

PASSENGER STANDING TO CHALLENGE SEARCHES AND SEIZURES: A DISTINCTION WITHOUT A CONSTITUTIONAL DIFFERENCE

*Dante P. Trevisani\**

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\* J.D. expected, May 2009. Special thanks to all the wonderful editors and staff of the *Florida Law Review* for their hard work on this Note, and to Professor Rodney Uphoff for fostering my interest in criminal procedure. Very special thanks to Marcella Coutts: without her love and support this Note would not have been possible.

## I. INTRODUCTION

On November 27, 2001, Deputy Sheriff Robert Brokenbrough noticed a Buick with expired registration tags.<sup>1</sup> After verifying from the police dispatcher that the application for renewal tags was being processed, and therefore the Buick was not in violation of any traffic laws, he decided to pull the Buick over anyway.<sup>2</sup> When Brokenbrough approached the vehicle, he saw the passenger, Bruce Brendlin, whom he recognized as someone who had dropped out of parole supervision.<sup>3</sup> When backup arrived, the officers ordered Brendlin out of the car at gunpoint and placed him under arrest.<sup>4</sup> Deputies found an orange syringe cap on Brendlin, and a search of the car revealed tubing and a scale, objects used for the production of methamphetamine.<sup>5</sup>

Brendlin was charged with the possession and manufacture of methamphetamine.<sup>6</sup> He later moved to suppress the evidence obtained during both searches as fruits of an unconstitutional seizure of his person.<sup>7</sup> The trial court found that Brendlin, as a passenger, was not seized during the lawful traffic stop and denied the motion.<sup>8</sup> Brendlin ultimately pleaded guilty, subject to an appeal on the suppression motion.<sup>9</sup>

The United States Supreme Court unanimously reversed, holding that a passenger is seized within the meaning of the Fourth Amendment during a traffic stop because a reasonable person in the passenger's position would not have felt free to depart without the officer's permission.<sup>10</sup>

At first blush, this holding seemed wholly unremarkable. Indeed, this decision comported with the views of nine circuit courts of appeal,<sup>11</sup> and

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1. *Brendlin v. California*, 127 S. Ct. 2400, 2403 (2007).

2. *Id.* at 2403–04.

3. *Id.* at 2404.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* The state appellate court reversed but was in turn reversed by the Supreme Court of California, which held that as a matter of constitutional law a passenger is not seized during a traffic stop, absent additional circumstances. *Id.* at 2404–05.

9. *Id.*

10. *Id.* at 2406–07. The *Brendlin* holding was reaffirmed in *Arizona v. Johnson*, 2009 U.S. LEXIS 868, \*7–8 (Jan. 26, 2009).

11. *See* *United States v. Mosley*, 454 F.3d 249, 253 & n.6 (3d Cir. 2006); *United States v. Perez*, 440 F.3d 363, 369 (6th Cir. 2006); *United States v. Grant*, 349 F.3d 192, 196 (5th Cir. 2003); *United States v. Ameling*, 328 F.3d 443, 446 n.3 (8th Cir. 2003); *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000); *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1163–64 (10th Cir. 1995); *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994); *United States v. Rusher*, 966 F.2d 868, 874 n.4 (4th Cir. 1992); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991) (holding that vehicle passengers are seized when a vehicle is stopped by police and that passengers have standing to challenge the constitutionality of the seizure).

nearly every state to have confronted the issue.<sup>12</sup> Authors of treatises on Fourth Amendment seizures have also agreed, even without a clear mandate from the Court.<sup>13</sup> The Court even noted that it had essentially already reached its conclusion in previous cases, albeit in dicta.<sup>14</sup> During oral argument, the Justices seemed incredulous at California's position that a reasonable passenger would feel free to leave the scene during a traffic stop.<sup>15</sup>

Despite the common-sense nature of the Court's decision, the result was hardly a foregone conclusion. Indeed, in stark contrast to the *Brendlin* holding that passengers have standing to object to illegal seizures during traffic stops, the Court has routinely declared that passengers do not have

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12. See, e.g., *State v. Bowers*, 976 S.W.2d 379, 381–82 (Ark. 1998); *State v. Haworth*, 679 P.2d 1123, 1123–24 (Idaho 1984); *People v. Bunch*, 796 N.E.2d 1024, 1029 (Ill. 2003); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *State v. Hodges*, 851 P.2d 352, 361 (Kan. 1993); *State v. Carter*, 630 N.E.2d 355, 360 (Ohio 1994); *State v. Harris*, 557 N.W.2d 245, 251 (Wis. 1996) (holding that vehicle passengers are seized when a vehicle is stopped by police and that passengers have standing to challenge the constitutionality of the seizure). Other than California, only two states adhered to the view that a passenger is not seized when the car in which the passenger is riding is stopped by police. See *People v. Jackson*, 39 P.3d 1174, 1184 (Colo. 2002) (en banc); *State v. Mendez*, 970 P.2d 722, 729 (Wash. 1999) (en banc). Of course, the courts of those states will now have to follow the federal constitutional rule set forth in *Brendlin*.

13. See, e.g., 6 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11.3(e), at 194 (4th ed. 2004) (“If either the stopping of the car, the length of the passenger’s detention thereafter, or the passenger’s removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit.” (internal citations omitted)). This treatise is mentioned favorably by the Court in *Brendlin*. *Brendlin*, 127 S. Ct. at 2408.

14. *Brendlin*, 127 S. Ct. at 2406. The Court nearly decided the issue in two cases dealing with the unlawful seizure of a passenger, and neither time did the Court indicate any distinction between the driver and the passenger that would affect the Fourth Amendment analysis. See *Whren v. United States*, 517 U.S. 806, 808–10 (1996) (failing to distinguish between driver and passenger where both claimed to have been illegally seized during a traffic stop); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (noting that stopping a vehicle constitutes a seizure of the “occupants”).

15. See Transcript of Oral Argument at 32–34, *Brendlin*, 127 S. Ct. 2400 (No. 06-8120). In response to the California advocate’s position that a reasonable passenger would feel free to leave when stopped by police, Justice Kennedy remarked:

You’re representing the State of California and you want to establish the proposition that any time there is a traffic stop in the State of California or I guess anywhere in the United States all the passengers are free to immediately leave, absent some further countermanning officer—order by the officer. I think that’s a quite surprising proposition . . . I just think you have no social or empirical documentation for that position.

*Id.* at 32–33.

standing to challenge the constitutionality of *searches* of automobiles in which they are riding.<sup>16</sup>

This Note argues that the holding of the Court's past decisions denying passengers standing to challenge searches comports neither with logic nor with its recent decision in *Brendlin*, and should therefore be changed. Part II explains the development of the law regarding passenger standing in searches, while Part III explains the development of the law regarding passenger standing in seizures. Part IV argues that the differing approaches to passenger standing are theoretically inconsistent and cannot be reconciled. Part V addresses the reason for this inconsistency; namely, the Court's erroneous determinations of how a "reasonable" person feels during searches and seizures, and the Court's poor judgment of societal perceptions of reasonable behavior. Finally, Part VI offers a recommendation for a proper resolution of the two positions.

