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The Constitutional Risks of Ridesharing: Fourth Amendment Protections of Passengers in Uber and Lyft

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**THE CONSTITUTIONAL RISKS OF RIDESHARING:
FOURTH AMENDMENT PROTECTIONS OF
PASSENGERS IN UBER AND LYFT**

Genesis Martinez*

ABSTRACT

The Fourth Amendment provides limited protections for automobile passengers against governmental intrusion. A passenger is only protected against unreasonable searches in places where he harbors a reasonable expectation of privacy. The Supreme Court has not yet considered the reasonable expectation of privacy of passengers in Uber and Lyft. The modern transportation innovations require that the Court consider the reasonableness of the existing Fourth Amendment doctrine. In application, the doctrine does not adequately protect Uber and Lyft passengers, because it fails to consider how transportation advances have evolved society’s privacy expectations. To remedy these shortcomings, the Court must establish consistent jurisprudence for privacy rights in vehicles.

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INTRODUCTION

Last Saturday evening, as a night of dancing and champagne in New York City was coming to an end, I considered my options for getting back to my hotel. I thought to myself, “Hmmm, I could be a true ‘New Yorker’ and walk in the blistering cold or I could hail a taxicab.” As I stepped outside the bar and a chilling gust of wind struck me and my younger sister, she turned to me and said: “If you want to get home before sunrise, let’s call an Uber!” I shuffled to open the Uber application on my phone and requested a ride. Immediately, I was matched with Roberto, a driver with a near perfect rating of 4.8 stars. As we waited for the car to arrive, the Uber application invited me to explore the driver’s profile. I learned that Roberto had been driving for Uber for eleven months, and that he spoke both English and Spanish.

Thankfully, the Uber arrived in few minutes. Once we were inside, I turned to my younger sister and asked: “Why did you insist that I call an

Uber? We could've hailed a taxi if we had a little more patience." My millennial sister flashed a sarcastic grin and said, "C'mon, everyone uses ridesharing apps like Uber and Lyft nowadays because it's cheaper, faster, and more convenient. We could've called the Uber from inside the bar and it would've been waiting for us before we even stepped outside." She continued, "Plus, I feel more comfortable because I can check out the driver's credentials before the car gets here. I guess I just feel safer and 'in control' when I take an Uber."

In that moment, I realized the immense impact ridesharing services like Uber and Lyft had made in the transportation industry. I understood why Uber and Lyft were so popular: the car—which I refer to as a “modern for-hire vehicle”¹—arrived quickly, the service was offered at a competitive fare, and the process for requesting the ride was seamless. Most importantly, riding in a non-commercial car made me feel like I was riding with a friend: I could sit wherever I wanted, and I could adjust the radio at my leisure. Despite the fact that I had never met my driver, browsing through his profile made me feel safer than I would feel in a taxicab. What I did not know at the moment was that the feeling of greater safety may have just been a double-edged sword.

As a passenger in an automobile, an individual may be subject to police interference. As a general matter, the Fourth Amendment protects individuals against unreasonable searches and seizures.² Normally, a police officer must have a lawful warrant to conduct a search, otherwise the search is “*per se* unreasonable under the Fourth Amendment.”³ But under the automobile exception, officers are authorized to conduct warrantless searches of automobiles.⁴ Further, the common enterprise assumption⁵ and the search incident to arrest rule⁶ sometimes allow officers to conduct warrantless searches of the passenger compartment of the vehicle, including any person, “purse, briefcase, or other container within that space.”⁷

Nevertheless, “a search which is reasonable at its inception may violate the Fourth Amendment”⁸ if an officer conducts a warrantless search of a

¹ This Comment will use the term “traditional for-hire vehicle” to describe taxicabs, limousines, and buses. On the other hand, it will use the term “modern for-hire vehicle” to describe the quasi-private vehicles used by ridesharing companies such as Uber and Lyft.

² U.S. CONST. amend IV.

³ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁴ *See Carroll v. United States*, 267 U.S. 132, 149 (1925).

⁵ *See generally* *Wyoming v. Houghton*, 526 U.S. 295 (1999).

⁶ *See generally* *Arizona v. Gant*, 556 U.S. 332 (2009).

⁷ *Id.* at 345.

⁸ *Terry v. Ohio*, 392 U.S. 1, 18 (1968).

passenger's person or belongings without a lawful basis.⁹ To claim the protection of the Amendment, a non-owner passenger must have "a legitimate expectation of privacy in the invaded" vehicle.¹⁰ In essence, the passenger "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable."¹¹ Therefore, under the Fourth Amendment, anything that an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."¹² And an individual's expectation of privacy is reasonable if he "owns or lawfully possesses or controls property . . . by virtue of this right to exclude."¹³

In this day and age, technology is granting the government greater access to areas and information that individuals "seek[] to preserve as private."¹⁴ This raises serious issues in regard to individuals' Fourth Amendment protections, because greater governmental access could infringe on an individual's right to exclude. Currently, the Supreme Court has considered the effect of technology on an individual's Fourth Amendment rights in only a select number of cases.¹⁵ For example, in *Jones v. United States*, the Supreme Court made clear that individuals are not protected from all forms of governmental interference under the Fourth Amendment.¹⁶ The Court reinforced the premise that the Amendment "protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates."¹⁷ Further, it noted that "the Fourth Amendment is [not] concerned with 'any technical trespass that led to the gathering of evidence.'"¹⁸ In fact, "trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search [protectable under the Amendment] unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of

⁹ See generally *Gant*, 556 U.S. at 332 (extending the scope of a search incident to arrest to include the passenger compartment if it is within the arrestee's reach at the time of arrest or if it is reasonable to believe that evidence of the offense of arrest could be found in the vehicle); *Houghton*, 526 U.S. at 295 (allowing warrantless searches of passengers who are believed to be engaged in a common enterprise with the driver).

¹⁰ *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

¹¹ *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

¹² *Katz*, 389 U.S. at 351.

¹³ *Rakas*, 439 U.S. at 143 n.12.

¹⁴ *Katz*, 389 U.S. at 351.

¹⁵ See generally *United States v. Jones*, 565 U.S. 400, 411 n.8 (2012).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* (citation omitted).

privacy.”¹⁹ In sum, the Court held that “the [g]overnment’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements”²⁰ was a ***physical intrusion*** that “would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”²¹

By reviving the common-law trespassory test in *Jones*,²² the Court suggested that individuals’ privacy rights are shrinking in the technological age. Considering that physical intrusion is no longer necessary for many forms of surveillance, the government can easily access an individual’s private areas and information without violating the Fourth Amendment.²³ In the concurring opinion, Justice Sotomayor notes that the “technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations.”²⁴ It seems that Justice Sotomayor’s insightful understanding of the intersection between technology and the Fourth Amendment will play a vital role for the protection of privacy rights in the midst of a technology driven world. But for now, as technology advances and continues to provide the government greater access to private areas and information, an individual’s zone of privacy will continue to shrink.

Although the trend of shrinking privacy interests does not come as a surprise when it comes to technology, it would be unexpected in modern transportation. Despite the understanding that an individual has a diminished privacy interest in vehicles, that interest “is nevertheless important and deserving of constitutional protection.”²⁵ With the advent of Uber and Lyft, the scope of a passenger’s protection from police interference in a modern for-hire vehicle is unclear. Simply put, under the current Fourth Amendment doctrine, it is unsettled whether a passenger in a modern for-hire vehicle has “a constitutionally protected reasonable expectation of privacy.”²⁶

Modern for-hire vehicles raise serious questions about the reasonableness of the existing Fourth Amendment doctrine.²⁷ Currently,

¹⁹ *Id.* at 408 n.5 (referencing *Katz*, 389 U.S. 347).

²⁰ *Jones*, 565 U.S. at 404.

²¹ *Id.* at 404–05.

²² *Id.* at 409.

²³ *See id.* at 414–15 (Sotomayor, J., concurring).

²⁴ *Id.* at 415 (Sotomayor, J., concurring) (referencing *Katz*, 389 U.S. at 347). “I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one’s public movements.” *Id.*

²⁵ *Arizona v. Gant*, 556 U.S. 332, 345 (2009).

²⁶ *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

²⁷ *See Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (explaining that to determine whether a warrantless search of a passenger in a vehicle violates the Fourth Amendment, the court “must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand,

passengers are left to balance their interest in easier, cheaper rides against the disadvantage of unclear Constitutional rights. Is this a risk every rider is willing to take in order to save a couple of dollars? Probably not, and the most daunting concern is that the majority of modern for-hire passengers are not aware of these risks. Yet, one thing is certain: “technological advances . . . will . . . affect the *Katz* test by shaping the evolution of societal privacy expectations.”²⁸ But because the existing jurisprudence is outdated, it fails to account for the modern innovations of transportation and how it has transformed society’s privacy expectations.

