LIVE AND LET DRIVE: THE STRUGGLE FOR UNAUTHORIZED DRIVERS OF RENTAL CARS IN ATTAINING STANDING TO CHALLENGE FOURTH AMENDMENT SEARCHES

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This Note analyzes the current circuit split regarding standing for unauthorized drivers of rental vehicles to challenge Fourth Amendment searches. Courts have adopted three different approaches to determine such standing. Some circuits apply a bright-line rule that denies standing to any unauthorized driver. Other circuits utilize a modified bright-line approach that focuses on whether the renter granted the unauthorized driver permission to drive the vehicle. Finally, other circuits implement a totality-of-the-circumstances approach, considering a variety of factors regarding the driver's relationship with the renter and the rental company.

This Note addresses the increasing relevance and use of rental vehicles in today's society, as well as the law relating to Fourth Amendment standing. After conducting a thorough analysis of each approach to standing for unauthorized rental vehicle drivers, the author critiques each approach, examining the merits and shortcomings of each rule. Finally, the author advocates for a new approach that will provide more consistent results and afford an unauthorized driver the opportunity to demonstrate a legitimate expectation of privacy in the vehicle.

I. INTRODUCTION

A family travels to the great Southwest on vacation to see the Grand Canyon and several other national parks. They rent a car so that they can enjoy the beautiful scenery while traveling from location to location. While driving through a picturesque canyon, the family stops to take pictures at several scenic lookouts. While the mother and father are enjoying the sights at one lookout, their twenty-two-year-old son realizes he left his backpack at the last lookout only a mile back. Instead, he took another tourist's backpack that was identical to his own. The son, a perfectly capable driver, offers to drive himself the two minutes back to the previous lookout point so his parents can continue to enjoy the scenery and stretch their legs. This presents the family with a dilemma be-

cause the father is the only person who signed the rental agreement, and, therefore, is the only person authorized to drive the rental car.

This example demonstrates how situations may arise where an unauthorized driver might get behind the wheel of a rental car. To continue with this hypothetical, suppose the father decides there is no real harm in allowing his oldest son to drive himself the mile back to the previous stop to get his backpack. On the way, a police officer pulls the son over for driving two miles per hour over the speed limit. The officer asks the son if he will consent to a search. The son questions why the officer wants to search the vehicle, to which the police officer barks, "Because I feel like it, what do you care?" The officer then proceeds to rummage through the backseat of the car, over the son's objections. While searching in the mistakenly taken backpack, the officer finds a small bag of what he believes to be cocaine, and he arrests the son. As part of his defense, the son would like to object to the violation of his Fourth Amendment right against unreasonable searches,[1] but he may not have that opportunity because of the varying approaches courts take regarding standing for unauthorized rental car drivers.

Depending in which federal circuit a suit is brought, an unauthorized driver of a rental car may or may not have standing to object to the search.[2] Authorization by the rental company may seem like a small detail, but it can determine a plaintiff's standing under the Fourth Amendment.

This Note analyzes the current circuit split on standing for unauthorized drivers of rental vehicles to challenge searches under the Fourth Amendment. Part II provides background about the increasing relevance and use of rental vehicles in today's society, as well as a summation of the law relating to Fourth Amendment standing. Part III presents the different approaches to determine standing for unauthorized rental vehicle drivers and critiques each approach. Part IV considers the merits and shortcomings of each approach and advocates for a new approach based on these considerations and Supreme Court precedent regarding standing.

II. BACKGROUND

Rental vehicles are becoming more common in the everyday lives of many Americans. As renting cars becomes more common, more people must decide whether to allow friends or family members to drive a rented car. This Section first describes the common use of rental cars in society. Next, to provide a background of the law surrounding standing, this Section describes how courts evaluate whether a defendant has a le-

1. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

2. *See* discussion *infra* Part II.B.

gitimate expectation of privacy.[3] As the car rental industry grows, a unified approach to determine standing for objecting to Fourth Amendment searches of rental vehicles is of increasing importance. This Section describes several recent decisions that demonstrate the potential variance in outcomes, depending in large part on the approach adopted by a particular court to determine standing for unauthorized drivers of rental vehicles.[4]

A. Common Use of Rental Vehicles in Society

Traditionally used for away-from-home travel, rental vehicles are becoming more and more relevant in the everyday lives of Americans.[5] In 2005, a poll showed that about one-third of drivers ages twenty-five or older needed a vehicle other than their primary automobile and were "more likely to rent a vehicle to meet that need."[6] A driver might need a bigger car for just one morning, simply to carpool with a child's sports team or to move a piece of furniture across town. Urban residents who do not own cars may need a car for limited purposes. If a person's car is in the shop or in need of repairs, she may need to rent a car in the interim. Car rental companies are meeting this growing need by opening neighborhood locations.[7]

Car rental companies generally place restrictions on who can rent cars and what can be done with those cars. Drivers are often required to be of a minimum age—typically twenty-five or twenty-one, with additional fees—and have a valid driver's license.[8] In addition, renters must often pay with a credit card to provide their information to the rental

3. Standing is not so much the relevant inquiry under today's law, as much as whether a person has a "legitimate expectation of privacy." *See* Rakas v. Illinois, 439 U.S. 128, 143 (1978).

4. Cases may have similar facts involved, yet depending on the court's interpretation of a "legitimate expectation of privacy," the same defendant might have standing in one circuit, but not in another. *See* discussion *infra* Part II.C. (describing facts of United States v. Dennis, No. 06-650-01, 2007 WL 2173394 (E.D. Pa. July 27, 2007), and United States v. Boruff, 909 F.2d 111 (5th Cir. 1990)).

5. The Auto Channel, Rental Car Industry Expansion into Neighborhoods to Meet Lifestyle and Transportation Needs (May 1, 2005), http://www.theautochannel.com/news/2005/05/18/090459.html.

6. *Id.* ("Nearly half of survey respondents (46 percent) say they are more likely to rent an automobile for personal use if there is a rental car location near their neighborhood—a 20 percent increase from 1995. The rental car industry is meeting this trend via a steady expansion into neighborhoods.").

7. *See, e.g.*, *id.* (discussing the expansion of Enterprise, an industry leader in the rental car market, into neighborhoods). The article goes on to note that a poll showed that 54 percent of drivers would prefer to rent a car than borrow from a friend. *Id.*; *see also* Hertz, Other Hertz Operations, https://www.hertz.com/rentacar/misc/index.jsp?targetPage=USOHOfooter2.jsp (last visited Aug. 29, 2009) (describing Hertz Local Edition, which specializes in convenient locations to serve neighborhood needs).

8. English the Easy Way, Car Rental-Hidden Cost, http://www.english-the-easy-way.com/Reading/Travel/Car_Rental_Hidden_Costs.html (last visited Aug. 29, 2009).

company; restrictions such as using the car only for legal purposes or only in a limited area may also be imposed.[9]

The Hertz rental company authorizes an individual who signs the rental agreement to drive the car, provided that the individual furnishes a valid driver's license and, sometimes, a second form of identification.[10] Hertz allows individual renters to add "additional authorized operators" to the rental agreement for a fee of $13.00 per additional driver per day.[11] These additional authorized operators, however, are subject to more restrictions: they must be present and sign the rental agreement at the time of rental and they must present an acceptable credit or debit card in their own name, as well as a valid driver's license verifying that they are at least twenty-one years old.[12] Hertz will only authorize a driver automatically—that is, without meeting these additional requirements—in extremely limited circumstances.[13] Rental policies of other companies are comparable.[14]

For the most part, additional drivers must meet the same basic qualifications as any other renter to be authorized to drive the vehicle, and they must be present and sign the agreement. Though it is possible to authorize additional drivers, the extra trouble may not seem worthwhile at the time of rental, especially when allowing another person to drive the car seems harmless.

Recall the opening hypothetical with the son who drove his father's rental car. Here was a sympathetic character who had permission to drive the car from his father, was driving for only a short time, and was seemingly abused by the police officer. Imagine, however, less sympa-

9. One rental company imposed additional fines for speeding, and these were enforced through the use of global tracking and satellite technology; however, the fines were struck down because they were not fully disclosed to renters. Paul Zielbauer, *Car Rental Agency Is Ordered to Stop Charging Speeders Fines*, N.Y. TIMES, Feb. 21, 2002, at B5, *available at* http://query.nytimes.com/2002/02/21/nyregion/car-rental-agency-is-ordered-to-stop-charging-speeders-fines.html.

10. Hertz, Requirements to Rent, https://www.hertz.com/rentacar/customersupport/index.jsp?targetPage=faqsRightNow.jsp&leftNavUserSelection=globNav_9_1 (last visited Aug. 29, 2009). The company may require a credit card or even simply a utility bill demonstrating the person's current address. *See, e.g.*, Hertz, What Is an Example of a 3rd Form of ID?, https://www.hertz.com/rentacar/customersupport/index.jsp?targetPage=faqsRightNow.jsp&leftNavUserSelection=globNav_9_1 (last visited Aug. 29, 2009).

11. Hertz, Authorized and Additional Authorized Operators, https://www.hertz.com/rentacar/byr/index.jsp?targetPage=rentalQualificationsView.jsp?KEYWORD=OPERATORS (last visited Aug. 29, 2009). The fee is capped at a maximum of $65.00 per rental, but it is unclear as to whether that means each Additional Authorized Operator may only be added for five days to the rental, or whether the total amount of fees for all additional operators may not exceed $65.00. *Id.*

12. *Id.* There are some exceptions to this—in California, no fee for Additional Authorized Drivers is applied, and in New York, the fee is only $10.00 per additional driver per day, with a maximum of $50.00 per each Additional Authorized Driver. *Id.*

13. Automatically authorized drivers must meet minimum age criteria. In situations where the renter is a business and books with a Corporate Discount Number, an employee, employer, or fellow employee of the renter will be authorized. *Id.* The renter's spouse may be automatically authorized, but only for rentals that originate in California, Iowa, or New York. *Id.*

14. *See, e.g.*, Alamo, Alamo Rental Policies, http://www.alamo.com/ (last visited Aug. 29, 2009) (follow "rental policies" hyperlink); Dollar, General Policies, http://www.dollar.com/AboutUs/GeneralPolicies.aspx (last visited Aug. 29, 2009).

thetic characters who may seek to challenge a search—often the subject of cases before the United States Courts of Appeals.[15] Maybe the driver, a drug user with a suspended license, acquires a rental car from a friend.[16] Or maybe the driver carries a false driver's license and acquires cars from seemingly random renters to assist in his drug dealings.[17] Regardless of whether the unauthorized driver is a sympathetic character, he may want to object to the procedure used by the police officer in searching the car. This requires standing to object to the search.[18]

B. Standing Is Measured by a "Legitimate Expectation of Privacy"

Constitutional rights, such as those protected by the Fourth Amendment, may only be raised by a person with standing to assert the protected right.[19] If a person is granted standing, he has, for example, the opportunity to challenge the inclusion of evidence that was gathered against him through improper police conduct.[20] Thus, the presence or absence of standing is of significant consequence.