## II. PASSENGER STANDING TO CHALLENGE THE CONSTITUTIONALITY OF AUTOMOBILE SEARCHES

### A. *Early Approaches to the Definition of "Search"*

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."<sup>17</sup> However, not all police action implicates the Fourth Amendment. Only conduct that qualifies as a "search" or "seizure" is subject to the Amendment's reasonableness requirement.<sup>18</sup> The precise definition of a search, therefore, has been a central question in the Supreme Court's Fourth Amendment jurisprudence.<sup>19</sup> At first, the Court based its definition of a search on

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16. See *Rakas v. Illinois*, 439 U.S. 128, 148 (1978). The use of the word "standing" here does not refer to the standing doctrine that emanates from Article III's "case or controversy" requirement. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Rather, it refers to the ability of a defendant to challenge, under the Fourth Amendment, the constitutionality of a search or seizure. Interestingly, although the *Rakas* Court attempted to remove the word "standing" from the analysis, *Rakas*, 439 U.S. at 138–40, courts and commentators have continued to use the term. See *Arizona v. Johnson*, 2009 U.S. LEXIS 868, \*16 (Jan. 26, 2009) ("A passenger therefore has standing to challenge a stop's constitutionality."); LAFAYE, *supra* note 13; Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663, 1664 n.1 (2007) (continuing to refer to the inquiry in terms of "standing"). Thus, for clarity and harmony with the Court's previous cases, this Note will also refer to the inquiry in terms of "standing."

17. U.S. CONST. amend. IV.

18. WELSH S. WHITE & JAMES J. TOMKOVICZ, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS ON INVESTIGATION AND PROOF* 3 (6th ed. 2008).

19. See *id.* at 3–4. For a general review of search and seizure definitions, see Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth*

property law concepts, holding that police conduct is not a search unless it qualifies as a common-law trespass.<sup>20</sup> That approach was later refined to define a search as any physical invasion, no matter how small, even if such an invasion did not qualify as a trespass.<sup>21</sup>

In 1967, the Court in *Katz v. United States* abandoned the physical invasion approach and laid the foundation for the modern conception of a Fourth Amendment search.<sup>22</sup> In *Katz*, the Court eschewed any reliance on physical intrusion or property law, and declared that a search occurs when the aggrieved person can claim that the government violated a justified or legitimate expectation of privacy.<sup>23</sup> This inquiry comprises two distinct questions: first, whether the person exhibits a subjective expectation of privacy, and second, whether society is prepared to recognize that expectation of privacy as reasonable.<sup>24</sup> This formulation continues today to define what constitutes a search within the meaning of the Fourth Amendment.<sup>25</sup>

This threshold requirement has important implications. If the conduct of the police is a search, then it must be reasonable.<sup>26</sup> If a court finds that the police did not have probable cause to search or otherwise acted

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*Amendment Standing*, 27 U. MEM. L. REV. 907 (1997) and David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051 (2004).

20. See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that a wiretap was not a search and noting that the Fourth Amendment was not implicated unless there was a physical search of a person, a seizure of tangible effects, or an actual physical invasion of a house or curtilage).

21. See *Silverman v. United States*, 365 U.S. 505, 506, 512 (1961) (holding that a search occurred when police inserted a “spike mike” several inches into the wall to listen to conversations); cf. *Goldman v. United States*, 316 U.S. 129, 131, 135 (1942) (holding that when the police placed a “detectaphone” against the outer wall of a building and listened to conversations inside, this was not a search because there was no physical invasion).

22. *Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”).

23. *Id.* at 353.

24. *Id.* at 361 (Harlan, J., concurring). Although this formulation of the test did not appear in the majority opinion, and only appeared in Justice Harlan’s concurrence, this two-part test was quickly adopted as the law in subsequent cases. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (adopting Justice Harlan’s two-part test).

25. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (applying Justice Harlan’s two-part test). An alternate formulation of the test, which appeared a year after *Katz*, is “whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.” *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (citing *Katz*, 389 U.S. at 352).

26. What constitutes a “reasonable” search or seizure (that is, what level of justification is needed before police can conduct a search or seizure) is beyond the scope of this Note. In the automobile context, generally the decision to stop a vehicle “is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *Whren v. United States*, 517 U.S. 806, 810 (1996).

unreasonably, it can suppress the evidence obtained in that search.<sup>27</sup> However, if the conduct is not a search, it is not subject to the reasonableness requirement, and thus the evidence will not be suppressed no matter how unreasonable the police actions were.<sup>28</sup>

### B. *Automobile Searches*

The Court has routinely held that drivers have a legitimate expectation of privacy in their cars, such that police examinations of the interior of cars qualifies as a search within the meaning of the Fourth Amendment.<sup>29</sup> However, even though several cases implied that passengers, at least in some situations, enjoyed a similar expectation, the decision in *Rakas v. Illinois* made clear that the Court was not extending the Amendment's protection against unreasonable searches to passengers of the car.<sup>30</sup> Thus, if the police stop an automobile and conduct an unconstitutional search of the car, the driver can challenge the constitutionality of the search and seek to have the obtained evidence suppressed. However, if the obtained evidence also implicates the passenger, the passenger cannot challenge the constitutionality of the search.<sup>31</sup>

This reasoning originally revolved around the concept of standing, which was explained in *Alderman v. United States*: "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."<sup>32</sup> This rule was further explained by the test set forth in *Jones v. United States*, in which the Court held that anyone who was legitimately on the searched premises had an interest sufficient to assert standing.<sup>33</sup> In the case of a residence (which was the case in *Jones*), this essentially meant that if a person were there with the permission of the owner or regular tenant, that person was legitimately on the premises and therefore had Fourth Amendment standing.<sup>34</sup> Thus, before *Rakas*, several Supreme Court opinions assumed that, because a

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27. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that the exclusionary rule applies to the states).

28. See *Smith*, 442 U.S. at 740–42.

29. See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 49 (1970) (“[Drivers] have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.” (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925))).

30. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

31. *Id.* at 148–49.

32. *Alderman v. United States*, 394 U.S. 165, 171–72 (1969).

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

34. *Id.*

passenger was in the car with the driver's or owner's permission, the passenger had standing to challenge an unlawful search of the car.<sup>35</sup>

Therefore, it came as a surprise when *Rakas* definitively declared that passengers could not challenge the lawfulness of searches of automobiles in which they were riding.<sup>36</sup> In *Rakas*, police officers pulled over a car they suspected had just been used in a robbery and ordered the occupants, including the passengers, out of the car.<sup>37</sup> The police searched the car and discovered a box of rifle shells in the locked glove compartment and a sawed-off shotgun under the passenger seat.<sup>38</sup> The passengers later moved to suppress the rifle and shells found in the car on the grounds that the search violated the Fourth Amendment.<sup>39</sup> The trial court denied the motion, finding that the passengers lacked standing to challenge the constitutionality of the search.<sup>40</sup> The state appellate court agreed, and the Illinois Supreme Court denied the petitioners leave to appeal.<sup>41</sup>

The U.S. Supreme Court affirmed in a 5-4 decision.<sup>42</sup> Justice Rehnquist, writing for the majority, reasoned that the determinative question was whether the person contesting the lawfulness of the search had a legitimate expectation of privacy in the space searched.<sup>43</sup> Since the definition of a search is an invasion of a legitimate expectation of privacy, the inquiry essentially boiled down to whether that particular person was searched within the meaning of the Fourth Amendment.<sup>44</sup>

Applying the announced principle, the Court concluded that the passengers had no legitimate expectation of privacy, since the car was driven and owned by someone else and the passengers asserted no interest

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35. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 219–20 (1973) (noting that respondent was neither driver nor owner, and owner was not in the automobile at all); *Chambers v. Maroney*, 399 U.S. 42, 43 (1970) (noting that petitioner was neither driver nor owner); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217–18 (1968) (noting that two out of three petitioners were neither driver nor owner); *Preston v. United States*, 376 U.S. 364, 365 (1964) (noting that petitioner was neither driver nor owner).

