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Peter Goldberger

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CONSENT, EXPECTATIONS OF PRIVACY, AND THE MEANING OF "SEARCHES" IN THE FOURTH AMENDMENT*

PETER GOLDBERGER**

I. INTRODUCTION

The fourth amendment to the United States Constitution protects the security of "the people . . . in their persons, houses, papers and effects" against "unreasonable searches and seizures."¹ The extent of this protection depends in large part upon judicial construction of two of the amendment's phrases: "searches and seizures" and "unreasonable."² If

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** Visiting Associate Professor of Law, Whittier College School of Law. J.D., Yale Law School, 1975; B.A., Haverford College, 1971. Comments on earlier drafts from numerous colleagues and friends were invaluable to me in developing and presenting the ideas contained in this Article. Thanks are also due to the Alumni-Faculty Development Fund of the Villanova Law School, where I was Professor of Law while writing this Article, to my research assistants there, James Davis, Sharon Roseman, and Bernadette Wolffe, and to Susan Beirne and Madeline Bialecki, tireless processors of words.

¹ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

² The protective force of the amendment also depends to some extent upon the significance, if any, accorded to its use of the term "the people" in reference to the object of its protection, and to the meaning afforded the limiting phrase, "in their persons, houses, papers, and effects." Although the Supreme Court has repeatedly held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)), the text might seem to lend itself to a more "regulatory" and less "atomistic" reading. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974); Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529 (1978); Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U.L. REV. 259 (1983). Cf. *Singleton v. Wulff*, 428 U.S. 106, 113-18 (1976) (plurality opinion) (physician has standing to litigate the constitutionality of a state abortion statute); *United States v. Miller*, 307 U.S. 174 (1939) (the right accrues to organized groups, not individuals); U.S. CONST. amend. I ("the right of the people peaceably to assemble") (emphasis added); U.S. CONST. amend. II ("the right of the people to keep and bear Arms") (emphasis added); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-26, 12-29 (1978) (relationship between the nature of first amendment rights and the allowance of third-party standing, and third-party standing in other privacy contexts).

The second clause of the fourth amendment ("and no Warrants shall issue . . .," see

official behavior affecting the security of the people in their houses, for example, is not viewed as a "search" or "seizure," it is not governed by the fourth amendment and need not even be reasonable to be lawful, so far as that amendment is concerned.³ Likewise, even if police conduct⁴

supra note 1) stands in an uncertain relationship to the first. The drafters' intentions are impossible to know. The grammatical break between the clauses was first introduced by Congressman Egbert Benson of New York as an amendment to a draft reading "The right of the people . . . shall not be violated by warrants issuing without probable cause . . ." The proposed amendment—what we now know as the fourth amendment—which plainly has the effect of expanding the realm of protection to warrantless searches as well as regulating the issuance of warrants, was soundly defeated. But when the entire Bill of Rights came back to the House from the Committee of Three, which included Benson and which had been appointed merely to arrange for transmission to the Senate of what the House had approved separately, the fourth amendment read as we now know it; that is, it contained Benson's rejected two-clause phrasing. The entire Bill, as reported by the Committee of Three, then passed both chambers without further discussion of the point. N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 101-03 (1937, reprint 1970); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 n.30 (1921).

The most important issues left unsettled by the Benson alteration, of course, concern the circumstances under which a search may be deemed reasonable without a warrant. Whatever the precise contours of these rules may be held to be from time to time, it is clear that under some circumstances, a search or seizure will not be deemed reasonable within the meaning of the first clause of the fourth amendment unless a valid warrant has been obtained and executed as provided in the second clause. *See, e.g.,* *Mincey v. Arizona*, 437 U.S. 385, 394-95 (1978) (unanimous Court: warrantless searches "are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions") (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *cf. Texas v. Brown*, 460 U.S. 730, 735 (1983) (plurality: "a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions").

The Warrant Clause can be construed and applied so as to give it greater or lesser significance. *See* T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 23-46 (1969); Amsterdam, *supra*, at 367, 410-14; Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M.L. REV. 33 (1979-80); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 281-304 (1984).

³ *See, e.g.,* *United States v. Dionisio*, 410 U.S. 1, 15-16 (1973); *Lewis v. United States*, 385 U.S. 206, 211 (1966); Moylan, *The Fourth Amendment Inapplicable vs. the Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. ILL. U.L.J. 75. Even when the fourth amendment does not apply, however, related protection may be available from other constitutional sources, such as the due process clause of the fifth or fourteenth amendments, and in some cases the first amendment. Likewise, police conduct may be regulated by state constitutional law, state or federal legislation, local regulations, or common law. *See* Amsterdam, *supra* note 2, at 377-80.

⁴ By its terms, *supra* note 1, the fourth amendment would not seem to be limited to official action, unless that were implicit in its reference to "searches and seizures." Nevertheless, the amendment's inapplicability to private action has long been settled. *United States v. Jacobsen*, 104 S. Ct. 1652, 1656 (1984); *Walter v. United States*, 447 U.S. 649, 656 (1980); *Burdeau v. McDowell*, 256 U.S. 465 (1921); *cf. Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (police action not governed by fourth amendment if person turning over evidence is not an "agent of the state"). *See generally* J. CREAMER, *THE LAW OF ARREST, SEARCH AND SEIZURE* 53, 341-46 (3d ed. 1980); F. INBAU, M. ASPEN & J. SPIOTTO, *PROTECTIVE SECURITY LAW* (1983).

The text of this Article uses the term "police," rather than some broader term covering other state actors, simply because criminal cases constitute the amendment's most common

affecting people's physical security is understood to be a "search," the fourth amendment is no bar to the intrusion when official actions of that kind are viewed by judges⁵ as reasonable.⁶

The Supreme Court developed the currently prevalent definition of "search" to explain the extension of fourth amendment protection, in *Katz v. United States*,⁷ to conversations electronically overheard without physical trespass and, in *Terry v. Ohio*,⁸ to the external pat-down of a

application, without denying the significance of the fourth amendment in other contexts. *See, e.g.,* *Donovan v. Lone Steer, Inc.*, 104 S. Ct. 769 (1984) (wage and hour investigation by civil subpoena); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (IRS jeopardy seizure); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (housing code enforcement); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (grand jury subpoena duces tecum).

⁵ The contours of the fourth amendment, as an aspect of constitutional law, are inherently subject to judicial definition. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Nevertheless, there is an important role for legislation in the protection of fourth amendment rights. *See, e.g.,* 12 U.S.C. §§ 3401-3422 (Supp. V 1982) (financial records); 18 U.S.C. §§ 2510-2520, 3504 (1982) (regulation of wire interception of oral communications); 26 U.S.C. § 7609 (1982) (third-party IRS summonses); 42 U.S.C. §§ 2000aa-2000aa-7 (Supp. IV 1982) (regulation of searches for journalists' work product). In addition, internal police regulation can play a major part. *See United States v. Caceres*, 440 U.S. 741, 755 (1979); 28 C.F.R. §§ 47.1-47.5 (1983) (internal U.S. Justice Dept. regulation of requests for financial records); *id.* § 50.10 (subpoenas to news media); *id.* §§ 59.1-59.6 (third-party searches); Amsterdam, *supra* note 2, at 416-28.

⁶ *See, e.g.,* *Michigan v. Summers*, 452 U.S. 692 (1981); *Chimel v. California*, 395 U.S. 752, 765 (1967) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting)); *Terry v. Ohio*, 392 U.S. 1 (1968).

⁷ 389 U.S. 347 (1967). The first Supreme Court decision to impose fourth amendment regulation upon the electronic overhearing of conversations was not *Katz*, but rather *Berger v. New York*, 388 U.S. 41 (1967). *See also* *Silverman v. United States*, 365 U.S. 505 (1961). In *Berger*, however, the Court offered no general test or explanation for overruling *Olmstead v. United States*, 277 U.S. 438 (1928) (wiretapping of telephone conversation not a search and seizure under fourth amendment). Indeed, the threshold ruling in *Berger* that wiretapping constituted a "search and seizure" of conversation, 388 U.S. at 51, was entirely unnecessary to the decision. The bug in that case was planted in a private office and the conversations recorded there. *Id.* at 107 (White, J., dissenting). Under the then-prevailing "standing" doctrine, *Berger*, who was legitimately on the premises, *see Jones v. United States*, 362 U.S. 257, 264, 267 (1960), could have raised a fourth amendment objection to the physical entry necessary to plant the bug and moved to suppress the overhearing of his statements as the "fruit" of that "poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). This analysis does not require an answer to the question whether a "seizure" of conversation, other than as the fruit of an unlawful, physical "search," is ever prohibited by the fourth amendment. Perhaps for this reason, *Katz* does not even cite *Berger*, which was decided just six months earlier.

The *Katz* view of what may constitute a search, although usually and properly viewed as repudiating the holding of *Olmstead*, does find a surprising foreshadowing in that opinion. One reason Chief Justice Taft gave for concluding that the illegal wiretapping of *Olmstead's* conversations was not a search is this: "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside . . ." 277 U.S. at 466. *Cf. Murchison, Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 518-19 (1982) (seeing roots of *Katz* in *Carroll v. United States*, 267 U.S. 132 (1925), but not in *Olmstead*).

⁸ 392 U.S. 1 (1968).

suspect's clothing. Building upon these cases, the Court now uses the notion of "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action"⁹ to identify, at least in part,¹⁰ those interests protected by the fourth amendment. If no such expectation is invaded, it is generally said that no "search" has occurred.

The *Katz* definition includes a subjective element—actual expectation of privacy—and an objective element—the "legitimacy" of any such expectation.¹¹ The subjective element is said to incorporate both the likely expectations that an individual would have in a given situation¹² and the actual expectations of the defendant,¹³ as manifested in testimony concerning either the defendant's thoughts¹⁴ or conduct.¹⁵ Even where such actual expectation may be found, the Court has sometimes said that the defendant¹⁶ "assumed the risk"¹⁷ of an intrusion into

⁹ *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing, *inter alia*, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); see generally 1 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 220-435 (1978); 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.2, at 162-84 (1984); P. POLYVIU, *SEARCH & SEIZURE: CONSTITUTIONAL AND COMMON LAW* 20-93 (1982); Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289 (1981); Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1 (1981); Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831, 834-59 (1979); Note, *Tracking Katz: Beepers, Privacy and the Fourth Amendment*, 86 YALE L.J. 1461 (1977).

¹⁰ *United States v. Place*, 103 S. Ct. 2637, 2644-45 (1983), held that subjecting a person's luggage to a trained, drug-sniffing dog is not a "search" under the fourth amendment. The Court's analysis did not seem to involve an application of the *Katz* test, but rather a view that this "*sui generis*" procedure "is so limited both in the manner in which the information is obtained and in the content of the information revealed" as not to implicate the amendment. *Id.* See LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy and Balancing Asks)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1178-83 (1983); Loewy, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C.L. REV. 329, 331-33 (1984); but see *United States v. Jacobsen*, 104 S. Ct. 1652, 1662 (1984) (explaining *Place* as application of *Katz* test and applying it to field test of powder for presence of cocaine).

¹¹ In referring to the prevailing doctrine, this Article uses the term "legitimate" to modify "expectations of privacy," rather than the alternative "reasonable," see *supra* text accompanying note 9, to avoid confusion with the separate question of whether police action that is a search violates the fourth amendment because it is "unreasonable." See also *infra* notes 65-70 and accompanying text.

¹² *E.g.*, *Smith v. Maryland*, 442 U.S. 735, 742-43 (1979).

¹³ *E.g.*, *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980).

¹⁴ *Id.*

¹⁵ See *Katz v. United States*, 387 U.S. 347, 352 (1967).

¹⁶ The scope of fourth amendment rights may also be of critical concern to civil plaintiffs, see, e.g., *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); M. AVERY & D. RUDOVSKY, *POLICE MISCONDUCT LITIGATION MANUAL* (1980); defendants in forfeiture actions, see, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Boyd v. United States*, 116 U.S. 616 (1886); defendants in administrative proceedings, see, e.g., *G.M. Leasing Corp.*, 429 U.S. at 338; 1 W.

his or her privacy,¹⁸ and that the required expectation of privacy was therefore either missing or not objectively legitimate.

Soon after the *Katz* decision, commentators began to recognize significant deficiencies in the new definition.¹⁹ As the Supreme Court started to take what had at first been an expansion of the accepted definition of "search" and treat it instead as a limitation,²⁰ the criticism intensified.²¹ Today, it is common to find scholarly discussion of Supreme Court "search" cases that is highly alarmist in tone. Indeed, it is difficult to disagree with the view that these decisions describe a society too redolent of the totalitarian: no business relationship is confidential, especially with banks and utilities; the use of an automobile, especially as a passenger, must be avoided; only in your own home are you secure, and then only if you live alone, do not have guests, do not share, and keep the windows covered and the door bolted.²² In *Smith v.*

LAFAYE, *supra* note 9, § 1.5(e), at 96-102; and third-party witnesses, *see, e.g.,* *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

¹⁷ *E.g.,* *Smith v. Maryland*, 442 U.S. 735, 745 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion).

¹⁸ The issue of personal privacy, formerly referred to as the "standing" doctrine, *see* *Alderman v. United States*, 394 U.S. 165, 172 (1969); *Jones v. United States*, 362 U.S. 257, 261 (1960); *Nardone v. United States*, 308 U.S. 338, 341 (1939); may be better viewed as part of the question whether the fourth amendment interests of the person asserting the claim have been affected by the official intrusion. *See* *Rakas v. Illinois*, 439 U.S. 128 (1978); *Mancusi v. DeForte*, 392 U.S. 364, 367-68 (1968) (identifying "standing" with "reasonable expectation of freedom from government intrusion"). *But see* Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979); Williamson, *supra* note 9. Whether a personal impact should be required under any rubric is arguable. *See supra* note 2.

¹⁹ Dash, *Katz—Variations on a Theme by Berger*, 17 CATH. U.L. REV. 296 (1968); Dutille, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1, 11-13 (1971); Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 982-86 (1968).

²⁰ *See* *United States v. Miller*, 425 U.S. 435 (1976); *United States v. White*, 401 U.S. 745 (1971).

²¹ Amsterdam, *supra* note 2, at 384; Bacigal, *supra* note 2, at 539-45; Grano, *Foreword—Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 428-44 (1978); Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75 (1976); Stone, *The Scope of the Fourth Amendment: Privacy and the Police Uses of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUND. RES. J. 1193; Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 355-63 (1978); *but see* Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, U. ILL. L.F. 518, 540 (1975); Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1398 n.311 (1977); Note, *The Reasonable Expectation of Privacy—Katz v. United States, A Postscriptum*, 9 IND. L. REV. 468 (1976) (uncritical views of *Katz*).

²² Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 233-34 & n.257 (1983); Burkoff, *When is a Search Not a "Search"?* *Fourth Amendment Doublethink*, 15 U. TOLEDO L. REV. 515 (1984); La Fave, *supra* note 10, at 1172-83; Kamisar, *The Warren Court (Was It Really So Defense Minded?)*, *the Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER*

Maryland,²³ for example, the Court concluded that no one could—and thus no one is entitled to—expect that an intrusion of which the telephone company is electronically *capable* would not be exploited and made available to the police upon request.²⁴ Similarly, in *United States v. Knotts*,²⁵ the Court held that the use of an electronic “beeper” to track the movements of an automobile was not a “search,” because the device revealed no more than a hypothetical legion of police, conducting total surveillance of all roads, might theoretically have collectively observed. And in *United States v. Miller*,²⁶ the Court suggested that passage of a statute could remove the Constitutional protection from certain records that would be otherwise available.

Because the interpretation of the fourth amendment determines what a free people can expect in the way of privacy from governmental intrusions, the harsh criticism visited upon such arid judicial positivism is well-justified. Where the scholarship has fallen short, however, is in its failure to move beyond criticism of cases applying the *Katz* definition to proposal and defense of a constructive alternative. Such an alternative would have to identify carefully all the interests protected by the fourth amendment. Second, it would have to be objective, that is, external to arbitrary, ad hoc limitation, either legislative or judicial. Finally, it would have to be flexible, that is, capable of responding to technological and other developments in police techniques²⁷ without losing its protec-

COURT—THE COUNTER-REVOLUTION THAT WASN'T 62, 74-75 (V. Blasi ed. 1983); Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 189-90 (1980); Wasserstrom, *supra* note 2, at 269-72, 374-87; cf. P. POLYVIQIU, *supra* note 9, at 31-32 (claiming that “American courts as a general matter, and however they may present their rulings,” actually apply analysis propounded by Amsterdam, *supra* note 2); Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U.L. REV. 1, 20-32, 50 (1983) (expressing ambivalence about *Rakas*, *Rawlings*, *Miller*, and *Smith*).

