first to whether "people in general entertain any actual expectation of privacy in the numbers they dial."[84] Citing the fact that pen registers are known to be routinely used by the telephone companies for recording the dialing of long-distance telephone calls as well as for other business purposes,[85] and the fact that "[m]ost phone books tell subscribers . . . that the company 'can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls,' "[86] the opinion concluded that people do not have this requisite expectation of privacy. "Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret."[87]

80. The opinion noted that, though the pen register had been installed by the phone company—a private party, the company had acted at police request. In light of this, the State conceded that sufficient agency existed to render the installation 'state action.' *Id.* at 2579 n. 4.
81. *Id.* at 2579-2580.
82. *Id.* at 2580.
83. *Id.*
84. *Id.* at 2581.
85. *Id.*
86. *Id.*
87. *Id.*

Nevertheless, petitioner argued that his conduct, in using the telephone in his own home to the exclusion of others, demonstrated an expectation of privacy. The opinion, however, concluded that this "could make no conceivable difference," since petitioner still had had to convey the same information to the telephone company.[88]

Moreover, the opinion noted that "even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation [was] not one that society [was] prepared to recognize as 'reasonable.' "[89] To support this point, the opinion pointed out "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[90] Here, "petitioner voluntarily conveyed numerical information to the telephone company;"[91] and therefore, the expectation would not have been legitimate.[92]

C. *Wolfish*

The next case to be discussed is *Bell v. Wolfish.*[93] There, an action had been filed challenging the conditions in the Metropolitan Correctional Center (MCC), a federal facility in New York City which primarily housed pretrial detainees. After the lower courts ruled in favor of the challengers, the Supreme Court granted certiorari and reversed.[94]

Part of the challenge had been to the MCC requirement that all inmates had "to expose their body cavities for visual

88. *Id.* at 2582. This should be compared to Alderman, *supra* note 72.
89. Smith v. Maryland, *supra* note 74, at 2582.
90. *Id.* This would seemingly correspond to the observation made by Mr. Justice Powell, in his opinion in Rakas, that one of the Court's considerations in Fourth Amendment cases is what precautions the claimant took to protect his privacy. *See supra* note 69.
91. Smith v. Maryland, *supra* note 74, at 2582.
92. In his dissent, Mr. Justice Stewart expressed his view that there should be no distinction between dialed phone numbers and phone conversations for Fourth Amendment purposes. Both require a certain amount of disclosure to the phone company; yet, the majority's opinion only protects an individual from disclosure of the latter. *Id.* at 2583.
Mr. Justice Marshall, in his dissent, questioned the majority's conclusion that individuals do not have an expectation of privacy as to the phone numbers they dial. He further questioned how voluntarily the defendant had turned over the phone number to the telephone company—what was his alternative. *Id.* at 2584-2585.
93. Bell v. Wolfish, ____ U.S. ____, 99 S.Ct. 1861 (1979). The Court split 5-4 on the aspect of the case discussed here with Justices Marshall, Powell, Stevens and Brennan dissenting.
94. *Id.* at 1866.

inspection as a part of a strip search conducted after every contact visit with a person from outside the institution."[95] The challengers asserted that this practice violated the Fourth Amendment's protection against unreasonable searches.

Mr. Justice Rehnquist, writing for the Court, was willing to assume "for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility."[96] Apparently included among those rights was a reasonable expectation of privacy as to one's person, since the opinion continued upon the presumption that a search within the meaning of the Fourth Amendment had occurred. The opinion thereafter dealt only with the second half of the *Katz* analysis, whether the search was in compliance with the Constitution.

Turning to this question, Mr. Justice Rehnquist commented that in order for a search to pass muster under the Fourth Amendment it merely must have been reasonable.[97] He continued:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted.[98]

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95. *Id.* at 1884. Also challenged were: 1) the double-bunking of pretrial detainees (this was claimed to deprive individuals of liberty without due process); 2) a restriction on the books and magazines that an inmate could receive from outside the institution (this was argued to contravene the inmates First Amendment rights); 3) a rule against the receipt of packages from the outside containing food or personal property (here it was asserted that pretrial detainees were denied property without due process); and 4) the conducting of unannounced searches, 'shakedowns,' at irregular intervals which the inmates were not allowed to watch (here the challenge was based on the Fourth Amendment).
96. *Id.*
97. For this proposition Carroll, *supra* note 36, was cited. *Id.* at 1884.
98. *Id.*

Cited for this statement of the law were, among others, *Katz* and *Terry v. Ohio.*[99]