Generally, an individual must show that she was the actual "victim of a search or seizure."[21] A person is without standing when he makes a claim to suppress evidence collected in a search or seizure that actually violated another person's rights.[22] For example, if person *A*'s home is searched and evidence incriminating person *B*—who is absent from the scene—is uncovered, person *B* cannot object to an unreasonable search of person *A*'s home on Fourth Amendment grounds; person *B* would have standing only if it was *B*'s home that was searched.[23] After the decision in *Rakas v. Illinois*,[24] the proper inquiry for determining Fourth

15. *See* discussion *infra* Part III.A.

16. *See, e.g.*, United States v. Best, 135 F.3d 1223, 1224 (8th Cir. 1998) (describing factual situation where a driver was without a valid license so he borrowed a rental car from his best friend in order to visit his daughter).

17. *See, e.g.*, United States v. Thomas, 447 F.3d 1191, 1194 (9th Cir. 2006) (describing factual situation where drug trafficker instructed someone with whom he did not seem to have any prior relationship to rent a car for him).

18. Under the Fourth Amendment, a person has protection against unreasonable search and seizure provided that the person has a legitimate expectation of privacy in the invaded area; this inquiry determines standing. *See* discussion *infra* Part II.B.

19. *See* U.S. CONST. art. III, § 2 (limiting what can be heard by the federal courts to "cases" and "controversies"). This has been interpreted to mean that "the Supreme Court will separate those persons who have a sufficient injury or controversy that justifies an Article III court ruling on their claims from disgruntled citizens." JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 34 (2004).

20. *See* NOWAK & ROTUNDA, *supra* note 19.

21. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 343 (4th ed. 2006) (internal quotations omitted). Dressler and Michaels describe Fourth Amendment rights as being "personal," and not "vicariously asserted." *Id.*

22. *Id.*

23. Under *Minnesota v. Olson*, 495 U.S. 91, 94 (1990), an overnight guest may still have a legitimate expectation of privacy, but person *B* would not have a legitimate expectation of privacy if he was not in the home and had no ownership of the home.

24. 439 U.S. 128 (1978).

Amendment rights became whether the defendant's rights—and not someone else's—were violated by the challenged police action.[25]

After *Rakas*, establishing standing became more difficult.[26] Prior to *Rakas*, a defendant could establish standing under the Fourth Amendment if she: "(1) owned or had a possessory interest in the premises searched; (2) was legitimately on the premises at the time of the search; (3) owned the property seized; or (4) had lawful possession of the property seized."[27] In *Jones v. United States*,[28] the Supreme Court granted "automatic standing" where "possession of the evidence seized was a necessary element of the crime for which the defendant was being prosecuted."[29] For example, if drugs were seized by the police, and the defendant was charged with possession of drugs, the defendant would have automatic standing. The rule prevented the defendant from incriminating himself of an element of the charged crime merely by claiming ownership in order to challenge a search.[30] The Court eliminated this automatic standing rule in *United States v. Salvucci*.[31] In *Simmons v. United States*,[32] the Court held that a defendant's testimony supporting a Fourth Amendment motion to suppress evidence could not be used against him at trial. In *Salvucci*, the Court observed that the *Simmons* holding had resolved the self-incrimination dilemma.[33]

Under *Rakas*, however, the focus of the search became "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[34] For example, consider whether a person may ever have a legitimate expectation of privacy in another person's residence. Depending on a person's relationship with a homeowner or how much control of the residence the person has, he may challenge the search of the home in some circumstances, even if the

25. *See id.* at 143 (holding that the test for "capacity to claim the protection of the Fourth Amendment . . . [is] whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); 1 DRESSLER & MICHAELS, *supra* note 21, at 351.

26. In *Rakas*, Justice Rehnquist noted that he could "think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the . . . standing requirement . . . is more properly subsumed under substantive Fourth Amendment doctrine," but the new test did narrow the scope of measurement for Fourth Amendment rights. *Rakas*, 439 U.S. at 139; *see also* 1 DRESSLER & MICHAELS, *supra* note 21, at 351–53 (describing the Court's opinion in *Rakas* and the impact of its decision).

27. 1 DRESSLER & MICHAELS, *supra* note 21, at 348.

28. 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

29. 1 DRESSLER & MICHAELS, *supra* note 21, at 349.

30. *Id.*

31. 448 U.S. at 85.

32. 390 U.S. 377 (1968).

33. *Salvucci*, 448 U.S. at 84–85. The Court disregarded the justification of automatic standing—depriving prosecutors of the advantage of contradictory claims—by pointing out that it is not contradictory for a prosecutor to charge a defendant with drug possession and maintain that the defendant's Fourth Amendment rights were not violated by an unconstitutional search. *Id.* at 89.

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

homeowner is not present.[35] A greater degree of control over the apartment can create a legitimate expectation of privacy.

Consider an additional situation where a person may not have an ownership interest in the searched location, but still has a legitimate expectation of privacy. In *Minnesota v. Olson*, the Supreme Court granted a person standing to challenge the search of another's residence.[36] In *Olson*, an overnight guest was able to challenge police entry of a home, even though the guest lacked control over the premises and was never alone in the home.[37] In the decision, Justice White noted that the holding "merely recognizes the everyday expectations of privacy that we all share."[38] If a person was required to have absolute control of a home to have standing, "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."[39]

With respect to privacy interests in residences, the Court has not recognized unlimited standing for guests. In *Minnesota v. Carter*, the Court held that someone merely "legitimately on the premises" would not have standing, even though an overnight guest would.[40] The distinguishing factors that establish standing to object to a search of another person's residence appear to be the length of time on the premises, as well as the current and prior relationship between the owner and the guest.[41]

Under the Fourth Amendment, property used for commercial purposes is treated differently from purely residential property. Guests on the premises for commercial purposes, as in *Minnesota v. Carter*, have a lesser expectation of privacy.[42] While admitting that individuals still may have an expectation of privacy in commercial property, Justice Blackmun noted that "[a]n expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."[43]

35. In *Jones v. United States*, a guest who was alone in his friend's apartment when the search occurred had standing because he had keys to the premises, had slept there, and was considered to have complete dominion and control of the apartment absent the host. 362 U.S. 257, 259, 265 (1960).

36. Minnesota v. Olson, 495 U.S. 91, 99–100 (1990).

37. *See id*. at 99–100. *But cf. Jones*, 362 U.S. at 259, 265 (holding that overnight guest had standing where owner was not present, because he had complete control of the apartment).

38. *Olson*, 495 U.S. at 98.

39. *Id.* at 100.

40. 525 U.S. 83, 91 (1998). In *Minnesota v. Carter*, the guests were at an apartment for a limited amount of time for commercial purposes, and they did not have any prior relationship with the apartment or its owner. *Id.* at 90–91.

41. *Compare Olson*, 495 U.S. at 99–100 (holding that overnight guest has legitimate expectation of privacy), *with Carter*, 525 U.S. at 90–91 (holding that guest on premises for commercial purposes does not have legitimate expectation of privacy).

42. *See, e.g.*, *Carter*, 525 U.S. at 90 ("Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours.").

43. New York v. Burger, 482 U.S. 691, 700 (1987) (upholding a search because a business owner's expectation of privacy for commercial property is attenuated, especially in a "closely regulated" industry).

Though the Supreme Court has not issued an opinion on the issue of whether an individual has standing to challenge a search of another person's *rental* vehicle, it has ruled on the issue of standing to object to the search of another person's automobile. Based on the principles from *Rakas*, a non-owner may still have a reasonable expectation of privacy in the area of the vehicle searched.[44] For instance, if owner *A* lends her car to *D* for a week during which *D* is to have exclusive control over the car, *D* will have a legitimate expectation of privacy in the car, and accordingly have standing to object to a search.[45] If a non-owner occupant of a car has "exclusive dominion and control over the car," then he has a legitimate expectation of privacy and thus, standing.[46] A non-owner or passenger, however, may only have a legitimate expectation of privacy in limited areas of the car.[47]

In sum, the appropriate inquiry to determine standing for a Fourth Amendment search is whether the person claiming protection has a "legitimate expectation of privacy in the invaded place."[48] Given the expanding role of rental cars in everyday life and the ease of granting a friend or family member use of that rental car for a short period of time, the ability of an unauthorized driver to object to a search is becoming more significant.

C. Approach to Standing Makes a Difference

Recently, in *United States v. Dennis*, the United States District Court for the Eastern District of Pennsylvania decided whether an unauthorized driver of a rental car had standing to challenge a vehicle search.[49] In that case, prosecutors charged James H. Dennis with possession and intent to distribute cocaine after the police, acting on a tip, investigated a green Pontiac Grand Prix parked outside a property where they suspected Dennis was inside purchasing cocaine.[50] After Dennis ex-

44. Justice White expressed concern that after *Rakas*, passengers of cars would be able to attain standing too easily, noting, "Insofar as passengers are concerned, the Court's opinion today declares an 'open season' on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no 'mere' passenger may object, regardless of his relationship to the owner." Rakas v. Illinois, 439 U.S. 128, 157 (1978) (White, J., dissenting).

