HERTZ AND THE FOURTH AMENDMENT: A POST-*RAKAS* EXAMINATION OF AN UNAUTHORIZED DRIVER'S STANDING TO CHALLENGE THE LEGALITY OF A RENTAL CAR SEARCH

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INTRODUCTION

In April 2006, Hertz Corporation and Shelby Automobiles, Inc. excited auto enthusiasts everywhere with their announcement that they were bringing back the famed "Rent-A-Racer" program from the 1960s with the introduction of the all new Shelby GT-H.[1] The GT-H is a high-performance, special-edition Ford Mustang that was made available to rent exclusively from Hertz at major airports across the country.[2] However, because production was limited to just five hundred vehicles, only a handful of individuals were lucky enough to enjoy one before the program was once again discontinued in early 2007.[3]

One such lucky individual was Doug, a Mustang-obsessed, corporate retail employee from New Jersey.[4] Determined to be among the first to rent a GT-H, Doug spent nearly a month phoning Hertz and monitoring its web site until one day in early June 2006 he was able to locate one at Logan International Airport in Boston, Massachusetts.[5] A few days after finalizing his reservation and getting the necessary time off of work, Doug flew to Boston to begin his odyssey with the GT-H.[6] Although Doug spent most of his precious time in the GT-H positioned behind its sporty three-spoke steering wheel, he did make time for a couple of stops, including a winning one in Syracuse, New York.[7] While in Syracuse, Doug entered the GT-H in a local car show, where much to his surprise he beat out all other Mustang owners for "Best in Show" honors—a definite first for a rental car.[8]

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1 *New York Auto Show*, CAR & DRIVER, June 2006, at 40.

2 David Newhardt, *2006 Ford Shelby GT-H*, SPORTS CAR INT'L, November 2006, at 24.

3 *New York Auto Show*, *supra* note 1.

4 Steve Spence, *And the Winner Is . . . a Rental Car!*, CAR & DRIVER, October 2006, at 40.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

Now imagine that instead of traveling from Boston to Syracuse alone, Doug invited a friend to go along for the ride. Suppose that the friend is also a big-time Mustang fanatic and thus insists on taking turns at the wheel. Although Doug and the friend are tempted to explore the full performance of the GT-H, they are both continually mindful of all traffic laws. Nevertheless, despite their cautious driving, Doug and the friend are pulled over by a highway patrolman just a few miles outside of Syracuse. The friend, who is driving at the time, notices that the patrolman has an astonished look on his face as he approaches the GT-H.

Instead of requesting that the friend hand over his driver's license or vehicle registration, the patrolman asks that he pop the hood. The patrolman has no reason for pulling them over other than to check out the GT-H. After looking under the hood for a few minutes, the patrolman asks if he can take a closer look inside the car; but before Doug can tell him to go right ahead, the friend interjects and tells the patrolman that they don't have time because they really need to get back on the road as soon as possible. The friend's comments surprise Doug and annoy the patrolman. The patrolman, who is determined to get a closer look at the GT-H, proceeds to look inside the car without Doug's or the friend's permission. During his inspection of the GT-H's sport gauges, leather seats, and commemorative placard, the patrolman stumbles across a small plastic baggie filled with marijuana that is hidden in the driver's side door map pocket. The patrolman then immediately places both Doug and the friend under arrest for possession.[9]

After determining that the marijuana belonged to the friend and that Doug was unaware of its presence within the GT-H, the Onondaga County District Attorney decides to charge only the friend with possession. Now facing heavy fines and possible jail time, the friend files a motion to suppress the evidence (i.e., the marijuana) obtained by the patrolman during his search of the GT-H. What result?

Surprisingly, in many jurisdictions the friend's motion would be denied for lack of standing, since it was Doug who had rented the GT-H and was listed on the rental agreement as an authorized driver, not the friend. In fact, the Fourth, Fifth, and Tenth Circuits have developed a bright-line test that denies standing to an unauthorized driver of a rental car (i.e., a driver who is not listed as an authorized driver on a rental agree-

[9] Although this scenario is a fictional one, the actual ending to Doug's journey with the GT-H was just as tragic. After only having the GT-H for three days, Doug hit a deer while traveling west through the Pocono Mountains on his way to see friends and family in Chicago, Illinois. *Id.* Doug was not hurt in the accident, but the GT-H sustained substantial front end damage. Spence, *supra* note 4, at 40. Since there was no replacement GT-H available, Doug was left with no other choice but to return home to New Jersey six days earlier than he had planned. *Id.*

ment).[10] The Ninth Circuit, however, recently rejected this bright-line test, choosing instead to join the Eighth Circuit in adopting a different bright-line test, which grants standing to a defendant who has received permission to use a rental car from an authorized driver.[11] The Sixth Circuit, like the Eighth and Ninth Circuits, has also refused to implement the Fourth, Fifth, and Tenth Circuits' bright-line test, but has decided to develop a "totality of the circumstances" test, which examines a range of factors surrounding an unauthorized driver's use of a rental car, as opposed to a different bright-line test.[12] Thus, there is currently a split among the federal circuit courts on the issue of whether an unauthorized driver of a rental car has standing to assert his or her Fourth Amendment rights and challenge the legality of a search. This Comment argues that the Eighth and Ninth Circuits' bright-line test is more faithful to Fourth Amendment "search" jurisprudence—particularly the Supreme Court's seminal decision in *Rakas v. Illinois*[13]—than the Fourth, Fifth, and Tenth Circuits' bright-line test or the Sixth Circuit's "totality of the circumstances" test and should therefore be adopted by all federal circuit courts.

This Comment proceeds in three parts. First, Part I provides a brief overview of the Fourth Amendment, the exclusionary rule, and the standing requirement. Part II then explains the three different approaches that have been developed by the federal circuit courts to address the issue of an unauthorized driver's standing to challenge the legality of a rental car search. Finally, Part III conducts a post-*Rakas* examination of those three different approaches and concludes that the Eighth and Ninth Circuits' bright-line test should be adopted by all federal circuit courts because it is more faithful to Fourth Amendment "search" jurisprudence and more suitable to safeguard constitutional guarantees by effectively and efficiently deterring police mis-conduct.

I. BACKGROUND OF LAW

The Fourth Amendment is composed of a mere fifty-four words, but it plays a crucial role in preserving the most basic of liberties that every American enjoys—principally, the freedom from unreasonable governmental intrusion. In *Harris v. United States*,[14] Justice Frankfurter went so far as to state that the Fourth Amendment holds "a place second to none in the

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10 United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994); United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990); United States v. Roper, 918 F.2d 885, 887-88 (10th Cir. 1990).

11 United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006); United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998).

12 United States v. Smith, 263 F.3d 571, 586 (6th Cir. 2001).

13 439 U.S. 128 (1978).

14 331 U.S. 145 (1947).

Bill of Rights."[15] Yet, despite having such constitutional significance, the law pertaining to the Fourth Amendment "has not—to put it mildly—run smooth."[16] In the following Parts, this Comment briefly reviews the historical backdrop of the Fourth Amendment and explains the principles behind the exclusionary rule—the judicially created remedy for Fourth Amendment violations—and the standing requirement.

A. *The Fourth Amendment*

In 1767, the British Parliament passed the Townsend Revenue Act, which imposed high tariffs on many goods imported into the colonies.[17] In order to enforce this Act, the British Parliament authorized the highest court in each colony to issue writs of assistance to customs officers.[18] Armed with these writs, customs officers had the power to search for uncustomed goods wherever they pleased, including in the private homes of colonists.[19] The abuse of this power quickly led to widespread resentment among colonists and served as "the first in a chain of events which led directly and irresistibly to revolution and independence."[20]

In an attempt to safeguard "the people" against the arbitrary invasions of privacy experienced by colonists at the hands of customs officers before the Revolution, the Framers of the Constitution adopted the Fourth Amendment.[21] The Fourth Amendment provides:

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15 *Id.* at 157 (Frankfurter, J., dissenting).

16 Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring). Why not? Many legal commentators have suggested that the "imperfect state of the art of Fourth Amendment jurisprudence rests on the terms of the amendment itself." BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 1-2 (1986). The Fourth Amendment, like many other amendments to the Constitution, is composed of rather general and ambiguous language, which has presented the judiciary with significant interpretive challenges. *Id.* at 2. As a result, many areas of Fourth Amendment jurisprudence have been marred by "inconstancy and intellectual confusion." *Id.* at 4.

17 The Townsend Revenue Act, http://www.ushistory.org/declaration/related/townshend.htm (last visited Oct. 17, 2007).

18 Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79, 90 (1999).

19 ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 5 (2003).

20 Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 510 (1988) (quoting Albert Bushnell Hart, *Introduction* to AMERICAN HISTORY LEAFLETS NO. 33 (Albert Bushnell Hart & Edward Channing eds., 1906).

