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Mary I. Coombs

University of Miami School of Law, mcoombs@law.miami.edu

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Shared Privacy and the Fourth Amendment, or the Rights of Relationships

Mary I. Coombs†

Fourth amendment law currently pays little attention to claims of shared privacy. In this Article, Professor Coombs traces the development of the current atomistic approach through derivative standing and third-party consent cases. She suggests that current doctrine, and the Supreme Court's framing of the issues in such cases, assume that expectations of privacy belong only to individuals unless joint claims are legally formalized. She then reconstructs these areas of fourth amendment law, drawing upon feminist jurisprudence and its emphasis on human interconnectedness. Specifically, she proposes linking the standards for granting derivative standing with those for recognizing third-party consents to searches. She also proposes that certain relationships be presumptively protected in order to structure judicial decisionmaking and to encourage a more sympathetic approach to shared privacy claims.

INTRODUCTION

Much of what is important in human life takes place in a situation of shared privacy. The important events in our lives are shared with a chosen group of others; they do not occur in isolation, nor are they open to the entire world. We likewise, if we can, share selectively the places that we care about and use most, such as our homes, our cars, and our workplaces. In this Article, I argue that current fourth amendment jurisprudence is impoverished and distorted by neglecting the ways in which privacy embodies chosen sharing.

The Supreme Court's landmark decision in *Katz v. United States*¹ placed privacy at the heart of the fourth amendment and promised to replace arcane notions of property law with a standard more sensitive to

† Associate Professor of Law, University of Miami. B.A. 1965, M.A. 1970, J.D. 1978, University of Michigan. I would like to thank my colleagues, including Terence Anderson, Kenneth Casebeer, Michael Fischl, Patrick Gudridge, Jeremy Paul, Irwin Stotzky, and Steven Winter, both for their specific comments and insights and for their part in creating a community that makes intellectual work possible. I also want to thank my research assistants, Bert Jordan, class of 1987, and Virginia Forbes Adams, class of 1988, and my editor, Chris Spaulding, Boalt Hall class of 1988. Chris' capacity to transform what I said into what I meant illustrates both the difficulty and the possibility of communication.

1. 389 U.S. 347 (1967).

the complex realities of life. Unfortunately, the "expectation of privacy" standard formulated in *Katz* has not lived up to its promise. The courts have applied a narrow, individualistic conception of privacy, rooted in the right to exclude others, the right "to be let alone."² Consequently, current fourth amendment law tends to ignore shared privacy, implicitly adopting a view of persons as highly individualistic in their behaviors and expectations.

The paradigmatic fourth amendment case is generally perceived as involving an assessment of a police search or seizure vis-à-vis the rights of an individual defendant,³ though other individuals and their relationship to the defendant may significantly affect the application of fourth amendment doctrines.⁴ Furthermore, even where no other persons are deemed relevant to current legal doctrine, the defendant is always embedded within a community, and the police conduct in searching may have an impact on his family, friends, and colleagues.⁵

The courts' neglect of shared privacy can be seen in the marginalization of the two doctrinal areas where such concerns necessarily surface. First is the question often defined as standing: When can someone other than the person whose property or privacy rights were most obviously infringed (the primary rightholder) raise a fourth amendment claim?⁶ Second is the validity of third-party consent: When can someone besides the defendant consent to a search that intrudes on an area over which the defendant has a claim?⁷

Looking at the two issues simultaneously reveals the extent to which the courts' use of doctrinal boxes obscures the logical connection between the two sorts of cases. Third-party consent turns on assessments of relations between people that might give one of them authority to con-

2. *Id.* at 350. This orientation also reflects a vision of rights as necessarily belonging solely to individuals. This vision is explored and criticized in Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 593-98 (1986).

3. See, e.g., W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.2(a) (1984) (introducing concept of expectations of privacy without mentioning shared privacy issues).

4. See, e.g., *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (asserted justification for search was risk of destruction of evidence by defendant's mother and brother who returned home while search was in progress); *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) (twenty-three black youths besides defendant taken to police station for fingerprinting); *Terry v. Ohio*, 392 U.S. 1, 6-7 (1968) ("reasonable suspicion" for stop and frisk of each of three companions based on police officer's assessment of behavior of all of them).

5. *Cf.*, e.g., *United States v. Chadwick*, 433 U.S. 1, 4-5 (1977) (mentioning the presence of companions at the moment of search but assigning no significance to that fact, though companions were also later arrested).

6. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) (standing to challenge car search denied to passengers).

7. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to car search valid even though consentor, like defendant, was merely a passenger).

sent to a search of a place to which the other also has access. Derivative standing often turns on similar assessments of relations between people to determine whether one of them has a sufficient, though derivative, link to the place searched to challenge the police conduct.⁸

The courts' neglect of shared privacy may stem, in part, from the perspective of judges and lawyers who litigate these issues. Individuals rarely articulate beforehand precisely how much they expect to share access to places within their control. Absent formal statements (for example, a document granting a joint property interest in the place searched), decisionmakers are likely to inject their own assumptions about sharing.⁹ These assumptions, while not explicit, become embodied in the framing of the issues presented. In "standing" decisions, for example, contemporary courts tend to frame the facts narrowly; the "place searched" is described very precisely, as are the challenged police activities. Such narrow framing excludes from consideration much of the relevant context of the case and tends to lead courts to conclude that the defendant's interests were not implicated by the search.¹⁰

The courts' preferences for narrow frames, for attributing control of a place or object to a single person, and for viewing rights as individual, are related phenomena. Each reflects a preference for logic, rigor, and precision, for organizing intellectual and human phenomena into neatly defined categories. Each reflects a distaste for the messiness of ordinary life, and each, I suggest, is linked to a privileging of reason over emotion, mind over body, and individual over community that is traditionally male. The set of preferences, then, reflects the hierarchy of gender in our

8. Courts' failure to connect these two doctrines may stem, in part, from the fact that they point to opposite results. A capacious view of sharing would require standing for more claims, but would also validate consent more readily. Thus, a result-oriented jurisprudence, whether liberal or conservative, might leave the connection obscured.

9. The difficulty is a matter of both legal sociology and jurisprudence. First, most American judges are, and always have been, white, male, and middle to upper class; a group with particularly well-developed experiences and concepts of individualized privacy. Cf. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 404 (1974) ("People who live in single houses or well-insulated apartments tend to take a rather parochial view of privacy."). Second, existing law has tended to discount the value of sharing, and a judge who turns to case law as a source for defining the meaning of "expectation of privacy" will perpetuate that restrictive view. Although expectations of privacy are supposed to have their source outside the closed world of fourth amendment law, *Rakas v. Illinois*, 439 U.S. at 143 n.12, it may often seem more "lawyerly" to a judge to rely on prior cases rather than on lived experience to comprehend such expectations. The seeming neutrality of precedent obscures the degree to which prior cases were informed by a particular, narrow view of privacy.

10. This power of the frame is not susceptible to doctrinal formulation since the framing occurs before the doctrine is applied to the situation thus defined. The problem of unduly narrow frames could be mitigated, however, by an expansive view of evidentiary relevance that would recognize the parties' own articulation of the behaviors, interactions, and concerns that they thought important.

society.¹¹

In this Article, I seek to reorient fourth amendment jurisprudence by placing a notion of relational privacy at the center. Such a reorientation would treat searches as paradigmatically involving an intrusion into an area that is subject to an ongoing personal relationship between the defendant and others. Privacy would be seen as the protection of chosen intimacy rather than aloneness, and rights would be seen as belonging, if not to groups as such, at least to people living within groups.

My proposed reconceptualization of core fourth amendment values is based on two assumptions. First, I assume that ordinary patterns of human behavior embody shared privacies. That is, people are embedded in relationships and they act as if they expect those relationships to be respected by others. Second, I assume that shared privacy is invaluable. We need to be able safely to share with others to become fully human. We further need to be able to create enclaves from the world at large in which we can be with our chosen intimates.

Restructuring fourth amendment jurisprudence could be justified by either the first, empirical, claim or the second, normative, one. I suggest both, in part because each is vulnerable. The normative claim, like any claim about human good, can be asserted, but not, I believe, logically proven. Nonetheless, most Westerners would probably agree on the importance of shared privacy. Such near-consensus will suffice as a basis for discussion and even action.

The empirical claim could probably be proven scientifically, though I make no attempt to do so here. There is, of course, a danger of circularity in asserting that the law should reflect existing social attitudes and behaviors, since the law itself often shapes those behaviors. Nevertheless, the law is likely to shape citizens' expectations only when the general public is aware of it. For example, lay people and lawyers alike have become inured to the omnipresent airport x-ray search and no longer expect their luggage to be entirely private. Most lay people, however, are probably not aware that the law would not recognize their claim to privacy in a friend's car.¹² Thus, existing behaviors and expectations are relatively unaffected by fourth amendment case law.

In essence, I suggest that fourth amendment jurisprudence would better reflect how people do behave and how people should be permitted to behave if it explicitly considered shared privacy in determining when a

11. See F. Olsen, *The Sex of Law* (1985) (unpublished manuscript on file with the author); see also *infra* notes 17-20 and accompanying text.

12. The gap between fourth amendment law and real-life expectations of shared privacy is illustrated by the fact that my criminal procedure students are consistently most surprised by decisions such as *Rakas v. Illinois*, 439 U.S. 128 (1978), and *United States v. Miller*, 425 U.S. 435 (1976), which recognize the privacy claims of only a narrow class, or of no one.

search has occurred and who may challenge it.¹³ The class of potential claimants should include more than the primary rightholder. It should also include derivative claimants—people with a relationship with the primary rightholder such that we would expect the primary rightholder to share the umbrella of her claim. One purpose of this Article is to develop a process for determining who may make such shared privacy claims.

Our relations with others are, of course, infinitely complex. We are dependent upon them, drawing from our relationships much of our sense of identity. Those nurturing relationships require protection from invasion and destruction by the state or other unwanted outsiders. However, we also define ourselves in part by our separation from others, and we often seek to use the state to protect those interests in autonomy against the threat of other persons.¹⁴

To the extent this Article focuses on standing, autonomy concerns are not implicated; the threat to our interests comes not from other individuals, but from the government. In the context of challenges to third-party consent, however, autonomy can conflict with relational rights. As a corollary to my proposal for broadened standing, I argue that third-party consent should be recognized where the consent is uncoerced, and where the consenter, by virtue of his relationship to the primary rightholder, would otherwise have standing to challenge the search. While this may seem to privilege the consenter's autonomy over the defendant's interest in the relationship, I suggest that it actually recognizes the fragility of relationship. In the dynamics of the real world, relationships are not permanent and absolute statuses; we all run the risk that those we thought irrevocably committed to us may choose to act

13. Despite its title, Professor Alschuler's excellent article, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. L. REV. 1 (1983), deals primarily with a problem rather distinct from the subject of this Article. Alschuler is concerned for the most part with the dissimilar treatment of what he sees as essentially similar cases: police actions to coerce *A* into providing information about *B*, and police searches of *A*'s premises to discover items entrusted to *A* by *B*. He suggests that the fairest reading of the *Katz* "expectation of privacy" test would view both police actions as searches since both are "privacy-invading criminal investigations." *Id.* at 44.

In contrast, this Article is limited to situations where that which is shared is property, broadly construed, and does not deal with "pure" information sharing. In addition, I attempt here to use the insights of feminist jurisprudence to develop and expand relational concepts suggested by Alschuler's analysis.

14. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979) (renounced in Gabel and Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16 (1984)). The word "we" here may falsely suggest a universality in our epistemological and moral stance vis-à-vis relationships. Cf. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (exploring the different set of contradictions between the need for and harm from other people faced by women, whose material existence evokes connection rather than separation as the felt "natural state"). For a discussion of the gendered nature of relational concerns, see *infra* notes 17-20 and accompanying text.

against us. On the other hand, the government should not be permitted to intensify this risk in human society. Consent should allow governmental invasion of relational rights only when it reflects the free decision of a once-intimate other, not acquiescence to police coercion or bribery.

The current law's individualistic orientation and neglect of shared privacy is not required by formal fourth amendment doctrine. Relational notions of privacy could easily be incorporated in determining whether the defendant, under a "totality of the circumstances," exhibited a "reasonable expectation of privacy." Relational privacy concerns are now obscured by decisionmakers' background assumptions about the nature of human relationships¹⁵ and by the law's individualistic rhetoric of "privacy" and "rights." As currently used, such language pictures people as essentially separate, each carrying his rights around him like protective armor. However, this language can be recast to recognize the communal nature of our lives.

The adoption of a relational model would require courts to apply a different set of background assumptions about human behavior, one that recognizes relationships of inclusion and sharing as the norm, in both senses of the word. It would also require broadening the frames through which courts view cases. Rather than dividing human experience into discrete, readily examined categories, as current law tends to do, a relational approach would use a "wide-angle lens" to view the complexity of human relationships.¹⁶

Contemporary feminist scholarship has provided the intellectual grounding of both my proposed reevaluation of relational concerns and my advocacy of more holistic modes of analysis. Some feminist writers have suggested a gender difference in the value that people place on relationships.¹⁷ As a result of different psychological development and acquisition of gender roles by boys and girls, men tend to desire and achieve individualism and autonomy, while women tend to value connection and relationship.¹⁸ Feminists have also asserted that there are clear gender

15. See *supra* note 9.

16. The ability to think about something without thinking about things with which it is inextricably connected would be seen as a failure of vision, not the essence of "thinking like a lawyer."

17. See, e.g., C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 24-63 (1987); N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984).

18. Because a child's primary parent is almost always female, boys acquire their gender identity by defining themselves negatively—as different from their mothers. Girls, on the other hand, define themselves positively, and thus retain a sense of connection to their mothers. See, e.g., N. CHODOROW, *THE REPRODUCTION OF MOTHERING* 173-77 (1978); D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* 28-29 (1976). Both Chodorow and Dinnerstein also note that, for boys, this process of negative differentiation involves an assertion of the superiority of the male role. See N. CHODOROW, *supra*, at 180-82; D. DINNERSTEIN, *supra*, at 176-78.

differences in values and moral reasoning,¹⁹ and have sought means by which traditionally “female” methodologies and values can be brought to bear on issues in the traditionally “male” public sphere. Just as other feminist legal scholars have reconsidered theories of equality in light of women’s concerns and values,²⁰ I seek here to use feminist insights to propose a fourth amendment jurisprudence that recognizes and protects the value in relationships.

The Article is divided into four parts. In Part I, I provide a context for the rest of the Article, beginning with a brief excursus on the problems the exclusionary rule poses for fourth amendment analysis, and continuing with an examination of the criteria for determining traditional single-party standing. I suggest that the doctrine’s shift from property notions to expectations of privacy, though intended to expand the class of those protected, may, in fact, have contributed to the neglect of relational concerns by later, less sympathetic, courts.

In Part II, I examine the judicial treatment of derivative fourth amendment claims based on shared privacy. I begin by categorizing types of relationships and identifying those that are likely to support a derivative claim under existing case law. I then discuss chronologically the most significant Supreme Court derivative standing cases, suggesting that both the older rule-based approach and the present “substantive fourth amendment” approach are unsatisfactory.

In Part III, I examine the obverse side of shared privacy in fourth amendment jurisprudence: situations in which relationships with others increase a person’s vulnerability to police intrusions. The primary focus of Part III is the doctrine of third-party consent. In this Part, I attempt to define, through understanding the meaning of relationships, when and why the consent of one person should suffice to allow police to search a place shared by others.

In Part IV, I propose a method for integrating shared privacy concerns into fourth amendment jurisprudence. I suggest that certain relationships between the defendant and the primary rightholder, such as sharing a household, should give rise to a rebuttable presumption that the defendant has a claim. For other relationships, such as friendship, courts should consider specific facts about the relationship to determine whether to recognize the defendant’s claim.

I propose a similar test for third-party consent, stressing that where the intimacy of the relationship between the consentor and the defendant renders betrayal of the defendant’s interests unlikely, courts should take

19. See, e.g., M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN’S WAYS OF KNOWING* (1986); C. GILLIGAN, *supra* note 17.

20. See, e.g., Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986); F. Olsen, *supra* note 11.

care to assure themselves that the consent was uncoerced. Finally, I propose procedures to allow parties to articulate and give legal meaning to those elements of their relationships that are often made legally invisible by existing doctrine and practice. Such articulation could both influence the immediate legal outcomes and allow the participants to express publicly the meaning of their shared life.

I

SHARED PRIVACY CLAIMS: CONTEXT AND PRELIMINARIES

A. "Standing" and the Exclusionary Rule

Most judicial consideration of fourth amendment issues occurs when defendants attempt to exclude evidence. While some early cases viewed having a fourth amendment claim as both necessary and sufficient for an exclusionary remedy,²¹ current doctrine bases the application of the exclusionary rule solely on the regulatory concern with deterring unconstitutional police actions.²² A deterrence rationale, however, does not tell the court in which cases such a remedy should be granted. There is no logical bar, for example, to applying the exclusionary remedy independent of standing requirements.²³ That is, the exclusionary rule could be made to depend solely on the existence of police misconduct and the likelihood that exclusion will deter such conduct in the future.²⁴

Under such an approach, standing would consist of two separate

21. See, e.g., *Goldstein v. United States*, 316 U.S. 114, 120 (1942); *Weeks v. United States*, 232 U.S. 383, 393 (1914); cf. *Alderman v. United States*, 394 U.S. 165, 205-06 (1969) (Fortas, J., concurring in part and dissenting in part) (fourth amendment "grants the individual a personal right, not to privacy, but to insist that the state utilize only lawful means of proceeding against him").

22. See, e.g., *Illinois v. Krull*, 107 S. Ct. 1160, 1165-66 (1987); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969); *Linkletter v. Walker*, 381 U.S. 618, 636 (1965).

23. Indeed, California courts, until recently, rejected any standing limitation in exclusionary cases. See, e.g., *People v. Martin*, 45 Cal. 2d 755, 759-61, 290 P.2d 855, 857 (1955). *Martin* was superseded by the passage of Proposition 8 in 1982, which amended the California Constitution to eliminate the exclusionary remedy in criminal proceedings except as mandated by the United States Constitution. See CAL. CONST. art I, § 28(d); *In re Lance W.*, 37 Cal. 3d 873, 885-90, 694 P.2d 744, 751-55, 210 Cal. Rptr. 631, 638-42 (1985).

A court focused solely on regulatory objectives would not necessarily grant exclusion in every case of misconduct, however. Rather it would need to balance two considerations. Too weak an exclusionary rule will insufficiently deter illegal searches and seizures. Too powerful an exclusionary rule will prevent the conviction of more factually guilty defendants than necessary. Standing is a possible, but not necessary, device to achieve the desired balance.

24. Some commentators assume that the fourth amendment is properly construed as embodying either an atomistic or a regulatory perspective. If the former, then the exclusionary rule should be viewed as reflecting a right of the defendant; if the latter, then standing limits should reflect a utilitarian calculus regarding the amount of deterrence required. See, e.g., Amsterdam, *supra* note 9, at 367-68; Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493, 495-96 (1980); see also Bacigal, *A Case for Jury*

questions. For purposes of tort damages or other civil remedies, the issue would be whether the claimant has a fourth amendment claim of her own. In criminal cases, the question would be whether the claimant should be permitted to seek exclusion of evidence.²⁵

Yet, despite substantial arguments for unlinking standing from access to an exclusionary remedy, the Supreme Court has interpreted the fourth amendment otherwise.²⁶ The class of defendants who may seek exclusion of evidence is limited to those whose own fourth amendment

Determination of Search and Seizure Law, 15 U. RICH. L. REV. 791, 813 (1981) (attributing the atomistic perspective to the Supreme Court).

It is not necessary, however, to assume a unitary vision of the fourth amendment. Indeed, the usual mode of fourth amendment analysis involves balancing competing interests. Neither perspective is necessarily exclusive. For example, if we begin, as the current Court does, with a regulatory approach, we could view the atomistic requirement of standing as a rough means for limiting the range of cases in which the costs of exclusion need be borne. Conversely, the Court at an earlier time arguably took "account of the regulatory objectives of the exclusionary rule when defining the contours of the personal aggrievement requirement." Kuhns, *supra*, at 514.

25. Constitutional standing, though always required, would present no significant obstacle to this unlinking. Every defendant has a concrete interest adverse to the government and will suffer injury-in-fact if the challenged evidence is admitted. This is sufficient for Article III standing. *See, e.g., United States v. Nechy*, 827 F.2d 1161, 1165 (7th Cir. 1987).

Curiously, insofar as the exclusionary rule is construed solely as a deterrent, the standing of all criminal defendants to invoke it is called into question. The defendant, on this view, is not necessarily within the zone of interests protected by the amendment. Nonetheless, a variety of theories have been used to allow litigants to challenge government infringement on the constitutional rights of others with whom they have the requisite relationship. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (physicians may raise right-to-privacy claims of patients); *Barrows v. Jackson*, 346 U.S. 249 (1953) (white sellers may raise equal protection claims of potential Black buyers); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (private school may raise due process claim of potential students). These cases are frequently described as resting on a *jus tertii* concept that looks to the likely impact on unknown, future victims of unconstitutional actions. For discussions of *jus tertii*, see generally, Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

Third-party constitutional standing seems to be a practical necessity. Nonetheless, there is something odd about a rule that would permit a defendant, against whom damaging evidence was discovered, to avoid conviction while an otherwise similarly situated party who had not committed a crime would have no redress. For example, in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Court might have allowed Rawlings to exclude the pills found in Ms. Cox's purse to increase deterrence, even though he had no expectation of privacy in that purse. If, however, he had stuffed indecent pictures of himself in that purse he would have no standing, on that instrumentalist, exclusion-as-deterrence rationale, to sue the police for the embarrassment he suffered when they were illegally exposed to view.

26. To some extent, the criticism of commentators who view standing and the exclusionary rule as inconsistent reflects a belief that the existing balance provides insufficient deterrence. One response to this belief is to abandon the current approach to fourth amendment standing and allow anyone who has suffered injury-in-fact to challenge police actions. *See Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52 (1985) (arguing that the constitutional "injury-in-fact" standard should be the only standing limit in fourth amendment cases, and that criminal defendants should be viewed as representatives of the collective interest in regulating police behavior).

rights are implicated by a search or seizure.²⁷

This linkage has had several negative effects on fourth amendment jurisprudence. First, combined with the current Court's distaste for the exclusionary remedy,²⁸ it has led to a very limited view of the class of persons whose fourth amendment rights are implicated by any given search. Second, busy trial courts can use the standing rules to avoid deciding whether an action is illegal. Such avoidance of substantive issues may inhibit the development of fourth amendment doctrine.²⁹ Third, linking standing and the exclusionary rule may encourage police illegality in the multiparty context,³⁰ especially where the police recognize that the target of their search is unlikely to have standing and the party whose rights are most clearly infringed is unlikely to enforce them. Indeed, the majority of the Supreme Court has been completely unwilling to break this linkage even to deter such bad faith police actions.³¹ Finally, the linkage, together with a narrow view of standing, affects the availability of civil remedies.³² While the notion of tort remedies for

27. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 137 (1978); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969).

28. The Supreme Court has tended to apply the exclusionary rule narrowly because it is skeptical of the benefits and concerned with the costs of exclusion. See *Amsterdam, Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-91 (1964); *Loewy, The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1273-92 (1983); *Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389-96 (1983).

29. Cf. *United States v. Leon*, 468 U.S. 897, 956 n.15 (1984) (Brennan, J., dissenting) (good-faith exception to warrant requirement inhibits doctrinal development). The danger of stunting doctrinal growth is probably less severe in the standing context, since, in a multiparty case, the same police activities unchallengeable by the derivative claimant might be effectively challenged by the primary rightholder.

30. See *United States v. Payner*, 447 U.S. 727, 746-47 (1980) (Marshall, J., dissenting); 4 W. LAFAVE, SEARCH AND SEIZURE § 11.3(j), at 368 (1987).

31. See *United States v. Payner*, 447 U.S. 727 (1980). In *Payner*, an Internal Revenue Service operative deliberately broke into an apartment and stole documents listing U.S. citizens with foreign bank accounts from a briefcase that a Bahamian bank executive had left behind. The information was used to indict the citizens listed, including Payner, for tax evasion. Since no privacy right of Payner was infringed, the Court denied him an exclusionary remedy under either the fourth amendment or the Court's supervisory powers. The majority appears to have taken little account of the fact that under the circumstances, the bank executive was extremely unlikely to bring a civil suit, complain to authorities, or even turn up in the United States again.