In anticipation of cases concerning searches of passengers in modern for-hire vehicles, the Supreme Court needs to establish consistent jurisprudence for privacy rights in vehicles. Future courts should find that passengers in modern for-hire vehicles have a reasonable expectation of privacy, because these passengers’ subjective expectation of privacy is “one that society is prepared to recognize as ‘reasonable.’”²⁹ This Comment will analyze the existing Fourth Amendment doctrine and use it as a tool for discussing the reasonableness of warrantless searches of passengers in modern for-hire vehicles. The introduction introduces the Fourth Amendment concerns of passengers in modern for-hire vehicles. Part I discusses the existing Fourth Amendment jurisprudence. Part II of this Comment provides a taxonomy for passenger rides under the Fourth Amendment and provides background on each classification. Part III addresses the forward-looking application of the current Fourth Amendment jurisprudence to determine the reasonableness of searches of passengers in modern for-hire vehicles. Part IV proposes the creation of a set of cogent guidelines to be used by future courts who will address the Fourth Amendment protections of passengers in modern for-hire vehicles.

I. REMEMBERING THE ANTIQUE FOURTH AMENDMENT DOCTRINE

A. *The Fourth Amendment and Privacy Interests*

The Fourth Amendment provides the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”³⁰ “The touchstone of the Fourth Amendment is

the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests”).

²⁸ *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) (referencing *Katz*, 389 U.S. at 347).

²⁹ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

³⁰ *Houghton*, 526 U.S. at 299 (quoting U.S. CONST. amend. IV).

reasonableness.”³¹ Only governmental actions are subject to the Fourth Amendment, specifically, actions that constitute a “search or seizure”³² as defined by the courts.³³ To determine whether a search violates the Fourth Amendment, the court “must evaluate the search . . . under traditional standards of reasonableness”³⁴ by focusing on “the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.”³⁵ Then it must balance the “the need to search . . . against the invasion which the search . . . entails.”³⁶

An individual’s right to claim the protection of the Fourth Amendment depends “upon whether the . . . [individual] has a legitimate expectation of privacy in the invaded place.”³⁷ In *Katz v. United States*, Justice Harlan’s concurrence pronounces a two-prong test for this determination.³⁸ First, an individual must exhibit “an actual (subjective) expectation of privacy” in the invaded place.³⁹ Second, an individual’s subjective expectation of privacy must be legitimate, meaning it must be one that society is prepared to recognize as objectively reasonable.⁴⁰

To meet the second prong of the *Katz* test, an individual’s expectation of privacy must stem from “a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”⁴¹ Despite the Court’s recognition that a search can occur without physical intrusion,⁴² “[r]ecent cases . . . reflect the Supreme Court’s continued consideration of property interests in determining Fourth Amendment privacy interests.”⁴³ As traditionally held in *Rakas v. Illinois*:

³¹ *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

³² Reasonable seizures under the Fourth Amendment are beyond the scope of this Comment.

³³ See *Houghton*, 526 U.S. at 299; see generally Dante P. Trevisani, *Passenger Standing to Challenge Searches and Seizures: A Distinction Without a Constitutional Difference*, 61 FLA. L. REV. 329, 332–33 (2009).

³⁴ *Houghton*, 526 U.S. at 299–300.

³⁵ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

³⁶ *Id.* (citation omitted).

³⁷ *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

³⁸ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

³⁹ *Id.*; see *Rakas*, 439 U.S. at 143.

⁴⁰ See *Rakas*, 439 U.S. at 143; *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁴¹ *Rakas*, 439 U.S. at 143 n.12.

⁴² See *Katz*, 389 U.S. at 353.

⁴³ *United States v. Acosta*, 965 F.2d 1248, 1256–57 (3d Cir. 1992). See generally *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988); *United States v. Dunn*, 480 U.S. 294 (1987).

While “[e]xpectations of privacy protected by the Fourth Amendment . . . need not be based on a common-law interest in real or personal property, . . . by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.”⁴⁴

All in all, an individual who owns, lawfully possesses, or controls property is likely to have a legitimate expectation of privacy in that property because he has a right to exclude others.⁴⁵

Accordingly, under the Fourth Amendment, an individual does not have the same degree of protection in all invaded places.⁴⁶ If an individual has a lesser expectation of privacy, the individual will be subject to greater police intrusion. In other words, a lawful search under the Fourth Amendment will have fewer restrictions if the individual’s reasonable expectation of privacy is diminished. The Supreme Court has established extensive precedent which essentially categorizes invaded places into a hierarchy of greater or lesser privacy protections.

At the top of the hierarchy and “[a]t the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”⁴⁷ An individual’s privacy interests in his own home are almost absolute, but an individual’s privacy interests in the home of another may be diminished.⁴⁸ In *Minnesota v. Carter*, the Court equated an overnight guest’s privacy interests with those of the home owner.⁴⁹ On the other hand, the *Carter* Court held that commercial guests did not have the heightened protections enjoyed by a home owner because “[a]n expectation of privacy in commercial premises, however, is different from,

⁴⁴ *United States v. Kennedy*, 638 F.3d 159, 164 (3d Cir. 2011) (alteration in original) (quoting *Rakas*, 439 U.S. at 143 n.12).

⁴⁵ *See Rakas*, 439 U.S. at 143 n.12 (“One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.”); *see also Kennedy*, 638 F.3d at 164 (citing *Rakas*, 439 U.S. at 143 n.12) (“[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude.”).

⁴⁶ *See Florida v. Jardines*, 569 U.S. 1, 6 (2013) (explaining that private property must be enumerated in the Amendment’s text to be protected and introduces the concept of heightened or lessened protections).

⁴⁷ *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

⁴⁸ *See Minnesota v. Carter*, 525 U.S. 83, 89 (1998) (explaining that the Supreme Court has “held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else”).

⁴⁹ *Id.* at 90 (“[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.”).

and indeed less than, a similar expectation in an individual's home."⁵⁰ Further down on the hierarchy of privacy interests are vehicles. The Court "has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment."⁵¹ In other words, individuals have a diminished expectation of privacy "in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects . . . [i]t travels public thoroughfares where both its occupants and its contents are in plain view."⁵² While, "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks," a higher degree of police intrusion is acceptable.⁵³ Nonetheless, the diminished privacy interest of vehicle occupants is constitutionally protected.⁵⁴ And so, while it is well established that the Amendment protects people, not places, an individual's protection may depend on where that individual is.⁵⁵

B. An Individual's Diminished Expectation of Privacy in Automobiles

In consideration of the principles detailed above, the courts have established various rules which provide guidance for future courts to delineate the privacy interests of an individual in an automobile. To begin, a search of a person, house, paper, or effect under the Fourth Amendment requires a warrant based upon probable cause.⁵⁶ Warrantless searches "are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."⁵⁷ It is undisputed that automobiles are enumerated as "effects" in the Fourth Amendment,⁵⁸ but "warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not."⁵⁹ This section will discuss two exceptions to the warrant requirement that allow warrantless searches of automobiles: the automobile exception and the search incident to arrest

⁵⁰ *Id.* (quoting *New York v. Burger*, 482 U.S. 691, 700 (1987)).

⁵¹ *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

⁵² *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

⁵³ *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). *See generally* *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵⁴ *See Arizona v. Gant*, 556 U.S. 332, 345 (2009).

⁵⁵ *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998) ("But the extent to which the Fourth Amendment protects people may depend upon where those people are."); *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁵⁶ *See Katz*, 389 U.S. at 357.

⁵⁷ *Id.*

⁵⁸ *United States v. Jones*, 565 U.S. 400, 404 (2012) ("[A] vehicle is an 'effect' as that term is used in the Amendment.").

⁵⁹ *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

exception. Additionally, it will discuss the common enterprise assumption, which also allows warrantless searches of passengers.

1. The Automobile Exception

In *United States v. Carroll*, the Court provided a warrant requirement specific to automobiles.⁶⁰ Under the automobile exception, a warrantless search of an automobile is permissible if based upon probable cause, “that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction.”⁶¹ The Court’s reasoning for providing an automobile warrant exception is grounded in the two justifications.

First, the “inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.”⁶² Even if the vehicle is not actually moving at the time of the encounter, “the vehicle is obviously readily mobile by the turn of an ignition key.”⁶³ In summary, restricting officers from searching an automobile until a lawful warrant is obtained presents serious risks; by that time, it is likely that automobile has been removed from the jurisdiction and the contraband has been destroyed.⁶⁴

On the other hand, “the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction.”⁶⁵ The second justification provided in *Carroll* is that an individual has a “reduced expectation of privacy in an automobile, owing to its pervasive regulation.”⁶⁶ But, in *Delaware v. Prouse*, the Court found that “[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.”⁶⁷ Justice White, writing for the majority, emphasized the practicality of automobile travel:

Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one’s home, workplace, and leisure activities. Many people spend more hours each

⁶⁰ See generally *Carroll v. United States*, 267 U.S. 132 (1925).