²³ 442 U.S. 735 (1979).

²⁴ *Id.* at 745. The Court stated:

The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that . . . it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police.

In relying on this rationale, *Smith* employs *Katz* in a way that, if applied to *Katz* itself, would require the reversal of that seminal case. The telephone company is as capable of listening to its customers' conversations as it is of recording the local numbers they dial. 442 U.S. at 746-48 (Stewart, J., dissenting). See also *United States v. Karo*, 104 S. Ct. 3296, 3304 n.4 (1984).

²⁵ 460 U.S. 276 (1983). For analyses giving *Knotts* its due, see Arenella, *supra* note 22, at 233-34 n. 257; LaFave, *supra* note 10, at 1174-78; Loewy, *supra* note 10, at 352-53 and Wasserstrom, *supra* note 2, at 375-79. See also *United v. Karo*, 104 S. Ct. 3296 (1984) (monitoring, although not the mere installation, of beeper in private place is “search”).

²⁶ 425 U.S. 435 (1976).

²⁷ Cf. Alschuler, *supra* note 22, at 6-8 n.12 (seeing virtue in *Katz*'s tie to contemporary “expectations”). For discussions of advancing police technology and the difficulty the law has had keeping up, see S. MANWARING-WHITE, *THE POLICING REVOLUTION: POLICE TECH-*

tive function. But it would also have to take account of the intuitively satisfying aspects of the *Katz* formula—subjective expectation and assumption of risk—that suggest that police ought not be prohibited from affecting people's interest when people themselves invite such action.

This Article attempts to deal with these problems by offering an alternative definition of a "search" that identifies four types of protected interests, derived from the language of the fourth amendment itself. The proposal eliminates the subjective element of expectation of privacy, and its attendant concept "assumption of risk," from the threshold analysis of search. Fourth amendment activity would be defined as governmental action impairing a person's interest in the privacy of physical presence, place, communication or possession.²⁸

The concepts of expectation of privacy and assumption of risk, however, would not be lost from fourth amendment analysis. The Article demonstrates how these aspects of the *Katz* test can be better accommodated within a determination of whether there has been voluntary and authoritative consent, rendering a search reasonable even without a warrant or probable cause. Part II of the Article shows that the Supreme Court's "no search" and consent cases are closely related and often indistinguishable. Part III of the Article then offers a new, comprehensive, interest-based definition of "search." In Part IV, the Article discusses the doctrine of consent searches to demonstrate how careful employment of the notion of expectation of privacy, and its attendant concept assumption of risk, can lead to the solution of several perennial problems in consent analysis.

One constellation of facts that can, in proper circumstances, satisfy the requirement of reasonableness involves an individual's subjective abandonment of his or her protected privacy, with its accompanying assumption of the risk of intrusion. The existing doctrine of consent accommodates these factors and permits their deletion from the definition of search by placing them squarely and unambiguously within the concept of reasonableness. The Article concludes by illustrating how application of this theory to selected problem cases eliminates redundancies and ambiguities in the current "no search" and consent cases, clarifies the proper analysis of these cases, and rationalizes the definitions of

NOLOGY, DEMOCRACY AND LIBERTY IN BRITAIN (1983); A. MILLER, ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS (1971); Bender, *Privacy*, in OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY 243-46, 250-51 (N. Dorsen ed. 1984); Landever, *Electronic Surveillance, Computers and the Fourth Amendment—The New Telecommunications Environment Calls for Reexamination of Doctrine*, 15 U. TOLEDO L. REV. 597 (1984). See also *United States v. Karo*, 104 S. Ct. 3296, 3302 (1984) ("exploitation of technological advances . . . implicates the Fourth Amendment").

²⁸ See *infra* notes 104-18 and accompanying text.

"search" and "consent" in such a way as to uphold legitimate individual privacy interests while meeting law enforcement requirements.

II. IDENTIFYING THE CONFUSION AND REDUNDANCIES

The Supreme Court has decided a number of cases that turn on the meaning of the fourth amendment term "searches." Several others explore the meaning of fourth amendment consent. Many of the same concepts and elements recur in the two lines of authority. As a result, the concept of expectation of privacy—and its constituent element assumption of risk—may be used in one case to determine whether a search occurred, and in another case to determine whether there was consent. Yet these cases do not rely upon one another or even refer to one another. The Court has never acknowledged the resulting redundancy and confusion in fourth amendment doctrine.²⁹

In several cases arising both prior to and after *Katz*, it is impossible to tell whether the Court has upheld the admission of evidence based on a "consent" theory or a "no search" theory.³⁰ In *On Lee v. United States*,³¹ an informer broadcast a conversation with the defendant to a federal narcotics agent secreted outside. The agent later testified to the incriminating statements at trial. In *Lopez v. United States*,³² the suspect's bribe

²⁹ The Supreme Court's failure to see the relationship between the two lines of cases has inhibited the lower courts from confronting the redundancies in analysis between search and consent determinations. In *People v. Nunn*, 55 Ill. 2d 344, 304 N.E.2d 81, *cert. denied*, 416 U.S. 904 (1973), the Illinois Supreme Court recognized the potential impact of the *Katz* expectation of privacy test on its analysis of a third-party consent case. A year later, however, in *People v. Stacey*, 58 Ill. 2d 83, 317 N.E.2d 24 (1974), after the Supreme Court announced a test for such cases in *United States v. Matlock*, 415 U.S. 164 (1974), without reference to *Katz*, the same court felt compelled to overrule its decision in *Nunn*. Although some commentators have seemed to note the doctrinal overlap and confusion, most have not proposed a resolution. See Alschuler, *supra* note 22, at 34-36 n.97; Grano, *supra* note 21, at 430 n.54, 432-44; Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 54-64 (1974); Yackle, *supra* note 21, at 355 n.149; *cf.* Bacigal, *supra* note 2 (proposing unique solution).

³⁰ See *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966). In *Hoffa* and *Lewis*, agents entered the defendants' homes, having gained defendants' misplaced trust. The agents made no electronic transmissions or recordings but simply testified at trial to what they heard the defendants say. The Court found no fourth amendment violation in either case, without stating whether the determination was based on a conclusion that the entries were not "searches" or that the defendants consented to the search. *Hoffa*, however, implied that undercover police work to which a suspect has consented is not a search. 385 U.S. at 301-02. See generally Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968). *Cf.* *Dunaway v. New York*, 442 U.S. 200, 222-25 (1979) (Rehnquist, J., dissenting, takes issue with the majority view that consent to accompany police to the stationhouse was not voluntary. But rather than argue that the seizure was reasonable because the consent *was* voluntary, Justice Rehnquist argues that there was no "seizure"); *Abel v. United States*, 362 U.S. 217 (1960) (discussed *infra* text accompanying notes 167-68).

³¹ 343 U.S. 747 (1952).

³² 373 U.S. 427 (1963).

offers were secretly recorded by the agent to whom they were made. In both cases, the Supreme Court found no fourth amendment violation.³³ In neither *On Lee*, decided in 1952, nor *Lopez*, a 1963 case, did the Court explain whether its holding was based on a determination that there had been no "search" or whether the search was not "unreasonable"³⁴ based on consent.³⁵

In 1971, *United States v. White*³⁶ upheld *On Lee* against a challenge that it had been overruled by *Katz*,³⁷ as the Court allowed the warrantless radio transmission of the defendant's conversation with an undercover agent. Again, the plurality's language is unclear as to whether they found no "search" or whether they found consent and thus a reasonable search.³⁸

The discrepancies become more apparent when we juxtapose con-

³³ The 5-4 decision in *On Lee* was authored by Justice Jackson. Justices Black and Frankfurter dissented on supervisory power grounds; Justices Frankfurter, Douglas and Burton dissented on fourth amendment grounds. In *Lopez*, Justice Harlan rendered the Court's 6-3 decision. Chief Justice Warren concurred, distinguishing *On Lee*. Justices Brennan, Douglas and Goldberg dissented.

³⁴ U.S. CONST. amend. IV.

³⁵ In *On Lee*, the Court says only, "[t]he conduct of [the informer and the agent] did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amendment." 343 U.S. at 751. In *Lopez*, the Court implies consent as a basis for its holding by stating that the agent "was not guilty of an unlawful invasion of petitioner's office He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously" 373 U.S. at 438. The Court adds that the recording device worn by the agent "was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment," *id.* at 439, which points more toward a no-search conclusion.

³⁶ 401 U.S. 745 (1971).

³⁷ Justice White's plurality opinion in *United States v. White* was joined by three other Justices. *Id.* at 746. Justice Black concurred for the reasons set forth in his dissent in *Katz*. *Id.* at 754 (Black, J., concurring). Justice Brennan concurred on the ground that *Katz* is not retroactive, while Justices Douglas, Harlan and Marshall each dissented separately.

³⁸ The leading opinion in *White* states, "Our problem . . . is what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant." 401 U.S. at 752. From this, one can infer that the agents' activities did not amount to a search. But the plurality also says, "the difference . . . between the electronically equipped and the unequipped agent is [not] substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of 'reasonableness,'" *id.* at 752-53, and that it is "untenable to consider the activities . . . of the police agent . . . to be a 'reasonable' investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an 'unreasonable' and unconstitutional search and seizure." *Id.* at 753. These latter comments suggest warrant exception analysis. See also Grano, *supra* note 21, at 433 & n. 78. On these cases, see generally Stone, *supra* note 21.

Several state supreme courts, construing their own constitutions, have disagreed with the U.S. Supreme Court on the merits of the question in *White*. See, e.g., *State v. Glass*, 583 P.2d 872 (Alaska 1978), *modified on reh'g*, 596 P.2d 10 (1979); *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981) (privacy clause); *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975) (unreasonable search and seizure clause); *State v. Brackman*, 178 Mont. 105, 582 P.2d 1216 (1978) (privacy clause); but see *State v. Reeves*, 427 So. 2d 403 (La. 1983) (no violation of state

sent and non-search cases. In *Schneckloth v. Bustamonte*,³⁹ the Court found a search reasonable based on a third party's voluntary though uninformed consent. In *Rakas v. Illinois*,⁴⁰ the Court found that the fourth amendment was not implicated in a startlingly similar situation. In each, the defendant was a passenger in a car driven by another, and was incriminated by evidence found in a search of a part of the car not under his personal control. In *Rakas*, the Court held that the defendant did not establish that the search affected an interest about which he had a right to complain. In *Bustamonte*, the Court went directly to the reasonableness of the search, upholding it on the basis of another passenger's consent. Given the identity of factual circumstances, the *Bustamonte* Court could have used an analysis akin to that in *Rakas* and found that no search affecting *Bustamonte* had occurred.⁴¹ Under that approach, the *Bustamonte* Court would not have reached the question of consent.

constitutional right to be secure in "communications" against unreasonable searches and seizures).

³⁹ 412 U.S. 218 (1973). *Bustamonte* was a front-seat passenger in an automobile that also contained five other men. The car was stopped at 2:40 a.m. for having a burned out headlamp and license tag light. Only Alcala, the other front-seat passenger, could produce a driver's license; Alcala said the car belonged to his brother. When a policeman asked if he could search the car, Alcala casually replied, "Sure, go ahead." The officer testified that the atmosphere was "congenial" at the time of the request. *Id.* at 220. Alcala opened the trunk and glove compartment for the police. The officer found the incriminating evidence, stolen checks, "[w]added up under the left rear seat." *Id.* The trial court found no threats, coercion or submission to vitiate the consent.

⁴⁰ 439 U.S. 128 (1978). *Rakas*, another man (King), and two women were passengers in an automobile, owned and driven by one of the women, who was King's former wife. Brief for Petitioner at 4-7, *id.* On suspicion that the car may have been used in a recent robbery, police officers stopped the four and ordered them out of the car. In the ensuing examination of the vehicle's interior, police retrieved a box of rifle shells from the locked glove compartment and a sawed-off rifle from under the front passenger seat. 439 U.S. at 130. The two men were charged with the robbery. *Rakas* failed to assert that the police lacked probable cause to stop the car from proceeding on the highway. Such a finding would have permitted suppression of the evidence as "fruits" of an illegal "seizure" of the defendants' "persons." *See, e.g., Texas v. Brown*, 460 U.S. 730, 741 (1983); *United States v. Cortez*, 449 U.S. 411 (1981); *Colorado v. Bannister*, 449 U.S. 1, 4 n.3 (1980) (per curiam). A motion to suppress the fruits of the search was denied for lack of "standing." 439 U.S. at 129. On certiorari, the Supreme Court affirmed by a 5-4 majority, holding that after *Katz* there was no need for a fourth amendment "standing" doctrine separate from the question whether there had been a search (or seizure) affecting the defendant's own "legitimate expectation of privacy." 439 U.S. at 143. The majority in *Rakas* held the petitioners had not established such a search because they were mere passengers in the car and did not claim any possessory or other interest in the items seized.

⁴¹ *Bustamonte* obviously could not have been decided in reliance on *Rakas*, which arose later and announced a new theory. *Alderman v. United States*, 394 U.S. 165 (1969); *Mancusi v. DeForte*, 392 U.S. 364 (1968); and other cases, however, already stood for a well-settled proposition that standing required a personal invasion of privacy. Thus, the later date of *Rakas* does not explain why *Bustamonte* was decided as a consent case and not a "standing" case.

Moreover, had *Bustamonte* been decided consistently with *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (discussed *infra* note 42), the Court could have focused upon Alcala's

Although the result would have been the same, the analysis would have been entirely different.⁴²

Another illustration of the redundancy between the concepts of search as defined after *Katz* and consent appears by considering *Stoner v. California*⁴³ in conjunction with *United States v. Miller*⁴⁴ and *Smith v. Maryland*.⁴⁵ *Stoner* was a consent case that suppressed evidence gained in a warrantless search of a guest's hotel room, where the police sought to justify the search through the consent of a hotel employee. The *Stoner* Court recognized that a hotel guest, as part of a business relationship with the hotel, "undoubtedly gives 'implied or express permission' to 'such persons as maids, janitors or repairmen' to enter his room 'in the performance of their duties.'"⁴⁶ Nevertheless, "the conduct of the night clerk and the police in searching the room in Stoner's absence was of an entirely different order."⁴⁷ The protection of a guest in a hotel against

opening the trunk for police. According to *Coolidge*, because that passenger was not acting as an official agent, there was no "search" under the fourth amendment.

⁴² The Court's treatment of one of the issues in *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971), illustrates an analogous ambiguity. There, prior to the petitioner's arrest on murder charges, officers went to his home and asked his wife whether Coolidge owned any guns. She responded that she would get them. The police accompanied her, and she brought out four weapons. When she asked if they wished to take the guns, one officer replied, "might as well." The officers then asked about the clothing Coolidge had worn on the night of the murder, and Mrs. Coolidge brought out some pants and a hunting jacket. The police gave her a receipt for the guns and clothing and took them away. The Court unanimously held the evidence admissible.

Although this aspect of the case has often been characterized by commentators as an instance of third-party consent, *see, e.g.*, C. WHITEBREAD, CRIMINAL PROCEDURE § 10.04, at 208 (1980), only one member of the Court seems to have seen it that way. 403 U.S. at 520 (White, J., concurring in part). The majority viewed it as a non-search case. The *Coolidge* opinion expressly declined "[t]o hold that the conduct of the police here was a search and seizure" *Id.* at 489. Indeed, the Court's subsequent characterizations of *Coolidge* have been ambivalent. *See* *United States v. Matlock*, 415 U.S. 164, 171 (1974) (calling *Coolidge* a "third-party consent" case); *Schneckloth v. Bustamonte*, 412 U.S. 218, 245 (1973) (calling *Coolidge* a consent case); *id.* at 234 n.15 (treating it as involving private search not governed by fourth amendment). The *Coolidge* Court said that "a criminal suspect" lacks any "constitutional protection against the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion." 403 U.S. at 489-90 (footnote omitted). The Court's consideration of the fact that Coolidge was a "criminal suspect" was improper. Under the fourth amendment, the rights of a criminal suspect, or indeed of a criminal, are neither greater nor less than those of anyone else. *See generally* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L. REV. 329, 337 (1973); Grano, *supra* note 21, at 431, 432, 434 (discussing *Michigan v. Tyler*, 436 U.S. 499 (1978); *Mincey v. Arizona*, 437 U.S. 385 (1978)); Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983). *But compare* *United States v. White*, 401 U.S. 745, 752 (1971) (White, J., plurality opinion), with *id.* at 789-90 (Harlan, J., dissenting); *see also* *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (Stewart, J., for unanimous Court on this point).

⁴³ 376 U.S. 483 (1964), also discussed *infra* notes 162-65.