Political response has provided an alternative to judicial control of such transgressions, at least where the relevant government agency is the Internal Revenue Service and the interests of politically sophisticated citizens are threatened. Following congressional hearings, the Commissioner of Internal Revenue "adopted guidelines that require agents to instruct informants on the requirements of the law and to report known illegalities to a supervisory officer, who is in turn directed to notify appropriate state authorities." *Id.* at 733 n.5.

32. Fourth amendment standing defines the class of persons who may challenge a fourth amendment violation in any forum, not just those who may claim the benefits of the exclusionary rule. Perhaps because the bulk of fourth amendment litigation arises in a criminal context, courts and commentators sometimes confuse this point. See, e.g., *Payner*, 447 U.S. at 734-37 (denying remedy to defendant under supervisory power because he lacked standing, while using exclusionary

guilty victims of illegal searches may be chimerical, there are frequently other parties with legitimate interests in the places searched. For them, civil remedies may be important,³³ and narrowing standing in order to curb the exclusionary rule makes it correspondingly difficult for such parties to obtain them.

So far, I have used the term "standing" to define the class of persons entitled to raise a fourth amendment challenge. In recent years, however, the Supreme Court has rejected the use of that term in fourth amendment cases. In *Rakas v. Illinois*,³⁴ it held that standing should not be the subject of a separate inquiry,³⁵ rather, a court should decide "the substantive question of whether the challenged search or seizure violated the Fourth Amendment rights of that particular defendant."³⁶ Nevertheless, the standing concept remains relevant to the Court's search and seizure jurisprudence.³⁷

rule-related arguments); Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U. L. REV. 1, 29 (1971) ("Standing tells us not which searches were illegal but which parties may assert their illegality for purposes of the exclusionary rule.").

33. One such remedy is injunctive relief. See *Blackburu v. Snow*, 771 F.2d 556 (1st Cir. 1985) (holding illegal a prison policy requiring all visitors to submit to body cavity searches); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (enjoining widespread pattern of searching homes of innocent third parties in hopes of finding crime suspects); *Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976) (rejecting university policy of searching all people seeking to enter football stadium).

For particularized searches, tort is the mode of redress. The effectiveness of a tort remedy should be neither minimized nor exaggerated. An innocent party may be more likely to bring suit and more likely to obtain a finding of liability. Cf. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986) (damages possible when doctor-plaintiff's clinic door chopped down by police in search for employees believed to be present).

Under *Malley v. Briggs*, 106 S. Ct. 1092 (1986), the police are entitled to immunity from a suit based on an illegal search only if their behavior is shown to be "objectively reasonable." *Id.* at 1098. However, in light of *Memphis Community School District v. Stachura*, 106 S. Ct. 2537 (1986), which held that damages may not be assessed for the mere violation of a constitutional right, there will be little incentive to bring such suits unless the fourth amendment violation causes significant damage to property, reputation, or mental health. Cf. *e.g.*, *Smith v. Heath*, 517 F. Supp. 774 (M.D. Tenn. 1980) (awarding \$140,000 damages, including \$32,500 punitive damages, where police, in pursuit of a minor traffic offender, burst into a home with guns blazing, seriously injured one plaintiff, and ransacked the house in a futile search for evidence that would justify the shooting), *aff'd*, 691 F.2d 220 (6th Cir. 1982). Furthermore, the effectiveness of such suits as a means of systemic deterrence in addition to or in lieu of a broad exclusionary rule, *see* *Bivens v. Six Unknown Agents*, 403 U.S. 388, 413-24 (1971) (Burger, C.J., dissenting), has been seriously undermined by the decision in *Anderson v. Creighton*, 107 S. Ct. 3034 (1987). In that case, the Court provided the police immunity from civil suits whenever a reasonable police officer could believe the facts justified a warrantless search.

34. 439 U.S. 128 (1978).

35. Of course, the proponent of a fourth amendment claim still must demonstrate constitutional standing. *Rakas*, 439 U.S. at 132 n.2; *see supra* note 25.

36. 439 U.S. at 138.

37. *See, e.g.*, *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276, 279 (1983). Sometimes the same question—that of whose rights, if any, are infringed by a government action—is articulated as whether the activity was a "search" or a "seizure." *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 183-84 (1984); *United States v. Jacobsen*, 466 U.S. 109 (1984).

In theory, this distinction is purely semantic. Before *Rakas*, the Court's standing analysis consisted of two inquiries: (1) injury-in-fact and (2) whether the defendant's own fourth amendment rights had been violated.³⁸ In *Rakas*, the Court essentially conceded the first and collapsed the second into the substantive determination. In practice, however, the formal change has been problematic. It obscures the three questions that always lurk in the multiparty context: (1) Did the claimant have a fourth amendment right at stake? (2) Was anyone else's fourth amendment right at stake? and (3) Did the challenged activities violate the fourth amendment? A negative answer to the first question avoids having to reach the third for purposes of the particular lawsuit, but, because the rights of other parties may be at stake, it does not (as it would in the single-party context) render the third question pointless. In a suit involving the same facts brought by a different claimant whose fourth amendment rights were at stake (that is, a claimant with "standing"), the legitimacy of the police actions would need to be examined.

Two examples illustrate the problem. First, consider a case where the primary rightholder is also the claimant. The claimant alleges that government agents infringed his fourth amendment rights by opening his suitcase, examining his bank records, or coming on his land. A court may reject these claims by deciding, for example, that he had abandoned the suitcase,³⁹ that he had no expectation of privacy in the bank's records of his transactions,⁴⁰ or that he had no expectation of privacy in the open fields that he owned.⁴¹ Each determination, whether articulated as a lack of standing or as a lack of any substantive fourth amendment interest, is a finding that the government activity did not infringe any constitutionally protected interests. At least in theory, the reasonableness of, or justification for, the police conduct is thus irrelevant to the constitutional analysis.⁴²

In contrast, imagine a case where the police, seeking to discover evidence against a mob figure, wait for him to go on vacation and then break into his house.⁴³ Burglar has been awaiting the same opportunity, and the police surprise her inside the mob figure's house, burglar tools and loot in hand. Under either a traditional or shared privacy analysis,

38. *Rakas*, 439 U.S. at 139.

39. See *United States v. O'Bryant*, 775 F.2d 1528 (11th Cir. 1985).

40. *United States v. Miller*, 425 U.S. 435 (1976).

41. *Oliver v. United States*, 466 U.S. 170 (1984).

42. See Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1 S. ILL. U.L.J. 75 (1977). Note, however, that the preliminary determination of whether there was a search may be affected by the court's evaluation of the reasonableness of the investigative technique or the need for the police activity. See *infra* text accompanying notes 81-87.

43. This hypothetical is a variation of one discussed in Alschuler, *supra* note 13, at 4-5.

no right of Burglar has been infringed by the police break-in; she lacks fourth amendment "standing," and the evidence thus discovered can be introduced at her trial.⁴⁴ It is equally clear, however, that the mob figure's fourth amendment rights *were* implicated by the police actions, and, if he were to bring a tort suit, the government would have to show probable cause and the other prerequisites to a valid search in order to avoid liability.

So long as there are situations where the class of those permitted to raise claims is restricted in some fashion, the terminology of standing serves a valuable function. If a party to a legal action is determined not to be a rightholder, a decision couched in the language of standing makes it clearer that a fourth amendment violation may have occurred nonetheless.

The primary purpose of this Article, however, is not to clarify the Court's treatment of fourth amendment standing or argue for unlinking questions of standing and remedy. Rather, it is to reconceptualize the class of persons whose rights are implicated by a fourth amendment violation that occurs in a multiparty context, to include those who have relationships of sharing with the primary rightholder. Such a reconceptualization, by enlarging the class of persons who may claim a remedy, would also, under current doctrine, expand the class of persons who may invoke the exclusionary rule.⁴⁵

B. Property, Privacy, and the Single Defendant

Most real-life multiparty fourth amendment cases, of course, bear little resemblance to the burglar hypothetical. Typically, the defendant's link to the place searched or item seized is not fortuitous. Rather, she has a relationship with the primary rightholder, who, in turn, has a property or privacy interest that the government has invaded. That relationship of shared privacy arguably provides the basis for the defendant, as well as the primary rightholder, to assert a fourth amendment claim. Before discussing shared privacy claims in more detail, I briefly trace the evolution of the expectation-of-privacy standard as it has developed with respect to single-party claims.

Every multiparty case has embedded within it a single-party case: The primary rightholder can, at most, share what she herself has. For

44. See *People v. Solario*, 19 Cal. 3d 760, 764, 566 P.2d 627, 629, 139 Cal. Rptr. 725, 727 (1977). A contrary result must entail a decision to maximize deterrence of police misconduct by imposing no fourth amendment limits on the range of people who may raise search and seizure claims. See Doernberg, "The Right of the People": *Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983).

45. It thus advances indirectly the instrumental concerns addressed more directly by others. See, e.g., Kuhns, *supra* note 24; Doernberg, *supra* note 26.

example, it is black letter law that fourth amendment claims can be lost by abandoning the property searched, even inadvertently.⁴⁶ Thus, I might have the right to challenge a search of my parent's apartment where I leave some of my property and occasionally stay. But if my parents were to move and inadvertently leave my things behind, I would have no cognizable complaint about a later police search. As to me as much as to my parents, the place searched would then be a stranger's apartment.

Two questions permeate fourth amendment jurisprudence. First, is the conceptual basis for the claim grounded in notions of property or of privacy? Second, to the extent expectations of privacy determine the existence of a claim, what criteria do courts use to decide when such expectations are "reasonable"? These are discussed in turn. The discussion is primarily descriptive; I seek to show the common patterns within the decisions without suggesting either that the case law requires these results or that these results are desirable.

1. *Historical Development: Property vs. Privacy as a Basis for Fourth Amendment Claims*

Fourth amendment analysis traditionally began by determining whether any property right had been infringed.⁴⁷ Nevertheless, the use of property concepts to mark the boundaries of fourth amendment protection did not mean that privacy interests were irrelevant.⁴⁸ An individ-

46. See, e.g., *United States v. O'Bryant*, 775 F.2d 1528 (11th Cir. 1985) (no expectation of privacy regarding briefcase left in car, where car was stolen and briefcase was left next to trash dumpster).

47. In *Entick v. Carrington*, 19 Howell's State Trials 1030 (1765), the classic case that served as inspiration for the fourth amendment, Lord Camden, in condemning a general warrant, asserted that "[t]he great end, for which men entered into society was to secure their property. . . . [E]very invasion of private property, be it ever so minute, is a trespass," *id.* at 1066, and thus forbidden to the government absent compelling justification. (The "official" report of the case, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765), does not include the complete text of Lord Camden's opinion.) See also *Olmstead v. United States*, 277 U.S. 438 (1928) (wiretapping not a search since it does not interfere with any interest in a tangible thing); *Boyd v. United States*, 116 U.S. 616 (1886) (defendant protected from forced production of documents by fourth and fifth amendments under property and privacy rationales). See generally N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

48. Indeed, in many cases, courts invoke both privacy and property concerns, often without clearly distinguishing the two. See, e.g., *Entick*, 19 Howell's State Trials at 1066 ("though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass"). The sharp dichotomy that some current writers seek to draw between property and privacy, see, e.g., Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197 (1981), is simply inconsistent with the 18th century conception of the relation between these ideas. Private houses and private papers were protected from unwarranted invasion; there was no reason to separate the property right from the privacy interest embodied within it. See, e.g., *Entick*, 19 Howell's State Trials at 1066; 3 ELLIOT'S DEBATES ON THE

ual, to the extent he wanted privacy (that is, the power to exclude unwanted others from access), could be expected to purchase such a right through the property law system.⁴⁹

At least with tangible objects, the rights associated with ownership or possession generally do serve to maintain the item or place as private. The fourth amendment, in turn, protects the owner from unlawful invasion by the government of those areas and items.⁵⁰ Furthermore, an owner can, formally or informally, provide others access to his property, thereby creating a zone of protection for particular relationships.

In one important respect, however, the use of property as a threshold test for allowing fourth amendment claims was underinclusive. Searches that can be carried out without physical manipulation of the objects searched and without physical presence in a protected area can invade privacy, but they do not interfere with traditional property rights. Nonetheless, to the extent the relevant risk was simply a constable peering through a window, the ready availability of self-help remedies (such as hanging curtains) avoided any need for the courts to reexamine the limits of property as a conceptual basis of the doctrine.⁵¹

The development of electronic wiretapping and bugging brought to the surface certain inadequacies of property as the sole determinant of

FEDERAL CONSTITUTION 448-49 (1881) (comments of Patrick Henry on the need for the fourth amendment).

49. The boundaries of the world one could make private were thus defined, like many other valued things, by one's wealth as well as by one's willingness to pay. The law protecting privacy operated on the world as it existed, including the distribution of wealth within it. "Persons are secure in the privacy of their houses if they have houses, secure in the privacy of other private places if they are able to enter them. The amendment rests on the premise that individuals will acquire and hold private property." Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52 (1974).

Note that a pure property rationale for the fourth amendment embodies a gender bias. Except where community property notions apply, it is far more likely, especially in a traditional relationship, that the man of the house holds the title to jointly used property. See Knetsch, *Some Economic Implications of Matrimonial Property Rules*, 34 U. TORONTO L.J. 263 (1984).

50. *Boyd v. United States*, 116 U.S. 616 (1886), held that the fourth amendment had an absolutist core, akin to the fifth amendment's condemnation of any compelled self-incrimination. *Id.* at 624, 634-35. Under such an analysis, searches for certain kinds of items—those in which the government had no property claim superior to that of the defendant—were per se unreasonable. Current doctrine holds that the government's power of search or seizure is not delimited by notions derived from substantive property law. *Warden v. Hayden*, 387 U.S. 294 (1967). In other words, the fourth amendment has been reinterpreted as a procedural protection only, although the level of justification required may be very high for particularly intrusive searches and seizures. See, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1985) (firing bullet into fleeing defendant's body); *Winston v. Lee*, 470 U.S. 753 (1985) (removing bullet from defendant's body); cf., e.g., *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983) (limiting authority to carry out strip searches and body-cavity searches); *Tinetti v. Wittke*, 479 F. Supp. 486 (E. D. Wis.) (limiting authority to carry out strip searches), *aff'd.*, 620 F.2d 160 (7th Cir. 1980).

51. See, e.g., *Taylor v. United States*, 286 U.S. 1 (1932) (searchlight directed through small opening in garage revealed contraband); *United States v. Lee*, 274 U.S. 559 (1927) (searchlight revealed contraband on deck of boat).

fourth amendment standing. When the "thing" the citizen wishes to keep private is a conversation, property rules work poorly.⁵²

At first, the Court held to property and its corollary, trespass, to define the parameters of fourth amendment protection. Thus, the claim that wiretapping violated the fourth amendment was rejected in *Olmstead v. United States*, since "[t]he Amendment itself shows that the search is to be of material things."⁵³ In his dissent to *Olmstead*, Justice Butler found a quasi-property right in telephone conversations that would permit fourth amendment control of wiretapping without reconceptualizing traditional doctrine: "The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it."⁵⁴ The Court's inability to fit new technology into old doctrine led to patent absurdities in the case law. The Court held, for example, that government eavesdropping, carried out by placing a microphone against the wall of an adjoining apartment, was not a search,⁵⁵ but found a constitutionally relevant distinction in the use of a "spike mike," which penetrated the defendant's wall from an adjacent apartment.⁵⁶ Although the latter defendant was undoubtedly delighted to have the evidence against him suppressed, it seems unlikely that he cared about the physical sanctity of his wall.⁵⁷

In *Katz v. United States*,⁵⁸ the Court rejected property as the touchstone of fourth amendment analysis. The facts of *Katz* are fairly simple, though assessing their significance is not. FBI agents attached a

52. The difficulty in applying property law to conversation is suggested by the case law seeking to define copyright in unpublished works. See, e.g., *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

The difficulty in conceptualizing property rights in a conversation may reflect not only its intangibility but its essentially relational nature. The words of each party are her own, but they generally have meaning and value only as part of a jointly created whole. The proper treatment of conversations involving the defendant has been a subject of substantial controversy under modern fourth amendment jurisprudence, see, e.g., *Alschuler*, *supra* note 13, but is beyond the scope of this Article.

53. 277 U.S. 438, 464 (1928).

54. *Id.* at 487; cf. *Entick v. Carrington*, 19 How. St. Trials 1030, 1066 (1765) (quoted *supra* note 48).

55. *Goldman v. United States*, 316 U.S. 129 (1942).

56. *Clinton v. Virginia*, 377 U.S. 158, 158 (1965) (per curiam) (Clark, J., concurring); see also *Silverman v. United States*, 365 U.S. 505, 509 (1961) (fourth amendment applicable where "eavesdropping was accomplished by means of an unauthorized physical penetration into the [defendants'] premises").

57. There is, of course, nothing unusual in litigation turning on an issue quite distinct from the real interests and concerns of the parties. See *Sinon*, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 37 & n.18; cf. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920) (legal claims and obligations are conceptually distinct from moral claims and obligations). To the extent, however, that property had been perceived as a proxy for privacy concerns, see, e.g., *Warden v. Hayden*, 387 U.S. 294, 303-09 (1967), the discontinuity casts doubt on the legitimacy of the doctrine itself.

58. 389 U.S. 347 (1967).

microphone to a public telephone booth that they knew Katz, a suspected bookmaker, used. When Katz stepped into the booth to make a call, the agents activated the device and recorded his conversations.⁵⁹ Although Katz clearly had no property right in the telephone booth, he argued that he did have a possessory interest during the time he was within it.⁶⁰ Therefore, he argued, the telephone booth was a "constitutionally protected area."⁶¹

The Court in *Katz* rejected altogether the need to prove a trespass and adopted a new mode of analysis.⁶² The crucial question became whether Katz had an expectation of privacy in the phone booth.⁶³ The Court decided that he did have such an expectation when he entered the phone booth, closed the door and sought to exclude the intruding ear.⁶⁴ It held, in essence, that a person could establish a reasonable or legitimate⁶⁵ expectation of privacy as to activities or items to which property rights could not or did not attach, and that such expectations could serve as the basis for a fourth amendment claim.

In the decades since *Katz*, the relevance of property to fourth amendment law has been unclear.⁶⁶ On the one hand, cases like *Oliver v.*

59. *Id.* at 354 & n.14.

60. *Id.* at 352. Even in the heyday of the property regime, a possessory interest could serve as the basis for standing. *See, e.g., Jones v. United States*, 362 U.S. 257 (1960).

61. *Katz*, 389 U.S. at 349; *see also Silverman v. United States*, 365 U.S. 505 (1961).

62. *Katz*, 389 U.S. at 353. The Court had already held that technical trespass under state property law was unnecessary. *See Silverman v. United States*, 365 U.S. 505 (1961); *United States v. Jeffers*, 342 U.S. 48 (1951). Those cases could be read, however, simply as adopting a federal common law of property for fourth amendment cases, with a distinct regime of entitlements and greater protection against intrusions.

63. *Katz*, 389 U.S. at 351-52; *see also id.* at 360-62 (Harlan, J., concurring).

64. *Id.* at 352.

65. Harlan's seminal concurrence in *Katz*, 389 U.S. at 360, refers to "reasonable" expectations of privacy. Use of the term "legitimate" to describe protectable expectations can be traced to Justice Powell's opinion in *Couch v. United States*, 409 U.S. 322, 336 (1973). That formulation was subsequently adopted by Justice Rehnquist in *Rakas v. Illinois*, 439 U.S. 128 (1978). The majority opinion in *Katz* spoke of "justifiable" expectations. 389 U.S. at 353.

Each formulation carries connotations that can interfere with understanding what is or ought to be at stake. "Reasonableness" or "justifiability" seem like criteria for separating valid from invalid claims but in fact serve merely as definitional stops. "Legitimacy" implies an assessment not merely of the privacy interest but also of the activity or object sought to be protected; thus, the fact that defendant is seeking to suppress evidence in a criminal trial can become a reason for denying "legitimacy" to the defendant's expectations. "Expectation," though having an objective as well as a subjective component, draws us away from the notion of entitlement. In particular, it may influence courts to deny any continuing independent significance to property in fourth amendment analysis. Finally, the term "privacy" has an atomistic flavor and thus implicitly cuts against claims relying on shared access to the place searched or the item seized. *See supra* text accompanying note 9.

On the power of language to draw us away from thinking about concrete problems, *see generally Casebeer, The Judging Glass*, 33 U. MIAMI L. REV. 59 (1978); *Cohen, Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

66. The *Katz* opinion itself suggested the continuing relevance of property or possessory rights to fourth amendment analysis. *Katz*, 389 U.S. at 350 & n.4.

*United States*⁶⁷ hold that a property right alone is insufficient to ground a fourth amendment claim. On the other hand, cases like *Rawlings v. Kentucky*⁶⁸ rely heavily on the absence of a property right in denying the defendant's fourth amendment claim.⁶⁹ Property clearly remains significant in assessing challenges to seizures.⁷⁰ Even when inquiry is limited to searches, as in the remainder of this Section, property may be relevant as an indicium of legitimate expectations of privacy.⁷¹

67. 466 U.S. 170 (1984) (fourth amendment inapplicable to "open fields"); *cf.* *United States v. Quinn*, 106 S. Ct. 1623, 1623-25 (1986) (Burger, C.J., dissenting from dismissal of certiorari) (arguing that owner of boat who is not present at time of search has no standing to challenge that search).

68. 448 U.S. 98 (1980).

69. *Rawlings'* neglect of the "property" aspect of the fourth amendment appears to have infected some lower courts. For example, in *United States v. Grandison*, 780 F.2d 425, 432 (4th Cir. 1985), *vacated*, 107 S. Ct. 1270 (1987), the court of appeals rejected a fourth amendment challenge to the admission of a letter "contained in an open envelope, wrapped in an unsealed plastic bag," because it had been left in a car belonging to a friend of the defendant. The court concluded, citing *Rawlings*, that the defendant had abandoned any expectation of privacy and, implicitly, any property interest as well. *Id.* Such a conclusion requires assuming either that the letter was immediately incriminating (and thus in "plain view"), or that the defendant's friend's car was as open to the public as a city trash dump.

70. A seizure is an interference with the right of possession and use of an object and has nothing to do with privacy as such. *See* *United States v. Salvucci*, 448 U.S. 83, 91 n.6 (1980); Slobogin, *Capacity to Contest a Search and Seizure*, 18 AM. CRIM. L. REV. 387, 414-15 (1981). Thus, even if searches were analyzed entirely under an expectation-of-privacy criterion, property rights would remain directly relevant for determining standing to challenge seizures. *See* *Katz v. United States*, 389 U.S. 347, 350 & n.4 (1967). Some commentators have argued that the Court's analysis in *Rawlings* reflected a misunderstanding of this point. *See, e.g.,* Alschuler, *supra* note 13, at 14-17.

The classic example of separate analyses for a search and subsequent seizure was written by (then) court of appeals Judge John Paul Stevens in *United States v. Lisk*, 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976). *Lisk* had left a bomb in the trunk of his friend's car. Judge Stevens held that, even though *Lisk* had no standing regarding the search of the trunk that revealed the bomb, he could challenge the subsequent police seizure. That challenge failed, however, since it was immediately evident when the trunk was opened that the bomb was evidence of a crime; the seizure was a reasonable one.

71. The continuing force of individual property claims is demonstrated in *Alderman v. United States*, 394 U.S. 165 (1969). Over the dissent of Justice Harlan, the majority granted standing to the owner of the property where phones were tapped, even as to transcripts of conversations in which he did not participate. Similarly, courts generally have been willing to grant standing to defendants with a cognizable interest in the place searched even if incriminating evidence is uncovered only by a further search of a container that belongs to a third party. *See, e.g.,* *United States v. Karo*, 468 U.S. 705, 714 (1984) (warrantless monitoring by an electronic tracking device in a private home violates fourth amendment rights of homeowner); *United States v. Perez*, 700 F.2d 1232, 1236 (8th Cir. 1983) (homeowner has standing to assert fourth amendment claim when his guests' bags are searched in his home). *But see* *Karo*, 468 U.S. at 724 (O'Connor, J., dissenting) ("When a closed container is moved by permission into a home, the homeowner and others with an expectation of privacy in the home itself surrender any expectation of privacy they might otherwise retain in the movements of the container—unless it is *their* container or under *their* dominion and control.") (footnote omitted) (emphasis in original).

2. *Expectations of Privacy: Criteria*

By defining the scope of the fourth amendment in terms of privacy expectations and relegating property interests to a secondary role, the Court has left lower courts without a coherent body of law with which to analyze fourth amendment claims. Consequently, the courts have had to attempt to define the amorphous concept of privacy.

