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## COMMENTS

### THIRD-PARTY CONSENT SEARCHES, THE SUPREME COURT, AND THE FOURTH AMENDMENT

#### I. INTRODUCTION

The fourth amendment prohibits unreasonable searches and seizures.<sup>1</sup> This prohibition generally requires that any search be based upon a warrant issued pursuant to probable cause.<sup>2</sup> A search conducted without a warrant usually is regarded as per se unreasonable.<sup>3</sup> There are, however, exceptions to this warrant requirement.<sup>4</sup> One "well-settled" exception to the warrant requirement of the

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<sup>1</sup> The fourth amendment provides:

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.

<sup>2</sup> See *Warden v. Hayden*, 387 U.S. 294, 301-02 (1967); *Mapp v. Ohio*, 367 U.S. 643, 643-60 (1961); *Weeks v. United States*, 232 U.S. 383, 393-94 (1914). See also 1 W. LAFAVE, *SEARCH AND SEIZURE* § 3.1, at 438-39 (1978); Comment, *Constitutional Law—Search and Seizure—Third Party Consent to Warrantless Searches and Seizures—United States v. Diggs*, 30 RUTGERS L. REV. 1056 (1977).

Probable cause exists where the police officers have knowledge of or reasonably trustworthy information about facts and circumstances that are sufficient in themselves to cause a reasonable person to believe that an offense has been or is being committed. See E. CORWIN, *THE CONSTITUTION* 342-43 (1978). See also *Draper v. United States*, 358 U.S. 307, 313 (1959); *Carroll v. United States*, 267 U.S. 132, 162 (1924).

<sup>3</sup> See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The rule that most warrantless searches are per se unreasonable was derived by reading the reasonableness requirement found in the first clause of the fourth amendment together with the warrant requirement found in the second clause of the amendment. See Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 798 (1966); Note, *Constitutional Law—Search and Seizure—Third Party Consent*, 39 U. CIN. L. REV. 807 (1970).

<sup>4</sup> Exceptions to the warrant requirement include: (1) searches of a vehicle, upon probable cause, for the fruits and instrumentalities of a crime, *Chambers v. Maroney*, 399 U.S. 42 (1970); (2) searches incident to a valid arrest, *Chimel v. California*, 395 U.S. 752 (1969); (3) "stop and frisk" searches, *Terry v. Ohio*, 392 U.S. 1 (1968); and (4) certain emergency searches, e.g., *Warden v. Hayden*, 387 U.S. 294 (1976) ("hot pursuit" searches).

fourth amendment "is a search that is conducted pursuant to consent."<sup>5</sup>

The most obvious application of the so-called consent search exception occurs when the party at whom the search is directed and whose property is to be searched is the party who consents to the search.<sup>6</sup> The consent search exception to the requirements of the fourth amendment also may be used to validate a search in which the party who gives the consent is not the party at whom the search is directed.<sup>7</sup> Searches in such situations have been upheld as valid consent searches provided the consenting party had some close relationship with the property to be searched or the person at whom the search was directed.<sup>8</sup> Such searches are called third-party consent searches.<sup>9</sup>

In 1974, the United States Supreme Court for the first time expressly considered the question of whether the consent exception to fourth amendment warrant requirements could be extended to third-party consent searches.<sup>10</sup> In *Matlock v. United States*,<sup>11</sup> the Court upheld the validity of a search based upon the consent of a third party.

Because of the uncomplicated fact situation involved in *Matlock*, the Supreme Court did not have to address directly some of the more complex issues that may arise once a search pursuant to third-

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<sup>5</sup> *Schneckloth*, 412 U.S. at 219 (citing *Zap v. United States*, 328 U.S. 624, 630 (1946); *Davis v. United States*, 328 U.S. 582, 593-94 (1946)).

<sup>6</sup> See, e.g., E. CORWIN, *supra* note 2, at 346; Note, *supra* note 3, at 808; Comment, *supra* note 3, at 800.

<sup>7</sup> See, e.g., E. CORWIN, *supra* note 2, at 347; Note, *supra* note 3, at 808; Comment, *supra* note 3, at 801.

<sup>8</sup> See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968); *United States v. Stone*, 471 F.2d 170 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *White v. United States*, 444 F.2d 724 (10th Cir. 1971); *United States v. Wixom*, 441 F.2d 623 (7th Cir. 1971); *United States v. Alloway*, 397 F.2d 105 (6th Cir. 1968); *Roberts v. United States*, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 381 U.S. 945 (1965); *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962); *Bellam v. State*, 233 Md. 368, 196 A.2d 891 (1964). See also Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 254-55 (1974); Comment, *supra* note 3, at 801; Note, *supra* note 3, at 808. See generally Comment, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12, 21-24, 25-30; Annot., 31 A.L.R.2d 1078 (1953).

<sup>9</sup> See, e.g., Matthews, *Third Party Consent Searches: Some Necessary Safeguards*, 10 VAL. U.L. REV. 29 (1976); Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U.L. REV. 1087 (1973).