36. *Rakas*, 439 U.S. at 148; see also Christopher Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 387 (1981) (“In *Rakas v. Illinois*, however, the Court substantially altered both the form and the substance of [the Fourth Amendment] inquiry.”).

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

38. *Id.*

39. *Id.* at 129–30.

40. *Id.* at 131.

41. *Id.* at 131–32.

42. *Id.* at 150, 156.

43. *Id.* at 148.

44. *Id.* at 140 (“[T]he question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant . . . . That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.”).

in the seized property.<sup>45</sup> According to the Court, a locked glove compartment, the space underneath the passenger seat, and the trunk of a car are all areas in which passengers do not have legitimate expectations of privacy.<sup>46</sup> Therefore, the Court concluded, because the passengers had no legitimate expectation of privacy, they were not searched within the meaning of the Fourth Amendment, and they could not challenge the constitutionality of the police action.<sup>47</sup>

*Rakas* rejected the previous framework of *Jones* and its progeny, which analyzed the concept of standing in terms of whether the person seeking to challenge the legality of the search was legitimately on the searched premises.<sup>48</sup> Although the *Rakas* Court upheld the factual holding of *Jones*, it expressly declined to adopt its legitimately-on-the-premises formulation as the general rule, noting that such a test relied on property law concepts, which was something the Court claimed it was unwilling to do.<sup>49</sup>

In sum, to demonstrate a Fourth Amendment search violation, a defendant must show a reasonable expectation of privacy in the area or items searched. For automobile searches, the Court has held that passengers generally have no reasonable expectation of privacy in the cars in which they are riding, and thus do not have standing to challenge a search of the car.

### III. PASSENGER STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SEIZURES DURING TRAFFIC STOPS

In addition to prohibiting unreasonable searches, the Fourth Amendment protects against unreasonable “seizures.”<sup>50</sup> Both property and persons are subject to seizure by police.<sup>51</sup> However, as mentioned above, not all police action qualifies as a seizure within the meaning of the Amendment.<sup>52</sup> When the police make a traffic stop, the driver of the car is unquestionably seized, but up until the recent *Brendlin* decision it was unclear whether a passenger was also seized. This Part explains the law

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45. *Id.* at 148.

46. *Id.* at 148–49.

47. *Id.*

48. *Id.* at 132–33.

49. *Id.* at 141–42. Lower courts have generally not diverged from *Rakas*. See, e.g., *United States v. Bouffard*, 917 F.2d 673, 677–78 (1st Cir. 1990) (remanding for determination of whether defendant, the driver and owner of a vehicle, had a legitimate expectation of privacy in the trunk of the car); *United States v. Smith*, 621 F.2d 483, 487 (2d Cir. 1980) (holding that a driver, but non-owner, of a vehicle has no legitimate expectation of privacy in the vehicle’s trunk).

50. U.S. CONST. amend. IV.

51. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 207 n.6 (1979); *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

52. See *supra* note 18 and accompanying text.

behind the seizure-of-persons doctrine, and how that doctrine led to the *Brendlin* decision.

A. *The Definition of a Fourth Amendment Seizure of a Person*

As with searches, the Fourth Amendment is not implicated unless a seizure has taken place.<sup>53</sup> If so, the police action must be reasonable; if there is no seizure, then no Fourth Amendment limitation is placed on the police.<sup>54</sup> Moreover, if the police conduct an unreasonable seizure, any evidence obtained pursuant to that seizure is generally inadmissible.<sup>55</sup> Therefore, the precise definition of a “seizure” of a person is of great importance. The landmark case of *Terry v. Ohio* established that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”<sup>56</sup> The Court later refined that definition by stating that “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>57</sup>

In *Florida v. Bostick*, the Court considered the question of seizures of persons on public buses.<sup>58</sup> In *Bostick*, police officers conducting random searches of buses traveling between cities approached a suspect on a bus and asked him for consent to search his luggage.<sup>59</sup> The Florida Supreme Court held that because a reasonable person in the suspect’s position would not have felt free to leave, the suspect was seized within the meaning of the Fourth Amendment.<sup>60</sup> The U.S. Supreme Court reversed, holding that a strict application of the rule—whether a reasonable person

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53. U.S. CONST. amend. IV.

54. *See supra* note 28 and accompanying text.

55. *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 507–08 (1983) (plurality opinion) (holding that evidence obtained pursuant to an unreasonable seizure was tainted).

56. *Terry*, 392 U.S. at 16. In recent years the Court has narrowed the definition of a seizure to expand the range of conduct that an officer may engage in without triggering the Fourth Amendment. *See, e.g.*, William R. Snyder, Jr., *Slipping Down the Slope of Probable Cause: An Unreasonable Exception to What Was Once a Reasonable Rule*; *Hiibel v. Sixth Judicial District Court*, 124 S. Ct. 2451 (2004), 57 FLA. L. REV. 445, 445–46 (2005) (explaining that police may now demand identification without triggering the Fourth Amendment).

57. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion). A majority of the Court later adopted this definition in *Royer*, 460 U.S. at 502 (“These circumstances surely amount to a show of official authority such that ‘a reasonable person would have believed that he was not free to leave.’” (quoting *Mendenhall*, 446 U.S. at 554)); *see also* *INS v. Delgado*, 466 U.S. 210, 215 (1984) (same). The Court later characterized the test as whether “the police conduct . . . communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

58. *Florida v. Bostick*, 501 U.S. 429, 433 (1991).

59. *Id.* at 431–32.

60. *Id.* at 433.

would feel “free to leave”—was inappropriate.<sup>61</sup> The rule, the Court reasoned, should not be strictly confined to whether a reasonable person would feel free to physically leave the scene, because that rule would have no application in the bus scenario, where the passengers already do not feel free to depart the bus.<sup>62</sup> Rather, “the appropriate inquiry is whether a reasonable person would feel free to decline the officers’ requests [for information] or otherwise terminate the encounter.”<sup>63</sup> The Court stressed that it was not breaking new ground, but merely following the logic of the principle set forth in previous opinions.<sup>64</sup>

### B. *Seizures of Persons in Traffic Stops*

These principles are readily applicable to the automobile traffic stop. “The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver ‘even though the purpose of the stop is limited and the resulting detention quite brief.’”<sup>65</sup> Indeed, the few cases that have indirectly addressed the issue seem to have quite naturally assumed this without feeling the need to explain it.<sup>66</sup> And although the Court, before *Brendlin*, had not squarely answered the question of whether a passenger is also seized, it had repeated in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver.<sup>67</sup>

### C. *The Brendlin Decision*

Thus, the question in *Brendlin v. California* was whether a passenger, when the car in which the passenger is riding is stopped by the police, would feel free to terminate the encounter with the police.<sup>68</sup> In *Brendlin*,

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61. *Id.* at 436.