21 BLOOM, *supra* note 19, at 11; *see also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 310 (1998) ("[T]he Fourth Amendment 'took its origin in the determination of the framers' to create safeguards against those arbitrary and abusive invasions." (quoting Weeks v. United States, 232 U.S. 383, 390 (1914))).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[22]

The Fourth Amendment was designed to protect "the people" from the power of the government by prohibiting unreasonable searches and seizures.[23] Thus, in order for the protection of the Fourth Amendment to apply, two requirements must be satisfied: first, there must be a government action, as opposed to a private action; and second, there must be a search or seizure.[24] However, determining whether these two requirements have been satisfied is often difficult because it is not always apparent what constitutes a "government action" or a "search" or "seizure."[25] Since this Comment is not specifically concerned with what constitutes a "government action" or a "seizure," those issues will be set aside, and the subsequent discussion will focus on what constitutes a "search."

Before the Supreme Court's landmark decision in *Katz v. United States*[26] in 1967, the scope of Fourth Amendment protections was limited by the common law property concept of trespass.[27] Prior to *Katz*, the Court relied on the "trespass" doctrine to determine whether a government action constituted a search.[28] According to this doctrine, a search did not occur unless there was "an actual physical intrusion into a constitutionally protected area such as a home."[29] For example, in *Olmstead v. United States*,[30] the Court found that wiretapping did not amount to a search because no "physical invasion" occurred.[31] Similarly, in *Goldman v. United States*,[32] the Court held that federal authorities did not violate the Fourth Amendment when they placed a detectaphone against an office wall to hear conversations that were taking place in the next office because they did not trespass onto the defendants' property.[33]

The Court abandoned the "trespass" doctrine in favor of a more expansive approach to Fourth Amendment rights based on "reasonable expecta-

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22 U.S. CONST. amend. IV.

23 BLOOM, *supra* note 19, at 39.

24 *Id.*

25 *See id.* at 39-44; *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 357-59 (1974) (search and seizure).

26 389 U.S. 347 (1967).

27 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 6.02 (4th ed. 2006).

28 *Id.* § 6.03[A].

29 BLOOM, *supra* note 19, at 45.

30 277 U.S. 438 (1928).

31 *Id.* at 466.

32 316 U.S. 129 (1942).

33 *Id.* at 134-35.

tions of privacy" in *Katz*.[34] In *Katz*, federal authorities attached an electronic listening device to the outside of a public telephone booth to record the defendant's conversations.[35] At trial, the government, over the defendant's objections, was allowed to admit the recordings of the defendant's conversations into evidence.[36] On appeal, the Ninth Circuit affirmed the defendant's conviction, holding that federal authorities did not violate the defendant's Fourth Amendment rights because "[t]here was no physical entrance into the area occupied by [the defendant]."[37]

The Supreme Court reversed the defendant's conviction, holding that the defendant's Fourth Amendment rights had been violated even though there was no physical intrusion into the telephone booth.[38] The Court stated that since the "Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," it no longer made sense to determine the Fourth Amendment's reach "upon the presence or absence of a physical intrusion into any given closure."[39] Justice Stewart, writing for the Court, concluded that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[40]

Although Justice Stewart's opinion in *Katz* declared that the Fourth Amendment "protects people, not places,"[41] it failed to provide a workable standard for the Fourth Amendment's coverage.[42] Consequently, subsequent decisions by the Court have relied on what has come to be known as the "legitimate expectation of privacy" standard that Justice Harlan outlined in his concurring opinion in *Katz*.[43] In his concurrence, Justice Harlan agreed with the majority's holding that the Fourth Amendment protects "people, not places" but further asked "what protection it affords to those people."[44] To answer this question, Justice Harlan suggested that in order for a person to qualify for the protection of the Fourth Amendment, two requirements must be satisfied: "first [he or she must] have exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation [must] be one that society is prepared to recognize as 'reasonable.'"[45]

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34 Katz v. United States, 389 U.S. 347, 362 (1967) (Harlan, J., concurring).

35 *Id.* at 348 (majority opinion).

36 *Id.*

37 *Id.* (first alteration in original) (quoting Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966)).

38 *Id.* at 359.

39 *Id.* at 353.

40 *Katz*, 389 U.S. at 351.

41 *Id.*

42 DRESSLER & MICHAELS, *supra* note 27, § 6.02[B].

43 BLOOM, *supra* note 19, at 45.

44 *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

45 *Id.*

B. *The Exclusionary Rule*

1. The Adoption of the Exclusionary Rule

Although the text of the Fourth Amendment guarantees "[t]he right . . . to be secure . . . against unreasonable searches and seizures,"[46] it is silent on the appropriate remedy for violations of this right. Accordingly, in *Weeks v. United States*,[47] the Supreme Court adopted the exclusionary rule, a judicially created remedy for Fourth Amendment violations.[48] The exclusionary rule is applied in criminal trials to bar the use of evidence obtained from unreasonable searches and seizures.[49] The Court has declared that without such a remedy, the Fourth Amendment "might as well be stricken from the Constitution."[50]

Initially, the effect of the exclusionary rule as a remedy for Fourth Amendment violations was limited, since the Court in *Weeks*, and subsequently in *Wolf v. Colorado*,[51] held that the rule applied only to federal prosecutions.[52] However, half a century later, the Court extended the exclusionary rule to state prosecutions in *Mapp v. Ohio*.[53] Justice Clark, writing for the Court, stated that the exclusionary rule was "logically and constitutionally necessary," and that if such a rule was not made applicable to state prosecutions, then "the assurance against unreasonable . . . searches and seizures would be, 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties . . . ."[54]

2. Three Rationales for the Exclusionary Rule

In *Weeks* and *Mapp*, the Court offered three rationales for adopting the exclusionary rule.[55] First, the exclusionary rule upholds the "imperative of judicial integrity."[56] The *Weeks* Court declared that those who possess the authority to "execute the criminal laws of [this] country" and violate those laws to obtain convictions should "find no sanction in the judgments of the

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46 U.S. CONST. amend. IV.

47 232 U.S. 383 (1914).

48 *Id.* at 392-94.

49 INGA L. PARSONS, FOURTH AMENDMENT PRACTICE AND PROCEDURE 77-78 (2005).

50 *Weeks*, 232 U.S. at 393.

51 338 U.S. 25, 33 (1949).

52 *Id.* at 28, 33.

53 367 U.S. 643 (1961).

54 *Id.* at 655-56.

55 *See* Richard B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493, 499-501 (1980).

56 *Mapp*, 367 U.S. at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

courts, which are charged at all times with the support of the Constitution."[57] Additionally, in *Mapp*, Justice Clark cautioned, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[58] Essentially, the exclusionary rule preserves judicial integrity by preventing judges from condoning wrongdoing.[59]

Second, the exclusionary rule deters police misconduct.[60] In *Mapp*, the Court noted that the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[61] Basically, if police know that courts will exclude unconstitutionally obtained evidence at trial, then they will be deterred from violating constitutional rights while exercising their authority.[62]

Finally, the exclusionary rule provides a remedy for Fourth Amendment violations, a remedy that the *Mapp* Court described as "logically and constitutionally necessary."[63] Without such a remedy for Fourth Amendment violations, courts, as Justice Clark explained in *Mapp*, would be granting the right to be free from unreasonable searches and seizures "but . . .

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57 Weeks v. United States, 232 U.S. 383, 392 (1914).

58 *Mapp*, 367 U.S. at 659.

59 *See Weeks*, 323 U.S. at 394 (stating that allowing the government to use evidence obtained in violation of the Fourth Amendment "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution").

60 *Mapp*, 367 U.S. at 656.

61 *Id.* (quoting *Elkins*, 364 U.S. at 217); *see also* United States v. Calandra, 414 U.S. 338, 347 (1974) ("[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . .").

62 DRESSLER & MICHAELS, *supra* note 27, § 20.02. Note that many legal commentators have, through the use of empirical studies, drawn into question the effectiveness of the exclusionary rule as a deterrent. *See, e.g.*, William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 339 (1991) ("The fact that even well-trained officers were so frequently unable to identify and apply [search and seizure] rules indicates that, as currently formulated, the complexity of the law imposes a substantial limitation on the possibility of deterring police illegality."). *But see* Amsterdam, *supra* note 25, at 431-32. Amsterdam asserts:

> [The exclusionary rule] is not supposed to "deter" in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity.
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> Rather, the exclusionary rule is designed to operate in the manner of the procedure now being used in some appliance stores with the encouragement of police authorities: branding the social security number of the purchaser into the chassis of new television sets in order to make them less attractice [sic] as objects of larceny by diminishing their resale value in the hands of anyone but the true owner. Of course, a branded television set may nonetheless be stolen by someone who does not notice it is branded, or who thinks he can sell it with the brand, or who simply wants to watch the Superbowl on it. But at least the effort to depreciate its worth makes it less of an incitement than it might be.

Id. at 431-32.