<sup>10</sup> Several third-party consent cases, however, previously had reached the Supreme Court. The first such case was *Amos v. United States*, 255 U.S. 313 (1921). In *Amos*, the Supreme Court expressly reserved the question of whether a wife could consent to a search of the family home when that search was directed at her husband. Later cases seem to have implicitly recognized the validity of third-party consent searches. See Wefing & Miles, *supra* note 8, at 255-60; *infra* note 104.

<sup>11</sup> 415 U.S. 164 (1974).

party consent is recognized as a valid exception to fourth amendment requirements.<sup>12</sup> This Comment will address one particularly troublesome issue that can arise under the third-party consent doctrine: the situation in which one or more of the co-occupants of a property who are present when permission to search is sought agree to the search, while one or more of the other present co-occupants register their objections to the search. This Comment will first examine the issue in light of the Supreme Court's opinion in *Matlock*, and will show that, in light of that opinion, a search made pursuant to the consent of one present co-occupant, but over the objection of another, must be held to be valid. This result will then be used to illustrate the Supreme Court's failure to develop a test for applying the third-party consent exception that is completely satisfactory under fourth amendment standards, as well as the Court's failure to develop a theoretical rationale that logically embraces both the general consent and the third-party consent exceptions to the fourth amendment. Finally, this Comment will argue that because of these two failures, the Supreme Court has not shown the third-party consent search exception, and possibly even the general consent search exception, to be consistent with the mandates of the fourth amendment, and that serious reevaluation of these doctrines by the Supreme Court is thus in order.

## II. THE SUPREME COURT'S *MATLOCK* DECISION

The Supreme Court first expressly recognized the validity of third-party consent searches in *Matlock v. United States*.<sup>13</sup> The rela-

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<sup>12</sup> For example, in *Matlock*, the defendant was not actually present when the police requested the third party's consent to search. *Id.* at 166. The Supreme Court therefore did not have to address the question of whether a third-party consent would be valid if the person at whom the search was directed was present but ignored by police when they requested permission to search (i.e., police knew the potential defendant was there but chose instead to request permission to search from a third party whom they felt would be more likely to consent). Nor did the Court have to discuss what would be the effect of a defendant who was present but silent when the third party granted permission to search (i.e., the police did not realize that the other person present when they requested permission to search was actually the potential defendant, and the potential defendant did not identify himself or herself and made no comment regarding the search). Both of these issues may have been resolved *indirectly* by the Court because the decision in *Matlock* indicates that the *availability* of the defendant to give his or her consent is immaterial. See *infra* text accompanying notes 35-39, 52-54. In addition, because *Matlock* made no objection to the search prior to its occurrence, 415 U.S. at 166, the Supreme Court did not have to consider the question of whether the objection of the party at whom the search was directed, whether or not he or she was present at the time of the search, would suffice to invalidate a third-party consent search.

<sup>13</sup> 415 U.S. 164 (1974).

tively uncomplicated circumstances of that case,<sup>14</sup> however, did not require the Court to examine the implications of more complex third-party consent situations. Matlock was arrested prior to the time that the search occurred, was not asked for his permission to search, and was not with the third party when police sought consent to search.<sup>15</sup> Thus, the Supreme Court did not have to address even so simple a situation as one in which the person at whom the search was directed had a realistic opportunity to object to the search but did not, much less the more complex situation in which such an objection actually occurred. As a result, the Supreme Court was able to adopt a third-party consent exception to the requirements of the fourth amendment without carefully examining the parameters of such an exception, and without clearly articulating the constitutional bases for the exception. As one pair of commentators has observed: "[Although] *Matlock* afforded the Court another opportunity to examine the third party consent issue and to explore the constitutional basis for its previous position of [impliedly] permitting such searches. . . . [t]he Court refrained . . . from a close scrutiny of the constitutional justification for this type of search . . . ."<sup>16</sup>

In fact, the Court's discussion of the third-party consent issue in *Matlock* was very brief. The Court first noted that a third-party consent doctrine had been accepted by a number of lower courts.<sup>17</sup> The Court then pointed out that the question of whether "a wife's permission to search the residence in which she lived with her husband could 'waive his constitutional rights' "<sup>18</sup> had been specifically reserved in *Amos v. United States*.<sup>19</sup> The Court went on to say, however, that "more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with

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<sup>14</sup> Matlock was arrested by police in front of the home where he lived with his girlfriend, Mrs. Gayle Graff, her parents, and other members of her family. Mrs. Graff's parents rented the home. After the arrest, and without asking Matlock which room in the house he occupied or if he would consent to a search, the police went to the door of the house. Mrs. Graff allowed them to enter the house and told them that she and Matlock shared the east bedroom on the second floor. Mrs. Graff also gave the police her consent to search that bedroom. The search revealed incriminating evidence that was admitted at Matlock's trial. *Id.* at 166.

The technical issue in the case was whether certain hearsay evidence was admissible and legally sufficient to "satisfactorily prove Mrs. Graff's actual authority to consent to the search." *Id.* at 168.

<sup>15</sup> *Id.* at 166.

<sup>16</sup> Wefing & Miles, *supra* note 8, at 261.

<sup>17</sup> 415 U.S. at 170.