62. *Id.*

63. *Id.*

64. *Id.* at 437.

65. *Brendlin v. California*, 127 S. Ct. 2400, 2406 (2007) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

66. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 809 (1996) (assuming, without deciding, that the occupants of a vehicle are seized when the vehicle is subjected to a traffic stop); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976) (same); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (same).

67. *See, e.g.*, *United States v. Hensley*, 469 U.S. 221, 226 (1985) (“[S]topping a car and detaining its occupants constitute a seizure . . . .”); *Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984) (“[W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure . . . .” (internal quotations omitted)); *Colorado v. Bannister*, 449 U.S. 1, 4 n.3 (1980) (“There can be no question that the stopping of a vehicle and the detention of its occupants constitute a ‘seizure’ within the meaning of the Fourth Amendment.”); *Prouse*, 440 U.S. at 653 (“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth Amendment] . . . .”).

68. *Brendlin*, 127 S. Ct. at 2406. Despite the Court’s admonition in *Bostick* that the proper

the police made an unconstitutional traffic stop of the car in which Brendlin was a passenger, searched the car, and discovered drug paraphernalia.<sup>69</sup> Brendlin was charged with the possession and manufacture of methamphetamine.<sup>70</sup> He later moved to suppress the evidence obtained during both searches as fruits of an unconstitutional seizure of his person.<sup>71</sup> Brendlin claimed that the seizure occurred when the car in which he was a passenger was stopped by the police, and that, because the police lacked any reasonable suspicion to do so, the seizure was unconstitutional, and therefore any evidence obtained after that illegal seizure should have been suppressed.<sup>72</sup> The trial court denied the suppression motion, finding that the stop was lawful and that, even if it were not, Brendlin was not seized within the meaning of the Fourth Amendment until the police ordered him out of the car.<sup>73</sup> Brendlin pleaded guilty subject to appeal on the suppression issue and was sentenced to four years in prison.<sup>74</sup>

On appeal, the California Court of Appeals reversed, holding that Brendlin was seized by the traffic stop, and that the seizure had been unlawful because the police lacked any reasonable suspicion to stop the car.<sup>75</sup> The State appealed to the California Supreme Court.<sup>76</sup> The State conceded that the officer had no reasonable suspicion to believe that the car was being operated unlawfully and therefore should not have stopped the car.<sup>77</sup> Nevertheless, the California Supreme Court reversed, holding that, even though the stop was unlawful, Brendlin, as a passenger rather than the driver, was not seized within the meaning of the Fourth Amendment, and therefore the trial court was correct in refusing to suppress the evidence.<sup>78</sup>

The U.S. Supreme Court unanimously reversed, holding that a passenger is seized within the meaning of the Fourth Amendment when the car in which the passenger is riding is stopped by police, because a reasonable person in the passenger's position would not have felt free to

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inquiry was not whether a person would feel free to physically depart the scene, the Court in *Brendlin* seemed to assume that, for any passenger to terminate a traffic stop encounter, the passenger must necessarily physically depart from the scene. *Id.* at 2407.

69. *Id.* at 2404, 2406. For a fuller recitation of the facts, see *supra* text accompanying notes 1–10.

70. *Brendlin*, 127 S. Ct. at 2404.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 2404–05.

depart without the officer's permission.<sup>79</sup> In reaching this conclusion, the Court relied on two observations. First, the Court noted that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize the officer's safety.<sup>80</sup> Indeed, there is a "societal expectation of 'unquestioned [police] command' at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission."<sup>81</sup> Second, the Court noted:

Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of 'roving patrols' that would still violate the driver's Fourth Amendment right.<sup>82</sup>

Thus, the Court recognized that the passenger seizure rule was necessary to deter illegal police action.

Because a passenger is seized within the meaning of the Fourth Amendment during a traffic stop, that passenger has standing to challenge the constitutionality of the traffic stop if prosecutors seek to introduce any evidence obtained pursuant to the stop at the passenger's criminal trial. This doctrine stands in stark contrast to the doctrine employed when a passenger attempts to challenge the admission of evidence obtained pursuant to a *search* of a car. This apparent inconsistency will be explored in the next Part.

#### IV. INCONSISTENT DOCTRINES: PASSENGER STANDING TO CHALLENGE SEARCHES VERSUS SEIZURES

The *Brendlin* decision raises an interesting paradox: If passengers can challenge unconstitutional seizures, why then are they not permitted to challenge unconstitutional searches? In one scenario the police have full reign to violate the Fourth Amendment and still use evidence against passengers that would be inadmissible against the driver. In the other, the police cannot use the evidence obtained against either occupant. To clarify the difference, imagine the following scenarios.

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79. *Id.* at 2403, 2406–07.

80. *Id.* at 2407.

81. *Id.* (quoting *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)).

82. *Id.* at 2410.

In Scenario 1, the police observe a car commit a traffic violation and pull the car over. This seizure is legal because the observation of the traffic violation provided the justification necessary to make the traffic stop.<sup>83</sup> The police officer approaches the car, and, without any justification, orders all the occupants out of the car and commences a search of the car.<sup>84</sup> This search is illegal because the officer had no justification to search the car.<sup>85</sup> The officer finds marijuana in the center console, and arrests both the driver and the passenger.<sup>86</sup> Here, the driver would be able to suppress the evidence because the search was illegal (i.e., the driver's Fourth Amendment rights were violated because the driver had a reasonable expectation of privacy in the car). The passenger, on the other hand, has no standing to challenge the search against his Fourth Amendment rights because, according to the Court, the passenger had no reasonable expectation of privacy in someone else's car absent some particularized showing of a sufficient interest.<sup>87</sup> Thus, the police may use this evidence against the passenger, but not against the driver.

In Scenario 2, a police officer stops a vehicle without any suspicion of wrongdoing. This seizure is illegal because the officer had no justification for making the stop.<sup>88</sup> The officer approaches the car, and exactly as in

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83. See *Whren v. United States*, 517 U.S. 806, 810 (1996) (stating that the police's decision to stop an automobile is reasonable when the police have probable cause to believe that a traffic violation has occurred).

84. Unfortunately, the Supreme Court has often condoned such disturbing official behavior when it is directed toward vulnerable groups of people. See, e.g., *Alfredo Mirandé, Is There a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV. 365, 368 (2003) (arguing that Mexican aliens are subject to warrantless searches and seizures in violation of the Fourth Amendment); *Christopher Slobogin, The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 391 (2003) (arguing that alienage, race, and poverty affect police investigations governed by the Fourth Amendment).

85. See *Chambers v. Maroney*, 339 U.S. 42, 48 (1970) ("[A]utomobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize.").

86. The discovery of drugs to which none of the car's occupants claim ownership provides sufficient justification for arresting all of the occupants. See *Maryland v. Pringle*, 540 U.S. 366, 372 (2003).