⁴⁴ 425 U.S. 435 (1976).

⁴⁵ 442 U.S. 735 (1979).

⁴⁶ 376 U.S. at 489 (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

⁴⁷ 376 U.S. at 489.

unreasonable searches and seizures, the Court reasoned, "would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel."⁴⁸ The warrantless search was therefore unlawful, notwithstanding the cooperation of the clerk. *Miller* and *Smith* are factually analogous to *Stoner*. In *Miller*, in response to subpoenas *duces tecum* served on two separate banks by federal agents, bank employees disclosed their records on Miller and provided the agents with copies. The Court held that Miller's motion to suppress the evidence derived from this information had been correctly denied because "he possessed no Fourth Amendment interest that could be vindicated by a challenge to the subpoenas."⁴⁹ In *Smith*, the telephone company installed "a pen register . . . to record the numbers dialed from the telephone at [a suspect, Smith's] home" at the request of police.⁵⁰ Evidence derived from the pen register was used to convict Smith. The Supreme Court upheld the denial of Smith's motion to suppress this evidence, concluding that the use of the pen register involved no "search" affecting Smith's privacy interest.⁵¹ In *Miller* and *Smith*, using a "search" perspective, the Court held that Miller's and Smith's respective limited disclosures of their private affairs to banks and the telephone company rendered "unreasonable" or not "legitimate" any expectation that those exposures would remain limited. As stated in *Smith*, so long as the telephone company was capable of recording and disclosing the numbers its customers dialed through its electronic system, the customer had no right to assume the company's employees would not do so.⁵² Thus, by concentrating on

⁴⁸ *Id.* at 490.

⁴⁹ 425 U.S. at 445. This was so, the Court ruled, because Miller had "no legitimate 'expectation of privacy' in [the] contents" of either his "original checks and deposit slips" or "the microfilm copies actually viewed and obtained . . ." *Id.* at 442. There had been "no intrusion into any area in which [Miller] had a protected Fourth Amendment interest . . ." *Id.* at 440. "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443. This view was followed in *United States v. Payner*, 447 U.S. 727 (1980), to uphold the use of evidence obtained by a government agent who broke into a dwelling, picked the lock on a bank officer's briefcase, and stole bank records for copying. Because this activity affected no privacy expectation of the depositor (Payner), it did not have to be reasonable, so far as Payner was concerned. Applying their own Constitutions, two state supreme courts have rejected the *Miller* reasoning. *Burrows v. Superior Court*, 13 Cal. 3d 238, 242-45, 529 P.2d 590, 592-95, 118 Cal. Rptr. 166, 168-71 (1974); *Commonwealth v. DeJohn*, 486 Pa. 32, 40-48, 403 A.2d 1283, 1287-91 (1979), *cert. denied*, 444 U.S. 1032 (1980) *cf.* *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980) (civil subpoena for bank records effects a "search" under state constitution, but not one that is "unreasonable"). See also *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979) (extending *Burrows* to telephone company, hotel, and credit card billing records).

⁵⁰ *Id.* at 737. See also *United States v. New York Tel. Co.*, 434 U.S. 159 (1977).

⁵¹ The Court's 5-3 decision was authored by Justice Blackmun. *Cf.* *People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982); *Commonwealth v. Beauford*, 475 A.2d 783 (Pa. Super. 1984) (disagreeing with *Smith* on state constitutional bases).

⁵² 442 U.S. at 745-46.

consent in *Stoner*, and on search in *Miller* and *Smith*, the Court reached different results. Regardless of whether privacy interests in a hotel room differ from the privacy interests in one's employment of a bank or telephone company, a different mode of analysis is not justified.

On some occasions, the Court has upheld the authority of a third-party consent on an "assumption of risk" analysis. Yet, the "assumption of risk" analysis is essentially the same test as is used in other cases to show there was no search. In *Frazier v. Cupp*,⁵³ the petitioner and his cousin, jointly suspected of committing a murder, both stashed clothing sought as evidence in a duffel bag kept at the cousin's home. The cousin consented to a police search of the duffel bag, resulting in seizure of both men's clothes. The Court unanimously upheld the search; because the cousin "was a joint user of the bag, he clearly had authority to consent to its search."⁵⁴ Frazier's cousin was eligible to give consent sufficient to render a warrantless search of their shared duffel bag reasonable, because Frazier "assumed the risk that [his cousin] would allow someone else to look inside."⁵⁵

Likewise, in *United States v. Matlock*,⁵⁶ the Court considered a governmental appeal from the suppression of evidence acquired in a search of the room that respondent subletted from the tenants of a house and shared with the tenants' daughter, Graff. The Court ruled that the respondent "assumed the risk" that his lover or any other co-inhabitant of their house "might permit the common area to be searched."⁵⁷ By virtue of their "assumptions" of analogous "risks," however, *Miller*⁵⁸ and *Smith*⁵⁹ lost their right to any expectation of privacy and so were held not to be the subjects of "searches" at all. Again, it may or may not be appropriate to recognize a greater privacy interest in a shared duffel bag or bedroom than in a bank account or telephonic impulse, but the exposure of private possessions or communications to a third party should not be sufficient to destroy the privacy interest in the latter case when it does not do so in the former case.

In *Rawlings v. Kentucky*,⁶⁰ Rawlings, a drug dealer, temporarily stashed his wares in the purse of a recent acquaintance, Cox, while both were guests in a private home. During a search of the house, Cox complied with a police request to empty her purse. The Court analyzed

⁵³ 394 U.S. 731 (1969).

⁵⁴ *Id.* at 740. Frazier's claim to have given the cousin permission to use only one compartment of the duffel bag was bootless, because based on "metaphysical subtleties . . ." *Id.*

⁵⁵ *Id.*

⁵⁶ 415 U.S. 164 (1974).

⁵⁷ *Id.* at 171 n.7.

⁵⁸ *Miller*, 425 U.S. at 443; see *supra* text accompanying note 49.

⁵⁹ *Smith*, 442 U.S. at 745; see *supra* text accompanying notes 50-52.

⁶⁰ 448 U.S. 98 (1980).

Cox's compliance differently from that of Matlock's lover in permitting a search of their shared bedroom closet.⁶¹ The Court conceded that Rawlings had some possessory interest in the purse once he placed his valuable drugs in it.⁶² Thus, a third-party consent analysis would have been appropriate for testing the reasonableness of the search. So analyzed, it is at least questionable whether Cox's consent would be found to be voluntary.⁶³ The same is true of *Miller*, where the banks' agreement to permit inspection and copying of their depositor's records was given in response to grand jury subpoenas.⁶⁴ In *Rawlings* and *Miller*, the choice of a line of analysis may have determined the outcome of the case.

Although the concept of "assumption of risk" is limited to cases of third-party consent, redundancy between issues of search and consent also occurs in first-party consent cases where voluntariness of consent is the central issue. In those few cases in which the Court has attempted to resolve the question of "search" by making a comprehensive examination of the relevant factors, it has developed a list very much like the list developed in cases examining the voluntariness of the consent. The *Miller* and *Smith* cases again provide useful illustrations. In *Miller*, the Court chose the word "legitimate,"⁶⁵ which had only once before appeared,⁶⁶ to identify those expectations of privacy protected by the

⁶¹ *United States v. Matlock*, 415 U.S. 164 (1974). See *supra* text accompanying notes 56-57.

⁶² The possessory interest was outweighed, however, in the majority's view, by other points: the short period of time Rawlings had known Cox, that he had never before kept anything in her purse, that he had no "right to exclude other persons from access" to her purse, that at least one other friend of Cox did have free access, that Rawlings probably did not have her consent to use the purse, and that he failed to take "normal precautions to maintain his privacy," given the "precipitous nature of the transaction." 448 U.S. at 105. The real difference between the majority and the dissenters concerns the definition of a "search": the majority sees the "search" as defined exclusively by reference to the area intruded into (privacy of place), rather than by reference to the thing revealed (interest in possession). See also *infra* text accompanying notes 111-13. Cf. *United States v. Salvucci*, 448 U.S. 83 (1980) (rejecting the doctrine of "automatic standing," which had allowed standing merely on the accusation of possession).

⁶³ See *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968).

⁶⁴ *United States v. Miller*, 425 U.S. 435, 437-38 (1976). Compliance when confronted with compulsory process is not "voluntary." *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968). On whether execution of a subpoena duces tecum effects a search or seizure, see *United States v. Dionisio*, 410 U.S. 1, 8-11 (1973); *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135 (3d Cir. 1981), cert. denied, 459 U.S. 1020 (1982).

⁶⁵ *United States v. Miller*, 425 U.S. 435, 442 (1976).

⁶⁶ In *Couch v. United States*, 409 U.S. 322, 326 (1973), Justice Powell—also the author of *Miller*—used the expression "legitimate expectation of privacy" in rejecting a fourth amendment objection to an IRS summons. Prior to Powell's use of "legitimate," Justice Harlan and Chief Justice Warren used "reasonable." *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Stewart used the word "jus-

fourth amendment, such that the invasion of these privacy interests would constitute a "search." The choice of the word legitimate suggests a focus on interests protected by *positive law*, rather than an analysis of what privacies are inherently part of a free, modern society.⁶⁷ Thus, in *Miller*, rather than ask whether an individual has an inherent right to privacy concerning bank records, the Court examined the federal Bank Secrecy Act,⁶⁸ which required banks to maintain these records.⁶⁹ The Court then used the existence of the Act to show a "lack of any legitimate expectation of privacy concerning the information kept in bank records"⁷⁰ *Smith* examined additional factors. First, Justice Blackmun analyzed whether "people in general entertain any actual expectation of privacy in the numbers they dial."⁷¹ Relying on common sense and common knowledge, such as the fact that all subscribers receive bills for long distance calls, itemized by the number dialed, and that telephone books often contain notices that the telephone company may be able to aid in identifying the source of annoying calls, the Court declared that "it is too much to believe" that people "harbor any general expectation that the numbers they dial will remain secret."⁷² The Court then turned to *Smith's* own, personal, subjective expectations. The majority rejected as "immaterial"⁷³ *Smith's* argument that he expected the local numbers he dialed to remain private because he used his home telephone exclusively. The Court stated that "[r]egardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call."⁷⁴

tifiable." *Id.* at 353. Professor Wasserstrom has recently and erroneously attributed the origin of the Court's use of "legitimate" to Justice Rehnquist's 1978 opinion in *Rakas*. See Wasserstrom, *supra* note 2, at 386.

⁶⁷ This distinction between inherent and positivist views of the interests protected by the fourth amendment is explicit in *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978), in which the Court refers to protected expectations of privacy as those "which the law recognizes as 'legitimate'" (emphasis added). Such interests may be identified, the Court stated, either in "concepts of real or personal property law" or in "understandings that are recognized and permitted by society." *Id.* Although the Court noted that such "understandings" could not be found "primarily [in] cases deciding exclusionary-rule issues in criminal cases," *id.*, it did not suggest another source.

⁶⁸ 12 U.S.C. § 1829b(d) (1970).

⁶⁹ The Act was held constitutional on its face in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).

⁷⁰ 425 U.S. at 442. The *Miller* Court also looked at two other factors: the law of negotiable instruments, and common social experience in dealing with banks.

⁷¹ 442 U.S. at 742. Although the Court in *Smith* referred to this as a "subjective" factor, it would actually seem to be an "objective" factor, testing reasonableness by comparing the defendant's claim to the expectations of others in society.

⁷² *Id.* at 743.

⁷³ *Id.*

⁷⁴ *Id.* Again the Court's labeling of this point as "subjective" is incorrect, see *supra* note 71; if, as the Court said, no one could "rationally think" this factor would make a difference, 442

*Davis v. United States*⁷⁵ represents an extended analysis of a set of facts to determine whether a purported consent to search was voluntary.⁷⁶ The discussion in *Davis* of consent focused on factors remarkably similar to those used in *Miller* and *Smith* to assess whether there was a search. Davis was suspected of black-marketeering in gasoline during World War II. Under then-existing statutes and regulations,⁷⁷ a system of ration coupons controlled the sale and purchase of gasoline. A service station's possession of an insufficient number of coupons to refill its tanks would suggest illegal sales. The regulations declared the ration coupons, even while in circulation, to be "the property of the Office of Price Administration."⁷⁸ When the OPA agents demanded access to Davis' coupon supply, which was kept in a locked room in his service station, they

U.S. at 743, then the Court was looking at the reasonableness of the belief, not its genuineness, thus confounding the subjective with the objective.

Although the Court earlier in that Term had denied that the legitimacy of expectations of privacy would be tested primarily against rulings in the Court's own cases, see *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978); *supra* note 67, that is the method used in *Smith*. The Court referred to an alternative approach, but did not use it. See *infra* note 103. Instead, relying upon a string-citation of five cases and quoting from *Miller*, the Court found the case controlled by the principle that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." 442 U.S. at 743-44 (citing *Couch v. United States*, 409 U.S. 322, 335-36 (1973); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lopez v. United States*, 373 U.S. 427 (1963)).

⁷⁵ 328 U.S. 582 (1946).

⁷⁶ See also *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (discussed *supra* note 39). *Mendenhall* dealt primarily with the legality of the seizure of the defendant's person, but also found a voluntary consent to search during detention. After being stopped in an airport by narcotics officers, Mendenhall agreed to accompany them to their office in the same terminal building, where an agent asked her to consent to a search of her person and handbag, explaining that she need not agree. An agent searched the purse and discovered evidence of her use of an alias. A policewoman arrived to conduct the body search. Mendenhall began to disrobe and handed over two packets of heroin. The Supreme Court upheld the trial court's finding of consent. The five-member majority emphasized that the agent's warnings of her right to refuse consent tended to vitiate any coercive influence. The Court ignored Mendenhall's youth (age 19), race (black), and sex (female) in assessing the voluntariness of her consent.

Other cases discuss particular aspects of the voluntariness of consent. In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979), and *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968), the Court ruled that consent could not be voluntary if police had first claimed authority to search. See also *Johnson v. United States*, 333 U.S. 10, 12, 13 (1948) (opening door in response to police statement, "I want to talk to you a little bit," not voluntary); *Amos v. United States*, 255 U.S. 313, 315, 317 (1921) (acquiescence to statement that officers "had come to search the premises" held not consent); cf. *United States v. Faruolo*, 506 F.2d 490 (2d Cir. 1974) (threat to "seek" or "get" a warrant if consent is refused vitiates consent only if the threat could not, in fact, be carried out). The Court has also held that lawful custody does not preclude a finding of voluntary consent, *United States v. Watson*, 423 U.S. 411, 424-25 (1976), but that illegal custody may vitiate consent. *Florida v. Royer*, 460 U.S. 491 (1983).

⁷⁷ See 328 U.S. at 583-84 n.1, 588 & nn.4-10.

⁷⁸ *Id.* at 588 nn.8-9.

were acting on authority granted expressly by statute and impliedly by the implementing regulations.⁷⁹

Because *Davis* involved a search for "public documents at the place of business where they are required to be kept,"⁸⁰ the Court overtly applied a less "strict test of consent."⁸¹ On this basis, the Supreme Court upheld the lower court's finding of consent.⁸² In support of its conclusion, the majority⁸³ relied on several factors: (1) the public rather than private character of the documents⁸⁴; (2) the demand was made during business hours; (3) the "right to inspect existed" by statute; and (4) common law gives "greater leeway" to "an owner of property who seeks to take it from one who is unlawfully in possession . . . than he would have but for his right to possession."⁸⁵

These factors are indistinguishable from those used to determine whether the expectation of privacy test has been met for a "search." First, as in *Miller*, the Court validated the government action based in part on the existence of a statute. Actually, the statutory power to inspect means nothing; if the agents were relying on the statute, that fact would simply raise, but could hardly answer, the question of its constitu-

⁷⁹ The statute permitted authorities to "make such inspection . . . as may be necessary or appropriate . . ." *Id.* at 583-84 n.1. The regulation required that every regulated person produce records "[u]pon demand . . . for inspection . . ." *Id.* at 588-89 n.10.

⁸⁰ *Id.* at 593.

⁸¹ *Id.*

⁸² The Court reached this conclusion even though (on the view of the conflicting evidence most supportive of the decision) *Davis* had been subject to an hour's questioning, had at first refused permission, was aware during that time that "another agent was in the rear shining a flashlight through an outside window of the inner room and apparently trying to raise the window," *id.* at 586-87, and the agent with whom *Davis* was speaking testified he "didn't try to convince him. I told him that he would have to open that door." *Id.* at 586. *Davis'* statement, said to establish consent, was, "He don't need to do that. I will open the damned door." *Id.* at 587. The Court held, in sharp contrast to the "implied coercion" language of *Amos v. United States*, 255 U.S. 313, 317 (1921), *see supra* note 76, "that the officers did not exceed the permissible limits of persuasion . . ." 328 U.S. at 591. The *Davis* Court also employed, for the first time, a vocabulary of "consent" rather than "waiver." *Id.* at 587. *See infra* note 177.

