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Byrd v United States: Unauthorized Drivers of Rental Cars Have Fourth Amendment Rights? Not as Evident as it Seems

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No discerning student of the Supreme Court would contend that Justice Anthony Kennedy broadly interpreted the Fourth Amendment during his thirty years on the Court. For example, in *Maryland v King*,[1] a 2013 case that Justice Samuel Alito described as "perhaps the most important criminal case that this Court has heard in decades,"[2] Justice Kennedy's majority opinion rejected a Fourth Amendment challenge to a Maryland law requiring forensic testing of DNA samples taken from persons arrested for violent crimes. *King* was criticized by individuals and organizations across the political spectrum,[3] and it

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[1] 569 US 435 (2013).

[2] Transcript of Oral Argument, *Maryland v King*, No 12-207, at 35 (Feb 27, 2013), archived at http://perma.cc/ZD4J-58YU.

[3] Conservative Republican Senators Rand Paul and Ted Cruz, the *New York Times* editorial pages, the *American Prospect*, and the American Civil Liberties Union all denounced *King*. See Rand Paul, *Big Brother Says "Open Your Mouth*!" (American Conservative, June 10, 2012), archived at http://perma.cc/4YRJ-F4BW; Ted Cruz, *Statement on SCOTUS Decision in Maryland v. King* (June 3, 2012), archived at http://perma.cc/C75J-WKLD; Editorial, *DNA*

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has been characterized as "a watershed moment in the evolution of Fourth Amendment doctrine and an important signal for the future of biotechnologies and policing."[4]

A decade before *King* was announced, Justice Kennedy wrote for a majority of the Court in another controversial case dealing with police bus sweeps for drugs and guns. *Drayton v United States*[5] addressed whether passengers on an interstate bus were seized when police approached, asked for identification, and requested permission to search their bodies and luggage for weapons or illegal narcotics, and whether police must inform persons of their right to refuse to cooperate to validate a consent search.[6] Drayton and Brown were companions seated on a bus when officers questioned them and asked to search their luggage and persons at a rest stop. After narcotics were discovered on Brown, an officer said to Drayton, "Mind if I check you?"[7] Without a verbal response, Drayton lifted his hands above his legs, which allowed the officer to pat down his legs and detect narcotics concealed underneath his pants. Kennedy concluded that no seizure had occurred, and that police need not inform passengers of their rights when requesting consent to search because it is the responsibility of citizens to know and assert their rights if they wish not to cooperate.[8]

Lastly, consider Justice Kennedy's position on the exclusionary rule, which requires the suppression of evidence obtained by police in violation of the Fourth Amendment. In contrast to other "moderate"

and Suspicionless Searches, NY Times A24 (June 4, 2013); Scott Lemieux, *Scalia Gets It Right* (American Prospect, June 3, 2013), archived at http://perma.cc/55L8-SG8K; American Civil Liberties Union, *Comment on Supreme Court DNA Swab Ruling (Maryland v. King)* (June 3, 2013), archived at http://perma.cc/4XF6-M9LN. More recently, Barry Friedman stated that the "decision in *King* is built on a lie." Barry Friedman, *Unwarranted: Policing Without Permission* 274 (Farrar, Straus and Giroux, 2017) (noting that *King* justified its result because of the State's interest in "identifying" arrestees, but identification had nothing to do with why the State takes DNA samples; "the DNA of arrestees is being checked to solve cold cases").

[4] Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 Harv L Rev 161, 161 (2013). See also Tracey Maclin, *Maryland v King: Terry v Ohio Redux*, 2013 Supreme Court Review 359, 402–3 (noting that the logic of *King* "invites law enforcement officials to extend DNA searches to persons arrested for any offense and even to persons merely detained by the police").

[5] 536 US 194 (2002).

[6] Id at 203.

[7] Id at 199.

[8] Id at 207. See Tracey Maclin, *The Good and the Bad News About Consent Searches in the Supreme Court*, 39 McGeorge L Rev 27, 63–65 (2008); Janice Nader, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Supreme Court Review 153, 179.

conservative Justices who have recently sat on the Court, Justice Kennedy has *never* voted to apply the exclusionary rule in a case in which the scope of the rule was contested in a search and seizure case.[9] Tellingly, he provided the fifth vote and concurred in the three key sections of Justice Antonin Scalia's opinion in *Hudson v Michigan*,[10] which held that suppression is never a remedy for knock-and-announce violations.[11] Academic commentators generally agree that *Hudson* is a direct attack on the exclusionary rule from several perspectives and lays the foundation for abolishing the rule as a categorical matter.[12] Justice Kennedy wrote a concurring opinion in *Hudson* in which he stated that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."[13] Justice Kennedy's cryptic comment raised several ques-

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[9] See Tracey Maclin, *The Supreme Court and the Fourth Amendment's Exclusionary Rule* 346 (Oxford, 2013). Justice Kennedy's votes in exclusionary-rule cases put him in the company of Chief Justice Roberts and Justices Scalia, Thomas, and Alito who have also never voted to apply the exclusionary rule. By comparison, Justices O'Connor and Souter, neither of whom championed the exclusionary rule, voted to enforce the rule at least once during their tenure on the Court. O'Connor voted for the defendant in *Illinois v Krull*, 480 US 340 (1987), and in *Murray v United States*, 487 US 533 (1988) (O'Connor joined Justice Marshall's dissent), while Souter voted for the defendant in *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357 (1998).

[10] 547 US 586 (2006).

[11] Id at 589.

[12] Wayne R. LaFave, 1 *Search and Seizure: A Treatise on the Fourth Amendment* § 1.6(h) at 281 (West, 5th ed 2012) (arguing that *Hudson*'s cost-benefits analysis was "dead wrong, but also that it has the capacity to metastasize into a much broader limitation upon the suppression doctrine"); Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 Iowa L Rev 1741, 1764 (2008) (describing *Hudson*'s attenuation theory as a "formula for abolishing the [exclusionary] rule"); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 Chi Kent L Rev 191, 202 (2010) (stating that at its "most fundamental level," the result in *Hudson* "called into question the future of the exclusionary rule," and that abolition of the rule "is Scalia's clear aim; he has planted the seeds in *Hudson* and needs one more vote to reap the harvest"); James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 Iowa L Rev 1819, 1841–47 (2008) (stating that when read broadly, *Hudson* "foreshadows and anticipates outright abolition" of the exclusionary rule). See also Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 Chi Kent L Rev 209, 210 (2010); David A. Moran, *The End of Waiting for the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 Cato S Ct Rev 283; Sharon L. Davies and Anna B. Scanlon, *Katz in the Age of Hudson v. Michigan: Some Thoughts on "Suppression as a Last Resort,"* 41 UC Davis L Rev 1035 (2008). Recently, in *Collins v Virginia*, 138 S Ct 1663 (2018), Justice Thomas questioned the Court's power to impose the exclusionary rule on the states. Id at 1675–80 (Thomas, J, concurring) (explaining first that the exclusionary rule "is not rooted in the Constitution or a federal statute" or federal common law, then stating skepticism that the Court has the authority to impose the rule on the states).

[13] *Hudson*, 547 US at 603 (Kennedy, J, concurring in part and concurring in the judgment).

tions, including why someone who claims to support the "continuing vitality of the exclusionary rule . . . would cast the crucial fifth vote for an opinion that openly declared war on the exclusionary rule."[14]

In light of his previous votes in search and seizure cases, surprisingly Justice Kennedy, in what would be his final Fourth Amendment opinion for a majority of the Court, authored an opinion in favor of a criminal defendant. In *Byrd v United States*,[15] a unanimous Court rejected the government's argument that unauthorized drivers always lack an expectation of privacy in a rental car and thus can never challenge a police search of the car.[16] Byrd was driving a rental car in violation of the rental agreement but with the permission of the renter; the police searched the trunk of the car, allegedly without consent or probable cause, and found heroin and body armor. The Court in *Byrd* held that the search was unlawful because "as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver."[17]

When *Byrd* arrived at the Court, few would have predicted a victory for Terrence Byrd, let alone a unanimous vote for the defense. Even apart from the Court's general antagonism to Fourth Amendment claims, too many obstacles stood in the way of a victory for Byrd.[18] First, the federal appellate courts had split three ways on whether an unauthorized driver of a rental car could raise a constitutional challenge to a police search.[19] A majority of the court of appeals—the Third, Fourth, Fifth, and Tenth Circuits—had adopted a bright-line rule that unauthorized drivers lacked standing to contest

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[14] Moran, 2006 Cato S Ct Rev at 308 (cited in note 12).

[15] 138 S Ct 1518 (2018).

[16] Id at 1522.

[17] Id at 1524. In the final section of the opinion, the holding was framed without the caveat: "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." Id at 1531.

[18] Byrd had the burden of proving that he had a legitimate expectation of privacy in the car. See *Rawlings v Kentucky*, 448 US 98, 104 (1980).

[19] See Darren M. Goldman, Note, *Resolving a Three-Way Circuit Split: Why Unauthorized Rental Drivers Should Be Denied Fourth Amendment Standing*, 89 BU L Rev 1687 (2009); Lisa J. Zigterman, Note, *Live and Let Drive: The Struggle for Unauthorized Drivers of Rental Cars in Attaining Standing to Challenge Fourth Amendment Searches*, 2009 U Ill L Rev 1655; Petition for a Writ of Certiorari, *Byrd v United States*, Docket No 16-1371, *11–18 (US filed May 11, 2017) (available on Westlaw at 2017 WL 2130318) ("Byrd Cert Brief").

a search.[20] By contrast, in the Eighth and Ninth Circuits, "an unauthorized driver *always* had standing to challenge a search, so long as the unauthorized driver had the permission of an authorized driver."[21] In these circuits, the rental contract between the authorized driver and the rental company was irrelevant to the standing issue; what mattered most was whether the driver had permission from the authorized driver.[22] Although the approach of the Eighth and Ninth Circuits could also be characterized as a bright-line rule—that is, the unauthorized driver always has standing when he has the permission of the authorized driver—that directive lacked clarity for both police and judges attempting to apply it.[23] Finally, the Sixth Circuit announced a third rule. While recognizing an initial presumption against standing, the Sixth Circuit embraced a totality of the circumstances test to decide whether an unauthorized driver had standing.[24]

Another apparent impediment for Byrd was the result and reasoning of *Rakas v Illinois*.[25] Frank Rakas and Lonnie King were passengers in a vehicle that was the suspected getaway car in a robbery. After police lawfully stopped the car, a search revealed a box of rifle shells in the locked glove compartment and a sawed-off rifle underneath the front passenger seat. Neither passenger claimed ownership of the vehicle or the rifle or the shells.[26] When these items were in-

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[20] *United States v Kennedy*, 638 F3d 159, 165 (3d Cir 2011); *United States v Wellons*, 32 F3d 117, 119 (4th Cir 1994); *United States v Seely*, 331 F3d 471, 472 (5th Cir 2003) (per curiam); *United States v Roper*, 918 F2d 885, 887–88 (10th Cir 1990).

[21] Goldman, 89 BU L Rev at 1708 (footnote omitted) (cited in note 19).

[22] Id at 1711.