63 *Mapp*, 367 U.S. at 655-56.

withhold[ing] its privilege and enjoyment."[64] In essence, when courts apply the exclusionary rule, they are protecting the constitutional rights of those who have been the victims of unreasonable searches or seizures.[65]

3. Limitations on the Exclusionary Rule

The exclusionary rule has been the cause of much controversy since its adoption by the *Weeks* Court nearly a century ago.[66] Courts have been concerned that applying the exclusionary rule allows "[t]he criminal . . . to go free because the constable has blundered."[67] This concern has led the Court to impose limitations on the application of the exclusionary rule in state and federal prosecutions.[68] For example, in *United States v. Leon*,[69] the Court introduced the good faith exception to the exclusionary rule.[70] The good faith exception allows evidence seized pursuant to a search warrant that is later found to be invalid to be used at trial against a defendant if the police reasonably believed that the warrant was valid at the time of the seizure.[71] This and other exceptions, including the standing requirement discussed below, have had a significant impact on the application of the exclusionary rule in state and federal prosecutions.[72] Since the exclusionary rule is essentially the only available remedy for Fourth Amendment violations, the Court's recent efforts to restrict its applicability have in effect limited the protection of the Fourth Amendment.[73]

C. *The Standing Requirement*

In order for a defendant to assert his or her Fourth Amendment rights and claim the benefit of the exclusionary rule, he or she must have stand-

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64 *Id.*

65 *See* Kuhns, *supra* note 55, at 500 ("To refuse . . . to apply the exclusionary rule . . . would make the Fourth Amendment 'a form of words, valueless and undeserving of mention in the perpetual charter of inestimable human liberties . . . .'" (internal quotation marks omitted) (quoting *Mapp*, 367 U.S. at 655)).

66 *See* BLOOM, *supra* note 19, at 24.

67 People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.).

68 BLOOM, *supra* note 19, at 24; *see also* Wesley MacNeil Oliver, *Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. REV. 201, 203 (2005) (noting that exceptions to the exclusionary rule are generally created when the Court determines that the societal costs of excluding evidence outweigh the deterrent benefits).

69 468 U.S. 897 (1984).

70 *Id.* at 922.

71 DRESSLER & MICHAELS, *supra* note 27, § 20.06[A][1]-[2].

72 *See infra* Part I.C.

73 *See* BLOOM, *supra* note 19, at 24.

ing.[74] To have standing, a defendant must show that his or her Fourth Amendment rights were violated by establishing that he or she was "a victim of a search or seizure . . . as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[75] Thus, a defendant must first show that he or she was a victim of a search or seizure to establish standing to challenge the legality of a search or seizure.

Initially, courts adopted a narrow approach to the standing requirement, which was derived from common law property concepts.[76] Under this narrow approach, a defendant had to have a property or possessory interest in the place or area searched or in the item seized in order to establish standing.[77] Thus, a defendant who was merely a guest or an invitee in the home of a friend or loved one when a search or seizure occurred would not be able to establish standing to challenge the legality of that search or seizure.

The Supreme Court abandoned this narrow approach to the standing requirement in *Jones v. United States*.[78] In *Jones*, the defendant was at a friend's apartment when police, who were stationed around the exterior of the building, observed him placing narcotics on an awning just outside a window.[79] Upon searching the apartment and finding the narcotics, police arrested the defendant and charged him with possession.[80] Prior to trial, the defendant moved to suppress the evidence seized by police during their search of the apartment.[81] At the suppression hearing, the government argued that the defendant did not have standing to challenge the legality of the search because he did not have a property or possessory interest in the friend's apartment or in the evidence seized.[82] The trial court agreed and denied the defendant's motion.[83] The D.C. Court of Appeals then affirmed the trial court's decision.[84]

The Supreme Court reversed the lower courts, holding that the defendant did have standing to assert his Fourth Amendment rights and challenge

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74 Amsterdam, *supra* note 25, at 360.

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

76 Simien, *supra* note 20, at 499.

77 *See, e.g.*, Wilson v. United States, 218 F.2d 754, 756 (10th Cir. 1955) ("The law is well settled that the protection of the Fourth Amendment to the Constitution against unreasonable search and seizure is personal to the one asserting it, and one who claims no property or possessory interest in that which has been seized as a result of a search may not object to its introduction in evidence." (citing Steeber v. United States, 198 F.2d 615, 617 (10th Cir. 1952))).

78 362 U.S. 257 (1960).

79 *Id.* at 259.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Jones*, 362 U.S. at 260.

the legality of the search.[85] The Court found that a defendant need not have a property or possessory interest in the place or area searched or in the item seized to have standing.[86] The Court recognized instead that a defendant "legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[87] The Court concluded that the defendant's presence in the friend's apartment was legitimate because he had a key, was an overnight guest, and was present at the time of the search.[88]

The *Jones* Court's expansive approach to the standing requirement went beyond the protection of property interests to the protection of privacy interests.[89] The Court's decision to grant standing to a defendant "legitimately on the premises" at the time of a search was a significant departure from the narrow approach that had been previously espoused by the lower courts.[90]

Two decades later, the Court, in *Rakas v. Illinois*,[91] abandoned the "legitimately on the premises" approach to the standing requirement and adopted an inquiry similar to that seen in *Katz*, which focuses directly on the substance of a defendant's Fourth Amendment claim that he or she had a legitimate expectation of privacy in the place or area searched.[92] In *Rakas*, the defendants, Frank Rakas and Lonnie King, were traveling in a car with two female companions, one of whom was driving, when they were stopped by police in connection with an armed robbery that had occurred earlier in the day.[93] After ordering the defendants and their companions out of the car, police searched the interior of the vehicle and discovered a box of shotgun shells in the glove compartment and a sawed-off shotgun under the front passenger seat.[94]

Prior to trial, the defendants moved to suppress the evidence seized by police during the search of the vehicle.[95] The trial court denied the defendants' motion, finding that they lacked standing to challenge the legality of the search because they were merely passengers in the car and neither of

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85 *Id.* at 263.

86 *Id.* at 265.

87 *Id.* at 267.

88 *Id.* at 259, 265.

89 *See id.* at 266.

90 *See* Simien, *supra* note 20, at 500 (noting that the *Jones* Court "broke from the prior cases which had viewed the requisite property interests . . . too narrowly" and that it rejected "the notion that common law rules of ownership were dispositive of one's right to claim the fourth amendment's protection of the place searched").

91 439 U.S. 128 (1978).

92 *See id.* at 138-40.

93 *Id.* at 130.

94 *Id.*

95 *Id.*

them had a property or possessory interest in the gun or the shells.[96] The state appellate court affirmed the trial court's decision denying the defendants' motion, holding that a passenger in a car lacked standing to challenge the legality of a search.[97]

On appeal before the Supreme Court, the defendants, relying on the Court's approach to the standing requirement in *Jones*, argued that they had standing because they were "legitimately on the premises" at the time of the search.[98] The Court, however, rejected the defendants' arguments, finding that the "legitimately on the premises" approach to the standing requirement adopted in *Jones* created "too broad a gauge for measurement of Fourth Amendment rights."[99]

In abandoning the "legitimately on the premises" approach to the standing requirement, the Court decided that standing should no longer be analyzed "distinct[ly] from the merits of a defendant's Fourth Amendment claim."[100] The Court found instead 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."[101] The Court explained, "Fourth Amendment rights are personal in nature . . . , and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing."[102] Thus, the Court collapsed the issue of the defendants' standing to challenge the legality of the search into the merits of their Fourth Amendment claim.[103]

In assessing the merits of the defendants' Fourth Amendment claim, the Court, using the analysis seen in *Katz*,[104] considered whether they had a legitimate expectation of privacy in the car at the time of the search.[105] The Court found that although the defendants were in the car with the permis-

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96 *Id*. at 131.

97 *Rakas*, 439 U.S. at 131.

98 *Id*. at 132.

99 *Id*. at 142.

100 *Id*. at 138-39.

101 *Id*. at 139.

102 *Id*. at 140.

103 *Rakas*, 439 U.S. at 139; *see also* Richard A. Williamson, *Fourth Amendment Standing and Expectations of Privacy:* Rakas v. Illinois *and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831, 835 (1979) (stating that the significance of the *Rakas* decision lies in the fact that it was the first case in which the Court "expressly acknowledged the close relationship between the concept of "standing" and the merits of substantive claims presented by litigants"). Although the concept of a separate standing issue was rejected by the Court in *Rakas*, lower courts have continued to use "standing" in determining whether a defendant may challenge the legality of a search. *See, e.g.*, United States v. Smith, 263 F.3d 571, 582 (6th Cir. 2001) ("In the present case, we . . . use 'standing' to refer to the threshold substantive determination of whether [the defendant] has a reasonable expectation of privacy under the Fourth Amendment.").

104 *See supra* Part I.A.

105 *Rakas*, 439 U.S. at 143, 148-49.

sion of its owner, they did not have a legitimate expectation of privacy in the areas of the car that were searched—the glove compartment and under the passenger seat.[106] The Court explained that "these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy."[107] Thus, the Court affirmed the lower courts and held that the defendants' Fourth Amendment rights had not been violated by police because they did not have a legitimate expectation of privacy in the areas searched.[108]

Since *Rakas* was decided in 1978, the Court has not reexamined the issue of standing in the context of automobile searches. However, the Court has decided several important cases regarding the issue of standing in the context of residential searches. For example, in *Minnesota v. Olson*,[109] the Court held that the defendant, who was an overnight guest in the home of a friend, had a legitimate expectation of privacy in the premises and therefore could challenge the legality of the search.[110] Conversely, in *Minnesota v. Carter*,[111] the Court held that the defendant, who was in the home of another defendant for the purpose of a business transaction, did not have a legitimate expectation of privacy in the premises and therefore could not challenge the legality of the search.[112]

II. THE CIRCUIT SPLIT

The federal circuit courts have adopted three different approaches to address the issue of whether an unauthorized driver of a rental car has standing to challenge the legality of a search. The first approach is seen in the Fourth, Fifth, and Tenth Circuits. These circuits have developed a

106 *Id.* at 147.