⁸³ The Court's 6-2 decision was written by Justice Douglas. Justices Frankfurter and Murphy dissented on the ground that *Davis'* acquiescence was coerced. *Id.* at 599-602. Justice Jackson did not participate.

⁸⁴ This factor was important under the then-prevalent theory tying the fourth amendment exclusionary rule to the privilege against compulsory self-incrimination under the fifth amendment. *See, e.g., Wilson v. United States*, 221 U.S. 361, 380 (1911); *Boyd v. United States*, 116 U.S. 616, 630 (1886). The tie between the fifth amendment and the fourth has since been broken. *See Andresen v. Maryland*, 427 U.S. 463, 470-77 (1976); *Fisher v. United States*, 425 U.S. 391 (1976).

⁸⁵ 328 U.S. at 591. In addition, the lower court found that although *Davis* "at first refused . . . he soon was persuaded," and that neither "force [n]or threat of force was . . . employed to persuade him." *Id.* at 593. The Court held that all these factors supported the conclusion of a voluntary consent. *Id.* at 594.

tional validity, which the Court did not address.⁸⁶ What is left, however, is a set of factors very much like those currently relied upon by the Court in determining whether a "search" has occurred: they are factors measuring both the individual's subjective and objective expectations of privacy—both whether she or he truly holds the expectation and the extent to which society views it as reasonable. In *Davis*, the subjective factor was Davis's willingness to submit; the objective factors were the existence of the rationing system, the nonresidential character of the premises, the daylight hour, and the common law.⁸⁷

With this degree of redundancy and confusion in the cases, a good basis exists for reexamining the twin concepts of search and consent to clarify their separate meanings. But there is more reason than that. Assignment of an issue such as "expectation of privacy" or "assumption of the risk" to the "search" prong or "reasonableness" prong of a case is of practical, as well as theoretical, importance. Because of differences in the legal standards and in the allocation of burdens of proof, this assignment can affect real outcomes.

When an individual's conduct is examined to determine whether consent to search has been given, the acquiescence must be "voluntary," although not necessarily "knowing."⁸⁸ When one person's conduct is to be relied upon as establishing consent, but the fruits of the search are to be used against another, a second issue arises: whether the third party had "authority" to consent.⁸⁹ Although justly subject to criticism as elu-

⁸⁶ As the Court later recognized, when an officer incorrectly claims the lawful authority to search, subsequent consent cannot be found to be voluntary. If, on the other hand, the claim of authority is valid, consent is immaterial. *United States v. Biswell*, 406 U.S. 311, 314-15 (1972). A closely related principle is exemplified by *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968), discussed *supra* note 76.

⁸⁷ One factor, perhaps classifiable as "subjective," should be discarded as entitled to no significant weight. The *absence* of force (even if the conduct and statements of the agents could be so characterized) is not determinative of a voluntary consent. Only the *presence* of force could be realistically determinative of whether consent had been voluntary.

On the same day as *Davis*, the Court decided *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947) (per curiam). In *Zap*, a contractor with the Navy was required under a term of his contract to submit to official inspection of his accounts and records. 328 U.S. at 627. This contract provision, however, simply recited a statutory obligation of all war contractors. *Id.* at 626 & n.2. In the course of one such inspection, an FBI agent seized a \$4000 check as evidence of violation of the False Claims Act. The Court (per Douglas, J.) unanimously held that by entering into the contract, the petitioner "voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 628. Although neither the majority nor the dissenters in *Davis* and *Zap* saw the similarity of the two cases, the cases are viewed today as the origins of "implied consent" to administrative inspection in certain highly regulated businesses. See 2 W. LAFAVE, *supra* note 9, § 8.2(1), at 676-77; 3 *id.* § 10.2(b), at 212-13, 217-20. Cf. *United States v. Davis*, 482 F.2d 893, 908-15 (9th Cir. 1973) (upholding airport carry-on baggage screening on this theory).

⁸⁸ *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). See also *infra* note 177.

⁸⁹ *E.g.*, *United States v. Matlock*, 415 U.S. 164 (1974).

sive and indefinite,⁹⁰ it cannot be gainsaid that the standard for judging voluntariness is both clearer and stricter than the ad hoc and unmoored notion of "legitimacy" that currently determines whether governmental invasion of an expectation of privacy is a search.⁹¹ Some cases in which no search has been found because of factual points suggesting the lack of a "legitimate expectation of privacy" would not satisfy a voluntariness test if analyzed as a question of consent.⁹²

Likewise, analysis of third-party authority to consent in terms of mutual use of and shared access to or control over the property⁹³ employs a more intelligible and more stringent standard than the test for determining that no search occurred on the basis of assumption of risk.⁹⁴ Where the prosecution has been able to show no search by invoking assumption of the risk, it would often fail if it had to demonstrate authoritative third-party consent. Thus, the choice of analysis may determine the outcome of a case, because reliance on consent will be less likely to result in upholding the police action.

The same consequence may follow because of different allocation of burdens of proof. The Supreme Court has said that the person asserting a fourth amendment claim must show that a "search" or "seizure" affecting the privacy of his or her own "person, house, papers or effects" occurred.⁹⁵ The burden then generally shifts, however, to the state⁹⁶ to justify the search or seizure as reasonable.⁹⁷ Under current analysis, the concept of expectation of privacy falls ambiguously into either the analytical category of "search" or "consent." Whether the police conduct will be found lawful may depend in a close case on the judicial characterization of the concept as either a "search" factor or a "reasonable-

⁹⁰ See, e.g., 2 W. LAFAVE, *supra* note 9, § 8.2, at 637 (citing *Reck v. Pate*, 367 U.S. 433, 455 (1961) (Clark, J., dissenting) (voluntariness of confession)), and *Weinreb*, *supra* note 29, at 57. See generally 2 W. LAFAVE, *supra* note 9, § 8.1-8.6 at 610-778.

⁹¹ See *supra* text accompanying notes 9, 65-67.

⁹² See *supra* text accompanying notes 62-64, 76-87.

⁹³ *United States v. Matlock*, 415 U.S. 164, 171 & n.7 (1974); see *infra* text accompanying notes 134-171.

⁹⁴ See *supra* text accompanying notes 53-59.

⁹⁵ *Alderman v. United States*, 394 U.S. 165, 183 (1969); *Jones v. United States*, 362 U.S. 257, 261 (1960); *Nardone v. United States*, 308 U.S. 338, 341 (1939).

⁹⁶ The term "state" is used simply because the amendment is understood to limit the uses of official authority. See *supra* note 4. Of course, the amendment constrains federal action, too, as well as that of individuals acting merely "under color" of official right. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961).

⁹⁷ See, e.g., *Florida v. Royer*, 460 U.S. 491, 497 (1983); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Where the state seeks to justify the search on the basis of a warrant, however, the shifting of burdens is more complex. Once the state comes forward with the warrant, the burden is upon the challenger to demonstrate its invalidity. See 3 W. LAFAVE, *supra* note 9, § 11.2(b), at 499 & n.20. See generally 3 *id.* § 11.2(b), at 498-512; 1 W. LAFAVE & J. ISRAEL, *supra* note 9, § 5.3(d), at 425-26. For a discussion of the appropriateness of this allocation of burdens, see *infra* notes 193-94 and accompanying text.

ness" factor.⁹⁸

Because submitting a given case to a search analysis rather than a consent analysis can have these practical consequences for the protection of individual rights, it is appropriate to propose a method for eliminating the problems of analytical ambiguity and conceptual redundancy in the present doctrine. If, as discussed in this part of the Article, all of the facts that would bear upon the voluntariness of a consent would also bear upon whether the police action in the case constituted a "search," then one might abandon the concept of consent as an analytical category in fourth amendment cases and subsume it into the question of whether any "search" had occurred.⁹⁹ On the other hand, one might maintain the distinct concept of consent and redefine the meaning of "search" so as to eliminate the redundancy. The option of offering a new definition of search, which would not only avoid the overlap with consent cases but could also respond to the problems that have arisen under *Katz*, certainly seems more opportune.¹⁰⁰ This is the task undertaken in the next part of this Article.

III. AN OBJECTIVE, INTEREST-BASED DEFINITION OF SEARCH

Part II of this Article reveals substantial overlap in the facts and concepts considered in Supreme Court discussion of issues of search and consent. As a result, significant ambiguity exists concerning the proper analysis of these search and seizure cases. A method of fourth amend-

⁹⁸ See *United States v. Davis*, 482 F.2d 893, 913-15 (9th Cir. 1973) (misplacement of burden as to consent requires reversal); cf. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (burden of proof respecting element of defense); *Speiser v. Randall*, 357 U.S. 513, 520-21, 525-26 (1958) (outcome of case may depend more on allocation of burdens than on substance of controlling law); *Palmer v. Hoffman*, 318 U.S. 109 (1943) (burden of proof substantive under *Erie* test).

⁹⁹ Cf. *Rakas v. Illinois*, 439 U.S. 128 (1978) (subsuming concept of "standing" into definition of search after noting their redundancy); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982) (arguing for elimination of dormant commerce clause analysis in favor of covering same concepts under privileges and immunities).

¹⁰⁰ In addition to the alternatives discussed in the text—elimination of the concept of consent and redefinition of the concept of search—one might redefine both concepts. The discussion below shows this to be unnecessary as well as undesirable, because the problem can be solved without disturbing what Part IV of this Article finds to be a useful and adequate current definition of consent. But see *infra* note 186.

If one's starting point were merely that certain fourth amendment cases had been wrongly decided, then one might better address the problem simply by arguing that the dissenting opinion or losing party's brief seemed more persuasive. That is not primarily the concern here. As the Supreme Court said of an analogous issue: "We are under no illusion that by dispensing with [a particular analytic] rubric . . . we have rendered any simpler the determination of . . . the legality of a search and seizure. But by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under [a procedural] heading . . . we think the decision of this issue will rest on sounder logical footing." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978).

ment analysis may provide, as the conventional doctrine does, both that there is no search when there is no expectation of privacy, and that when there is a limited expectation, there is a search requiring less justification to make the search reasonable.¹⁰¹ It is not possible, however, for a logically coherent system to hold in some cases that there is no expectation of privacy and therefore no search, and in others that there is no expectation and therefore a search which is reasonable. Likewise, it is not possible for a single, consistent system to hold in some cases that there was no search if the individual "assumed the risk" of intrusion, and in other cases that the search was reasonable because he or she "assumed the risk." Nevertheless, as shown in Part II, such a situation exists in recent "no search" cases and cases involving issues of consent. The discussion that follows shows that an objective, textually derived, interest-based definition of "search" can help resolve the confusion.

This Article breaks no new ground in suggesting that there are serious deficiencies in using the "legitimate expectation of privacy" formulation as a basis of a definition of search. Neither an objective nor a subjective expectation of privacy test can withstand principled scrutiny.¹⁰² In Professor Amsterdam's words:

An actual, subjective expectation of privacy obviously has no place . . . in a theory of what the fourth amendment protects. It can neither add to,

¹⁰¹ *Donovan v. Dewey*, 452 U.S. 594 (1981). See also *Cardwell v. Lewis*, 417 U.S. 483, 488-92 (1974) (plurality opinion) (discussed in Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313 (1981)). Indeed, it is possible to disagree in a given case whether there is little expectation of privacy or none at all. Thus, in *Donovan v. Dewey*, which was decided on a "reasonableness" basis, Justice Rehnquist concurred on "open fields" grounds, taking the view that there was, therefore, no search at all. *Id.* at 609 (Rehnquist, J., concurring). On the relationship between "open fields" and "expectation of privacy," see also *United States v. Oliver*, 104 S. Ct. 1735 (1984). Likewise, in *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135 (3d Cir.), cert. denied, 459 U.S. 1020 (1982), the panel divided on the question whether compulsory production of facial and scalp hair samples constitutes a search and seizure; Judges Sloviter and Becker held that it does not, at least so long as production of subcutaneous material is not called for, *id.* at 137-40, while Judge Gibbons argued that it does constitute a search and seizure, but is reasonable when ordered pursuant to grand jury subpoena, *id.* at 141-46. See also *Michigan v. Long*, 103 S. Ct. 3469, 3478-83 (1983); *United States v. Place*, 103 S. Ct. 2637, 2642-44 (1983); *Michigan v. Summers*, 452 U.S. 692 (1981); *Terry v. Ohio*, 392 U.S. 1 (1968) (requirements of reasonableness in given case depend upon balancing of degree of intrusion upon individual privacy interests against legitimate law enforcement needs); cf. 1 W. LAFAVE, *supra* note 9, § 2.1(c), at 234-40; Amsterdam, *supra* note 2, at 388-95 (proposing sliding scale of fourth amendment rules for different situations); Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127 (1984) (advocating sharp restriction of "balancing" analysis).

¹⁰² See *supra* text accompanying notes 19-26; *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting: "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.")

nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive electronic surveillance.¹⁰³

What has been lacking is an alternative formulation for a definition of "searches."

Professor Amsterdam has argued convincingly that "[s]earches' are not particular methods by which government invades constitutionally protected interests[;] they are a description of the conclusion that such interests have been invaded."¹⁰⁴ If constitutional protection is to survive and function in light of changing police techniques and practices, the focus must be on the impact of official action on people's security, not on how the impact was achieved.

Identification of protected fourth amendment interests is not a simple task. Efforts to reduce the scope of fourth amendment protection to a formula have been numerous, divergent, and ultimately unsatisfying.¹⁰⁵ Perhaps the best solution is to turn to the language of the

¹⁰³ Amsterdam, *supra* note 2, at 384. Accord, e.g., Note (1981), *supra* note 101, at 316 n.21. The Court seems to acknowledge this crucial defect in its test in *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979), without retreating from its previous formulations and without seeming to recognize that the concession made in that footnote is fatal:

Situations can be imagined, of course, in which *Katz*' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection In such circumstances, where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a 'legitimate expectation of privacy' existed in such cases, a normative inquiry would be proper.

See also 1 W. LAFAVE, *supra* note 9, § 2.1, at 59 n.52.1 (Supp. 1983) ("the majority in *Smith* . . . seems not to have heeded its own warning . . ."). The Court's uneasiness with the subjective element may also be implicit in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the only case in which the Court unequivocally upheld a finding that the defendant lacked subjective expectations of privacy. Notwithstanding this finding, the *Rawlings* Court did not rest its conclusion of no search on that ground. *Rawlings* thus implies both that a lack of a subjective expectation of privacy may not always establish that no search occurred, and that expectation may not always be a *sine qua non* in establishing that there was a search. See also *Hudson v. Palmer*, 104 S. Ct. 3194, 3199 n.6 (1984).

¹⁰⁴ Amsterdam, *supra* note 2, at 385. See also 1 W. LAFAVE, *supra* note 9, § 2.1(c), at 230; 76 MICH. L. REV. 154 (1977); Note, *supra* note 101, at 337-43; Note, *supra* note 9; *A Reconsideration of the Katz Expectation of Privacy Test*.

¹⁰⁵ See 1 W. LAFAVE, *supra* note 9, § 2.1, at 221-34; Amsterdam, *supra* note 2, at 361-65, 380-87; Peebles, *supra* note 21; Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 50-53; Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 177-90, 209-13; Wasserstrom, *supra* note 2, at 270; Note, *supra* note 9, at 1469-76.

The tendency to look for the meaning of the fourth amendment simply by seeking a "correct" definition of "privacy," on the premise that "privacy" is the object of the amendment's protection, see, e.g., Note, *supra* note 101, at 326-30; Note, *Formalism, Legal Realism and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977), simply begs the question. The point is to ascertain what interests, involving privacy or

amendment itself and to observe that the Framers' concern was with official action ("searches and seizures") affecting the "secur[ity]" of the people "in their persons, houses, papers, and effects."¹⁰⁶ Taking each of these four terms as emblematic of a realm of protection, a comprehensive yet manageable conception of fourth amendment-protected interests emerges.

Protection for the security of the "person" suggests regulation of detentions, arrests, any official examination of the body and its coverings, and what Professor Weinreb calls the "privacy of presence"—an interest in the place where a person happens to be.¹⁰⁷ The security of the "house" represents Professor Weinreb's "privacy of place"—an interest in control over access to certain specially important locations, without regard to one's physical presence,¹⁰⁸ as well as a recognition of

otherwise, are protected by the prohibition against unreasonable searches and seizures. *See also infra* note 114 and accompanying text.