⁶¹ *United States v. Ross*, 456 U.S. 798, 805, 808 (1982) (“[T]he probable-cause determination must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers.”); *Carroll*, 267 U.S. at 149.

⁶² *Opperman*, 428 U.S. at 367.

⁶³ *California v. Carney*, 471 U.S. 386, 393 (1985).

⁶⁴ See *id.* at 390–91; *Carroll*, 267 U.S. at 151, 153.

⁶⁵ *Opperman*, 428 U.S. at 367.

⁶⁶ *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

⁶⁷ *Delaware v. Prouse*, 440 U.S. 648, 662 (1979).

day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.⁶⁸

The majority's opinion in *Carroll* previews an intuitive understanding of the future of transportation. Given the importance of automobiles today, it would be unreasonable for any court to hold that individuals do not have an expectation of privacy in automobiles. Such a finding would severely diminish the rights of countless individuals, considering that automobile travel is no longer optional in most parts of the world. While it is established that an individual's privacy interests are diminished in an automobile, this "interest is nevertheless important and deserving of constitutional protection."⁶⁹

a. The Scope of Searches Under the Automobile Exception

Although the *Carroll* exception allows lawful warrantless searches of automobiles, a search of "intolerable intensity and scope" will deem the search unconstitutional.⁷⁰ Under *United States v. Ross*, a warrantless search under the automobile exception always allows officers to conduct "a 'probing search' of compartments and containers within the automobile so long as the search is supported by probable cause."⁷¹ Searches can be "as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'"⁷² In summary, the scope "is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause."⁷³

The scope of a warrantless search of an automobile "is defined by the object of the search and the places in which there is probable cause to believe that it may be found."⁷⁴ It "is not defined by the nature of the container in which the contraband is secreted."⁷⁵ Therefore, "[i]f probable cause justifies

⁶⁸ *Id.* at 662–63.

⁶⁹ *Arizona v. Gant*, 556 U.S. 332, 345 (2009).

⁷⁰ *Terry v. Ohio*, 392 U.S. 1, 17–18 (1968).

⁷¹ *California v. Acevedo*, 500 U.S. 565, 570 (1991) (quoting *United States v. Ross*, 456 U.S. 798, 800 (1982)).

⁷² *Ross*, 456 U.S. at 800 (quoting U.S. CONST. amend IV).

⁷³ *Id.* at 823.

⁷⁴ *Id.* at 824.

⁷⁵ *Id.*

the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”⁷⁶

i. *California v. Acevedo*'s Container Rule

Even after the *Ross* decision, it was unclear whether an officer had to establish probable cause in relation to each container searched.⁷⁷ The Supreme Court addressed this issue in *California v. Acevedo*.⁷⁸ It held that “police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”⁷⁹ In other words, warrantless searches of containers inside of an automobile, are reasonable under the Fourth Amendment if an officer had probable cause to search the automobile in the first place.⁸⁰ Nevertheless, this broad rule has one caveat: for a container to be within the scope of a warrantless automobile search, the container must be found in the *particular* part of the automobile in which the police have probable cause to believe that contraband is hidden.⁸¹ For example, probable cause that a container found in the trunk of a vehicle contains contraband does not justify a search of the entire vehicle; it only justifies a search of the container in the trunk.⁸² The *Acevedo* Court acknowledged that “the privacy interests in a car’s trunk or glove compartment may be no less than those in a movable container.”⁸³ Even with this geographical limitation, warrantless searches of automobiles have few restrictions.

2. *Search Incident to Arrest in the Automobile Context*

Aside from the automobile exception, a warrantless search of an automobile may be permissible incident to a lawful arrest. Under the search incident to arrest rule, when an individual is lawfully arrested, an officer can conduct a full search of the arrestee’s person.⁸⁴ In the interest of officer safety

⁷⁶ *Id.* at 825.

⁷⁷ *See California v. Acevedo*, 500 U.S. 565, 574 (1991).

⁷⁸ *Id.* at 573.

⁷⁹ *Id.* at 580.

⁸⁰ *See id.*

⁸¹ *See id.* at 592 (White, J., dissenting) (“Because the police can seize the container which is the object of their search, they have no need either to search or to seize the entire vehicle. Indeed, as even the Court today recognizes, they have no authority to do so.”).

⁸² *See id.*

⁸³ *Id.* at 573 (1991) (quoting *United States v. Ross*, 456 U.S. 798, 823 (1982)).

⁸⁴ *Chimel v. California*, 395 U.S. 752, 763 (1969) (finding that under the search incident to arrest rule it “is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction”).

and evidence preservation,⁸⁵ an officer could also search the area within the arrestee's immediate control. Also known as the grabbing area, the Court construed "that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."⁸⁶ Depending on the area where an individual is arrested, the scope of these warrantless searches can be extended further to include other persons and items.

The scope of the search incident to arrest rule was considered in the automobile context in *Arizona v. Gant*.⁸⁷ The Court overruled the broad interpretation of the rule in *New York v. Belton*, which allowed an automatic search of the passenger compartment pursuant to a lawful arrest of an occupant.⁸⁸ Under *Gant*, a search incident to arrest "permit[s] an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest."⁸⁹ The majority contends that the rule is grounded in "concern[s] about giving police officers unbridled discretion to rummage at will among a person's private effects."⁹⁰ Yet, the searches permissible under the rule are very extensive. If either of the prongs of the *Gant* test are met, it "authorize[s] police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space."⁹¹ In justification, the Court claimed that "[t]hese exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search."⁹²

a. *Passenger's Privacy Rights: Wyoming v. Houghton's Common Enterprise Assumption*

Wyoming v. Houghton's common enterprise assumption is the best guidance provided by the Court on this passenger privacy question.⁹³ In *Houghton*, a police officer pulled over David Young because his car had a

⁸⁵ *See id.*

⁸⁶ *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (quoting *Chimel*, 395 U.S. at 763).

⁸⁷ *See generally id.* at 332.

⁸⁸ *See generally* *New York v. Belton*, 453 U.S. 454 (1981).

⁸⁹ *Gant*, 556 U.S. at 346.

⁹⁰ *Id.* at 345.

⁹¹ *Id.*

⁹² *Id.* at 347.

⁹³ *See generally* *Wyoming v. Houghton*, 526 U.S. 295 (1999); Daniel J. Hewitt, *Don't Accept Rides from Strangers: The Supreme Court Hastens the Demise of Passenger Privacy in American Automobiles*, 90 J. CRIM. L. & CRIMINOLOGY 875 (2000); *see also* *Think Twice Before Sharing a Ride: Probable Cause to Arrest All Occupants of Vehicle*, 18 NO. 1 CRIM. PRAC. REP. 1 (2004) (discussing the implications of the common enterprise assumption for passengers in a vehicle containing illegal contraband).

faulty break light and he was speeding.⁹⁴ Young was accompanied by his girlfriend and Sandra Houghton.⁹⁵ When he approached, the officer noticed a needle in Young's shirt pocket.⁹⁶ Notwithstanding the fact that Young admitted to using the needle to take drugs, the officer searched the passenger compartment for contraband.⁹⁷ The search uncovered a purse which Houghton claimed to be hers.⁹⁸ The officer then proceeded to search Houghton's purse, in which he found drug paraphernalia and methamphetamine.⁹⁹ Houghton was subsequently arrested and contested the validity of the search.¹⁰⁰ The Supreme Court found the search of Houghton's purse was reasonable and introduced the common enterprise assumption.¹⁰¹

Under the common enterprise rule, when an officer is conducting a lawful search based upon probable cause, a presumption arises that the occupants in a vehicle are in a common enterprise.¹⁰² Based on the assumption, "it is reasonable for police officers . . . to examine packages and containers [found inside the vehicle] without a showing of individualized probable cause for each one."¹⁰³ The Court claims that a driver and passenger will *often* "have the same interest in concealing the fruits or the evidence of their wrongdoing."¹⁰⁴

In effect, the common enterprise rule under *Houghton* is an automatic presumption. Simply being a passenger in a vehicle which is stopped and subsequently searched, is sufficient for this assumption to arise. An officer does not need a "positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission."¹⁰⁵ Instead, an officer can search a passenger's belongings even without suspicion. Justice Steven's dissent points out that the "assumption of common enterprise between the passenger and driver of a car [are] based simply on physical proximity."¹⁰⁶

94 *Houghton*, 526 U.S. at 297.

95 *Id.* at 298.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* at 298.

101 *Id.* at 305.

102 *Id.* at 304–05.

103 *Id.* at 302.

104 *Id.* at 304–05.

105 *Id.* at 305.