Privacy in the fourth amendment context⁷² comprises the ability to shield certain core aspects of ourselves from governmental intrusion—either information about us⁷³ or, perhaps more fundamentally, our physical being.⁷⁴ The underlying assumption is that people need a zone that can be protected and separated from the world at large. Some commentators assert that people need this ability to exclude so that they can bestow something of value to friends and loved ones when they choose to share things about themselves.⁷⁵ Others simply presume its value.⁷⁶

Courts have sought to translate these ideas into concrete legal standards by developing a series of subtests to determine which expectations of privacy should be protected.⁷⁷ Three criteria seem to run through the

72. There is an enormous quantity of legal and philosophical literature about privacy in general. See, e.g., 13 NOMOS: PRIVACY (J. Pennock & J. Chapman eds. 1971); A. WESTIN, PRIVACY AND FREEDOM (1967); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Gross, *Privacy and Autonomy*, in PHILOSOPHY OF LAW 246 (J. Feinberg & H. Gross 2d ed. 1980); Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323 (1975).

73. See Fried, *Privacy*, 77 YALE L.J. 475, 475 (1968).

74. See Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974).

75. See, e.g., Fried, *supra* note 73, at 482. In the fourth amendment context, however, the issue is generally whether the *police* should have access to a certain aspect of our lives. Even if the police are allowed access, those with whom we have relations of love, friendship, and trust must still depend on voluntary sharing to gain access to those things that we seek to keep "private." The individual privacy protected by the fourth amendment thus may be my interest in exclusion, in choosing who is *not* to know about me, rather than my ability to determine whom to include. The latter is protected, if at all, by concepts of shared privacy. See *Warden v. Hayden*, 387 U.S. 294, 323 (1967) (Douglas, J., dissenting) ("[E]very individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets . . .").

76. See, for example, Justice Brandeis' famous dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), with its paean to the "right to be let alone," or Justice Douglas' opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

77. See Amsterdam, *supra* note 9, at 349. While scholars generally recognize that there is a "core" of values at the heart of the fourth amendment, indicated by the language of the amendment itself, they disagree over how this core of values is affected by social context. See Alschuler, *supra* note 13, at 6 n.12 (privacy norms are necessarily social constructs and thus vary with time); Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 536 (1978) ("[The fourth amendment] must consider what citizens have a right to expect rather than society's current expectations. A public opinion poll cannot define . . . reasonable expectation.").

Alschuler, I think, has the better of the argument. The notion of privacy that underlies the fourth amendment is rooted in ordinary behavior, and people's actual expectations of what is private are historically contextual. Changes in behaviors and social norms inevitably affect our subjective

courts' decisions: (1) the privacy of the place searched,⁷⁸ (2) the intrusiveness of the police behavior, and (3) the measures taken by the claimant to protect her privacy.⁷⁹ Each criterion contains both an empirical inquiry (how do most people normally behave?) and a normative inquiry (what claims should people be able to assert?). These two inquiries are sometimes articulated as whether the defendant demonstrated (a) a subjective expectation of privacy that was (b) objectively reasonable.⁸⁰

In the usual fourth amendment case, the Court's empirical inquiry attempts to determine whether the investigative technique used by the police is so common⁸¹ or so easily guarded against that the defendant would not have any expectation of privacy as to the evidence uncovered by it. For example, the defendant would have no cognizable expectation of privacy if the police merely peered through an uncurtained first-floor

sense of privacy. For example, contemporary attitudes towards bodily privacy are substantially different from the Victorians'.

78. Most private are people's homes and bodies. Police entry into the home usually requires the full panoply of fourth amendment protections, and even nontrespassory incursions are subject to fourth amendment limits. *See, e.g., Dow Chemical Co. v. United States*, 106 S. Ct. 1819, 1825-26 (1986) (holding aerial surveillance of a business not a search, but distinguishing such surveillance of a private home). Similarly, it is difficult to conceive of circumstances in which an inspection of those portions of a person's body not generally exposed to the public would not constitute a search. *See, e.g., Winston v. Lee*, 470 U.S. 753 (1985) (surgery to obtain evidence from defendant's body is a search); *cf. Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985) (strip searches of visitors to maximum security prison impermissible without particularized and reasonable suspicion), *cert. denied*, 106 S. Ct. 1199 (1986). For an analysis of third-party claims regarding items secreted in the body of another, see *infra* note 292.

At the other end of the spectrum are places that are deemed by their nature insufficiently private. Thus, investigations of open fields or the contents of trash cans are generally not searches. *See Oliver v. United States*, 466 U.S. 170 (1984) (open fields); *California v. Rooney*, 107 S. Ct. 2852, 2862 (1987) (White, J., dissenting from dismissal of certiorari) ("society is not prepared to accept as reasonable an expectation of privacy in trash"); *United States v. Kramer*, 711 F.2d 789 (7th Cir.) (trash not protected), *cert. denied*, 464 U.S. 962 (1983). *But see People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969) (trash protected under the fourth amendment). Similarly, cars have been held to carry a lesser degree of protection than homes. Here, as elsewhere, the Court's vision of people's ordinary behavior and expectations seems unduly narrow. At least for Southern Californians, the car often serves as a portable living space as well as a means of transportation. *See Grano, Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 637 (1982); *Katz, Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 569-71 (1982).

79. The fourth amendment's language focuses on the reasonableness of the government's action, not the reasonableness of the defendant's actions in preventing incursions on her privacy. However, if we want to assess the reasonableness of the government's conduct in light of the claimant's expectations, some degree of circularity may be unavoidable.

80. *See Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring). While the defendant may subjectively expect less privacy than the average person, it is unclear that such low expectations should legitimate police actions, and I am aware of no case that has so held.

81. Since the test turns on the defendant's expectations, the real issue is not how common a technique is, but how common the awareness of it is. *See Smith v. Maryland*, 442 U.S. 735 (1979) (majority and dissent disagreed on whether most people know about telephone company pen registers). *Compare id.* at 743 *with id.* at 749 & n.1 (Marshall, J., dissenting).

window⁸² because that technique is available to curious passersby⁸³ and easily prevented by installing curtains or shades.⁸⁴

At the other end of the spectrum are investigative techniques that are either generally unavailable or illegal. If, for example, certain information could be gathered only by a sophisticated military infrared camera, we would reasonably expect such information to remain private.⁸⁵ To hold that citizens have no expectations of privacy because the police commonly use a particular technique would allow the government to pull itself up by its bootstraps, destroying otherwise existing expectations of privacy by inputting to citizens knowledge of the availability or use of techniques that are unlikely to be used by nongovernmental entities.⁸⁶ Similarly, the government should not be allowed to destroy citizens' expectations of privacy by using obvious and intrusive investigative techniques.⁸⁷ Courts should attempt to discover what sorts of private prying

82. See, e.g., *James v. United States*, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969) (admitting evidence found when police stooped down and peered through crack in garage door since "what he saw would have been visible to any curious passerby"). But see *State v. Tarantino*, 83 N.C. App. 473, 350 S.E.2d 864 (1986) (finding reasonable expectation of privacy on almost identical facts), remanded for further consideration in light of *United States v. Dunn*, 107 S. Ct. 1134 (1987), 319 N.C. 409, 354 S.E.2d 727 (1987).

83. While we do not expect police to adhere to Emily Post, some permitted intrusions extend well beyond what even the most curious of bystanders would do. For example, the majority in *California v. Ciraolo*, 106 S. Ct. 1809 (1986), found no search in a deliberate police overflight of defendant's back yard since "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." *Id.* at 1813. The dissent, however, would have found that the risk that an ordinary air passenger would have made such observations and realized whose back yard he was peering into was "too trivial" to consider. *Id.* at 1818 (Powell, J., dissenting). See LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 295-300 (1986).

84. Failure to take direct action to protect privacy may indicate lack of concern and thus show that the defendant had no expectation of privacy. See, e.g., *United States v. Head*, 783 F.2d 1422, 1424, 1427-28 (9th Cir.) (police officer's looking in dark-coated window of defendant's van "by placing his face against the glass and cupping his hands around his eyes" not a search since the defendant "might have prevented all viewing by the installation of curtains"), *cert. denied*, 106 S. Ct. 2895 (1986). However, since every precaution imposes some costs, we cannot assume that the failure to take precautions evinces a lack of concern with privacy without knowing both the perceived cost of the precaution and the perceived risk created by not taking it. It seems unlikely, for example, that the defendants in *People v. Guerra*, 21 Cal. App. 3d 534, 98 Cal. Rptr. 627 (1971), were not concerned with privacy simply because they talked loudly enough within their apartment that the police could overhear by pressing their ears to the door.

85. Cf. *Dow Chemical Co. v. United States*, 106 S. Ct. 1819 (1986) (not a search when government examines defendant's property with a \$22,000 mapping camera). The line between an ordinary and an extraordinary technique is an extraordinarily difficult one to draw.

86. The determination of how common a given technique is often depends on the judge's intuition and is very sensitive to the level of generality at which the issue is defined. For example, the decision in *United States v. Whaley*, 779 F.2d 585 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 931 (1987), seems a great deal less troubling if the activity is described as "looking through an uncurtained window" rather than scrambling down the bank of a canal and looking through a window that is otherwise inaccessible. See *id.* at 590.

87. Justice Harlan warned against such misuse of the subjective prong of the expectation of privacy test. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). Nonetheless,

an ordinary citizen, with a reasonably well-developed sense of privacy, would seek to guard against. If they found that people generally expect to be overheard in restaurants or that they do not expect anyone to examine their trash cans, that would establish an empirical baseline for identifying the kinds of activities that invade privacy.

The ultimate issue, however, is not purely empirical. Our conclusion also rests on a normative judgment: Is the defendant's expectation one to which society is prepared to give legal force? If I were to take an item I wished to keep secret and carefully hide it under a bush near an abandoned farmhouse far out in the country, I would expect it to remain undiscovered. As a prediction, the expectation would be entirely reasonable. Yet, if the police uncovered the item, it is unlikely that many people would say that the police had carried out a search, invading my reasonable expectation of privacy. That normative judgment reflects our views of "appropriateness" in regard to the factors listed above—the generally private nature of the place searched, the intrusiveness and commonness of the investigative technique, and the ease of self-help remedies.

Both the objective and subjective prongs of the expectation-of-privacy standard are sufficiently indeterminate that judges' individual assumptions about how people behave and ought to behave may easily intrude. Judges tend to assess these factors through the eyes of someone like themselves; such assessments may bear only a tangential relationship to the lives of those more commonly subject to police investigations.⁸⁸ The indeterminacy of the standard also allows the court's decision as to what expectations of privacy are "objectively reasonable" to be influenced by the perceived value of either the government interest advanced by an investigative technique⁸⁹ or the activities or objects the technique is

courts have held, for example, that the signs warning airline passengers of x-ray searches before boarding either eliminate any expectation of privacy or, what amounts to the same thing, render anyone's voluntary passage through the machines an automatic consent to the search. *See, e.g., United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980); *United States v. DeAngelo*, 584 F.2d 46 (4th Cir.), *cert. denied*, 440 U.S. 935 (1978).

88. *See Amsterdam, supra* note 9, at 438 (describing the difficulty of establishing any zone of privacy in the ghetto). The legal realists stressed the impact of the judge's own beliefs, ideas, and socialization on his decisions. *See, e.g., J. FRANK, LAW AND THE MODERN MIND* 143-47 (1936). Nonetheless, legal rules such as those suggested here can constrain a judge's felt ability to follow his own underlying predilections. *See Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

89. Courts have held that certain activities are not searches because they are essential to furthering important government interests, such as protecting our borders from illegal aliens, *see, e.g., United States v. Ramsey*, 431 U.S. 606 (1977) (routine border searches require no government justification) or fighting drug trafficking, *see, e.g., United States v. Mendenhall*, 446 U.S. 544, 561 (1980) ("The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit."). Since every fourth amendment exclusionary rule case implicates some social

likely to uncover.⁹⁰ The indeterminacy of "expectations of privacy" may be unavoidable if courts are to attempt to formulate rules that accommodate the messiness of ordinary life.⁹¹ The challenge is to develop administrable standards that will also accurately reflect the lives of the people who are most frequently involved in fourth amendment cases.

In Part IV, I propose a more focused inquiry about the scope of protection for "third-party claimants," using an explicit and relatively protective set of background assumptions. A similar mode of analysis might also be valuable in the single-party context, not by purporting to require particular decisions, but by encouraging conscious consideration of certain privacy values that courts currently appear to undervalue.⁹²

evil that a legislature has chosen to criminalize, it is difficult to discern any limiting principle to this line of argument.

90. If a court is convinced that the technique will only affect those guilty of crime, it is less likely to consider the technique a search. Thus, a dog sniff that exposes nothing about the contents of a piece of luggage except whether it contains cocaine has been held not to be a search. *United States v. Place*, 462 U.S. 696 (1983); *see also* *United States v. Jacobsen*, 466 U.S. 109 (1984) (field test for cocaine not a search). It will be interesting to see how the Court deals with such an investigative technique when the process, though not the result, is seen to intrude on the personal integrity of all made subject to it, guilty and innocent alike. The Court's focus on results, largely a product of the linking of fourth amendment and exclusionary rule, tends to discount the significance of the fourth amendment as a barrier to the *process* of searching. *See* *United States v. Thomas*, 757 F.2d 1359, 1366-67 (2d Cir. 1985) (dog sniff immediately outside defendant's dwelling held a search).

A similar belief about the class perceived as protected informs decisions that, for example, open fields are unprotected. *See, e.g.,* *Oliver v. United States*, 466 U.S. 170, 176-77 (1984). In these situations, however, some innocent activities of innocent people are at risk. To hold that these intrusions are not a search thus necessarily considers the cost to privacy interests, though real, small enough to be outweighed by the law enforcement benefit. Use of such a balancing process to eliminate fourth amendment review altogether is inappropriate.

91. Even acknowledging that the need for fact-sensitivity makes a bright line undesirable as well as unworkable, the courts could develop criteria to structure the inquiry. Fourth amendment jurisprudence has been described, entirely circularly but not entirely unfairly, as holding "that the Fourth Amendment applies only to searches that intrude upon reasonable expectations of freedom from government search." *Kitch, Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 134.

92. Given the indeterminacy of "expectations of privacy," perhaps property could provide an alternative or additional basis for resisting government claims. If property seems too narrow to encompass much of what seems worthy of protection, that perception may reflect a failure of imagination rather than anything inherent in the notion of property. Property for fourth amendment purposes seems to be the traditional, individualistic, tangible, lay person's notion of property. The shift to privacy discourse in *Katz* may have been a product of the Court's dissatisfaction with traditional property rules as a basis for fourth amendment claims. In fact, property notions embedded in such fields as trusts, corporations, and intellectual property are often quite expansive; some contemporary writers conceptualize property as "an aspect of relations between people." *Baker, Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742 (1986); *see also* *Radin, Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); *Singer, The Reliance Interest in Property*, 40 STAN. L. REV. 611, 699-701 (1988) (arguing that in many areas the law recognizes privacy interests created by the claimant's reliance on a relationship with the owner). This vision could be adapted to encompass shared interests in places and things, even those not currently legally cognizable. Of course, such a reconceptualization might leave "property" as vague as "expectations of privacy" often is now.

II SHARED PRIVACY AS A BASIS OF FOURTH AMENDMENT CLAIMS

When more than one person has an interest in the place searched, a court must decide whether the fourth amendment interests of the particular person before the court were infringed. In this Part, I develop several distinctions that seem relevant to that decision. I begin with an ahistoric, inductive model, setting out the factors on which courts appear to have relied. I then examine a few Supreme Court cases, demonstrating how the Court has applied these factors in reaching its conclusions. While this Part is primarily descriptive, it also identifies flaws in the Court's treatment of shared privacy claims, laying the foundations for the alternative approach set out in Part IV.

A. Patterns of Relationships: Factors in Analyzing Derivative Claims

Courts use two major factors to assess the strength of derivative claims:⁹³ the relationship between the claimant and the primary rightholder, and the claimant's own interest in the place searched or item seized.

1. The Nature of the Relationship: Explicit and Implicit Sharing

The nature of the relationship between the primary rightholder and the claimant varies. Courts seem more inclined to protect clearly defined, legally specified relationships, such as commercial contracts, than more undefined relationships, such as close friendships.

Some commercial relationships deal explicitly with questions of "shared" property. For example, if I give my painting to a bank for placement in a safety deposit box, I am, in a sense, depending on the bank's property rights (that is, its right to exclude others) for protection. In the commercial context, however, the claimant's own property or property-like rights often suffice to confer standing. Once the contract of bailment is entered into, I have a property right to the safekeeping of the item;⁹⁴ I become a primary rightholder.

93. The separation of criteria that follows is purely a heuristic device. In practice, courts blend these factors into a thick soup that not only makes conclusions logically indeterminate but allows judges to decide cases based on their own unarticulated background assumptions or, worse, outcome preferences. See *infra* text accompanying notes 175-90.

94. Because commercial bailments involve an explicit, legally structured relationship, the law more readily gives them force in contexts other than the relationship *inter se*. Thus, much of this Article might be viewed as an attempt to carry over into the realm of intimate relationships the protections that flow from commercial bailments. There is an intriguing historical dialectic at work here; the formal, legal structure of commercial bailments developed in response to the perceived inadequacy of traditional unwritten patterns of trust to protect people in relationships from each

Sometimes, even though the relationship is commercial, the bailment is not explicit. The passenger in a taxicab, for example, consciously thinks of herself as purchasing transportation from point *A* to point *B*. But it is unlikely that either party thinks about whether she has also purchased the right to exclude other people from the cab for the duration of the ride.⁹⁵ Where the terms of the commercial relationship are not developed in anticipation of police infringement on an area as to which one or both of the parties arguably has an expectation of privacy, courts should perform the same sort of concrete analysis of the relationship and behavior as they should in the noncommercial context.⁹⁶ For example, the taxicab passenger, like the passengers in *Rakas v. Illinois*,⁹⁷ might ordinarily have no access to, and thus no reasonable expectation of privacy in, the glove compartment, but she might well have such a claim as to the trunk.⁹⁸

If shared privacy were taken seriously, relations involving chosen intimacy would be provided the greatest protection. However, such relationships are often the most problematic for fourth amendment jurisprudence because intimates rarely formalize their expectations of each other's behavior or memorialize them in formal legal documents.⁹⁹

others' deprivations. Consider, for example, how 18th century courts sought to create the crimes of embezzlement and larceny-by-trick in order to provide the protections of the criminal law to bailees.

With the growth of large scale production and the marketing of goods on a wide national basis the personal, immediate relationship that existed between manufacturer, merchant and buyer in the manorial system and under the guilds [sic] gave way to an impersonal, distant relationship. As a result, buyers of merchandise were without the first-hand protections they had previously enjoyed.

J. HALL, THEFT, LAW AND SOCIETY 70 (1955) (footnote omitted).

95. See *Chapa v. State*, 729 S.W.2d 723 (Tex. Crim. App. 1987) (defendant had legitimate expectation of privacy in cab). Though the driver is present, this has little impact on the passenger's expectation of privacy. The driver's role includes a learned obliviousness to conversations and events in the back seat of his vehicle.

96. One's contracts with taxicab drivers, auto repair shops, or drycleaners are rarely worked out in great detail. Yet, one's relationship with these parties is rarely as intimate or personalized as with gratuitous bailors (that is, friends, neighbors, or relatives). It might thus be appropriate for the law to develop a set of presumptions based on the expectations of most people regarding the extent to which such commercial bailors should protect the bailee's interests. The presumptions would then become an implied-in-fact term to the contract, to be changed only in extraordinary circumstances. Protection for derivative claimants would exist, as it would for more personalized relationships, but the extent of such protection would be more rulelike, since the relationships themselves are less variable in their patterns and sociological dynamics.

97. 439 U.S. 128 (1978); see *infra* notes 152-64 and accompanying text.

98. There is always the risk that we will look to expectations produced by the very legal structures we are seeking to control. Focusing on people's behavior, on the shared privacies embedded in action, rather than on their intentions or stated expectations, may reduce the risk of reinforcing currently distorted social relationships by relying on prior legal determinations.

99. Consider how few prenuptial agreements there are compared to the number of marriages. Even within the commercial world, only a minute portion of transactions occurs through the sorts of discrete exchanges assumed in traditional contract law. See generally Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 485-91.

To the extent that the law does not recognize intimate relationships and the expectations implicit within them, a primary rightholder's property rights are undercut. One reason we protect the legal right to exclude others is to empower the owner to choose to share his home or other property with his intimates.¹⁰⁰ To recognize the owner's choice only when it is embodied in a legal document or in a formal legal relationship renders it nearly nugatory. When people choose to share their things with another person, legal rights seem unimportant. Legal documentation is necessary only to provide the new intimate either with future rights against the grantor or with an independent right against the rest of the world. Since the parties' relationship is one of inclusion, their failure to focus on rights of exclusion scarcely evidences an intent not to provide such rights.

The exact contours of such shared privacies remain to be explored. Clearly, however, where the claimant is part of a sufficiently small and intimate group that shares a place, she has an expectation of privacy there that should be recognized.¹⁰¹ For example, assume that a husband has sole legal ownership of the family residence. Few would dispute that his wife,¹⁰² or adult child living at home,¹⁰³ should be able to challenge a search of that home.

Similarly, courts should recognize that a gratuitous bailment gives rise to expectations of shared privacy even though the bailee has only a minimal legal claim against the bailor. For example, I might, when leaving town for a few days, ask my closest friend to keep my expensive new painting for me. When she agrees, I can assume that she will place it in some place to which she has access and which she feels is safe from strangers. If the police break into her house a few days later and find the painting in her closet, I ought to be able to assert a fourth amendment challenge to the search.¹⁰⁴ Current doctrine does not bar the recognition

100. "[O]ne of the main rights attaching to property is the right to share its shelter, its comfort and its privacy with others. . . . [T]he decision [in *Rakas*] did not elevate property rights over privacy rights so much as it diminished the value of both." Alschuler, *supra* note 13, at 13.

101. "Part of the definition of personal privacy is what might be called social or communal privacy, the interest people have in the security of their arrangements for sharing what they have with others." White, *The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 217.

102. See, e.g., *Thompson v. State*, 206 So. 2d 195, 198 (Miss. 1968); *Brewer v. State*, 142 Miss. 100, 107 So. 376 (1926); cf. *United States v. Wilcox*, 357 F. Supp. 514, 518 (E.D. Pa. 1973) (husband has standing regarding a search of home owned by wife where he visited the home every weekend and had his own key).

103. See *Brames v. State*, 273 Ind. 565, 568, 406 N.E.2d 252, 254 (1980); cf. *Kishel v. State*, 287 So. 2d 414 (Fla. Dist. Ct. App. 1974) (defendant had standing to challenge search of apartment building owned by father).

104. Cf. *State v. Tanner*, 304 Or. 312, 745 P.2d 757 (1987) (finding standing under state constitution to challenge search of home where goods defendant had pledged to owners as collateral for loan were found).

of such shared privacy claims. However, because such concerns are not explicitly recognized by current fourth amendment law, the courts neglect them. This neglect is self-reinforcing to the extent courts look to precedent rather than the lived experience of the parties before them in reaching decisions under a "totality of the circumstances" test.

2. *The Claimant's Interest in the Place Searched: Equal and Unequal Claims*

In all derivative fourth amendment challenges, the defendant's claim is secondary in the sense that it cannot stand alone.¹⁰⁵ Nonetheless, the secondary and the primary rightholders may have relatively equal, mutually interdependent claims of privacy. For example, a wife's claim is formally derivative if the deed to the place searched is in her husband's name. However, her claim would surely be recognized in any situation where her husband's would.

Sometimes, however, secondary claimants have significantly weaker claims than the primary rightholder. A babysitter in someone's home may have some expectation of privacy if the police enter the home while he is there and discover evidence against him. His claim seems weaker, however, than those of the household members. The electric company meter reader has a claim that is weaker still, probably too weak to recognize at all.