45. This is a fact pattern similar to the case involving the residence in *Jones v. United States*, where a guest in an apartment had standing because he had keys to the premises, had slept there, and was considered to have complete dominion and control of the apartment, as the host was not present. 362 U.S. 257, 259, 265 (1960); *see also* 1 DRESSLER & MICHAELS, *supra* note 21, at 358 (describing application of *Rakas* principles to automobile searches where the owner is not present).

46. *See* 1 DRESSLER & MICHAELS, *supra* note 21, at 357–58 (discussing the application of *Rakas* to automobile searches where the owner is absent).

47. In applying the "legitimate expectation of privacy" inquiry, a non-owner would *not* have a legitimate expectation of privacy if the owner had locked the trunk or glove compartment, thereby prohibiting access. *See Rakas*, 439 U.S. at 129, 148–49.

48. *Id.* at 143.

49. United States v. Dennis, No. 06-650-01, 2007 WL 2173394, at *4 (E.D. Pa. July 26, 2007). Dennis raised several arguments regarding the unreasonableness of the search, but the government responded that he lacked standing under the Fourth Amendment to challenge the search. *Id.*

50. *Id.* at *1–3.

ited the property, pulled away in the Grand Prix, and was pulled over by the police, Dennis was unable to provide a driver's license or vehicle registration.[51] When the police saw a white plastic bag underneath the front passenger seat of the car, they identified it as likely being cocaine.[52] The Grand Prix was a rental car, and Dennis was not an authorized driver under the terms of the agreement; he had, however, received permission to use the car from its renter, whom he had known for many years.[53] In this decision, the district court concluded that Dennis had a reasonable expectation of privacy in the property searched and that he could challenge the search of the rental vehicle.[54]

Compare the *Dennis* decision to *United States v. Boruff*, a 1990 decision, where the Fifth Circuit denied the defendant standing to challenge a search.[55] In *Boruff*, Boruff and Taylor planned to use a truck owned by Boruff and a car rented by Boruff's girlfriend—which she had given him permission to use—to smuggle drugs.[56] Because their caravan fit the profile of a smuggling pattern common to the area, the police pulled over the truck driven by Taylor, which contained marijuana, and the rental car driven by Boruff, which contained a radio and other paraphernalia linking Boruff to the drugs in the truck.[57] Both Boruff and Taylor were arrested; Boruff sought to object to the search of the rental car, but he was denied standing because the court determined that he did not have a legitimate expectation of privacy.[58]

In reading the facts of these recent decisions, one might wonder how the courts distinguished one situation from the next, granting standing to object to the search under the Fourth Amendment in the former scenario but not the latter. Courts in different circuits have come to different conclusions as to whether an unauthorized driver has a reasonable expectation of privacy in a rental vehicle.[59] The Supreme Court has yet to rule on this issue, leaving appellate courts to formulate their own rules, which often results in a lack of uniformity in appellate court approaches and rationales.[60]

51. *Id.* at *3.
52. *Id.*
53. *Id.*
54. *Id.* at *4–6. The court, however, determined that the search was reasonable and denied a motion to suppress the evidence recovered in the search. *Id.* at *8–10.
55. *See* United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990). Boruff argued that he had a legitimate expectation of privacy in the rental car because "he was in sole possession and control of the vehicle at the time of the stop." *Id.*
56. *Id.* at 113–14.
57. *Id.* at 114.
58. *Id.* at 117.
59. *See* discussion *infra* Part III.A.
60. *See* discussion *infra* Part III.

III. ANALYSIS

There are three main tests to determine standing for unauthorized drivers of rental cars. The first test is a bright-line rule that no unauthorized driver of a rental vehicle will have standing to challenge a search.[61] The second is a modified bright-line rule where, if the driver had the permission of the authorized driver to use the rental vehicle, then he will have standing to challenge a search.[62] The final approach to determine standing is a totality-of-the-circumstances test that takes into account a number of factors surrounding the driver's possession of the car.[63] Although each of these approaches has merit, each also has shortcomings.[64] Because each approach falls short in one aspect or another, perhaps a new approach that fuses the strengths and significant factors of each with past Supreme Court precedent is necessary.[65]

A. Circuit Court Approaches

Circuit courts have adopted three different approaches to determine standing for unauthorized drivers of rental vehicles. The bright-line approach provides that no unauthorized driver will ever have standing; anyone not listed as an authorized driver on the rental agreement cannot have a legitimate expectation of privacy.[66] The modified bright-line approach grants standing if an unauthorized driver has permission to use the vehicle from an authorized driver because this is a form of common authority over the car.[67] On the basis that standing is too fact-specific an inquiry to be governed by a bright-line rule, the totality-of-the-circumstances approach takes into account a number of factors surrounding the unauthorized driver and his relationship with the vehicle, renter, and rental agency.[68]

1. Bright-Line Rule: No Standing for Unauthorized Drivers of Rental Vehicles

Courts in the Fourth, Fifth, and Tenth Circuits have adopted a bright-line rule that unauthorized drivers of rental vehicles never have

61. *See* United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (holding that defendant did not have standing because he was not listed as authorized driver on car rental agreement); *see also* United States v. Roper, 918 F.2d 885, 888 (10th Cir. 1990); *Boruff*, 909 F.2d at 115, 117.

62. *See* United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006) (holding that defendant lacked standing, but only because he failed to present evidence that he had permission from the authorized driver to use the vehicle); *see also* United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998).

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

64. *See* discussion *infra* Part III.B.

65. *See* discussion *infra* Part IV.

66. *See* discussion *infra* Part III.A.1.

67. *See* discussion *infra* Part III.A.2.

68. *See* discussion *infra* Part III.A.3.

standing to challenge a search under the Fourth Amendment.[69] Courts in these circuits consider whether a search intrudes upon a space where an individual has a legitimate expectation of privacy—the baseline test for standing. Only then has the search violated the individual's Fourth Amendment rights.[70] Recall that this expectation of privacy must be one that society is prepared to recognize as being reasonable, and the courts reason that it is not objectively reasonable for an individual to expect privacy in an automobile rented under an agreement that forbids him from driving it.[71]

In *United States v. Roper*, the Tenth Circuit, applying this bright-line approach, denied Roper standing to challenge a search.[72] Roper was the driver of the car, and there were two passengers.[73] Griffin, a passenger, received the rental car from his common-law wife who had rented the vehicle.[74] Griffin's driver's license was suspended, so he hired Roper and the other passenger to drive the car cross-country; although Roper did not own any of the cocaine being transported, he was aware that it was in the car.[75] The court reasoned that Roper was not in lawful possession of the car, was not listed as an additional driver in the rental contract, and thus had no standing to challenge the search.[76] One judge concurred that Roper lacked standing, but disagreed with the court's adoption of the bright-line rule.[77]

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

70. *Wellons*, 32 F.3d at 119 ("[A]ppellant, as an unauthorized driver of the rented car, had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights.").

71. *Boruff*, 909 F.2d at 116. Boruff did not exhibit a reasonable expectation of privacy because he was "well aware of . . . restrictions" against use of the car for illegal activity and that he was authorized by the company to drive the car. *Id.* at 117.

72. *Roper*, 918 F.2d at 885. In *Roper*, the Tenth Circuit based its bright-line approach in part upon its prior decision in *United States v. Obregon*, 748 F.2d 1371 (10th Cir. 1984). *Roper*, 918 F.2d at 887. The decision in *Obregon*, however, was not necessarily reached using the bright-line approach. Instead, the court in *Obregon* recounted the "attenuated" relationship between the defendant and the rental car. *Obregon*, 748 F.2d at 1374. While stating that the defendant "may have had permission from the renter of the car to use it, . . . this is not determinative of the standing inquiry in this case," the court also stated that defendant had "made no showing that any arrangement had been made with the rental car company that would have allowed him to drive the car legitimately" and that "[d]efendant's relationship to the rented car is too attenuated." *Id.* (recounting the findings of the district court). This statement seems to leave open the possibility that had the defendant been able to prove a closer relationship to the car's renter, the court might have granted him standing. Thus, at the time of the *Obregon* decision, the Tenth Circuit may have considered more factors than only whether the driver's name is listed on the rental agreement, even though the circuit later adopted the bright-line approach.

73. *Roper*, 918 F.2d at 886.

74. *Id.*

75. *Id.*

76. *Id.* at 888.

77. *Id.* (McKay, J., concurring) ("I don't believe that standing should turn on whether someone is listed as an additional driver on a car rental contract. Whatever rights may exist between the driver with permission of the lessee and the lessor, they should not determine the driver's standing to object to a search.").

Adopting a similar bright-line approach in *United States v. Wellons*, a 1994 decision, the Fourth Circuit denied Wellons, the defendant, standing to challenge the search of his rental vehicle.[78] Wellons and two companions drove to Atlanta in a rented vehicle; the only authorized driver was one of Wellons's companions.[79] The two companions parted ways from Wellons, who continued to drive to Pittsburgh in the rented car that he was not authorized to drive.[80] On his way, Wellons was pulled over by a police officer and was unable to provide a rental agreement when asked for vehicle registration.[81] After Hertz verified that Wellons was not an authorized driver, the police officer searched the car and found cocaine in two bags of luggage.[82] The court denied Wellons standing because he was not listed on the rental agreement, which forbade use of the rental car by an unauthorized driver.[83]

The circuits choosing to adopt the bright-line rule justify it on the grounds that the defendant cannot vicariously attain standing.[84] Courts adopting this rule disregard whether the unauthorized driver had an authorized driver's permission to be driving the car—a fact that, as demonstrated by the opening hypothetical,[85] can distinguish between instances of authorized and unauthorized use of rental vehicles.[86] The Fifth Circuit clarified that it must be the driver's *own* expectation of privacy, not that of a third party.[87] Because the rental car is property belonging to the rental agency, only the rental agency can give true permission to use the vehicle.[88] Thus, the only person with a legitimate expectation of privacy would be the actual renter who has the permission of the rental agency to use the car. Proponents of the bright-line approach argue that permis-

78. 32 F.3d 117, 119–20 (4th Cir. 1994).

79. *Id.* at 118.

80. *Id.*

81. *Id.*

82. *Id.* at 119.

83. *Id.* ("[A]n unauthorized driver of the rented car[] had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights.").

84. *See, e.g.*, United States v. Roper, 918 F.2d 885, 887 (10th Cir. 1990).