<sup>18</sup> *Id.*

<sup>19</sup> 255 U.S. 313 (1921).

whom that authority is shared.”<sup>20</sup> Then the Court stated that one of its prior cases<sup>21</sup> had held that “a consent search is fundamentally different in nature from the waiver of a trial right.”<sup>22</sup> With this statement, the Court implied that the consent search exception need not be imbued with the same protections and prohibitions as are applicable before a defendant may waive a trial right. This position could serve to increase the likelihood of recognition of valid third-party consents.<sup>23</sup>

The Court concluded its discussion of the third-party consent issue with the sweeping pronouncement that the cases cited by the Court<sup>24</sup> established that a search may be validated by the consent of a third party who has “common authority over” or a “sufficient relationship to” the object of the search.<sup>25</sup> In adopting “common authority” as the criterion for judging the validity of third-party consent searches, the Court ratified the property-oriented approach to third-party consent searches that had been adopted by many lower federal<sup>26</sup> and state<sup>27</sup> courts, and which is frequently called the

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<sup>20</sup> 415 U.S. at 170. The two cases cited by the Court, however, do not fully support that statement. In one of the two cases cited by the Court, *Frazier v. Cupp*, 394 U.S. 731 (1969), the party who consented to the search was the party at whom the search was directed. In the other case, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court concluded that there was no search that needed to be evaluated under fourth amendment standards. An examination of the facts of these two cases, see *infra* note 104, reveals that they provide a very weak foundation for the Court’s assertion of a long-accepted tradition of upholding third-party consent searches. By definition, a third-party consent search involves a search that must be evaluated by fourth amendment standards (unlike the search in *Coolidge*), and typically does not involve a situation (like the one in *Frazier*) where the person giving his or her consent is the person at whom the search is directed as well as the person with authority over the property being searched.

<sup>21</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>22</sup> 415 U.S. at 171 (citing *id.*).

<sup>23</sup> See *infra* text accompanying notes 98-105.

<sup>24</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Frazier v. Cupp*, 394 U.S. 731 (1969). The problems inherent in relying on *Frazier* and *Coolidge* as a basis for a third-party consent exception to the fourth amendment are discussed *supra* note 20. The Supreme Court did not explain its purpose in citing the *Schneckloth* holding that a consent search differs from a waiver of a trial right. The reason why rejection of a waiver approach to the general consent exception might serve to make third-party consents more constitutionally acceptable is discussed *infra* notes 98-105.

<sup>25</sup> The Court said:

These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

415 U.S. at 171.

<sup>26</sup> See, e.g., *United States v. Stone*, 471 F.2d 170 (7th Cir. 1972), cert. denied, 411 U.S. 931 (1973); *United States v. Ellis*, 461 F.2d 962 (2d Cir.), cert. denied, 409 U.S. 866 (1972); *United States v. Wilson*, 447 F.2d 1 (9th Cir. 1971); *United States v. Wixom*, 441

"possession and control" or "access and control" test.<sup>28</sup> The Court provided a brief explanation of the meaning of "common authority" when it stated that common authority was not derived from property concepts, but rather from the fact of joint access and control that makes it "reasonable to recognize" that all parties having such control have the right to consent to the search and have assumed the risk that one of them might do so.<sup>29</sup>

The Court's discussion of third-party consent made no mention of the particular facts of the *Matlock* case.<sup>30</sup> Thus, there is no reason to assume that the third-party consent exception, or the "possession and control" test for determining the validity of third-party consent searches, would be limited to the particular situation involved in *Matlock*. For example, although *Matlock* was not asked for his consent and was not present when the police officers sought consent from the third party,<sup>31</sup> the Court's final formulation of the third-party consent exception does not require that the person at whom the search is directed be absent at the time of the search.<sup>32</sup> The

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F.2d 623 (7th Cir. 1971); *United States v. Cataldo*, 433 F.2d 38 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971); *United States ex rel. Cabey v. Mazurkiewicz*, 431 F.2d 839 (3d Cir. 1970); *United States v. Thompson*, 421 F.2d 373 (5th Cir. 1970), *vacated on other grounds*, 400 U.S. 17 (1970); *Gurleski v. United States*, 405 F.2d 253 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969); *Wright v. United States*, 389 F.2d 996 (8th Cir. 1968); *United States v. Airdo*, 380 F.2d 103 (7th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Nelson v. California*, 346 F.2d 73 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965); *Burge v. United States*, 342 F.2d 408 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965); *Roberts v. United States*, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 381 U.S. 945 (1965). *See generally* Annot., 31 A.L.R.2d 1078, 1086-88.

<sup>27</sup> *See, e.g.*, *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955); *People v. Howard*, 166 Cal. App. 2d 638, 334 P.2d 105 (1958); *People v. Haskell*, 41 Ill. 2d 25, 241 N.E.2d 430 (1968); *People v. Walker*, 34 Ill. 2d 23, 213 N.E.2d 552 (1966); *Nestor v. State*, 243 Md. 438, 221 A.2d 364 (1966); *Commonwealth ex rel. Cabey v. Rundle*, 432 Pa. 466, 248 A.2d 197 (1968); *State v. Cairo*, 74 R.I. 377, 60 A.2d 841 (1948); *Burge v. State*, 443 S.W.2d 720 (Tex. Crim. App.), *cert. denied*, 396 U.S. 934 (1969). *See generally* Annot., 31 A.L.R.2d 1078, 1086-88.