The babysitter's claim is weak for two reasons. First, his direct interest in the place searched is relatively slight and impermanent. Second, there are people with whom he is not intimate who have stronger claims than his over the place searched. The existence of such "superior claimants" (and their relationship with the defendant) is obviously relevant in deciding whether their consent justifies a search.¹⁰⁶ However, it may also determine whether the defendant has a fourth amendment claim at all, for it affects a court's assessment of whether the superior claimants would reasonably be expected to seek to preserve the defendant's privacy in the place searched.¹⁰⁷

The strength of the secondary party's claim depends on fairly con-

105. Even in a multiparty context, the claim may exist independent of any sharing. For instance, if the defendant is legitimately in a place (a store, for example), she may have a claim vis-à-vis a search of the immediate surrounding area that disrupts her movement, based on a disturbance of her "security of presence." This interest is entirely independent of any relationship with a primary rightholder. Alternatively, the claimant's interests may stem from her own property or possessory rights. In either situation, the existence of others with claims regarding the place searched becomes irrelevant except insofar as they were so numerous or so presumptively unconcerned with each others' welfare that none could legitimately claim an expectation of privacy. See *infra* text accompanying notes 191-98.

106. See *infra* text accompanying notes 239-48.

107. See *infra* text accompanying notes 295-97.

crete facts about the relationship. For example, an ordinary house guest would have only a secondary claim. Were he to stay long enough, however, he might become recognized as a member of the household, with his own direct, though shared, claim of privacy in the house.

The identity of the primary rightholder is not immutable. Once a bailment takes place, the lessee ordinarily becomes the primary rightholder and the original owner's expectation of privacy becomes subordinated.¹⁰⁸ Indeed, in some cases, the lessor's interest is so reduced that it will no longer support a claim.¹⁰⁹ In most commercial relationships, however, and in all noncommercial sharings, the original primary rightholder retains a claim. The cab driver has, for a payment, shared her authority over the inside of the cab; my hosts have let me share their home.

3. *Keeping Watch Over My Goods: The Bailee's Claim*

Sometimes the defendant has no direct claim regarding the place searched. Instead, the defendant's claim may relate to a particular item that he has entrusted to the primary rightholder. The relationship may be gratuitous or commercial, and the claim does not depend on physical access to the place searched.¹¹⁰ Indeed, the claimant may not know where the item is stored. Rather, the defendant's claim depends on the concatenation of two facts—the primary rightholder's property or possessory interest in the place where she has stored the item and her willingness or presumptive obligation to protect the claimant's interest. In at least some circumstances, this combination may be sufficient to ground the defendant's fourth amendment claim.¹¹¹

Note that where the bailment is gratuitous, the strength of the parties' claims is almost always unequal: The primary rightholder has full control of the place searched while the defendant's interest stems solely from the relationship between them. Perhaps because these claims are necessarily relational, they are particularly difficult to fit within an atomistic view of fourth amendment privacy. This may help explain why such claims rarely appear in the case law, though commercial and gratuitous bailments are common.

108. See *infra* text accompanying notes 152-71.

109. See, e.g., *United States v. Konigsberg*, 336 F.2d 844, 846-47 (3rd Cir.) (landlord has no standing to complain of search of rented garage), *cert. denied*, 379 U.S. 933 (1964).

110. I reasonably expect my drycleaner to care for the clothes I bring him; I do not expect to be able to go into the back of his shop and retrieve them for myself. See Gutterman, "A Person Aggrieved": *Standing to Suppress Illegally Seized Evidence in Transition*, 23 EMORY L.J. 111, 119 (1974).

111. See *United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983) (defendant had standing to challenge search of his briefcase that he had entrusted to a codefendant for safekeeping), *cert. denied*, 465 U.S. 1023 (1984); *State v. Tanner*, 304 Or. 312, 745 P.2d 757 (1987).

4. *Putting It All Together*

As we shall see, there is no simple formula for determining how persuasive the claimant's case needs to be in order to establish a "reasonable expectation of privacy."¹¹² It is at least clear, however, that the claimant need not have the most compelling claim over the place searched.¹¹³ Rather, the defendant's claim should succeed if her relation to the place searched is strong and if others do not have a relation to the place that would undermine that claim. Both inquiries are obviously questions of degree. A long-term employee, for example, probably has an expectation of privacy in papers kept in his office, at least where access to that office is limited, even though the employer may have a stronger, property-based claim.¹¹⁴ Furthermore, that claim may exist despite the equal access to the office of a small number of fellow employees.¹¹⁵

The existence of others with stronger claims over the place searched is always relevant and requires a close consideration of context. However, stronger claims should eliminate the defendant's claim only if the court concludes that the defendant could not reasonably have assumed that those primary rightholders would protect his interests.

Consider two hypothetical defendants, each seeking to invoke the exclusionary rule. In the first case, the defendant leaves his new red Corvette at the repair shop to fix a defective trunk latch. The police, who unsuccessfully chased a speeding red Corvette earlier that evening, spot the defendant's car. They investigate and find an unregistered gun in the back seat and some drugs in the trunk. In the second case, the defendant is a house guest whose host is throwing a party in her honor. While the party guests are in the back yard, the police, relying on a defective warrant, enter the house and seize drug paraphernalia from both an open bag and a closed but unlocked purse that the defendant has left on the mantel.

The first defendant might claim that he expected the repair shop to respect and protect his privacy, especially in his trunk. But if the cars are

112. See *infra* text accompanying notes 275-94, proposing criteria for deciding relational standing claims.

113. Likewise, in the law of constitutional standing, the plaintiff need only pass a defined hurdle, not be the party with the strongest claim. Cases such as *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), require that the plaintiff show some particularized injury from the challenged action, but they do not impose a "best plaintiff" rule.

114. For example, the Supreme Court held that a union official had standing to challenge the introduction at his trial of papers that the police took from the office he shared with a few other union officers. *Mancusi v. DeForte*, 392 U.S. 364 (1968); cf. *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987) (although government employees are entitled to a reasonable expectation of privacy in their offices, those expectations may be unreasonable where a supervisor or employer rather than a police officer conducts the search).

115. *Mancusi*, 392 U.S. at 367.

generally left on an unfenced open lot, his claim may be weaker, and it may have been unreasonable for him to expect that the police would not wander past and look in the back seat. The second example can be analyzed in a similar fashion. Because the defendant is a house guest and not merely a party guest, her challenge to the search of the house, despite her absence at the moment of search, has some chance of success.

Clearly, this sort of analysis cannot lead to a determinate answer. The criteria that courts have used in the past, however, can influence the decision by focusing the court's attention on certain facts, such as the defendant's right to exclude others, while obscuring other facts, such as the prior dealings between the defendant and the primary rightholder.¹¹⁶

B. *The Supreme Court Analyzes Shared Privacy Claims*

Courts do not explicitly work through a checklist of factors. Their approach is influenced by the implicit patterning they perceive in relevant precedent. To assess the inadequacies of existing doctrine, then, also requires an examination of representative Supreme Court cases. These cases divide into two groups: the old "standing" cases and the more recent "substantive fourth amendment" cases. In examining them, we shall discover a change in the Court's approach to the tension between privacy and crime control. Each approach has significant weaknesses. Together, they suggest a synthesis, which is set out in Part IV.

1. *The Early Cases: Through the Lens of "Standing"*

Traditionally, the Court dealt with derivative fourth amendment claims by deciding whether the defendant had "standing." In a series of cases in the 1950's and 1960's, the Court developed a concept of standing that encompassed at least some derivative claims.

a. *United States v. Jeffers*

In *Jeffers*,¹¹⁷ the police illegally searched a hotel room, seized a box of cocaine from a closet shelf, and used it as evidence in convicting Jeffers. The legal occupants of the room were Jeffers' aunts; they had provided him a key and permission to use the room at will, and he did so frequently. Although the aunts were unaware that he was storing drugs in the room, there is no indication that his use of the room to store his possessions was without their permission or contrary to their wishes. Thus, Jeffers appeared to have a relatively strong case for secondary standing; the primary rightholders (the aunts) had shared extensively with him, and the place shared was still quite private.

116. See *infra* text accompanying notes 152-71.

117. 342 U.S. 48 (1951).

Although the Supreme Court allowed Jeffers' claim, it did not rely on a derivative standing rationale. Rather, the Court linked the seizure of the drugs, as to which Jeffers undoubtedly had standing (since he conceded possession¹¹⁸), with the preceding search of the hotel room, which was illegal.¹¹⁹ The *Jeffers* Court thus granted standing to challenge the search to a defendant with a primary right to challenge only the seizure.

This holistic approach made sense on the facts because the defendant could reasonably have assumed his goods in his aunts' room were protected from police scrutiny. However, like the other "broad" standing doctrines developed in these earlier cases, the *Jeffers* approach can be criticized easily by concocting hypotheticals where its application seems nonsensical. For example, a criminal hiding in a stranger's cabin, who is captured when the police illegally enter the cabin,¹²⁰ could use the language (but not the purpose) of *Jeffers* to exclude goods of hers that are seized during her arrest. Similarly, I suggested earlier that a burglar had no claim vis-à-vis police entry to the burglarized home; broadly read, *Jeffers* would give the burglar standing if he were the target of that illegal entry. Nonetheless, it seems likely that most claimants have a substantial relational claim to the private places where they or their goods are found. If so, it may be better to use the *Jeffers* rule, despite its occasional overinclusiveness, than an apparently more precise rule that disallows some legitimate relational claims.

b. Jones v. United States

In *Jones*,¹²¹ the police, acting pursuant to an arguably invalid warrant, entered an apartment and seized drugs that Jones had hidden in a bird's nest on an awning outside the apartment window. The apartment belonged to Jones' friend, Evans. Jones was using it with Evans' permission and had a key of his own. He had a change of clothes in the apart-

118. Before *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the defendant's possession of the seized item generally sufficed to establish a fourth amendment claim.

119. "We do not believe the [search and seizure] are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied." *Jeffers*, 342 U.S. at 52. This approach contrasts sharply with that in *United States v. Lisk*, 522 F.2d 228 (7th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976) (discussed *supra* note 70).

Separating the analysis of a search and of a seizure reflects a perception of the police activity as a series of consecutive, narrow slices. The choice between that view and the holistic one in *Jeffers* cannot be made (or critiqued) on grounds of pure logic or doctrine. See *Heller, A New Distinction Between Standing to Contest a Search and Standing to Contest a Seizure*, 13 AM. CRIM. L. REV. 801 (1976). See generally *Kelman, Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (analyzing the impact of framing on legal decisionmaking).

120. Absent a warrant or exigent circumstances, such a search would be illegal as to the homeowner. See *Steagald v. United States*, 451 U.S. 204 (1981).

121. 362 U.S. 257 (1960).

ment and had slept there "maybe a night."¹²²

The Court granted Jones standing on two distinct rationales. First, since he was charged with possession, standing was conferred automatically.¹²³ Second, he was "legitimately on [the] premises" searched.¹²⁴ The Court rejected the government's assertion that the claimant must "have dominion over the apartment" or be "domiciled" there to have standing. Under the test proposed by the prosecution, status as an invitee or guest would never suffice.¹²⁵ The Court refused to "import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions [of] private property law."¹²⁶

The test the Court adopted, however, was broader than necessary to respond to genuine relational concerns and thus vulnerable to the scathing criticism it received in *Rakas v. Illinois*.¹²⁷ The *Rakas* Court suggested, for example, that a visitor could "object to a search of the basement if the visitor happened to be in the kitchen" when the search occurred.¹²⁸ People may frequently be in a place legitimately without having the sort of intimate relationship with its owner that would justify a derivative fourth amendment claim.¹²⁹ Further, the *Jones* test tends to ignore degrees of interests in the place searched, such as the distinction between visitors and residents. Such distinctions are often important in determining the scope of defendant's claim; that is, whether it extends to the bathroom cabinets, or whether it exists for searches made in her absence.

c. Mancusi v. DeForte

DeForte, the defendant in *Mancusi*,¹³⁰ was a Teamsters official.

122. *Id.* at 259.

123. *Id.* at 263. The theory of automatic standing was that it was unfair to require defendants to admit a key element of the crime in order to challenge police conduct. The "automatic standing" aspect of *Jones* was overruled in *United States v. Salvucci*, 448 U.S. 83 (1980), on the ground that defendant's dilemma did not exist after *Simmons v. United States*, 390 U.S. 377 (1968), held that testimony at a suppression hearing could not be used in the prosecution's case-in-chief. Arguably, the dilemma was not solved, if such testimony can still be used for purposes of impeachment. See 4 W. LAFAYE, *supra* note 30, § 11.2(d) nn.144-48, at 242-43. Some lower courts since *Salvucci* have said they will allow such use. See, e.g., *United States v. Gomez-Diaz*, 712 F.2d 949 (5th Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984); *United States v. Quesada-Rosadal*, 685 F.2d 1281 (11th Cir. 1982); *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981).

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

125. *Id.* at 265.

126. *Id.* at 266.

127. 439 U.S. 128 (1978).

128. *Id.* at 142.

129. Consider, for example, guests at an "everyone invited" college graduation celebration. Presence, of course, provides protection against searches that intrude on personal security. See *supra* note 105. Such protection, however, does not depend on the legitimacy of the defendant's presence.

130. 392 U.S. 364 (1968).

State law enforcement personnel, investigating the union local, were seeking union records. Without a warrant, they searched the office DeForte shared with "several other union officials" and seized the records,¹³¹ which were later introduced at DeForte's trial.

In finding that DeForte had standing to challenge the search, the Court noted DeForte's shared occupation of the office, his frequent presence there, and his "custody of the papers at the moment of their seizure."¹³² Adopting a privacy, rather than property, orientation to fourth amendment claims, the Court first assumed that an employee with a private office would have a claim if it were searched.¹³³ It then held that the fact that the office was shared did not destroy that expectation of privacy: "DeForte still could reasonably have expected that only [his office inates] and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups."¹³⁴

Of all the Supreme Court cases examined here, *Mancusi* is probably the most sensitive to its particular facts. It establishes no general rule other than that sharing does not automatically eliminate an otherwise valid claim.

d. *Alderman v. United States*

In *Alderman*,¹³⁵ the Court returned to its search for clear rules to govern relational claims. In searching, however, the Court lost sight of the particular facts before it and created a rule insufficiently sensitive to factual differences.

The Court's opinions in *Alderman* provide few of the relevant facts; we know only that Alderman and his codefendant Alderisio were convicted of using the telephone to make murderous threats in interstate commerce. Apparently, at least some of the government's evidence stemmed from wiretaps of telephones at "Alderisio's place of business," and either Alderisio or Alderman was a party to some of the recorded conversations.¹³⁶ The wiretap may have been installed without any phys-

131. *Id.* at 365.

132. *Id.* at 368-69. It is difficult to see why this last factor ought to be significant, particularly given its manipulability by the defendant. The Court did not seem to place great weight on this factor, as it was mentioned only once in the opinion.

133. Justice Black's dissent, explicitly adopting a very narrow, property-based view of fourth amendment standing, would have rejected even this claim on the ground that an official "suffers no personal injury" when the office he occupies is invaded. *Mancusi*, 392 U.S. at 373. Formally, any employee's claim is secondary. However, the grant of authority from the employer/primary rightholder is frequently so extensive that the occupant's claim is essentially primary.

134. *Id.* at 369.

135. 394 U.S. 165 (1969).

136. *Id.* at 167. The government claimed that the premises were actually owned by associates of

ical invasion of the premises.¹³⁷

In deciding whether Alderman or Alderisio had standing to challenge the wiretap-derived evidence, Justice White's majority opinion first held that neither being the target of an investigation nor being the codefendant or conspirator of someone with standing sufficed to establish the defendant's own standing.¹³⁸ That holding seems unassailable if one assumes first, that the only justification for the exclusionary rule is deterrence, and second, that deterrence does not require extending standing beyond those whose own rights, either primary or derivative, are at stake.¹³⁹

The Court then ruled that parties to an illegally overheard conversation and the owners of the premises on which such conversations occurred were entitled to seek exclusion.¹⁴⁰ Although the former follows logically from *Katz*,¹⁴¹ the legitimacy of the latter class was vigorously disputed by Justice Harlan.

White asserted that a homeowner's rights are invaded by an illegal seizure of conversations taking place over his phone just as they are by the removal of tangible items from that home, though the items may belong to another. Where a tangible object is seized, the homeowner has standing because his right of privacy is violated by the intrusion into the home that necessarily preceded the seizure of the item. However, Justice White provided no rationale for his assertion that recording conversations emanating from a home is equivalent to seizing the fruits of an illegal search.¹⁴²

Harlan, on the other hand, mistakenly assumed that when tangible objects belonging to another are seized from a home, the property owner's claim stems from a possessory interest in those objects.¹⁴³ He

Alderisio or a corporate employer. Like the Court, I assume, for purposes of discussion, that Alderisio owned the premises. *See id.* at 168 n.1.

137. *Id.* at 179 n.11.

138. *Id.* at 171; *see infra* text accompanying notes 292 (discussing relevance of being a conspirator of a primary rightholder to conspirators' standing).

139. *Compare Alderman*, 394 U.S. at 174-75 (rejecting argument that deterrence would be enhanced by broader application of the exclusionary rule) *with id.* at 205-06 (Fortas, J., dissenting) (fourth amendment grants an individual the right "to insist that the state utilize only lawful means of proceeding against him"). The *Alderman* majority suggested that "standing" could be used to limit the class of people entitled to exclude illegally obtained evidence through a form of cost-benefit analysis. *Id.* at 174-75; *see Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 634 (1983) (examining the deterrence aspect of the exclusionary rule in light of *Alderman*); *see also supra* text accompanying notes 21-33 (discussing relationship of standing and the scope of the exclusionary rule).

140. *Alderman*, 394 U.S. at 176.

141. *Katz v. United States*, 389 U.S. 347 (1967).

142. *Alderman*, 394 U.S. at 177-78.

143. *Id.* at 189 (Harlan, J., dissenting); *see White's criticism, id.* at 177 n.10.

distinguished fourth amendment interests in conversations as stemming solely from an expectation of privacy uncounected to any property claim.¹⁴⁴ Although the majority construed Harlan's position as barring the homeowner's claim of privacy in conversations by others held over his phone,¹⁴⁵ Harlan's opinion actually suggests that "an individual should be permitted to raise a constitutional claim when the privacy of members of his family has been violated," though "if a perfect stranger is overheard on one's property" the homeowner should not have standing.¹⁴⁶

White could have made the counterargument that anyone a person invites into his home and allows to use his phone is likely to have a sufficiently close relationship with the homeowner that the homeowner should always be given standing as a matter of administrative convenience. Conversations could, of course, occur from business telephones where no such presumption of relationship arises.¹⁴⁷ Nonetheless, it would be a rare case where the owner's affairs would be discussed in the call (so that she needed standing) and yet the parties to the conversation not be business associates. Thus, the majority's rule, if not its rationale, seems sensible. Note, however, that the speaker is the primary rightholder; the property owner's claim is relational and secondary.¹⁴⁸

2. *The Recent Cases: A Reaction Sets In*

The Supreme Court's earlier approaches to relational privacy claims were vulnerable to criticism.¹⁴⁹ It is therefore not surprising that a majority of the Court concurred in Justice Rehnquist's transformation of standing doctrine in *Rakas v. Illinois*¹⁵⁰ and *Rawlings v. Kentucky*.¹⁵¹

144. *Id.* at 190-91 (Harlan, J., dissenting).

145. *Id.* at 176 (White, J.) (stating that Harlan's "position is that unless the conversational privacy of the homeowner himself is invaded, there is no basis in the Fourth Amendment for excluding third-party conversations overheard on his premises").

146. *Id.* at 193, 194 (Harlan, J., dissenting).

147. Imagine, for example, that Katz had used a pay phone in his local coffee shop to carry on his bookmaking business. Should the owner of the coffee shop be in a different position than Katz's other customers?

148. Alternatively, one could argue that "automatic standing" should be granted to the property owner to deter police from using illegal wiretaps in the hope that the owner's coconspirators will say something that can be used against her.

149. The early cases, however, also exhibit virtues lacking in the modern approach.

150. 439 U.S. 128 (1978).

151. 448 U.S. 98 (1980). I do not discuss in the text two other Burger Court "standing" decisions, *United States v. Miller*, 425 U.S. 435 (1976) (no expectation of privacy in bank records), and *Smith v. Maryland*, 442 U.S. 735 (1979) (no expectation of privacy in telephone pen registers). The language of those decisions suggests that the mere fact of sharing (with the bank or telephone company) destroys any expectation of privacy because the defendant assumes the risk that the third party will consent to a search. See *Miller*, 425 U.S. at 443. Yet the Court surely did not mean to imply that courts should presume that third parties will always consent and that such consents will always be valid. Such a rule would eliminate the concept of shared privacy; only hermits would have

a. *Rakas v. Illinois*

In *Rakas*, police investigating a recent robbery stopped a car in which the defendants were passengers, searched it, and discovered a sawed-off rifle under the front passenger seat and a box of rifle shells in the glove compartment. Defendants did not claim a property interest in the seized items¹⁵² or the car; the owner and driver¹⁵³ of the car was the ex-wife of one of the defendants.¹⁵⁴ The trial court denied the motion to suppress.

On review, the Supreme Court rejected traditional standing analysis and reformulated the issue as "whether . . . the proponent of the motion to suppress has had his own Fourth Amendment rights infringed."¹⁵⁵ This change was asserted to be a question of intellectual elegance; the majority could "think of no decided cases of this Court that would have come out differently" if decided as a matter of substantive fourth amendment doctrine rather than standing.¹⁵⁶ As a doctrinal proposition, this

substantial fourth amendment rights. See Amsterdam, *supra* note 9, at 402; Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 323 & n.22 (1984).

Smith and *Miller* are distinguishable from most of the cases discussed in the text on at least two grounds. First, the sharing in these cases is with a large institution. Like commercial bailments, the relationship at issue is a formal one. Whatever expectations of privacy exist are inherent in anyone's relationship with any bank or telephone company; one does not have a special relationship with a particular bank that creates greater or lesser expectations than one would have with a different bank. Thus, to the extent that the Supreme Court has misapprehended how much privacy we do expect, the solution lies in a different rule rather than a contextualized analysis appropriate to more individualized relationships. Cf. Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (1982) (limiting impact of *Miller*).

Second, what is shared in *Smith* and *Miller* is information not embodied in any tangible form belonging to the defendant. The item seized exists only because the bank or telephone company created it. The parallel, in terms of more intimate relations, is not entrusting a package to a friend but sharing a secret. Clearly, my friend could pass that secret on to the government (though she could also consent to a search of my package). More importantly, in the absence of a privilege, the government could force her to testify against me, and I would have no legal grounds to object. See *United States v. Giraldo*, 822 F.2d 205 (2d Cir.) (defendant's conviction affirmed even though trial judge used undue coercion to force a codefendant to testify), *cert. denied*, 108 S. Ct. 466 (1987). See also Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613 (1976); Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 636.

Smith and *Miller* might therefore be viewed more accurately as resting on a cusp between fourth amendment shared privacy and the testimonial privilege concern with shared information. See Alschuler, *supra* note 13, at 20-39 (examining the interrelationships of these doctrines in light of *Smith* and *Miller*). Viewed in this way, *Smith* and *Miller* are not obstacles to the reconceptualization of fourth amendment shared privacy proposed here.

152. Under the law at the time such a concession seemed unnecessary; the automatic standing rule for possessory crimes had not yet been overruled by *United States v. Salvucci*, 448 U.S. 83 (1980).

153. *Rakas*, 439 U.S. at 130.

154. *Id.* at 167 n.20 (White, J., dissenting).

155. *Id.* at 133.

156. *Id.* at 139.

claim is undoubtedly true; the relevant criteria were simply shifted to a different rubric. As an empirical prediction of how the Burger or Rehnquist Courts would decide cases such as *Jones* or *Alderman*, however, it is almost surely false; shared privacies, particularly among those proven to have broken the law, now appear to carry little weight.

In deciding whether the defendants could assert a claim, the *Rakas* Court declined to apply the "legitimately on the premises" test articulated in *Jones v. United States*.¹⁵⁷ That test, it decided, erroneously swept within its protection those whose own rights were not violated by the challenged search.¹⁵⁸ Instead, the Court purported to decide whether the defendants had a legitimate expectation of privacy, with its "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."¹⁵⁹ As for the petitioners in *Rakas*, the Court determined that as mere passengers in a car they neither owned nor leased, they lacked "any legitimate expectation of privacy in the glove compartment or area under the seat of the car"¹⁶⁰ because these were "areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy."¹⁶¹

As Justice White argued in dissent, the majority opinion focused solely on the relationship between the defendants and the car (or, more specifically, particular areas within the car¹⁶²). White suggested that the Court should focus instead on expectations that exist between the defendants and the owner, who allowed them both to ride in her car and, presumably, to store items under the seat and in the glove compartment.¹⁶³ Yet despite the majority's own formulation—that expectations of privacy

157. 362 U.S. 257, 267 (1960).