[23] For example, "the test does not define what 'permission' is, or how it is proven." Id at 1719. Would police "be required to contact the authorized driver or could the officer just take the unauthorized driver's word?" Id. In other words, the test of the Eighth and Ninth Circuits "fails to accomplish its intended goal—ease of use." Id.

[24] *United States v Smith*, 263 F3d 571 (6th Cir 2001). Five factors were considered by the court: (1) whether the unauthorized driver had a valid driver's license; (2) whether the unauthorized driver was able to proffer the rental agreement and had sufficient knowledge about the vehicle and the circumstances surrounding the rental; (3) the nexus between the authorized driver and unauthorized driver; (4) whether the unauthorized driver had permission to drive the vehicle from the authorized driver; and (5) whether the unauthorized driver had a business relationship with the rental company. Id at 586. See also *United States v Winters*, 782 F3d 289, 300–01 (6th Cir 2015) (reaffirming the test from *Smith* and stating that the fact that the defendants were not listed on the rental car agreement was "entitled to some weight" in the totality of the circumstances analysis).

[25] 439 US 128 (1978).

[26] Why the defendants never asserted a property interest in the rifle or the shells remains a mystery. Shortly after *Rakas* was decided, Professor Kamisar offered the following speculation:

troduced at trial, the Illinois courts ruled that the defendants lacked standing to contest the search. The Supreme Court agreed, holding that passengers' lawful presence in a vehicle was not enough, by itself, to confer standing. *Rakas* explained that because neither Rakas nor King had a property or possessory interest in the vehicle or the items, they failed to prove they held a Fourth Amendment privacy interest in the glove compartment or in the area under the front seat. "Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy."[27] In *Byrd*, the government argued that *Rakas* precluded Byrd from claiming a legitimate expectation of privacy in a rental car that he neither owned nor leased.[28] While Byrd's presence in the vehicle was legitimate since he had obtained the keys from the authorized driver, *Rakas* instructed that legitimate presence "is a necessary, but not a sufficient, foundation for asserting Fourth Amendment rights."[29]

Another seeming hurdle for Byrd was that his case would rise or fall on whether he had standing.[30] In the typical search and seizure case,

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> Recall that at the suppression hearing the defense lawyer maintained that his client did not "have to admit" that the items seized were theirs. The way he put that suggests that perhaps the defense lawyer was unaware that testimony given to establish standing to object to illegally seized evidence may not be used against the defendant at his trial on the question of guilt or innocence. [See *Simmons v United States*, 390 US 377 (1968).]
>
> On the other hand, perhaps the defense lawyer was thinking of putting his client on the stand at the trial and was painfully aware that in a few jurisdictions, including Illinois, a defendant's testimony at his pretrial hearing to suppress illegally seized evidence has been admissible for impeachment purposes if and when the defendant testifies at his trial. In these jurisdictions, *Simmons* has been modified in light of *Harris v. New York*, 401 U.S. 222 (1971), which allows statements obtained in violation of *Miranda* to be introduced at trial for impeachment purposes.

See Jesse H. Choper, Yale Kamisar, and Laurence H. Tribe, *The Supreme Court: Trends and Developments* 163–64 (National Practice Institute, 1979) (remarks of Professor Kamisar).

[27] *Rakas*, 429 US at 149.

[28] See *Byrd*, 138 S Ct at 1522.

[29] Brief for the United States, *Byrd v United States*, Docket No 16-1371, *14 (US filed Dec 13, 2017) ("Government Brief").

[30] *Rakas* merged the issue of standing with the substantive merits of a defendant's Fourth Amendment claims. In future cases, *Rakas* explained that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas*, 439 US at 139. Interestingly, a year later the Court used the term "standing" notwithstanding what was said in *Rakas*. See *Arkansas v Sanders*, 442 US 753, 761 n 8 (1979). Despite *Rakas*'s instruction, courts still analyze defendants' Fourth Amendment claims under the standing rubric, as did the lower courts in Byrd's case. *United States v Byrd*, 679 Fed Appx 146, 150 (3d Cir 2015). *United States v Byrd*, 2015 WL 5038455, *2 (MD Pa 2015). As Orin Kerr observes,

standing is not an issue. Police illegally enter *A*'s home and seize criminal evidence. Or, police illegally frisk *B* and discover a weapon in his pocket. *A* clearly has a basis to contest the intrusion because police entered *his* home, as does *B* because police searched *his* person. "The basic rule of standing is that a litigant may assert only a violation of his own fourth amendment rights."[31] But in cases where a defendant's nexus to a challenged search or seizure is attenuated or illegitimate, the concept of standing becomes important and sometimes controversial. The Court has left no doubt that the car thief or the "burglar plying his trade in a summer cabin during the off season"[32] lacks standing to contest what would otherwise be an illegal police search because their presence in the stolen vehicle or the cabin is illegal or "wrongful."[33]

Furthermore, lengthy history exists on the interplay of standing and the exclusionary rule. Opponents of the exclusionary rule are generally averse to grant standing to criminal defendants to contest a search or seizure. The best evidence of this phenomenon emerged after the onset of the exclusionary rule. In 1914, *Weeks v United States*[34] ruled that evidence obtained in violation of the Fourth Amendment was inadmissible in federal court.[35] "Almost immediately thereafter lower federal courts began to develop a limitation on the applicability of the exclusionary rule that has become known as the 'standing' requirement."[36] Seven years later, one scholar noted that the standing

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"judges, practitioners, and academics still talk about standing . . . because the issue of whose rights are being violated is a conceptually distinct question from whether anyone at all has Fourth Amendment rights." Orin Kerr, *Four Thoughts on Byrd v. United States* (Volokh Conspiracy, Jan 2, 2018), archived at http://perma.cc/G78Y-63QN. Forty years after *Rakas* explained that notions of standing were unnecessary and unhelpful for deciding search and seizure cases, the Court now agrees that "[t]he concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search." *Byrd*, 138 S Ct at 1530.

[31] Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 NIU L Rev 1, 4 (1983).

[32] *Rakas*, 439 US at 143 n 12.

[33] *Jones v United States*, 362 US 257, 267 (1960) (explaining that anyone "legitimately on premises where a search occurred may challenge its legality" when evidence obtained from the search is offered against him, but distinguishing those "who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched").

[34] 232 US 383 (1914).

[35] Id at 398.

[36] Richard B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 Iowa L Rev 493, 493 (1980) (citation omitted). While the "precise origins of

doctrine permitted the government to profit from unconstitutional searches.[37] In cases where a defendant's basis for contesting a search is debatable, conferring standing to a particular defendant "is solely for the purpose of determining whether evidence unlawfully obtained should be excluded at trial."[38] For jurists opposed to suppressing illegally obtained evidence, standing is a gateway to invoking exclusion and thus should be discouraged whenever possible.

The interplay between standing and the exclusionary rule was clearly on the minds of some Justices in *Rakas*.[39] Then-Justice Rehnquist's opinion for the majority pointedly noted that "[c]onferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials."[40] Rehnquist also stated that "misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations."[41] Since *Rakas*, the Court has been even less willing to enforce exclusion as a remedy. Thus, Byrd would have to persuade a Court openly hostile to the exclusionary rule that he should be afforded standing.

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the fourth amendment standing requirement are unclear," Professor Kuhns believes that the "[f]irst and perhaps most important[ ]" factor in the development of the concept of standing was that it "provided courts that were disenchanted with the exclusionary rule with a means of limiting the scope of the rule." Id at 504 n 78, citing Richard A. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw U L Rev 471, 472 (1952).

[37] Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 Harv L Rev 361, 375 (1921).

[38] Welsh S. White and Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U Pa L Rev 333, 356 (1970). See also William A. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo L Rev 1 (1975) ("In the past, the Court has often used language which refers to standing to challenge or the scope of the amendment when it is really deciding whether a specific remedy—the exclusionary rule—should be available.") (footnote omitted); Kuhns, 65 Iowa L Rev at 505 (cited in note 36) ("[I]n contrast to a substantive holding that a particular search or seizure is unconstitutional . . . standing cases involve an attempt to preclude a defendant from invoking the exclusionary rule.").

[39] The first sentence of Justice Harry Blackmun's pre-argument memo to himself read: "This case focuses on the exclusionary rule and raises an issue as to its expansion." Harry A. Blackmun, Pre-Argument Memorandum on *Rakas v Illinois*, *Harry A. Blackmun Papers*, Box 290, Folder 3, Manuscript Division, US Library of Congress (on file with Library of Congress). Likewise, in his pre-argument memo Justice Lewis Powell noted that if the defendants' standing argument prevailed "the result would be a major extension of the scope of the exclusionary rule." Lewis F. Powell, Jr., Papers, Washington and Lee School of Law, Box 60. Finally, during the Justices' conference discussion, Chief Justice Burger remarked that the "only issue is standing." Powell Papers, Box 60.

[40] *Rakas*, 439 US at 137.

[41] Id at 138 (footnote omitted).

Finally, Byrd needed to propose a constitutional test, preferably a workable bright-line rule that would not be too restrictive of police interests, that would resolve his and future cases. As discussed above, *Rakas* foreclosed legitimate presence in the car as a proxy for Fourth Amendment protection. Moreover, for Justices inclined to a textual interpretation of the Constitution, Byrd needed to address the fact that the Fourth Amendment protects people in "their" effects.[42] Byrd could not assert the constitutional rights of the authorized driver because Fourth Amendment rights are personal and cannot be vicariously asserted.[43] Thus, Byrd's test had to show why an unauthorized driver could nonetheless claim a vehicle that he neither owned nor leased was "his" under the Fourth Amendment.

In an attempt to prove his point, counsel for Byrd stated during oral argument that his client "ha[d] the right to exclude others" from the rental car which "bolsters also [Byrd's] reasonable expectation of privacy"[44] in the car. Counsel then accepted Justice Stephen Breyer's characterization of the rule Byrd was proposing: "A person who has possession of and is [the] driver of a car, whoever he is, has a reasonable expectation in privacy of the parts of the car, unless in driving or possessing it or—he's committing a crime."[45] This test emphasizes Byrd's possession and control of the vehicle. A few moments later, however, counsel seemed to offer a different test that emphasized the privacy of items stored in a closed vehicle. When Justice Elena Kagan asked why society should consider Byrd's conduct reasonable, counsel responded: "Because society recognizes that when you put your personal items in a locked space . . . you have an expectation of privacy regarding it."[46] Counsel never reconciled the differences in these formulations.

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[42] US Const, Amend IV.

[43] *Alderman v United States*, 394 US 165, 171 (1969) ("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."); id at 174 ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.") (citations omitted).

[44] Transcript of Oral Argument, *Byrd v United States*, Docket No 16-1317 at 27 (Jan 9, 2018), archived at http://perma.cc/MK9V-TFXN.

[45] Id. At the end of the oral argument, counsel for Byrd restated his proposed bright-line rule. "This Court should adopt a clear bright-line rule that unless you're a criminal trespasser, unless you're a car thief, that you have at least the ability to invoke the Fourth Amendment." Id at 69.

[46] Id at 31.