<sup>28</sup> *See, e.g.*, *Matthews*, *supra* note 9, at 30; *Wefing & Miles*, *supra* note 8, at 212, 261; *Comment*, *supra* note 9, at 1105; *Comment*, *supra* note 2, at 1061; *Comment*, *supra* note 3, at 804.

<sup>29</sup> The Court stated:

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

415 U.S. at 171 n.7 (citations omitted).

<sup>30</sup> *Id.* at 169-72.

<sup>31</sup> *Id.* at 166.

<sup>32</sup> Early in its discussion, the Supreme Court did say that previous cases indicate that

Court, however, had no cause to address the question of whether the third-party consent exception that it created is broad enough to cover the situation in which the party at whom the search is directed is present and/or objects to the search.

The Court's decision in *Matlock* thus failed to articulate an analytical framework for the third-party consent exception. Instead, the Court merely relied upon a few prior Supreme Court decisions that were accepted uncritically as providing a foundation for the third-party consent search exception. The Court also failed to delineate the intended scope of the third-party consent search exception. An analytical framework at least would have allowed lower courts to develop the parameters of the third-party consent search exception on their own. They would be able to examine the validity of searches in difficult situations, such as that in which two co-occupants are present and one consents to the search while the other objects, in light of the purposes and policies of the third-party consent exception. Instead of providing such a framework, the Court merely adopted the "possession and control" test that had been used by lower federal<sup>33</sup> and state<sup>34</sup> courts to validate third-party consent searches. As will be demonstrated, the Supreme Court's failure to develop an analytical framework that could explain or define the parameters of the third-party consent exception has resulted in disagreement among lower courts over the results that are mandated in particular situations by the Supreme Court's "possession and control" test. This disagreement is most evident in the "disagreeing co-occupant" situation that is the focus of this Comment.

### III. SOME STATE AND LOWER FEDERAL COURT DECISIONS ON THIRD-PARTY CONSENT SEARCHES OF JOINTLY OCCUPIED PREMISES WHEN ONE OF THE CO-OCCUPANTS WHO IS PRESENT OBJECTS TO THE SEARCH

Subsequent to the *Matlock* decision, a number of courts have held that a search conducted pursuant to the consent of one present co-occupant and over the objection of another present co-occupant

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the consent of one with common authority over the property being searched is valid against an "absent, nonconsenting person." *Id.* at 170 (emphasis added). See *supra* text accompanying note 20. The Court's final formulation, however, makes no mention of the non-consenting party's whereabouts. See *supra* note 25. The mention of an absent party earlier in the discussion, therefore, should not be regarded as limiting the third-party consent search exception.

<sup>33</sup> See *supra* note 26.

<sup>34</sup> See *supra* note 27.



is constitutionally permissible.<sup>35</sup> These courts take the position that this situation falls squarely within the *Matlock* ruling, although they do not necessarily agree on the reasons for this conclusion. Some courts, noting that the defendant in *Matlock* was present in the front yard of the residence that was searched immediately prior to the time when police solicited the third party's consent to search, argue that the Supreme Court could not have considered it important that the party at whom the search was directed was "absent" at the time of a third-party consent search.<sup>36</sup> These courts state that the defendant's "absence" was not a deciding factor in *Matlock*; police could have sought his permission if they had wanted to. These courts therefore conclude that the presence of a defendant should not alter the availability of third-party consent searches.

Another rationale used by courts that find searches conducted over the objection of one co-occupant to be valid is that, under *Matlock*, joint occupants lose their expectation of privacy in their residence. That is, upon moving in with another person or persons, joint occupants assume the risk that such other person or persons will allow police to search the residence. Some courts reason that if one assumes the risk by becoming a joint occupant, the assumption of risk cannot be altered by objecting to a search.<sup>37</sup>

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<sup>35</sup> See, e.g., *United States v. Sumlin*, 567 F.2d 684 (6th Cir. 1977); *United States v. Canada*, 527 F.2d 1374 (9th Cir. 1975); *People v. Haskett*, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982); *People v. Cosme*, 48 N.Y.2d 286, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979).

<sup>36</sup> See, e.g., *Sumlin*, 567 F.2d at 687; *Canada*, 527 F.2d at 1379.

In *Sumlin*, the defendant (Sumlin) was arrested in the apartment that he apparently shared with one Edith Alexander. After the arrest, agents asked Sumlin for permission to search the apartment, and he refused. Only then, according to Sumlin, did the police ask Ms. Alexander for her permission to search. She gave them permission, and the search revealed evidence that was later admitted at Sumlin's trial. *Sumlin*, 567 F.2d at 686.

In responding to Sumlin's contention that his initial refusal to consent to the search of his apartment precluded a search based on Ms. Alexander's consent, the court found that *Matlock* had settled that a third person with common authority over a defendant's premises or effects can consent to a search of those premises or effects. *Id.* at 687. The court went on to rebut the argument that such a consent is valid only in the absence of the party at whom the search was directed by noting that "*Matlock* did not depend on the defendant's absence for the defendant there had just been arrested in the front yard of the residence when the third person's consent to search was procured." *Id.*

*Canada* similarly upheld a third-party consent search conducted in the presence of the defendant. Although the defendant in *Canada* made no obvious objection to the search, the court's analysis of the issue, which is almost identical to that found in *Sumlin*, indicates that any objection on the part of the defendant would have made no difference to the decision regarding the validity of the search. *Canada*, 527 F.2d at 1379.