87. See *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (stating that petitioners made no showing that they had any legitimate expectation of privacy in various parts of the car in which they were passengers). The *Rakas* opinion yields the inevitable conclusion that passengers, without showing more, can never object to a search of the car, no matter where the items are located. See *LAFAVE, supra* note 13, § 11.3(e), at 196–97 ("Given the fact that in *Rakas* a justified expectation of privacy is deemed to be lacking not only as to such places as the trunk and glove compartment, but also as to an area closer to the passengers under the seat, it is doubtful there is such an expectation anywhere in the vehicle." (internal citations omitted)).

88. See *Delaware v. Prouse*, 440 U.S. 648, 663 (holding that suspicionless stops of automobiles violate the Fourth Amendment).

Scenario 1, without justification orders the occupants out of the car and commences a search of the car. Again, the officer finds marijuana in the center console and arrests both the driver and the passenger. Here, unlike in Scenario 1, both the driver and the passenger will be able to suppress the evidence because the initial seizure of the car was unconstitutional, and any evidence obtained subsequent to the stop becomes illegally obtained.<sup>89</sup>

Thus, the question becomes, how are the two scenarios sufficiently different so as to produce a different outcome for the passenger? The only difference is the illegality of the initial seizure, or traffic stop. In Scenario 2, the officer lacked any objective justification for seizing the car and its occupants, whereas in Scenario 1 the initial seizure was valid. After the initial seizure, the events proceed in exactly the same way, but the passenger's ability to challenge the police action is different depending on the legality of the initial traffic stop. The seizure distinction, therefore, is what determines whether a passenger has standing to challenge the constitutionality of police action when a car is stopped by police.

However, that distinction has no basis in the Court's precedent or in common sense—in fact, by failing to examine the passenger's expectation of privacy, it ignores the very inquiry that the Court painstakingly crafted over the years. The question must be approached from the standpoint of a constitutional analysis, which examines why there was a constitutional violation in each case. In most cases, the Court stressed that the primary purpose behind the Fourth Amendment is the protection of privacy.<sup>90</sup> Thus, to best protect that interest, the Court fashioned a test that focuses on whether the person had a reasonable expectation of privacy in the spaces invaded by the police.<sup>91</sup> Consistent with this, the Court insisted that its cases denying standing to passengers who are trying to challenge searches are based on the fact that the passenger had no reasonable expectation of privacy in the car, and should have expected that anyone could view items in the car.<sup>92</sup>

With passengers, however, the distinction cannot be justified on the grounds of protecting a privacy interest. If the true definition of a Fourth Amendment search is a reasonable expectation of privacy, the passenger search versus seizure distinction essentially implies that a passenger has a reasonable expectation of privacy when the police unlawfully stop the car, but no such expectation if the police stop the car lawfully. This means

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89. See *Brendlin v. California*, 127 S. Ct. 2400, 2410 (2007) (stating that evidence uncovered as a result of an arbitrary traffic stop would be inadmissible against any passengers).

90. *Katz v. United States*, 389 U.S. 347, 350 (1967).

91. See *id.*

92. See *Rakas*, 439 U.S. at 148–49 (stating that the glove compartment, area under the seat, and trunk of an automobile are areas in which passengers would not normally have a legitimate expectation of privacy).

that a passenger's Fourth Amendment rights can be extinguished by valid police conduct, but reaffirmed by invalid police conduct, with absolutely no change in the expectation of privacy analysis. If passenger standing, however, truly turns on a passenger's expectation of privacy, it should not turn on the legality of police conduct. If a passenger does not have a privacy interest that warrants Fourth Amendment protection when the police make a valid traffic stop, there is no reason to hold that the passenger's interest rises to a constitutional level when the police make an invalid traffic stop.

The main justification for the distinction is the initial illegality of the police action. This point has limited validity: If evidence obtained subsequent to an invalid seizure is inadmissible as to any occupant, police will be discouraged from stopping random cars in the hopes of finding contraband.<sup>93</sup> However, while the deterrence of unjustified police conduct is certainly a valid purpose of Fourth Amendment evidence exclusion, that does not end the inquiry. An analysis of the passenger's expectation of privacy must be conducted.

Another rationale behind the decision in *Rakas* not to accord passengers with standing to challenge searches is the fact that the driver can still raise a constitutional challenge, which will provide the necessary deterrence to police misconduct.<sup>94</sup> However, this creates two problems. First, in the cases where evidence implicates both the passenger and the driver, the driver may not be charged with a crime, and therefore no one may object to the introduction of evidence obtained in violation of the Fourth Amendment. Second, and more important, this rationale applies with equal force to seizures. That is, the driver is still available to challenge the legality of the police action when the police unlawfully, as opposed to lawfully, stop a car. The reasoning should be equally applicable to seizures.<sup>95</sup>

The implicit distinction fashioned by *Rakas* and *Brendlin* poses another problem. Because passenger standing now turns on the legality of the initial traffic stop, passenger standing now also turns entirely on the conduct of the driver. If the driver does not violate a traffic law, then, absent some other justification for stopping the car, passenger standing is preserved. If, however, the driver violates a traffic law, an action over

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93. See Stanley Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U. L. REV. 266, 304-05 (1976) (stating that police may often be willing to risk suppression by some defendants to gain evidence that may be admissible against others); Welsh S. White & Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 349, 365 (1970) (same).

94. *Rakas*, 439 U.S. at 134 ("There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it.").

95. See *supra* note 82 and accompanying text.

which the passenger has no control, the police are justified in making a seizure, and thus the passenger no longer has standing to challenge any subsequent police misconduct. Again, the distinction turns on events that do not affect the passenger's expectation of privacy. If the primary purpose of the Fourth Amendment is the vindication of privacy rights, then the search versus seizure distinction for passenger standing cannot be justified because the passenger's standing (and, by implication, the passenger's expectation of privacy) changes based on circumstances over which the passenger has no control and that do not actually change the expectation of privacy.

A further inconsistency that flows from this distinction arises in the context of searches based on third-party consent. Twelve years after *Rakas*, in *Illinois v. Rodriguez* the Court held that consent to search from a third party is valid any time the police reasonably believe that the third party has a privacy interest in the area, even if that party does not in fact have such an interest.<sup>96</sup> Applying this holding to the facts of *Rakas*, as long as the police are reasonable (albeit erroneous) in thinking a passenger has an interest in the glove compartment, consent obtained from either would validate a search of the glove compartment, even though (according to the Court), neither has an interest. This is inconsistent: A person cannot simultaneously have an interest sufficient to consent to a search yet insufficient to assert standing. The absence of such an interest may mean the person does not have standing to challenge a search, but it should also mean the person has no authority to consent to a search. If passengers cannot argue that a search of the car was unconstitutional, they should not be able to consent to a search of the car. Hence, if consent is valid with a reasonable belief that the consenter has an interest in the space, that person should also have standing to contest the associated search.<sup>97</sup>

One may argue that the distinction is unimportant because the *Rakas* Court implicitly left open the possibility that passengers can assert standing if they owned the items seized.<sup>98</sup> However, this argument fails for two reasons. First, evidence that does not belong to the passenger can still be admitted against the passenger. Second, and more importantly, this

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96. *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990).

97. See *Rakas*, 439 U.S. at 163 (White, J., dissenting) (“If a nonowner may consent to a search . . . then that same nonowner must have a protected privacy interest. The scope of the authority sufficient to grant a valid consent can hardly be broader than the contours of protected privacy.”); Christopher Slobogin, *Having It Both Ways: Proof That the U.S. Supreme Court Is “Unfairly” Prosecution-Oriented*, 48 FLA. L. REV. 743, 746–47 (1996).