85. *See supra* Part I.

86. Often times, a driver is using a car rented by someone with whom he has a close relationship. *Compare* United States v. Smith, 263 F.3d 571, 586–87 (6th Cir. 2001) (granting standing based on the totality-of-the-circumstances approach where defendant's wife rented a car and gave the defendant permission to drive it), *with Roper*, 918 F.2d at 887–88 (holding that the defendant driver did not have standing based on the bright-line approach where the driver was hired by the actual renter's boyfriend). Common trends, such as an increase in neighborhood car rentals and the fact that some states are adoption laws that count spouses as authorized drivers, demonstrate that car rental companies might expect for some rental car sharing to occur. *See, e.g.*, Hertz, Authorized and Additional Authorized Operators, *supra* note 11.

87. United States v. Boruff, 909 F.2d 111, 115 (5th Cir. 1990) ("[T]he defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party." (quoting United States v. Payner, 447 U.S. 727, 731 (1980))).

88. This line of reasoning extends the law of standing as related to an *individual* allowing another to borrow her vehicle, to an *agency* or *organization* allowing another to borrow its vehicle. *See supra* note 46 and accompanying text.

sion makes no difference in an unauthorized driver's expectation of privacy because the rental company, not the authorized driver, is the owner of the car, and the rental agreement expressly disapproves of the unauthorized driver's use of the vehicle.[89]

Because rental agreements often expressly forbid use of the car for illegal purposes and use of the car by unauthorized drivers,[90] when someone violates those express terms of the rental agreement, the Fourth Circuit has reasoned that the person cannot possibly have a legitimate expectation of privacy in that vehicle.[91] Without a demonstration that a person is legitimately driving a car—which would be impossible as an unauthorized driver—that person cannot have a legitimate reason to expect privacy in the car, especially if he knows he is in violation of the rental agreement.[92]

Although this bright-line rule provides clarity for courts, it has been criticized as being overly harsh and "blunt."[93] Nevertheless, the Fourth, Fifth, and Tenth Circuits have determined that due to the lack of legitimacy in driving the car in the first place, an unauthorized driver of a rental vehicle can *never* have standing to challenge a search of that vehicle under the Fourth Amendment.

2. Modified Bright-Line Rule: Standing with Permission from an Authorized Driver

The Eighth and Ninth Circuits have adopted a modified bright-line rule, holding that unauthorized drivers of rental cars do not have standing unless they can show that they had "the permission of the authorized driver" to use the car.[94] These courts recognize that if "an unauthorized driver has a possessory or ownership interest in the car," he may have a legitimate expectation of privacy.[95] Even though drivers are unable to

89. *See, e.g.*, United States v. Wellons, 32 F.3d 117, 118–19 (4th Cir. 1994). Wellons had permission from the renter of the car but did not have Hertz's permission to be driving the car; rather, the rental agreement expressly disapproved of his driving the car. *Id.*

90. *See, e.g.*, Alamo, Quicksilver Master Rental Agreement, http://www.alamo.com/qsTerms.do (last visited Aug. 29, 2009); Hertz, Authorized and Additional Authorized Operators, *supra* note 11.

91. *Wellons*, 32 F.3d at 119 (noting that "driver of rental car had no legitimate expectation of privacy in rental car where driver was not listed as valid driver on rental agreement, even though he had permission of actual renter to drive the car, as agreement expressly forbade . . . use of car by an unauthorized driver, and driver was aware of . . . [this] restriction[]" (citing *Boruff*, 909 F.2d at 117)).

92. *See* United States v. Roper, 918 F.2d 885, 887–88 (10th Cir. 1990).

93. United States v. Kennedy, No. 06-23, 2007 WL 1740747, at *3 (E.D. Pa. June 15, 2007) ("Despite the laudable qualities of this standard—including ease of applicability—it is a blunt instrument, particularly in an area of law that usually calls for a fact-specific analysis.").

94. United States v. Thomas, 447 F.3d 1191, 1197, 1199 (9th Cir. 2006); *see also* United States v. Best, 135 F.3d 1223, 1225–26 (8th Cir. 1998). Interestingly, in neither of these cases were the defendants able to establish standing through valid permission, as neither of them were able to prove that they had permission to be using the car, although the *Best* case was remanded. *Thomas*, 447 F.3d at 1199; *Best*, 135 F.3d at 1225.

95. *Thomas*, 447 F.3d at 1198 ("[A] defendant who lacks an ownership interest may still have standing to challenge a search, upon a showing of 'joint control' or 'common authority' over the property searched.").

claim actual ownership in a colloquial sense, they can do so by demonstrating "joint control" or "common authority" over the property searched.[96]

In *United States v. Best*,[97] the Eighth Circuit outlined the modified bright-line approach. In *Best*, a state trooper who pulled Best over for improper lane usage discovered that Best's driver's license was suspended and informed him that the car would have to be towed because he was not a licensed driver.[98] The state trooper conducted an inventory search of the car and found marijuana inside the door panel.[99] The Eighth Circuit concluded that the search violated the Fourth Amendment and the marijuana should be excluded as evidence, but only if Best could establish standing on remand.[100] Best claimed that his friend rented the automobile, and the court concluded that Best would have a legitimate expectation of privacy *if* he could offer evidence of permission to use the vehicle.[101]

Similarly, in *United States v. Thomas*, the Ninth Circuit denied standing to the defendant by applying the modified bright-line approach.[102] A police officer received an informant tip that Thomas was renting vehicles or instructing others to rent vehicles for him, which he then used to transport cocaine from California to Washington.[103] The source identified himself as someone who had once rented a car for Thomas, also naming "McGuffey" as another past renter, and the police corroborated this information with the car rental company named by the source.[104] When the rental company informed the police that McGuffey had reserved a rental car at a Washington airport, the officer installed a tracking device on the car.[105] When the tracking device indicated that the car was traveling across the country, the police pulled it over and found Thomas behind the wheel.[106] The officers then searched the car under the authority of an outstanding warrant and found cocaine.[107] The court considered whether Thomas had joint control, mutual use, or common authority over the car—a "possessory or ownership interest"—to determine whether he had a legitimate expectation of privacy.[108] Because Thomas had not provided any evidence that he had McGuffey's permis-

96. *Id.* ("Common authority rests 'on mutual use of the property by persons generally having joint access or control for most purposes.'" (quoting Illinois v. Rodriguez, 497 U.S. 177, 181 (1990))).

97. 135 F.3d at 1225.

98. *Id.* at 1224.

99. *Id.*

100. *Id.* at 1225–26.

101. *Id.* at 1225. The district court had not made a factual determination as to whether the defendant had permission to use the vehicle, so the case was remanded for further proceedings. *Id.* at 1226.

102. 447 F.3d 1191, 1199 (9th Cir. 2006).

103. *Id.* at 1194.

104. *Id.*

105. *Id.* at 1195.

106. *Id.*

107. *Id.*

108. *Id.* at 1198.

sion to drive the car, the court denied him standing to challenge the search and, therefore, the opportunity to have the evidence excluded.[109]

Unlike courts adopting the bright-line rule, circuits employing the modified bright-line permission test permit a driver to have a legitimate expectation of privacy as a result of the common authority derived from a joint possessory interest.[110] To these courts, the concept of standing for a defendant under the Fourth Amendment is "a fact-bound question dependent on the strength of his interest in the car and the nature of his control over it; ownership is not necessary."[111] A person can demonstrate this "common authority" through a showing that he "received permission to use a rental car" and thus has "joint authority over the car."[112] This fact-specific analysis is, in part, why some courts reject the bright-line rule.[113]

The touchstone of this modified analysis is not ownership of the car, but rather the premise that ownership is *not* necessary to have a legitimate expectation of privacy.[114] Courts that adopt the modified bright-line rule consider whether an unauthorized driver has a legitimate expectation of privacy in the rental vehicle, that expectation being legitimate when society accepts it as objectively reasonable.[115] Unlike a bright-line rule that eliminates any possibility of an unauthorized driver having a legitimate expectation of privacy,[116] the Eighth and Ninth Circuits have contemplated that society would accept the expectation of privacy as reasonable if the driver has an appropriately close relationship with the vehicle.[117] These courts have defined this relationship as being one of "joint control" or "common authority," holding that the relationship exists if "the unauthorized driver can show he or she had the permission of the authorized driver."[118]

109. *Id.* at 1199.

110. *See, e.g.*, *id.* In *Thomas*, the court reasoned that "'possessory or ownership interest' need not be defined narrowly," as concepts of real or personal property law can establish legitimacy. *Id.* at 1197 (quoting Rakas v. Illinois, 439 U.S. 128, 142 n.12 (1978)). An ownership interest is then not necessary if the defendant establishes common authority or joint control. *Thomas*, 447 F.3d at 1198. Common authority depends on whether a person has mutual use of property or joint access or control. *Id.*

111. United States v. Dennis, No. 06-650-01, 2007 WL 2173394, at *4 (E.D. Pa. July 26, 2007) (quoting United States v. Baker, 221 F.3d 438, 442 (3d Cir. 2000)).

112. *Thomas*, 447 F.3d at 1198 ("[A] defendant may have a legitimate expectation of privacy in another's car if the defendant is in possession of the car, has the permission of the owner, holds a key to the car, and has the right and ability to exclude others, except the owner, from the car." (citing United States v. Portillo, 633 F.2d 1313, 1317 (9th Cir. 1980))).

113. *See Dennis*, 2007 WL 2173394, at *5–6; United States v. Kennedy, No. 06-23, 2007 WL 1740747, at *3 (E.D. Pa. June 15, 2007).

114. Common or joint authority may establish an ownership or possessory interest. *See, e.g.*, *Thomas*, 447 F.3d at 1198.

115. *Id.* at 1196.

116. *See supra* Part III.A.1.

117. *See Thomas*, 447 F.3d at 1197; United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998).

118. *Thomas*, 447 F.3d at 1197.