In applying this test, Mr. Justice Rehnquist further stated:

> We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt . . . that on occasion a security guard may conduct the search in an abusive fashion. . . . Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner. . . . But we deal here with the question whether visual body cavity inspections as contemplated by the MCC rules can *ever* (emphasis in original) be conducted on less than probable cause. *Balancing* the *significant* and *legitimate* security *interest of the institution against* the *privacy interest of the inmates*, we conclude that they can. [Emphais added][100]

Thus, under Mr. Justice Rehnquist's test, Fourth Amendment rights were defeated by legitimate governmental interests.[101]

Mr. Justice Marshall's dissenting opinion disagreed with the use of the legitimate interest standard. In its stead, he advocated the invocation of the compelling necessity standard, claiming that the due process clause required

99. Terry v. Ohio, 392 U.S. 1 (1968). The Court in Terry held that
> there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Id. at 27. The Court excused this search from the Fourth Amendment's warrant requirement by stating that
> we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Id. at 20. For this the opinion turned to the balancing test outlined in Camara, *supra* note 40, and concluded that this 'stop and frisk' type search was reasonable under the Fourth. *Id.* at 20-27.

100. Bell v. Wolfish, *supra* note 93, at 1885.

101. Throughout the opinion, Mr. Justice Rehnquist, after recognizing that the inmates maintained various constitutional rights even inside the correctional facility, concluded that the constitutional rights were subject to the prison administrators' legitimate governmental interests.

its application.[102] Further, he stated that under that standard it was indisputable that the government could not justify the searches.[103]

D. Sanders

The final case to be considered is *Arkansas v. Sanders*.[104] There, Lonnie Sanders had been tried for possession of marihuana. Evidence introduced at the trial had been obtained as the result of a warrantless search of Sanders' suitcase. At the time of the search, the suitcase was resting in the trunk of taxi in which Sanders was a passenger.[105] The police had been acting on a tip that the suitcase contained marihuana when they stopped the taxi in order to conduct the search.[106]

Following his conviction, Sanders appealed to the Arkansas Supreme Court, contending that the evidence obtained as a result of the search should have been inadmissible under the exclusionary rule. The Court agreed and reversed. The U.S. Supreme Court granted certiorari in order to clarify the rule as "to warrantless searches of luggage seized from automobiles."[107]

Mr. Justice Powell, writing for the Court, did not address whether a reasonable expectation of privacy had existed. He merely assumed that the scope of the Fourth Amendment's protection included the suitcase, since it was the private property of Sanders.[108]

Almost all of the opinion was directed toward applying the latter half of the *Katz* analysis, whether the search

102. Bell v. Wolfish, *supra* note 93, at 1894.
103. Mr. Justice Marshall also questioned the result under the standard in Mr. Justice Rehnquist's opinion. *Id.* Mr. Justice Powell dissented on the grounds that in order to justify the body cavity searches there must exist "some level cause, such as a reasonable suspicion." *Id.* at 1886. Mr. Justice Stevens' dissent addressed other aspects of the decision. *Id.* at 1895.
104. Arkansas v. Sanders, ____ U.S. ____, 99 S.Ct. 2586 (1979). The Court split 7-2 in this case, with Blackmun and Rehnquist dissenting.
105. There was no problem with standing in this case, presumably because Sanders was undeniably the owner of the suitcase. Moreover, as a passenger in a taxi his expectation of privacy would conceivably be of greater significance than the expectations of the petitioners in *Rakas*.
106. Arkansas v. Sanders, *supra* note 104, at 2588.
107. *Id.*
108. *Id.* at 2590.

comported with the Constitution. In outlining the Constitutional test, Mr. Justice Powell stated that "[i]n the ordinary case . . . a search of private property must [have been] both reasonable and performed pursuant to a properly issued search warrant."[109]

The opinion then turned to the issue of whether the warrant requirement could properly be disregarded under the facts of the case. It was noted that previously the Court had recognized various exceptions to the warrant requirement. "These [had] been established where it was concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search."[110] In determining whether an exception should be established, a balancing test was employed. In this test "the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence," were weighed against "the reasons for prior recourse to a neutral magistrate."[111]

Mr. Justice Powell further pointed out that since disregarding the warrant requirement necessarily infringed upon the purposes of the Fourth Amendment, the Court had not been cavalier in recognizing exceptions. They were always jealously drawn.[112] The burden was placed upon those seeking the exceptions to demonstrate the need for them. And, the reach of each exception was specifically limited "to that which [was] necessary to accommodate the identified needs of society."[113]