¹⁰⁶ U.S. CONST. amend. IV. This approach is not to be identified with the one that the Supreme Court took in the 1920's. *See Olmstead v. United States*, 277 U.S. 438, 464 (1928) ("The amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects."); *Hester v. United States*, 265 U.S. 57, 59 (1924) ("the protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields"). Contrary to the Court's recent use of the *Hester* language, the amendment does not "indicate[] with some precision the places and things encompassed by its protections." *Oliver v. United States*, 104 S. Ct. 1735, 1740 (1984). Rather, the amendment prohibits all unreasonable searches affecting the security of the people (not simply "the people"), in (not "of") these places and things. A search of something or somewhere else can assuredly undermine the security in one of the enumerated interests.

Likewise, the conception of a search offered in this Article is not the literalist view of Justice Black. *See Landynski, In Search of Justice Black's Fourth Amendment*, 45 *FORDHAM L. REV.* 453 (1976). Like all constitutional provisions, the fourth amendment must be allowed to grow in response to changing but equivalent historical conditions. *See Alschuler, supra* note 22, at 40-46. On the other hand, unlike the *Katz* test, it is not cut off totally from the words chosen by the Framers. The proposal made here is what Professor Chase has called "a combined language and purpose interpretation." Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 *N.Y.U. L. REV.* 518, 584 (1977).

¹⁰⁷ *See Weinreb, supra* note 29, at 52-53; *see also Reich, Police Questioning of Law Abiding Citizens*, 75 *YALE L.J.* 1161 (1966). How widely beyond the immediate location of the person the protection of presence extends must depend upon the circumstances of the individual case.

¹⁰⁸ Weinreb, *supra* note 29, at 53-54; *see also Poe v. Ullman*, 367 U.S. 497, 549-51 (1961) (Harlan, J., dissenting); *cf. Alderman v. United States*, 394 U.S. 165, 178-80 (1969) (absent homeowner has "standing"). Such places include not only "houses" in the literal sense, but also must extend to other places people live and work. *See 1 W. LAFAVE, supra* note 9, §§ 2.3-2.4, at 290-349. *See also infra* note 109.

Under this view of the fourth amendment, it is the person's privacy of place and not the "house" that is protected. Thus, an automobile or luggage is encompassed also. *See also infra* text accompanying notes 111-13.

Under prevailing doctrine, a necessary requisite to claim the privacy of "presence" or of "place" is that the individual must be "legitimately on the premises." *See Rakas v. Illinois*, 439 U.S. 128 (1978) (not always sufficient); *Jones v. United States*, 362 U.S. 257, 267 (1960) (necessary). An objective, interest-based definition of search renders this limitation on the scope of threshold fourth amendment interests unnecessary. Like the concepts of "expec-

at least some real property interests.¹⁰⁹

The security in one's "papers" reflects protection for the modern concept of privacy of communication and record-keeping. While history would not permit treating mere overhearing as a search, it is appropriate to analogize telephone conversations, radio transmission and recording devices to written notes and letters.¹¹⁰ Finally, to be secure in one's "effects" reflects an interest in possession and custody of personal property.¹¹¹ The interest in the security of one's effects encompasses seizures or searches of the effects themselves, as well as searches of the immediate place where the effects are located,¹¹² without regard to property law or other "legitimate" interests.¹¹³

tation of privacy" and "assumption of the risk," the doctrine of "legitimately on the premises" is not properly a factor in determining whether a search occurred. Rather, it is a factor in third-party consent analysis. When police surprise a burglar hiding in the closet of the home that he or she has been ransacking, a "search" ensues, but it is authorized and made reasonable by the owner's express or implied consent. See *infra* notes 135-48, and 170-74 and accompanying text.

¹⁰⁹ See Dutile, *supra* note 19, at 1-17, 27-33; Yackle, *supra* note 21, at 369-71; Note, *supra* note 9, at 1478-80; Note, *supra* note 104, at 175-83. By extending the fourth amendment to protect privacy interests in commercial premises, the Supreme Court has long recognized that the protection afforded to the people in their "houses" cannot be limited to the home. See, e.g., *United States v. Oliver*, 104 S. Ct. 1735, 1741 n.8 (1984); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

At the same time, however, not every invasion of a legally defined real property interest can be said to impair this interest. In *United States v. Oliver*, 104 S. Ct. 1735 (1984), the Supreme Court revived the "open fields" doctrine, which leaves outside of fourth amendment protection privately owned lands beyond the "curtilage" of a home. (The curtilage is defined "as the area around the home to which the activity of home life extends." *Id.* at 1743 n.12.) See also *Donovan v. Lone Steer, Inc.*, 104 S. Ct. 769, 772-73 (1984) (no "search" in entry into motel lobby and restaurant open to public). To some extent, the fourth amendment is inherently biased in favor of the wealthy: the more effects one owns, the bigger the "house," etc., the more is protected. But everyone must live somewhere, and be that somewhere an apartment, a mansion, or a cot in a shelter, the security of that place is equally protected by the fourth amendment. But see *Hudson v. Palmer*, 104 S. Ct. 3194, 3198-3202 (1984) (prisoner has no fourth amendment privacy interest in cell). Extending that protection to undeveloped lands, even where intimate activities may occur, see *Oliver*, 104 S. Ct. at 1748-49 (Marshall, Brennan & Stevens, JJ., dissenting), would simply permit the rich to buy protection from governmental intrusion that others must forego when they employ the streets, parks, and other public facilities for similar purposes.

¹¹⁰ The protection for private recording and dissemination of one's thoughts must be distinguished from protection of the papers as physical objects; otherwise, the protection for "papers" merely repeats the more general protection of "effects." See also Note (1981), *supra* note 101, at 329 (interest in informational "secrecy" as aspect of privacy protected under fourth amendment); see generally McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55 (1977-78).

¹¹¹ *United States v. Oliver*, 104 S. Ct. 1735, 1740 & n.7 (1984). See Dutile, *supra* note 19, at 17-25; Yackle, *supra* note 21, at 372-85.

¹¹² See *Rawlings v. Kentucky*, 448 U.S. 98, 117-18 (1980) (Marshall, J., dissenting); *United States v. Jeffers*, 342 U.S. 48, 52 (1951); see also *supra* notes 107-08.

¹¹³ The interest in personal property should not be read as coextensive with the history-bound law of personal property. A fourth amendment conception of "effects" limited to le-

Under this four-fold conception, fourth amendment interests may be identified with "expectations of privacy" only loosely: not all privacy interests are covered,¹¹⁴ nor are all the interests that are covered necessarily best described as realms of privacy.¹¹⁵ Nevertheless, because privacy is the concept most often described as the focus of fourth amendment protection,¹¹⁶ these areas of protection may generally be referred to as interests in the privacies of physical presence, place, communication and possession. A search or seizure is governmental action impairing one of these four interests.¹¹⁷ It is unnecessary to constrict

gally recognized property rights would be both inapt and ineffective. Such a construction would imply regulation that did not restrict police actions in relation to either contraband or stolen goods, in which no "property" rights can exist. See *United States v. Jeffers*, 342 U.S. 48, 53-54 (1951). Nor would it be consistent with the amendment's historical origins. See N. LASSON, *supra* note 2, at 38-78 (general searches and writs of assistance sought contraband papers).

¹¹⁴ [T]he Fourth Amendment cannot be translated into a general constitutional 'right of privacy' Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual states.

Katz v. United States, 389 U.S. 347, 350-51 (1967) (emphasis in original) (footnotes omitted). Nor does the fourth amendment touch upon privacy issues such as control of publicity, protection against dissemination of private and embarrassing facts, reproductive or sexual autonomy, or freedom of conscience or thought. See generally C. FRIED, *AN ANATOMY OF VALUES* 140 (1970); A. WESTIN, *PRIVACY AND FREEDOM* (1967); Alschuler, *A Different View of Privacy*, 49 TEX. L. REV. 872 (1971); Bender, *Privacies of Life*, 248 HARPER'S, April 1974, at 36; Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34 (1967); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974); Pollak, *Thomas I. Emerson, Lawyer and Scholar: Ipse Custodiet Custodes*, 84 YALE L.J. 638 (1975); Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1978) (and several responses in the same volume, including Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of the Law*, *id.* at 475); Note, *supra* note 101, at 313-16, 328-30; Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976).

¹¹⁵ *Katz v. United States*, 389 U.S. 347, 350 (1967) ("protections [of fourth amendment] go further [than protection of privacy], and often have nothing to do with privacy at all" (footnote omitted)). The examples given in *Katz* are a public arrest and an open seizure of goods. *Id.* at 350 n.4. Whether these official actions invade an interest in "privacy" depends, of course, on the elusive meaning of that term. Compare *id.* with Weinreb, *supra* note 29, and Reich, *supra* note 107 (viewing searches and seizures of persons as invasions of privacy). Compare also *Katz*, 389 U.S. at 350 n.4; Note, *supra* note 9, at 1478-80; and Note, *supra* note 104, at 171-75 (distinguishing property interests from privacy); with Alschuler, *supra* note 22, at 17 n.40; Dutille, *supra* note 19, at 2-3 (interrelationship of property and privacy); Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964) (property rights as crucial to individualism), and Weinreb, *supra* note 29, at 52. On the varied meanings given the term "privacy," see generally the sources cited in *supra* note 114.

¹¹⁶ *E.g.*, *Warden v. Hayden*, 387 U.S. 294, 301-02 (1967).

¹¹⁷ Just as the social compact of society, implemented through civil and criminal law, requires that individuals refrain from exploiting intrusive opportunities, so the fourth amendment demands that the government also exercise such restraint. *Walter v. United States*, 447 U.S. 649, 654 (1980); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); Note, *supra* note 9, at 1481-84; Comment, *Electronic Eavesdropping and the Right to Privacy*, 52 B.U.L. REV. 831,

and distort the definition of "search" to uphold those investigative techniques that are reasonable because of the individual's invitation of, or subjective response to, the intrusion. Again, to call such intrusions "searches" is not to forbid them, but to insist upon only their justification according to a standard of reasonableness.¹¹⁸

IV. EXPECTATIONS OF PRIVACY AND THE NATURE OF CONSENT TO SEARCH

When problems arise in the application of the black letter law of consent,¹¹⁹ courts often seek to resolve them by referring to expectations of privacy. As explicated in Part IV.A., which follows, when the focus of the case is the scope of the consent, reference to expectations of privacy is basically appropriate. Less well understood, however, is the proper

838 (1973); *but cf.* *Smith v. Maryland*, 442 U.S. 735 (1979) (decided just nine days after *Lo-Ji*).

The new definition proposed in this Article does not contain an element requiring that the governmental action have been deliberate or motivated by an evidence-gathering interest. As under present law, a warrantless "search" undertaken entirely for safety's sake, pursuant to a uniform administrative policy, or in an honest effort to assist, is not "unreasonable." See *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983); *Michigan v. Tyler*, 436 U.S. 499 (1978); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Dunbar*, 470 F. Supp. 704 (D. Conn. 1979); *Burkoff*, *supra* note 22, at 541-46 (discussing *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983)); *cf.* *Amsterdam*, *supra* note 2, at 383-84 (criticizing use of term "intrusion" in summarizing *Katz* test).

¹¹⁸ Although the definition offered here covers both searches and seizures, this Article is concerned almost exclusively with problems in the definition of "search." Under prevailing law, the definitions of "seizure" are separate from that for "search." See *United States v. Jacobsen*, 104 S. Ct. 1652, 1656 & n.5 (1984).

¹¹⁹ Often, successful police work requires warrantless searches and seizures. The reason for the lack of a warrant may be that no warrant could issue, because probable cause to search is lacking. Police may also *prefer* to search without a warrant. See 2 W. LAFAYE, *supra* note 9, § 8.1, at 611. Under these circumstances, a consent search may be the only means of obtaining evidence. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). This is so because of all the search warrant exceptions authorizing a full search for an investigative purpose, only consent and search incident to arrest dispense with probable cause to search, and search incident to arrest requires probable cause to arrest. *Cf.* *Michigan v. Long*, 103 S. Ct. 3469 (1983); *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding less intrusive warrantless "searches" on less than probable cause).

The black letter law of consent, as developed by the Supreme Court, may be stated simply. Effective consent to search must be voluntary. See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 557 (1980). It must not be a mere acquiescence to a claim of authority. See, e.g., *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968). It need not, however, be "knowing." See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Voluntariness is not precluded by lawful, official custody. Compare *United States v. Watson*, 423 U.S. 411, 424-25 (1976) (lawful custody), with *Florida v. Royer*, 460 U.S. 491 (1983) (unlawful custody). One person's voluntary consent may establish the reasonableness of a search affecting another's interests, if the consenting "third party" has actual authority, which arises from mutual use of and shared access to or control over property. *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). Landlords and hotel clerks generally do not have such authority. *Stoner v. California*, 376 U.S. 483 (1964) (hotel); *Chapman v. United States*, 365 U.S. 610 (1961) (landlord); spouses, cohabitants and cousins may. *Matlock*, 415 U.S. 164 (1974); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

use of an expectation-of-privacy analysis in third-party consent cases. Both cases and treatises have suggested that the third party has authority because the first party has no expectation of privacy.¹²⁰ Part IV.B. demonstrates, however, that authority arises from the third party's particular relationship with the property and not from a lack of expectation on the part of the first party. Clarification of these issues shows how the redefinition of "searches" proposed in Part III leads to a better understanding of the nature and role of consent in fourth amendment cases.

A. THE PROBLEM OF SCOPE

Reference to expectations of privacy is often used to determine the scope of a warrantless search justified by a valid consent. The Supreme Court has never squarely dealt with the limitation in scope placed on the search by the consent.¹²¹ No doubt, an individual consenting to a police search seldom thinks to attach express limitations to that consent. Yet such limits will be implied by the courts. Consent to search one's automobile, for example, would not justify destroying the upholstery to search within the seat cushions.¹²² At the same time, an unqualified consent may authorize a broader search than envisioned by the consenting individual if the expanded scope is foreseeable.¹²³ As a result of court-implied limits, a search justified by consent may be broader—or narrower—than could have been authorized by a warrant.¹²⁴ In a search pursuant to warrant, the particularity and probable cause requirements limit the intensity of the search; these limitations are essential to the notion that a search pursuant to a valid warrant is inherently reasonable.¹²⁵ This same function is served by the limitations in scope placed on a consent search.¹²⁶

¹²⁰ See *infra* text accompanying notes 143-77.

¹²¹ The Court came close, however, in *Gouled v. United States*, 255 U.S. 298, 305-06 (1921), *reaff'd*, *Lewis v. United States*, 385 U.S. 206, 211 (1966):

A government agent . . . may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search. . . .

¹²² See 2 W. LAFAVE, *supra* note 9, § 8.1(c), at 625.

¹²³ *E.g.*, *United States v. Torres*, 663 F.2d 1019 (10th Cir. 1981) (consent to "complete" search of car authorized removal of the ashtray, revealing money that was reached by removing air vent), *cert. denied*, 456 U.S. 973 (1982).

¹²⁴ Because a warrantless search is presumed to be unreasonable regardless of the existence of probable cause, where both probable cause and consent are present, the permissible scope of the search will be determined by the consent and not by the probable cause. In such a case, a carefully framed grant of consent may well be narrower than the authority that could be conferred by warrant. Similarly, a broad grant of consent may permit a search beyond that conferrable by warrant.

¹²⁵ See 2 W. LAFAVE, *supra* note 9, § 4.5, at 72; *id.* § 4.6, at 95-96.

¹²⁶ The scope limitation serves the same function in other warrant-exception situations. See *Florida v. Royer*, 460 U.S. 491, 502-07 (1983) (scope of *Terry* stop); *United States v. Ross*,

Thus, the scope limitation on consent searches serves a central role in controlling warrantless governmental intrusion upon constitutionally protected privacy concerns. A search to which valid consent has been given is reasonable because privacy is personal, and so, can be voluntarily put aside. To the extent that the search exceeds the degree of voluntary exposure, however, there is still a violation of privacy.

The relationship between scope and expectation of privacy may be illustrated by the recent difficult case of *United States v. Schuster*.¹²⁷ When Schuster told an employee, Poteat, that he had counterfeit \$100 bills for sale, the employee reported the matter to the Secret Service. Schuster gave Poteat a key to his apartment¹²⁸ and told him where he could find a sample bill for an unnamed prospective buyer. Poteat gave the key to an agent, Bowron, who entered the apartment with Poteat and retrieved the counterfeit bill from the indicated location.¹²⁹ Whether Schuster's consent extended to Bowron provoked a troubling question about the scope of consent and its relationship to privacy interests. Schuster gave his express consent to his employee, Poteat, who, unbeknownst to Schuster, was by then acting as a government agent. A majority of the Eleventh Circuit, sitting en banc, concluded that the scope of Schuster's consent had not been exceeded.¹³⁰ The dissenters, emphasizing that

456 U.S. 798, 817-24 (1982) (scope of automobile search); *Walter v. United States*, 447 U.S. 649, 656-59 (1980) (scope of official intrusion following private search).