3. Totality-of-the-Circumstances Approach

The Sixth Circuit, diverging from both the bright-line and modified bright-line approaches, takes into consideration the great variety of factual differences that may surround an unauthorized driver's situation. In *United States v. Smith*,[119] a police officer pulled over a rental car for speeding and failing to maintain control. The officer observed that the passenger "appeared to be stoned and had a white . . . substance around his lips."[120] The driver provided the officer with the rental agreement, which showed that his wife rented the car and that he was not an authorized driver.[121] Using a drug dog, the officer discovered methamphetamine, cocaine, and other drugs.[122] As it turned out, Smith organized the car rental with the agency, and his wife had simply picked up the car.[123] Based on these facts, Smith would not have a legitimate expectation of privacy in a circuit governed by the bright-line rule.[124] Smith, however, would likely have standing under a modified bright-line rule regime if he showed that his wife gave him permission to drive the rental car.[125] Departing from both bright-line standards, the Sixth Circuit determined that Smith could challenge the search based on the "totality of the circumstances."[126]

The Sixth Circuit agreed that "as a general rule, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle."[127] The court, however, did not consider such a bright-line rule to be dispositive because no single factor would be "invariably determinative" in any instance.[128] Instead, the court considered the following factors in determining whether Smith would have a legitimate expectation of privacy: (1) whether he was a licensed driver, (2) whether he was able to present the rental agreement and provide information about the car, (3) his relationship with the person who gave him the car, (4) whether he had permission from an authorized driver, and (5) whether he had any relationship with the rental company.[129]

Although the Sixth Circuit certainly made clear that it evaluated more than whether the driver had permission from an authorized driver,

119. 263 F.3d 571 (6th Cir. 2001).
120. *Id.* at 575.
121. *Id.*
122. *Id.* at 576.
123. *Id.* at 586.
124. *See supra* Part III.A.1. The bright-line rule states that an unauthorized driver of a rental vehicle can never have standing to challenge a Fourth Amendment search.
125. *See supra* Part III.A.2.
126. *Smith*, 263 F.3d at 586 ("In considering the reasonableness of asserted privacy expectations, the [Supreme] Court has recognized that no single factor invariably will be determinative." (quoting Rakas v. Illinois, 439 U.S. 128, 152 (1978) (Powell, J., concurring))).
127. *Smith*, 263 F.3d at 586.
128. *Id.*
129. *Id.*

it shed little light on how to balance these five factors.[130] One could question how a person who did not have permission from an authorized driver could *ever* have standing under this test, or alternatively, how someone with permission could ever be denied standing. Nonetheless, the court clearly decided that a bright-line test was not appropriate, despite the driver's violation of the rental agreement, by pointing out that while driving a rental vehicle without authority might be against *company policy*, it is not *illegal*.[131] The court held that all surrounding circumstances must be considered when determining standing.

B. Critiquing the Approaches

Although the different circuits have employed a wide range of reasoning in justifying the three approaches, each approach has its weaknesses. The bright-line approach presumes that no unauthorized driver has a legitimate expectation of privacy, but violation of a rental agreement may not be sufficient to justify this assumption. While the modified bright-line rule allows standing with permission from an authorized driver, the inquiry remains extremely narrow and does not consider any of the surrounding circumstances. The totality-of-the-circumstances approach takes a variety of factors into account, but the factors are so interrelated that such a fact-specific inquiry seems inefficient and unnecessary. Although each approach has its shortcomings, the tests are not irreconcilable because of the close relationship between some of the principle ideas from each approach. If a driver knowingly drives a car that he is not supposed to be driving, he does not have a legitimate expectation of privacy as a baseline rule; but under some circumstances he may have an expectation of privacy that society—and the Court—should recognize as reasonable.

1. Critique of Bright-Line Approach

The bright-line approach holds that an unauthorized rental car driver can *never* have a legitimate expectation of privacy.[132] This view, however, does not mesh with Supreme Court decisions regarding what constitutes a legitimate expectation of privacy in other settings. Because the bright-line rule justifies the denial of a reasonable expectation of privacy on the premise that the driver is in contravention of the rental agreement, it becomes impractical in application, considering the vast number of ways one might violate a rental agreement. Additionally, this view is criticized as being overly harsh, as it fails to take into account *any* of the

130. *See id.* Aside from saying that "most significantly" Smith had established a business relationship with the rental agency, the decision simply mentioned the factors involved in the test. *Id.*

131. *Id.* at 587. This same argument could also be advanced for a modified bright-line approach. *See* discussion *supra* Part III.A.2.

132. *See* discussion *supra* Part III.A.1.

surrounding factual circumstances.[133] Finally, because the bright-line rule is so clear and predictable, it may create undesirable incentives for police action. This rule means that a driver who knowingly uses a car that he is not technically supposed to drive should not expect to have privacy in that car. Perhaps this rule overly restricts what constitutes a legitimate expectation of privacy.

The bright-line rule is somewhat inconsistent with Supreme Court holdings regarding what constitutes a legitimate expectation of privacy. Recall some of the cases discussed earlier regarding the right of house-guests to challenge searches; standing depended on the nature of the guest's relationship with the owner and time spent in the searched area.[134] For example, apartment leases do not typically prohibit tenants from inviting overnight guests in the way that car rental agreements limit who may drive a rented car, but lease agreements often provide that a sublessee must be approved by the landlord.[135] Were a tenant to sublet an apartment in violation of the original lease, the sublessee might still have a legitimate expectation of privacy in the apartment, because past Supreme Court decisions allow standing based on a person's relationship with the owner and duration of his or her stay.[136] If these principles are applied to the rental car situation, it seems analogous to say that an unauthorized driver—who has permission from the authorized renter and is the only person using the car for several days—has a reasonable expectation of privacy in that car. Though it is true that the renter of the car does not *own* the car,[137] a tenant of an apartment does not *own* his unit, yet can still extend an expectation of privacy to others. While a car is different from a residence, perhaps an unauthorized driver should still have valid reason to expect privacy based on Supreme Court precedent.

As proponents of the modified bright-line and totality-of-the-circumstances approaches argue, violation of an agreement is not a sufficient reason to deprive someone of an expectation of privacy.[138] In a variety of settings, several circuits have ruled that even where a rental or

133. United States v. Kennedy, No. 06-23, 2007 WL 1740747, at *11 (E.D. Pa. June 15, 2007) ("Despite the laudable qualities of this standard—including ease of applicability—it is a blunt instrument, particularly in an area of law that usually calls for a fact-specific analysis.").

134. *Compare* Minnesota v. Carter, 525 U.S. 83, 90 (1998) (holding that guest on premises for commercial purposes does not have legitimate expectation of privacy), *with* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (holding that overnight guest has legitimate expectation of privacy). *See also* discussion *supra* Part II.B.

135. 49 AM. JUR. 2D *Landlord and Tenant* § 981 (2008).

136. *See, e.g.*, *Olson*, 495 U.S. at 100 (holding that overnight guest has legitimate expectation of privacy); Jones v. United States, 362 U.S. 257, 262 (1960) (holding that guest had legitimate expectation of privacy when owner was absent based on guests' control of the apartment and the duration of his stay).

137. See *supra* Part III.A.1 for a discussion of this argument supporting the bright-line rule.

138. *See, e.g.*, United States v. Smith, 263 F.3d 571, 587 (6th Cir. 2001). *But see* United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (arguing that unauthorized drivers can never have a legitimate expectation of privacy because they drive the car in violation of the rental agreement).

lease agreement is violated, a privacy interest still exists.[139] The Ninth Circuit held in *United States v. Henderson* that if an *authorized* driver of a rental car possessed the car for too long, thereby exceeding the length of the agreement, the driver retained his privacy interest in the vehicle, provided that the lessee retained control over the car for the entire period of time.[140] The Eleventh Circuit granted standing to a similarly situated defendant in violation of his car rental agreement, ruling that he maintained a reasonable expectation of privacy despite keeping the car longer than the duration of the agreed upon rental period.[141] Considering these holdings, an unauthorized rental car driver's expectation of privacy is not unreasonable simply because it violates the terms of a lease or rental agreement.

Having a rule that denies standing based on violation of a rental agreement would lead to impractical and inconsistent results. For example, Alamo's rental policy provides that a trailer may not be attached to a rental vehicle unless Alamo supplies the trailer.[142] If the rationale for denying an unauthorized driver standing is that the driver is in violation of the rental agreement, then under the same logic, even an authorized driver would not have standing to challenge a search of the rental car if he had attached a trailer Alamo did not provide. Additionally, rental policies for additional authorized drivers vary from company to company, and it would be impractical to determine on a case-by-case basis whether a driver is in violation of his rental policy to determine his basis for standing. One might wonder to what extent rental agencies actually expect that renters will abide by the agreement; the basic premise of the rental industry is, after all, to allow drivers other than the actual owner to use an automobile.

The unique facts of cases from circuits that adopt the bright-line approach demonstrate the extremely narrow perspective of the test, showing that the bright-line rule denying standing to unauthorized drivers of rental vehicles does not appear to be completely aligned with the *Rakas* test of a "legitimate expectation of privacy."[143] Recalling the fact patterns of the decisions in the Fourth, Fifth, and Tenth Circuits adopting the bright-line approach,[144] the outcome of the standing issue would have

139. In *United States v. Thomas*, 447 F.3d 1191, 1197–98 (9th Cir. 2006), the court discussed several relevant cases and precedents to counter the argument that a driver has no legal right to control a rental car in violation of the rental agreement.

140. United States v. Henderson, 241 F.3d 638, 646–47 (9th Cir. 2001).

141. United States v. Cooper, 133 F.3d 1394, 1400 (11th Cir. 1998). In a somewhat analogous situation, the Ninth Circuit reasoned that for a motel room, "the mere expiration of the rental period, in the absence of affirmative acts of repossession by the lessor, does not automatically end a lessee's expectations of privacy." United States v. Dorais, 241 F.3d 1124, 1129 (9th Cir. 2001). Similarly, the Tenth Circuit held that a motel guest's right to privacy extend past check-out time. United States v. Owens, 782 F.2d 146, 150 (10th Cir. 1986).