106 Hewitt, *supra* note 93 at 897.

This doctrine was revisited in *Maryland v. Pringle*.¹⁰⁷ In that case, an officer stopped and searched an automobile which contained large quantity of drugs and cash.¹⁰⁸ When the three occupants of the vehicle denied knowledge of the drugs and cash, the officer presumed they were in a common enterprise and placed all three occupants under arrest.¹⁰⁹ On review, the Court found it was “an entirely reasonable inference *from these facts* that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.”¹¹⁰ It noted that “[t]he quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.”¹¹¹ All in all, the majority’s view is that “[w]hile the Fourth Amendment does not permit guilt by association, . . . it does allow police officers to use common sense and infer a common enterprise among co-passengers of a small automobile where drug dealing is likely.”¹¹² Allowing officers to use their common sense to analyze the situation before presuming that the driver and passenger are engaged in a common enterprise, might indicate that the common enterprise assumption does not always arise automatically anymore.

II. SOMETHING OLD AND SOMETHING NEW: TRADITIONAL FOR-HIRE VEHICLES AND MODERN FOR-HIRE VEHICLES

A. Fourth Amendment Taxonomy of Passenger Rides

Most individuals select their method of transportation without any thought of the implications it may have on their Fourth Amendment rights. But the unrecognized reality is that an individual’s Fourth Amendment protections may be heightened or diminished depending on the type of vehicle they are in or type of ride in which they are engaging. A consistent analysis of the existing Fourth Amendment suggests that a passenger’s choice of transportation will dictate the permissible scope of police intrusion throughout their ride.

For this Comment, I have categorized passenger rides into three classifications, which I will refer to as “the taxonomy of passenger rides.” For purposes of the Fourth Amendment, this categorization is best described

¹⁰⁷ *Maryland v. Pringle*, 540 U.S. 366 (2003).

¹⁰⁸ *Id.* at 368–69.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 372 (emphasis added).

¹¹¹ *Id.* at 373.

¹¹² *Farkarlun v. Hanning*, 855 F. Supp. 2d 906, 918–19 (D. Minn. 2012).

as a taxonomy because it classifies the types of rides passengers commonly engage in according to the nature of the ride and the type of vehicle the ride is completed in. The taxonomy of passenger rides facilitates the analysis and application of the existing Fourth Amendment doctrine.

The first type of rides are **gratuitous or friendly rides** in which individuals choose to ride as passengers in a friend's or family member's vehicle. This type of ride is non-commercial: the passenger does not pay a fare for the ride because the driver and the passenger have some type of non-commercial relationship.¹¹³ The driver uses his personal non-commercial vehicle¹¹⁴ to transport the passenger.

Next, some passengers opt for paid transportation such as taxicabs, limousines, and buses. These types of rides, known as **traditional for-hire rides**,¹¹⁵ require that the passenger pay a fare for the service. The driver and passenger have no connection aside from this commercial transportation transaction.¹¹⁶ Traditional for-hire vehicles are specifically manufactured for commercial use, and typically include physical partitions dividing the passenger area from the driver's area. For example, most taxicabs have a physical partition which divides the cab into two cabins: the driver's cabin and the passenger cabin.

Lastly, passengers can elect to take an Uber or Lyft, a quasi-private vehicle engaging in ridesharing rides, or **modern for-hire rides**. The driver and passenger are matched through a smartphone application.¹¹⁷ Similar to traditional for-hire rides, the driver and passenger have no connection aside from the immediate commercial transportation transaction.¹¹⁸ Drivers use their private vehicles to complete these commercial rides, so unlike traditional for-hire vehicles, these vehicles do not have a physical partition. Uber and Lyft drivers use their personal vehicle during "work hours" and are likely to continue to use the same vehicle after and before subsequent shifts.

A close reading of the *Katz*¹¹⁹ test and the Fourth Amendment doctrine mentioned in Part I of this Comment, indicate that courts must take into account the difference between these types of rides and analyze how the

¹¹³ This relationship requirement can include (but is not limited to): friends, neighbors, family, and co-conspirators.

¹¹⁴ The vehicle is owned and used by the driver for personal purposes, such as commuting to everyday activities.

¹¹⁵ I will also use the term "traditional for-hire" as a short reference throughout this Comment.

¹¹⁶ Situations where a commercial driver has a long-standing agreement with a passenger, in which the driver provides rides regularly for the passenger, are outside of the scope of this paper.

¹¹⁷ *How Lyft Works: 6 Things to Know Before Your First Ride*, LYFT BLOG (Jun. 9, 2016), <https://blog.lyft.com/posts/how-does-lyft-work>.

¹¹⁸ Situations where a modern for-hire driver has a long-standing agreement with a passenger, in which the driver provides rides regularly for the passenger, are outside of the scope of this paper.

¹¹⁹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

differences affect the passenger's subjective expectation of privacy and society's objective expectation of privacy. The taxonomy of passenger rides will facilitate the *Katz* analysis when conducted by future courts.¹²⁰

1. For-Hire Vehicles

In order to understand the taxonomy, it is essential to understand the origin of for-hire rides. A car for-hire is a vehicle used to provide individuals with transportation services in exchange for monetary compensation.¹²¹ In reality “any motor vehicle, when used for transporting persons or goods for compensation” is a for-hire vehicle.¹²² Typically, they are commercial vehicles such as taxicabs, limousines, and buses.¹²³ Traditional black cars and app-based car services like Uber and Lyft have also been classified as for-hire vehicles.¹²⁴ Much like Uber and Lyft, a black car service is a company who subcontracts work to independent drivers that own and operate their own vehicles.¹²⁵ In New York, black cars are considered “[a] segment of the for-hire vehicle industry [which] primarily serves business clientele with luxury cars.”¹²⁶

This Comment divides for-hire vehicles into two classifications: traditional for-hire vehicles and modern for-hire vehicles. Traditional for-hire vehicles include forms of commercial transportation that have been already analyzed by the courts: taxicabs, limousines, buses, and black cars. Modern for-hire vehicles include the vehicles used in app-based ridesharing services like Uber and Lyft, which have not yet been analyzed by the courts.

2. Traditional For-Hire Vehicles: A Passenger's Reasonable Expectation of Privacy in a Taxicab

There is vast precedent discussing the reasonable expectation of privacy of passengers in traditional for-hire vehicles. While the lower courts are split

¹²⁰ *Id.*

¹²¹ FLA. STAT. § 320.01(15)(a) (2018).

¹²² *Id.*

¹²³ OFFICE OF THE MAYOR OF THE CITY OF N.Y., FOR-HIRE VEHICLE TRANSPORTATION STUDY 1 (2016), <http://www1.nyc.gov/assets/operations/downloads/pdf/For-Hire-Vehicle-Transportation-Study.pdf>.

¹²⁴ *Id.*

¹²⁵ Jarrad Kulick, *Executive Car Service Vs. Black Car Service*, ALL STAR LIMOUSINE SERV. LTD. (Aug. 16, 2013), <http://www.allstarlimo.com/All-Star-Limo-Blog/2013/8/Executive-Car-Service-Vs-Black-Car-Service>.

¹²⁶ *Definitions: Taxi, Livery, Car Service, Black Car*, SCHALLER CONSULTING ARCHIVE (2002), <http://www.schallerconsult.com/taxi/newfb/defin.htm>.

on question of passenger privacy, the *Katz* Court clearly established that an individual in a taxicab “may rely upon the protection of the Fourth Amendment.”¹²⁷ Consistent with the Court’s analysis in *Katz*, other courts have found that the fare, the right to control the vehicle’s destination, and the right to exclude, sufficiently establish a taxicab passenger’s reasonable expectation of privacy.¹²⁸

In *United States v. Santiago*, the District Court for the Southern District of New York held that passengers in taxicabs have a reasonable expectation of privacy based on their ability to exclude others from the ride.¹²⁹ The court found that a taxicab passenger’s expectation of privacy is objectively reasonable because the rear area of the taxicab is the area that the passenger pays to control.¹³⁰ This finding turned on the distinction that “[t]ypically, a passenger in an automobile does not have a right to expect privacy as he has no right to exclude others from the car.”¹³¹ In contrast, because a taxicab passenger determines the destination of the taxicab, the passenger “may exclude others from the cab, as he has hired the cab for his exclusive use for the duration of his trip. In effect, the passenger area belongs to the passenger who pays for it during the course of the trip.”¹³²

In *United States v. Bulluck*, the District Court for the Southern District of New York rejected the contention that taxicab passengers have the ability to exclude others.¹³³ First, it found that a passenger’s ability to object to the cab driver taking on another fare did not equate to the capacity to exclude all other individuals from the cab.¹³⁴ Then, the court maintained that “[p]assengers have no meaningful privacy in a cab,”¹³⁵ because the driver “is inches away at all times and can see and hear everything that is happening in the rear seat.”¹³⁶ Most importantly, the court alleged that passengers do not have sufficient dominion or control of the taxicab because “the cab driver

¹²⁷ *Katz v. United States*, 389 U.S. 347, 352 (1967).