¹²⁷ 717 F.2d 537 (11th Cir. 1983) (en banc) (per curiam), *cert. denied*, 104 S. Ct. 1008 (1984).

¹²⁸ Actually, the apartment was leased to his girlfriend, but Schuster resided there. 684 F.2d 744, 746 n.1 (11th Cir. 1982), *vacated*, 697 F.2d 910 (1983) (en banc), *adopted by plurality of en banc court*, 717 F.2d at 537.

¹²⁹ 684 F.2d at 746, 748. The court asks why the agent chose to enter along with Poteat, thus complicating the legal question in the case. *Id.* at 748. The answer is obvious: his goal was not to simplify the fourth amendment issues but rather to make a credible case that would not depend on a jury's acceptance of the word of Poteat, who had a criminal record and "admittedly held a grudge against Schuster." *Id.* at 746. Moreover, Poteat had already demonstrated his unreliability on an earlier occasion in the same case. *Id.* at 746 n.2.

The district court had also suppressed the evidence because Schuster did not know he was consenting to a search by government agents. This contention was dismissed on appeal based on settled law that misplaced trust in a government agent will not vitiate a consent. *United States v. White*, 401 U.S. 745 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952). See *supra* notes 30-38 and accompanying text.

¹³⁰ Twelve judges comprised the court en banc. Six readopted the original panel decision in the case, 684 F.2d 744, holding that "[b]ecause Poteat assumed the role of government agent, the consent given to him carried over to Agent Bowron to the extent that the scope of the search was limited to the consent given and Poteat accompanied the agent." *Id.* at 749. Chief Judge Godbold understood the plurality to have based its decision on "a plenary rule that consent to one person operates as a consent to the whole world, or at least to the entire world of law enforcement officers." 717 F.2d at 538 (Godbold, C.J., concurring). Concurring specially, the Chief Judge disavowed this view, preferring to rest his vote "on the ground that when the defendant surrendered his privacy to Poteat he also surrendered it with respect to anyone that Poteat might deal with, within the parameters of the surrender." *Id.* Similarly,

Schuster consented only to Poteat's entry, contended that "the search by Agent Bowron cannot be condoned[,] because it significantly expanded the scope of the privacy interest Schuster consented to have invaded."¹³¹

Schuster gave permission to Poteat to enter the apartment, walk down the hallway, open a closet, move at least one personal item aside, and retrieve the counterfeit \$100 bill. Was there a greater invasion of Schuster's privacy of place because Bowron accompanied Poteat? An answer to this subtle question requires careful analysis of what is meant in our society by the privacy protected by the fourth amendment. On the one hand, one could choose to restrict the scope of the search to the

Judge Clark concurred specially to emphasize his view that the "acquisition of the counterfeit bill, although by Bowron who accompanied Poteat, did not exceed the authority granted by Schuster to Poteat . . . [A]ny object other than the counterfeit bill obtained by Poteat or Bowron while in the apartment could not be admitted in evidence." *Id.* at 539-40 (Clark, J., concurring).

In a separate concurrence, Judge Tjoflat argued that the majority's consent analysis was "needless . . . because there was no 'search' or 'seizure' in the first place." *Id.* at 538 (Tjoflat, J., concurring). Citing only *Katz*, Judge Tjoflat wrote that "when one engaged in criminal activity tells another about the activity and gives that person the key to an apartment with specific directions to obtain contraband for a prospective buyer, he has no reasonable expectation that that person will not allow a government agent to accompany him to the apartment, enter the apartment, and take the contraband described." *Id.* (Tjoflat, J., concurring).

¹³¹ 717 F.2d at 544. Judge Johnson authored the dissenting opinion, in which Judges Kravitch and Hatchett joined. The dissent rejects Judge Tjoflat's view that there was no "search," *id.* at 541-43, as well as the other judges' consent analyses. *Id.* at 543-44. Although the dissenters' conclusion (like the majority's unarticulated premise) on the "search" issue is plainly correct, their explanation is not cogent. First, the dissenters fail to note that a reference to *Katz* cannot demonstrate that no "seizure" occurred, *compare id.* at 538 (Tjoflat, J., concurring); the "legitimate expectation of privacy" test does not define seizures. *See United States v. Jacobsen*, 104 S. Ct. 1652, 1656 & n.5, 1660 & n.18 (1984). Second, a "no search" conclusion cannot be reached by arguing that Agent Bowron merely retraced an earlier, private search that had already destroyed the same privacy interests to the same degree; *cf.* 717 F.2d at 542-43 (rejecting such a contention on theory that fruits of such a search are useable to obtain a warrant but not to support a warrantless seizure). The premise of this argument is flawed, because there was no prior, private search. It was not Schuster's revealing the location of the counterfeit bill to Poteat that constituted a "search," but the latter's entry into the apartment. By the time that occurred, Poteat was actively engaged as a government agent, not as a private citizen. *Compare* 684 F.2d at 746, *with Jacobsen*, 104 S. Ct. at 1657-59.

Contrary to the suggestion of Judge Clark, 717 F.2d at 540, Judge Tjoflat's view, *see supra* note 130, is not the same as that of Justices Brennan and Fortas concurring in *Lewis*, 385 U.S. 206, 212 (1966). That opinion took the position that by opening his home to the general public as a place of business, a person takes the home outside the protection of the fourth amendment; Schuster did not so employ his girlfriend's apartment. Moreover, Brennan and Fortas carefully avoided suggesting that the illegality *vel non* of the business had anything to do with their conclusion. Judge Tjoflat's view is wrong because Agent Bowron's action impaired an interest of Schuster's that is protected by the fourth amendment—his security or privacy of place. This interest is no less available to the criminal than to anyone else. *See supra* note 42. Of course, Judge Tjoflat's thinking that *Katz* supported his position and the dissenters' inability to identify his error dramatically illustrate the confusion between "search" and "consent" caused by accepted fourth amendment doctrine, as discussed in Part II of this Article.

precise terms of the consent given. Such a strict rule could be justified, because consent searches dispense with both warrant and probable cause, the two cornerstones of reasonableness.¹³² Moreover, upholding searches beyond the precise consent given would set a trap for the unwary. On the other hand, one could choose a more relaxed view of the scope rule that would protect police from having to determine the scope of the consent on a case-by-case basis.¹³³

In *Schuster*, the only material respects in which the entry of the apartment exceeded the scope of the consent are that two, rather than one, persons entered, and that the second person was a government agent. Schuster gave his permission so that Poteat could get the bill for a prospective buyer; the stranger who came with Poteat was that buyer. Schuster's expectations were not exceeded, and the ultimate effect on privacy of place interests was minuscule. Thus, on these facts, the result in *Schuster* was correct. In general, resolving the issue of scope of consent calls for an analysis of expectations and invasions of privacy.

B. THE BASIS OF THIRD-PARTY CONSENT

Two troublesome types of third-party consent cases cannot properly be resolved simply by reference to expectation of privacy. In one type, consent to search is given by one person with authority, but simultaneously or previously refused by another authorized person.¹³⁴ The other type of third-party consent problem arises when a person has failed to prevent another's access to his or her belongings in such a way that the courts will infer authority to consent by the non-owner. Analysis of third-party consent cases discloses that authority to consent related to expectations of privacy, but not in the ways commonly thought.

1. *The Problems of Conflicting Grants and Refusals of Permission to Search*

The refusal of consent by one authorized person coupled with the granting of consent by another is a recurring problem in fourth amendment analysis. In *People v. Cosme*,¹³⁵ for example, the defendant and his

¹³² This characteristic of the consent doctrine is unique among fourth amendment rules authorizing a full search. See *supra* note 119; cf. *supra* note 117 (non-investigative searches).

¹³³ *Schneekloth v. Bustamonte*, 412 U.S. 218, 229-34 (1973). A relaxed view of consent also would be consistent with the Court's rejection of "metaphysical subtleties" in the recognition of authority to consent. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

¹³⁴ Under *United States v. Matlock*, 415 U.S. 164 (1974) (see *supra* notes 56-57 and accompanying text), the test for third-party binding consent when based upon "common authority" is a shared access that gives the third party independent control and an objective assumption by the "first party" of the risk of disclosure by the third party. *Id.* at 171 & n.7. See Bacigal, *supra* note 2, at 545-51; White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 224-25.

¹³⁵ 48 N.Y.2d 286, 422 N.Y.S.2d 652, 397 N.E.2d 1319 (1979).

cohabitant, Hennessey, had a quarrel, and she told the New York City Police that Cosme kept cocaine and a gun in their shared bedroom closet. The police came to the apartment, where she gave them the key, explained how to avoid activating an alarm, and drew them a diagram showing the exact location of the closet. The New York Court of Appeals adopted the trial court's reasonable assumption that when the police entered with drawn guns, handcuffed Cosme and a male companion, and required them to lie face down on the floor, Cosme's protestations included at least an implied refusal of consent to search.¹³⁶ Nevertheless, the court unanimously upheld the search on the basis of Hennessey's consent.

The court's reasoning leads to the bizarre conclusion that Cosme lacked any protectable privacy interest in his own apartment:

[A]n individual who does not possess exclusive authority and control over premises has no reasonable expectation of privacy with respect to those premises

Proceeding as we do from this theoretical background, we are led to the conclusion that an individual who possesses the requisite degree of control over specific premises is vested in his own right with the authority to permit an official inspection of such premises and that this authority is not circumscribed by any 'reasonable expectation of privacy' belonging to co-occupants. Whether the principle is characterized as an 'assumption of risk' or a relinquishment of the 'expectation of privacy' guaranteed by the Fourth Amendment, the fact remains that where an individual shares with others common authority over premises or property, he has no right to prevent a search in the face of the knowing and voluntary consent of a co-occupant with equal authority.¹³⁷

The same view is taken in other cases.¹³⁸

Cases that deny third-party consent under these circumstances also sometimes equate the authority of one person's consent with the other's lack of an expectation of privacy. In *Silva v. State*,¹³⁹ for example, the

¹³⁶ 48 N.Y.2d at 289, 422 N.Y.S.2d at 653, 397 N.E.2d at 1321.

¹³⁷ 48 N.Y.2d at 291-92, 422 N.Y.S.2d at 655, 397 N.E.2d at 1322. There is nothing in the opinion to support Professor LaFave's explanation of this case. LaFave cautiously endorses a general rule against upholding one person's consent when any other cohabitant is present and refuses, and would treat the *Cosme* holding as an instance of a special exception to his rule. 2 W. LAFAVE, *supra* note 9, § 8.3(d), at 708 (1978); *id.* at 252 n.59.1 (Supp. 1983). The exception would apply to cases "when the consenting occupant acts to allow police seizure of items of contraband . . . which the consenting occupant thus might otherwise have later been charged with possessing." *Id.* at 251-52. *Cosme* does not support LaFave's summary of the facts, which states that Hennessey "took initiative to summon police because defendant was storing drugs in the closet also used by her." *Id.* at n.59.1 (emphasis added). To the extent that her motivation is revealed in the opinion, her calling the police seems to have been part of a quarrel with Cosme, not an effort at self-protection.

¹³⁸ *E.g.*, *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam) (alternate holding) (quoting *United States v. Sumlin*, 567 F.2d 684, 687-88 (6th Cir. 1977)).

¹³⁹ 344 So. 2d 559 (Fla. 1977).

facts are virtually identical to *Cosme*.¹⁴⁰ Citing only *Katz*,¹⁴¹ the court finds the consent vitiated, tying its conclusion to the privacy interest in the contents of the closet:

[T]he person whose property is the object of a search should have controlling authority to refuse consent. His rights are personal to him . . . [A] present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another. This is particularly true where the police are aware that the person objecting is the one whose constitutional rights are at stake.¹⁴²

The shared premise underlying these conflicting conclusions—that a third party's authority to consent is dependent upon the absence of a legitimate expectation of privacy by the defendant—is erroneous.

If the New York Court of Appeals is serious in stating that *Cosme* had no legitimate expectation of privacy in his apartment or bedroom closet because he shared it with another person,¹⁴³ then the police intrusion into the apartment was not a "search" as to *Cosme* within the meaning of the fourth amendment. It would, therefore, not have to be justified as reasonable by Hennessey's consent or anything else. Likewise, if *Silva* had a legitimate expectation of privacy in his bedroom closet because he kept his possessions there,¹⁴⁴ it would demonstrate only that the police intrusion into the closet *was* a "search" as to *Silva*, and not necessarily that it was unreasonable.¹⁴⁵ Consent might justify the search if it were voluntary and authorized. Under conventional analysis, whether the defendant had a legitimate expectation of privacy in the place searched can answer only whether a "search" occurred and does not answer whether the consent was valid.

The real question in these cases is whether an otherwise authorized person should lose the authority to consent when another authorized

¹⁴⁰ See *supra* text accompanying notes 135-38. *Silva* and Brandon, unmarried, shared an apartment. There was a fight. Brandon informed police of contraband in a bedroom closet. Police arrived and she admitted them. Over *Silva's* objection, the police searched the closet and seized the contraband. He was convicted of possession. Unlike *Cosme*, the closet in *Silva* was not shared. This distinction may be relevant to answering whether she was authorized, but does not justify the use of a different analytical framework.

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

¹⁴² 344 So. 2d at 562-63 (footnote omitted). The last sentence of this passage is based on a false premise. As Professor Weinreb has written, "[w]hose crime the police were investigating cannot be determinative; the amendment secures us against invasions of privacy, not the discovery of incriminating evidence." Weinreb, *supra* note 29, at 61.

¹⁴³ The proposition is so ludicrous that to state it would seem to refute it, *but see Smith v. Maryland*, 442 U.S. 735 (1979) (police use of a pen register not a search because numbers dialed from home telephone could have been intercepted by telephone company), discussed *supra* notes 24, 52, and accompanying text.

¹⁴⁴ *Silva* was decided almost one year after *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹⁴⁵ This view would be erroneous under current fourth amendment doctrine. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). It would be correct under the definition proposed in this Article. See *supra* note 112 and accompanying text.

person objects to the search. On the one hand, if Hennessey's mutual use and joint control of the closet derived entirely from Cosme's generosity, his objection should obviate her consent.¹⁴⁶ As a matter of social convention, it may be that the unanimous consent of the adult occupants (or at least of those present) is necessary to render reasonable an invitation to enter. But social convention is not the law here. As Professor Weinreb put it, "even a spouse's express instruction . . . should not be effective to invalidate consent that did not depend on his authority in the first place; what does not exist by his dispensation cannot be removed by his command."¹⁴⁷ In *Matlock*, the Supreme Court said that the relationship giving rise to authority must be such "that the others have assumed the risk that one of their number might permit the common area to be searched."¹⁴⁸ If the authority of the others could be withdrawn by a cohabitant, the first party would not, by definition, assume the risk that another would consent to a search. Thus, in both *Cosme* and *Silva*, with each cohabitant having authority in his or her own right, the protestations of the other cohabitant should be insufficient to obviate the consent. The result reached in *Cosme* is correct, and in *Silva*, wrong, but the analysis in each is equivalently flawed.

2. Joint Access Without Sharing

Authority to consent may also be in issue in non-shared areas to which various people have joint access. A particularly knotty problem arises when one has taken precautions to avoid sharing but has failed, due to a miscalculation of the risks to privacy. In *Commonwealth v. Latshaw*,¹⁴⁹ Bubb owned a farm tract. She lived in half the farm house, renting the other half to her niece and the niece's husband, Hinds. Bubb did not lease out any part of the barn, but allowed Hinds and others (with her permission) to keep some animals and equipment there. Hinds gave the defendant permission to use the hayloft of the barn to process and store marijuana shipments, for which the defendant paid Hinds a fee per shipment. When Bubb discovered the material in her hayloft, she invited the police to come and authorized them to search the barn, including sealed cartons and a locked footlocker found there. The Pennsylvania Supreme Court upheld the search based on third-

¹⁴⁶ See *Frazier v. Cupp*, 394 U.S. 731 (1969), in which the petitioner's shared use of his cousin's duffel bag, kept in the cousin's home, would seem to derive solely from a unilateral grant of authority.

¹⁴⁷ Weinreb, *supra* note 29, at 61-62. Professor Weinreb distinguishes between a present and an absent cohabitant, but does not explain what in these two situations would justify a different result. Compare *id.* at 62 n.43, with *id.* at 63.