107 *Id.* at 148-49.

108 *Id.* at 148-50.

109 495 U.S. 91 (1990).

110 *Id.* at 95-97.

111 525 U.S. 83 (1998).

112 *Id.* at 91. The Court's ruling in *Carter* that business guests, unlike overnight guests, may not have a legitimate expectation of privacy in their host's home has incited much debate within the legal community. In fact, there are many legal commentators who have argued that there is no constitutional basis for distinguishing between overnight guests and business guests when it comes to determining the Fourth Amendment's coverage. *See, e.g.*, Edwin J. Butterfoss & Mary Sue B. Snyder, *Be My Guest: The Hidden Holding of* Minnesota v. Carter, 22 HAMLINE L. REV. 501, 529 (1999) (concluding that the result of the Court's decision in *Carter* will be a "'standing' jurisprudence that undervalues expectations of interpersonal privacy and fails to recognize that 'much of what is important in human life takes place in a situation of shared privacy'" (quoting Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1593 (1987))); Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 274 ("There is no basis for excluding guests who do not remain overnight, because it is only what they say and do while they are present that is protected.").

bright-line test, which denies standing to an unauthorized driver of a rental car.[113] The second approach is seen in the Eighth and Ninth Circuits. These circuits have developed a different bright-line test, which grants an unauthorized driver of a rental car standing if he or she had the permission of an authorized driver to use the car at the time of the search.[114] The final approach is seen in the Sixth Circuit. This circuit has rejected the bright-line tests of the other circuits and developed a "totality of the circumstances" test that considers a range of factors surrounding an unauthorized driver's use of the rental car to determine whether he or she has standing.[115]

A. *The Bright-Line Test of the Fourth, Fifth, and Tenth Circuits*

The first approach developed by the federal circuit courts to determine whether an unauthorized driver of a rental car has standing to challenge the legality of a search is seen in the Fourth, Fifth and Tenth Circuits. These circuits have adopted a bright-line test that denies standing to a driver of a rental car who is not listed as an authorized driver on the rental agreement.

The Tenth Circuit, in *United States v. Obregon*,[116] was the first of these circuits to address the issue of an unauthorized driver's standing. In *Obregon*, the defendant, Fernando Obregon, was driving on Interstate 40 through western New Mexico when he was stopped at a police roadblock, which had been set up to conduct routine driver's license and car registration checks.[117] After discovering that Obregon was driving a rental car with expired license plates and that he was not listed as an authorized driver on the rental agreement, police requested that he park the car on the shoulder of the interstate.[118] While parked, Obregon consented to having the car searched by police.[119] Upon finding three small bags of cocaine in his luggage, police placed Obregon under arrest.[120]

Prior to trial, Obregon moved to suppress the evidence seized by police during the search of the car.[121] The district court denied Obregon's motion, finding that his relationship to the car was "too attenuated to support a claim of standing."[122] On appeal, the Tenth Circuit affirmed, holding that

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113 United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994); United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990); United States v. Roper, 918 F.2d 885, 888 (10th Cir. 1990).

114 United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006); United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998).

115 United States v. Smith, 263 F.3d 571, 586 (6th Cir. 2001).

116 748 F.2d 1371 (10th Cir. 1984).

117 *Id.* at 1373.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.* at 1374.

122 United States v. Obregon, 573 F. Supp. 876, 879 (D.N.M. 1983).

Obregon, as an unauthorized driver of a rental car, did not have standing to challenge the legality of the search.[123] The court found that despite having permission to use the car from an authorized driver and being in sole possession of the vehicle at the time of the search, Obregon did not have a legitimate expectation of privacy in the car and therefore lacked standing to challenge the legality of the search.[124]

The Tenth Circuit again confronted the issue of an unauthorized driver's standing in *United States v. Roper*.[125] In *Roper*, the defendant, Michael Eugene Roper, Jr., was driving through Oklahoma with some friends when a highway patrol trooper stopped him for a traffic violation.[126] After issuing Roper a citation, the trooper asked to search the car.[127] Roper gave his consent, and the trooper proceeded to search the car.[128] He found two packages of cocaine hidden within the upholstery of the front seats.[129]

After being indicted on charges of possession with intent to distribute, Roper moved to suppress the evidence seized by the trooper during his search of the car.[130] At an evidentiary hearing on the motion, it was established that the car Roper was driving was a rental from California and that he was not listed as an authorized driver on the rental agreement.[131] The district court denied Roper's motion, holding that as an unauthorized driver of a rental car he lacked standing to challenge the legality of the search.[132]

On appeal, the Tenth Circuit upheld the district court's decision, finding the facts of the case to be similar to those considered in *Obregon*.[133] The court held that Roper, like the defendant in *Obregon*, did not have standing to challenge the legality of the search because he could not establish a legitimate expectation of privacy in a car that he neither owned nor lawfully possessed.[134]

The Fifth Circuit adopted similar reasoning in *United States v. Boruff*.[135] In *Boruff*, the defendant, James O. Boruff, was returning to Texas from Mexico in a car that had been rented by his girlfriend when he was stopped by a border patrol agent.[136] The agent suspected that Boruff was involved in a drug smuggling operation because he observed him following

123 *Obregon*, 748 F.2d at 1374-75.
124 *Id*.
125 918 F.2d 885 (10th Cir. 1990).
126 *Id*. at 886.
127 *Id*.
128 *Id*.
129 *Id*.
130 *Id*. at 885.
131 *Roper*, 748 F.2d at 886.
132 *Id*.
133 *Id*. at 887.
134 *Id*. at 887.
135 909 F.2d 111 (5th Cir. 1990).
136 *Id*. at 113.

closely behind another vehicle that border patrol agents knew contained hundreds of pounds of marijuana.[137] After placing Boruff under arrest, the agent searched his vehicle and discovered four thousand dollars in cash.[138] Boruff was then indicted on charges of conspiracy to possess.[139]

Boruff moved to suppress the evidence obtained by the agent at the time of the search.[140] The district court denied Boruff's motion, finding that he had no legitimate expectation of privacy in the rental car and therefore lacked standing to challenge the legality of the search.[141] The Fifth Circuit affirmed the decision, holding that although Boruff had permission to use the car from an authorized driver and was in sole possession of the car at the time of the search, he did not have a legitimate expectation of privacy in the car because, under the terms of the rental agreement, only his girlfriend was authorized to drive the car.[142] The court found that Boruff's girlfriend had no authority to give him permission to use the car and that the express terms of the rental agreement forbade the use of the car in any illegal activity, which Boruff clearly violated by involving the car in his drug smuggling operation.[143]

The Fourth Circuit followed the reasoning of both the Fifth and Tenth Circuits in *United States v. Wellons*.[144] In *Wellons*, the defendant, Sherman L. Wellons, Jr., was driving through West Virginia on his way to Pittsburgh, Pennsylvania when he was stopped by a state trooper for exceeding the posted speed limit.[145] When the trooper asked to see his driver's license and vehicle registration, Wellons explained that the car he was driving had been rented by a friend and that he did not have the rental agreement with him.[146] The trooper then issued Wellons a citation and contacted the rental company to verify his claim.[147] The rental company told the trooper that Wellons was not an authorized driver and that it wanted the car im-

137 *Id*. at 114.

138 *Id*.

139 *Id*. at 115.

140 *Id*.

141 *Boruff*, 909 F.2d at 115.

142 *Id.* at 117. Note that the Fifth Circuit has delivered conflicting opinions on the issue of whether an unauthorized driver has standing to challenge the legality of a rental car search. In *United States v. Kye Soo Lee*, 898 F.2d 1034 (5th Cir. 1990), which was decided three months before *Boruff*, the Fifth Circuit held that an unauthorized driver of a rental car may have standing to challenge the legality of a search if he or she had the permission of the authorized driver to use the car at the time of the search. *Id.* at 1038. However, since *Kye Soo Lee* and *Boruff* were decided, Fifth Circuit cases have repeatedly followed the bright-line approach that was developed in *Boruff*. *See, e.g.*, United States v. Seeley, 331 F.3d 471, 472 n.1 (5th Cir. 2003) (noting that *Kye Soo Lee* "is not controlling here because it neither reflects nor addresses the terms of the truck rental agreement").

143 *Boruff*, 909 F.2d at 117.

144 32 F.3d 117 (4th Cir. 1994).

145 *Id*. at 118.

146 *Id*.