¹²⁸ *See* *United States v. Santiago*, 950 F. Supp. 590, 598 (S.D.N.Y. 1996); *Chapa v. State*, 729 S.W.2d 723, 729 (Tex. Crim. App. 1987) (finding that although “the driver of the cab, though a perfect stranger, may have shared a degree of privacy in the area beneath the front seat . . . does not defeat appellant’s reasonable claim to freedom from government intrusion there”).

¹²⁹ *See generally Santiago*, 950 F. Supp. at 590.

¹³⁰ *Id.* at 598.

¹³¹ *Id.* at 597.

¹³² *Id.* at 598.

¹³³ *See generally* *United States v. Bulluck*, No. 09 Cr. 652 (PGG), 2010 U.S. Dist. LEXIS 47577, at *1 (S.D.N.Y. May 13, 2010).

¹³⁴ *Id.* at *63.

¹³⁵ *Id.*

¹³⁶ *Id.*

never surrenders actual control over the cab to a passenger, maintains custody of the keys to the cab, and controls its locks at all times.”¹³⁷

Subsequently, *United States v. Mota* was decided, in which the District Court recognized that *Bulluck* incorrectly held that passengers in taxicabs did not have an expectation of privacy.¹³⁸ It mentions that occasionally courts have found that taxicab passengers have an expectation of privacy “by virtue of their ability to exclude others and determine the course of the taxicab for the duration of their ride.”¹³⁹ Impliedly, *Bulluck* can only stand for the proposition that the power to object to a driver taking on another fare is not sufficient to establish a passenger’s control and ability to exclude others for the duration of the ride.¹⁴⁰ In effect, it leaves open the possibility for future litigants to establish that for-hire passengers have sufficient control under *Katz* based on other abilities.¹⁴¹

3. Modern For-Hire Vehicles: The Advent of Technology Based Transportation

While Uber and Lyft may be well known in the transportation market, the nature of the rides provided by these companies are an issue of first impression to the Fourth Amendment. Although the quasi-private vehicles used by Uber and Lyft are for-hire vehicles, they are distinguishable from taxicabs and limousines. Modern for-hire vehicles do not fit in neatly into the courts’ Fourth Amendment analysis of traditional for-hire vehicles. In order to make sense of the reasoning behind the taxonomy of passenger rides, it is important to understand ridesharing and become familiar with the companies who provide these services.¹⁴²

Nowadays, ridesharing is most individuals’ preferred method of transportation. Ridesharing is an arrangement made through a smartphone application “in which a passenger travels in a private vehicle driven by its owner for a fee.”¹⁴³ These services are particularly popular in cities like New

¹³⁷ *Id.* at *62.

¹³⁸ *United States v. Mota*, 155 F. Supp. 3d 461, 471 n.6 (S.D.N.Y. 2016).

¹³⁹ *Id.*

¹⁴⁰ *Bulluck*, 2010 U.S. Dist. LEXIS 47577, at *1.

¹⁴¹ *Katz v. United States*, 389 U.S. 347, 361 (1967).

¹⁴² As a general note, this background section is also based on the author’s personal experience with Uber and Lyft.

¹⁴³ *Ride-Share*, GOOGLE, <https://www.google.com/search?q=google+dictionary&oq=google+dictionary&aqs=chrome..69i57j0l5.5158j0j9&sourceid=chrome&ie=UTF-8#dobs=ride-share> (last visited Mar. 1, 2019).

York and San Francisco where taxicabs are difficult to hail.¹⁴⁴ Determination to make transportation cheaper and easier lead to the creation of an affordable black car service with a technological twist.¹⁴⁵ The evolution was led by two companies known as Uber and Lyft.¹⁴⁶ The first ridesharing application, created by Uber Technologies Inc., hit the market in June 2010.¹⁴⁷ Subsequently, Lyft launched in 2012.¹⁴⁸

Although Uber and Lyft are separate companies, essentially, they provide the same service: commercial transportation in privately owned vehicles driven by the vehicle's owner. Gone are the days of hailing rides on the side of the road. Uber and Lyft users can request a ride remotely in the tap of a finger.¹⁴⁹ To initiate a ride, users log into the respective software application on their smartphone and request a ride.¹⁵⁰ The user has an option to select a car-pool style ride in which the driver can pick up other customers, or the user can opt to request a private ride.¹⁵¹ Once the user is paired with an available driver via the application, the user is given access to the driver's profile, which includes a rating based on ratings given by prior riders, "their name, a headshot, the make and model of their car, a photo of the car, and their approximate ETA in minutes."¹⁵² Next, the driver will pick up the user in a privately owned vehicle and will drive the user to the selected destination.¹⁵³ To assure that their vehicles are easily recognizable, Uber's "driver partners"¹⁵⁴ display a reflective "U" sign in the passenger side windshield during the hours they are actively working for Uber.¹⁵⁵ "Lyft

¹⁴⁴ Sarah Mitroff, *Uber vs Lyft: 9 Things to Consider Before Your First Ride*, C|NET (Nov. 2, 2015), <https://www.cnet.com/how-to/uber-lyft-ride-share-ride-hailing/>.

¹⁴⁵ Artyom Dogtiev, *Uber Revenue and Usage Statistics 2017*, BUSINESSOFAPPS (Jan. 8, 2018), <http://www.businessofapps.com/data/uber-statistics/>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; Mitroff, *supra* note 144.

¹⁵⁰ *See* O'Connor v. Uber Techs., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015). *See generally* Mitroff, *supra* note 144; Dogtiev, *supra* note 145.

¹⁵¹ Mitroff, *supra* note 144.

¹⁵² *Id.* *See also* O'Connor, 82 F. Supp. 3d at 1135 ("Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination.").

¹⁵³ Mitroff, *supra* note 144; Dogtiev, *supra* note 145. *See also* O'Connor, 82 F. Supp. 3d at 1135.

¹⁵⁴ Uber Promotions, Inc. v. Uber Techs., Inc., 162 F. Supp. 3d 1253, 1259 (N.D. Fla. 2016) (explaining that Uber refers to their drivers as "driver partners" to highlight that these drivers are independent contractors who use their own cars to transport passengers).

¹⁵⁵ *Vehicle Requirements Augusta*, UBER, <https://www.uber.com/drive/augusta/resources/uber-u-signs/> (last visited Apr. 14, 2018).

gives each driver a ‘Carstache’ (a big fuzzy pink mustache) to attach to the front of his car when using it to give ‘Lyfts.’”¹⁵⁶

During the ride, the smartphone application provides the user with a real time map of the ride.¹⁵⁷ The user can change the destination of the ride at any time through application.¹⁵⁸ At the end of the ride, the user is asked to rate the driver and provide feedback.¹⁵⁹ The driver is also asked to rate the user.¹⁶⁰ The user’s rating is used to pair the user in future rides.¹⁶¹ The rating feature is important, for both drivers and passengers, because it gives them the option of screening out their match. For passengers, a “low rating – perhaps because you trashed their car . . . [or] were rude . . . –can mean that fewer drivers will accept your requests for a ride.”¹⁶² For modern for-hire drivers, “[u]nlike taxi drivers, whose driving behavior won’t necessarily affect their ability to continue to pick up passengers, low ratings on Lyft and Uber can cause drivers to lose opportunities to get business or even face penalties from the companies.”¹⁶³ All in all, modern for-hire vehicles are distinguishable from traditional for-hire vehicles in many ways, which affect individuals’ expectation of privacy and shapes the “evolution of societal privacy expectations.”¹⁶⁴

III. CONFRONTING AN OLD PROBLEM IN A NEW SETTING: PREDICTING THE PRIVACY INTERESTS OF PASSENGERS IN MODERN FOR-HIRE VEHICLES

A. *Revisiting the Fourth Amendment Doctrine*

As technology and transportation evolve, the validity of the existing privacy protections is questioned. A proper analysis of the existing Fourth Amendment doctrine is conducted “under traditional standards of reasonableness by assessing, on the one hand, the degree to which . . . [the search] intrudes upon an individual’s privacy and, on the other, the degree to

¹⁵⁶ *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015) (alteration in original).

¹⁵⁷ *Mitroff*, *supra* note 144.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *United States v. Jones*, 565 U.S. 400, 415–16 (2012) (“I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one’s public movements.”) (referencing *Katz v. United States*, 389 U.S. 347 (1967)).

which it is needed for the promotion of legitimate governmental interests.”¹⁶⁵ Interpretation of “[t]he *Fourth Amendment* is to be construed in the light of what was deemed an unreasonable search . . . when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”¹⁶⁶

In anticipation of cases concerning the Fourth Amendment protections of passengers in modern for-hire vehicles, the Court needs to establish jurisprudence that adequately delineates the privacy rights in modern for-hire vehicles. The existing precedent does not adequately “conserve public interests . . . [or] the interests and rights of individual citizens.”¹⁶⁷ Because the existing Fourth Amendment doctrine is long-established, it is unlikely that the Court will abandon this precedent. Instead, the existing doctrine should be used to provide future courts with the tools to address this privacy question. But it is important for future courts to take into consideration that modern for-hire vehicles are quasi-private, a hybrid between private and commercial vehicles. Therefore, while precedent addressing the privacy rights of traditional for-hire passengers may be informative, it fails to account for the private aspects of these rides.