¹⁴⁸ 415 U.S. at 171 n.7.

¹⁴⁹ 481 Pa. 298, 392 A.2d 1301 (1978), *cert. denied*, 441 U.S. 931 (1979).

party consent.¹⁵⁰ The court, however, focused exclusively upon the reasonableness of Latshaw's expectations of privacy for his property in the hayloft rather than upon the overall reasonableness of the search. The facts of the case illustrate the significance of the difference in approach.

As to the materials seized in the open area of the hayloft, it makes sense to say that Latshaw had no legitimate expectation of privacy. Though he paid a fee for the use of the hayloft,¹⁵¹ he took no precautions to protect his property, much less his privacy, from the intruding eyes of strangers.

The footlocker and sealed cartons, however, do not present the same problem. An owner maintains a protected privacy interest in property left in a sealed container on another's premises.¹⁵² Thus, when the property is opened and/or seized by police, it must be said that a search occurs.¹⁵³ This is not to say, however, that the search is unreasonable. A search pursuant to a warrant based upon probable cause, or in conformity with an exception to the warrant requirement, could be lawful. Bubb's "consent" could validate the search, if the consent were authorized. *Matlock* held that authority to consent will be found when there is "mutual use of the property by persons generally having joint access or control for most purposes."¹⁵⁴ Bubb did not have "common authority" as defined in *Matlock*.

Matlock suggested an alternate route to authority to consent. If an individual had some "other sufficient relationship to the premises or effect sought to be inspected,"¹⁵⁵ courts would find authority to consent. The Court has never elaborated upon what alternative "relationship" to the premises or effects would be "sufficient."

One possible "sufficient relationship" would exist when the property is either dangerous or incriminating to the person offering con-

¹⁵⁰ The case was decided by a vote of 4 to 3. *Id.*

¹⁵¹ See *Katz v. United States*, 389 U.S. 347, 352 (1967) (Katz entitled to rely on privacy of telephone booth once he "shuts the door behind him, and pays the toll that permits him to place a call").

¹⁵² See, e.g., *United States v. Isom*, 588 F.2d 88 (2d Cir. 1978). Indeed, personal property law does not treat the discoverer of valuable property in a sealed container as a "finder." R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 682-87 (3d ed. 1981); R. BROWN, *THE LAW OF PERSONAL PROPERTY* 24-32 (3d ed. W. Raushenbush 1975) (distinguishing between finders of "lost" and "misplaced" goods).

¹⁵³ See *Walter v. United States*, 447 U.S. 649 (1980).

¹⁵⁴ 415 U.S. at 171 n.7. Bubb may have had shared authority over the container, as distinguished from its contents, but this would render reasonable only its seizure and removal from her premises at her behest, not its subsequent warrantless search. Compare *United States v. Chadwick*, 433 U.S. 1 (1977), with *Texas v. Brown*, 460 U.S. 747-51 (1983) (Stevens, J., concurring).

¹⁵⁵ 415 U.S. at 171.

sent.¹⁵⁶ But such a case would require an objective basis for the belief in the existence of these special circumstances. Because the belief would be used to justify a full search, it should rise to the level of probable cause. And if a search of this kind, by its nature, cannot be reasonable without probable cause, then a warrant should generally be required to protect the defendant's privacy by subjecting the probable cause judgment to a neutral magistrate's advance scrutiny. In an emergency situation, probable cause to search permits dispensing with the warrant requirement.¹⁵⁷ Where evidence is incriminating, a warrant based on probable cause could issue; where evidence presents a danger to the consenting party, the appropriate warrant might be administrative.¹⁵⁸ Thus, the risk of danger or incrimination to the third party does not afford an alternative to "common authority" as a satisfactory basis for a finding of authority to consent.

Another possible source of a "sufficient relationship" might be a conferral of authority by positive law.¹⁵⁹ In *Chapman v. United States*,¹⁶⁰ the rural landlord, suspecting moonshining, led police to the tenant's house and gave permission to enter through a bathroom window. The government argued that the consent was valid because under common law and under Georgia statutes, the landlord had authority to enter "to view waste" of the leased premises. The Court rejected this justification and held the search unlawful. Because the rejection was arguably based on the government's inability to meet the technical requisites of either common or statutory law, however, the issue remained an open question.¹⁶¹

¹⁵⁶ See 2 W. LAFAYE, *supra* note 9, § 8.3(d), at 221-22 (Supp. 1983); *cf. id.* § 8.3(h), at 226-29; 1 W. LAFAYE & J. ISRAEL, *supra* note 9, § 3.10(d)(7), at 354 (discussing *Lalshaw* as exemplifying a situation in which an "in own right" test and "assumption of risk" test for common authority point in different directions. Professor LaFave errs in this analysis because, under *Matlock*, these are not alternative tests. Rather, each is a necessary element for authority based on shared access and control. See 415 U.S. at 171 n.7).

¹⁵⁷ In an emergency situation, courts permit dispensing with the warrant where there is probable cause to search. See, e.g., *Michigan v. Clifford*, 104 S. Ct. 641 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978) (fire); *Cupp v. Murphy*, 412 U.S. 291 (1973); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (imminent destruction of evidence); *cf. Mincey v. Arizona*, 437 U.S. 385, 394-95 (1978) (no general exception for scene of serious crime); *Vale v. Louisiana*, 399 U.S. 30 (1970) (no general exception for immediate search of arrestee's home).

¹⁵⁸ See, e.g., *Donovan v. Dewey*, 452 U.S. 594 (1981); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

¹⁵⁹ Dictum in *Matlock* disavows the possibility of finding authority to consent in the rules of property law. 415 U.S. at 171 n.7.

¹⁶⁰ 365 U.S. 610 (1961). Compare *Trupiano v. United States*, 334 U.S. 699 (1948), *overruled on other grounds* in *Rabinowitz v. United States*, 339 U.S. 56, 66 (1950), in which the Court unanimously assumes that a landlord of farm property could grant police effective consent to enter and search the leased land and building.

¹⁶¹ The discussion does not identify what relevance local private property law might have.

Some additional light was shed on the subject in *Stoner v. California*.¹⁶² There, a hotel night clerk granted the police entrance to an absent guest's room. The Court unanimously concluded that the search was not validated by this consent.¹⁶³ The Court found that California law did not authorize a hotel keeper to consent to a police search of a guest's room, but also suggested that such a law would have to "survive constitutional challenge."¹⁶⁴ Positive law could not, then, create authority to consent that did not exist under the Constitution. Conferral of authority by law, therefore, does not seem to be the "sufficient relationship" envisioned by the *Matlock* Court.¹⁶⁵

Thus, although the Supreme Court's language in *Matlock* left open the possibility that authority to grant consent might arise from the relationship between the third-party and the premises and effects, it is doubtful that such situations exist. Because Bubb lacked the "joint access or control for most purposes" that arises from "mutual use of the property,"¹⁶⁶ the *Latshaw* court should have held that she had no authority to consent to a warrantless search and seizure of the locked footlocker and sealed cartons found in her hayloft.

Although Bubb's own "expectation of privacy" in the barn was not enough to validate the search and seizure on the basis of her consent, a

In one paragraph, the majority dismisses the *common law* argument on the rights of a landlord on three separate grounds: (1) that the technical requisites for entry at common law were not met (the Court reasoned that the common law did not permit breaking, and opening the window is a common-law "breaking"); (2) that the entry was in fact for a law enforcement purpose, not to "view waste"; and, (3) most profoundly, that "subtle distinctions, developed and refined by the common law of private property" should not control personal rights in the administration of the fourth amendment. 365 U.S. at 616-17 (quoting *Jones v. United States*, 362 U.S. 257, 266 (1960)). The very next paragraph, however, rejects the government's argument from Georgia *statutory* law solely on the ground that the statute's procedural requirements, as interpreted by the Court, had not been met. This approach left almost completely open the question whether the tenant's fourth amendment rights could be limited by restrictive state statutory policy granting the landlord authority to consent. *Cf. Ker v. California*, 374 U.S. 23, 38 (1963) (assuming for purposes of lawfulness of arrest-entry that use of pass-key voluntarily provided by landlord is "breaking"). In *Chapman*, Justices Frankfurter and Black concurred in the result; Justice Clark dissented. 365 U.S. at 618-19.

¹⁶² 376 U.S. 483 (1964). See also *supra* notes 43-48 and accompanying text.

¹⁶³ See also *United States v. Jeffers*, 342 U.S. 48, 51-52 (1950) (government conceded that it was illegal to enter and search hotel room with key supplied by manager), *overruled on other grounds* in *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (semble), and *Rakas v. Illinois*, 439 U.S. 128, 146-47 (1978); *Lustig v. United States*, 338 U.S. 74 (1949) (Court's unquestioned premise appears to be that hotel owner had no authority to consent to search of guest's room).

¹⁶⁴ 376 U.S. at 488.

¹⁶⁵ Similarly, the Court rejected the state's reliance on the doctrine of "apparent authority," taken from the law of agency. *Id.* Only *Stoner*, "by word or deed, either directly or through an agent," could thus "waive" his constitutional right. *Id.* at 489. *Cf. United States v. Matlock*, 415 U.S. 164, 177-78 n.14 (1974) (seeming to leave open the question of apparent authority). See *infra* notes 175-85 and accompanying text.

¹⁶⁶ *Matlock*, 415 U.S. at 171 n.7.

third party's lack of authority is intimately related to the existence of the defendant's expectation of privacy. This principle is further demonstrated by a re-examination of *Abel v. United States*.¹⁶⁷ In *Abel*, the F.B.I. seized certain items from a wastebasket during a three-hour search of the petitioner's hotel room. Abel had been arrested by I.N.S. agents in the early morning for deportation, and told to pack the things he wished to take, check out, and pay his hotel bill. Although his payment entitled him to the use of the room until 3 p.m., the hotel management authorized the F.B.I.'s warrantless search when Abel vacated the room and left in the custody of the agents. The opinion of the Court, by Justice Frankfurter, states that the F.B.I. action was "entirely lawful."¹⁶⁸

The conclusion of the Court is by no means irresistible. As in the *Latshaw* case, authority can arise only from exclusive control or a relationship of sharing; the hotel keeper has neither while the guest had a right of continued use. The validity of the hotel's consent depended upon Abel's lack of a continuing fourth amendment interest in the room. The hotel's authority to consent, in the absence of a sharing relationship, was therefore dependent on Abel's lack of an expectation of privacy. Thus, the management's consent could not validate a warrantless search or seizure until after 3:00 p.m.¹⁶⁹ In a "relationship" of joint access without sharing there is no authority to consent until the control becomes exclusive.

C. VALID CONSENT: VOLUNTARY AND AUTHORITATIVE

The conventional discussions of a valid consent to search are often indistinguishable from discussions of whether a search occurred—both concern the expectation of privacy.¹⁷⁰ As the foregoing discussion

¹⁶⁷ 362 U.S. 217 (1960).

¹⁶⁸ *Id.* at 241. Abel's stronger interest was in the items seized, not the place searched, but the Court concluded he could not prevail along this line of analysis either. 362 U.S. at 241; *cf.* *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (analysis of interest in things seized). By leaving the pencil and wood-block behind in a trash can, he had abandoned them; their seizure would thus not affect any interest of Abel's. *But cf.* *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960) (no abandonment if defendant retained interest in place). Alternatively, the Court reasoned that if the search was not unlawful, seizure was justified because the evidence consisted of instrumentalities of a crime found in "plain view." *But cf.* *Texas v. Brown*, 460 U.S. 730, 743-44 (1983) (plurality: whether "inadvertent discovery" is a necessary element of plain view seizure).

¹⁶⁹ If Abel had voluntarily vacated the room, his technical property law interest continuing until 3:00 p.m. would not prevail; without voluntariness, however, there could be no abandonment. *See* *Rios v. United States*, 364 U.S. 253, 262 (1960); 1 W. LAFAVE & J. ISRAEL *supra* note 9, § 3.2(h), at 176.

¹⁷⁰ Professor LaFave, for example, falls into this confusion in his response to the *Bustamonte* observation that a "'waiver' approach [to the definition of consent] would be thoroughly inconsistent with our decisions that have approved 'third party consents.'" 412 U.S. at 245, *quoted in* 2 W. LAFAVE, *supra* note 9, § 8.1(a), at 618. He quotes approvingly from a student

shows, it is not the defendant's lack of a legitimate privacy interest that permits the fruits of a search based on another's consent to be used against him; rather, it is the other person's authority to consent in his or her own right. Thus viewed, the doctrine of third-party consent is saved from collapsing into the definition of search. Authority to consent for a third party, however, cannot exist in the absence of "common authority" over the objects in question.¹⁷¹ The result is fairly common in fourth amendment analysis: a person's legitimate expectation of privacy may be lawfully defeated by something that happens to, or is done by, someone else.¹⁷²

The analysis of "third-party consent" should ask only: (1) was the consent "voluntary," and (2) did the person who consented have authority, that is, joint access or control? If both requirements are met, and the scope of the intrusion is appropriately confined, the search is reasonable. If not, the reasonableness of the search cannot be established by consent. Whether the defendant benefits from the lack of consent is then a question of "standing": did this unreasonable search infringe upon any of the defendant's fourth amendment interests?¹⁷³ The existence of "standing" does not render unreasonable a search supported by valid consent, but the absence of "standing" will prevent a defendant from excluding evidence derived from the violation of another's constitutional rights. The motion is not denied because one person consented for another, but because the voluntary consent by an authorized person renders the search reasonable, and what is found in a reasonable search is admissible against anyone, so far as the Constitution is concerned.¹⁷⁴

note that mischaracterizes *Matlock* as standing for the proposition that such searches are "upheld on the rationale that by entrusting his property so completely to a third party, the defendant no longer has a justifiable expectation of privacy in the property. . . ." *Id.* (quoting Note, 52 N.C. L. REV. 644, 653-54 (1974)).

¹⁷¹ See *supra* notes 149-69 and accompanying text.

¹⁷² For example, evidence found in a lawfully stopped automobile may incriminate a passenger who did not contribute to the probable cause for the search. See, e.g., *Gray v. State*, 596 P.2d 1154 (Alaska 1979); compare *United States v. Di Re*, 332 U.S. 581, 586-87 (1948) (search of person who happens to be in automobile not permitted simply because auto search is appropriate), with *United States v. Place*, 103 S. Ct. 2637 (1983) (scope of search incident to "Terry stop" of automobile). Likewise, one person's property may be searched and seized on the basis of its unlucky proximity to a second person who is being arrested. *Hill v. California*, 401 U.S. 797, 804-05 (1971). See also *Michigan v. Summers*, 452 U.S. 692 (1981) (resident may be detained simply because he or she happens to be present where search warrant for narcotics is to be executed); cf. *Ybarra v. Illinois*, 444 U.S. 85 (1979) (frisk not lawful merely because one is present where search warrant is being executed). Professor Weinreb's otherwise outstanding analysis also misses the point that third-party authority does not depend on the first party's lack of authority. Weinreb, *supra* note 29, at 63.

¹⁷³ See *Rakas v. Illinois*, 439 U.S. 128 (1979). Of course, it will often be more efficient to look at this question first. Cf. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); see *supra* text accompanying notes 39-42.

¹⁷⁴ The only exception would be if the evidence were the "fruit of the poisonous tree" with

The proper analysis of authority and its relationship to "standing" also helps solve the subjective/objective, or apparent authority/actual authority issue that has plagued discussion of third-party consent.¹⁷⁵ If the police conduct a warrantless search based on the consent of one who seems to have authority, but does not, is the search lawful? A variation on a hypothetical used effectively by Professor Weinreb¹⁷⁶ proves helpful here. A housepainter, hired to work on the interior of a private home, is instructed by the owner—concerned with both privacy and safety—to let no one in the house, including police. Police show up at the door. Answering their knock, the painter fails to identify herself as such, and to the police she reasonably appears to be a young adult resident of the house. She tells them, "Glad to see you. Come on in and look around to your hearts' content." Her invitation to the police, we shall assume, satisfies the *Bustamonte* test of voluntariness without rising to the level of a knowing and intelligent waiver.¹⁷⁷ The painter has a

respect to some prior violation of the defendant's rights. *Wong Sun v. United States*, 371 U.S. 471 (1963). Cf. *Florida v. Royer*, 460 U.S. 491 (1983) (first-party consent tainted as fruit of illegal detention).