142. Alamo, Alamo Rental Policies, *supra* note 14.

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

144. *See supra* notes 73–86 and accompanying text.

been different were a different approach used.[145] For instance, in the *Boruff* decision, Boruff's girlfriend rented a car and turned it over to him,[146] while in the *Wellons* decision, Wellons drove a car rented by a friend.[147] These close relationships between the renter and driver would likely warrant standing under either a modified bright-line approach or a totality-of-the-circumstances approach.[148] In *Roper*, however, the defendant was randomly hired to drive a rented vehicle containing drugs.[149] Roper would likely fail both the modified bright-line test and the totality-of-the-circumstances test, as he did not have permission of the renter, who was the common-law wife of the man who hired him to drive the car. The bright-line approach does not take into account any unique factual situations; though the test properly prevents Roper (a character who does not deserve to have standing in any regime) from challenging the search, perhaps Wellons and Boruff should have standing based on their relationship with the renter. Even though it is easy to apply, the bright-line approach extensively limits who has a legitimate expectation of privacy against unreasonable searches and seizures under the Fourth Amendment.

An additional factor to consider is the opportunity for police profiling.[150] Rental vehicles often have an appearance distinguishable from nonrental vehicles. In *United States v. Smith*,[151] the police officer testified that he "suspected that the occupants were driving a rental vehicle."[152] He remarked that rental cars are "usually white, four-door and untinted, such as this vehicle."[153] In the past, most states required distinguishing marks for rental vehicles.[154] Some states, however, have revised these re-

145. *See* discussion *supra* Parts II.C, III.A.

146. United States v. Boruff, 909 F.2d 111, 113–14 (5th Cir. 1990).

147. United States v. Wellons, 32 F.3d 117, 118 (4th Cir. 1994).

148. These tests take into consideration the relationship between the renter and the driver, and the approach will prove significant because if the property was seized in violation of defendant's Fourth Amendment rights, it could be excluded as evidence at trial.

149. *See* United States v. Roper, 918 F.2d 885, 886 (10th Cir. 1990).

150. The Ninth Circuit observed,

> [W]e cannot help but be aware that the burden of aggressive and intrusive police action falls disproportionately on African-American, and sometimes Latino, males. . . . [A]s a practical matter neither society nor our enforcement of the laws is yet color-blind. Cases, newspaper reports, books, and scholarly writings all make clear that the experience of being stopped by the police is a much more common one for black men than it is for white men.

Washington v. Lambert, 98 F.3d 1181, 1187 (9th Cir. 1996).

151. *See* discussion *supra* Part III.A.3.

152. United States v. Smith, 263 F.3d 571, 575 (6th Cir. 2001).

153. *Id.*

154. *See New York Acts on Rental Cars*, N.Y. TIMES, June 13, 1993, § 5, at 3, *available at* http://query.nytimes.com/1993/06/13/travel/travel-advisory-new-york-acts-on-rental-cars.html. At the time of publication, states that still require unique identification marks for rental vehicles include Colorado, Florida, Illinois, Louisiana, Maryland, Mississippi, North Carolina, Virginia, Washington, and Wyoming; Maryland designated license plates with the letters "DR," while in Mississippi, plates contained the word "rental." *Id.*

quirements because of various problems that resulted from making rental vehicles so easily identifiable.[155]

A problem arises because if police are aware that a car is a rental vehicle, they may be more inclined to pull the car over. Upon pulling the car over, the officer will likely ascertain whether the driver is authorized. If the police officer knows that a driver is unauthorized, the officer might be more inclined to conduct a search that would be unreasonable under the Fourth Amendment—based on little or no suspicion—because she would know that her behavior would go unpunished. If a bright-line rule applied and unauthorized drivers never had standing to sue, the exclusionary rule would not apply, and the evidence found, if any, would be admitted.[156] This potential profiling problem indicates that a bright-line rule could have undesirable consequences.

The bright-line approach has many shortcomings. The central concept, however—that an unauthorized driver does not *reasonably* expect privacy in a car he is not technically allowed to be driving—is not by any means far-fetched. Given the fact-specific inquiries the Supreme Court conducts in other situations, however, such a bright-line rule may overly restrict the opportunity for standing.

2. Critique of Modified Bright-Line Permission Test

A modified bright-line approach compensates for some of the weaknesses of the strict bright-line approach by inquiring whether the driver had permission from the renter to operate the vehicle. Because the driver has an opportunity for standing, the incentives the modified rule would create for police are not a concern, unlike the bright-line rule. The inquiry shifts the focus from the violation of the rental agreement to whether permission from the renter creates common authority over the vehicle.[157] The modified bright-line rule, however, is not without its own weaknesses. The true owner of the vehicle is the rental agency; thus, the renter may not properly be said to grant common authority or *any* authority over the vehicle to another person.[158] Additionally, the inquiry is extremely narrow, taking into account only one of several surrounding factors.

155. *See id.* In Florida, six foreign tourists were killed between December of 1992 and April of 1993, in part because of poorly marked highways, but also in part because of "specially marked rental-car license plates that say 'easy prey' to thugs." *Fighting Fear in Florida*, TIME, Apr. 19, 1993, at 22, *available at* http://www.time.com/time/magazine/article/0,9171,978248,00.html. Florida has actually enacted a statute mandating that "[a] rental car company may not rent in this state any for-hire vehicle, other than vehicles designed to transport cargo, that has affixed to its exterior any bumper stickers, insignias, or advertising that identifies the vehicle as a rental vehicle." FLA. STAT. § 320.0601(1) (2005).

156. *See* discussion *supra* Part III.A.1.

157. *See* discussion *supra* Part III.A.2.

158. This argument is related to the argument *for* the bright-line rule—that only the true owner can give valid permission to use the vehicle. *See* discussion *supra* Part III.B.1.

To suppress evidence under the Fourth Amendment, a defendant must show (1) a Fourth Amendment interest in either the property searched or the property seized, and (2) that the search or seizure infringed on this interest.[159] In a regime eliminating standing for unauthorized rental car drivers, an ownership interest in the property seized would be required.[160] If claiming ownership over the property seized—drugs, for instance—was the only way for a defendant to gain standing to challenge the search, he would be faced with the quandary of having to admit ownership of contraband.[161] Although this sort of evidence cannot be used against a defendant at trial,[162] a defendant might still be reluctant to claim possession of the contraband. The modified bright-line rule eliminates this potential dilemma for defendants who were unauthorized rental car drivers by potentially giving them a legitimate expectation of privacy in the rental vehicle. This approach compensates for some of the problems of self-incrimination by providing a greater likelihood that Fourth Amendment standing will be granted to defendants.[163]

One problem with the modified approach is that the authorized driver is not in a position to grant authority to other drivers to borrow the car. The relationship between the car's owner and the driver is attenuated, as the car's *actual* owner—the rental agency—gives person *A* permission to use the car, but then person *A* gives person *B* permission

159. *See* Kent M. Williams, Note, *Property Rights Protection Under Article I, Sections 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures*, 75 MINN. L. REV. 1255, 1259 (1991).

160. A bright-line approach basically eliminates standing for unauthorized drivers of rental cars. *See* discussion *supra* Part III.A.1. The modified bright-line approach, however, justifies itself in part upon the theory that unauthorized drivers have a form of ownership through common authority. *See* United States v. Thomas, 447 F.3d 1191, 1197 (9th Cir. 2006).

161. This is why some have advocated for a return of automatic standing. In *Commonwealth v. Amendola*, the Supreme Judicial Court of Massachusetts adopted an automatic standing rule. 550 N.E.2d 121, 125 (Mass. 1990). *See also* Marielise Kelly, Case Comment, *Constitutional Law—Fourth Amendment Possessory Crimes: The Doctrine of Automatic Standing Endures in Massachusetts—* Commonwealth v. Amendola, 25 SUFFOLK U. L. REV. 306, 312 (1991) (stating that a defendant charged with "illegal possession of drugs has automatic standing to contest the legality of the seizure"). Absent automatic standing "defendants would be encouraged to commit perjury by denying an interest in the searched area when one actually existed because the risk of linking oneself to the place where the goods were found [was] too great." *Id.* at 312–13.

162. *See supra* notes 28–33 and accompanying text.

163. Under *Rawlings v. Kentucky*, it is possible that a defendant would be denied standing despite claiming ownership over the property possessed in a search. *See* 448 U.S. 98, 104–05 (1980). Rawlings placed marijuana in another person's purse and did not have standing to object to the search of the purse, in part because of the short relationship of the parties, the defendant's lack of control and power to exclude others from the purse, and the abrupt nature of the transaction. *Id.* at 105; *see also* 1 DRESSLER & MICHAELS, *supra* note 21, at 360. Professor LaFave, however, argues that this holding does not preclude a bailor from having a reasonable expectation of privacy, considering that a person often chooses a particular bailee because he or she expects that his property will be protected. *See* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.3 (4th ed. 2004). Under a bright-line rule, a defendant could not challenge based on a privacy interest in the location searched, and thanks to *Rawlings*, he also may not be able to attain standing by claiming an interest in the property seized. He could be left with no way to challenge an unreasonable search, but the modified bright-line rule eliminates this problem.

to use the car.[164] Perhaps only the rental agency should possess the authority necessary to grant someone a "legitimate expectation of privacy"[165] in the car. Given that the business of the rental car industry necessitates allowing *other* drivers to use the car,[166] this limitation on what constitutes a reasonable expectation of privacy may be overly stringent.

Most rental agreements, however, explicitly prohibit drivers not authorized by the rental agency from driving the car.[167] Courts that apply the modified bright-line approach do not consider the "technical violation of a leasing contract" to be cause for the lack of a privacy interest.[168] In other words, a defendant's privacy interest is not dependent on his compliance with a lease agreement.[169]

Despite expanding the bright-line rule, the modified bright-line approach is still criticized as being too narrow. In considering only whether the unauthorized driver has permission from the renter to operate the car, a person who does not even have a driver's license could be granted standing to challenge a search.[170] The driver could be anyone under this view, whether or not rental car company would allow the individual to rent a car in the first place.[171] Although the inquiry is a simple one, the modified bright-line approach is limited because it only considers one factor.[172]

Matthew M. Shafae argues that a modified bright-line approach is insufficient to determine standing in this setting because "courts must conduct an exhaustive analysis of a defendant's possessory interest in the

164. In applying the *Rakas* rule for standing to nonrental vehicles, only person *A* would have standing. *See* discussion *supra* Part II.B. The totality-of-the-circumstances approach compensates for this shortcoming by considering the relationship between the rental agency and the driver. *See* discussion *supra* Part III.A.3.