While the Court generally requires probable cause for automobile searches, *Rakas* demonstrated that with the right set of facts, police do not always need probable cause to search a car. Put differently, vehicle occupants may not be similarly situated under the Fourth Amendment—even when they occupy the same vehicle. Some are protected; some are not. Byrd would need to surmount one or more of the obstacles described above to prove that he was the right type of vehicle occupant entitled to invoke the Fourth Amendment.

I take a closer look at *Byrd* to examine what it means for Fourth Amendment doctrine. Part I summarizes Justice Kennedy's majority opinion and the brief concurrences submitted by Justices Thomas and Alito. Part II scrutinizes *Byrd*'s holding: I demonstrate that the Court's holding is not as simple as it seems, and I consider whether the crucial elements of Justice Kennedy's analysis affect the logic of prior precedents and the Court's view of standing under the Fourth Amendment. Part III contemplates *Byrd*'s impact on the development of search and seizure law in the future.

I. The Court's Reasoning in Byrd

In 1980, the Kentucky Supreme Court remarked that the law on standing was "totally incomprehensible."[47] Though that statement was hyperbole, the Court's Fourth Amendment rulings have not always provided guidance and clarity regarding standing. For example, prior to 1960, "[lower] courts were inclined to hold that neither the bailee-operator of a vehicle nor a passenger therein had standing with respect to a search of a vehicle."[48] Judges who denied standing in such circumstances were not defying Supreme Court precedent. In the Court's first important automobile case, *Carroll v United States*,[49] the Justices reserved the question whether an occupant of a vehicle "who did not own the automobile" could challenge a police search.[50] According to one account, the Court had addressed "fourth amendment standing issues in only a dozen cases" between

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[47] *Rawlings v Commonwealth*, 581 SW2d 348, 349 (Ky 1979), aff'd 448 US 98 (1980).

[48] LaFave, 6 *Search and Seizure*, § 11.3(e) at 243 (footnote and citations omitted) (cited in note 12).

[49] 267 US 132 (1925).

[50] Id at 162.

1948 and the announcement of *Rakas*.[51] And since *Rakas*, the Court had not heard a case involving standing to challenge a car search until it decided to review *Byrd*.[52]

A. JUSTICE KENNEDY'S OPINION FOR A UNANIMOUS COURT

On September 17, 2014, Terrence Byrd's girlfriend, Latasha Reed, rented a car for him, most likely because Byrd was ineligible to rent a car due to his criminal record.[53] After renting the car from a Budget Rental Company facility in Wayne, New Jersey, Reed gave Byrd the keys. Byrd was not listed as an authorized driver on the rental agreement. Byrd took control of the car and later headed to Pittsburgh, after a stop at his home to gather some personal items which he put in the trunk of the rental car. While driving on Interstate 81 near Harrisburg, Byrd passed a state trooper who was parked in the median.

State Trooper David Long testified that he was suspicious of Byrd "because he was driving with his hands at the '10 and 2' position on the steering wheel, sitting far back from the steering wheel, and driving a rental car."[54] The trooper knew the vehicle was a rental car because one of its windows contained a barcode. Based on these observations, Long decided to follow Byrd. A short time later, he stopped Byrd for remaining in the left lane too long after passing another vehicle.[55] According to Long, Byrd was " 'visibly nervous' and 'was shaking and

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[51] Kuhns, 65 Iowa L Rev at 514 (footnote omitted) (cited in note 36).

[52] A year after *Rakas*, a passenger in a taxi cab challenged a search of his suitcase which police found in the trunk of the cab. See *Arkansas v Sanders*, 442 US 753 (1979). Because the passenger "concede[d] that the suitcase was his property, . . . there [was] no question of his standing to challenge the search." Id at 761 n 8. Before *Rakas*, many of the Court's automobile search rulings "assumed that a mere passenger in an automobile is entitled to protection against unreasonable searches occurring in his presence. In decisions upholding the validity of automobiles searches, [the Court has] gone directly to the merits even though some of the petitioners did not own or possess the vehicles in question." *Rakas*, 439 US at 158–59 (White dissenting) (citations omitted).

[53] Early in the oral argument, counsel for Byrd appeared to concede the point. Oral Argument in *Byrd* at 4 (cited in note 44) ("Justice Ginsburg: Could he have been—could he have been the renter, given his criminal record? Mr. Loeb: Perhaps not, Your Honor.").

[54] *Byrd*, 138 S Ct at 1524.

[55] This was obviously a pretextual stop. Although not mentioned in Justice Kennedy's opinion, Byrd was African American. See e-mail from Joshua E. Rosenkranz, Counsel of Record for Terrence Byrd, to Tracey Maclin, Professor of Law, Boston University School of Law (June 12, 2018) (on file with author). Trooper Long wanted to find a reason to question Byrd and search the vehicle he was driving.

had a hard time obtaining his driver's license.'"[56] After giving Long an interim license and the rental agreement, Byrd told Long that a friend had given permission to drive the car.

Another trooper, Travis Martin, soon arrived at the scene. Realizing that Byrd was not authorized to drive the vehicle, Martin remarked that Byrd "has no expectation of privacy" in the car.[57] After Byrd refused consent to search the car, the troopers told Byrd they did not need his consent because he was not listed on the rental agreement.[58] A search of the trunk revealed body armor and forty-nine bricks of heroin in a laundry bag. The lower federal courts denied Byrd's suppression motion. Specifically, the district court, relying on circuit precedent, ruled that an unauthorized driver of a rental car lacked "standing" to challenge the search of the car.[59]

In the courts below, Byrd argued that his Fourth Amendment rights were violated because he had a reasonable expectation of privacy in the rental car.[60] Addressing that claim, Justice Kennedy began his analysis by noting that "property concepts"[61] would guide the Court in evaluating Byrd's argument. "One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it."[62] At the same time, the Court's precedents establish that a "common-law property interest in the place searched" is not essential to claim "a reasonable expectation of privacy in it."[63] Acknowledging that the Court had not offered "a single metric or exhaustive list of considerations" to decide when a person has a reasonable expectation of privacy,[64] Justice Kennedy

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[56] *Byrd*, 138 S Ct at 1524.

[57] Id at 1525. A computer search of Byrd's name revealed, inter alia, that Byrd "had prior convictions for weapons and drug charges as well as an outstanding warrant in New Jersey for a probation violation." Id. The troopers learned that the State of New Jersey did not want Byrd arrested for extradition. Id.

[58] Id. During the back-and-forth with the troopers, Byrd admitted that he had a "blunt" in the car, which the troopers understood to mean a marijuana cigarette. Id.

[59] *Byrd*, 2015 WL 5038455 *2.

[60] At the Court, Byrd proffered an alternative claim that he "had a common-law property interest in the rental car as a second bailee that would have provided him with a cognizable Fourth Amendment interest in the vehicle." *Byrd*, 138 S Ct at 1526–27. The Court refused to consider this claim because it had not been raised or considered below. Id.

[61] Id at 1527.

[62] Id.

[63] Id.

[64] *Byrd*, 138 S Ct at 1527.

reaffirmed *Rakas*'s instruction that privacy interests "must have a 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."[65] Positive law and societal understandings, according to Kennedy, "are often linked" and that linkage was evident in this case because "[o]ne of the main rights attaching to property is the right to exclude others," and society recognizes that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude."[66]

Offering a vastly different perspective and at the same time swinging for a doctrinal home run, the Solicitor General proposed a bright-line rule that would limit Fourth Amendment privacy to those persons listed on the rental contract. The government argued that only authorized drivers of rental cars have expectations of privacy in those vehicles and "drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone."[67] The government's argument was apparently based, in part, on the view that *Rakas* precluded passengers from challenging the search of a car's interior. The Court, however, rejected this stance because it "rests on too restrictive a view of the Fourth Amendment's protections."[68] Though the government believed that *Rakas* supported its position, Justice Kennedy explained the government had misread *Rakas* because it "did not hold that passengers cannot have an expectation of privacy in automobiles."[69] In fact, as Justice Kennedy reminded the government, *Rakas* specifically rejected the dissent's claim that it was "hold[ing]" that "a passenger lawfully in an automobile 'may not invoke the exclusionary rule and

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[65] Id at 1527, citing *Rakas*, 439 US at 144 n 12.

[66] *Byrd* at 1527, quoting *Rakas*, 439 US at 144 n 12, citing William Blackstone, 2 *Commentaries on the Laws of England*, ch 1 (1765).

[67] *Byrd*, 138 S Ct at 1527. The government's proposed bright-line rule was at odds with the laws of several states. "For example, under state law in Illinois, Iowa, Missouri, Nevada, New York, Oregon, and Wisconsin, spouses automatically are authorized drivers regardless of whether they are listed on the rental car contract." Brief of the American Civil Liberties Union and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Petitioner, *Byrd v United States*, Docket No 16-1371, *13 (US filed Nov 20, 2017) ("ACLU Brief"). Thus, the government's proffered test was not as workable as it seemed on paper.

[68] *Byrd*, 138 S Ct at 1527–28.

[69] Id at 1528.

challenge a search of that vehicle unless he happens to own or have a possessory interest in it.'"[70] Narrower in scope, *Rakas* merely held that legitimate presence alone was insufficient to assert a Fourth Amendment interest, which was enough to resolve the case.

Furthermore, Justice Kennedy explained that *Rakas* did not control Byrd's case "because this case does not involve a passenger at all but instead the driver and sole occupant of a rental car."[71] Embracing Justice Powell's view in his *Rakas* concurrence, Justice Kennedy agreed that a "distinction . . . may be made in some circumstances between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an automobile or of its locked compartments."[72] This distinction among occupants of automobiles paralleled some of the logic of *Jones v United States*,[73] where Jones was arrested after police found narcotics in the apartment in which he was temporarily residing. The apartment "belonged to a friend" who had given Jones permission to use the apartment along with a key to it.[74] Jones had some clothes in the apartment, had slept there "maybe a night," but the apartment was not his home.[75] Though the apartment was not Jones's home, the Court ruled that Jones had standing to challenge the search.[76]

For Justice Kennedy, Byrd's Fourth Amendment claim was similar to Jones's because both "had complete dominion and control over the [place searched] and could exclude others from it."[77] This understanding of what the Fourth Amendment protects was "also consistent"[78] with the *Rakas* majority's explanation that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude."[79] Relying on these passages from *Jones* and *Rakas*, Justice Kennedy then stated: "The Court sees no reason why the expectation of privacy that

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[70] *Rakas*, 439 US at 149 n 17 (citations omitted).

[71] *Byrd*, 138 S Ct at 1528.

[72] Id.

[73] 362 US 257 (1960).

[74] Id at 259.

[75] Id.

[76] Id at 265.

[77] *Byrd*, 138 S Ct at 1528, citing *Rakas*, 439 US at 149.

[78] *Byrd*, 138 S Ct at 1528.