¹⁷⁵ See 2 W. LAFAVE, *supra* note 9, § 8.3(g), at 716-25. The status of the controversy in the Supreme Court is unclear. See *United States v. Matlock*, 415 U.S. 164, 177-78 n.14 (1974); *Schneekloth v. Bustamonte*, 412 U.S. 218, 246 (1973) (discussing *Hill v. California*, 401 U.S. 797 (1971)); *Stoner v. California*, 376 U.S. 483, 489 (1964).

¹⁷⁶ Weinreb, *supra* note 29, at 63. Professor LaFave also repeats Weinreb's use of this hypothetical. 2 W. LAFAVE, *supra* note 9, § 8.3(g), at 722.

¹⁷⁷ In its early cases, the Supreme Court assumed that "consent" and "waiver" were interchangeable terms. See, e.g., *Amos v. United States*, 255 U.S. 313, 317 (1921). In *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), the Court held that a voluntary consent need not be "knowing and intelligent" and thus need not satisfy the traditional test of constitutional waiver. *Bustamonte* did not decide, however, whether voluntary consent to search is conceptually the same thing as a waiver of fourth amendment rights. The analysis of consent developed in the text above shows that the two are not necessarily the same. See Wood, *The Scope of the Constitutional Immunity Against Searches and Seizures* (pt. II), 34 W. VA. L.Q. 137, 146-47 (1928). First, not all waivers of fourth amendment rights involve consent. See *Tollet v. Henderson*, 411 U.S. 258 (1978); *McMann v. Richardson*, 397 U.S. 759 (1970) (waiver of fourth amendment claims incident to guilty pleas); cf. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (no waiver if state law permits appeal). See generally Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

Second, one may speak of a waiver of fourth amendment rights in relation to unreasonable searches. Although tricky to grasp, it is possible that consent to search will not render the search reasonable. Imagine that the housepainter is a law student, outstanding in her grasp of criminal procedure and constitutional law, and that her greeting to the inquiring police is, "I am only the housepainter and have been explicitly instructed to refuse you entrance. However, I nonetheless willingly invite you in to look around to your hearts' content." Under the *Matlock* test of "joint access or control for most purposes," 415 U.S. at 171 n.7, the police should know that the painter lacks authority to consent and that the search is therefore "unreasonable." See 2 W. LAFAVE, *supra* note 9, § 8.6(c), at 767-70; Weinreb, *supra* note 29, at 63 & n.47; Annot., 99 A.L.R. 3d 1232 (1980). Her statement, of course, cannot waive the homeowner's rights. *Bustamonte*, 412 U.S. at 245-46. Yet surely the student waived her own fourth amendment rights, so that the fruits of this unreasonable search should nonetheless be useable

legitimate expectation of privacy in the home, because her protected interests are affected if the police simply barge in.¹⁷⁸ The homeowner, even while absent, also has such an expectation.¹⁷⁹ Thus, as to either of them, the police entry is a "search." Whether the search is lawful, then, depends on whether she has authority to consent.

The housepainter has no actual authority. She has not received authority from the homeowner nor has she the shared control required by *Matlock*.¹⁸⁰ If apparent authority would render the consent valid, however, as most courts have contended,¹⁸¹ then the search was lawful.¹⁸² Professor LaFave notes, quite persuasively, that whether apparent authority may validate consent depends upon one's attitude toward consent searches. One who believes them to be both necessary and desirable¹⁸³ would support the apparent authority approach. One viewing consent searches with disfavor, perhaps because they avoid both the warrant and probable cause requirements that are central to fourth amendment privacy protection,¹⁸⁴ would opt for the stricter, actual authority approach.¹⁸⁵

against her on the basis of waiver, even though her lack of authority means that what she gave the police was not "consent." See also *infra* text accompanying notes 180-85. "Waiver" is an intentional relinquishment of a known right. "Consent" as defined by *Bustamonte* does not require intentional relinquishment of a known right. At the same time, there is no reason but policy—the balancing of law enforcement interests against privacy that is inherent in the fourth amendment's conception of reasonableness—why knowledge of one's rights should not be considered a *sine qua non* of voluntariness, as it is in the case of a custodial confession. *California v. Prysock*, 453 U.S. 355 (1981) (per curiam); *Miranda v. Arizona*, 384 U.S. 436 (1966). That issue has been well argued elsewhere. 2 W. LAFAVE, *supra* note 9, § 8.1, at 612-20; Amsterdam, *supra* note 2, at 445 nn.102-03; Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 243-52 (1974); Weinreb, *supra* note 29, at 56-57. Thus, although consent as such does not constitute a waiver of fourth amendment rights, the *Bustamonte* Court was wrong to suggest that the existence of third-party consent meant that consent need not meet the test for waiver. 412 U.S. at 245-46. For present purposes, however, this Article accepts the controversy as settled by *Bustamonte* in favor of a "totality of the circumstances" test. But see *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) (state constitutional basis).

¹⁷⁸ Although lacking any property interest, a housepainter has a legitimate claim to privacy of presence in a home that is her work-site. See *Mancusi v. DeForte*, 392 U.S. 364 (1968) ("standing" to object to search of shared desk at place of work). Cf. *Rakas v. Illinois*, 439 U.S. 128 (1978) (automobile passenger has no legitimate expectation of privacy in locked glove compartment or area beneath seat).

¹⁷⁹ See *Alderman v. United States*, 394 U.S. 165, 176-80 (1969).

¹⁸⁰ See *supra* text accompanying notes 149-69.

¹⁸¹ See cases collected by Professor LaFave, 2 W. LAFAVE, *supra* note 9, § 8.3(g), at 717-18 n.91.

¹⁸² Authority to consent generally has been recognized for an adult cohabitant, even though that person is not the homeowner or tenant. See 2 W. LAFAVE, *supra* note 9, § 8.5(c,d,e), at 748-59; Annot., 4 A.L.R.4th 1050 (1981); Annot., 4 *id.* 196 (1981); Annot., 1 *id.* 673 (1980); Annot., 99 A.L.R.3d 593 (1980).

¹⁸³ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973).

¹⁸⁴ See *supra* note 119.

¹⁸⁵ See Weinreb, *supra* note 29, at 64.

Even if we adopt a requirement of actual authority to protect the interests of the homeowner, however, the housepainter should not be allowed to complain successfully of the illegal search if it yielded evidence against her. At the same time, if evidence is offered against the homeowner, we should not say that he or she "assumed the risk" of unwarranted search by leaving another person in charge of the premises. The most satisfying solution seems to be a two-tiered analysis that would demand actual authority when the evidence was sought to be used against the non-consenting first party, and a lesser standard of apparent authority when the evidence is sought to be used against the one who voluntarily consented.

Consent renders a search reasonable whenever it is both voluntary and authoritative.¹⁸⁶ Having a legitimate expectation of privacy in a place and/or thing is a necessary predicate for authority to consent, but it does not always give rise to that level of shared access and control that is essential to a finding of authority to consent to search or seizure.¹⁸⁷ Thus, expectation of privacy is a necessary component in determining the validity of a consent. Eliminating expectation of privacy from the definition of search clarifies the meaning of consent by helping to resolve the confusion in some lower courts on such issues as scope and authority.

V. CONCLUSION: THE IMPORTANCE OF CONSENT AFTER REDEFINING "SEARCHES"

In *Schneckloth v. Bustamonte*,¹⁸⁸ the Court required consideration of the totality of the circumstances when evaluating the voluntariness of a consent to search. Because this consideration will assess all facts pointing to genuine, subjective abandonment of protected privacy interests, it is unnecessary to assess expectations of privacy in determining what constitutes a search. As the decisions in *Davis*¹⁸⁹ and *Bustamonte*¹⁹⁰ show, a proper consent analysis can acknowledge the reasonableness of a search

¹⁸⁶ The foregoing analysis shows that the Supreme Court's discussion of consent to search is basically satisfactory. Exceptions must be noted for the Court's finding, however, of voluntariness in *United States v. Mendenhall*, 446 U.S. 544, 558-60 (1980); see *supra* note 76, and its ruling in *United States v. Watson*, 423 U.S. 411, 424-25 (1976) (consent obtained from one in custody may be found voluntary even in the absence of *Miranda*-type prophylactic warnings).

¹⁸⁷ As the Supreme Court said in *Matlock*, consent is valid if given by one "who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected." 415 U.S. 164, 171 & n.7 (1974) (emphasis added). See *supra* note 155 and accompanying text. The sufficiency of other relationships that have been suggested are considered and rejected at *supra* notes 156-66 and accompanying text.

¹⁸⁸ 412 U.S. 218, 227, 249 (1973).

¹⁸⁹ *Davis v. United States*, 328 U.S. 582 (1946); see *supra* notes 75-87 and accompanying text.

¹⁹⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); see *supra* note 39 and accompanying text.

to which an individual subjectively agreed. Likewise, *Matlock*¹⁹¹ and *Frazier*¹⁹² demonstrate that the concept of "assumption of risk" is comfortably accommodated within a consent analysis as well. The fourth amendment's concern with protection of individual privacy can be best satisfied through a careful consideration of the scope, voluntariness and authority of consent, once the purely objective threshold of "standing" (impact on one's protected interests) is crossed.

This analysis properly leaves the burden of proof on the moving party, the self-identified victim of an unconstitutional search, to establish the occurrence of an event affecting his or her protected interests.¹⁹³ In most cases, the defendant will have ready access to this information. The burden then shifts to the government to justify the search on the basis of consent. The prosecution is in the best position to say what justified the police conduct. Indeed, in the case of third-party consent, the defendant may not even have been present. Moreover, this allocation with respect to each issue avoids placing the burden of proof on a party to establish the nonexistence of an event.

From a policy perspective, the defendant moving to suppress evidence is seeking exclusion of relevant and probative facts and should bear some burden in showing the need for such exclusion. At the same time, the prosecution, in opposing the motion on the basis of consent, is seeking to support a warrantless search.¹⁹⁴ For these reasons, it is not only appropriate that the burden first be on the defendant to show that a search occurred, but also that it then shift to the prosecution to show that the search was consented to. It is important that distinctions between these issues be carefully drawn and maintained.

Although the burden of showing a search remains with the defendant, and the burden of showing consent remains with the government, the outcomes of some cases would change simply because factual issues formerly subsumed in the definition of search would become factual questions of consent. The examination of the contents of Cox's purse would be a search as to Rawlings,¹⁹⁵ but for reasons other than those

¹⁹¹ *United States v. Matlock*, 415 U.S. 614 (1974); see *supra* note 56 and accompanying text.

¹⁹² *Frazier v. Cupp*, 394 U.S. 731 (1969); see *supra* note 53 and accompanying text.

¹⁹³ See *supra* notes 95-98 and accompanying text.

¹⁹⁴ The proponent of such a "disfavored contention" should have the burden of proof. MCCORMICK ON EVIDENCE § 337, at 786 (3d ed. E. Cleary 1972).

¹⁹⁵ See *supra* notes 60-62 and accompanying text, discussing *Rawlings v. Kentucky*, 448 U.S. 98 (1980). There was clearly a seizure affecting the possession of Rawlings' "effects," but that action was reasonable, because at the time of the seizure the drugs were in "plain view," and there was probable cause to believe they were contraband. Similarly, although the seizure was also a fruit of police conduct that was a "search" of the house where Rawlings was a guest, and therefore a "search" affecting his fourth amendment interest in both the "privacy of presence" and the "privacy of place," this entry was rendered reasonable by a warrant. *Id.* at 100; see *Payton v. New York*, 445 U.S. 537 (1980). Thus, the only event to which Rawlings

supplied by the Supreme Court.¹⁹⁶ His particular behavior and subsequent statements would be irrelevant. Rather, the police impaired Rawlings' protected interest in possession, because their action revealed his "effects." Moreover, the fruits of this search, the drugs, should have been suppressed. Although Cox's "consent" to empty her purse was certainly authorized, it was not voluntary.¹⁹⁷ Likewise, when Lopez¹⁹⁸ spoke with an undercover operative, who recorded that conversation and shared it with the government, a "search" occurred because the privacy of Lopez's communications was affected. The "search" in *Lopez* was reasonable, however, because the informant had authority to consent to the recording—joint control over those spoken words were sufficient to permit his sharing them with the prosecutors—and did so voluntarily.¹⁹⁹ By sharing his thoughts this way, Lopez may be said to have "assumed the risk" of repetition or recording of his statements.

The police actions involved in both *Smith* and *Miller* were searches too, but in those cases, unreasonable searches. Because the police compiled the telephone numbers that Smith dialed,²⁰⁰ they impaired the

could plausibly look in seeking to suppress the drugs would be the search of the purse itself. For a different analysis, see Alschuler, *supra* note 22, at 18-19.

¹⁹⁶ See *supra* notes 62-63 and accompanying text.

¹⁹⁷ See 448 U.S. at 101.

¹⁹⁸ See *supra* notes 32-35 and accompanying text, discussing *Lopez v. United States*, 373 U.S. 427 (1963).

¹⁹⁹ See *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966). The result under Title III, the federal wiretap regulation statute, is the same. 18 U.S.C. § 2511(2)(c) (1982); see, e.g., *United States v. Kelly*, 708 F.2d 121 (3d Cir. 1983); *United States v. Bonnano*, 487 F.2d 654 (2d Cir. 1973). For a radically different approach, see Alschuler, *supra* note 22, at 33-57; see also Stone, *supra* note 21.

A seizure of communications may, nevertheless, be the fruit of an unlawful search and suppressible as such. In *Lopez*, the agent entered the defendant's apartment by concealing his true identity, but not his immediate purpose, the receipt of bribe money. The initial entry in that case may constitute a search with the defendant's consent. See 2 W. LAFAVE, *supra* note 9, § 8.2(m), at 677-84. Regardless of any deception as to identity, however, the voluntariness of that consent may be vitiated by extreme misrepresentations as to the purpose of the entry—as when the police enter posing as utility meter-readers or on the pretext of responding to a report of a life-threatening emergency, such as a gas leak. See *Baldwin v. United States*, 450 U.S. 1045 (1981) (Marshall, J., dissenting from denial of cert.); *id.* § 8.2(n), at 684-90. Likewise, the search may become unreasonable by exceeding the scope of the consent. See *Gouled v. United States*, 255 U.S. 298, 306 (1921); *supra* notes 121-33 and accompanying text. In either case, the ultimate seizure, although reasonable itself on the third-party consent theory discussed above, would be subject to suppression unless the taint of the prior illegality was so attenuated as to be purged. See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

Moreover, undercover informants should be viewed as violating the first amendment's freedoms of association and thought when they are used to investigate such matters as political activities. See generally F. DONNER, *THE AGE OF SURVEILLANCE* (1980); 1 N. DORSEN, P. BENDER & B. NEUBORNE, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 834-39 (4th law school ed. 1976).

²⁰⁰ See *supra* notes 51-52 and accompanying text, discussing *Smith v. Maryland*, 442 U.S. 735 (1979).

security of his private communications. Similarly, Miller's bank records were private communications, the compilation and examination of which implicated the fourth amendment, although the examination of any single check might not.²⁰¹ The use of a telephone or a checking account cannot be seen as an individual's implied voluntary consent to further disclosure, any more than Stoner's use of a hotel employing a maid implied permission for a police search of his hotel room.²⁰² Nor was the third-party "consent" of the bank or telephone company effective, even if voluntary²⁰³; it was no more authorized than that of the hotel management in *Stoner*. Although there was joint access in *Miller* and *Smith*, as in *Latshaw*,²⁰⁴ absent the element of sharing, authority to consent was impossible.

One who greets the police at the door and voluntarily invites them in to look around without warrant or probable cause has displayed no personal expectation of privacy. When the police accept that invitation, their conduct is not unreasonable; consent has been given. Yet what ensues must, out of respect for language, logic, and constitutional values, be called a search. Consistent application of this simple analysis would help society establish justice, by maintaining that delicate balance²⁰⁵ between ensuring domestic tranquility and securing the blessings of liberty²⁰⁶ that is embedded in the fourth amendment.

²⁰¹ See *supra* note 50 and accompanying text, discussing *United States v. Miller*, 425 U.S. 435 (1976); *id.* at 447-53 (Brennan, J., dissenting).

²⁰² See *supra* notes 43-48 and accompanying text, discussing *Stoner v. California*, 376 U.S. 483 (1964).

²⁰³ See *supra* note 64 and accompanying text.

²⁰⁴ *Commonwealth v. Latshaw*, 481 Pa. 298, 392 A.2d 1301 (1978), *cert. denied*, 441 U.S. 931 (1979), discussed at *supra* notes 149-69 and accompanying text.

²⁰⁵ See F. FRIENDLY & M. ELLIOTT, *THE CONSTITUTION: THAT DELICATE BALANCE* (1984); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 182 (1962) ("the delicate balance between freedom and order").

²⁰⁶ See U.S. CONST. preamble.