158. *Rakas*, 439 U.S. at 148. *Jones* itself is ambiguous on this question. Although it purports to grant standing to anyone legitimately on the premises searched, it also asserts that standing requires a showing that the defendant "himself was the victim of an invasion of privacy." *Jones*, 362 U.S. at 261. The doctrinal disagreement between *Jones* and *Rakas*, then, may turn on the meaning of being a victim rather than on the need to be one.

159. *Rakas*, 439 U.S. at 144 n.12.

160. *Id.* at 148.

161. *Id.* at 148-49. The majority also argued that the defendants could not succeed because, in the trial court, they claimed only that they were legitimately on the premises, not that they had a legitimate expectation of privacy in the places searched. *Id.* at 149-50 n.17. In light of the fact that petitioners relied on a doctrine that was still good law at the time of the suppression hearing, the Court's decision seems indefensible. Not only did it refuse to make a particularized judgment, on the facts available, of whether petitioners might have had such an expectation, it also denied them the opportunity to develop the relevant facts on remand. *Id.* at 130 n.1.

162. It is possible to construe the *Rakas* opinion narrowly by limiting it to areas where passengers, in general, would not have access. Such a construction, however, seems disingenuous. The Court asserts that the trunk would be similarly unprotected, *id.* at 148-49, yet one giving a friend a ride to the airport would likely use the trunk to store her suitcases. During the ride, both parties should have an expectation of privacy in the trunk.

163. *Id.* at 167-68 (White, J., dissenting).

can be grounded in “understandings” not embodied in law—the *Rakas* decision arguably collapsed “reasonable expectations of privacy” back into notions of property law.¹⁶⁴

b. Rawlings v. Kentucky

The Court expanded upon its new approach to standing in *Rawlings*.¹⁶⁵ In that case, police entered the home of Marquess with a warrant for his arrest and discovered petitioner Rawlings, his companion, Vanessa Cox, and three other people. They also smelled burning marijuana. The police detained the five occupants for about forty-five minutes until they obtained a warrant to search the house and then ordered Cox to empty her purse.¹⁶⁶ The purse contained drugs belonging to Rawlings.

The Court held that Rawlings had no reasonable expectation of privacy in Cox’s purse and rejected as irrelevant his claim of ownership of the drugs.¹⁶⁷ In reaching its conclusion, the Court purported to consider a number of facts about Rawlings’ relationship with Cox,¹⁶⁸ such as the brief duration of their relationship,¹⁶⁹ that he had never before asked her

164. See, e.g., *Jones v. United States*, 362 U.S. 257, 266 (1960); cf. *Chapman v. United States*, 365 U.S. 610, 617 (1961) (authority for third-party consent cannot turn on details of state property law). *Rakas* not only limits privacy to that protected by property. It also embodies an unnecessarily narrow and formalistic view of property rights. Cf. Singer, *supra* note 92, at 699-701 (discussing some courts’ recognition of “property rights” arising out of relationships).

165. 448 U.S. 98 (1980).

166. One could view this detention as operating on all the occupants, thus giving Rawlings standing to complain of its consequences in the later search. See *infra* note 179; cf. *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 695 (E.D.N.Y. 1977) (both defendants have standing to challenge search of luggage of one since the arresting agent “viewed them as a unit”); *People v. Eyler*, 132 Ill. App. 3d 792, 477 N.E.2d 774, 785 (1985) (allowing defendant to suppress statement of companion made shortly after both were illegally arrested), *cert. denied*, 107 S. Ct. 1632 (1987).

167. *Rawlings*, 448 U.S. at 105-06. Since Rawlings had no legitimate expectation of privacy in the place where the drugs were found, it was as if he had “placed his drugs in plain view.” *Id.* at 106. If the drugs had been enclosed in an opaque container when placed in the purse, Rawlings presumably would have had a cognizable privacy interest in the container, even under the Court’s approach.

168. *Id.* at 105. The factors relied on by the Court fall into two categories, although the Court did not so divide them. Some factors, such as the brevity of the relationship and the suddenness of the bailment, undercut Rawlings’ assertion that he acted with Cox’s permission when he placed the drugs in her purse. Other factors, such as the fact that Cox had granted another person access to the purse, show only that Rawlings’ interest in the purse was not as great as Cox’s. Shared access to a place does not necessarily destroy expectations of privacy if the secondary party reasonably expects the primary rightholder to protect his interests by sharing discriminately—for example, with mutual friends, but not with the police. Thus the mere fact of shared access does not establish that Rawlings’ privacy interest was insufficient to ground a fourth amendment claim.

169. *Id.* Courts disagree on the correct result for more permanent relationships. Compare *United States v. Driver*, 776 F.2d 807 (9th Cir. 1985) (husband’s standing to challenge a search of wife’s purse conceded) and *United States v. Perez*, 700 F.2d 1232, 1236 (8th Cir. 1983) (standing granted to challenge evidence found in purse of girlfriend and traveling companion), *cert. denied*, 468 U.S. 1217 (1984) with *Ramirez v. United States*, 294 F.2d 277, 281 (9th Cir. 1961) (husband has

to hold property for him, that another companion of Cox's had regular access to her purse, and the "precipitous nature of the transaction,"¹⁷⁰ as well as his lack of any cognizable property or possessory interest in her purse.¹⁷¹ In essence, Rawlings failed to overcome the Court's presumption that Cox's purse was hers and hers alone.

3. *Framing and Failure: Why the Tests Don't Work*

In one sense, the tests articulated in *Rakas* and *Rawlings* seem more fact-sensitive and more responsive than prior doctrine to the particular relationships among the claimant, the place searched, and the primary rightholder. The Court's application of those tests, however, is troubling. It assumes that expectations of privacy stem only from narrowly conceived property rights or other specifically articulated relationships. Its background assumption is one of radical individualism rather than one of shared access, trust, and concern. It assumes, absent explicit proof to the contrary, that people do not share.¹⁷² The Court is thus blind to much day-to-day human interaction, and its jurisprudence ignores concerns that grow out of relationships but are not readily articulated.¹⁷³

The old tests, such as *Jones'* "legitimately on the premises" test or *Alderman'* s homeowner standing vis-à-vis wiretaps, assured protection in many cases where a sensitive concern for relationships would find such

no standing to challenge search of wife's purse absent claim of ownership of property seized), *overruled on other grounds*, United States v. Demma, 523 F.2d 981 (9th Cir. 1975).

170. *Rawlings*, 448 U.S. at 105. A number of commentators have suggested that the Court's analysis of these factors was inadequate. See, e.g., 4 W. LAFAVE, *supra* note 30, § 11.3(c), at 308-11; Alschuler, *supra* note 13, at 14-17. Further, although the majority claimed that it was "assuming that petitioner's version of the bailment is correct," *Rawlings*, 448 U.S. at 105, that assertion is open to doubt. The decision may have been colored by the trial court's assessment that "[i]t is far more plausible to believe that [Rawlings] saw the officers pull up out front and then elected to 'push them off' on Vanessa Cox, believing that search was probable, possible, and eminent [sic]." *Id.* at 102 n.1.

If the facts were as the trial court assumed, it would be reasonable to conclude that, had she been asked, Ms. Cox would not have considered Rawlings' interests in deciding whether to consent to a search of her purse. Such a conclusion would indicate Rawlings had no legitimate expectation of privacy in Cox's purse. See *infra* text accompanying notes 278-81.

171. The Court appeared not to recognize that its assertion that he did not "have any right to exclude other persons from access to Cox's purse," *Rawlings*, 448 U.S. at 105, is simply another way of stating that it was not his property.

172. The law's difficulty in understanding relationships may reflect the same preference for individuals or abstract groups that appears in philosophical literature. "A major lacuna in contemporary ethical theory is the absence of a well-developed analysis of friendship or theory of personal relationships." C. CARD, VIRTUE AND MORAL LUCK 4 (University of Wisconsin Institute for Legal Studies Working Papers Series No. 1, Paper No. 4) (1985) (footnote omitted).

173. I focus here primarily on the assumptions of judges whose vision of shared privacy is unduly narrowed by the doctrine. Some less scrupulous judges may consciously manipulate doctrine to maximize convictions. Changes in doctrinal rules of the sort suggested here cannot prevent such manipulation.

protection appropriate. They were, however, clumsy instruments. Like many rules, they were overinclusive and thus vulnerable to Rehnquist's "parade of horrors" attack.¹⁷⁴

On the other hand, the weakness of the Court's current formula is revealed in the indeterminacy that has resulted from courts' efforts to apply the doctrine. Most cases seem fairly sensible on their own terms. Yet, read together, the cases often seem absurdly inconsistent and unpredictable.¹⁷⁵ Furthermore, shared privacy appears in these cases less prominently than might be expected, given how often people share places and things in everyday life.

A primary source of these inconsistent and crabbed readings of privacy is the way courts frame facts with respect to time, place, and generality.¹⁷⁶ Once these frames are imposed, the legal doctrine appears capable of providing relatively predictable outcomes. The frames themselves, however, are manipulable and greatly influence outcomes.¹⁷⁷ Furthermore, readers of opinions are often entirely dependent on the court's description of the facts. The factors that might have seemed crucial to the result are unknown to the reader if they are outside the frame imposed by the court.

Framing takes place in a number of dimensions. There is a spatial dimension; the place searched may be described as a house or a drawer in a bedroom dresser.¹⁷⁸ There is also a temporal dimension, which is often closely linked to the spatial frame; a search of the drawer can also be viewed as merely one part of the process of entering and searching the

174. See *Rakas*, 439 U.S. at 142.

175. The incoherence of fourth amendment law and standing law in particular has been a staple of academic criticism. See, e.g., 4 W. LAFAVE, *supra* note 30, § 11.3, at 279-83; J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 74 (1966); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 *IND. L.J.* 329 (1973). Factors that seem determinative in one case drop out of the calculus in another. Compare, e.g., *McDonald v. United States*, 335 U.S. 451 (1948) (defendant can challenge invasion of landlady's apartment to reach common hallway) with *Maryland v. Garrison*, 107 S. Ct. 1013 (1987) (no discussion of relationship between defendant and neighbor whose apartment warrant had authorized police to search).

176. The analysis here draws on the concepts developed in Kelman, *supra* note 119.

177. A notable recent example of framing can be found in *Hardwick v. Bowers*, 106 S. Ct. 2841 (1986), which upheld the constitutionality of a Georgia statute criminalizing sodomy. Justice Blackmun declared in his dissent:

This case is no more about "a fundamental right to engage in homosexual sodomy," as the court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about . . . "the right to be let alone."

Id. at 2848 (Blackmun, J., dissenting) (citations omitted). Neither the majority's nor Justice Blackmun's characterization of what the case was "about" was logically compelled by the facts.

178. Spatial framing is often easier to perceive in cases concerning a third party's authority to consent to a search. See, e.g., *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962) (bailee can consent to search of trunk of car); *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955) (third party cannot consent to search of locked cabinet).

house.¹⁷⁹ Similarly, one may frame an issue at varying levels of abstraction. For example, in describing what I saw on a walk through a forest, I may describe an object as a tree, a deciduous tree, a maple, or a 5-year-old North American silver maple.¹⁸⁰ Abstraction is unavoidable, for language itself categorizes. Nevertheless, the level of abstraction is not determinate.¹⁸¹ For example, the "place" searched may be defined abstractly, as an "enclosed structure on private property," or very particularly, as "an apparently abandoned, unfenced, ramshackle farmhouse."¹⁸² The same is true of relationships among the parties. For instance, the primary rightholder, on whose presumptive good will the defendant's claim rests, may be described as a close relative of the defendant, his sister-in-law who lives in the other half of the duplex, or the sister-in-law who just found out that the defendant was cheating on her sister.¹⁸³

The choice of frame is not dictated by the doctrinal structure of the law. Nor is it random. Rather, the choice of frame and of doctrinal structure are generally consistent with each other because they each reflect a court's conscious or unconscious vision of social organization.¹⁸⁴

179. The relevant time frame can be expanded by considering the evidence discovered at time *B* a facet of the illegality at time *A*. For example, in *Wong Sun v. United States*, 371 U.S. 471 (1963), Blackie Toy's statements to the police were inadmissible as fruits of the prior illegal physical invasion of his store. Similarly, in *Alderman*, the conversations were the fruit of the earlier installation of the wiretap on the owner's phone. *Alderman v. United States*, 394 U.S. 165, 176-77 (1969).

180. The level of abstraction at which events and people are described is also important as a matter of rhetoric. The successful defendant in *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968), was described as a "union," not a "Teamster," official.

181. See Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 698-708 (1984). In discussing the difficulty in applying "situation-sense" to particular cases, Feinman notes that "nothing in the facts themselves indicates the appropriate level of generalization." *Id.* at 705 (emphasis in original).

182. While ordinarily narrow frames should benefit the government, they could operate to "separate" the place searched from the justification for the search. For example, in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the police had a warrant to search the home. The case was a difficult one only on the assumption that the warrant did not allow a search of Cox's purse inside that home. *Id.* at 102.

183. Two examples illustrate the extent to which shifting frames can radically alter the meaning of a case. In *California v. Ciraolo*, 106 S. Ct. 1809 (1986), the Court, in holding the police's aerial surveillance not a search, distinguished the search in *Katz*. The latter, it held, invaded *Katz*'s legitimate privacy expectation regarding "his conversation." *Ciraolo*, caught "grow[ing] illicit drugs" could have no such legitimate expectations in his "unlawful conduct." *Id.* at 1813. The Court could just as easily have contrasted *Ciraolo*'s expectations of privacy in the "backyard of his home" with *Katz*'s "bookmaking activities." Similarly, *Rakas* distinguished *Jones*, stating that *Rakas* had no legitimate claim over the "glove compartment and area under the seat of the car," as *Jones* did over "the apartment." *Rakas v. Illinois*, 439 U.S. 128, 141 & n.17 (1978). Would our attitudes toward these temporary guests be different if we instead described the areas searched as "the car" and "a bird's nest in an awning outside the window"? *Jones v. United States*, 362 U.S. 257, 259 (1960).

184. See Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 528-30

Thus, current fourth amendment jurisprudence tends to treat each element of the analysis precisely, discretely, and logically.¹⁸⁵ Similarly, courts generally view the people upon whom that jurisprudence acts as separate, atomized individuals and consider the challenged police actions serially rather than as part of a whole.¹⁸⁶

As observed above, the courts have generally preferred narrow frames in evaluating fourth amendment claims. Narrow frames are more precise, more particularized, more "rigorous." This preference, however, only recreates at the level of fact manipulation the same choice that is often made unthinkingly at the level of doctrine—a preference for that which appears analytically rigorous and precise over that which is responsive to the unarticulated and perhaps inarticulable connectedness between events and persons. In other words, in using narrow frames, the courts prefer the hard, crystalline, "legal" solution to the soft, fuzzy, feminine one.¹⁸⁷ If courts took seriously the supposed aim of the doctrine to protect preexisting expectations of privacy, the use of narrow frames would be recognized as often false to the parties' expectations and the manner in which those expectations are formed.¹⁸⁸

The power of framing is, of course, inevitable in the law or in any discourse that depends upon generalization and categorization. The salient fact is not that courts use frames but that the frames they choose

(1987) (summarizing Critical Legal Studies literature and arguing that legal rules reflect unstated but often determinative political and social values). The power of the frame and its invisibility to those who look through it have been powerfully articulated by Catharine MacKinnon. See MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638-39 (1983) (male dominance's "point of view is the standard for point-of-viewlessness, its particularity the meaning of universality").

185. Consider, for example, the Court's precise sequential analysis of the police conduct in stopping the car, searching for the vehicle identification number, and moving the papers on the dashboard in *New York v. Class*, 475 U.S. 106 (1986). Similarly, in *Rawlings*, the police's detention of Rawlings, Cox, et al., was specifically rejected as a basis for challenging the admission of drugs found in the ensuing search. *Rawlings v. Kentucky*, 448 U.S. 98, 107 (1980). Sometimes such precision can work to defendants' benefit. See, e.g., *Arizona v. Hicks*, 107 S. Ct. 1149 (1987) (holding that even the slightest movement of objects in defendant's home was outside a "plain view" exception and that the justification for entry did not extend to such a search). This sort of "masculinist" analysis is criticized in Scales, *supra* note 20, at 1388 (arguing that to attempt to render precise that which is blurred is the supporting methodology of false objectivity).

186. Consider, for example, *United States v. Sharpe*, 470 U.S. 675, 686-88 (1985), where the Court held the length of the stop of Sharpe's vehicle irrelevant because the evidence was discovered in coconspirator Savage's vehicle, though it was the combined behavior of the two defendants that justified the stop in the first instance. See also *United States v. Ramirez*, 810 F.2d 1338, 1341 (5th Cir.) ("[f]or fourth amendment purposes, it is necessary to analyze the search of the room and the inspection of the personal property separately" where defendants' arrest prevented them from returning to the hotel room to retrieve their property), *cert. denied*, 108 S. Ct. 136 (1987); see also discussion of *Rakas*, *supra* note 162.

187. See F. Olsen, *supra* note 11.

188. See generally C. GILLIGAN, *supra* note 17; *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 49-53 (1985) (comments of C. Menkel-Meadow).

reflect their particular vision of the world. A view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the atomistic social theory underlying the Court's present doctrine.

In each dimension, a narrower frame is generally less protective of a secondary party's claim. A court using a narrow spatial frame defines precisely the place or object subjected to the search or seizure. The defendant's interests are also defined as extending over a narrow area. Thus, the court will often find that those interests were not invaded by the challenged police activity. The circles simply do not overlap.¹⁸⁹ The selection of a narrow temporal frame also protects fewer derivative claimants. In effect, the court divides an ongoing stream of police investigative activity into a series of discrete searches and limits the defendant's claim to the "search" that most concretely involved his own interests.¹⁹⁰

As suggested in the Introduction, there is a natural link between courts' choice of frame and the extent to which they recognize relationships. With a broader frame, courts are more likely to recognize people's relationships and their concern for the well-being of others as protectable interests. Our concern for ourselves is almost always viewed as central and thus falls within the narrowest frame; our concern for others can be protected only with a broader frame.

The model set out in Part IV does not automatically require any particular framing—no model could. However, it does encourage courts to adopt a presumptive picture of the world that recognizes the value of shared privacy and to be more sensitive to particular facts about the relationship between the claimant and the primary rightholder. The proposal is consistent with, and will evoke a greater willingness to recognize, the interrelatedness of events and activities by encouraging the use of broader frames of time, place, and generality.

189. Note, however, that when the issue is the validity of a third-party consent, a narrow frame will tend to deny the third party's authority and thus lead to exclusion of the challenged evidence.

190. For example, in *Rakas*, the Court stated that a casual visitor who happens to be in the kitchen should not be able to challenge a contemporaneous search of the basement. *Rakas v. Illinois*, 439 U.S. 128, 142 (1978). If the police extended their search to the kitchen, the visitor's right to exclude evidence found in the basement would turn on whether the court viewed the police actions as an uninterrupted stream of events or as two or more consecutive searches. The *Rakas* Court took the narrow view, ignoring all activities prior to the search of the glove compartment.

By contrast, the majority in *United States v. Jeffers*, 342 U.S. 48, 52 (1951), rejected such precise framing of police actions. The search of the defendant's aunts' hotel room and the subsequent seizure of the defendant's property were, the Court held, "incapable of being untied" because they were "bound together by one sole purpose—to locate and seize the [defendant's] narcotics." *Id.*; see also *Alderman v. United States*, 394 U.S. 165, 180 (1969) (illegal phone tap and subsequent recording of particular conversations viewed as part of same illegality).

III RELATIONSHIPS AND RISK: DANGERS IN SHARING

The preceding analysis of shared privacy-based claims demonstrated that sharing can expand the class of people entitled to claims of privacy. In this Part, I first explore the risks inherent in sharing. One may lose a legitimate expectation of privacy when the group allowed access to a place or thing becomes too large. Also, the probability that the police will be justified in searching a place is greater when privacy is shared, for there are more people whose activities might give rise to probable cause. Second, I examine the risk that another legitimate claimant over a particular place will consent to its search. Finally, I note the ways in which courts have on occasion misconstrued the risks of sharing to deny that shared expectations of privacy exist or to limit severely their scope.

A. *The Cost of Sharing*

1. *"A Private Affair": Limits of Size and Intimacy*

Sharing with a sufficiently large number of people may make a place no longer private. Once this occurs, no group member can claim that he or she has a reasonable expectation of privacy. For example, imagine that a police officer purchases membership in a 500-member "private" club whose only membership criterion is the payment of dues. If the officer then enters the club and observes gambling, none of the members would have a fourth amendment claim.¹⁹¹ A court would likely reach the same conclusion even if the club proved that it would not have sold the officer a membership had it known she was a police officer.¹⁹² Given the club's essentially "open door" policy, police entry into the club would no more be a search than would police entry into a store during business hours. As another commentator writes, "[a]t least in cases in which property interests are uninvolved, the fourth amendment creates no right to share information with all the world save governmental officers."¹⁹³

191. Cf. *United States v. Briones-Garza*, 680 F.2d 417, 421 (5th Cir.) (no expectation of privacy where defendant "shared his quarters with an ever changing group of approximately fifty other people"), *cert. denied*, 459 U.S. 916 (1982); *United States v. Vicknair*, 610 F.2d 372, 380 (5th Cir.) (defendant had no expectation of privacy in a vessel, given the "latitude to use it given to so many people," the "lack of separate space, quarters, or lockers for anyone," and "the apparently indiscriminate coming and going of so many people"), *cert. denied*, 449 U.S. 823 (1980). *But cf.* *Recznik v. City of Lorain*, 393 U.S. 166, 168-69 (1968) (per curiam) (defendant could deny police entrance to an after-hours gambling club because "[t]he congregation of a large number of persons in a private home does not transform it into a public place open to the police") (emphasis added).

192. Cf. *Lewis v. United States*, 385 U.S. 206 (1966) (no fourth amendment violation where police officer obtained entry into suspect's home on the pretense that he was an ordinary narcotics purchaser).

193. *Alschuler*, *supra* note 13, at 32 n.94. *But see Doernberg*, *supra* note 44, at 269 n.57

Note, however, that the claim eliminated by "excess" sharing is that based on expectations of privacy. Arguably, a property-based claim of the primary rightholder¹⁹⁴ can survive a greater degree of sharing than can the shared privacy claim of secondary rightholders.¹⁹⁵

A separate, but intertwined, consideration is the intimacy of relationship among those who share access to the place searched.¹⁹⁶ The size of a group is, of course, often related to the capacity of its members to develop a sense of intimacy. Workers in an office shared by only two or three people¹⁹⁷ more readily develop a sense of intimacy and shared concern than those on the factory floor.¹⁹⁸ Sometimes, however, even fairly large groups can be intimate. For example, if a convention of civil rights lawyers takes place at a rented lodge, all the attendees, and not just the executive director who signed the register, ought to have a reasonable expectation of privacy in the common areas of the lodge.

2. "Et tu?": Sharing and Probable Cause

Relationships of intimacy can provide a basis for government incursions on privacy that might not otherwise be justified. For instance, even if the police have no reason to suspect me of any crime, they may legally

(asserting that the current Supreme Court "fails to deal with the distinction between a person's expectation of privacy from the world at large and his expectation of freedom from governmental intrusion").

194. The Supreme Court held in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), that a factory store owner had a fourth amendment claim against government inspectors despite the access to the place searched by a substantial number of his employees; that decision presumably rested on such property rights.

195. The definition of the place shared in these cases is important. When I open my home to a large party, I might temporarily lose any expectation of privacy in those areas to which the guests have access. If we define the place searched narrowly, however, I could still claim such an expectation in my dresser drawers. Note that, in the cases discussed in this section, it is generally to the defendant's advantage to construe narrowly the dimensions of sharing, while in the standing cases, a narrow construction usually favors the government.

196. For example, Rawlings had no right to challenge a search of the purse of Cox, his (apparently nonexclusive) companion of a few days. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). However, the rule is sometimes different for longer term relationships. See *supra* note 169; see also *Pollard v. State*, 270 Ind. 599, 388 N.E.2d 496 (1979) (husband has legitimate expectation of privacy in his wife's automobile because of the relationship between parties).