Since Arkansas had argued that the search should be proper under the automobile exception to the warrant requirement, the opinion discussed its applicability. Under the exemption, cars could be searched without a warrant so long as probable cause existed.[114] The reason for establishing

109. *Id.* By the use of the term 'reasonable,' Mr. Justice Powell apparently means that there must have been some pre-existing justification for the search. *See id.* at 2592.
110. *Id.* at 2590.
111. *Id.* at 2591.
112. *Id.*
113. *Id.*
114. *See* Carroll, *supra* note 36.

this exception had been twofold. First, "the inherent mobility of automobiles often makes it impractical to obtain a warrant,"[115] thus something of an emergency situation existed when dealing with a car. Secondly, the nature of the automobile often "dilute[d] the reasonable expectation of privacy that exist[ed] with respect to differently situated property;"[116] therefore, it was less likely that a search within in the meaning of the Fourth Amendment was occurring. Mr. Justice Powell's opinion in Sanders concluded that neither of the rationales would be furthered by extending the automobile exception to include luggage within the car; therefore, the exception could not be so extended.[117]

III. THE RULE

The rule to be applied to Fourth Amendment claims must be extracted from the decisions perused above. On a superficial level, the opinions fashioned a two-step inquiry into: 1) whether the government's activities constituted a search within the meaning of the Fourth Amendment, and 2) whether the search comported with constitutional requirements. However, at times this bifurcation breaks down; the test employed in order to determine whether a search had occurred has been used to evaluate whether the search complied with constitutional criteria.[118] Nonetheless, this delineation of the issues provides a good starting point to begin the quest for the rule mandated by the Court.

115. Arkansas v. Sanders, *supra* note 104, at 2591.
116. *Id.*
117. Mr. Justice Burger's concurrence suggested that the Court's be read only to hold that where police had probable cause and ample opportunity to obtain a search warrant authorizing a search of a suitcase, the presence of that suitcase in an automobile will not excuse their failure to seek the warrant. *Id.* at 2594.
Mr. Justice Blackmun's dissent, argued that the result in this case will spawn untold difficulties and confusion. In light of Carroll, *supra* note 36, Chimel, *supra* note 40, and this decision, upon properly stopping a car police would be faced with the impossible task of determining what permissibly could and could not be searched. *Id.* at 2595.
118. An example of this appeared in Arkansas v. Sanders, *id* at 2591, where the Court's opinion noted that part of the justification for the 'car exception' is a reduction of the reasonableness of an individual's expectation of privacy with respect to a car as opposed to other property.

A. Determining Whether a Search Occurred

Mr. Justice Powell's concurring opinion in *Rakas* probably provides the most complete synopsis of the test to be employed when determining whether a search has occurred within the meaning of the Fourth Amendment. Under the test the essential elements of a search are a reasonable expectation of privacy and a governmental intrusion upon that expectation. But, "[t]he ultimate question is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances."[119]

Unfortunately, the Court has steadfastly refused to identify the surrounding circumstances that need to be keyed upon. On occasion though, it has in its opinions focused upon one or more of the following factors: the precautions taken in order to maintain one's privacy; the uses made of the location in which the expectation of privacy was vested; the likely intent of the drafters of the Constitution as to the particular expectation of privacy involved; and the property rights the claimant possessed in the invaded area. But even here, the Court has equivocated; a factor crucial in one decision will be ignored in another.[120] Such an approach is analogous to a 'Rorschach blot;' a court looks at the facts of a case, shouts either 'reasonable' or 'unreasonable,' and points to those facts which offer support for its conclusion.[121]

There is one limitation on a court's freedom to conclude that an expectation of privacy is reasonable; that is the recurring theme in recent Court opinions that the exclusionary rule should be applied sparingly.[122] This may even

119. Rakas v. Illinois, *supra* note 50, at 435.
120. In *Katz* much was made of the fact that the defendant had shut the door to the public telephone booth behind him, *see* discusion by Mr. Justice Rehnquist in Rakas v. Illinois, *supra* note 50, at 433. On the other hand, in Smith v. Maryland, the Court's opinion refused to find that the fact the defendant had placed the phone call from the phone in his own home of any significance, ... U.S. ....., 99 S.Ct. at 2582.
121. In psychology, the principle behind the use of a Rorschach blot is that the viewer when shown the blot will reveal the inner self, because the viewer will see whatever he subconsciously wants to see. Presumably this is true of the courts. *See* Amersterdam, *supra* note 9, at 375.
122. *See supra* note 67, and Note, *The Evisceration of the Exclusionary Rule: the Supreme Court Invents the Oral Evidence Exception, United States v. Ceccolini, 435 U.S. 268 (1978)*, 15 LAND AND WATER L. REV. 323 (1980).

be visible in the factors that the Court has looked to when determining the reasonableness of an expectation of privacy mentioned above.