[79] Id, citing *Rakas*, 439 US at 144 n 12.

comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it."[80] Put simply, both Byrd and Jones "had the expectation of privacy that comes with the right to exclude."[81] Perhaps offering a slight dig at the government, Kennedy noted that the government conceded that "an unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker."[82]

Of course, Byrd's situation differed from Jones's in at least one significant way: Jones had the permission of his friend to use the apartment, whereas Byrd was expressly barred from driving the vehicle under the rental agreement and his girlfriend had no authority under the agreement to override that restriction. Thus, the government insisted that because Byrd's driving constituted a breach of the rental agreement, he had no standing to complain about the search.[83] In any event, the Court was not persuaded. First, the Court found the government was "misreading" the rental agreement when it argued that the rental company would consider the agreement "void" once an unauthorized driver operated the car.[84]

Second, Justice Kennedy noted that car rental agreements contain many restrictions, including, for example, prohibitions on driving a rental car on unpaved roads or driving while using a handheld cellphone.[85] Even the government acknowledged that such restrictions have no connection with a driver's reasonable expectation of privacy in the rental car.[86] To be sure, the Court observed that violating the authorized-driver provision is a serious breach of the rental agreement, "but the Government fail[ed] to explain what bearing this breach of contract, standing alone, has on expectations of privacy in

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[80] Id.

[81] Id.

[82] *Byrd*, 138 S Ct at 1529, citing Oral Argument in *Byrd* at 48–49 (cited in note 44).

[83] *Byrd*, 138 S Ct at 1529.

[84] Id. For good measure, Justice Kennedy quoted the rental agreement, which stated: "Permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement. This may result in any and all coverage otherwise provided by the rental agreement being void and my being fully responsible for all loss or damage, including liability to third parties." Id at 1529.

[85] Id.

[86] Id.

the car."[87] Put differently, Kennedy saw no principled distinction "between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy."[88] Such provisions concern "risk allocation between private parties—violators might pay additional fees, lose insurance coverage, or assume liability for damage resulting from the breach."[89] However, these concerns about risk allocation are irrelevant to the issue of whether a person has a reasonable expectation of privacy in a rental car if he "has lawful possession of and control over the car."[90] In other words, the rental agreement's failure to recognize Byrd as an authorized driver did not eliminate the protection the Fourth Amendment provided by his "lawful possession and control and the attendant right to exclude"[91] others from the vehicle.[92]

After explaining why the provisions of the rental agreement did not undermine constitutional protections, Justice Kennedy explained that the Court must focus on "the concept of lawful possession."[93] At this point, Kennedy considered "an important qualification"[94] of Byrd's proposed rule, which he had earlier described as urging that "the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control."[95] Recalling that prior cases had established that "wrongful" presence at the scene of a search would preclude a person from invoking Fourth Amendment protection, Kennedy observed that "[n]o matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car."[96] He then mentioned an argument that the

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[87] *Byrd*, 138 S Ct at 1529.

[88] Id.

[89] Id.

[90] Id.

[91] *Byrd*, 138 S Ct at 1528.

[92] See also Orin Kerr, *Byrd v. United States: The Supreme Court Takes a Broad View of Fourth Amendment Standing* (Volokh Conspiracy, May 15, 2018), archived at http://perma.cc/VEK9-RS6W (explaining that *Byrd* adopted the norm that "the terms in rental car contracts are really about the risk allocation under the contract, not the rental car company's efforts to block the delegation of possession to someone else. Given that, the fact of not having the person's name on the rental car contract doesn't eliminate the otherwise-existing Fourth Amendment right.").

[93] *Byrd*, 138 S Ct at 1529.

[94] Id.

[95] Id at 1528.

[96] Id at 1529.

government did not make below, namely, that Byrd's possession of the car was "wrongful" because he intentionally used his girlfriend to mislead the rental car company.[97] In the government's eyes, Byrd's actions made him the equivalent of a car thief.[98] Observing that it was unclear whether the conduct of which the government accused Byrd amounted to a crime, the Court remanded this claim to the lower court, while intimating that the government should eventually prevail: "[I]t may be," the Court said, "that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright."[99] In other words, if the government's view of the facts were true, then Byrd might be "no better situated than a car thief,"[100] and thus lack an expectation of privacy in the rental car.

b. justices thomas's and alito's concurring opinions

While joining Justice Kennedy's opinion, Justices Thomas and Alito penned brief concurring opinions. Justice Thomas chided the parties for failing to "adequately address several threshold questions" related to Byrd's claim that he held a property interest in the rental car.[101] According to Justice Thomas, Byrd's argument that the vehicle "was *his* effect"[102] required consideration of at least three issues. First,

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[97] *Byrd*, 138 S Ct at 1530.

[98] Briefly put, the government argued that Byrd knew he would never be able to rent a car due to his criminal record. Therefore, "he used Reed, who had no intention of using the car for her own purposes, to procure the car for him to transport heroin to Pittsburgh." Id.

[99] Id. Interestingly, the Court instructed the lower courts on remand to address the government's "theft-equivalent" claim despite the government's failure to raise this claim in the proceedings below. By contrast, the Court was silent on whether the lower courts should consider Byrd's alternative claim that he possessed a property interest in the car as a second bailee, which was also not raised below. Id at 1524 (concluding that a "remand is necessary to address in the first instance the Government's argument that . . . Byrd had no greater expectation privacy than a car thief").

Also, the government had argued in its brief in opposition to certiorari that even if Byrd had standing to challenge the search, the troopers had probable cause that the vehicle contained evidence of criminality. The Court of Appeals did not address that issue in light of its ruling that Byrd lacked standing. The Court noted that on remand, the appellate court was free to decide the probable-cause issue if the argument had been preserved by the government. Id at 1530.

[100] Id at 1531.

[101] *Byrd*, 138 S Ct at 1531 (Thomas, J, concurring).

[102] Id.

"under the original meaning of the Fourth Amendment," what type of property interest was necessary to prove that an item was someone's personal "effect"?[103] Second, "what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else?"[104] Finally, is operating a rental car as an unauthorized driver "illegal or otherwise wrongful under the relevant law," and, if so, does that unlawful conduct impact the Fourth Amendment analysis?[105] In Justice Thomas's view, the answers to these questions are "vitally important to assessing whether Byrd can claim that the rental car is his effect."[106]

Justice Alito had a more nuanced view of the Court's holding. He asserted that the Court had *not* held that the typical unauthorized driver of a rental car can always assert the illegality of a search. Rather, the Court held that "an unauthorized driver of a rental car is not always barred from contesting a search of the vehicle."[107] Justice Alito explained that an unauthorized driver's right to raise a Fourth Amendment claim turned on the answers to several questions, including "the terms of the particular rental agreement," "the circumstances surrounding the rental," "the reason why the driver took the wheel," "any property right that the driver might have," and "the legality of his conduct under the law of the State where the conduct occurred."[108] Put differently, in future cases a defendant would have to do more than simply allege that he was an unauthorized driver who had not committed a fraud on the rental company in order to merit standing. Based "[o]n this understanding," Justice Alito joined Justice Kennedy's majority opinion.[109] But Justice Alito was joining an opinion that did not exist. Factors that Justice Alito considered relevant to whether an unauthorized driver had standing to challenge a search, for example, "the terms of the particular rental agreement,"[110] and "the reason why the driver took the wheel,"[111] were irrelevant to

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[103] Id.

[104] Id.

[105] *Byrd*, 138 S Ct at 1531 (Thomas, J, concurring).

[106] Id.

[107] Id at 1531 (Alito, J, concurring).

[108] Id at 1532.

[109] *Byrd*, 138 S Ct at 1532.

[110] Id.

[111] Id at 1531 (Alito, J, concurring).

or played no role in Justice Kennedy's analysis. Justice Alito made a point of saying that on remand, the Court of Appeals could reexamine whether Byrd had standing to challenge the search or resolve the appeal on other grounds.[112]

II. Fourth Amendment Protection for Unauthorized Drivers of Rental Cars? Not as Easy as It Seems

The result in *Byrd*—especially from a unanimous Court—was a surprise. And at this point, the Court's motivation is not clear. In the GPS-tracking case, *United States v Jones*,[113] which held that the government conducted a search when it surreptitiously placed a global positioning system (GPS) device on a vehicle,[114] court watchers honed in on the Deputy Solicitor General's concession during oral argument that the government's position would allow FBI agents to place GPS tracking devices on the cars of the Justices without cause.[115] The result in *Riley v California*,[116] which ruled that police could not routinely search an arrestee's cell phone incident to arrest, was driven by the technological advances that allow cell phones to store vast amounts of personal information.[117] There was no similar revelation or magic moment in *Byrd* that appeared to make a difference.[118] I believe that most, if not all, of the Justices would not

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[112] Id.

[113] 565 US 400 (2012).

[114] Id at 404.

[115] See, for example, Linda Greenhouse, *Reasonable Expectations* (NY Times, Nov 16, 2011), online at http://opinionator.blogs.nytimes.com/2011/11/16/reasonable-expectations (Perma archive unavailable) ("[I]t's not implausible to suppose that the outcome of the GPS case will depend in large part on the justices' view of reasonable government behavior toward a citizenry that includes themselves. In fact, it's implausible to suppose otherwise."). See also Garrett Epps, *Justice Roberts: Could the Government Track My Car?* (Atlantic, Nov 8, 2011), archived at http://perma.cc/9VFP-GNYC; Tamara Rice Lave, *Protecting Elites*, 14 NC J L & Tech 461, 461–63 (2013) (arguing that the Justices in *Jones* could only sympathize with Jones once they realized that the government could target them as well).

[116] 134 S Ct 2473 (2014).

[117] Id at 2493 ("But the fact that a search in the pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery. The fact that someone could have tucked a paper bank statement in a pocket does not justify a search of every bank statement from the last five years.").

[118] One commentator on *Byrd* thinks that the Justices were concerned about the Fourth Amendment rights of innocent drivers:

> [T]he Justices were worried about the interests of the innocent, when confronting the Government's argument for their proposed rule in the case. The Justices were

allow an unauthorized driver to operate a car he or she had rented, nor would they drive a rental car without being listed on the rental agreement. Maybe the best explanation for the result in *Byrd* is that the government overreached in offering a rule that would confine Fourth Amendment privacy only to persons listed on the rental agreement. This was asking too much even for a Court ordinarily unreceptive to Fourth Amendment claims,[119] so the Justices voted for Byrd by default.

A. THE UNCERTAIN BASIS OF THE COURT'S HOLDING

While the result in *Byrd* was a surprise, the basis and scope of its holding is uncertain. The Court held: "[A]s a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver."[120] In a key passage, Justice Kennedy stated that "lawful possession and control and the attendant right to exclude"[121] affords standing to challenge a search. Despite this

> worried that if the Government got its way, and got them to rule that unauthorized drivers had no privacy rights in the trunks of cars, that rental cars would then always be subjected to being stopped, until it is determined that the driver is authorized, or that unauthorized drivers, who are not committing any crime (only a contract violation) will be subject to having the police rummaging around their belongings on the side of the road, and there will be no need to offer any justification. Police would be authorized to rummage around on a whim.