<sup>37</sup> See, e.g., *Sumlin*, 567 F.2d at 688; *Canada*, 527 F.2d at 1379; *Haskett*, 30 Cal. 3d at 856, 640 P.2d at 786, 180 Cal. Rptr. at 650.

For example, the court in *Sumlin* said that it could not find any constitutional signifi-

Finally, some courts stress that the consenting co-occupant, as a resident of the premises, has an independent right to permit police

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cance in the fact that Sumlin initially had denied the officers his permission to search the apartment. *Sumlin*, 567 F.2d at 687-88. The Court characterized the rationale behind the *Matlock* rule as being "that a joint occupant assumes the risk of his co-occupant exposing their common private areas to such a search." *Id.* at 688. Under such conditions, the court commented, there is no reasonable expectation of privacy on the part of the defendant. *Id.* Sumlin's initial refusal to consent could not in any way lessen the risk, which he had assumed upon agreeing to share an apartment, that his co-occupant would consent to a search. So the "slight factual dissimilarity" from *Matlock* was held insufficient to require invalidation of the search. *Id.* The court observed in a footnote that "Alexander was the only party to sign the lease (although the lease was made out in both her name and in Sumlin's assumed name), indicating [that] she had primary authority over the apartment." *Id.* at n.12. Although this fact does not facially affect the court's analysis, which is made in terms of "common authority," it may have been a factor in the opinion.

*Canada* likewise stressed that by granting a third party common authority over the property that was later searched, the defendant assumed the risk that the third party would consent to just such a search. *Canada*, 527 F.2d at 1379.

In *Haskett*, the defendant was arrested and detained on the front porch of his house. His wife then came to the door and asked police what they wanted. The police responded that they were investigating a crime and asked if they could come into the house and talk to her about it. She agreed, and once they were inside the house, she consented to a search. A few minutes later, although the search had not as yet revealed any evidence, one of the police officers left the house to handcuff the defendant and place him in the police car. At this time, the officer apparently asked for the defendant's permission to conduct a search of the house, and permission was denied. The officer then returned to the house and continued the search (with the wife's consent). The search eventually turned up the incriminating evidence that was used in defendant's trial. 30 Cal. 3d at 856, 640 P.2d at 785, 180 Cal. Rptr. at 650.

The defendant claimed that this was a case of first impression that "require[d] a special rule vitiating the consent of one co-occupant when the other is present and protests the entry or search." *Id.* at 856, 640 P.2d at 785, 180 Cal. Rptr. at 649. The court, however, could perceive no relevant distinction between the facts in this case and those in *Matlock*. In fact, the court concluded that the Supreme Court in *Matlock* had clearly "recognized that law enforcement authorities need not seek the consent of all co-occupants before searching their commonly held property . . ." *Id.* at 856, 640 P.2d at 786, 180 Cal. Rptr. at 650. The Supreme Court did not explicitly state this rule, of course, but the position is implicit in the holding that *Matlock's* failure to consent was irrelevant. Also, it can be argued that the rule is reasonably evident from the Supreme Court's statement that "the others [may] have assumed the risk that *one* of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7 (emphasis added). It is this language that the California Supreme Court cites for its proposition. *Haskett*, 30 Cal. 3d at 856, 640 P.2d at 786, 180 Cal. Rptr. at 650.

The court in *Haskett*, however, did state that "the assumption of risk inherent in co-occupancy has its limits. An entry or search, even though authorized by a co-occupant, may be so intrusive that it belies the conclusion that the parties assumed or even contemplated the risk of its occurrence by deciding to jointly inhabit the subject residence." *Id.* at 857, 640 P.2d at 786, 180 Cal. Rptr. at 650. But because the police in this case "made their identity and purpose known to defendant, in his presence sought and obtained his wife's consent to enter, and validly arrested and removed him from the house before he expressly refused consent to search," the wife's consent was held fully adequate to uphold the search. *Id.* at 857, 640 P.2d at 786, 180 Cal. Rptr. at 650.

to search the premises.<sup>38</sup> These courts find this position to be entirely consistent with the Supreme Court's discussion of assumption of risk in *Matlock*.<sup>39</sup>

Acceptance of the validity of searches made over the objection of one co-occupant is, however, by no means universal. Several commentators<sup>40</sup> and a number of lower courts<sup>41</sup> assumed, prior to

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<sup>38</sup> See *Cosme*, 48 N.Y.2d at 292-93, 397 N.E.2d at 1322, 422 N.Y.S.2d at 654.