147 *Id*.

pounded.[148] After Wellons refused to consent to a search of the car, the trooper ran his drug-sniffing dog around the exterior of the car.[149] The dog alerted to the presence of narcotics.[150] Upon searching the vehicle and discovering several bags of cocaine and heroin, the trooper placed Wellons under arrest.[151]

At trial, Wellons was convicted of conspiracy to distribute and possession with intent to distribute.[152] Wellons appealed his conviction to the Fourth Circuit, challenging the legality of the search.[153] The Fourth Circuit affirmed Wellons' conviction, holding that despite being in possession of the car at the time of the search and perhaps having the permission of an authorized driver, he did not have a reasonable expectation of privacy in the car and therefore lacked standing to challenge the legality of the search.[154] The court found that only the lawful owner of the vehicle (i.e., the rental car company) could authorize Wellons to use the car.[155]

B. *The Bright-Line Test of the Eighth and Ninth Circuits*

The second approach developed by the federal circuit courts to determine whether an unauthorized driver of a rental car has standing to challenge the legality of a search is seen in the Eighth and Ninth Circuits. These circuits, like the Fourth, Fifth, and Tenth Circuits, have also adopted a bright-line test. However, their bright-line test differs from that of the other circuits in that it grants an unauthorized driver of a rental car standing if he or she had the permission of an authorized driver to use the car at the time of the search.

The Eighth Circuit first addressed the issue of an unauthorized driver's standing in *United States v. Muhammad*.[156] In *Muhammad*, the defendant, Wallace D. Muhammad, was driving in Lincoln, Nebraska in a car that had been leased to another person when the police stopped him in connection with a drug investigation.[157] Upon searching the vehicle and discovering cocaine in the trunk, the police placed Muhammad under arrest.[158]

148 *Id.* at 118-19.
149 *Id.*
150 *Wellons*, 32 F.3d at 119.
151 *Id.*
152 *Id.* at 118.
153 *Id.*
154 *Id.* at 119 & n.2.
155 *Id.* at 119.
156 58 F.3d 353 (8th Cir. 1995).
157 *Id.* at 354.
158 *Id.*

Prior to trial, Muhammad moved to suppress the evidence obtained during the search of the rental car.[159] The district court denied the motion, finding that Muhammad had failed to establish that he had permission to use the vehicle from the rental company or the authorized driver listed on the rental agreement.[160] On appeal, the Eighth Circuit affirmed, holding that since Muhammad presented no evidence that he had been given permission to use the car by the authorized driver, he did not have either a subjective or objective expectation of privacy in the car and therefore lacked standing to challenge the legality of the search.[161] The court noted that in order to satisfy the standing requirement, Muhammad needed to make an affirmative showing that he had consensual possession of the car at the time of the search (i.e., that the authorized driver or rental company gave him permission to use the car).[162]

The Eighth Circuit revisited the issue of an unauthorized driver's standing in *United States v. Best*.[163] In *Best*, the court held that if an unauthorized driver has been granted permission to use a rental car by an authorized driver, then he or she would have a reasonable expectation of privacy in the car and, therefore, would have standing to challenge the legality of a search.[164]

The Ninth Circuit followed the Eighth Circuit's reasoning and adopted its bright-line test in *United States v. Thomas*.[165] In *Thomas*, the defendant, Roshon E. Thomas, was returning home to Spokane, Washington in a rental car after having spent several days in California, when he was stopped by the police in connection with a drug investigation.[166] Upon searching Thomas' rental vehicle, the police found several hundred grams of cocaine and over a thousand dollars in cash.[167]

Before trial, Thomas moved to suppress the evidence obtained by the police at the time of the search.[168] During the suppression hearing, it was established that Thomas was not listed as an authorized driver on the rental agreement and that he had not been given permission to use the vehicle by the rental car company or the authorized driver.[169] Accordingly, the district court denied the motion, holding that Thomas, as an unauthorized driver,

159 *Id.* at 355.
160 *Id.*
161 *Id.*
162 *Muhammad*, 58 F.3d at 355.
163 135 F.3d 1223 (8th Cir. 1998).
164 *Id.* at 1225.
165 447 F.3d 1191 (9th Cir. 2006).
166 *Id.* at 1194-95
167 *Id.* at 1195.
168 *Id.*
169 *Id.*

had no legitimate expectation of privacy in the car and therefore lacked standing to challenge the legality of the search.[170]

On appeal, the Ninth Circuit affirmed on the issue of Thomas's standing to challenge the legality of the search.[171] Upon reviewing the approaches developed in other circuits, the court decided to adopt the approach seen in the Eighth Circuit, which grants standing to an unauthorized driver who had the permission of an authorized driver to use the car at the time of the search.[172] The court found that "a defendant may have a legitimate expectation of privacy in another's car if the defendant is in possession of the car, has the permission of the owner, holds a key to the car, and has the right and ability to exclude others, except the owner, from the car."[173] The court refused to base Fourth Amendment rights "on a rental agreement to which the unauthorized driver was not a party and may not capture the nature of the unauthorized driver's use of the car."[174] The court noted that an unauthorized driver may still have a legitimate privacy interest in a rental car even though he or she is in technical violation of the rental agreement.[175] The court concluded, however, that Thomas lacked standing to challenge the legality of the search because he had not established that he had permission to use the rental car from either the rental car company or the authorized driver.[176]

C. *The "Totality of the Circumstances" Test of the Sixth Circuit*

The third approach adopted by the federal circuit courts to determine whether an unauthorized driver of a rental car has standing to challenge the legality of a search is seen in the Sixth Circuit. This circuit, in *United States v. Smith*,[177] rejected the bright-line tests of other circuits and developed a "totality of the circumstances" test.[178] This test considers a range of factors, which may include whether the unauthorized driver had the permission of an authorized driver to use the car at the time of the search, to determine whether an unauthorized driver of a rental car has standing to challenge the legality of a search.[179]

In *Smith*, the defendant, Steven Eugene Smith, was traveling with his brother through western Tennessee in a rental car when he was stopped by a

170 *Id.* at 1195-96.
171 *Thomas*, 447 F.3d at 1199.
172 *Id.* at 1196-99.
173 *Id.* at 1198 (citing United States v. Portillo, 633 F.2d 1313, 1317 (9th Cir. 1980)).
174 *Id.* at 1198-99.
175 *Id.* at 1198.
176 *Id.* at 1199.
177 263 F.3d 571 (6th Cir. 2001).
178 *Id.* at 586.
179 *See id.*

highway patrolman for failure to maintain lane control.[180] When the patrolman reviewed Smith's driver's license and the rental agreement, he noted that neither Smith nor his brother was authorized to drive the car.[181] In fact, the only individual listed on the rental agreement as an authorized driver was Smith's wife, Tracy Smith.[182] After the patrolman informed Smith that he was going to issue him a warning citation, he asked him and his brother if they had any weapons or narcotics in the car.[183] Although Smith responded in the negative, the patrolman ordered him and his brother to exit the car, so that he could search them.[184] The patrolman then proceeded to run his drug-sniffing dog around the car.[185] The dog alerted to both of the car's front doors.[186] Upon searching these and other areas of the car, the patrolman found a bag containing several ounces of cocaine and methamphetamine, as well as a loaded 9mm pistol.[187] The patrolman then placed Smith and his brother under arrest.[188]

After being indicted for possession with intent to distribute, Smith and his brother moved to suppress the evidence obtained during the patrolman's search of the car.[189] The district court granted Smith's motion, but denied his brother's motion.[190] The government then filed a notice of appeal, seeking reversal of the district court's decision granting Smith's motion.[191]

On appeal before the Sixth Circuit, the government argued that since Smith was not listed on the rental agreement as an authorized driver, he did not have a legitimate expectation of privacy in the car and therefore did not have standing to challenge the legality of the search.[192] Before assessing the merits of the government's argument, the court reviewed the decisions of the other circuits that had addressed the issue of an unauthorized driver's standing, but decided not to adopt their reasoning.[193] The court acknowledged that an unauthorized driver of a rental vehicle generally does not have a legitimate expectation of privacy in the car, but refused to adopt a bright-line test.[194] The court stated that it would be inappropriate to adopt a

180 *Id.* at 575.

181 *Id.*

182 *Id.*

183 *Smith*, 263 F.3d at 575-76.

184 *Id.* at 576.

185 *Id.* For an interesting discussion on drug-sniffing dogs and the Fourth Amendment, see Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1 (2006).

186 *Smith*, 263 F.3d at 576.

187 *Id.*

188 *Id.*

189 *Id.* at 576-77.

190 *Id.* at 577.

191 *Id.*

192 *Smith*, 263 F.3d at 581.

193 *Id.* at 583-86.