Don Murray, *Byrd v. United States—Fourth Amendment Applies to Unauthorized, Non-Thief Rental Car Drivers* (Shalley and Murray, May 16, 2018), archived at http://perma.cc/R9U6-UC7V. Before any motorist can be stopped, police must have probable cause or reasonable suspicion that the driver has committed a traffic offense or other crime. Thus, in one sense, any motorist lawfully seized is not entirely "innocent." Even assuming, however, that motorists who commit traffic offenses are "innocent," if the Justices were truly worried about the Fourth Amendment rights of "innocent" drivers, they would have reversed *Whren v United States*, 517 US 806 (1996), which ruled that pretextual traffic stops do not violate the Fourth Amendment. Pretextual traffic stops do more harm to the Fourth Amendment rights of "innocent" motorists than police stops of rental vehicles operated by unauthorized drivers. See Tracey Maclin and Maria Savarese, *Martin Luther King Jr. and Pretextual Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 Memphis L Rev 43 (2018).

[119] Compare Greenhouse, *Reasonable Expectations* (acknowledging that a few Fourth Amendment rulings for defendants, like the GPS case, are exceptions; however, "Fourth Amendment cases involving behavior with which the justices don't instinctively identify, and in which the court rules reflexively for the government, are too numerous" to be considered anything but the norm for the Court) (cited in note 115).

[120] *Byrd*, 138 S Ct at 1524.

[121] Id at 1528.

seemingly straightforward language, *Byrd*'s holding leaves several questions unanswered.

For starters, why was Byrd's operation of the vehicle "lawful"? "Lawful" is not the first adjective that comes to mind if asked to describe Byrd's possession of the rental car. Putting aside his calculated efforts to mislead the rental company and also assuming that his actions did not constitute a criminal offense in most states, it is not obvious why Byrd had "lawful" possession and control of the car. While Byrd may have had his girlfriend's permission to drive the car, certainly, the owner of the car, Budget Rental Company, prohibited Byrd from driving the car by the rental agreement terms.[122]

The uncertain meaning of "lawful" in this context was illustrated during the oral argument. Justice Sonia Sotomayor asked the government's lawyer whether the son of a father who owns the car, but is not an authorized driver on the insurance contract or the car registration, has a legitimate expectation of privacy in the car after the father gives the son permission to drive the car.[123] The lawyer replied that the son possesses a privacy interest because he "has a connection to the owner of the car."[124] But what is the difference between this hypothetical and the facts in *Byrd*? Byrd also had a "connection" to the renter of the car. Imagine that the father in Justice Sotomayor's hypothetical allows his daughter to drive the car, but explicitly tells the daughter and her boyfriend that the boyfriend is forbidden to drive the vehicle. If the daughter allows the boyfriend to drive the car, is he a "lawful" driver? After all, the boyfriend has a "connection" to an authorized driver. But having a "connection" to an authorized driver does not provide much guidance to police who are deciding whether they can conduct a search, or to judges who have to decide

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[122] Compare Goldman, 89 BU L Rev at 1720 (cited in note 19):

> [T]he unauthorized driver is a willing participant in the misconduct. The unauthorized driver is driving a rental car while well aware that she does not have the owner rental company's permission; she thus knows that she is in wrongful possession of the car. As [*United States v Wellons*, 32 F3d 117 (4th Cir 1994)] noted, the unauthorized driver is in the exact same position as if she had stolen the car from the rental company's premises. Neither person is in *lawful* possession of the car.

(footnotes omitted).

[123] Oral Argument in *Byrd* at 65 (cited in note 44).

[124] Id.

whether a person has standing to challenge the search. Unfortunately, Justice Kennedy's opinion does not explain why Byrd's possession of the vehicle was "lawful."

Perhaps what made Byrd's possession and control "lawful" was the fact he had permission to drive the car from the authorized user, his girlfriend. Orin Kerr thinks that *Byrd* announced a limited holding. "Delegated rights from the legitimate renter ordinarily control, and at least the kinds of rental car contract terms that currently exist don't change that."[125] That fact—permission from the authorized driver—was emphasized in Byrd's brief and had been the overriding factor in the Eighth and Ninth Circuit rulings that granted standing to unauthorized drivers. Likewise, Professor Sherry Colb writes, "the important thing is that Byrd had permission to drive the car from the woman who rented it, and that gave him standing."[126] Colb argues that *Byrd* "recognizes that privacy arises not only from property ownership but from relationships between people who share spaces with one another."[127]

The problem with these explanations, however, is that in the analysis section of his opinion, Justice Kennedy never mentions that Byrd had his girlfriend's permission to drive the car. If permission from the legitimate renter was essential to proving a reasonable expectation of privacy in these circumstances, one would expect the Court to highlight that fact. Perhaps Justice Kennedy did not rely upon this factor because it is too similar to the concept of "legitimately on [the] premises" that was deemed insufficient in *Rakas*.[128]

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[125] Kerr, *The Supreme Court Takes a Broad View* (cited in note 92).

[126] Sherry F. Colb, *Rental Cars, Privacy, and Suppression of Evidence* (Verdict, June 20, 2018), archived at http://perma.cc/5ZXB-SZW6.

[127] Id.

[128] *Rakas*, 439 US at 143–48. Al Alschuler makes a compelling argument why an owner's permission should be sufficient to show a reasonable expectation of privacy:

> In *Rakas*, the driver of the automobile, who apparently also was its owner, almost certainly had given her passengers permission to use the glove compartment and the area under the seat. In all but the rarest circumstances, a person who stores property in an automobile's locked glove compartment with the automobile owner's permission has a reasonable expectation that the property will remain private in that compartment. Cultural expectations of privacy are changing and uncertain, but not so uncertain as to make a denial of that proposition anything but silly. Nevertheless, it is the owner's permission and not anyone's presence or absence that gives rise to the legitimate expectation of privacy.

Alschuler, 4 NIU L Rev at 12 (cited in note 31).

And, there is no mention anywhere in *Byrd* about privacy arising from relationships between people who share spaces with each other.[129] Moreover, if permission from the legitimate renter or owner is enough to confer standing, then the unlicensed driver would also have standing to challenge a search.[130] There is no suggestion, however, that Justice Kennedy meant his holding to go that far.

B. DO PROPERTY RIGHTS OR SOCIETAL NORMS MATTER MOST?

1. *"The right to exclude."* Rather than emphasize the fact that Byrd had permission from the authorized driver, Justice Kennedy stressed that Byrd had the right to exclude third parties, like a carjacker, from the vehicle. Kennedy suggests that this right is a property interest. Focusing on property interests may be the key to deciphering *Byrd*, because five weeks later, Justice Kennedy asserted that property interests are "fundamental" and "dispositive" in deciding whether a person has a legitimate expectation of privacy against a challenged police intrusion.[131] Assuming a right to exclude others is a property

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Alschuler further notes that the *Rakas* Court "did not discuss the possible significance of the defendants' failure to establish the owner's permission" as a basis for invoking the Fourth Amendment. Id at 14. Any uncertainty about whether an owner's permission could confer standing was eliminated by *Rawlings v Kentucky*, 448 US 98, 104–5 (1980), where the Court made clear that a defendant does not prove that he had a legitimate expectation of privacy merely because he had the owner's permission to store his effects in her purse.

[129] During the oral argument, Justice Ginsburg asked counsel for Byrd: "Does the familial relationship really matter?" Counsel replied: "No, Your Honor. It simply bolsters the expectation." Oral Argument in *Byrd* at 32 (cited in note 44).

[130] See *People v McCoy*, 646 NE2d 1361, 1365 (Ill App 1995) (Cook, J, specially concurring):

> The fact the relative is not licensed to drive might be relevant on the issue [of] whether the lessee actually loaned out the vehicle, but it is not relevant on the relative's possessory interest. It is possible for an unlicensed driver to possess a motor vehicle, just as it is possible for an unlicensed driver to own a motor vehicle. Even where a vehicle is operated illegally the operator may have a possessory interest in the vehicle.

Compare *People v LeFlore*, 996 NE2d 678, 689 (Ill App 2013) (dicta noting the court's disagreement with the dissent's conclusion that a "defendant's status as an unlicensed driver does not necessarily defeat his expectation of privacy in [his girlfriend's] vehicle"), with id at 706 (Birkett concurring in part and dissenting in part) (stating that "[a]s a revoked driver, defendant clearly had no legitimate expectation of privacy in [his girlfriend's] vehicle or its movements").

[131] *Carpenter v United States*, 138 S Ct 2206, 2228 (2018) (Kennedy, J, dissenting) (noting the "commonsense principle that the absence of property law analogues can be dispositive of privacy expectations").

interest,[132] perhaps the best way to read *Byrd* is that the existence or possession of that right is crucial to establishing an expectation of privacy.

Is the right to exclude imperative to establish Fourth Amendment standing? The answer has been a moving target for over half a century. The Justices have sent conflicting signals on the question. Many years ago, Justice Robert Jackson commented on why a "right to exclude" should not be determinative of one's standing to challenge a police search in *McDonald v United States*.[133] There, police suspected McDonald of running an illegal numbers operation in a room he rented in a rooming house. Without a warrant, an officer opened a window of the landlady's apartment and climbed through. The officer identified himself to the landlady and then admitted his colleagues.[134] After searching rooms on the first floor, the police went to the second floor of the rooming house where McDonald's room was located. An officer stood on a chair and peered through the transom. Inside he saw McDonald and Washington with gambling paraphernalia. The officer ordered McDonald to open the door. McDonald and Washington were arrested and the evidence seized. The government contended that McDonald had no standing to complain about the intrusion into the landlady's premises and the arrest of the defendants was based on evidence seen in plain view from a location where the police were lawfully present.[135]

Although the Court ruled that the warrantless entry, search, and seizure violated the Fourth Amendment, the Court did not directly address the government's argument that McDonald lacked standing to challenge the entry into the landlady's home.[136] Justice Jackson,

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[132] I agree with Orin Kerr that the Court did not articulate why a "right to exclude" is a property interest. "The Court doesn't grapple with what doctrines or approaches to property law should govern [in this setting]. . . . [I]t's not entirely clear why [an unauthorized driver's right to exclude a carjacker is a property interest] or what kind of property law test the Court has in mind to understand the right to exclude." Kerr, *The Supreme Court Takes a Broad View* (cited in note 92).

[133] 335 US 451 (1948).

[134] According to Justice Jackson, the officer was in plain clothes, "showed his badge to the frightened woman and then brushed her aside and then unlocked doors and admitted two other officers." Id at 457–58 (Jackson, J, concurring).

[135] Id at 453–54.