In *Cosme*, the Court of Appeals of New York upheld the validity of a search based on the consent of one co-occupant when another co-occupant was present and objected to the search. In *Cosme*, the defendant, Cosme, and his fiancée, Meryle Hennessey, with whom he shared an apartment "on at least a part-time basis," had an argument. She called the police and told them that the defendant had a gun and cocaine in the shared apartment. The police agreed to send over a patrol car, and Hennessey met the police in the outer vestibule of the apartment. Hennessey then told the officers that the items were stored in a closet that she shared with the defendant and drew a diagram to show the officers exactly where in the apartment the closet was located. She also gave the officers the key to the apartment and told them how to use it without setting off the burglar alarm. The police then went upstairs, unlocked the apartment door, and let themselves in. They saw the defendant and another man standing in the kitchen, and ordered them to "freeze," then handcuffed them and ordered them to lie face down on the floor. 48 N.Y.2d at 289, 397 N.E.2d at 1320-21, 422 N.Y.S.2d at 653.

The defendant claimed that his protestations upon being handcuffed by the officers constituted a refusal to consent to a search of the premises. The court found it unnecessary to reach that issue in light of its conclusion that "any refusal on the part of defendant to consent to a search would have been ineffective in the face of Hennessey's contrary expression of consent." 48 N.Y.2d at 290, 397 N.E.2d at 1321, 422 N.Y.S.2d at 654.

The court reached its conclusion by considering the "theoretical underpinnings of the third party consent rule." *Id.* at 291, 397 N.E.2d at 1321-22, 422 N.Y.S.2d at 654. The court stated that the third-party consent rule in New York was not based on agency principles, nor on the theory that "one co-occupant may commit another to a binding waiver of an important constitutional right . . ." Instead, the court said that the rule was based on the theory that one co-occupant has authority in his or her own right to permit a search of the premises that he or she occupies and that a party who shares control over the premises with another has no reasonable expectation of privacy in those premises. The court then noted that this position is the one expressed by the United States Supreme Court in *Matlock*. *Cosme*, 48 N.Y.2d at 290, 397 N.E.2d at 1322, 422 N.Y.S.2d at 655.

The court reasoned that because third-party consent searches do not depend on one party's authority to waive another's constitutional rights, and because there is no constitutionally protected reasonable expectation of privacy in a shared premises, a co-occupant has no grounds for objection if and when another co-occupant voluntarily consents to a police search of the jointly occupied premises. *Id.* at 292, 397 N.E.2d at 1322, 422 N.Y.S.2d at 655.

<sup>39</sup> See *id.* at 291, 397 N.E.2d at 1322, 422 N.Y.S.2d at 655.

<sup>40</sup> See, e.g., W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 9.5(f) (2d ed. 1980); N. SOBEL, CURRENT PROBLEMS IN THE LAW OF SEARCHES AND SEIZURES 130 (1964); Matthews, *supra* note 9, at 36; Comment, *supra* note 9, at 1090; Note, *supra* note 3, at 812; Comment, *supra* note 8, at 13, 31; MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 240.3 comment (Proposed Draft No. 1, 1972) ("It seems clear that a consent once given by X may be withdrawn or limited by Y, who has equal or superior control over the premises.").

<sup>41</sup> See, e.g., *United States v. Robinson*, 479 F.2d 300 (7th Cir. 1973); *Lucero v. Dono-*

*Matlock*, that the "possession and control" test, which was adopted by the Court, could not validate such searches.<sup>42</sup> The commentators relied almost exclusively on the notion that third-party consent searches in general, and especially those made over the objection of the person at whom the search is directed, cannot be reconciled with the universal recognition of the personal nature of the rights protected by the fourth amendment.<sup>43</sup> Other rationales utilized by courts and commentators who believe that the consent of one co-occupant should not be allowed to override the objection of another present co-occupant include: (1) the idea that the right of a third party to consent to search springs from his or her possessory interest in the property, and thus his or her consent cannot be regarded as "stronger" than the objection of a party whose right to object to the search springs from the same possessory interest,<sup>44</sup> and (2) the idea that there should be a policy of promoting "peace and tranquility" between joint occupants.<sup>45</sup>

At least one court since the *Matlock* decision has adopted the position that third-party consent searches made over the objection of one co-occupant are not valid. In *Silva v. State*,<sup>46</sup> the Florida

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van, 354 F.2d 16 (9th Cir. 1965); *People v. Reynolds*, 55 Cal. App. 3d 357, 369, 127 Cal. Rptr. 561, 568 (1976); *Lawton v. State*, 320 So. 2d 463 (Fla. App. 1975); *Dorsey v. State*, 2 Md. App. 40, 232 A.2d 900 (1967).

<sup>42</sup> One case that is frequently cited by courts and commentators in support of the proposition that a valid search may not be made over the objection of one with common authority in the property is *Tompkins v. Superior Court*, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (1963). In that case, the court said:

Joint occupancy of property, particularly residential property, obviously demands reasonable restrictions on the right of each joint occupant either by himself or through another to exercise full control over the property at all times regardless of the wishes of another joint occupant present on the premises. A joint occupant's right of privacy in his home is not completely at the mercy of another with whom he shares legal possession.