194 *Id.* at 586.

test which based a driver's standing to challenge the legality of a search solely on whether that driver was listed on the rental agreement as an authorized driver.[195] The court found instead that in order to determine whether Smith had a reasonable expectation of privacy in the car, and therefore standing to challenge the legality of the search, it needed to examine all of the circumstances surrounding Smith's use of the car.[196]

The court considered five factors before deciding that Smith's case was an exception to the general rule.[197] These factors included: (1) Smith had a valid driver's license at the time of the search; (2) Smith was able to provide the patrolman with the rental agreement and sufficient information about the vehicle; (3) Smith's wife was the authorized driver listed on the rental agreement; (4) Smith received permission from his wife to use the vehicle; and (5) Smith had established a business relationship with the rental car company when he reserved the vehicle himself and paid for it using his own credit card.[198]

The court found that Smith had a legitimate expectation of privacy in the rental car because "[h]is business relationship with the rental company and his intimate relationship with his wife, the authorized driver of the vehicle, are relationships which are recognized by law and society."[199] The court also stated that "[i]t was not *illegal* for Smith to possess or drive the vehicle, it was simply a breach of the contract with the rental company."[200] Thus, after applying "the totality of the circumstances" test, the court concluded that Smith had standing to challenge the legality of the search.[201]

III. ANALYSIS

The Supreme Court's decision in *Rakas* to merge the analysis of a defendant's standing to challenge the legality of a search with the analysis used to determine the substantive scope of his or her rights under the Fourth Amendment[202] has led to inconsistent results among the federal circuit courts. According to the Court's holding in *Rakas*, in order to claim the protection of the Fourth Amendment, a defendant must establish that he or she had a legitimate expectation of privacy in the place or area searched.[203] To determine whether a defendant had a legitimate expectation of privacy requires a twofold analysis: first, a court must determine whether a defen-

195 *Id.*
196 *Id.*
197 *Id.*
198 *Smith*, 263 F.3d at 586.
199 *Id.* at 587.
200 *Id.*
201 *Id.*
202 Rakas v. Illinois, 439 U.S. 128, 139 (1978).
203 *Id.* at 143.

dant had a personal expectation of privacy in the place or area searched; and second, a court must determine whether that expectation of privacy is one that society would accept as reasonable.[204] The difficulty of this two-fold analysis lies in its second prong—how does a court determine what expectation of privacy society would accept as reasonable?[205]

Since the Court in *Rakas* neglected to provide a "workable substantive definition of the scope of [F]ourth [A]mendment protections,"[206] the federal circuit courts have adopted myriad approaches to determine whether a defendant's expectation of privacy is one that society would accept as reasonable. These approaches have led the federal circuit courts to reach different conclusions when addressing similar Fourth Amendment issues. The Fourth Amendment issue that is the focus of this Comment—whether an unauthorized driver of a rental car has standing to challenge the legality of a search—reflects this lack of consensus.

As discussed above, the federal circuit courts have taken three different approaches to the issue of whether an unauthorized driver has standing.[207] In the following Parts, this Comment conducts a post-*Rakas* examination of these approaches to determine which approach is most faithful to Fourth Amendment "search" jurisprudence and should therefore be adopted by all federal circuit courts. Part A applies *Rakas* and its progeny to the circuit court decisions and argues that an unauthorized driver, with the permission of an authorized driver to use the car, has a legitimate expectation of privacy in a rental car. Part B then compares the bright-line test of the Eighth and Ninth Circuits with the "totality of the circumstances" test of the Sixth Circuit and concludes that the bright-line test of the Eighth and Ninth Circuits is more apt to safeguard Fourth Amendment rights by effectively and efficiently deterring police misconduct.

A. *Applying* Rakas *and its Progeny to the Circuit Court Decisions*

The Fourth, Fifth, and Tenth Circuits have held that a driver who is not listed as an authorized driver on the rental agreement does not have a legitimate expectation of privacy in a rental car.[208] In their decisions, these circuits have relied on one or both of the following arguments: first, an unauthorized driver does not have a legal property or possessory interest in a rental car; and second, an unauthorized driver's use of a rental car violates

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204 *See supra* Part I.A.

205 *See* BLOOM, *supra* note 19, at 46 ("Because there is no straightforward answer to this question, 'reasonable' has largely come to mean what a majority of the Supreme Court justices says is reasonable, leading scholars to note that 'when the court refers to society's judgment, it is looking in a mirror.'" (quoting PHILLIP E. JOHNSON, CASES AND MATERIALS ON CRIMINAL PROCEDURE 19 (3d ed. 2000))).

206 Williamson, *supra* note 103, at 837-38.

207 *See supra* Part II.A-C.

208 *See supra* Part II.A.

the terms of the rental agreement.[209] The Sixth, Eighth, and Ninth Circuits, however, have rejected both of these arguments, finding instead that an unauthorized driver has a legitimate expectation of privacy in a rental car if he or she has received permission to use the car from an authorized driver.[210] This Part examines both sides of these arguments to determine which side, if any, is supported by *Rakas* and its progeny. Specifically, the first Section asks whether the lack of a legal property or possessory interest precludes an unauthorized driver from having a legitimate expectation of privacy in a rental car, and the second Section asks whether a violation of the terms of a rental agreement forecloses an unauthorized driver from the protection of the Fourth Amendment.

1. Does the Lack of a Legal Property or Possessory Interest Preclude an Unauthorized Driver from Having a Legitimate Expectation of Privacy in a Rental Car?

The Fourth, Fifth, and Tenth Circuits have held that because an unauthorized driver does not have a legal property or possessory interest, he or she does not have a legitimate expectation of privacy in a rental car. The Sixth, Eighth, and Ninth Circuits, on the other hand, have held that an unauthorized driver may have a legitimate expectation of privacy in a rental car without having a legal property or possessory interest if he or she has received permission to use the car from an authorized driver. An examination of *Rakas* and its progeny demonstrates that the position of the Sixth, Eighth, and Ninth Circuits is more faithful to Fourth Amendment "search" jurisprudence.

In reaffirming the view adopted in *Jones* that "arcane distinctions developed in property . . . law . . . ought not to control" whether a defendant may claim the protection of the Fourth Amendment,[211] the Supreme Court in *Rakas* held that a legitimate expectation of privacy may be shown "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[212] Thus, although a defendant may not have a legal property or possessory interest in a place or area searched, he or she may have an interest that is "recognized and permitted by society," which legitimizes his or her expectation of privacy. For example, in *Jones*, the Court found that the defendant's interest in his friend's apartment as an overnight guest was sufficient to qualify for the protection of the Fourth Amendment even though he did not have owner-

209 *See supra* Part II.A.

210 *See supra* Part II.B-C.

211 Rakas v. Illinois, 439 U.S. 128, 143 (1978).

212 *Id.* at 143 n.12.

ship in or a right to possess the premises.[213] Similarly, in *Olson*, the Court found that the defendant, as an overnight guest, had a legitimate expectation of privacy in his host's home because "a person may have a sufficient interest in a place other than his home to enable him to be free in that place from unreasonable searches and seizures."[214]

An unauthorized driver, like an overnight guest, may also have an interest in a rental car that is "recognized and permitted by society." In fact, the three central arguments that are used to support an overnight guest's interest in a host's home may also be used to support a driver's interest in an authorized driver's rental car.

First, an unauthorized driver's control over an authorized driver's rental car is similar to the control that an overnight guest has over a host's home. In *Olson*, the Court stated that "when the host is away or asleep, the guest will have a measure of control over the premises."[215] Likewise, when an authorized driver permits an unauthorized driver to drive his or her rental car, the unauthorized driver will have a measure of control over the car.[216]

Second, an unauthorized driver, like an overnight guest in a host's home, has the power to exclude others from an authorized driver's rental car. In *Jones*, the defendant, as an overnight guest, had the right and ability to exclude others, except his friend, from the apartment.[217] Similarly, an unauthorized driver has the right and ability to exclude others, except an authorized driver or the rental company, from an authorized driver's rental car.

Finally, an authorized driver shares his or her privacy in a rental car with an unauthorized driver like a host shares his or her privacy with an overnight guest. In *Olson*, the Court stated that "[t]he houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest."[218] Likewise, an authorized driver who is willing to allow an unauthorized driver to drive his or her rental car is also willing to share his or her privacy.[219]

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213 Jones v. United States, 362 U.S. 257, 265-66 (1960).

214 Minnesota v. Olson, 495 U.S. 91, 98 (1990).

215 *Olson*, 495 U.S. at 99.

216 Note that in *Rakas*, the Court found that the defendants' situation was not analogous to that of the defendant in *Jones* because they made no showing that they as passengers had a legitimate expectation of privacy in the car of their two female companions. *Rakas*, 439 U.S. at 148-49. The Court reasoned that since the defendants did not have control over the car in which they were passengers, they could not have legitimately expected privacy in the areas that were the subject of the search they sought to contest. *Id.* at 149. Thus, according to the *Rakas* Court's reasoning, it seems logical to conclude that an unauthorized driver may have a legitimate expectation of privacy in a rental car if he or she has control over the car.

217 *Rakas*, 439 U.S. at 149 (interpreting Jones v. United States, 362 U.S. 257, 265-67 (1960)).

218 *Olson*, 495 U.S. at 99.

219 Note that some members of the Court have argued that because cars are operated on public streets and parked in public places, the expectation of privacy in one's car is "significantly different

Since an unauthorized driver who has the permission of an authorized driver to use the car has some measure of control over a rental car and the ability to exclude others from it, he or she, like an overnight guest, has an interest that is "recognized and permitted by society." And with such an interest an unauthorized driver, as the Court explained in *Olson*, is "entitled to a legitimate expectation of privacy despite the fact that [he or she] ha[s] no legal interest in the premises . . . ."[220] Thus, the Sixth, Eighth, and Ninth Circuits' position that the lack of a legal property or possessory interest does not preclude an unauthorized driver from having a legitimate expectation of privacy in a rental car if he or she has received permission to use the car from an authorized driver is more faithful to Fourth Amendment "search" jurisprudence.