98. See *Rakas*, 439 U.S. at 132 n.1, 142 n.11, 148. Furthermore, this conflicts with the long-held understanding that the Fourth Amendment protects privacy, not property. After all, even a person with no possessions is still entitled to expect privacy in certain circumstances. *Id.* at 164 n.14 (White, J., dissenting).

reading of *Rakas* is inconsistent with the Court's other cases.<sup>99</sup> In *Rawlings v. Kentucky*, decided two years after *Rakas*, the Court expressly held that mere ownership of an item was insufficient to establish a reasonable expectation of privacy.<sup>100</sup> Thus, passengers cannot rely on ownership of items placed in a car to acquire standing to challenge their seizure.

Hence, the distinction between the rule for passenger standing to challenge searches and the rule for passenger standing to challenge seizures is not founded on logic or constitutionally significant differences. The holding of *Brendlin* and the holding of *Rakas*, while they both may be internally consistent and adequately supported on their own, cannot be reconciled with each other because the differences in outcome do not turn on differences in expectations of privacy. A recommendation to remedy this problem will be explored in Part VI. Before that, however, it is necessary to examine the root of this problem; namely, the Court's apparent inability to accurately determine reasonableness in the search and seizure context.

#### V. THE COURT'S (IN)ABILITY TO DETERMINE REASONABLENESS IN SEARCHES AND SEIZURES

To determine whether a person has a "reasonable" expectation of privacy, the Court must take into account all the facts and circumstances and determine what a "reasonable" person would expect in that situation.<sup>101</sup> This inquiry also encompasses a judgment about society, in that the Court must determine whether this expectation of privacy is one that society is prepared to recognize as reasonable.<sup>102</sup> However, commentators have criticized the Court's judgment in this area, arguing that the Court's rationales have been flawed and inconsistent.<sup>103</sup> This Part

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99. See Slobogin, *supra* note 36, at 414–15.

100. *Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980).

101. See *id.*

102. See *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (noting that the definition of the reasonableness of an expectation of privacy must be made with reference "to understandings that are recognized and permitted by society").

103. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) ("Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course . . ."); Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 572–73 (1988) (questioning the Court's sincerity in its reasonableness holdings); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 745 (1992) (questioning several of the Court's reasonableness holdings); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 825 (1994) ("There can be no doubt that the Supreme Court's Fourth Amendment jurisprudence is riddled with inconsistencies . . ."); Rachel A. Van Cleave, Note, *Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L.J. 203, 219 (1988) (questioning

examines several of those decisions.

### A. *Determinations of Reasonableness in Searches*

In *Smith v. Maryland*,<sup>104</sup> police installed a device called a pen register, which records the numbers dialed on a suspect's phone.<sup>105</sup> The device was located at the phone company, not at the suspect's home.<sup>106</sup> The Court held that this installation did not constitute a search, because there was no reasonable expectation of privacy in the phone numbers dialed from one's home.<sup>107</sup> Although the decision in this case was not particularly controversial, the Court's reasoning is troublesome. Its chief reason was that a person has no legitimate expectation of privacy in information voluntarily turned over to a third party—because in doing so, the person has assumed the risk that the third party will disclose the information.<sup>108</sup> The Court also relied on this notion when it held that there is no reasonable expectation of privacy in the garbage that one puts at the curb,<sup>109</sup> and, in an even further perversion of the assumption of the risk doctrine, the Court has held that there is no reasonable expectation of privacy in bank records because a reasonable person voluntarily yields financial information to a bank knowing that the bank may disclose the information to the government.<sup>110</sup>

Justice Marshall's dissent in *Smith* illustrates its serious logical flaw: Even if an individual knows that a phone company uses pen registers for

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the Court's sincerity in its reasonableness holding). *But see* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 205 (1993) (arguing that the Court's Fourth Amendment jurisprudence is theoretically consistent).

104. 442 U.S. 735 (1979).

105. *Id.* at 737.

106. *Id.*

107. *Id.* at 742.

108. *Id.* at 743–44; *see also* United States v. Miller, 425 U.S. 435, 442–44 (1976), *superseded by statute*, Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641; Couch v. United States, 409 U.S. 322, 335–36 (1973); United States v. White, 401 U.S. 745, 752 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427, 437–39 (1963) (all holding that divulging information to a third party defeats any legitimate expectation of privacy).

109. California v. Greenwood, 486 U.S. 35, 37 (1988). For a critique of *Greenwood* and similar cases, see Hope Lynne Karp, Casenote, *Trash: A Matter of Privacy?*, 20 PACE L. REV. 541, 562–63 (2000).

110. *Miller*, 425 U.S. at 443. Indeed, if it is not reasonable to expect privacy in a bank, where one knows that the bank will take steps to safeguard information, it is difficult to imagine a place where one can expect his or her information to be kept private. Justice Stewart, dissenting in *Smith*, took issue with the majority's holding, pointing out that it was at odds with the Court's landmark decision in *Katz v. United States*. *Smith*, 442 U.S. at 746 (Stewart, J., dissenting). After all, it was *Katz* that held that information gleaned from a *public* telephone was protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 352 (1967).

internal monitoring, it certainly does not follow that the individual expects this information to be made available to the public or the government.<sup>111</sup> It is not reasonable to say that, when people divulge information to a necessary third party like a phone company or a bank, they should expect that the government or the public at large will see the information. The Court's "assumption of the risk" rationale falls apart because people are required to divulge information to phone companies, banks, and garbage collectors to carry out their everyday lives. No one voluntarily assumes these risks because there is no other choice.<sup>112</sup> Moreover, especially with regard to the case involving garbage,<sup>113</sup> just because a person knows that a third party may view certain information does not make the assumption that a third party will view the information reasonable. On the contrary, a reasonable person expects the events to unfold like they do virtually every time garbage is left at the curb: the garbage will be taken to a processing site and its contents will not be viewed. The rare instances in which third parties do gain access to such information do not change this expectation. People should not be charged with taking into account every remote possibility when calculating whether they will have privacy.

The Court continued to demonstrate a disconnect with reality with its decision in *California v. Ciraolo*.<sup>114</sup> In *Ciraolo*, police wanted to view the inside of the respondent's backyard, but could not do so because the respondent had erected a six-foot outer fence and a ten-foot inner fence that completely enclosed the yard.<sup>115</sup> The police secured a private plane and flew over the respondent's house at an altitude of 1,000 feet to view the inside of the backyard.<sup>116</sup> In a 5-4 decision, the Court held that the respondent's expectation of privacy was not reasonable because the backyard was observable from public airspace and without any physical intrusion.<sup>117</sup> Incredibly, the Court noted that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed."<sup>118</sup> Even if this suggestion were true, it strains credulity to say there is no reasonable expectation of privacy in a fenced-in backyard because someone could see it by flying overhead.<sup>119</sup>

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111. *Smith*, 442 U.S. at 748–49 (Marshall, J., dissenting).

112. *See id.* at 749–50.

113. *Greenwood*, 486 U.S. at 35.

114. 476 U.S. 207 (1986).

115. *Id.* at 209.