197. See, e.g., *Mancusi v. DeForte*, 392 U.S. 364 (1968).

198. As groups become larger, and personal connection more difficult to establish, felt intimacy and responsibility for others may lessen. Cf. N. NODDINGS, *supra* note 17, at 46-48 (obligation to care greater for friends than for strangers). Thus, the executive who has a private or semi-private office has a greater expectation of privacy than the office pool typist. Analysis of privacy rights in light of people's shared lives requires sensitivity to the limited ability of many people to achieve the privacy they desire. Although people want, and perhaps deserve privacy, many cannot "expect" it because they do not have the resources to achieve it. In both multiparty and single-party contexts, privacy is in fact, if not in theory, more available to those with wealth and power. Union movements serve, in part, to counteract this by facilitating felt bonds among even very large groups. These bonds can, in turn, justify privacy expectations despite the large number of people with whom the workplace is, perforce, shared.

search my home if they have probable cause to believe my cohabitant has contraband stored there. Similarly, if I take care of a package for a friend, probable cause to believe the package contains stolen goods and is in my home may justify a search of my house.¹⁹⁹

Even my own person or those items indisputably my own may be subject to search because of my relationship with a person or place. Although the police may not search me merely because I am on public premises that they have probable cause to search,²⁰⁰ they may be able to do so if they encounter me during an investigation of a more private place.²⁰¹ The nature of the place searched, the number of people present, and the reasonable presumptions about the relationship between the owner and others present may allow the police to extend suspicion from one to the others. Such suspicion, rooted in my relationship with known (or reasonably suspected) criminals can ultimately establish probable cause to believe that I too am involved in crime and can be searched.²⁰²

B. *The Risk of Betrayal: Third-Party Consent*

The most commonly recognized risk that relationships pose to fourth amendment claims is that the other person may consent to a search of the shared premises.²⁰³ In this Section, I explore, first, why one

199. See *Steagald v. United States*, 451 U.S. 204 (1981) (search for suspect in third party's home requires search warrant based on probable cause to believe suspect will be found there). The sharing of searched premises is most likely to come to the attention of the judicial system when evidence implicating the originally unsuspected party is found, as in *Steagald*. Note that every search of the home of a suspect who lives with nonsuspects involves an incursion on the privacy interests of innocent persons that is justified solely by their relationship with the suspect.

200. See *Ybarra v. Illinois*, 444 U.S. 85 (1979).

201. See, e.g., *Michigan v. Little*, 106 S. Ct. 580, 581 (1985) (Burger, C.J., dissenting from denial of cert.); *United States v. Flett*, 806 F.2d 823 (8th Cir. 1986) (rejecting "automatic companion" rule, which allowed frisk of any companion of arrestee, but finding sufficient justification where defendant was found at home of arrested gang member); *United States v. Gray*, 635 F. Supp. 572 (D. Me. 1986) (permissible to search through visitor's jacket found on back of chair when executing search warrant at a home), *aff'd*, 814 F.2d 49 (1st Cir. 1987); *State v. Gobely*, 366 N.W.2d 600 (Minn.) (permissible to frisk defendant who seeks entry to home of another where police are legitimately carrying out search), *cert. denied*, 106 S. Ct. 256 (1985); *cf. Michigan v. Summers*, 452 U.S. 692 (1981) (permissible to detain person leaving residence for which police have search warrant).

202. Such association is not in and of itself sufficient to justify a search. See, e.g., *United States v. Di Re*, 332 U.S. 581, 587 (1948) (mere presence in suspected automobile does not justify search of person). It may, however, be considered in the overall determination of whether there is probable cause or reasonable suspicion. See Comment, *United States v. Bell: Rejecting Guilt by Association in Search and Seizure Cases*, 61 NOTRE DAME L. REV. 258 (1986); see also *Zurcher v. Stanford Daily*, 436 U.S. 547, 560-63 (1978) (searching property of nonsuspect third party, rather than proceeding by subpoena, permitted in light of apparent intimacy between suspects and the third party).

203. See Goldberger, *supra* note 151, at 344-59. Consent is one of the most common methods by which police obtain authorization for searches. See 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 9.1 (2d ed. 1987) ("frequent usefulness [of consent] to law enforcement personnel . . . is reflected in the large volume of cases with consent search issues."); 3

person's consent should ever justify a search that affects another's fourth amendment interests, and second, when such consents are considered valid.²⁰⁴ Logically, the criteria for evaluating the validity of third-party consents and derivative fourth amendment claims should be the same. The two doctrines' radically different implications for crime control, however, have impeded recognition of this fact. The test proposed in Part IV for valid third-party consents grows out of the critique that follows of both components of the current test: whether the consent was voluntary and whether it was authorized.

1. *Single-Party Consents*

a. *Why Should Consent Ever Validate Searches?*

Consent searches have been justified under two different theories. Under one theory, consent to a search is considered equivalent to a waiver of fourth amendment rights. Under the other, the consent renders the ensuing search "reasonable."

At one time, the waiver rationale appeared to predominate.²⁰⁵ A consent was valid only if it constituted an "intentional relinquishment or

W. LAFAVE, *supra* note 30, § 8.1, at 147 ("The so-called consent search is frequently relied upon by police as a means of investigating suspected criminal conduct.").

Doctrinally distinct from consent searches, though often factually similar, are so-called private searches, in which private parties obtain evidence and provide it to the government. *See Note, Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967) (arguing that evidence obtained by private actors by means forbidden to police under fourth amendment should be excluded from criminal trials).

204. Throughout this Section, I assume that, absent consent, the defendant would have standing to challenge the search. If third parties provide the government with information rather than access to tangible items, the fourth amendment does not appear to limit such betrayal at all, for its protections do not extend to information known about a person by others. *See generally* Alschuler, *supra* note 13, at 20-32 (discussing government access to information kept by third parties). The related and extremely difficult issue of "false friends," that is, the degree to which the government should be able to arrange to have our friends betray us on a continuing basis or to plant government agents who pretend to be our friends, is beyond the scope of this Article. For further discussion of these issues, see Alschuler, *supra* note 13, at 33-50; Goldberger, *supra* note 151, at 344-59.

205. *See, e.g.*, *Johnson v. United States*, 333 U.S. 10, 13 (1948) (consent invalid if "granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right"); *see also* *United States v. Nikrasch*, 367 F.2d 740, 744 (7th Cir. 1966) (no valid consent where defendant was in police custody and not apprised of fourth amendment rights); *United States v. Moderacki*, 280 F. Supp. 633, 636 (D. Del. 1968) (valid consent required defendant to be apprised of fourth amendment rights despite prior *Miranda* warning). *See generally* Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211 (1974) (applying waiver theory); Note, *Family Consent to an Unlawful Search*, 28 WASH. & LEE L. REV. 207, 220 (1971) (explicitly adopting a waiver theory to negate third-party consent).

Some lower courts still analyze consent cases using the language of waiver. *See, e.g.*, *United States v. Gay*, 774 F.2d 368, 376-77 (10th Cir. 1985); *United States v. Recalde*, 761 F.2d 1448, 1453 (10th Cir. 1985).

abandonment of a known right."²⁰⁶ Using the waiver rationale, judges imposed a heavy burden upon the state to prove that consents were voluntary.²⁰⁷ It was feared that allowing police to search based on consent, with neither probable cause nor a warrant, would undermine the regulatory force of the fourth amendment.²⁰⁸

In *Schneckloth v. Bustamonte*,²⁰⁹ however, the Supreme Court, in its most thorough analysis of consent searches, rejected the waiver theory, thereby allowing for the possibility of valid third-party consents.²¹⁰ Describing consent as a "specifically established exception[]" to the requirements of both a warrant and probable cause,²¹¹ the Court determined that the consent made the search reasonable and therefore valid.

The *Schneckloth* opinion embodied a positive attitude toward consent to searches:

[I]t cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment [of fourth amendment rights]. We have only recently stated: "[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.²¹²

The Court thus presented two justifications for the new approach—society's interest in punishing crime and individuals' interest in helping law enforcement. The former seems a poorly disguised evasion of the fourth amendment, whose protections necessarily impede law enforcement. The latter justification purports to provide a legitimate basis for

206. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (setting out general standard for waiving constitutional rights).

207. See Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 131 (1967).

208. See, e.g., Mascolo, *Inter-Spousal Consent to Unreasonable Searches and Seizures: A Constitutional Approach*, 40 CONN. B.J. 351 (1966); Wefing & Miles, *supra* note 205.

209. 412 U.S. 218 (1973).

210. "[A] 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third party consents.'" *Id.* at 245. The waiver theory is inconsistent with third-party consent because rights are personal and can be waived only by the defendant or an authorized agent. Although the Court did not focus on the fact, the consent in *Schneckloth* was a third-party consent.

211. *Id.* at 219. In effect, the Court held that the police activities were a search, but that the search was justified.

212. *Id.* at 243 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 448 (1971)). The Court's new attitude toward consent searches reflected other policy choices as well. First, "successful" searches always uncover reliable evidence of crime and are thus socially valuable. *Id.* at 227-28. Second, a strict waiver rule would allow clever defendants to manipulate the system by assenting (thereby diverting the police from obtaining a warrant) and then falsely claiming in court that they lacked the knowledge necessary for valid consent. *Id.* at 230.

otherwise unreasonable searches by recognizing the consentor's autonomy interest in choosing to consent. If the consentor is a third party, her consent may in fact arise out of a sincere desire to help the police. In the single-party context, however, the Court's concern for effectuating the consentor's choice rings somewhat hollow. The legal challenge arises when the consentor herself subsequently seeks to negate that consent. The court's decision must deny effect to either her current choice or that reflected in the consent²¹³ and thus cannot entirely advance her autonomy interest.

The *Schneckloth* Court appeared to be trapped by its desire to permit third-party consents, which cannot be readily justified as waivers of another's constitutional rights.²¹⁴ It also sought an easier standard for the validity of a consent than "relinquishing a known right." One could recognize the former concern without wholeheartedly embracing the latter change. A more intellectually coherent, though less elegant, solution might be to retain the voluntariness test set out below for third-party consent, but return to a waiver standard for a target's consent. There is substantial reason to doubt that an accused who consents to a search contrary to her own interests is really concerned with aiding law enforcement. It thus seems appropriate at least to ensure, as *Schneckloth* does not, both that she knows she can refuse and that her refusal is voluntary.

b. *Consent and Coercion: The Meaning of Voluntariness*

The primary issue in *Schneckloth* was not whether to permit consent searches, but how to determine whether a consent is voluntary. A consent must be "freely and voluntarily given" for the ensuing search to be "constitutionally permissible."²¹⁵ Mere "acquiescence to a claim of lawful authority" is insufficient.²¹⁶ The *Schneckloth* Court held that the voluntariness of a consent should be evaluated under the "totality of the circumstances."²¹⁷ Applying this test, the Court considered the con-

213. In the single-party context, it is easy to see the consequences of the defendant's decision to consent. Even in that context, however, an autonomy argument for allowing consent searches might be made. Assume that the police come to the house of an innocent man, who wishes to cooperate. We would want to allow him to consent to a search of the house. If we design the rules so that it would later be difficult for the police to prove the validity of the consent, they might be unwilling to rely upon it. They might instead insist on occupying the dwelling for several hours until they could obtain a warrant, subjecting our innocent suspect to unnecessary stigma and inconvenience. For an argument that the fourth amendment is intended to protect innocent parties from facing such a dilemma, see Loewy, *supra* note 28, at 1257-63. In fact, however, the Court's justification for permitting consent searches seems much more deeply grounded in a willingness to give the police a free hand to control crime.

214. See *Schneckloth*, 412 U.S. at 245-46.

215. *Id.* at 222.

216. *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

217. *Schneckloth*, 412 U.S. at 227. The majority opinion never really confronted its conclusion,

sender's age, education and intelligence level, whether he was aware of his right not to consent,²¹⁸ whether he was in police custody, the nature of the police request, and whether there was coercion.²¹⁹

Despite, or perhaps because of, this extensive list of factors, there is little settled law in this area. Shortly after the *Schneckloth* decision, Professor Weinreb predicted that "[t]he product of *Schneckloth* is likely to be still another series of fourth amendment cases in which the courts provide a lengthy factual description followed by a conclusion . . . without anything to connect the two."²²⁰ His prediction has proved correct. In analyzing numerous cases on this issue, Professor LaFave recently noted that "it can seldom be said with confidence that a particular combination of factors will inevitably ensure a finding of either consent or no consent."²²¹ The problem is not simply one of complexity or disagreement about the proper relative weights of the various factors. Rather, the very concept of voluntariness, which these factors are supposed to determine, is a legal fiction. Whether a consent is voluntary is not simply a question of fact but is designed to be "an accommodation of the complex of values implicated in" the competing concerns of "security" and "liberty."²²²

2. *It's All Right With Me: Third-Party Consents*

a. *Justification: Why Allow Betrayal?*

While third-party consents are sometimes valid, it is not always clear why. The justification for third-party consent has been described both in terms of reduced expectations of privacy and assumption of risk. Each construction is both true and misleading.

Sharing access to a place or thing obviously reduces one's expectation of privacy therein; one can no longer assume that no one else will be there. Shared access, however, does not necessarily mean that any of the parties should be authorized to allow the police to enter. The fourth amendment rule could as logically require all rightsholders to consent in

reached just one year earlier in *Miranda v. Arizona*, 384 U.S. 436 (1966), that a voluntariness test was unworkable.

218. Such awareness, while relevant, was specifically held not to be required. *Schneckloth*, 412 U.S. at 232-33.

219. The Court assumed that trial judges could determine if there had been coercion in the police-citizen encounter. *Id.* at 229. However, reconstructing the facts to decide if a given consent was voluntary "must involve distinguishing nuances of tone and language . . . that are subject to easy distortion or poor recall by parties and that hence might allow covert coercion easily to escape a casual review by a court." *United States v. Berry*, 670 F.2d 583, 596 (5th Cir. 1982) (discussing whether an airport encounter with police was a "stop"); see also cases cited in *Wefing & Miles*, *supra* note 205, at 228-29 (1974).

220. Weinreb, *supra* note 49, at 57.

221. 3 W. LAFAVE, *supra* note 30, § 8.2, at 176; see cases cited in *id.*

222. *Schneckloth*, 412 U.S. at 224-25.

order to render a search reasonable.²²³

The "assumption of the risk" formulation is equally ambiguous. In one sense, granting someone else access to "your" premises and things requires assuming a risk that they will use that access in ways you would not have chosen—they may break your possessions, or throw them away, or send them to the FBI in a plain brown wrapper. Third-party consent, however, involves both the consentor and the police. The extent to which we, as a society, wish to permit the government to exploit someone's decision to share is a question of policy and constitutional interpretation. Once we decide the parameters of the government's power, the claimant "assumes" whatever risk inheres in that legal rule.²²⁴

A persuasive rationale for allowing third-party consent must rely on some interest of the third party that outweighs the defendant's privacy concerns and presumed desire to exclude the police. That interest is an autonomy-based right to choose to cooperate with the authorities.²²⁵ Under this rationale, the consentor need not have any particularized reason for consenting,²²⁶ though genuine consent at the expense of an intimate, without reason, will likely be rare.²²⁷ Furthermore, if we agree

223. See *United States ex rel. Cabey v. Mazurkiewicz*, 431 F.2d 839, 842 (3rd Cir. 1970). The Third Circuit's explanation of the rule allowing any rightholder to consent is representative: "The justification of the search . . . results from the impossibility of severing the joint right of control and the undesirability of permitting the exercise of the right of one to be limited by the right of the other." *Id.* at 842.

Private property law regarding jointly owned property provides no single determinative rule regarding disputes between the owners over use of the property. Depending on the particular property rule one deems analogous, one can find either that consent of all is required or that consent of only one is sufficient to create a change in the property relationship. For example, one joint tenant acting alone cannot usually transfer full title to the property, but she can change the nature of the joint tenancy.

The rule allowing any joint tenant to consent embodies the courts' greater relative valuation of the consentor's autonomy and lesser valuation of the claimant's privacy.

224. Cf. *Alschuler*, *supra* note 13, at 23 (stressing circular nature of most assumption-of-risk analysis). A paradigmatic misuse of the assumption-of-risk analysis is *United States v. Falcon*, 766 F.2d 1469 (10th Cir. 1985). The *Falcon* court held that consent to search an apartment authorized the police to seize and to listen to a tape left there by the consentor's brother, despite a label on the tape that said "Confidential, Do Not Play," because the consentor "could have played it at any time." *Id.* at 1476.

225. The third party consent doctrine, then, provides no reason to permit searches by government-planted informants, who act at all times as agents of the police and have no counterbalancing autonomy interests.

226. *But see* Comment, *supra* note 202 (arguing for such limits on the power to consent). Particularized reasons, such as being a victim, or wishing to clear one's name of unwarranted suspicion, should not authorize consent by one without sufficient access to the place searched (though such facts, when communicated to the police, may help provide the probable cause that would permit an unconsented search). *But see* *United States v. Diggs*, 544 F.2d 116 (3d Cir. 1976) (search valid where consentor was custodian of locked box).

227. Intimates are generally aware of each other's general attitudes regarding discretion and privacy. If I know my spouse is a private person, I would ordinarily not permit the police to search our house. *But see* Comment, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L.

with the Supreme Court that people should be encouraged to cooperate with the police in solving crime,²²⁸ we should seek to make people's real willingness to do so effective, even when they share the relevant place or thing with another.

An underlying presumption of this Article is that people rarely "betray" their friends by consenting to searches that may cause them harm. People with shared access to private places generally have warm, intimate, or at least congenial relationships with each other. Consent, however, is given in a single moment rather than over time, and at certain times, the relationship between the parties may be antagonistic. Even under such circumstances a consent by one of the parties is and should be valid.²²⁹ "The defendant is entitled . . . not to the enforcement of a promise or understanding . . . , but to have the other person himself freely make that decision" to consent.²³⁰ Furthermore, there will surely be some situations where people will genuinely choose to favor what they perceive as the interests of society rather than the interests of their particular intimates. To deny even the possibility of such a decision is to turn a freely chosen relationship into a status, denying one person's full personhood to protect another's interests.²³¹

REV. 121, 122 (1973) (third parties are likely to be insufficiently protective of defendants' privacy interests). Where the relationship is close, considerable skepticism about the voluntariness of the consent may be warranted. It is the consenter's general awareness of the defendant's attitude toward privacy and the government, implicit in the relationship, not her awareness of her cohabitant's involvement in criminal activity, that properly protects the defendant's interest. *Cf.* *Bumper v. North Carolina*, 391 U.S. 543, 556 (1968) (Black, J., dissenting) (when Bumper's grandmother consented to the search, "she actually wanted the officers to search her house—to prove to them that she had nothing to hide"). One could argue more readily, however, that no consent given by a nearly illiterate elderly Black woman to a pair of white police officers in the rural South could possibly be truly voluntary. Judges must be sensitive to context and avoid false preconceptions about social relationships.

Despite such risks, third-party consents do have a place in fourth amendment jurisprudence. This assertion assumes, first, that people will sometimes wish to assist authorities in solving crime, even at risk to the interests of their intimates, and second, that procedures for reviewing consent searches will be sufficiently sensitive to discover and reject those cases where the alleged consent is more accurately characterized as submission to government pressure.

228. See *Schneekloth*, 412 U.S. at 243.

229. Ordinarily, courts allow the government to rely on consent by one rightholder, regardless of the defendant's refusal to consent. See, e.g., *United States v. Sumlin*, 567 F.2d 684 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); *People v. Cosme*, 48 N.Y.2d 286, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979). Some courts, however, have invalidated searches where the defendant was present and explicitly refused to consent. "Though a joint occupant should have authority to consent . . . if the other party is unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another." *Silva v. State*, 344 So. 2d 559, 562 (Fla. 1977) (disallowing consent by battered paramour who invited police to search closet where defendant kept his guns).

230. White, *supra* note 101, at 224.

231. Some of my colleagues have argued that third-party consents should be permitted only where the consenter is a victim of the illegal activity. Such concerns stem, at least in part, from a distaste for the underlying substantive criminal law; for example, proscriptions against drug

b. Criteria: Who Can Give Such Consent?

This Section examines the relationships between the consentor, the defendant, and the place searched that courts have required for a third-party consent to bind the defendant. The standard articulation of the rule is found in *United States v. Matlock*.²³² The key, said the Court, is whether the consentor had (or perhaps appeared to have²³³) “common authority over or other sufficient relationship to the premises or effects sought to be inspected.”²³⁴

The authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.²³⁵

The touchstones of third-party consent law are the phrases “common authority” and “joint” or “mutual” use. In third-party consent cases, unlike standing cases, the behavior and expectations of the parties are explicitly central to the Court’s analysis. Common possessors may be able to consent, even if they do not possess technical property rights over the place searched.²³⁶ Conversely, property rights alone are insufficient

possession and gambling. Such issues should be dealt with more directly. Furthermore, once one allows an exception for crime-victim consenters, it is difficult to distinguish other situations where the consentor may be at risk from continuing criminal activity. Given the broad scope of conspiracy and complicity laws, a person may well be potentially subject to criminal penalties if someone else has brought drugs, guns, or other contraband into her home.

The best argument for narrowly construing third-party consents is that they will frequently be coerced rather than volunteered. A consent that is the result of “monetary or other material inducement from the authorities” should not be accorded the legal and moral weight of an independent, autonomous choice. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUND. RES. J. 1193, 1243 n.178. Nevertheless, courts may sometimes find such consents “voluntary.” Whether this risk is sufficiently high that the doctrine should be adjusted to take account of it is an empirical question beyond the scope of this Article.

One compromise solution might be to allow third-party consents without probable cause, but require prior judicial review in order to reduce the likelihood of confusing coercion with consent.

232. 415 U.S. 164 (1974).

233. Current law is unclear regarding the legitimacy of searches based on the consent of a party whom the police reasonably but erroneously believe to have authority to consent—the so-called “apparent authority” problem. The Supreme Court avoided ruling on the issue in *Matlock*, and cases and commentators are divided on the proper solution. Compare, e.g., *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955) (giving broad scope to apparent authority) with *Weinreb*, *supra* note 49, at 64 (rejecting apparent authority). My solution is set out *infra* text accompanying notes 298-303.

234. *Matlock*, 415 U.S. at 171; see also *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (“Petitioner, in allowing [his cousin] to use [a gym bag] and in leaving it in his [cousin’s] house, must be taken to have assumed the risk that [the cousin] would allow someone else to look inside.”).

235. *Matlock*, 415 U.S. at 171 n.7. The particular issue before the *Matlock* court was whether the hearsay rules applied to exclude testimony regarding the authority of the consentor at the suppression hearing. The Court held that they did not.

236. See, e.g., *United States v. Turbyfill*, 525 F.2d 57 (8th Cir. 1975); see also *State v. Kellam*, 48

to establish authority to consent.²³⁷ For example, if I loan my friend a large briefcase to use during her time at law school, my property interest is trumped by her control over the item; I should not be able to consent to a search of the briefcase, though I could demand its return at any time.

Third-party consent issues generally arise in two types of relationships. Sometimes, the consenter and the defendant have essentially equivalent links to the place searched.²³⁸ This was the case in both leading Supreme Court cases. The Court's criteria are most readily applied to such relationships. A significant number of relationships, however, such as those at issue in *Rakas v. Illinois*²³⁹ and *Rawlings v. Kentucky*²⁴⁰ are what might be termed "nested relationships." In *Rawlings* and *Rakas*, the question was whether the secondary party's interest, though weaker than that of the primary rightholder, was nonetheless sufficient to ground a fourth amendment claim. In the third-party consent context,

N.C. App. 891, 269 S.E.2d 197 (1980) (neighbor who was given key and instructions to watch house during owners' absence could consent to search). The apparent greater sensitivity to relational concerns and particularized facts in the doctrinal formulations in this area may reflect a more sympathetic attitude toward the consenter, whose interests would otherwise be ignored, than the parties in a standing case.

The one context in which joint authority and control has not always been found sufficient to authorize consent is a wife's consent to a search that incriminates her husband. "It has been generally assumed in this Circuit, however, that a wife, unlike other co-inhabitants, does not have authority to consent to a search of the premises she shares with her husband." *United States v. Thompson*, 421 F.2d 373, 375 (5th Cir.) (changing Fifth Circuit rule), *vacated on other grounds*, 400 U.S. 17 (1970); *see also* *Silva v. State*, 344 So. 2d 559, 561 (Fla. 1977) (prior cases "clearly indicate that the consent of a paramour will be sufficient to validate a search under circumstances in which the consent of a wife would not"). Courts' belief that citizen cooperation with the police should be encouraged is apparently undercut by the equally strong belief that wives should be loyal to their husbands and that the government should not interfere with the husband-wife relationship.