When considering the use made of a location by the individual claiming an expectation of privacy, the Court in effect appears to be weighing whether the claimant's criminal activity is such that the Court would prefer not to have the exclusionary rule invoked and run the risk that the claimant would escape a conviction. Thus, by using property for criminal activity, an individual may destroy the reasonableness of any expectation of privacy as to that property. An intrusion by the goverment violating this expectation would, therefore, be outside the scope of the Fourth Amendment's proscriptions and the concomitant exclusionary rule. Thus, any evidence obtained as a result of the government's conduct would be admissible.[123]

B. Determining Whether the Search Meets Constitutional Standards

Once a court determines that indeed a search occurred, it must examine the search to see if it satisfied the Fourth Amendment's criteria. For this, Mr. Justice Rehnquist concluded in *Wolfish* that all that is required is that the search be reasonable. His test of reasonableness is a balancing of the government's legitimate interests in the search against the individual's interest in maintaining his privacy.

On the other hand, Mr. Justice Powell argued in *Sanders* that the search must be both reasonable and conducted pursuant to a search warrant. By reasonable, he apparently meant that there must have been some pre-existing justification for the search. However, he did recognize exceptions to the search warrant requirement. These exceptions arise when the government's interest in the search outweighs the individual's interest in protecting his privacy.

123. Of course this may defeat the purpose of the exclusionary rule—deterence of police tactics that violate the spirit and meaning of the Fourth Amendment. In fact, the police will likely be encouraged to use questionable tactics whenever they are convinced that they are dealing with a criminal, because, if indeed they are, then the evidence obtained will more likely be admissible.

The real difference between these two approaches is that Mr. Justice Powell requires the balancing test to be done on a categorical basis, while Mr. Justice Rehnquist apparently advocates a case by case balancing. Clearly, from the language of other opinions,[124] Mr. Justice Powell's analysis is more correct.[125]

CONCLUSION

When the Court abandoned the *Olmstead* analysis of alleged Fourth Amendment violations, it was criticized for its failure to adequately construct the new standard of review. Even now, 12 years later, the same criticism can be leveled at the Court, since the controlling standard is still rather vague and uncertain. Of course, there are some indications that this is the result of an attempt by the Court to allow a mechanism whereby a court may avoid application of the exclusionary rule. Unfortunately, this results in the curtailment of substantive Fourth Amendment rights in order to limit the use of this remedy for the violation of those rights.

A better approach may be to firm up and possibly broaden the substantive rights, while discussing separately the appropriate remedy to administer when a violation of the rights is found. A search within the meaning of the Fourth should be found whenever government activities infringe upon an individual's privacy. Privacy should be defined as the right to be free from government intrusion, i.e. the right to be left alone.[126] This right would arise whenever a reasonable and prudent citizen would expect it in the same or similar circumstances, or whenever the recognition of the right would be necessary to protect and maintain our free, open, and democratic society.[127] Therefore, if a search is found to have occurred, it would be *per se* unreasonable unless it either satisfied the warrant requirement or fit one of the "well-delineated" exceptions. Finally, the question of

124. *See* Dunaway v. New York, ... U.S. ....., 99 S.Ct. 2249 (1979); in particular *see* Mr. Justice White's concurring opinion, *id.* at 2260. *Also, see* Delaware v. Prouse, ... U.S. ....., 99 S.Ct. 1391 (1979).
125. Wolfish may be viewed as establishing an exception for the category of inmate searches.
126. Katz v. United States, 389 U.S. at 350.
127. *See* United States v. White, 401 U.S. 745, 786-793 (1971) (Harlan. J. dissenting).

the appropriate remedy for violation of an individual's right could either be addressed by case-by-case balancing of the desirability of invoking the exclusionary rule, or by an in-depth re-examination by the Court of the continuing viability of the exclusionary rule.[128]

Nonetheless, the current state of the law concerning unreasonable searches and seizures under the Fourth Amendment is a shambles. Moreover, it is likely that confusion will continue to reign until such time as the Court is willing to provide a more concrete analysis of unreasonable searches and to face head-on its qualms concerning the exclusionary rule.

MARTIN J. MCCLAIN

128. I express no judgment on the wisdom of the exclusionary rule, as it is outside the scope of this comment and is deserving of separate treatment.