116. *Id.*

117. *Id.* at 213–14.

118. *Id.*

119. *Id.* at 223–24 (Powell, J., dissenting) ("Travelers on [planes] . . . normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against." (internal

For automobile searches, as in *Rakas v. Illinois*,<sup>120</sup> the Court also reached results difficult to justify. According to the Court, it is unreasonable for a passenger to expect privacy in a car, but it is reasonable for a driver to expect it.<sup>121</sup> The basis for this holding is puzzling. It makes little sense to say that a driver has a more reasonable expectation of privacy just because the driver is operating the car. If both the driver and the passenger leave important documents in a car while it is parked in a public place, there is little chance of another person viewing them. The same reasoning applies to the traffic stop situation. What if, right before they are pulled over, the passenger and driver switch places? Does the former driver's previously reasonable expectation of privacy suddenly become unreasonable? A person's position in the car does not change an expectation of privacy, and to hold otherwise is "contrary . . . to the everyday expectations of privacy that we all share."<sup>122</sup>

Further, by holding that passengers must have some interest in the particular items seized or spaces searched before they have standing, the *Rakas* Court essentially said that passengers have no legitimate expectation of privacy in cars unless they carry personal belongings with them or somehow "assert" an interest in some particular space in the car.<sup>123</sup> And according to the Court, even placing items into a locked glove compartment is insufficient to assert such an interest. Yet again, the Court misses the mark: Any passenger reasonably expects a certain level of privacy in a car whether or not they take anything with them. Indeed, "[e]ven a person living in a barren room without possessions is entitled to expect that the police will not intrude without cause."<sup>124</sup>

Not only has the Court employed a dubious reasonableness inquiry, but it has done so inconsistently. For instance, in *Bond v. United States*, the Court held that a person has a reasonable expectation of privacy in a soft-sided piece of luggage on a bus traveling long distances.<sup>125</sup> In *Bond*, Border Patrol agents boarded a bus and randomly felt the outside of the

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citation omitted)). In a similar case, the Court has also held that aerial surveillance from a helicopter hovering at 400 feet did not constitute a search for similar reasons. *Florida v. Riley*, 488 U.S. 445, 450–51 (1989).

120. 439 U.S. 128 (1978).

121. *Id.* at 148.

122. *Id.* at 167 (White, J., dissenting).

123. Furthermore, it seems unfair to put a defendant in the "criminally tendentious position" of choosing between on the one hand admitting ownership of contraband to win a suppression motion (but being convicted of possession), and on the other hand refusing to admit ownership and losing the suppression motion. *Jones v. United States*, 362 U.S. 257, 262 (1960), *overruled by* *United States v. Salvucci*, 448 U.S. 83 (1980). For a similar critique, see LAFAYE, *supra* note 13, § 11.3(e), at 194.

124. *Rakas*, 439 U.S. at 164 n.14 (White, J., dissenting).

125. *Bond v. United States*, 529 U.S. 334, 338–39 (2000).

luggage that was placed on the overhead rack.<sup>126</sup> The Court held that this physical manipulation was a search because a reasonable person would expect privacy in the contents of luggage, as it is not expected that “other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.”<sup>127</sup> This reasonable holding cannot be reconciled with the Court’s previous decisions on the reasonableness of privacy expectations. Indeed, if it is reasonable to expect that a soft-sided bag, in the course of public transportation, will not be felt in an exploratory manner, why is it not reasonable to expect that someone will not fly a plane 1,000 feet over your house and look into your backyard?<sup>128</sup> It is much more likely that a member of the traveling public will squeeze a soft-sided bag on a bus than observe the contents of a backyard from navigable airspace. Thus, although in many instances the Court has held that there is no reasonable expectation of privacy in areas where most people clearly would expect privacy, in other instances the Court has held there is a reasonable expectation of privacy in areas where few people would expect any.

#### B. *Determinations of Reasonableness in Seizures*

The Court’s analysis of reasonableness in seizures has also been questionable. For example, in *Florida v. Bostick*, two armed officers boarded a bus at a temporary stopping point.<sup>129</sup> They approached the respondent, stood over him, blocked the aisle so that he could not leave, and began to interrogate him.<sup>130</sup> They asked him for his ticket and identification, and then asked for consent to search his luggage.<sup>131</sup> Although the Court concluded that a reasonable person in that situation would have felt completely free to refuse to answer the officers’ questions and terminate the encounter with the police,<sup>132</sup> it is difficult to imagine how that could be true.<sup>133</sup> As the dissent points out, if the respondent

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126. *Id.* at 335–36.

127. *Id.* at 338–39.

128. See David G. Savage, *Hands-Off Policy: Just Because Police Can See a Bag Doesn’t Mean They Can Touch It*, 86 A.B.A.J., June 2000, at 36, 36 (calling the holding in *Bond* surprising); Stacy E. Roberts, Note, *Bond and Beyond: A Shift in the Understanding of What Constitutes a Fourth Amendment Search*, 33 U. TOL. L. REV. 457, 469–70 (2002) (noting that *Bond* was inconsistent with previous precedent); cf. Andrew P. Heck, Note, *The Wheels on the Bus Go ‘Round and ‘Round: Addressing the Need to Provide Greater Latitude to Law Enforcement Officers in the Public Transportation Setting*, 34 VAL. U.L. REV. 169, 170 (1999) (calling for more flexibility for law enforcement officers in conducting searches in public transportation settings).

129. 501 U.S. 429, 431 (1991).

130. *Id.* at 431–32.

131. *Id.*

132. *Id.* at 435.

133. See *id.* at 444–45 (Marshall, J., dissenting) (“I agree that the appropriate question is

wanted to exercise his right to terminate the encounter, he had only two options.<sup>134</sup> He could have “remained seated while obstinately refusing to respond to the officers’ questioning,” or he “could have tried to escape the officers’ presence by leaving the bus altogether.”<sup>135</sup> Faced with these possibilities, is it truly reasonable to think he had a choice? The answer is clearly no. The police’s show of authority in this case, given the circumstances, was surely enough to cause a reasonable person to believe that he could not terminate the encounter with the police.

Another similar case is *United States v. Drayton*, in which officers approached Drayton on a bus and asked for consent to search him.<sup>136</sup> Following *Bostick*, the Court held that, given all the circumstances, a reasonable person in that situation would have felt free to decline the officers’ requests and terminate the encounter with the police, and thus the police conduct did not amount to a seizure.<sup>137</sup> The Court partially relied on the fact that, because a bus contains “many fellow passengers . . . to witness officers’ conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.”<sup>138</sup>

Justice Souter, writing for the dissent, noted that there was an “air of unreality” surrounding the Court’s explanation for its decision.<sup>139</sup> In reality, the police made a show of force that would convey to any reasonable person that police efforts were not to be ignored without consequences. The questioning in cramped quarters, in view of a busload of passengers anxious to be on their way, actually increased the coercive atmosphere rather than decreased it, as the Court suggested. Thus, no reasonable passenger “would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether,” and therefore the police’s conduct should have amounted to a seizure.<sup>140</sup>

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whether a passenger who is approached during such a sweep ‘would feel free to decline the officers’ requests or otherwise terminate the encounter.’ What I cannot understand is how the majority can possibly suggest an affirmative answer to this question.”).