*Id.* at 69, 378 P.2d at 116, 27 Cal. Rptr. at 892. Despite this passage, which supports the position for which the case is so frequently cited, the actual holding of the case was in fact limited to the situation where a co-occupant who is away from the premises consents to a search that is objected to by a co-occupant who is present upon the premises, and the officer conducting the search does not even "disclose his purpose to the occupant who is present or . . . inform him that he has the consent of the absent [co]-occupant to enter." *Id.*

Surprisingly enough, the California Supreme Court, which decided *Tompkins*, is also one of the courts that has specifically held since the *Matlock* decision that a search conducted pursuant to the consent of one co-occupant but over the objection of another, when both are present at the time of the search, may be upheld. See *People v. Haskett*, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982); discussion *supra* note 37.

<sup>43</sup> Note, *supra* note 3, at 812. See also N. SOBEL, *supra* note 40, at 130; Wefing & Miles, *supra* note 8, at 279; Comment, *supra* note 9, at 1090.

<sup>44</sup> See, e.g., *Robinson*, 479 F.2d at 302; *Dorsey*, 2 Md. App. at 44, 232 A.2d 900 at 902.

<sup>45</sup> See, e.g., *Lawton*, 320 So. 2d at 465.

<sup>46</sup> 344 So. 2d 559 (Fla. 1977). The facts involved in *Silva* are almost exactly the same

Supreme Court stated that all third-party consent cases that have come before the United States Supreme Court "involve[d] fact situations in which the evidence was used against a party who was absent when consent to search was given."<sup>47</sup> The court said that, based on previous United States Supreme Court decisions, the rights of a person whose property is to be searched are "personal to him and derive from the United States Constitution."<sup>48</sup> The Florida court then reasoned that such rights should not be ignored merely "because of a leasehold or other property interest shared with another."<sup>49</sup> The court took the position that there is a valid distinction between a situation in which the defendant is present and objecting to the search and one in which he or she is unavailable to police.<sup>50</sup> The court also stated that a joint occupant's objection to a search must carry particular weight "where the police are aware that the person objecting is the one whose constitutional rights are at stake."<sup>51</sup>

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as those in *Cosme*, where the New York court upheld the search. See *supra* note 38. In *Silva*, one Mrs. Brandon and the defendant leased and lived in an apartment together. One morning, defendant hit Mrs. Brandon in the mouth. She left the apartment, called the police, and told them that the defendant was a convicted felon and that he kept guns in a closet in the apartment. Mrs. Brandon was waiting outside for the police when they arrived. When she attempted to let the police into the apartment, Mrs. Brandon discovered that the door was locked. She then put her hand through the jalousies and unlocked the door from the inside. After she and the police officers went into the apartment, she told the police that the guns were in the hall closet. The defendant at this point forbade the officers to search the closet. *Id.* at 560.

The only possibly significant difference between the facts of this case and those involved in *Cosme* is that the closet that was searched here contained only the defendant's belongings. The closet thus was not shared by the defendant and Mrs. Brandon in the sense that both had things stored in it. *Id.* Both Mrs. Brandon and her son, however, could and did occasionally go into the closet. *Id.* The Florida court's analysis of the validity of consent by one co-occupant when the other co-occupant objects did not, however, turn on the degree of control that Mrs. Brandon exerted over the closet. See *id.* at 562.

<sup>47</sup> *Id.* The Florida court cites *United States v. Matlock*, 415 U.S. 164 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); and *Frazier v. Cupp*, 394 U.S. 731 (1969), for this proposition. There is some problem with relying on these three cases for this proposition. In *Matlock*, the "absent" defendant was standing just outside his house when the search occurred. 415 U.S. at 166. See *supra* note 14. In *Coolidge*, the Court did not treat what had happened as a search for purposes of review. 403 U.S. at 489-90. See *supra* note 20. *Frazier* was not a typical third-party consent search case because the consenting party was the person at whom the search was directed, and he had possession of the property that was to be searched. 394 U.S. at 740. See *supra* note 20.

<sup>48</sup> 344 So. 2d at 562-63 (citing *Katz v. United States*, 389 U.S. 347 (1967)).

<sup>49</sup> *Id.* at 562.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 563 (footnote omitted).

IV. THE *MATLOCK* TEST AND THIRD-PARTY CONSENT SEARCHES OF JOINTLY OCCUPIED PREMISES WHEN ONE OF THE CO-OCCUPANTS WHO IS PRESENT OBJECTS TO THE SEARCH

The courts that have held that *Matlock* requires validation of searches consented to by one co-occupant but objected to by another are correct. Intuitively unappealing as it may be to think that one's objection to a police search of one's own home can be overridden by a consent given by another occupant of that home, the "possession and control" test articulated in *Matlock* does seem to mandate just such a result.

First, as was noted by the Sixth Circuit Court of Appeals in *United States v. Sumlin*,<sup>52</sup> the facts of *Matlock* do not support the conclusion that the outcome of that case turned upon the absence of the defendant when the third-party consent was given. *Matlock* was present in the front yard of his home and had contact with the police officers just moments before they asked another co-occupant of the house for her permission to search.<sup>53</sup> Thus, *Matlock* was not "absent" in any meaningful sense of the word. He was readily available to give or withhold his consent. Yet, both the officers and the Supreme Court seemed to regard his presence, and his consent or lack thereof, as irrelevant to the validity of the search.