[136] The Court simply stated: "We do not stop to examine that syllogism for flaws. Assuming its correctness, we reject the result." Id at 454. On a different aspect of *McDonald*, Professor Kuhns states that *McDonald* was "the first case to present a fourth amendment standing issue." Kuhns, 65 Iowa L Rev at 526 (cited in note 36). While not employing the

however, believed that McDonald had standing to challenge the police intrusion into the rooming house. "But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry."[137]

Since Justice Jackson proffered this view, the Court has gone back-and-forth on the importance of a right to exclude for standing purposes. Twenty years after Jackson's observation, in *Mancusi v DeForte*,[138] the Court held that a vice president of a local Teamsters Union had standing to challenge a search of an office he shared with other union officials.[139] The Court brushed aside the claim that DeForte lacked standing because he had no right to exclude others from the office. "It is, of course, irrelevant, that the Union or some of its officials might have validly consented to a search of the area where the records were kept, regardless of DeForte's wishes."[140] The Court explained that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[141]

Similarly, in *Minnesota v Olson*,[142] police entered the home of Robert Olson's girlfriend during the afternoon without a warrant to arrest him for murder.[143] Olson had spent the previous night at the residence and some of his clothes were there. After the Minnesota Supreme Court concluded that Olson had a sufficient interest in the girlfriend's home to contest the police entry, the Court affirmed, holding that a person's "status as an overnight guest is alone enough

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term "standing," *McDonald* "upheld the right of one defendant [Washington] to exclude illegally obtained evidence solely on the ground that his codefendant [McDonald] was entitled to exclude the evidence." Id (footnote omitted). Eventually, this aspect of *McDonald* was overruled by *Alderman v United States*, 394 US 165, 171 (1969) (rejecting the argument that "if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his codefendant or coconspirator"); id at 172 (stating that "[c]oconspirators and codefendants have been accorded no special standing").

[137] *McDonald*, 335 US at 458 (Jackson, J, concurring).

[138] 392 US 364 (1968).

[139] Id at 369.

[140] Id at 369–70.

[141] Id at 368.

[142] 495 US 91 (1990).

[143] Id at 93.

to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable."[144] In doing so, the Court rejected the State's argument that Olson's claim of a protected interest in the premises turned on whether he "had complete dominion and control over the apartment and could exclude others from it."[145] The Court noted that the fact that the host "has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy."[146] Reserving constitutional protection only to those with the authority to exclude others was inconsistent with societal norms. "If the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto."[147]

On the other hand, statements from the Court in other cases appear to condition Fourth Amendment protection on a right to exclude third parties. In a baffling footnote that both emphasized and discounted the importance of property interests to Fourth Amendment protection, Justice Rehnquist stated in *Rakas*, "One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."[148] And in another part of *Rakas*, Rehnquist distinguished car passengers from someone who is allowed to stay in a friend's apartment while the friend is away temporarily or a person using a telephone booth. The person staying at a friend's apartment "ha[s] complete dominion and control over the apartment and could exclude others from it" and the person using the phone booth is able "to exclude all others."[149] Tellingly, Rehnquist over-

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[144] Id at 96–97.

[145] Id at 98.

[146] *Olson*, 495 US at 99.

[147] Id at 99–100. See also *Bumper v North Carolina*, 391 US 543, 548 n 11 (1968) (stating that there was "no question of [Bumper's] standing to challenge the lawfulness of the search" of his grandmother's home "because the house searched was his home").

[148] *Rakas*, 439 US at 143 n 12 (citations omitted).

[149] Id at 149, citing *Jones v United States*, 362 US 257 (1960), and *Katz v United States*, 389 US 347 (1967). *Katz* held that government eavesdropping on the conversations of someone who uses a public telephone constitutes a search and seizure under the Fourth Amendment. "[A] person in a telephone booth may rely upon the protection of the Fourth

looked whether a passenger in a car could exclude third parties from the vehicle.[150]

One year after *Rakas*, in *Rawlings v Kentucky*,[151] the Court was more adamant about the necessity of having a right to exclude in order to claim Fourth Amendment protection.[152] In that case, police lawfully entered a home to arrest the homeowner. Although the homeowner was absent, police discovered several persons and "smelled marihuana smoke and saw marihuana seeds" in the home.[153] Three persons, including David Rawlings and Vanessa Cox, were detained to await the arrival of a search warrant. When other officers returned with the warrant, an officer ordered Cox to empty the contents of her purse. The purse contained a large quantity of illegal drugs, which Rawlings claimed were his. The Kentucky Supreme Court ruled that Rawlings had no standing to contest the search of the purse.[154] As he did in *Rakas*, Justice Rehnquist authored the Court's opinion. In rejecting Rawlings's argument that he had a privacy interest in the purse because Cox had given him permission to store his drugs in the purse,[155] Rehnquist outlined several factors that undercut Rawlings's claim.[156] One factor was that Rawl-

Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." Id at 352.

[150] In fact, Justice Rehnquist's opinion in *Rakas* never bothers explaining "why the passengers did not have a legitimate expectation of privacy in their friend's car, other than on [his] say so. After all, they seemed to do as much, if not more, to maintain privacy in their friend's car as Mr. Katz did in the public phone booth." Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 Nev L Rev 570, 601 (2008).

[151] 448 US 98 (1980).

[152] Id at 105.

[153] Id at 100.

[154] *Rawlings v Commonwealth*, 581 SW2d 348, 349 (Ky 1979).

[155] A majority of the Justices expressed skepticism that Cox consented to the transfer of the drugs. *Rawlings*, 448 US at 105.

[156] The Court deemed important the following: (1) When Rawlings placed the drugs in Cox's purse, "he had known her for only a few days." (2) Rawlings "had never sought or received [prior] access to her purse." (3) Rawlings did not "have any right to exclude other persons from access to Cox's purse." (4) The "precipitous nature of the transaction" did not support the inference that Rawlings took "normal precautions to maintain his privacy." (5) Rawlings's admission that "he had no subjective expectation that Cox's purse would remain free from governmental intrusion." Id. Professor Wayne LaFave has cogently explained why none these factors "can withstand close scrutiny" and are irrelevant to the issue decided in *Rawlings*. LaFave, 6 *Search and Seizure*, § 11.3(c) at 218–22 (cited in note 12).

ings lacked "any right to exclude other persons from access to Cox's purse."[157]

Obviously, the Court has not resolved whether a right to exclude others is essential to establish an expectation of privacy. The Court has read *Jones* and *Katz* to mean "that a right to exclude is one way to gain an expectation of privacy."[158] Other cases, such as *DeForte* and *Olson*, establish that an absence of a right to exclude has no bearing on the issue. Finally, *Rakas* and *Rawlings* intimate that "without a right to exclude there can be no legitimate expectation of privacy."[159] Justice Kennedy, the author of *Byrd*, has noted elsewhere that where societal expectations of privacy exist, "the absence of any property right to exclude others" is irrelevant.[160] Unfortunately, *Byrd* makes no effort to clarify the issue or reconcile the tension among these cases.

If the "right to exclude others" is the basis for *Byrd*'s holding, then *Byrd* means that even when an owner who is not present provides consent to search, that consent is ineffective to override an unauthorized driver's refusal to allow a police search. During oral argument, several Justices asked questions that involved purported consent by the owner of the vehicle which appeared to supersede Byrd's privacy in the vehicle. For example, Chief Justice Roberts asked about a rental contract that contained a provision that required the driver to consent to a search if stopped by the police.[161] Justice Alito wanted to know whether Byrd could contest a police search "if the rental agreement said that if any unauthorized person uses the car,

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[157] *Rawlings*, 448 US at 105, citing *Rakas*, 439 US at 149. Of course, unlike Byrd and the defendants in *Rakas*, Rawlings claimed ownership of the drugs, and thus had a property interest in the items seized. That fact made no difference to the *Rawlings* Court because "*Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protection of the Fourth Amendment." *Rawlings*, 448 US at 105, quoting *Rakas*, 439 US at 149–50 n 17. The Court's duplicity is obvious:

> *Rakas* had emphasized the defendants' failure to allege ownership of the property seized, and it had said that an owner of property would "in all likelihood" have standing to challenge its search or seizure "by virtue of [his] right to exclude." Accordingly, the defendant in *Rawlings* said to the Supreme Court, "I am the owner." And the Court responded, "Mr. Rawlings, don't be arcane."

Alschuler, 4 NIU L Rev at 15 (cited in note 31).

[158] LaFave, 6 *Search and Seizure*, § 11.3(a) at 181 n 79 (cited in note 12).

[159] Id.

[160] *Minnesota v Carter*, 525 US 83, 101 (1998) (Kennedy, J, concurring).

[161] Oral Argument in *Byrd* at 4–5 (cited in note 44).

[the company] consent[s] to a search by the police?"[162] Finally, Justice Kennedy wanted an answer to the question of whether, if police phoned the car rental company and received permission to search the car, that search violated Byrd's Fourth Amendment right.[163] If a right to exclude is the driving force behind the result in *Byrd*, then the unauthorized driver defendant should prevail in each hypothetical because he has "lawful possession and control [of the vehicle] and the attendant right to exclude,"[164] and thus would have an expectation of privacy to challenge any search. And even if the rental company has a superior property interest over an unauthorized driver vis-à-vis the vehicle, as in Justice Kennedy's hypothetical, the company's property interest does not eliminate the unauthorized driver's reasonable expectation of privacy that comes with lawful possession and control. Curiously, counsel for Byrd told the Justices that "the owner can—can grant [police] consent—to search the—the car."[165] That answer, however, is inconsistent with the Court's precedents.[166]

2. *A change in Fourth Amendment doctrine?* Assuming that the right to exclude is essential to the result in *Byrd*, does this logic signify a change in Fourth Amendment doctrine? Consider the defendants in *Rakas* who were passengers in a vehicle. They too likely possessed a right to exclude third parties. Imagine that the driver of the vehicle in *Rakas* stopped at a convenience store to purchase a cup of coffee, leaving the defendants, Rakas and King, inside the car to await her

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[162] Id at 9.

[163] Id at 10.

[164] *Byrd*, 138 S Ct at 1528.

[165] Oral Argument in *Byrd* at 10 (cited in note 44).

[166] Counsel's answer is inconsistent with *Chapman v United States*, 365 US 617 (1960), which held that a landlord did not have the authority to consent to a search of his tenant's home, and *Stoner v California*, 376 US 483 (1964), which held that a hotel clerk cannot consent to a search of the room of a hotel guest. Admittedly, *Byrd* seems distinguishable from *Chapman* and *Stoner* because Byrd was not authorized by the rental company to drive the rental car, whereas Chapman and Stoner were authorized respectively by the landlord and hotel to be on the premises. But that distinction brings us back to the relevance of Byrd's status as an unauthorized driver, which Justice Kennedy's opinion finds not to be particularly significant. See notes 83–92 and accompanying text. Finally, if the police called the rental company and got consent, as in Justice Kennedy's hypothetical, the conflict between the company's consent and Byrd's refusal to consent should be resolved in favor of Byrd. *Georgia v Randolph*, 547 US 103 (2006), ruled that where a wife gives police consent to search her home, but the husband is present and objects, the objection of the physically present husband prevails, rendering the warrantless search unreasonable as to the husband.

return.[167] With the driver inside the store, certainly Rakas and King, like Byrd, "would be permitted to exclude third parties from [the vehicle], such as a carjacker."[168] Yet, *Rakas* ruled that passengers lacked privacy interests in the glove compartment and area underneath the front seat, just as passengers lack privacy in the vehicle's trunk. To be sure, as Justice Kennedy reminded us, *Byrd* did "not involve a passenger at all but instead the driver and sole occupant of a rental car."[169] But that difference has no bearing on the right to exclude. If Byrd had been a passenger while his girlfriend drove the rental car to Pittsburgh, he would have still possessed a right to exclude third parties from the vehicle during a rest stop while his girlfriend was inside a restaurant buying a cup of coffee.