165. *See* United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (internal quotes omitted).

166. *See Seinfeld: The Alternate Side* (NBC television broadcast Dec. 4, 1991). Jerry, the show's main character, when told that his insurance only covers him for accidents that occur while *he* is driving the car, responds, "Your whole business is based on other drivers. It's a rented car. That's who's driving it, other drivers." *Id.*

167. *See, e.g.*, Alamo, Alamo Rental Policies, *supra* note 14; Dollar, General Policies, *supra* note 14.

168. United States v. Thomas, 447 F.3d 1191, 1198 (9th Cir. 2006).

169. *See id.* The Ninth Circuit held in *United States v. Henderson* that the lessee of a rental car has a reasonable expectation of privacy even after the rental period expires. 241 F.3d 638, 647 (9th Cir. 2001); *see also* discussion *supra* Part III.B.1.

170. *See, e.g.*, United States v. Best, 135 F.3d 1223, 1224–25 (8th Cir. 1998) (remanding for factual findings on whether friend had in fact granted permission for defendant Best to drive the car, even though Best's driver's license was suspended at the time).

171. There could be a number of reasons why a person might not be allowed to rent a car from a particular agency. In *Thomas*, the defendant was denied renting a car from one agency because he had outstanding late fees. *Thomas*, 447 F.3d at 1194. In *Roper*, Griffin had a suspended license so he had his common-law wife rent the vehicle and hired Roper to drive the vehicle. United States v. Roper, 918 F.2d 885, 886 (10th Cir. 1990).

172. Note, however, that defendants often do not succeed in carrying the burden of proof to prove permission. *See, e.g.*, *Thomas*, 447 F.3d at 1199.

searched property."[173] Shafae notes that in *Thomas*, the court analogized its reasoning to that of *Jones v. United States*, where the defendant—a guest in an apartment where the owner was not present—was granted standing based on his control of an apartment, as well as a variety of other surrounding factors.[174] The *Thomas* court, however, then adopted a modified approach rather than one that considered many factors.[175] Shafae's main argument against a modified bright-line rule is that it is too narrow an inquiry, and it does not consider the relationship between the unauthorized driver and the renter of the vehicle.[176]

An additional critique of the modified bright-line approach's permission test is that when applied, it will yield inconsistent results.[177] Shafae notes that in *Thomas*, because the court did not actually apply the permission rule (as the defendant did not provide sufficient evidence of permission), the court did not provide guidance for future courts attempting to apply the permission test.[178] Even though the permission test is a bright-line approach, Shafae expresses legitimate concerns relating to the difficulty of applying this test.[179]

Though the modified bright-line permission test compensates for some of the shortcomings of the bright-line rule and offers some clarity in application, it may not be sufficient in and of itself. Because the standing inquiry is dependent on many surrounding facts, taking only permission into account may fall short of properly determining which drivers have a reasonable expectation of privacy.

173. Matthew M. Shafae, Note, United States v. Thomas: *Ninth Circuit Misunder-"Standing": Why Permission to Drive Should Not Be Necessary to Create an Expectation of Privacy in a Rental Car*, 37 GOLDEN GATE U. L. REV. 589, 608 (2007).

174. *Id.* at 606 ("Accordingly, the *Thomas* court's reasoning relied upon authority that based its conclusions on multiple factors akin to a totality-of-the-circumstances test, not on one dispositive factor like the permission test."). In the *Jones* decision, although the property at issue was an apartment, the court considered factors such as permission to use the property from the owner, whether the defendant had a key to the property, and whether the defendant had the right and ability to exclude others from the property. *See* Jones v. United States, 362 U.S. 257, 259, 265 (1960).

175. *See Thomas*, 447 F.3d at 1198–99 (adopting modified bright-line approach).

176. *See* Shafae, *supra* note 173, at 608.

177. *Id.* at 606–07.

178. *See id.* The same argument could be made regarding the Eight Circuit's decision in *United States v. Best*, as the case was remanded to determine whether the defendant had permission. 135 F.3d 1223, 1225 (8th Cir. 1998).

179. Shafae notes that the only decision that cites *Thomas* in its reasoning is *United States v. Silva*, 470 F. Supp. 2d 1202, 1207 (D. Haw. 2006). Shafae, *supra* note 173, at 607. In *United States v. Silva*, a driver was fleeing arrest in a friend's car absent a "structured agreement" to use the car. *See id.* (describing facts of *Silva*, 470 F. Supp. 2d at 1206–07). Shafae argues that in this case, because there was no structured agreement, under a modified bright-line or "permission" rule, Silva would not have standing. *Id.* The court, however, applied the totality-of-the-circumstances test and granted Silva standing. *Id.* The court's conclusion was based in large part on the nature of the long-time friendship of Silva and the owner of the borrowed vehicle. *Id.*

3. Critique of Totality-of-the-Circumstances Approach

Rather than providing a bright-line test of clear application, the totality-of-the-circumstances approach considers many of the surrounding facts when determining whether an unauthorized driver has a legitimate expectation of privacy. Many of the additional inquiries, however, are so closely related to the driver receiving permission to use the car from the vehicle's renter that they become repetitive.

The Third Circuit's holding that adopting either the modified bright-line permission test or the totality-of-the-circumstances approach would produce identical results compels one to inquire what sort of situation would lead to different outcomes under the modified approach versus the totality-of-the-circumstances approach.[180] Consider a situation in which an unauthorized driver had permission from an authorized driver, and thus would satisfy the modified bright-line approach, but would not pass other factors under the totality-of-the-circumstances approach—if for instance, the driver did not have a license, was not able to present a valid rental agreement, had an attenuated relationship with the authorized driver, and had no relationship with the rental company.[181] Conversely, the driver might not have had permission from the authorized driver, but possessed a valid rental agreement, had a relationship with the authorized driver and the rental company, and was a licensed driver. In considering these examples, one must determine which of the factors from the totality-of-the-circumstances test are truly important. Because the Sixth Circuit did not clearly describe the weight of each factor in its totality-of-the-circumstances test, future courts may struggle in balancing the different inquiries.[182]

Although the protection of the Fourth Amendment right against unreasonable searches is important, perhaps the inquiry need not be as extensive as the five-factor test adopted by the Sixth Circuit.[183] Consider each of the test's five factors. Although the court said that as a general rule, an unauthorized driver will *not* have a legitimate expectation of privacy in a vehicle and cannot object to search, it stated that all surrounding circumstances should be considered.[184] The court considered whether the unauthorized driver (1) was licensed,[185] (2) was able to present the

180. *See* United States v. Dennis, No. 06-650-01, 2007 WL 2173394, at *6 (E.D. Pa. July 26, 2007) ("[T]he Third Circuit would utilize either the modified bright-line rule, under which unauthorized drivers of rental cars have standing to contest a search if they have the permission of an authorized driver, or the totality of the circumstances test." (quoting United States v. Kennedy, No. 06-23, 2007 WL 1740747, at *4 (E.D. Pa. June 15, 2007))).

181. *See* United States v. Smith, 263 F.3d 571, 586 (6th Cir. 2001) (listing five facts relevant to determination of whether the unauthorized driver had a legitimate expectation of privacy).

182. *See id.* The court did note that the driver's relationship with the rental agency was important, but provided little other guidance. *Id.*

183. *See id.*

184. *See id.*

185. *Id.* The court notes that an unlicensed driver would be on the road illegally, and would be less likely to have a legitimate expectation of privacy. *Id*.

rental agreement and provide sufficient information regarding the vehicle, (3) had any previous relationship with the renter, (4) had permission from the authorized driver to use the car, and (5) had any business relationship with the rental company.[186]

The Sixth Circuit considered factors three, four, and five—Smith's relationship with the authorized driver, who gave Smith permission to use the vehicle, and Smith's relationship with the rental company, as he had reserved the vehicle—most important.[187] Consider, however, how the second factor relates to the third and fourth factors. The rental agreement and information about the car are likely kept in the glove compartment or another area of the vehicle, in which case anyone could provide them regardless of his relationship with the car, or alternatively, the driver might receive them from the authorized driver who gave him permission. Thus, where the unauthorized driver is unable to present a rental agreement, he either did not have a close relationship with the car's renter or was simply not provided that information. If he *is* able to provide the rental information, he may just have been wise to check the glove compartment. In either situation, this factor should not be conclusive because it does not appear to shed much light on the driver's relationship with the car. This factor might be useful in demonstrating permission, but does not seem closely related with having a reasonable expectation of privacy.

The first factor—whether the driver had a valid license—is likely considered because of the purported relevance of whether the unauthorized driver was doing something illegal.[188] Though, as violation of the rental agreement may not be enough to warrant the lack of standing, driving without a license may not be either.[189] As such, perhaps the first factor is not overly persuasive.[190] Consider who has a more reasonable expectation of privacy: a licensed driver who meets no other factors, or an unlicensed driver who satisfies all the other factors. Even though an unlicensed driver should not be driving a car, the factor may not be demonstrative of the legitimacy of the driver's expectation of privacy in that car.

186. *Id.* at 586–87.

187. *Id.*

188. Courts have made a distinction between illegal activity and just breaking a contractual agreement. In one Fifth Circuit decision, the defendant was not listed as an authorized driver for the rental vehicle, the vehicle was overdue by five days, and the agreement specified it was not to be used for illegal activity. United States v. Riazco, 91 F.3d 752, 753 (5th Cir. 1996). The driver was still considered to have standing, because "[p]ermitting use by one who is not named in the contract is not illegal," but rather, the breach of contract "supplies the basis for cancellation of the agreement." *Id.* at 754. The appellate court reversed this decision, however, because the defendant had no possessory interest in the car. *Id.* at 754–55.

189. *See supra* notes 138–41 and accompanying text.

190. A recent district court decision, *United States v. Crisp*, noted that the combination of being an unauthorized *and* unlicensed driver is of greater significance. *See* 542 F. Supp. 2d 1267, 1281–83 (M.D. Fla. 2008).