B. Passengers in Modern For-Hire Vehicles Have a Reasonable Expectation of Privacy Under Katz v. United States

Future courts should consider that modern “advances . . . affect the *Katz* test by shaping the evolution of societal privacy expectations.”¹⁶⁸ Thus, in assessing the reasonableness of the common enterprise assumption and the search incident to arrest rule, courts should begin by examining the effects of the geographic composition of the interior of modern for-hire vehicles and the amount of control passengers have over the vehicle. A consistent reading of the Fourth Amendment precedent suggests that future courts will find that both prongs of the *Katz* test are met when framed by those considerations.¹⁶⁹

¹⁶⁵ *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

¹⁶⁶ *Carroll v. United States*, 267 U.S. 132, 149 (1925).

¹⁶⁷ *Id.* at 149.

¹⁶⁸ *Jones*, 565 U.S. at 415–16 (“I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one’s public movements.”) (referencing *Katz*, 389 U.S. at 347).

¹⁶⁹ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

1. The Geographical Composition of the Interior Cabin of Modern For-Hire Vehicles Supports Passengers' Subjective Expectation of Privacy

The existing Fourth Amendment precedent limits the scope of a passenger's expectation of privacy to the passenger compartment of the vehicle.¹⁷⁰ The notion is that the "the passenger area belongs to the passenger who pays for it during the course of the trip."¹⁷¹ In traditional for-hire vehicles this makes sense because taxicabs, buses, and limousines usually have a partition which physically divides the vehicle into two cabins: the driver's cabin and the passenger's cabin. The partition serves two important functions. First, it prevents the passenger from reaching into the front cabin and adjusting the air conditioning and radio. Most importantly, it alerts passengers that their area of control is the passenger compartment.

In a modern for-hire vehicle, it is unclear what geographical area would be considered the passenger compartment. Drivers use their own personal, privately owned non-commercial vehicles. Unlike commercial vehicles,¹⁷² private vehicles typically do not have physical partitions that divide the passenger compartment from the driver's compartment. These vehicles usually have an open format, without physical barriers to restrict the areas a passenger can access. This makes it even harder for a modern for-hire passenger to subjectively delineate the geographical areas which he has control over.

To further muddy the waters, Uber and Lyft do not restrict the areas in which passengers can sit. Instead, they invite passengers to sit both in the front and in the back of the vehicle.¹⁷³ Although some taxicab drivers may allow passengers to sit in the front seat, taxicab passengers rarely sit in the front because the partitions suggest that the front seat is off limits. Not only are the physical restrictions lacking in modern for-hire vehicles, but Uber's and Lyft's conduct promotes the line blurring. It cannot be reasonably predicted where a modern for-hire passenger will sit.

Based on the geographical composition of modern for-hire vehicles, it is reasonable for a passenger to believe that he has an expectation of privacy in the interior of the vehicle. A passenger has unrestricted ability to reach

¹⁷⁰ See generally *Arizona v. Gant*, 556 U.S. 332, 332 (2009); *United States v. Santiago*, 950 F. Supp. 590, 593 (S.D.N.Y. 1996).

¹⁷¹ *Santiago*, 950 F. Supp. at 598.

¹⁷² In the Comment, the term "commercial vehicles" is used to reference traditional for-hire vehicles, like taxicabs or limousines which are built and designed for commercial transportation purposes.

¹⁷³ *How Lyft Works: 6 Things to Know Before Your First Ride*, *supra* note 117 ("It's your ride, so set the tone depending on how you feel. If you want to hop in the backseat, . . . that's no big deal — there's no need to sit in the front seat and chat. But you can always ride shotgun . . .").

forward from the back seat to adjust the air conditioning or the radio. The passenger can also reach forward and place his belongings in the front passenger seat while still occupying the back seat. Passengers can even choose whether they want to sit in the front or back seat. In sum, the open format of modern for-hire vehicles allows passengers to exert physical control over the entire interior of the vehicle, not only the area where the passenger is seated.

2. Passengers Have Lawful Control over Modern For-Hire Vehicles by Virtue of Their Right to Exclude

The objective prong of the *Katz* test requires that an individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'"¹⁷⁴ The Fourth Amendment doctrine suggests that a passenger who can establish that he has sufficient control over the vehicle and a right to exclude others for the duration of the ride, meets this prong of the test. All the more reason, modern for-hire passengers' subjective expectation of privacy is likely to satisfy the objective prong of the *Katz* test.¹⁷⁵

To begin, the *Bulluck* court incorrectly alleges that passengers do not have sufficient control over for-hire vehicles because the driver never surrenders actual control over the vehicle "to a passenger, [because the driver] maintains custody of the keys . . . , and controls its locks at all times."¹⁷⁶ This assertion is explicitly incorrect because the *Katz* test does not require that a passenger have actual control of the vehicle. The Court has held that an individual who has **lawful** control of property "will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude."¹⁷⁷ While it is unclear what future courts will find to be sufficient to satisfy this requirement, in *Santiago* the court held that a passenger's ability to determine the destination of a taxicab and ability to exclude others was sufficient to establish lawful control.¹⁷⁸ Other courts have noted that controlling access to the vehicle and deciding who is invited to share the space is sufficient.¹⁷⁹ A consistent reading of this precedent suggests that the nature of modern for-

¹⁷⁴ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

¹⁷⁵ *Id.*

¹⁷⁶ *United States v. Bulluck*, No. 09 CR. 652 (PGG), 2010 U.S. Dist. LEXIS 47577, at *62 (S.D.N.Y. May 13, 2010).

¹⁷⁷ *United States v. Kennedy*, 638 F.3d 159, 164 (3d Cir. 2011).

¹⁷⁸ *See United States v. Santiago*, 950 F. Supp. 590, 598 (S.D.N.Y. 1996).

¹⁷⁹ *Bulluck*, 2010 U.S. Dist. LEXIS 47577, at *37 (holding "that non-owner passengers ordinarily do not have a reasonable expectation of privacy in the interior of the vehicles in which they are traveling, because they do not control access to the vehicle and do not have the right to exclude others").

hire rides and the mobile application provides passengers lawful control over the vehicle and the ability to exclude others from the ride.

Next, the ratings system in the mobile application allows passengers to exclude others. Drivers' ratings can be used as a screening feature by passengers to decide who they want to share space with. Passengers can decide to only ride with drivers who have a high rating. The application even allows passengers to cancel a ride based on a driver's poor rating. Impliedly, this screening feature gives passengers control over who they will be sharing a vehicle with.

Further, a modern for-hire passenger controls access to the vehicle.¹⁸⁰ When requesting a ride, the mobile application prompts modern-for hire passengers with the *option* to request a private ride or a carpool-style ride.¹⁸¹ Unlike taxicabs, this feature vests modern for-hire passengers with the power to exclude others from the ride at the very outset of the engagement. The driver cannot force a passenger to grant access to others for the duration of the ride. The car-pool option, available on both Uber and Lyft, is the only way a driver can pick up other customers while engaging on a ride.¹⁸² The passenger is the only person who can make the decision to allow or to exclude others. By accepting a non-carpool ride, modern for-hire drivers are expressly acknowledging the passenger's power to exclude. This feature alone should establish that modern for-hire passengers have a reasonable expectation of privacy.

Lastly, modern for-hire passengers' ability to determine the destination of the vehicle is sufficient to establish lawful control. Like the taxicab passengers in *Santiago*, modern for-hire passengers decide where the vehicle will be going and if there will be any stops along the way, and have the ability to direct the driver to take a preferred route.¹⁸³ The mobile application allows passengers to change the vehicle's destination in real time, without approval of the driver. Most ridesharing companies force the driver to comply with the passenger's suggested route even if it is longer or more troublesome. Even if the driver can refuse the change, the passenger's ability to change the destination and route of the vehicle at any time establishes that modern for-hire passengers are clearly in control of the vehicle for the duration of the ride.