237. *See, e.g.*, *United States v. Heisman*, 503 F.2d 1284, 1288 (8th Cir. 1974) (co-lessee's legal right to enter the room, in the absence of access or control, insufficient for valid consent). Where defendant's only link to the place searched is a technical property claim he may not even have "standing." *See, e.g.*, *United States v. Quinn*, 106 S. Ct. 1623 (1986) (Burger, C.J., dissenting from dismissal of certiorari); *United States v. Gomez*, 770 F.2d 251, 254-55 (1st Cir. 1985). *But see* *Commonwealth v. Latshaw*, 481 Pa. 298, 392 A.2d 1301 (1978) (the owner of a barn could consent to a search of the sealed cartons defendant had left there with the "permission" of a friend who had access but no property right in the barn).

238. *See* *United States v. Matlock*, 415 U.S. 164 (1974) (defendant and consenter lived together in searched room); *Frazier v. Cupp*, 394 U.S. 731 (1969) (defendant and consenter both used searched gym bag); *see also* *United States v. Bethea*, 598 F.2d 331 (4th Cir.), *cert. denied*, 444 U.S. 860 (1979) (defendant and consenter were cooccupants of bedroom); *Kirvelaitis v. Gray*, 513 F.2d 213 (6th Cir.) (defendant and consenter had joint control of closet), *cert. denied*, 423 U.S. 855 (1975). Whether the court finds such joint access may depend on its spatial and temporal description of the facts. *See, e.g.*, *United States v. Green*, 523 F.2d 968 (9th Cir. 1975) (area searched described as cotenant's bedroom; tenant could not consent); *State v. Kelley*, 184 Tenn. 143, 197 S.W.2d 545 (1946) (since consenter had left apartment and moved most of her possessions, she no longer had sufficient authority to consent).

239. 439 U.S. 128 (1978).

240. 448 U.S. 98 (1980).

the primary rightholder is generally the defendant, and the issue is whether the secondary rightholder has a sufficient relationship with the place searched that his consent may be used against the primary rightholder.²⁴¹

Thus, when a child is living at home, courts always recognize the consent of the parents to a search of the common areas,²⁴² and often uphold the parents' consent to a search of the child's room.²⁴³ The child, on the other hand, generally cannot consent to a search of the parent's room and may even be unable to consent to a search of the common living areas.²⁴⁴ A similar asymmetrical relationship exists between host and houseguest.²⁴⁵

Another nested relationship is that of bailor and bailee. Because the bailor lacks "access and control," he cannot ordinarily consent to a search. A bailee with essentially free access may consent to a search of

241. See *Anderson v. United States*, 399 F.2d 753, 756 (10th Cir. 1968) (discussing problem of consent by those with stronger or weaker claims).

Courts sometimes analyze as instances of nested control situations that are in fact examples of alternative control. Typically these cases involve consents by hotel personnel, e.g., *Stoner v. California*, 376 U.S. 483 (1964), or landlords, e.g., *Chapman v. United States*, 365 U.S. 610 (1961). As the Court indicated in those cases, a landlord or hotel owner is a secondary party, without authority to consent to a search in derogation of the dominant privacy interests of the lessee or renter.

More difficult, however, are cases where the defendant is arguably no longer a tenant or hotel guest at the relevant time. At some point, the defendant has "overstayed his welcome" and no longer has a valid claim over the property, though he or his possessions may still be physically present. See, e.g., *United States v. Akin*, 562 F.2d 459 (7th Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States v. Croft*, 429 F.2d 884 (10th Cir. 1970). While there is dispute over precisely when that shift occurs, there is never a situation in which both the guest and the hotel management have sufficient interests in the room to establish standing or validly consent to a search.

242. E.g., *United States v. Wright*, 564 F.2d 785 (8th Cir. 1977); *Brames v. State*, 273 Ind. 565, 406 N.E.2d 252 (1980).

243. Such authority has been found even where the child pays board, *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979), where the child pays rent and board, *United States v. Di Prima*, 472 F.2d 550 (1st Cir. 1973), and where the parent has access to the room only for the limited purpose of cleaning, *Preston v. State*, 444 So. 2d 939 (Fla. 1984).

The parent's authority is perceived as inherent in the parent-child relationship.

In his capacity as the head of the household, a father has the responsibility and authority for the discipline, training and control of his children. In the exercise of his parental authority a father has full access to the room set aside for his son for purposes of fulfilling his right and duty to control his son's social behavior and to obtain obedience.

Vandenberg v. Superior Court, 8 Cal. App. 3d 1048, 1055, 87 Cal. Rptr. 876, 880 (1970).

244. See, e.g., *Commonwealth v. Garcia*, 478 Pa. 406, 424 387 A.2d 46, 55 (1978) (16-year old who "did not have dominion over the home equal to that [of her parent]" cannot consent); cf. 2 W. LAFAYE, *supra* note 30, § 8.4(b), at 286-87 ("it cannot be said that the parents have assumed the risk of [a child's consent to search the family home], for this is contrary to the common understanding of the parent-child relationship"). But see *State v. Folkens*, 281 N.W.2d 1, 4 (Iowa 1979) (14-year old with key and household responsibilities can consent).

245. See, e.g., *United States v. Miroff*, 606 F.2d 777 (7th Cir. 1979), cert. denied, 445 U.S. 928 (1980); *United States v. Novick*, 450 F.2d 1111 (9th Cir. 1971), cert. denied, 405 U.S. 995 (1972); see also *Weinreb*, *supra* note 49, at 60 ("[I]t would violate our ordinary understanding of their temporary living arrangement if the guest admitted strangers in the absence of his host.").

the bailed item.²⁴⁶ A bailee of a locked box, however, may not authorize the police to open it unless he has been given a key.²⁴⁷ The bailee can offer to the police only as much access as the bailor intended him to have.²⁴⁸

It is not surprising that current law appears to recognize relationships and sharing more readily when the result is to avoid excluding evidence. Those concerned about police power should embrace this openness to relationships and avoid its harsh effects by other means. We should recognize shared interests broadly in both the standing and third-party consent contexts, while requiring clear proof that consents are voluntary in both third-party and first-party cases. In essence, relationships should be viewed as a source of shared protection except insofar as one of the parties to the relationship unambiguously and voluntarily chooses to remove that umbrella of protection.

C. *True and False Links: How the Courts Have Misunderstood the Meaning of Sharing*

As indicated above, relationships, though often the source of fourth amendment claims, can in some circumstances be costly. Even if one has such a claim, either directly or derivatively, the government may be able to use one's relations with others to establish that the challenged police action did not violate the fourth amendment. For example, a third party's activities may render the government's search "reasonable," or the third party may consent to the search.

Some Supreme Court decisions, however, lend support to the erroneous conclusion that sharing per se is fatal to fourth amendment claims. Although the Court has never held that the mere possibility of third-party consent eliminates expectations of privacy, it has occasionally used language suggestive of that view.²⁴⁹ Consider, for example, the *Rawlings*²⁵⁰ Court's reliance on three facts about the purse in which

246. *E.g.*, *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962); *State v. Bailey*, 276 S.C. 32, 274 S.E.2d 913 (1981).

247. *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955); *see also United States v. Presler*, 610 F.2d 1206 (4th Cir. 1979). *But see United States v. Diggs*, 544 F.2d 116 (3d Cir. 1976) (search valid where consentor was custodian of locked box).

248. Thus a drycleaner may allow the police to view the defendant's clothes, *Clarke v. Neil*, 427 F.2d 1322 (6th Cir. 1970), *cert. denied*, 401 U.S. 941 (1971), but the defendant's mother's consent to a search of her home will not permit the police to search a trunk the defendant has left there, *United States v. Block*, 590 F.2d 535 (4th Cir. 1978).

249. *See, e.g.*, *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (defendant "assumed the risk" when he stored the evidence in a gym bag he shared with his cousin). "[*Frazier*, in] effect, . . . states that there can be no reasonable expectation of privacy in a joint occupancy situation." *Recent Developments*, 41 TENN. L. REV. 923, 928 (1974); *see also Smith v. Maryland*, 442 U.S. 735 (1979) and *United States v. Miller*, 425 U.S. 435 (1976), discussed *supra* note 151.

250. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

Rawlings' drugs were found: he did not own it; he had no right to exclude others; and Cox had recently granted a third person access. These facts show only that three people shared access to the purse. They do not, as the Court's reliance on them suggests, eliminate reasonable expectations of privacy vis-à-vis the world at large.²⁵¹ So long as Cox did not consent, Rawlings should have had a protected interest in the purse. Nonetheless, the Court denied Rawlings' claim. Some lower courts have gone even further, holding that the mere *possibility* of third-party consent (inherent in shared access) is sufficient to eliminate the defendant's reasonable expectation of privacy.²⁵² Such reasoning, however, would render the third-party consent doctrine unnecessary, since the police would need no consent to search in any situation where such consent was possible.²⁵³

Clearly, merely sharing with persons whom we ordinarily expect to protect our interests ought not be equated with losing all expectations of privacy.²⁵⁴ Sharing does mean accepting the risk that others may exercise their autonomy and choose, in a particular instance, to consent. There is thus a sense in which one who shares "assumes the risk" inherent in the unpredictability of human beings. Too many courts, however, seem ready to convert this "assumption of the risk" into a battering ram

251. *Cf. Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (expectation of privacy found where "several officials" shared the same office).

252. Some of these cases conclude from a third party's legitimate consent, not that the search was reasonable, but that the defendant had no reasonable expectation of privacy in the first place. *See, e.g., Dickens v. Lewis*, 750 F.2d 1251, 1254 (5th Cir. 1984); *United States v. Block*, 590 F.2d 535, 539 n.5 (4th Cir. 1978); *People v. Cosme*, 48 N.Y.2d 286, 291-92, 397 N.E.2d 1319, 1321-23, 422 N.Y.S.2d 652, 654-55 (1979); *Commonwealth v. Latshaw*, 392 A.2d 1301, 1305 (Pa. 1978).

Sometimes courts conduct their analysis entirely backwards. For example, in *Alinovi v. Worcestor School Committee*, 777 F.2d 776, 781 (1st Cir. 1985), the court framed the issue as whether the plaintiff, a public school teacher, had a reasonable expectation of privacy in a paper she had written about her job for an evening course, which her supervisor had taken from her and used as the basis for a disciplinary action. The court found she did not, in part because she had given the paper to the college professor for whom it was written and "took no steps to insure that the professor not copy the paper and imposed no conditions to maintain it as a private or confidential document." *Id.* at 783. Thus, she lost fourth amendment protection for an item in which she had a property interest in part because she shared access with another person without obtaining explicit assurances that the paper would be kept confidential. This analysis implies that we can have no expectations of privacy in the things we share absent explicit assurances to the contrary; we can never simply assume that those with whom we share will protect our privacy.

253. One commentator would limit third-party consents to situations where the third party has an articulable reason for consenting, such as being a victim or a cotarget, or where the activity seems more akin to a private search initiated by the third party. *See Comment, supra* note 227, at 133. The author's rationale is that consent in other situations is invalid since the "defendant has a reasonable expectation that the third party will not consent to a search." *Id.* Nevertheless, just as the possibility of consent does not eliminate the defendant's preexisting expectation of nonconsent, that expectation should not be used to nullify the third party's actual consent.

254. Even Mr. Katz, the progenitor of "expectations of privacy," had such an expectation in the contents of his conversations, though he clearly shared each conversation with the party on the other end of the line. *United States v. Katz*, 389 U.S. 347, 352 (1967); *see Alschuler, supra* note 13, at 8.

by which the government may freely invade any place in which human interaction occurs. Neither as a matter of description nor prescription does it make sense to treat betrayal by our friends as the norm.

IV

A PROPOSED TEST FOR SHARED PRIVACY PROBLEMS

So far, I have described how poorly fourth amendment law now treats claims based on relationships. It fails because courts search for rules with little regard for the complexities of human life on which these rules are imposed. The blindness of legal doctrine to the importance of relationships in human life is due in part, I have suggested, to a perception of the world that is skewed by the individualism inherent in much liberal legal theory. This individualistic orientation in turn reflects a more general male bias that privileges autonomy over relationship.²⁵⁵ In formulating an alternative structure, I have drawn on feminist jurisprudence that highlights the insensitivity of present doctrine, not only to women's perspective on issues of unique importance to women (such as rape and family violence),²⁵⁶ but also to women's greater valuation of relationships.²⁵⁷

In this Part, I propose an alternative decisionmaking model for cases involving relational privacy that takes account of real world relational understandings. This model, once implemented, would bring us a step closer to realizing the latent promise of *Katz* to make the fourth amendment more responsive to real people's lives. In the first part of the proposal, I deal with shared privacy as a basis for establishing fourth amendment standing. I then suggest a corresponding approach to third-party consents.

Note that the model proposed here is not result-oriented; it includes both standing and third-party consent.²⁵⁸ In standing cases, defendants will likely argue for a broad view of relational privacy, while in consent cases, the state will make similar arguments. Relational claims willulti-

255. See Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 77-82 (1987); Scales, *supra* note 20, at 1382-83.

256. See MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 731 (1982) (discussing *State v. Wanrow*, 81 Wash. 2d 221, 559 P.2d 548 (1977)) ("Feminists understand the context of inequality in which a woman would shoot her husband under the circumstances. Courts, which seldom apply women's perspective, especially to men, better understand why a man would rape his wife under the circumstances.").

257. Whether the focus of relationships that seems to be a woman's ethic is historically contingent is disputed. See, e.g., *Feminist Discourse, Moral Values, and the Law—A Conversation*, *supra* note 188, at 46-48 (1985) (remarks of C. Gilligan); *id.* at 27-28 (remarks of C. MacKinnon). Care and interrelatedness are to be valued regardless of their genealogy.

258. See *supra* note 8.

mately be given their broadest legal recognition when the parallels between the two doctrinal fields are acknowledged.

A. *Standing Claims Based on Shared Privacy*

A derivative claimant ought to be able to challenge a search, even without a property or possessory²⁵⁹ interest of his own at stake, when he can reasonably assume that (1) the primary rightholder would seek to exclude the public in general, including the government, from the place or thing searched, and (2) the primary rightholder, in so acting, was taking the claimant's interests into account.²⁶⁰ In other words, the derivative claimant can assume that the primary rightholder has chosen to share with him the umbrella of her own fourth amendment rights.²⁶¹

1. *Rationale and Criteria*

In this Section, I propose a set of legal rules to incorporate principles of relational privacy into fourth amendment jurisprudence. The rules presume that certain categories of relationships give rise to enforceable expectations of shared privacy by the secondary party. The litigants may rebut these presumptions by introducing particularized facts about a specific relationship to show either that a presumptively protected relationship did not create expectations of privacy or that a relationship not presumptively protected did create such expectations.

As discussed earlier,²⁶² the Court's present standard for evaluating derivative fourth amendment claims appears to be a "totality of the circumstances" test.²⁶³ In theory, a court is supposed to look to particular, concrete realities of the relationship among this defendant, this third-party claimant, and the place searched or item seized. The court should then apply to the concrete set of facts its normative-predictive assessment of whether the primary rightholder would have protected the defendant's

259. The interest that a person has in the contents of his own conversations, even if not embodied in tangible form, are here subsumed under the rubric "property".

260. The friend's concern for his interest need not be the only, or even a primary, motivation for her unwillingness to allow the police in her home. His claim should depend only on a showing that she would want to protect his interests, as well as her own, when choosing to exclude others.

261. Thus constructed, the recognition of the claim is consistent with the expectations of the primary rightholder. Such expectations may, but need not, be embodied in concrete agreements in order to provide protection for the derivative claimant. In fact, the ability of the primary rightholder to share those places and things she controls is enhanced by recognizing a claim in those with whom she has shared. See Fried, *supra* note 73, at 482-83.

262. See *supra* text accompanying notes 149-76.

263. See *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *Rakas v. Illinois*, 439 U.S. 128, 144 (1978) (test is "whether the facts of a particular case give rise to a legitimate expectation of privacy"). Given the indeterminacy of the Court's test and its inability to channel judges' predilections, see *supra* notes 88-91 and accompanying text, it might more appropriately be named the "tautology of the circumstances" test.

interests. While this fact-specific inquiry could afford protection to shared privacy, its indeterminacy has instead permitted the development of a jurisprudence that is generally hostile to relational claims. As the opinions in *Rakas* and *Rawlings* illustrate, decisionmakers' unarticulated background assumptions about the significance of relationships for people's expectations and behavior have shaped the outcome of cases. Moreover, the Court's general concern with crime control and its reluctance to expand the scope of the exclusionary rule have also contributed to the hostility toward derivative claims. This narrow view of shared privacy is exacerbated at the trial court level, where a busy judge may give only limited time and attention to suppression motions. Without guidelines to structure the judge's inquiry, her decision is likely to reflect little more than her own unexamined instincts²⁶⁴ and the presumptions buried in prior case law.²⁶⁵

A set of categorical rules would serve to articulate openly a set of background assumptions. The rules proposed here are designed to place a strong positive value on relationships. These rules are an improvement over the present framework, I argue, on both an empirical level, for they better reflect ordinary behavior and attitudes, and a normative level, because they protect those relationships that are an important part of our personhood.

Note, however, that the rules are designed as rebuttable presumptions.²⁶⁶ Either of the parties might choose to present evidence of the particular patterns of interaction among the specific people in order to show whether this primary rightholder would in fact have been likely to protect this derivative claimant's interests. The presumption would have two effects. In some cases, there would be insufficient reason or opportunity to rebut a presumption, so that it becomes dispositive. In other cases, a presumption would serve to establish a context for particularized decisionmaking and could replace decisionmakers' unspoken assumption that people do *not* have reasonable expectations of shared privacy.

264. Such unguided decisionmaking is especially problematic to subordinate groups, whose interests may be invisible to or ignored by judges or other authorities. See Delgado, Dunn, Brown, Lee & Hubbard, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

265. Cf. *United States v. Berrong*, 712 F.2d 1370, 1374 (11th Cir. 1983) ("[b]inding precedent clearly states that there is no legitimate expectation of privacy in outbuildings and open fields") (quoting *United States v. Long*, 674 F.2d 848, 853 (11th Cir. 1982)).

266. One function of using rebuttable presumptions is to reduce the likelihood that precedent will be misapplied in subsequent cases. The current open-ended inquiry, combined with judicial desire for guidance and certainty, increases the likelihood that courts will construct a "rule" from prior cases without regard to the facts that influenced those precedents. This problem is even more severe when the precedent is framed or articulated in a manner that obscures the particular facts. The model proposed here endeavors to provide guidelines for judges while still allowing them to develop and examine the specific facts of the case before them.

Those identifiable categories of relationships sufficiently strong to permit a presumption that the parties would shelter one another's interests are relatively few.²⁶⁷ They are of two types.

First, the parties to some commercial relationships can be presumed to intend to protect each other's privacy. For example, in certain bailment relationships we can assume that the bailee will protect the bailor's interest, even absent an explicit agreement to do so. A useful rule of thumb might be to look to the level of care the bailee is required to exercise to protect the property. That a person can sue a drycleaner for losing his clothes suggests that he should reasonably be able to rely on the drycleaner to protect his clothes from other actions adverse to his interests. Even if we wish to *permit* the drycleaner to cooperate with the police by consenting²⁶⁸ to a search of the clothes, we should not *presume* that she will do so and thus deny the customer standing to challenge an unconsented search. We should assume that the defendant has purchased, *inter alia*, the loyalty and care of the bailee.²⁶⁹

Second, some relationships are so intimate that we can assume that the parties to them will protect each other's interests. Such relationships include those between spouses, roommates,²⁷⁰ and close family members.²⁷¹ To avoid privileging traditional family patterns,²⁷² we should

267. Because the presumptive categories are few and narrowly defined, the negative presumption flowing from the fact that a particular relationship is not within one of the defined categories should carry no weight once the claimant introduces evidence that she in fact had a sufficiently close and trusting relationship with the primary rightholder.

268. See *infra* text accompanying notes 295-303.

269. As a practical matter, a search will rarely infringe on the bailee's interests to a degree that would induce him to bring a civil suit against the police. Thus, recognizing the bailor's claim may provide the only significant deterrent to an unconstitutional search. *But see* Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986) (civil rights action against city for damages resulting from search that violated fourth amendment).

270. The term "roommate" is chosen here, rather than one that would require the existence of a sexual relationship (for example, live-in lover), to avoid heterosexist bias that would protect only opposite-sex couples and to reduce the need for intrusive inquiry into the nature of the relationship. Furthermore, even platonic roommate relationships are usually worthy of presumptive protection because they usually involve substantial friendship and because roommates share property interests.

271. Certainly the relationships protected by this presumptive privilege should include all those personal relationships to which a testimonial privilege applies. See *supra* note 151. This model should be extended further, however, both because the presumptions are rebuttable and because applying a presumption simply allows the claimant to challenge the police conduct; it does not automatically deprive the government of relevant evidence. We might include, for example, husband-wife, parent-child (including step- or foster-children) and siblings within the presumption. The precise scope of the set of relationships entitled to presumptive protection (for example, whether adult siblings are included) is admittedly arbitrary, but also relatively unimportant; the farther from the core we move, the more likely the presumption will be replaced with a particularized, contextual determination.

272. If we limited protection to traditionally recognized "appropriate" relationships, we would disallow claims by those who genuinely believed they were part of a meaningful shared relationship but never perceived the need to legitimize it through traditional categories such as marriage or contract. The symbolic and political effect would be to reinforce the silence of ideas and activities

also apply the presumption of protection to households; that is, to all those who share living quarters.

Many friendships involve the same degree of care, concern, and loyalty as close family or shared household relationships. It is difficult, however, to define the boundaries of a "friendship" category in administrable terms. No presumption seems workable. Friendships, like other such noncategorical relationships, thus must be examined on a case-by-case basis to determine whether protection is warranted.

Under the procedures set forth here, results of particular cases outside the presumptive categories would not be any more predictable than they are now, but relational claims would be recognized more readily.²⁷³ If the parties chose to open their relationship to examination, the court would hear a "thick description" of the relevant aspects of their lives together, from which a more sensitive judgment of the relational claim could be made.²⁷⁴ As with any fact-sensitive determination, the proposed model would necessarily rely on the sensitivity and good will of trial courts for its full effectuation.

2. Administration

a. *Is There a Cognizable Relationship?*

Under the proposed model, where the relationship at issue lies outside the presumptive categories, the defendant can try to show, by introducing specific, concrete facts, that the relationship in fact embodies shared expectations of privacy. For example, in *Rakas*, the defendants might have adduced evidence regarding their relationship with the driver-owner of the car. Such evidence would include not just testimony expressing their emotional ties but concrete facts, such as the length of time they had known her, the frequency with which they socialized, prior occasions on which she had lent them her car or given them rides, and so

outside the "instream." On the inadequacy of traditional family relationships to capture fully those relationships imbued with intimacy, see Richards, *The Individual, The Family and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 38-39 (1980) ("Those who define the meaning of their lives in nonfamilial terms are blithely excluded from the protection of the constitutional right to privacy. . . . [I]t is . . . unjust to assume that each views the family as the essence of the good life."). Limiting our recognition of relationships to traditional categories would also allow the intrusion of normative values of the "ideal" family relationship that bear little resemblance to social realities. See generally Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 32 ARIZ. L. REV. (forthcoming in volume 30 of the *Arizona Law Review*).

273. The proposed inquiry would maintain the fact-sensitivity of the current totality-of-the-circumstances test but reject its narrow view of shared privacy. It assumes that, if courts draw out the details of the parties' lives together and of their expectations about each other, the courts will frequently find that, for example, friends do have a shared expectation of privacy.

274. Cf. C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) (advocating the need for detailed, layered "thick" descriptions to understand other cultures).

forth.²⁷⁵ Conversely, the government can seek to rebut such a claim or challenge a presumptively protected relationship by presenting evidence; for example, that the defendant was estranged from her spouse.²⁷⁶

It is difficult to predict in the abstract precisely what evidence would be relevant to a given shared privacy claim. But since such a determination generally would take place at a suppression hearing argued before a judge, the need for clear delimitations on evidence is less essential than in a jury trial. Given the value to the parties of the opportunity to express in a public forum the felt meaning of their relationship, trial judges should be relatively generous in admitting such evidence.²⁷⁷

A key issue in determining when to recognize derivative interests is predicting whether, if asked to consent to a search, the primary rightholder would have protected the defendant's interests. It might seem that the most accurate way to determine this would be to elicit direct testimony on the issue from the primary rightholder.