Similarly, consider whether a right to exclude would affect the result in *Minnesota v Carter*.[170] There, two men, Wayne Thomas Carter and Melvin Johns, came to Kimberly Thompson's home. Relying on a tip from a confidential informant, an officer went to a window of Thompson's ground-floor apartment and was able to observe through a gap in the closed blind Carter and John packaging cocaine. This observation led to a search warrant and the subsequent arrest of the defendants and the seizure of incriminating evidence. Police later determined that Carter and Johns lived in Chicago and came to the apartment "for the sole purpose of packaging the cocaine."[171] The men had never been to the residence before and were there for less than three hours. The Minnesota Supreme Court ruled that the defendants had standing to challenge the officer's observation because they had a legitimate expectation of privacy as guests in Thompson's home.[172] The Court reversed. Writing for five Justices, Chief Justice Rehnquist explained that the defendants' claim straddled between that of an overnight guest who the Fourth Amendment protects and one "merely 'legitimately on the premises'" who has no

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[167] The driver of the vehicle was apparently King's former wife. See Choper, Kamisar, and Tribe, *The Supreme Court* at 165 (remarks of Professor Kamisar) (cited in note 26).

[168] *Byrd*, 138 S Ct at 1528–29, citing Oral Argument in *Byrd* at 48–49 (cited in note 44).

[169] *Byrd*, 138 S Ct at 1528.

[170] 525 US 83 (1998).

[171] Id at 86.

[172] Id at 87, citing *State v Carter*, 569 NW2d 169, 174 (Minn 1997), quoting *Rakas*, 439 US at 143.

constitutional protection.[173] Ultimately, the Court found that the defendants had no legitimate expectation of privacy in the apartment due to "the purely commercial nature of the transaction," the "relatively short period of time on the premises," and their "lack of any previous connection" with Thompson.[174]

If a right to exclude others matters for standing purposes, Carter and Johns had a valid claim for Fourth Amendment protection. Although *Carter* never mentions the issue, one could reasonably conclude that Carter and Johns, as invitees, could have excluded a vacuum-cleaner salesman or a trespasser seeking entry into the apartment. As Justice Kennedy put it in *Byrd*, they "would be permitted to exclude third parties from [the apartment], such as a [burglar],"[175] while Thompson was out.

The above discussion is not meant to suggest that *Byrd* signals the overruling of *Rakas* or *Carter* or undercuts their holdings. Rather, the discussion is offered to illustrate that *Byrd*'s reliance on a right to exclude to establish a reasonable expectation of privacy proves too much yet too little. Of course, some might say that there were no stops for coffee in *Rakas* or vacuum-cleaner salesmen in *Carter*. But there was no carjacker in *Byrd* either.

c. do societal norms control?

In other parts of the opinion, Justice Kennedy focuses not on property interests but on social norms. For example, he concludes that the rental agreement was not voided by Byrd's operating the car, and he emphasizes that various restrictions in the agreement have no connection with the privacy interests of drivers.[176] Of course, social norms often influence Fourth Amendment cases.[177] Indeed, the "Court has correctly reasoned that the 'security' protected by the Fourth Amendment is not self-defining and takes its meaning from reasonable

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[173] *Carter*, 525 US at 91.

[174] Id.

[175] *Byrd*, 138 S Ct at 1528–29, citing Oral Argument in *Byrd* at 48–49 (cited in note 44).

[176] *Byrd*, 138 S Ct at 1529.

[177] See, for example, *Katz*, 389 US at 352 (noting that persons who use pay phones are entitled to assume that their conversations are not being recorded by the government; a contrary result would ignore the "vital role that the public telephone has come to play in private communications"); *Olson*, 495 US at 98–99 (explaining that staying overnight in another's home is a "longstanding social custom that serves functions recognized as valuable by society").

expectations of privacy that the community's shared way of life sustains."[178] Justice Kennedy's opinion, however, is scant on the social norms that support the view that Byrd had a reasonable expectation of privacy in the rental car.

Are there social expectations or normative principles that support the result in *Byrd*? The law is well established that in routine cases police are not permitted to search a car without probable cause.[179] But *Byrd* does not rest on that legal norm. If it had, the Court would have issued a short opinion explaining that unauthorized drivers of rental cars possess the same Fourth Amendment rights as other drivers. Another possible answer is that everyone knows that unauthorized drivers frequently drive rental cars. Yet, Justice Kennedy does not mention or embrace this possible societal understanding as the basis for *Byrd*. Nor does Justice Kennedy ground his holding on the norm that Byrd's lawful presence in the vehicle secured him constitutional privacy. When pressed on the normative claim he was making, counsel for Byrd stated that:

> society recognizes that when you put your personal items in a locked space, . . . you have an expectation of privacy regarding it. . . . If someone is wrongfully present and creating a criminal act by being present, that's different. But the government concedes [Byrd] was not wrongfully present in the car, he had his personal items locked in the trunk, and as an objective matter, someone has a . . . reasonable expectation of privacy in those circumstances.[180]

This answer sounds like a mixture of privacy and "legitimately on [the] premises" norms, which was once enough to support Fourth Amendment standing, but was disavowed in *Rakas* as being sufficient, standing alone, to assert a Fourth Amendment interest.[181] *Byrd* reaffirms this aspect of *Rakas*.[182]

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[178] Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 Supreme Court Review 253, 274.

[179] See *Carroll v United States*, 267 US 132 (1925); *California v Acevedo*, 500 US 565 (1991); Justice Sotomayor was thinking about this norm when she asked during oral argument: "And absent probable cause, there's no right to search. So why are we here?" Oral Argument in *Byrd* at 21–22 (cited in note 44).

[180] Oral Argument in *Byrd* at 31–32 (cited in note 44).

[181] *Rakas*, 439 US at 143–48.

[182] "[I]t is also clear that legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy, because 'it creates too broad a gauge for measurement of Fourth Amendment rights.'" *Byrd*, 138 S Ct at 1527, citing *Rakas*, 439 US at 142.

Moreover, Justice Kennedy's opinion does not substantively apply the traditional *Katz* test, which measures privacy rights by asking whether the claimant has a subjective expectation of privacy that society deems reasonable. Even assuming Byrd thought he had a privacy interest in the car, why would society consider that expectation reasonable? Does society endorse an unauthorized driver operating a rental car? Or is this behavior reasonable because unauthorized drivers frequently drive cars they should not? Neither proposition is supported by a deep-seated societal understanding or any other obvious form of societal consensus. As noted above, the only societal norms or property interests remotely supportive of Byrd that were offered by the Court were that he had his girlfriend's permission to drive the car, and he had a right to exclude third parties. Unfortunately, Justice Kennedy does not provide a clear explanation for the *Byrd* holding.[183] Ultimately, lower courts will have to improvise when deciding future cases raising issues related to *Byrd*.

III. The Consequences of Byrd

While the basis of *Byrd*'s holding is undefined and "leaves a little bit unclear what test lower courts should [be] applying" in future cases,[184] one immediate result of *Byrd* is clear: in future cases, the typical unauthorized driver has standing to challenge a search of the rental vehicle he is operating.[185] Without saying so directly, Justice Alito refused to join this interpretation of *Byrd*. Rather, he took the position that "an unauthorized driver of a rental car is not always barred from contesting a search of the vehicle."[186] Whether an unauthorized driver could challenge a search, according to Alito, required consideration of multiple factors, including the provisions of the rental agreement, the circumstances surrounding the rental, why

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[183] See Kerr, *The Supreme Court Takes a Broad View* (cited in note 92) (stating that *Byrd*'s holding is "a bit difficult to pin down. . . . At times it sounds like not just property-like concepts but actual property law—property's right to exclude—that controls. . . . And at other times, the Court seems to not be applying property law at all. . . . So which is it, property? Social norms? . . . [T]he test itself isn't clearly resolved in *Byrd*.").

[184] Id.

[185] Lower courts have ruled that unauthorized drivers of rental vehicles have standing to contest the legality of a *seizure* of the vehicles they are driving. *United States v Starks*, 769 F3d 83 (1st Cir 2014); *United States v Worthon*, 520 F2d 1173 (10th Cir 2008). See also Bradley Michelsen, Comment, *Think Twice Before Borrowing a Friend's Rental Car: A Look at Fourth Amendment Standing Analysis in United States v. Worthon*, 34 Okla City U L Rev 263 (2009).

[186] *Byrd*, 138 S Ct at 1531 (Alito, J, concurring).

he was driving the vehicle, any property interest the driver possessed, and the lawfulness of the driver's conduct in the jurisdiction where it occurred.[187] "What this [instruction] permits in a variety situations is entirely unclear."[188] For example, how should police officers and judges apply two of the considerations suggested by Alito—the circumstances surrounding the rental and why the driver is behind the wheel? Answers to these questions will initially come from the unauthorized driver and are obviously subject to manipulation or falsehoods. For someone who favors workability and bright-line rules regarding police searches of vehicles,[189] Justice Alito's position promotes neither.

Byrd's holding mandates that in the run-of-the-mine case, an unauthorized driver of a rental car will be afforded the same constitutional protection as an authorized driver. Practically speaking, this is important because of the potential impact to society. One amicus brief informed the Court that there are "2.3 million rental cars currently in service" nationwide.[190] Further, "as of 2014, there were estimated to be about 19,115 car-sharing" vehicles in the country "shared by about 996,000 members."[191] *Byrd* means that the Fourth Amendment applies even when unauthorized drivers of rental vehicles and unregistered drivers of car-sharing programs take the wheel.

Moreover, the logic of *Byrd* is unlikely to be confined to cases involving rental cars.[192] One topic that *Byrd* may affect is whether a defendant has standing to challenge the installation and use of a GPS tracking device to locate a vehicle. In *United States v Jones*,[193] the Court unanimously agreed that this police conduct constituted a

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[187] Id.

[188] *Arizona v Gant*, 556 US 332, 361 (2009) (Alito, J, dissenting).

[189] See id at 360 (Alito, J, dissenting) (criticizing the majority's ruling because it eliminates a rule that was "relatively easy for police officers and judges to apply" and for adopting a test that requires "case-by-case, fact-specific decisionmaking").

[190] ACLU Brief at *20 (cited in note 67).

[191] Id at *21.

[192] Orin Kerr thinks *Byrd*'s analysis will impact the privacy protection afforded e-mail. According to Kerr, lower courts have ruled that "terms of service can eliminate Fourth Amendment rights that otherwise exist in a person's e-mail." Kerr believes that this view is wrong because "terms of service can at most control who has third party consent rights rather than who has a reasonable expectation of privacy in e-mail. *Byrd*'s explanation of why the terms of a rental contract don't control expectations of privacy in a car seems custom-made to bolster the argument that terms of service don't control expectations of privacy in e-mail." Kerr, *The Supreme Court Takes a Broad View* (cited in note 92).