In sum, a modern for-hire passenger's expectation of privacy is manifested by screening drivers, selecting a private ride, entering the vehicle,

180 *Id.*

181 Mitroff, *supra* note 144.

182 *Id.*

183 *See generally Santiago*, 950 F. Supp. at 598.

closing the door, and controlling the destination of the vehicle.¹⁸⁴ From a Fourth Amendment perspective these features are important because privacy depends on an individual's ability to control access to the vehicle and to decide who is invited to share the space.¹⁸⁵ Accordingly, modern for-hire passengers' expectation of privacy is "one that society is prepared to recognize as 'reasonable.'"¹⁸⁶

C. *The Common Enterprise Rule is Outdated*

Considering that future courts are likely to hold that passengers in modern for-hire vehicles have a reasonable expectation of privacy, the validity of the common enterprise assumption is at risk. A close reading of the common enterprise jurisprudence shows that the Court's understanding of transportation and passengers is outdated. It is important to remember that if evidence of wrongdoing is uncovered, regardless of whether any of the occupants in the vehicle take ownership, the common enterprise assumption will operate to automatically supply probable cause to search all of the occupants and the vehicle.¹⁸⁷ The common enterprise rule incorrectly assumes that a driver and passenger always share a common interest "in concealing the fruits or the evidence of their wrongdoing."¹⁸⁸ Logically, a common interest in harboring evidence is only plausible if the occupants have an ongoing relationship. Surely, a stranger will have no knowledge of any evidence of wrongdoing that could be found in the vehicle.

Keeping in mind that the *Houghton* majority denies that the assumption is based on "mere propinquity to others independently suspected of criminal activity,"¹⁸⁹ the only reasonable explanation for this rule is that Court assumed that people only ride in cars with friends, neighbors, family, co-conspirators, or the like. Impliedly, the belief is that individuals do not typically ride in vehicles with strangers. And so, the *Houghton* decision failed

¹⁸⁴ *Santiago*, 950 F. Supp. at 598 (holding that taxicab passengers manifest their subjective expectation of privacy "by entering the cab, closing the door and directing the driver to a particular destination"). See also *Katz v. United States*, 389 U.S. 347, 352 (1967) ("One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.").

¹⁸⁵ *Bulluck*, 2010 U.S. Dist. LEXIS 47577, at *37 (holding "that non-owner passengers ordinarily do not have a reasonable expectation of privacy in the interior of the vehicles in which they are traveling, because they do not control access to the vehicle and do not have the right to exclude others"). See also *United States v. Kennedy*, 638 F.3d 159, 164 (3d Cir. 2011) (citations omitted).

¹⁸⁶ *Katz*, 389 U.S. at 361.

¹⁸⁷ See generally *Think Twice Before Sharing a Ride: Probable Cause to Arrest All Occupants of Vehicle*, *supra* note 93.

¹⁸⁸ *Wyoming v. Houghton*, 526 U.S. 295, 305 (1999).

¹⁸⁹ *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

to account for modern transportation, a time when passengers and drivers have no relationship prior to engaging in the ride.¹⁹⁰

1. The Nature of Modern For-Hire Rides Negates the Validity of the Common Enterprise Assumption

To the extent that it might have been reasonable for the Court to assume a common interest between a driver and passengers, the advent of modern for-hire vehicles raises serious doubt to the plausibility of that inference. After the creation of Uber and Lyft, it is much more likely for persons to ride in vehicles with total strangers. The inference that a driver and passenger would have an interest in concealing evidence of wrongdoing is only plausible in non-commercial rides in private vehicles because these drivers and passengers commonly have an ongoing relationship. In contrast, the commercial nature of modern for-hire rides and the fleeting status of these passengers render the common enterprise presumption unreasonable in a modern for-hire vehicle.

The commercial nature of modern for-hire rides expressly negates the possibility of a common enterprise: modern for-hire passengers and drivers have no connection aside from the immediate ride they are engaging in.¹⁹¹ Uber and Lyft rides are commercial transportation transactions. The driver and passenger are matched through a ridesharing app.¹⁹² Modern for-hire drivers meet their passengers immediately before they enter the vehicle or once they are inside the vehicle. After the completion of a ride, the driver is likely to never see the passenger again. Although the application allows for drivers and passengers to screen each other before accepting a ride, this feature only provides their name and rating.¹⁹³ While a driver may choose to accept a ride based a passenger's five-star rating, it does not logically suggest that the driver will have a common interest in concealing the fruits of the passenger's criminal activity. In the event that a lawful search of the vehicle uncovers contraband, it is unreasonable to assume that the driver would have any interest in protecting, harboring, or hiding any incriminating evidence for the passenger (and vice versa).

¹⁹⁰ See generally *Houghton*, 526 U.S. at 295.

¹⁹¹ This Comment will not discuss the unlikely circumstance where a passenger is matched with a driver who they have previously been matched with.

¹⁹² *How Lyft Works: 6 Things to Know Before Your First Ride*, *supra* note 117.

¹⁹³ Mitroff, *supra* note 144.

2. The Introduction of a Fact Driven Analysis for the Common Enterprise Assumption

The common enterprise rule subjects individuals in modern for-hire vehicles to highly intrusive searches simply for being in close proximity to other law-breaking individuals. Because officers need more than just “mere propinquity to others independently suspected of criminal activity . . . [to] give rise to probable cause to search that person,”¹⁹⁴ the common enterprise assumption is unreasonable in modern for-hire vehicles. Thus, a future court will need to alter the applicability of the common enterprise rule in a way that adequately balances the passengers’ privacy interests and the government’s interests.

A modern interpretation of the common enterprise assumption is best embodied by converting this rule into a standard. *Houghton*’s common enterprise rule is an automatic presumption that arises without any consideration of the facts.¹⁹⁵ On the other hand, the analysis in *Pringle* makes clear that in reviewing the validity of the common enterprise assumption, courts should consider the facts and circumstances of each case.¹⁹⁶ The *Pringle* decision suggests that officers should be required to use their common sense and every day experience to properly infer a common enterprise.¹⁹⁷ In essence, the Court opened the door to the possibility of applying the common enterprise assumption as a standard, instead of a rule. Even the lower courts have typically required officers to establish “something extra” in order to act on the inference of common enterprise.¹⁹⁸ For example, courts have required “that the passenger in question had been a co-traveler for a longer time, had fled from the police, or in response to police questioning had been untruthful, evasive or very nervous.”¹⁹⁹

In light of the intrusiveness of warrantless searches, the common enterprise rule should be applied as a standard, instead of a rule, which requires that officers consider the facts and circumstances of each case before presuming that occupants in a vehicle are engaged in a common enterprise. Using common sense and every day experience, officers should be required

¹⁹⁴ *Ybarra*, 444 U.S. at 91.

¹⁹⁵ *See generally* *Wyoming v. Houghton*, 526 U.S. 295, 304 (1999).

¹⁹⁶ *See generally* *Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (considering the number of drugs and money found in the vehicle to be indicative of a common enterprise).

¹⁹⁷ *Id.*; *Farkarlun v. Hanning*, 855 F. Supp. 2d 906, 918–19 (D. Minn. 2012) (allowing “police officers to use common sense and infer a common enterprise among co-passengers of a small automobile where drug dealing is likely”).

¹⁹⁸ Wayne R. LaFave & David C. Baum, § 3.6(c) *Association with Another Person or With a Place*, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2017).

¹⁹⁹ *Id.*

to ask the driver and passenger questions to ascertain the relationship between the passenger and driver, the nature of the ride, and the status of the passenger. This will indicate whether the ride is commercial (traditional for-hire ride), private (friendly ride), or quasi-private (modern for-hire ride). The classification of the ride will equip the officer to correctly decide whether a common enterprise actually exists. Generally, the common enterprise assumption is more likely to be reasonable in non-commercial rides—private vehicles in which the driver and passengers are friends, family, or the like. The assumption is least reasonable in modern for-hire vehicles. In the event that the facts and circumstances of the encounter provide an officer with a reasonable basis to believe there is a common enterprise, the officer can conduct a warrantless search of the passenger. Absent a positive reason to believe that a common enterprise exists, a warrantless search of the passenger is unreasonable and prohibited.

*a. The Appearance of a Modern For-Hire Vehicle
Suggests to a Reasonable Officer that a Common
Enterprise Does Not Exist*

Under the standard approach proposed in the previous section, the appearance of modern for-hire vehicles should suggest to officers the absence of a common enterprise. While modern for-hire vehicles are privately owned vehicles, a reasonable officer using common sense and every day experience can easily determine that the occupants of a modern for-hire vehicle are not in common enterprise. From the outside looking in, modern for-hire vehicles look like normal vehicles. But if an officer takes a closer look, the common enterprise assumption is likely to be dispelled. First, Uber and Lyft drivers are required to have a trade dress sticker denoting the company's logo in their windshield.²⁰⁰ The logo displayed in the windshield should be sufficient to prompt a reasonable officer to inquire further about the nature of the ride. An officer upon seeing a vehicle with an Uber or Lyft sign in the windshield, with a phone mount holding a smartphone providing GPS services and a passenger, should reasonably infer that the driver-passenger relationship is one of commercial transportation. If the officer is unsure, he should be required to ask if the driver is conducting ridesharing services. As evidenced by the facts and circumstances of modern for-hire rides, the common enterprise assumption is least reasonable in modern for-hire vehicles.