2. Does a Violation of the Terms of a Rental Agreement Foreclose an Unauthorized Driver from the Protection of the Fourth Amendment?

The Fourth, Fifth, and Tenth Circuits have held that because an unauthorized driver's use of a rental car violates the terms of a rental agreement, he or she does not have a legitimate expectation of privacy in the car.[221] The Sixth, Eighth, and Ninth Circuits, on the other hand, have held that an unauthorized driver may have a legitimate expectation of privacy in a rental car even if his or her use of the car violates the terms of a rental agreement.[222] Although the issue of whether a breach of contract ends a defendant's expectation of privacy has not been specifically addressed by the Court, an examination of *Jones* and *Rakas*, as well as other federal circuit court deci-

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from the traditional expectation of privacy and freedom in one's residence." *Rakas*, 439 U.S. at 154 (Powell, J., concurring) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)). The Court in *Rakas* relied, at least in part, on this argument when holding that the defendants as passengers did not have a legitimate expectation of privacy in the car of their two female companions. *Id.* at 148-49 (majority opinion). However, some legal commentators have argued that the opposite is true—if one has a lower expectation of privacy in a car, then it is more likely that he or she would share it with another than if he or she had a higher expectation of privacy. *E.g.*, Butterfoss & Snyder, *supra* note 112, at 521. Butterfoss and Snyder assert:

> The lower expectation of privacy the Court assigns to . . . automobiles should not both reduce the privacy expectations of the owner and at the same time make it more difficult for the owner to share those expectations with another. In fact, arguably the opposite is true. If the owner enjoys a lower expectation of privacy, the owner might be willing to share it with others with whom the owner has a less-well-established relationship. For example, one might agree to share a ride, and their expectations of privacy, with someone on a long distance automobile trip more readily than one would invite someone into one's home to share their expectations of privacy.

Id.

220 *Olson*, 495 U.S. at 99.

221 *See supra* Part II.A.

222 *See supra* Part II.B-C.

sions, reveals that the position of the Sixth, Eighth, and Ninth Circuits is more faithful to Fourth Amendment "search" jurisprudence.

In *Jones*, the Court held that the defendant was entitled to have his motion to suppress adjudicated on its merits because he was "legitimately on the premises" at the time of the search.[223] Justice Frankfurter, writing for the Court, noted that such a motion "would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."[224] Similarly, in *Rakas*, Justice Rehnquist stated that "one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them . . . ."[225] Thus, the inquiry becomes whether an unauthorized driver's violation of the terms of a rental agreement is tantamount to a "wrongful presence."

To determine whether an unauthorized driver's violation of the terms of a rental agreement gives rise to what the Court has identified as a wrongful presence requires an understanding of how the Court has defined the terms "wrongful" and "presence" in the context of a search. The Court has made it clear that the term "presence" means being present at the place or area where the search occurred.[226]

The Court has not, however, been so clear when giving meaning to the term "wrongful." Yet, despite failing to provide a precise definition for the term, the Court has implied that, at least in the context of a search, it is to be interpreted as being synonymous with such terms as "illegal" or "unlawful." For example, in *Jones*, the Court held that the defendant's presence at his friend's apartment was not wrongful because he had permission to be there at the time of the search.[227] The *Jones* Court's holding suggests that if the defendant had been a trespasser (i.e., in the friend's apartment without his permission), then his presence would have been illegal and therefore wrongful. Likewise, in *Rakas*, Justice Rehnquist criticized several lower courts for misapplying the Court's "wrongful presence" terminology by inexplicably holding that "a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile."[228] Justice Rehnquist's criticism suggests that the term "wrongful" should be interpreted as meaning "illegal" or "unlawful." Thus, according to the Court's language in both *Jones* and *Rakas*, two conditions must be met in order for there to be a wrongful presence: first, the defendant must be present at the scene of the search; and second, the defendant's presence must be illegal or unlawful.

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223 Jones v. United States, 362 U.S. 257, 267 (1960).

224 *Id*.

225 *Rakas*, 439 U.S. at 141 (citing *Jones*, 362 U.S. at 267).

226 *See id.* at 141 n.9; *Jones*, 362 U.S. at 267.

227 *Jones*, 362 U.S. at 267.

228 *Rakas*, 439 U.S. at 141 n.9.

In *United States v. Smith*,[229] the Sixth Circuit commented that it was not illegal for the defendant to possess or control the rental car that he was driving when stopped by police, even though he was not listed as an authorized driver on the rental agreement.[230] The court stated:

> Although Smith's use of the vehicle was clearly a breach of the agreement with Alamo, it does not follow that he has no standing to challenge the search. It was not *illegal* for Smith to possess or drive the vehicle, it was simply a breach of the contract with the rental company.[231]

Similarly, in *United States v. Thomas*,[232] the Ninth Circuit suggested that an unauthorized driver who receives permission from an authorized driver to possess or control a rental car has a legal right to exclude others from the car, even if his or her possession or control of the car violates the terms of a rental agreement.[233]

Moreover, in *United States v. Cooper*,[234] the Eleventh Circuit held that the defendant retained his expectations of privacy in the rental car he was using when stopped by police, even though it was four days overdue.[235] The court commented that the defendant's "failure to call Budget to extend the due date four days may have subjected him to civil liability, but it should not foreclose his ability to raise a Fourth Amendment challenge to the [Florida Highway Patrol's] search of the rental car in a criminal proceeding."[236] Similarly, in *United States v. Henderson*,[237] the Ninth Circuit held that a lessee has a legitimate expectation of privacy in a rental car even after the lease expires and he or she is in violation of the terms of the lease agreement.[238]

As evidenced by these federal circuit court decisions, constitutional protections trump contractual limitations. Although an unauthorized driver's use of a rental car may be a violation of the terms of a rental agreement, it does not follow that he or she is foreclosed from claiming the protection of the Fourth Amendment. Since it is not illegal for an unauthorized driver, with the permission of an authorized driver, to possess or drive

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229 263 F.3d 571 (6th Cir. 2001).

230 *Id.* at 587.

231 *Id.*

232 447 F.3d 1191 (9th Cir. 2006).

233 *See id.* at 1198-99.

234 133 F.3d 1394 (11th Cir. 1998).

235 *Id*. at 1402.

236 *Id.*; *see also* Parker v. State, 182 S.W.3d 923, 927 (Tex. Crim. App. 2006) ("We fail to see how the fact that the car was a rental changes an individual's expectation of privacy in a car that [the defendant] borrowed from his girlfriend. [The defendant] did not steal the car; he did not even use it without [his girlfriend's] knowledge.").

237 241 F.3d 638 (9th Cir. 2001).

238 *Id.* at 647.

a rental car, his or her breach of a rental agreement cannot be tantamount to a wrongful presence under *Jones* and *Rakas*.

Furthermore, like an authorized driver who has failed to return a rental car in a timely manner, an unauthorized driver's expectation of privacy is not dependent upon whether he or she is in violation of the terms of a rental agreement. Thus, as the Sixth, Eighth, and Ninth Circuits have recognized, an unauthorized driver may have a legitimate expectation of privacy in a rental car even if his or her use of the car violates the terms of a rental agreement.[239] As a result, the position of these circuits is more faithful to Fourth Amendment "search" jurisprudence because it affords a legitimate expectation of privacy to an unauthorized driver whose presence in a rental car is not wrongful.

B. *The Bright-Line Test versus the "Totality of the Circumstances" Test*

The Sixth, Eighth, and Ninth Circuits have held that an unauthorized driver of a rental car has standing to challenge the legality of a search if he or she had permission to use the car from an authorized driver.[240] However, the approaches they have taken to reach this conclusion differ dramatically. The Eighth and Ninth Circuits have chosen to address the issue of an unauthorized driver's standing with the adoption of a bright-line test, while the Sixth Circuit has decided to confront the issue with the development of a "totality of the circumstances" test.[241] This Part examines both tests to determine which test is more apt to lead to correct and efficient results, while at the same time maximizing Fourth Amendment protections. Specifically, the first Section analyzes both tests to determine which test is best supported by *Rakas* and its progeny, and the second Section evaluates both tests to determine which test is more apt to protect the guarantees of the Fourth Amendment.

1. Applying *Rakas* and its Progeny to the Circuit Court Tests

In *Rakas*, the Court, as discussed above, abandoned the "legitimately on the premises" standard for the Fourth Amendment standing requirement in favor of the "legitimate expectation of privacy" standard.[242] Justice Rehnquist, writing for the Court, stated that "the phrase 'legitimately on the premises' has not been shown to be an easily applicable measure of Fourth Amendment rights so much as it has proved to be simply a label placed by

239 *See supra* Part II.B-C.
240 *See supra* Part II.B-C.
241 *See supra* Part II.B-C.
242 *See supra* Part I.C.

the courts on results which have not been subjected to careful analysis."[243] Thus, unlike the "legitimately on the premises" standard, the "legitimate expectation of privacy" standard generally requires case-by-case analysis.