The fifth factor—the driver's relationship with the rental agency—relates importantly to the question of whether the unauthorized driver should have a reasonable expectation of privacy in the car. If the driver made all the rental arrangements, as in *Smith*,[191] not allowing him to challenge a search for the sole reason that someone else picked up the car seems a bit harsh. But if the unauthorized driver made the rental reservation, and someone else picked up the car (making that person the renter and authorized driver), yet the unauthorized driver is still the one driving the car, it is difficult to comprehend a situation where the driver would *not* have a close relationship with and permission from the renter. Although the relationship of the driver and rental agency is an important factor, the inquiry may be somewhat repetitive.

Just because the facts surrounding one factor would not be decisive in the standing inquiry may not be grounds to disregard that factor altogether, but *all five* factors may not be necessary in creating a clear and accurate test. In most decisions, the most important factors to consider were the driver's relationship with the authorized driver, whether the renter granted the driver permission to operate the vehicle, and—in one rare situation—whether the driver had a relationship with the rental agency.[192]

IV. RESOLUTION AND RECOMMENDATION

Recall that the baseline test for determining standing to challenge searches and seizures under the Fourth Amendment is (1) whether a defendant has a subjective expectation of privacy in the area searched or the item seized, and (2) whether society considers this expectation reasonable.[193] Accordingly, an approach to evaluating standing of unauthorized drivers of rental vehicles should follow these guidelines.

Keeping in mind the problems with the bright-line rule from a policy standpoint—in particular, its inconsistency with other courts' decisions regarding what may be a "legitimate expectation of privacy"[194]—the bright-line approach is not ideal for determining standing for unauthorized drivers of rental vehicles. Not surprisingly, two recent decisions in the Third Circuit ruled out the possibility of adopting a bright-line approach, but both the modified bright-line test and the totality-of-the-circumstances test led to the same result; thus, the court considered both tests, but declined to adopt either test.[195] Courts seem to be adopting a

191. *See Smith*, 263 F.3d at 586.

192. *See id.* at 586–87.

193. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

194. *See* discussion *supra* Part III.B.1.

195. In *United States v. Dennis*, the defendant had permission from the authorized driver to use the vehicle, had known the authorized driver for twenty years, was alone and in control of the vehicle, had keys to the vehicle, and had been using the car for several hours prior to the search. No. 06-650-01, 2007 WL 2173394, at *6 (E.D. Pa. July 27, 2007). The court considered these factors—though ignoring the fact that defendant did not provide the officer with a driver's license or rental agreement—

line of reasoning that considers whether an unauthorized driver is driving a car in which she is not supposed to be in the first place, so "as a general rule, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle."[196]

As both the modified bright-line and totality-of-the-circumstances approaches recognize, although an unauthorized rental car driver should not generally expect privacy, there are situations in which an unauthorized driver may have a legitimate expectation of privacy.[197] A clearer test could be crafted that would combine the benefit of a bright-line rule's ease of application, but also take into account the fact-specificity that the inquiry of "legitimate expectation of privacy" requires. Considering past court decisions, two inquiries clearly emerge as being the most important. The relationship between the renter and driver is central to all decisions regarding standing for unauthorized drivers of rental vehicles, thus standing should not depend solely on the existence of permission. Courts should apply a test that first inquires whether a defendant had explicit or implied permission from the renter to use the vehicle, and then considers the relationship between the renter and the defendant.

To meet the first prong of this proposed test to determine standing, the court should first ask whether the unauthorized driver has permission from the authorized driver. The burden should be placed on the defendant to prove his standing. When applying the modified bright-line rule, courts place the burden on the defendant to prove that he had permission from an authorized driver;[198] this burden prevents drivers from merely saying they had permission without providing any evidence thereof.

In proving that one had the renter's permission to use the car, a defendant may have concrete evidence of an agreement or he may have to show permission from the surrounding circumstances. If the renter of the vehicle and the driver created an explicit agreement to use the car, or if the renter testifies that he gave permission to the defendant, the unauthorized driver will have little trouble proving that he had permission to use the car. As was a problem in the *Thomas* and *Best* cases,[199] however, some unauthorized drivers may not have explicit permission from the renter and may find it more difficult to demonstrate permission. For ex-

and reasoned that he would have standing under both the totality-of-the-circumstances test *and* the modified bright-line approach, but did not see the need to adopt either test. *Id.* at *3, *6. Similarly, in *United States v. Kennedy*, a decision by the District Court for the Eastern District of Pennsylvania a month earlier, the court also chose not to adopt either approach, as the defendant had a driver's license, permission to use the rental car from an authorized driver, and had been driving the car for several hours prior to the search. No. 06-23, 2007 WL 1740747, at *3–4 (E.D. Pa. June 15, 2007).

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

197. *See* discussion *supra* Parts III.A.2–3.

198. *See, e.g.*, United States v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006).

199. *See id.* at 1195; United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998).

ample, if a husband borrows the car his wife rented without asking, he might not have explicit permission, but rather an implied understanding that he could use the car. Though the factors from the totality-of-the-circumstances approach are so interrelated with the permission test that they are not necessary as a separate inquiry,[200] they can serve to demonstrate whether permission existed. If the unauthorized driver had organized the rental, the court might consider this as a form of permission or demonstration of common authority over the vehicle,[201] especially if the rental company were to testify or provide evidence. The defendant could use any relevant circumstances in making a case that he had "implicit" permission—for instance, possession of keys or registration, use of the car in the past, an understanding between the renter and unauthorized driver, or any combination of these factors.[202]

This initial inquiry recognizes the merits of the modified bright-line rule. Although a situation in which the unauthorized driver does *not* have permission from the renter yet somehow still legitimately expects privacy in the vehicle is difficult to comprehend,[203] this inquiry is more clear and easier to apply than a totality-of-the-circumstances approach. This initial inquiry, however, also compensates for the criticism that the modified bright-line permission test is too narrow by allowing a variety of factors to enter into the determination of explicit or implicit permission with the burden of proof on the defendant.[204]

The inquiry to determine a reasonable expectation of privacy should not simply end with permission; the court should proceed to assess the relationship between the renter and the authorized driver. If the unauthorized driver does *not* have permission from the authorized renter, the inquiry would end. But if the unauthorized driver *does* have permission from the authorized driver he then holds the burden of demonstrating that he has a relationship with the authorized driver or renter that warrants a reasonable expectation of privacy. Commercial relationships should not be considered relationships in which the driver should expect privacy.[205] The Supreme Court has not considered a commercial relationship or setting to be deserving of the same level of priva-

200. *See* discussion *supra* Part III.B.3.

201. Recall that common authority is the touchstone of the modified bright-line permission test. *See* discussion *supra* Part III.A.2.

202. These are factors that have been considered by other courts in the totality-of-the circumstances test. *See, e.g.*, United States v. Smith, 263 F.3d 571, 586–87 (6th Cir. 2001). In *United States v. Silva*, the court held that a long time relationship between the driver and the renter warranted an implicit understanding that the unauthorized driver could use the rental car, as demonstrated by the facts in the case. 470 F. Supp. 2d 1202, 1208 (D. Haw. 2006).

203. In situations involving residences or vehicles, this Note referenced no holding that provided standing for someone who did not have permission from the owner or authorized renter of the vehicle.

204. *See* discussion *supra* Part III.B.2.

205. *See* Minnesota v. Carter, 525 U.S. 83, 90–91 (1998) (holding that guest on premises for commercial purposes does not have legitimate expectation of privacy). This would make the difference for someone like Roper, who only had a business relationship with the car's renter. United States v. Roper, 918 F.2d 885, 886 (10th Cir. 1990).

cy as a personal relationship.[206] Though permission seems to be the true distinguishing factor between unauthorized drivers who do not have a legitimate expectation of privacy and those who do, the totality-of-the-circumstances approach is correct in that one factor should not be determinative of standing. The second step of this inquiry compensates for the problem in the permission test that any driver can attain standing if he shows permission, regardless of surrounding factors.

This proposed test considers the aspects that have been most influential in courts' decisions regarding this particular issue, and it remains consistent with Supreme Court holdings regarding standing and what constitutes a "legitimate expectation of privacy." Because an unauthorized driver violates the rental agreement—often knowingly—his expectation of privacy should be limited, but no single factor should determine the possibility of standing. This two-step inquiry places appropriate limits on standing while taking a variety of factors into consideration, and it provides clarity for courts in application.

V. CONCLUSION

When applying the doctrine of standing to unauthorized drivers of rental vehicles, courts have adopted three different approaches to determine standing to challenge a Fourth Amendment search. Some circuits adopt a bright-line rule of denying standing to any unauthorized driver under the rationale that a driver in violation of the rental agreement cannot reasonably expect privacy. Other circuits employ a modified bright-line rule, under which an unauthorized driver will have standing if he has permission from the renter to drive the vehicle. The rationale behind this approach is that permission creates common authority over the rental vehicle, creating a reasonable expectation of privacy. The totality-of-the-circumstances approach considers a variety of factors surrounding the driver's relationship with the renter and with the rental company, as the determination of a privacy expectation is a very fact-specific inquiry and must be determined on a case-by-case basis. The bright-line tests are criticized as being too narrow, but the factors of the totality-of-the-circumstances approach are so interrelated that such an in-depth inquiry is repetitive and unnecessary.

In reviewing the decisions among each circuit, the most significant factor in determining standing has been whether the driver had permission from the renter of the vehicle. To provide consistent results, however, more than just permission should be taken into account to determine if a reasonable expectation of privacy exists.

A new approach would be a two-step inquiry that places the burden of proof on the defendant. The defendant would first have to prove that he had either explicit permission from the vehicle's renter, or implied

206. *See supra* notes 40–43 and accompanying text.

permission based on the circumstances surrounding his use of the car and relationship with the renter. Once the defendant establishes that he had permission to use the car, the court should inquire as to the nature of the relationship between the defendant and the renter; a strictly commercial relationship is less likely to warrant standing. This new approach considers the importance of permission in the inquiry as a whole, while allowing a variety of factors to enter into the court's decision regarding standing. Although an unauthorized driver might be in violation of the rental agreement, the new approach affords him the opportunity to demonstrate that he had a legitimate expectation of privacy in the vehicle.