²⁰⁰ *Vehicle Requirements Augusta*, *supra* note 155.

D. *The Search Incident to Arrest Doctrine Permits Unreasonably Intrusive Searches of Modern For-Hire Passengers*

As if the common enterprise assumption was not daunting enough, passengers in modern for-hire vehicles will be exposed to highly intrusive searches under the search incident to arrest rule. In justification, the Court contends that applicability of the first prong of the *Gant* test is rare because “articles inside the passenger compartment are rarely ‘within the area into which an arrestee might reach.’”²⁰¹ But in many events, “the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.”²⁰² In a situation where the driver is arrested for an offense that leads police to reasonably believe that evidence of that offense could be found in the vehicle, officers can conduct a full search of the passengers and their belongings.²⁰³ In effect, the particularized suspicion as to the driver is automatically transferred on to the passengers. While this search is restricted to uncovering evidence of the crime of arrest, if other illegal evidence is found in a police officer’s search, then that other evidence may be seized. Obviously, this raises serious privacy concerns in modern for-hire vehicles because passengers will be subject to extremely intrusive searches based on the conduct of a stranger.

As the rule stands now, passengers are subject to searches they did nothing to provoke. Simply by being in an arrestee’s vehicle at the time of arrest, it is assumed that the passenger knows the driver’s history, their habits, and whether the driver is law abiding or not. This assumption is only reasonable when the passenger has actual familiarity with the driver. By choosing to ride in a car with friends and neighbors, passengers may take certain risks based on the logical assumptions that can be made. Friends are more likely to know enough about the driver, their habits, and their background to knowledgeably assess the risks they are subjecting themselves to by riding in their vehicle.

When a passenger has familiarity with the driver, a warrantless search under the rule is reasonable because the passenger’s self-diminished privacy interests are outweighed by the government’s interest in police safety and preserving evidence. For example, consider a situation in which a passenger is driven by a friend who is known to smoke marijuana while driving in a state where marijuana is illegal. Even if neither marijuana nor drug paraphernalia are visible during the time the friend was in the car, the

²⁰¹ *Arizona v. Gant*, 556 U.S. 332, 350 (2009) (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

²⁰² *Id.* at 344.

²⁰³ *Id.* at 347.

passenger has sufficient knowledge about the driver and the car to know that it is likely that there will be marijuana in the car. Therefore, by getting into the car despite the passenger's familiarity with the driver, the passenger knowingly subjects himself to police intrusion. By getting into a car with a friend, neighbor, or family member, these passengers have enough knowledge about the driver and the car to assess the risks they take by entering into the driver's vehicle.

On the other hand, a search of a passenger in a modern for-hire vehicle, incident to arrest of the driver, is highly intrusive and unreasonable under the Fourth Amendment. The assumptions that underlie the search incident to arrest rule do not exist in modern for-hire vehicles. Modern for-hire passengers do not have enough familiarity with their driver or the vehicle to make a reasonable risk assessment. While the passenger may know basic facts about the driver (such as the driver's name, rating, and the make of the vehicle), this information is not enough for the passenger to assess the type of risks he is subjecting himself to by riding in the vehicle. This information does not caution the passenger about the driver's habits or what police intrusion might lie ahead. In application, the passenger's person and personal belongings may be subject to a search because the police's suspicion is localized to a driver he met 30 seconds ago, despite the fact that the passenger had no idea or information to cause him to believe the driver would be engaged in any kind of wrongdoing that would lead to a stop. Given the nature of these rides, a search of a modern for-hire passenger under the search incident to arrest exception allows officers to intrude the passenger's privacy for being at the wrong place at the wrong time.

As a result, absent a familiarity between the driver and passenger, such an extensive search of a passenger based on the driver's arrest incorrectly "undervalues the privacy interests at stake."²⁰⁴ The justification for extensive searches of passengers under the exception is to uncover evidence regarding the offense committed by the driver, but evidence of the driver's offense will not be found on the passenger's person or belongings. The justifications of the rule are not served by searching modern for-hire passengers. The driver and passenger are strangers: considering the nature of these rides, there is no reasonable basis for believing that evidence of the driver's offense will be uncovered by searching the passenger. Instead, this extensive search of passengers will only uncover evidence unrelated to the offense of arrest, which will serve to make the rule a pretext for searching passengers in the absence of probable cause. This rule is only reasonable if the passenger knows enough about the driver and the car to assess the risk the passenger is taking by entering into a vehicle which may be subject to police intrusion.

204 *Id.* at 344–45.

Allowing the scope of a search incident to arrest to include searches of passengers is unreasonable in modern for-hire vehicles. Modern for-hire passengers do not have sufficient knowledge about the driver or the vehicle to justify the intrusive search permissible under the search incident to arrest rule.

IV. RESOLUTION

Future courts are likely to find that passengers in modern for-hire vehicles have a legitimate expectation of privacy “by virtue of . . . [their] right to exclude.”²⁰⁵ Yet, the protections of the current Fourth Amendment doctrine are unreasonable. First, the common enterprise assumption is unreasonable in modern for-hire vehicles because of the commercial nature of the driver-passenger relationship. Additionally, the scope of searches incident to arrest are unreasonably broad, because the rule allows modern for-hire passengers to be searched despite their lack of familiarity with the driver and the vehicle. Although these are two separate doctrines, they are both based on the archaic assumption that drivers and passengers typically ride with friends, family, or co-conspirators. Considering that the essence of modern transportation is that individuals ride in vehicles with strangers, the Court’s archaic assumptions are expressly unreasonable. In application, the current doctrine only serves to diminish a passenger’s privacy rights based simply on physical proximity to someone “independently suspected of criminal activity.”²⁰⁶

While it may have been optional to use an automobile at one point, today most individuals need to use automobiles. It is tremendously unreasonable for an individual to be stripped of his Fourth Amendment protections for engaging in necessary means of travel. A balancing of interests under traditional standards of reasonableness suggests that the privacy interests of passengers in modern for-hire vehicles outweigh the need to promote legitimate government interests. It is evident that change is needed, but because the existing Fourth Amendment doctrine is long-established, it is unlikely that the Court will abandon this precedent. Thus, it should be updated to accommodate the new realities of modern transportation.

Because modern for-hire vehicles are a hybrid between commercial and private vehicles, it is important for future courts to understand that their differences should shape the Fourth Amendment analysis. Using a set of cogent factors, future courts should consider the impact of modern transportation on passenger’s privacy interests. These factors include: the geographical composition of the vehicle, the nature of the ride, an

²⁰⁵ Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

²⁰⁶ Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

individual's subjective belief of control over a vehicle, and an individual's actual ability to control the vehicle.

Next, because the Court has held that "mere propinquity to others"²⁰⁷ is not enough to establish probable cause, the common enterprise rule and the search incident to arrest rule should be applied as constitutional standards. Application of the common enterprise assumption as a standard would require officers to consider the facts and circumstances of each case before presuming that occupants in a vehicle are engaged in a common enterprise. Using common sense and every day experience, officers should be required to ask the driver and passenger questions to ascertain the relationship between the passenger and driver, the nature of the ride, and the status of the passenger. In the event that the facts and circumstances of the encounter provide an officer with a reasonable basis to believe that there is a common enterprise, the assumption is proper, and a warrantless search of the passenger is permissible. Otherwise, absent a positive reason to believe a common enterprise exists, a warrantless search of a passenger in a modern for-hire vehicle is unreasonable.

Furthermore, the application of the search incident to arrest doctrine as a standard would require officers to consider the totality of the circumstances. In the event that the driver of a modern for-hire vehicle is arrested, and the offense of arrest provides the officer a reason to believe that evidence of the offense could be found in the vehicle, the officer can only search the passenger if the facts and circumstances of the encounter reasonably suggest that the passenger has sufficient familiarity with the driver. Officers would be required to ask the driver and passenger questions to ascertain the relationship between the passenger and driver, the nature of the ride, and the status of the passenger. Under the search incident to arrest standard, a warrantless search of the passenger is only permissible if the totality of the circumstances reasonably suggests that the passenger knew the driver, or that the passenger had reason to know that there was contraband in the vehicle. If a passenger does not have sufficient familiarity with the driver and the vehicle, a warrantless search of the passenger would be unreasonable.

Accordingly, converting the common enterprise assumption and the search incident to arrest rule into a standard adequately balances the passengers' privacy interests with the government's interests. A standard driven approach will honor the existing Fourth Amendment precedent but will also give weight to the distinguishing aspects of modern for-hire vehicles. This approach will assist future courts in understanding how

207 *Id.*

modern advances affect the *Katz* test and shape “the evolution of societal privacy expectations.”²⁰⁸

²⁰⁸ *United States v. Jones*, 565 U.S. 400, 415 (2012) (referencing *Katz v. United States*, 389 U.S. 347, 347 (1967)).