Direct testimony, however, is inappropriate evidence because it is inevitably hypothetical. On the one hand, we know that the rightholder had the power to consent²⁷⁸ and thereby render the defendant's expectation of privacy nugatory.²⁷⁹ On the other hand, we know that she did

275. *Cf. infra* text accompanying note 289. It might be argued that the extent of open-textured inquiry called for here is too great. A number of commentators have criticized fourth amendment law as relying far too much on fact-specific adjudication. *See, e.g.*, Dworkin, *supra* note 175, at 334. They argue instead for clear-cut rules, even at the cost of not being fully responsive to the particularities of specific cases. *See generally* Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985) (identifying two alternative solutions to the fundamental confusion of fourth amendment jurisprudence). Such arguments have substantial force when determining whether the police conduct was a search at all or what procedures the police must follow in executing a search. Both issues are entirely or primarily concerned with controlling police behavior. The regulatory concerns that underlie calls for clarity, however, are irrelevant to determining when shared privacies are sufficient to create a fourth amendment claim; shared privacy affects only the defendant's standing to obtain fourth amendment remedies, not the legality of the police action itself. *See Kuhns, supra* note 24, at 537.

276. Both the defendant and state should adduce concrete evidence of the relationship between the parties before the challenged search occurred. Evidence of "hypothetical" consent should be impermissible. *See infra* text accompanying notes 280-81.

277. *See infra* text accompanying notes 284-85. One argument for limiting relevant evidence at such hearings would be that intensely private facts ought not be exposed to the public scrutiny of a hearing. However, since it is a party to that relationship (the defendant) who seeks to establish a claim, such privacy concerns are less compelling. The prosecutor, presumably, would seek to show only that the parties were not as close as they now claim (though this pattern is admittedly reversed in third-party consent cases).

278. If she did not have the power to consent, her interests in the place would be irrelevant to the defendant's claim. This would be the case if her interests were subordinate to those of the defendant; for example, if she were the landlord or a maintenance person who was present when the police sought entrance to the house belonging to the defendant.

279. Note that the mere possibility of consent does not undercut the defendant's claim. Expectations are predictive and can be relied on except where they later prove untrue. *See supra* notes 249-54 and accompanying text.

Perhaps the *ex ante* nature of expectations of privacy is clearest in the paradigm single-party

not consent, or we would be dealing with a different issue. Except in the rare circumstance where the third party was asked and refused consent, the court must decide how she would have reacted to a contingency that she probably never specifically considered. Such after-the-fact testimony is, of course, subject to internal wishful thinking and cognitive dissonance.²⁸⁰ Moreover, allowing such testimony would create incentives for coercion of the primary rightholder by both the claimant and the government.²⁸¹

The determination should instead be made by examining evidence regarding the facts of the parties' relationship before the search. In order to gather such information, it is crucial that courts allow the parties to describe the realities of their relationship. The judge should then apply to that evidence her empirical and normative judgment to determine whether the primary rightholder would have consented to the search, despite the contrary interests of the defendant.²⁸²

Allowing parties to testify about their relationships does more than provide a basis for decision. It may also serve to educate the judiciary, both directly and, to the extent that relational facts become part of published opinions, indirectly. As precedent becomes transformed, the gap between precedent and real life may narrow. The police may also be affected by a shift to a more context-sensitive view of relational standing. Greater fourth amendment protection of relationships would create an

case. One has a high expectation of privacy in one's own home and, ordinarily, a fourth amendment claim if the police enter. If a wall blows away in a hurricane, however, or the home burns down, one's expectation of privacy as to that particular house is reduced or eliminated. See *Michigan v. Clifford*, 464 U.S. 287, 292 (1984). So long as the ex ante likelihood of such an event is sufficiently small, we ignore it except in those cases where it actually comes to pass.

280. Even when the issue is the actual prior relationship between the parties, "the suspect, the [primary rightholder,] or both often might attempt to 'color' the character of the relationship after the fact," Alschuler, *supra* note 13, at 48, in part because the intervening search has almost surely changed the nuances of the relationship. However, when the issue is one of historic facts, rather than hypothetical intention, the concreteness of the facts themselves, as well as the risks of committing perjury, should reduce the distortion in testimony.

281. The police, who have almost by definition already discovered incriminating evidence, could, for example, threaten to charge the primary rightholder as a codefendant. Where the police have arguably engaged in a violation of someone's fourth amendment rights, it would be perverse to allow them the opportunity to avoid the consequences of that behavior by attempting ex post facto to turn members of a family or other intimate grouping against each other. Cf. Lempert, *A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725, 737 (1981) (criticizing *Trammel v. United States*, 445 U.S. 40 (1980) (lodging marital privilege solely in the testifying spouse) for encouraging police coercion of that spouse). Defendants, too, may have means to encourage favorable testimony. See S. REP. NO. 532, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2515, 2521 (on the Victim and Witness Protection Act of 1982).

282. The appropriate inquiry is whether the primary rightholder would have given a stranger permission to enter. While she might more readily have acceded to a police request, out of a spirit of "cooperation," this should not benefit the government that did not ask, but invaded her privacy.

incentive for police to await the development of facts creating probable cause before intruding on shared premises.

The process of articulating relational behavior and concerns, however, has dangers as well as potentialities. To the extent we require people to describe their relationships through preexisting categories of legal rights, we discount and demigrate those aspects that are not amenable to such description.²⁸³

Under the proposed model, therefore, courts should allow all facts to be presented by the parties; they should encourage the speech of the "legally inarticulate" and include it within the universe of social realities that the law comprehends.²⁸⁴ The effect should be to recognize and rein-

283. Cf. Simon, *supra* note 57, at 55 (as lawyers formulate their case in order to achieve best results in court, the client's "only strategy of survival requires that he see himself as lawyers and officials see him, as an abstraction").

284. Cf. White, *supra* note 101, at 167:

To the extent that the officer, the suspect, and those who readily identify with either, can find in that language an expression or recognition of what they regard as their important concerns, the discourse functions as an important force of social definition and cohesion, placing the individual or official in a comprehensible public world in ways that he can respect. But to the extent that the individual or official faces a public world defined by a language he cannot speak, in which he cannot locate himself, which does not deal in intelligible ways with claims he regards as important, the discourse can be said to be one of authority rather than community, its force divisive rather than cohesive.

I recognize that creating a legal discourse that fosters community may be very difficult. Law and those trained in law may simply be unable to hear speech couched in a different vocabulary, while the ordinary citizen may be silenced by the structure of a legal setting. Furthermore, the litigants' perspective is inevitably filtered through lawyers, who may find it easier to force their clients into the preexisting mold of the law than to serve as "translators."

The simple directive to "listen" may nonetheless work to transform the law's vocabulary. And the existing structure of "totality of the circumstances" provides a relatively permeable barrier to that transformation.

In setting out this optimistic vision of the potential dialogue and understanding immanent within the fourth amendment context, I am not unmindful that a suppression hearing is typically part of a criminal case that will generally end, not with dialogue and understanding, but with the imposition of punishment on the defendant. See Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (violent consequences of law make the notion of law as a means of building community problematic). Nonetheless, progress toward achieving a more humane vision of fourth amendment law seems more likely to come from forcing openings in the legal process for human discourse than from some absolutist confrontation. Cf. Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 402-05 (1982-83) (advocating bringing reality of defendants' lives into courtroom); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 54 (1985) (describing women's different approach to trial practice).

For a less sanguine view of the potential for communicating across the gulf of experiences, values, and language, see A. RICH, *Our Whole Life*, in THE FACT OF A DOORFRAME 133 (1984):

Our whole life a translation
the permissible fibs
and now a knot of lies
eating at itself to get undone
Words bitten thru words
meanings burnt-off like paint
under the blowtorch
All those dead letters

force the value that people place on relationships and the resulting expectations of shared privacy. When law and the real world meet, we can demand that the world reformulate itself in the language of law—or we can transform the law by opening it to the language of the world.²⁸⁵

b. Was the Relationship Implicated by the Search?

In adjudicating fourth amendment relational privacy claims, a court must determine not only if the defendant's claim exists, but whether it extends to the particular area searched.²⁸⁶

In both commercial and personal presumptively protected relationships, the nature of the category ordinarily defines the scope of its protective umbrella. In a commercial bailment, for instance, the bailor's derivative expectation of privacy explicitly extends only to the bailed object.²⁸⁷ Conversely, presumptive protection for members of the same household should extend as far as the primary rightholder's protection, even if the defendant himself has never been to the place searched or the evidence found therein was not being held on his behalf.²⁸⁸ For example, the defendant should be able to challenge an illegal search of a house-

rendered into the oppressor's language
 Trying to tell the doctor where it hurts
 like the Algerian
 who walked from his village, burning
 his whole body a cloud of pain
 and there are not words for this
 except himself
 1969

Like Rich, we may despair of the possibility of communication, but we do not abandon hope. We write.

285. The necessity and transformative possibilities of reclaiming language from which we have been excluded has been the subject of much feminist writing. See A. RICH, *Power and Danger: Works of a Common Woman*, in *ON LIES, SECRETS AND SILENCE* 247 (1979); Cixous, *The Laugh of the Medusa*, in *NEW FRENCH FEMINISMS* 245 (E. Marks & I. de Courtivron eds. 1980). Some more traditional academics have also recognized the centrality of language to legal discourse. For example, James Boyd White has advocated a more open-textured vision of legal materials and emphasis on the speech of courtroom participants within the Anglo-American tradition. See White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 691-92 (1985). Other legal systems have been less hostile to the uncontrolled speech of nonprofessionals than the American legal system, with its formal, role-oriented structure. See Weissbourd & Mertz, *Rule-Centrism versus Legal Creativity: The Skewing of Legal Ideology Through Language*, 19 L. & SOC'Y REV. 623, 643-44 (1985).

286. It is this determination of the scope of a defendant's claim that the courts' power of framing affects most directly. See *supra* notes 176-90 and accompanying text.

287. Problems of application are likely to occur only when it is unclear if the bailment is still in effect. Courts have struggled to delimit the authority of lessor and tenant in such "holdover" situations. See, e.g., *United States v. Parizo*, 514 F.2d 52 (2nd Cir. 1975) (no expectation of privacy in motel room after rent has expired); *United States v. Wilson*, 472 F.2d 901 (9th Cir. 1972) (tenant maintains expectation of privacy despite being delinquent in paying rent).

288. The scope of protection proposed here is admittedly broader than that of present case law, which generally requires at least some propertylike relationship between the defendant and the place searched or item seized. *But see Alderman v. United States*, 394 U.S. 165, 193-94 (1969) (Harlan, J.,

mate's backyard storage shed that uncovers evidence incriminating the defendant.

For relationships not presumptively protected but for which shared privacy can be independently established, the temporal and geographic scope of the secondary party's claim will vary with the particular facts. For example, if I ask one of my colleagues to watch a package for me for a few minutes, my expectation that he will protect my interest by keeping the package free from prying eyes may be reasonable only for those few minutes. The same request, made to a close friend with whom a pattern of caring for each other and each other's possessions has developed, may have more "bite." Even if I do not return for a day or two, I might fairly expect her to continue to guard my package, perhaps taking it home with her to do so.

As one moves through the range of relationships, from the most intimate and extensive to the most casual and temporary, the extent of the secondary party's reasonable expectations of privacy progressively diminishes and the scope of her fourth amendment claim narrows accordingly. The judge's determination of how much sharing, and what kind, will support a claim has a normative component: Are the claimant's expectations "reasonable" and "legitimate"? The decision will thus reflect both the courts' background assumptions about how ordinary citizens behave and the parties' ability to paint a living picture of the particular relationship at issue.²⁸⁹

The range of relevant facts in any given case is large. For example, in determining if a house guest can exclude evidence found in the kitchen cabinets, we might want to know how long she was expected to stay, the frequency with which she and the host had exchanged visits, whether she had her own key, what household activities (particularly meal preparation) she participated in, whether she ever ate alone in the house, and any

dissenting) (suggesting granting a defendant standing to challenge invasions of the privacy of members of his family, regardless of where that invasion occurs).

The MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.1(5) (Proposed Official Draft 1975) also proposed certain categories of purely relational expectation of privacy claims. Although, as Professor Kamisar noted, the Code is thus overinclusive, 49 A.L.I. PROC. 73 (1973), there are likely to be few cases that turn on, say, a defendant's challenge to a search of his estranged wife's hotel room that leads to discovery of her private papers detailing his criminal activities. The model proposed in this Article prevents overinclusive protection by permitting government to rebut presumptively protected relationships. See *supra* text accompanying notes 266-67.

289. See *supra* note 284. Recreating relational situations in court is often extraordinarily difficult. The vocabulary is rarely available to describe that which has never been described before. "Hard cases arise often, because people living agreeably together usually do not arrive at explicit, regular practices; they proceed by understandings that are most satisfactory if they are imprecise, flexible and unstated." Weinreb, *supra* note 49, at 63. Not only are relationships often fluid and amorphous, they may be literally indescribable. Even in ordinary discourse, we often find that none of our words for friend/companion/acquaintance, etc., captures precisely the extent of intimacy in a particular relationship.

other indicia of the closeness of their relationship. Assuming such evidence is insufficient to establish her as a member of the household, it is still relevant to (1) whether she had authorized access to the area searched²⁹⁰ and (2) whether the host would have considered the defendant's interests in responding to a request to search.²⁹¹

One difficulty with such an analysis is that, in many cases, the most salient aspect of the relationship among the parties before the court may be that they were partners in crime. While being coconspirators should not create a fourth amendment claim that would not otherwise exist,²⁹² guilt alone should not destroy an otherwise valid claim.

Under the model proposed here, the proper approach (admittedly a difficult one to implement in many cases) is to exclude from judicial consideration of a relationship those aspects that are solely criminal. If the parties are intimates apart from their shared criminal activities, their relationship can support a derivative claim. Old buddies who hold up a shop together and store the loot in the house where one of them lives are still old buddies;²⁹³ a man hired off the street to stand guard outside a

290. For purposes of discussion, I use a narrow definition of the area searched. *But cf. supra* notes 176-90 and accompanying text (discussing problems of courts' framing issues in relation to time, space, and generality).

291. Note that she could establish a claim despite lack of access to the place searched if the host had placed the items there on her behalf.

292. *Cf. Grano, Foreword: Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 437 (1978) ("In taking the first step of defining the activity that constitutes a search it suffices, in a free society, to ask whether the conduct at issue could ever threaten or intrude upon . . . privacy expectations unrelated to criminal conduct."); Loewy, *supra* note 28, at 1229 ("the right of the people to be secure in their persons, papers, and effects does not include the right to be secure from the government's finding evidence of a crime"). *But cf. Alschuler, supra* note 13, at 19 (one "who entrusts property to a relative, friend or confederate in crime ordinarily has a reasonable expectation of privacy in any private place where the bailee stores this property") (emphasis added).

An unarticulated concern that fourth amendment claims should not be grounded on illegal relationships may underlie the courts' refusal to permit a relational challenge to an illegal search of a coconspirator's body. *See, e.g., United States v. Brown*, 743 F.2d 1505, 1507-08 (11th Cir. 1984). Courts "explain" such decisions by simply asserting that "[u]nlike a house, a truck, or a package, one cannot acquire a right to exclude others from access to a third person." *United States v. Kuespert*, 773 F.2d 1066, 1068 (9th Cir. 1985). In light of *United States v. Katz*, 389 U.S. 347 (1967), however, a defendant's inability to establish a property right should not preclude her from establishing an expectation of privacy.

It may at first seem perverse that the government can convict someone after an illegal search of another person's body but not after a less intrusive illegal search of a home or briefcase belonging to another. Assume, however, the evidence is found only by a strip or body-cavity search. It is difficult to imagine anyone sharing access to their body for licit purposes, except in the context of the most intensely intimate relationships. The fact pattern of coconspirators secreting drugs or other evidence on the body of one of the parties may simply not be generalizable to a noncriminal context. On the other hand, people often do innocently carry the goods of others in pocket or purse, and legitimate shared privacy claims can then arise.

293. This might have been the situation in *Brown v. United States*, 411 U.S. 223 (1973). The Court apparently did not examine, as they would under this analysis, whether the defendants were anything more than partners in crime.

truck full of dope while the driver runs an errand is, at best, a casual acquaintance.²⁹⁴ This separation will be most difficult when the illegal activity is central to the relationship and also to the overall life of the parties. If, for instance, the parties are linked by an illegal sexual intimacy or by a shared illegal drug culture, the relationship, I suggest, should be protected. That which binds them may be illegal, but it is the bonding rather than the illegality that is most central to them.

B. *Third Party Consent*

1. *Rationale*

Because both derivative standing and third-party consent turn on the nature of the relationship between the defendant and another, both doctrines should employ the same standards for adjudication. Therefore, in determining which relationships give rise to authority to bind another by consent, courts should use the same rebuttable presumptions and techniques for assessing evidence as for shared privacy claims.²⁹⁵

The test of relational claims would serve two functions. First, it would provide a structure for deciding whether the consenter had a sufficient relationship to the place searched, relative to that of the defendant, to establish authority to consent. Second, under my proposal, the more intimate the relationship between the parties is shown to be, the more skeptical the court should be that the consent was truly voluntary. That is, the credibility of the government's claim of voluntariness should be weakened to the extent that a consent under the circumstances is unlikely.

Note that here, as with derivative standing claims, the court's conclusion will depend on its description of the area searched. For example, the defendant in *Frazier v. Cupp*²⁹⁶ argued unsuccessfully that the gym bag in which the evidence was found should be viewed as composed of two distinct compartments, one used only by Frazier and the other used only by his cousin, Rawls. The model proposed here can bring to light, but cannot eliminate, the power of the frame.²⁹⁷

2. *Administration*

In dealing with third-party consent, the courts face a problem that

294. Cf. *United States v. Torres*, 720 F.2d 1506 (11th Cir. 1983) (no standing for temporary guard of the contraband).

295. See *supra* text accompanying notes 259-94. Decisions must grow out of an analysis of relationships; there is no more justification here than in the standing context for "a return to property law concepts of title and possessory interests [alone], which are remote from the purposes of the fourth amendment." Weinreb, *supra* note 49, at 63-64.

296. 394 U.S. 731 (1969).

297. See *supra* text accompanying notes 172-90.

does not arise in derivative standing claims: the problem of apparent authority.²⁹⁸ In derivative standing cases, the relevant facts are "found" entirely by the court; the police officer's belief as to whether the defendant was among those with a legitimate expectation of privacy has no legal significance. In consent search cases, however, the court must review a police officer's evaluation of whether the consenter had the authority to give that consent.

If we were to view the fourth amendment as a limit on unreasonable government action,²⁹⁹ we would permit searches where the police erroneously but reasonably³⁰⁰ believe that the consenter's authority is sufficient; that is, where *apparent* authority exists. Assuming that the police inquire sufficiently into the basis of the third party's authority,³⁰¹ cases of apparent authority should arise only when the third party lies to the police or is mistaken about the scope of her authority. In neither case, under my analysis, should the search following the consent be allowed to stand.

In the first situation, there is no genuine third-party autonomy to balance against the invasion of the defendant's private (and actually unshared) place. Further, the police are trained to spot a lie. If they fail to do so in a situation where the lie's consequences benefit the government, the risk of error should fall on them, not the defendant.³⁰²

298. See *supra* note 233.

299. The government is sufficiently involved in consent searches to implicate the fourth amendment. If, however, a private citizen acts entirely on his own in searching (though his motive for doing so may be to further a government prosecution) the government can always accept his "gift." *Burdeau v. McDowell*, 256 U.S. 465 (1921).

Because issues of authority become irrelevant once a set of facts is characterized as a private search, the criteria by which that characterization is made are critical. Unfortunately, the boundaries of private searches are not clearly defined. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971) (characterizing Mrs. Coolidge's action in providing inquiring police officers with clothing and guns belonging to her husband as a private search, although she was acting in response to police inquiries). See *generally* Note, *supra* note 203.

300. The reasonableness standard, however, imposes some genuine controls on the police. In order for their belief to be reasonable, it must rest on an assessment of the underlying facts and not merely on an acceptance of the third party's assertion of authority. The determination should be rather like that involved in assessing an informer's tip: Is the third party credible and do the facts provided about the relationship among the parties and the place searched suggest an adequate basis of authority? See *Spinelli v. United States*, 393 U.S. 410 (1969), *modified*, *Illinois v. Gates*, 462 U.S. 213 (1983).

301. For any third-party consent, the police should at least determine what formal relationship exists between the parties; is the would-be consenter a live-in lover, a house guest, or a baby sitter? If there is any reason to doubt the consenter's authority, further inquiry should be required to develop particularized facts; for example, how long has this house guest been staying there and to which rooms and containers does she have free access? Where there is reason to doubt the consenter's authority, a police search should be deemed unreasonable.

302. *But see, e.g., People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981) (search based on consent of woman having key to defendant's apartment and claiming to be his girlfriend upheld although it was later determined that she did not live there). Given the fluidity of relationships, such physical access by the consenter does not prove authority, and police should not be able to rely on it as determinative.

In the latter situation, the consentor's autonomy interest must be balanced against the claimant's genuine privacy concerns because the consentor honestly but mistakenly believes that she has authority to consent. The situation of mistaken authority is distinct from that of an actually authorized third-party consent because there need not be a relation between the parties that would permit the defendant to rely on the secondary party's concern for his interest. Assuming the third party is not an intimate of the defendant, she may be more willing to ignore his privacy interests and grant consent. Thus the balance of the shared privacy and autonomy interests favors the defendant more than in true third-party consent cases. In addition, it is frequently difficult to determine whether the third party genuinely believed she had the authority to consent or was exaggerating her relation to the defendant. These reasons, as well as the desirability of a simple rule rather than a complicated set of exceptions, suggest that mere apparent authority should never be sufficient to justify a third-party consent search.³⁰³

CONCLUSION

Eventually, courts will have to decide how far they ought to extend the protections of the primary rightholder's umbrella. This normative judgment will depend in large part on the value they place on relationships. By extending the umbrella broadly, we acknowledge the fundamental interdependence of human society and the importance of sharing and intimacy.³⁰⁴ By narrowing the umbrella's protections, we assume that rights are held only by and for individuals³⁰⁵ and relegate relationships to secondary or derivative importance. The latter is consistent with the underlying world view of a fundamentally atomistic society in which relationships are not sufficiently central to personhood to be worthy of much protection.³⁰⁶ The former is a vision of what is necessary and

303. Note that such a rule would not necessarily deny police the ability to conduct a search altogether. When they are in doubt, police will simply be forced to revert to standard procedure and develop probable cause, obtain a warrant, or find another exception to the warrant requirement before they carry out a valid search.

304. The importance of relationship to full human identity has been eloquently and forcefully described in a variety of feminist literature. See, e.g., N. CHODOROW, *supra* note 18; C. GILLIGAN, *supra* note 17; C. SMITH-ROSENBERG, *The Female World of Love and Ritual: Relations Between Women in Nineteenth Century America*, in *DISORDERLY CONDUCT* 53 (1985).

305. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971); R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); cf. C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 3 (1962) (critiquing liberal democratic theory for "its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them"); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179 (1982) (critiquing Rawls for rooting his liberalism in a vision of the essential self as "a person incapable of constitutive attachments . . . [and] wholly without character, without moral depth").

306. See generally Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 *TEX. L. REV.* 1477 (1984) (describing and criticizing both the liberal view of individual as primary

desirable in human experience—a vision more consonant with the lived experience of most people. That vision is enjoying a renaissance in legal thought and political theory, both among feminist theorists³⁰⁷ and other academics.³⁰⁸ The proposals outlined in this Article seek to implement that vision through a transformation of fourth amendment doctrine and practice.

and the Critical Legal Studies critique of the liberal view); West, *supra* note 14 (expanding description and critique to include views of cultural and radical feminism).

307. See, e.g., Law, *Equality: The Power and Limits of the Law*, 95 YALE L.J. 1769 (1986); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); see also sources cited *supra* note 304. Feminist writers have generally been careful to distinguish between chosen community and the perils (for women) of forced community inherent in traditional notions of family.

308. See, e.g., M. SANDEL, *supra* note 305; Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). These commentators focus on the tension between the polity as a whole and individual self-interest, rather than on the valuation of intermediate human groupings addressed in this Article. However, greater recognition of the importance of relationships parallels, on a smaller scale, efforts to reconceive political theory to reflect more accurately the interdependence of society. As this Article seeks to show, allowing police intrusion into shared places is doubly costly: It illegitimately permits the government to take advantage of sharing, and it ultimately discourages care and sharing as too risky.