The Sixth, Eighth, and Ninth Circuits have interpreted the "legitimate expectation of privacy" standard differently when addressing the issue of an unauthorized driver's standing to challenge the legality of a rental car search. The Sixth Circuit has interpreted the standard as requiring the development of a "totality of the circumstances" test, which examines all of the circumstances surrounding an unauthorized driver's use of a rental car.[244] For example, in *United States v. Smith*,[245] the Sixth Circuit found that a bright-line test "is inappropriate, given that we must determine whether [the defendant] had a legitimate expectation of privacy which was reasonable in light of all the surrounding circumstances."[246] The Eighth and Ninth Circuits, on the other hand, have interpreted the standard as being congruent with the adoption of a bright-line test.[247] For example, in *United States v. Thomas*,[248] the Ninth Circuit held that "an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter."[249] Similarly, in *United States v. Best*,[250] the Eighth Circuit found that if the authorized driver "had granted [the defendant] permission to use the automobile, [the defendant] would have a privacy interest giving rise to standing."[251]

Although the Court in *Rakas* ruled that the determination of whether a defendant had a legitimate expectation of privacy in the place or area searched would generally require case-by-case analysis, it has since adopted at least one bright-line test in order to better delineate the limitations of the "legitimate expectation of privacy" standard. In *Olson*, the Court established the bright-line test that an overnight guest has a legitimate expectation of privacy in a host's home.[252] Justice White, writing for the Court, stated that "we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home."[253]

The bright-line test that the Eighth and Ninth Circuits have adopted is similar to the one developed by the Court in *Olson* because it clearly defines the class of individuals to whom it applies. An unauthorized driver

243 Rakas v. Illinois, 439 U.S. 128, 147-48 (1978).
244 *See supra* Part II.C.
245 263 F.3d 571 (6th Cir. 2001).
246 *Id.* at 586.
247 *See supra* Part II.B.
248 447 F.3d 1191 (9th Cir. 2006).
249 *Id.* at 1199.
250 135 F.3d 1223 (8th Cir. 1998).
251 *Id.* at 1225.
252 Minnesota v. Olson, 495 U.S. 91, 98 (1990).
253 *Id.*

who has received permission from an authorized driver to use a rental car is like an overnight guest who has been invited to spend the night in a host's home. A clear line can be drawn between those who would have standing under the test and those who would not. Additionally, in *Rakas*, Justice Rehnquist, writing for the Court, stated, "Where factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so."[254] Thus, the "totality of the circumstances" test of the Sixth Circuit is unnecessary and should be abandoned because *Rakas* and its progeny support the bright-line test of the Eighth and Ninth Circuits. Furthermore, the Eighth and Ninth Circuits' bright-line test, as discussed below, better serves the purpose behind the exclusionary rule.

2. Protecting the Guarantees of the Fourth Amendment

The Supreme Court in *Mapp* stated that the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[255] The bright-line test of the Eighth and Ninth Circuits[256] better serves this purpose because it gives police the proper guidance they need to avoid trampling on Fourth Amendment rights. Complicated tests, like the "totality of the circumstances" test seen in the Sixth Circuit,[257] cannot be applied by the police in the field. They need simple, straightforward tests like the bright-line test that has been adopted by the Eighth and Ninth Circuits, which can be easily and correctly applied.

According to the "totality of the circumstances" test developed by the Sixth Circuit in *Smith*, multiple factors must be considered in determining whether an unauthorized driver of a rental car has standing to challenge the legality of a search.[258] These factors may include the relationship between the unauthorized driver and the authorized driver and the relationship between the unauthorized driver and the rental company.[259] However, it is not clear from the court's decision in *Smith* what kinds of relationships will confer standing upon an unauthorized driver and what kinds will not. The failure of the court to define the parameters for these and the other factors that may be examined in the "totality of the circumstances" test makes it

254 Rakas v. Illinois, 439 U.S. 128, 147 (1978).

255 Mapp v. Ohio, 367 U.S. 643, 656 (1961) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

256 *See supra* Part II.B.

257 *See supra* Part II.C.

258 *Smith*, 263 F.3d at 586.

259 *See id.*

difficult for the police to determine beforehand whether a search will or will not violate Fourth Amendment rights.

In describing the problems that are created for the police by unnecessarily complicated multi-factor tests, like the "totality of the circumstances" test of the Sixth Circuit, Professor Wayne R. LaFave stated:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[260]

Proponents of multi-factor tests like the Sixth Circuit's "totality of the circumstances" test, however, have argued that such tests are better than bright-line tests when addressing Fourth Amendment issues because they lead to results that are more consistent with their underlying justifications.[261] Justice Powell, in his concurring opinion in *Rakas*, advocated for the adoption of multi-factor tests over bright-line tests in Fourth Amendment cases by stating that "[t]his is not an area of the law in which any 'bright line' rule would safeguard both Fourth Amendment rights and the public interest in a fair and effective criminal justice system. The range of variables in the fact situations of search and seizure is almost infinite."[262] Nevertheless, despite Justice Powell's concern over the adoption of bright-line tests in Fourth Amendment cases, the Court has proceeded to adopt at least one since *Rakas* was decided in 1978—*Olson*'s overnight guest test.[263]

Although multi-factor tests like the Sixth Circuit's "totality of the circumstances" test may in the abstract be better than bright-line tests at reaching desirable results, their complexity makes them difficult to apply, which in turn compromises their overall effectiveness.[264] In pointing out the ineffectiveness of multi-factor tests in Fourth Amendment cases, Professor LaFave stated:

> [I]f our aim . . . is to ensure that "the people" are "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," then it may well be that the rules governing search and seizure are more in need of greater clarity than greater sophistication. And thus, as between a complicated rule which in a theoretical sense produces the desired result

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260 Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (footnotes omitted) (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting)).

261 DRESSLER & MICHAELS, *supra* note 27, § 2.07[A].

262 *Rakas*, 439 U.S. at 155-56 (Powell, J., concurring).

263 *See supra* Part III.B.1.

264 *See* Amsterdam, *supra* note 25, at 415 (characterizing a non-bright-line approach as "splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility and general ooziness").

> 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former. As someone once put it, an ounce of application is worth a ton of abstraction.[265]

The Eighth and Ninth Circuits' bright-line test[266] is one that can be applied easily and correctly in the field by police.[267] An unauthorized driver has either received permission from an authorized driver to use a rental car or he or she has not. There is no need to complicate the analysis by considering all of the circumstances surrounding an unauthorized driver's use of a rental car when it is clear that receiving the permission of an authorized driver to use the car is sufficient to legitimize his or her expectations of privacy. Thus, the Eighth and Ninth Circuits' bright-line test is more faithful to Fourth Amendment "search" jurisprudence than the Sixth Circuit's "totality of the circumstances" test because it is more apt to protect the guarantees of the Fourth Amendment by efficiently and effectively deterring police misconduct.

CONCLUSION

The Fourth, Fifth, and Tenth Circuits' bright-line test, which denies an unauthorized driver standing to challenge the legality of a search, is a misapplication of the *Rakas* Court's "legitimate expectation of privacy" approach to the Fourth Amendment standing requirement. An unauthorized driver cannot be denied standing solely on the grounds that his or her name is not listed on a rental agreement, because he or she may have a legitimate expectation of privacy in a rental car without possessing a legal property or possessory interest. Moreover, a violation of the terms of a rental agreement does not foreclose an unauthorized driver from asserting his or her Fourth Amendment rights, since constitutional protections trump contractual limitations. Thus, the Eighth and Ninth Circuits' bright-line test and the Sixth

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265 Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 321 (1982).

266 *See supra* Part III.A.

267 Of course, one could argue that it might be just as difficult for police to determine in the field whether an unauthorized driver has received permission from an authorized driver to use a rental car as it would be to conduct a multi-factor test. This argument might be true in some cases, but in the majority of cases it would be easier for police to determine whether an unauthorized driver had the permission of an authorized driver to use a rental car than it would to determine any of the other factors of the Sixth Circuit's "totality of the circumstances" test in *Smith*. *See supra* Part II.C. For example, when the authorized driver is the spouse of the unauthorized driver, it is relatively easy to determine whether permission to use a rental car has been granted. Moreover, in many cases the authorized driver is in the vehicle with the unauthorized driver at the time of the search. In these cases, it is quite simple for police to determine whether an unauthorized driver received permission from an authorized driver, since it requires nothing more than asking a question or two to someone who is present at the stop.

Circuit's "totality of the circumstances" test, which under certain circumstances grant standing to a defendant not listed as an authorized driver on a rental agreement, are more faithful to Fourth Amendment "search" jurisprudence.

Although both the Eighth and Ninth Circuits' bright-line test and the Sixth Circuit's "totality of the circumstances" test correctly recognize that a defendant may have a legitimate expectation of privacy in a rental car, the Eighth and Ninth Circuits' bright-line test is preferable because it increases predictability and administrative efficiency. In addition, the Eighth and Ninth Circuits' bright-line test is more effective at deterring police misconduct, since it can be applied easily and correctly in the field. Accordingly, the Eighth and Ninth Circuits' bright-line test should be adopted by all federal circuit courts.