134. *Id.* at 447–48.

135. *Id.*

136. 536 U.S. 194 (2002).

137. *Id.* at 200.

138. *Id.* at 204.

139. *Id.* at 208 (Souter, J., dissenting).

140. *Id.* at 212. Other cases demonstrate a similar disconnect in the Court’s reasonableness analysis. *See, e.g.*, *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988) (holding no seizure where police cruiser followed suspect on foot); *United States v. Mendenhall*, 446 U.S. 544, 547–48 (1980) (holding no seizure where federal agents approached suspect in an airport, identified themselves, asked to see her identification and plane ticket, asked her several questions, asked her to accompany them to an office for further questioning, and then asked to search her bag). Professor LaFave has argued that the Court probably does not really believe that a person feels free to leave when

### C. How Do We Measure 'Reasonableness'?

Legal scholars and social scientists have conducted studies to determine just what expectations of privacy society is prepared to recognize as reasonable. The Court's determination of reasonableness is implicitly based on the view of the average citizen, or at least in some way should be an accurate reflection of what the American public thinks.<sup>141</sup> However, the results of one study suggest that the Court's decisions on reasonableness do not reflect societal understandings.<sup>142</sup> For example, individuals surveyed believed that being approached by officers on a bus—the situation in *Bostick*—was sufficiently more intrusive than the *Bostick* Court indicated.<sup>143</sup> Similarly, where *United States v. Miller* held that one is not justified to expect privacy in the information disclosed to a bank, surveyed individuals viewed a scenario involving government inspection of bank records as particularly intrusive.<sup>144</sup> These inconsistencies demonstrate the manipulability of the concept of privacy. Indeed, although privacy advocates hailed the Court's decision in *Katz* to abandon reliance on property law concepts and instead to focus more on privacy as a major step in protecting citizens from government intrusion,<sup>145</sup> recent commentators, distraught at the Court's inconsistent interpretation of privacy, have called for a move away from privacy as the definition of a Fourth Amendment search.<sup>146</sup>

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confronted by a uniformed police officer, but that its holdings to the contrary are justified on policy grounds. See Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 741 (1991).

141. See *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (noting that the definition of the reasonableness of an expectation of privacy must be made with reference "to understandings that are recognized and permitted by society").

142. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 732 (1993) ("Although tentative, the results strongly suggest that some of the Court's decisions regarding the threshold of the Fourth Amendment . . . do not reflect societal understandings. Indeed, some of the Court's conclusions in this regard may be well off the mark.").

143. *Id.* at 742.

144. *Id.* at 740.

145. See Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 605 (2007).

146. See, e.g., Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 58 (2005) (arguing for a return to property law concepts); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1328–30 (1990) (discussing the Supreme Court's mistaken emphasis on privacy interests); Christopher Slobogin, *Let's Not Bury Terry: A Call For Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1054 (1998) (arguing that the Fourth Amendment analysis should be based on a balance between the need to search or

In sum, the Court's analysis is problematic because its determinations of a reasonable person's expectations are out of touch with reality. While ostensibly basing its decisions on common societal understandings, the Court continues to render holdings that do not reflect society's expectations.

## VI. A RECOMMENDATION

With its decision in *Brendlin*, the Court created an inconsistency that needs to be resolved. Practically, passenger standing to challenge police misconduct can vary widely based on the slightest difference in circumstances. Theoretically, there is no constitutionally significant difference in a passenger's invasion of privacy between lawful and unlawful traffic stops. However, the reason for the inconsistency is not the standing doctrine itself; the reason is the misapplication of the standing doctrine.

The correct path would be granting passengers standing to challenge searches of automobiles. Doing so would not require a shift in the applicable law; the test would still only allow those "searched" within the meaning of the Fourth Amendment to have standing to challenge the constitutionality of that search. The change would involve a different application of the law—a change in the objective factual determination of what is "reasonable." The Court must recognize a passenger's reasonable expectation of privacy in a car, and even more so in closed compartments such as the glove compartment or inside the center console. Justice White, writing for the majority in *Delaware v. Prouse*, effectively illustrates the point:

Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio* recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.<sup>147</sup>

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seize against the invasion which the search or seizure entails); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995) (arguing that the Fourth Amendment analysis should be based on coercion); Scott E. Sundby, "Everyman" 's Fourth Amendment: *Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1777 (1994) (arguing that the Fourth Amendment analysis should be based on trust between the government and its citizens).

147. *Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979).

This change will harmonize the passenger standing doctrine as it applies to searches and seizures, and will eliminate the unnecessary distinction between the two. Furthermore, it will serve to effectively deter police misconduct. Even though the *Brendlin* Court concluded that its decision would deter police misconduct, the current status of the passenger standing for searches doctrine does not significantly deter unjustified police action. That is, *Brendlin* provides sufficient deterrence from making unjustified traffic stops in the hopes of discovering contraband, because police know that any evidence obtained after the unlawful stop will be inadmissible against both the driver and the passenger. However, no such incentive for restraint exists for automobile searches, because following a lawful traffic stop, police can conduct unlawful searches of cars, knowing that any evidence obtained will be inadmissible against the driver, but fully admissible against the passenger. The police's far-reaching authority during traffic stops compounds this problem. For instance, police may make pretextual traffic stops when their true intent is to investigate other crimes,<sup>148</sup> and they may stop drivers for any minor traffic violation, even if no reasonable officer would make such a stop.<sup>149</sup> They may also arrest the driver for a minor traffic violation, even if that violation carries no penalty of jail time.<sup>150</sup>

Abuse of the standing doctrine has already been seen in other contexts. In *United States v. Payner*, the IRS affirmatively counseled its agents to allow criminal and unconstitutional searches and seizures of evidence in the custody of third parties and then to invoke the standing doctrine to get the evidence admitted against the party who was the target of the investigation.<sup>151</sup> Despite the district court's and court of appeals' refusal to condone such outrageous and illegal government behavior, the Supreme Court held that, pursuant to the standing doctrine, the evidence was admissible against the target because the target's Fourth Amendment rights had not been violated.<sup>152</sup> Therefore, to provide effective deterrence against unlawful searches of automobiles, evidence obtained by an unlawful search must be made inadmissible against both the driver and the passenger by giving the passenger standing to challenge the constitutionality of these searches. This solution best promotes the policies and purpose behind the Fourth Amendment.

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148. *Whren v. United States*, 517 U.S. 806, 812 (1996) (“We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification.”). For a discussion of *Whren*'s implications, see Kenneth Gavsie, *Making the Best of “Whren”*: *The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 387–88 (1998).

149. *Whren*, 517 U.S. at 818.

150. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

151. *United States v. Payner*, 447 U.S. 727, 729–30 (1980).

152. *Id.* at 730–31.

## VII. CONCLUSION

Passengers should not shed their constitutional rights when they accept a ride in another's car. The limitation on passenger standing to challenge searches of cars began on shaky constitutional ground. Since *Brendlin* in 2007, the search limitation is now completely inconsistent with the allowance of passenger standing to challenge seizures. The line between standing to challenge seizures and standing to challenge searches rests on a distinction without a constitutional difference. The solution is to bring the Court's reasonableness jurisprudence in line with widely shared social expectations and declare that passengers have reasonable expectations of privacy in the cars in which they ride.