[193] 565 US 400 (2012).

search under the Fourth Amendment, though the Justices were divided as to why. Five Justices adopted a property-based trespass analysis and emphasized that the government "physically occupied property for the purpose of obtaining information."[194] A different set of five Justices applied *Katz* to conclude that the defendant's "reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."[195] Since *Jones* was announced, lower courts have grappled with who may contest GPS installation and monitoring. As Professor Wayne LaFave has helpfully explained, three categories of defendants have been afforded standing by the lower courts:

> (1) only those persons with a sufficient property interest in the vehicle at the time of the initial "trespass" by which the GPS device was attached; (2) only those persons using or with an interest in the vehicle at the time the tracking information was obtained; or (3) only those persons qualifying in *both* respects.[196]

Regarding the first category, lower courts have suggested that unless a defendant has a property interest in a vehicle when police attach a GPS device, that defendant lacks standing to contest the installation.[197] After *Byrd*, however, a defendant challenging installation of a GPS device would not need a formal property interest in the vehicle or even proof that he is the regular driver of the vehicle. Under *Byrd*, it is enough that the defendant has "lawful possession and control"[198] at the time the GPS device is installed to merit standing.

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[194] Id at 404.

[195] Id at 415 (Sotomayor, J, concurring) (joining Justice Alito's opinion that long-term GPS monitoring constitutes a search); id at 430 (Alito, J, concurring in the judgment) (explaining that "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy").

[196] LaFave, 6 *Search and Seizure* § 11.3(e) Pocket Part at 30 (2017–18) (cited in note 12).

[197] See *United States v Sparks*, 711 F3d 58, 62 n 1 (1st Cir 2013) (dicta noting that Sparks did not own the vehicle, "but was its usual driver"; "on the other hand, [Michaud] seems to have had no equivalent interest in the" vehicle); *United States v Hernandez*, 647 F3d 216, 219 (5th Cir 2011) (concluding, before the decision in *Jones*, that defendant lacked standing to challenge installation of GPS because the truck was registered to his brother, defendant was not a regular driver and no proof that defendant had possessory interest in the house where truck was located when the GPS was attached). But see *People v LeFlore*, 996 NE2d 678, 688 (Ill App 2013) (concluding that if the defendant borrowed the vehicle with his girlfriend's consent, he has standing to contest "the State's use of the GPS device and any evidence obtained from that use, despite not being in possession of the vehicle when the GPS device was installed").

[198] *Byrd*, 138 S Ct at 1524.

When determining whether a defendant may challenge the monitoring (as opposed to the installation) of a GPS device attached to a vehicle, some lower courts have required that the defendant prove that he was either operating the vehicle or had a possessory interest in the vehicle at the time the tracking data are obtained. For example, in *United States v Gibson*,[199] the Eleventh Circuit concluded that a defendant lacked standing to challenge the use of a GPS tracking device to locate a vehicle on a particular day because he was neither the driver nor a passenger in the vehicle and held no possessory interest in the vehicle. Responding to the dissent's argument that the defendant had a reasonable expectation of privacy in the vehicle because he had the status of a co-owner of the vehicle, the court emphasized that the defendant failed to prove "that he had exclusive custody and control of the [vehicle]."[200] Requiring "exclusive custody and control" of a vehicle to claim a legitimate privacy interest seems inconsistent with *Byrd*. Certainly, Terrence Byrd did not have "exclusive custody and control" of the rental car that he was not authorized to drive. Byrd merely obtained the keys from a legitimate renter and drove away. Under typical conditions, that is enough to establish standing, notwithstanding the fact that Byrd could not bar the legitimate renter or the rental company from regaining control of the vehicle.

Moreover, a strong argument can now made that "a passenger *qua* passenger"[201] has a reasonable expectation of privacy that the vehicle he is traveling in is not subjected to GPS monitoring solely at the discretion of the police. Decided five weeks after *Byrd*, *United States v Carpenter*[202] leaves no doubt that an individual has a "reasonable expectation of privacy in the whole of his physical movements."[203] Specifically, *Carpenter* held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell-site location information] CSLI."[204] And

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[199] 708 F3d 1256 (11th Cir 2013).

[200] Id at 1278 (explaining that defendant lacked a privacy interest in the vehicle "because he was not the legal owner of the [vehicle], he has not established that he had exclusive custody and control of the [vehicle], and he was neither a driver of, nor a passenger in, the [vehicle] when it was searched").

[201] *Rakas*, 439 US at 148–49.

[202] 138 S Ct 2206 (2018).

[203] Id at 2217.

[204] Id.

though the Justices in *Carpenter* debated whether CSLI data are more or less precise than GPS tracking information, Chief Justice Roberts's opinion for the majority left no doubt that the constitutional issue was not going to turn on which type of technology was more accurate.[205] Instead, what mattered was that the government's access to CSLI related to Carpenter "invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements."[206]

Under *Carpenter*'s logic, even a mere passenger should have standing to contest the use of a GPS device to monitor a vehicle in which he is traveling.[207] To the extent that *Rakas*'s holding is inconsistent with this position, then its holding—that legitimately being inside a vehicle is not sufficient to establish standing to contest a search of the vehicle—does not survive either *Jones* or *Carpenter*, which have clearly refashioned and extended Fourth Amendment protection. As explained by the Chief Justice, five Justices in *Jones* concluded that GPS monitoring of a vehicle violates the Fourth Amendment rights of persons who have a reasonable expectation of privacy "in the whole of their physical movements."[208] *Carpenter* reaffirmed that conclusion and extended constitutional protection to the gathering of CSLI by the government. Nothing in the reasoning of either *Jones* or *Carpenter* supports denying the protection of those rulings to passengers.[209] After *Carpenter* and *Jones*, "everyone inside the car—everyone whose location becomes known" due to GPS monitoring or CSLI data collection, should have standing.[210] Put differently,

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[205] Id at 2210 (stating that "the rule the Court adopts 'must take account of more sophisticated systems that are already in use or in development.' . . . [T]he accuracy of CSLI is rapidly approaching GPS-level precision.").

[206] *Carpenter*, 138 S Ct at 2219.

[207] See, for example, *Commonwealth v Rousseau*, 990 NE2d 543, 553 (Mass 2013) (concluding, before the *Carpenter* decision, under the state constitution that "the government's contemporaneous electronic monitoring of one's coming and goings in public places invades one's reasonable expectation of privacy" even in the absence of a property interest in the vehicle).

[208] *Carpenter*, 138 S Ct at 2217, citing *Jones*, 565 US at 430 (Alito, J, concurring in the judgment); id at 415 (Sotomayor, J, concurring).

[209] Justice Scalia's opinion in *Jones* did not address Jones's standing to challenge the installation of the GPS device on his wife's vehicle. The government acknowledged that Jones was "the exclusive driver" of the vehicle. Scalia did comment that while Jones was not the owner of the vehicle, he "had at least the property rights of a bailee." *Jones*, 565 US at 404 n 2.

[210] See Orin Kerr, *Does Fourth Amendment Standing Work Differently for Jones Trespass Searches, Traditional Katz Searches, and Long-Term Katz Searches?* (Volokh Conspiracy, Feb 14, 2012), archived at http://perma.cc/9DTK-GU49 ("If the theory is about privacy rights in one's public physical location, not what is inside the car, I'm not sure that the standing

the "seismic shifts in digital technology"[211] and the government's ability to obtain vast amounts of personal information by using modern technology have rendered *Rakas*'s view of a passenger's privacy interest obsolete in the twenty-first century.

IV. Conclusion

In the final section of his opinion, Justice Kennedy intimates that we should have predicted the result in *Byrd*. "Though new, the fact pattern here continues a well-traveled path in this Court's Fourth Amendment jurisprudence."[212] In Justice Kennedy's view, the Court's precedents support *Byrd*'s holding "that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy."[213] The Court's precedents on standing are indeed "well-traveled." But that path is not clearly marked. The Court's rulings offer myriad directions and they lack guidance for judges and lawyers. While Justice Kennedy wants us to think that the reasoning and holding in *Byrd* is obvious, his opinion relies on property interests and societal norms that are hardly evident.

Some current Justices and scholars insist that property law has had and should continue to have an overriding influence in deciding Fourth Amendment cases.[214] *Byrd* regrettably follows that approach when Justice Kennedy states that "property concepts" will guide the

analysis still focuses on rights to the inside of the car (as it traditionally does). Under the logic of [Justices Alito and Sotomayor in *Jones*] rationale, shouldn't everyone inside the car—everyone whose location becomes known, have standing? Why should rights in the inside of the car matter under the long-term search inquiry?").

[211] *Carpenter*, 138 S Ct at 2219.

[212] *Byrd*, 138 S Ct at 1531.

[213] Id.

[214] See, for example, *Carpenter*, 138 S Ct at 2239 (Thomas, J, dissenting) ("The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment."); William Baude and James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv L Rev 1821, 1837–39 (2016) (noting that the key episodes in the historical development of the Fourth Amendment focused on property law). In the context of a case addressing "conversational privacy," the Justice responsible for the *Katz* test, Justice John Harlan, urged his colleagues to "reject traditional property concepts entirely, and reinterpret standing law in the light of the substantive principles developed in *Katz*." *Alderman v United States*, 394 US 165, 191 (1969) (Harlan, J, concurring in part and dissenting in part). For Harlan, that meant "[s]tanding should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that *Katz* protects." Id (footnote omitted).

Court's decision making.[215] But property rights should not control the meaning and scope of the Fourth Amendment. Orin Kerr has convincingly shown that—over the course of the Court's Fourth Amendment jurisprudence—concepts of property law have not been decisive for the Court.[216] And as a policy matter, property rights should not control who has standing to invoke the Fourth Amendment. Rather, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[217] As the Court's precedents demonstrate, when the Justices rely upon property concepts like a right to exclude third parties to decide who has standing, inconsistent results and confusion are inevitable because officers in the field cannot easily determine remote property interests. Accurate measurement of property rights often requires extensive fact-finding post hoc.

There was another "well-traveled path" available to the Court in *Byrd*. Police cannot search a motorist's vehicle unless probable cause exists that the vehicle contains evidence of criminality. If Byrd's operation of the vehicle was not a crime, why should he not have the same Fourth Amendment rights as other lawful drivers? The Court could have ruled *simpliciter* that unauthorized drivers (who are not car thieves) occupy the same seat as other drivers: police cannot search their vehicles without probable cause. Period. No need to ponder "property concepts"[218] like a right to exclude third parties. If there is no probable cause, there can be no search. That approach would have avoided future confusion for police, judges, and the public. And it would have promoted a traditional view of the Fourth Amendment: police should not have "unbridled discretion" to invade the privacy of motorists.[219]

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[215] *Byrd*, 138 S Ct at 1527.

[216] Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Supreme Court Review 67, 69 ("To the extent the early cases reveal any consistent methodology, they suggest a mix of property, privacy, and policy concerns not entirely dissimilar to those that have influenced the *Katz* test."); id at 87 (noting that despite claims made by the Justices in the 1960s, "the Court had never held that 'property interests control' Fourth Amendment law. Property traditionally had played a role in Fourth Amendment law, just as it continues to play a role today. But it was never the exclusive test.").

[217] *Mancusi v DeForte*, 392 US 364, 368 (1968).

[218] *Byrd*, 138 S Ct at 1527.

[219] *Delaware v Prouse*, 440 US 663, 648 (1979).