Second, the Court's final conclusion about third-party consent made no mention of the location of the defendant at the time of the search. Rather, the Court merely stated that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party . . . ."<sup>54</sup>

Of course, that the Supreme Court regarded the defendant's presence at the place being searched as constitutionally irrelevant does not necessarily mean that the Court would look upon a defendant's presence at *and* objection to the search with a similar disinterest. The test for determining the validity of a third-party consent search as articulated in *Matlock*, however, provides no basis for the idea that the defendant's objection would invalidate the search.

Under the Court's test, the validity of a search based upon the consent of a third party is premised upon his or her "common authority over or other sufficient relationship to the premises or effects

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<sup>52</sup> 567 F.2d 684, 687 (6th Cir. 1977).

<sup>53</sup> 415 U.S. at 166.

<sup>54</sup> *Id.* at 171.

sought to be inspected.”<sup>55</sup> “Common authority,” in turn, is based on “mutual use of the property by persons having joint access or control for most purposes.”<sup>56</sup> Thus, the validity of the third party’s consent is based on his or her relationship to the *property* being searched. This relationship necessarily must have developed before the consent to search is sought. The defendant’s objection to the search at the time consent to search is sought can in no way alter the prior relationship on which the validity of the third party’s consent is based. If the defendant’s objection cannot alter the facts that make the consent search valid, it obviously cannot render the consent search itself invalid.

Furthermore, the Court stated that “common authority” may serve as the basis for a valid third-party consent because such authority makes it “reasonable to recognize that . . . [the other occupants] have assumed the risk that one of their number might permit the common area to be searched.”<sup>57</sup> Presumably, this means that the co-occupants assumed the risk when they decided to live in a jointly occupied residence. As the Sixth Circuit Court of Appeals observed in *Sumlin*,<sup>58</sup> a defendant’s objection at the time of the search cannot rebut the presumption that he knew what he was doing and “assumed the risk” when he decided to live in jointly occupied premises. If the assumption of risk is not nullified by the defendant’s objection to the search, then the basis for the validity of the third-party consent is likewise not eliminated, and the search must be held valid.<sup>59</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at n.7. The Supreme Court also said that the ability to consent to a search could be based on “some other sufficient relationship to the premises or effects . . . .” *Id.* at 171. The Court did not explain what would constitute a “sufficient relationship,” but it seems clear from the ambiguity of the phrase that this test was intended to be less generally applicable than the “common authority” standard. That is, “common authority” was intended to be the standard by which *most* third-party consent searches are judged. Perhaps if the “common authority” standard could not be met in a particular case, but the third party still had a substantial interest in the property that was searched, the search would still be validated under the “sufficient relationship” test. Two commentators had this to say about the “sufficient relationship” standard: “It is questionable whether this concept adds anything to the possession and control doctrine or whether it further serves to confuse an already amorphous concept.” Wefing & Miles, *supra* note 8, at 213 n.12.

<sup>57</sup> 415 U.S. at 171 n.7.

<sup>58</sup> 567 F.2d at 684.

<sup>59</sup> Presumably, a finding of assumption of risk could be avoided if the co-occupants had entered into a contract when they first moved in together that said that neither party would ever agree to permit a common area to be searched. If assumption of risk forms the basis for allowing common authority to validate a search based on the consent of a third party with such authority, then the logical conclusion is that the premises subject to the above-mentioned contract could never be the object of a valid third-party consent

A theory that would allow a defendant's presence during and objection to a third-party consent search to invalidate that search thus finds no theoretical support in the *Matlock* decision. In addition, the application of such a theory in third-party consent cases would create an obvious practical anomaly. A rule holding that a defendant could invalidate a search if he or she were present and objected to the search, but could not invalidate the search if he or she were absent when the search took place, would be tantamount to a holding that the defendant's constitutional right to be free from unreasonable searches of his or her home stops when he or she walks out the door. The defendant's rights would depend upon the fortuity of his or her location when the police conduct the search. It should not be assumed the Court would create such an anomaly willingly.

There are two possible theories that could eliminate the anomalous effect of a holding that a present defendant should be able to invalidate a third-party consent search while an absent defendant should not. The first involves a presumption that an absent defendant would not object to the search if he or she were present. Although it would explain why an absent defendant would not be permitted to invalidate a third-party consent search, this position is clearly untenable because by definition a third-party consent search is directed at the absent party. If the search is challenged in court, the search must have revealed some incriminating evidence that the state is attempting to use against the absent party. It is difficult to imagine anyone who would be *more* likely to object to a search than this absent suspect who had incriminating evidence stored on the premises that were to be searched.

The second theory that could support a different result when the defendant is absent than when he or she is present and objecting at the time of the search could be that the reasonableness of the search depends heavily upon the police officers' perceptions of the situation at the time the search occurs.<sup>60</sup> If the police are granted permission to search by a party apparently in control of the premises and no one objects to the search, the police may be reasonable

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search. This result clearly would provide advantages to those clever enough (or those planning far enough ahead on engaging in criminal activities) to enter into pre-cohabitation contracts. The Supreme Court could, however, circumvent this problem by declaring that the assumption of risk inheres in the nature of the living arrangement and cannot be altered by contract. Or, perhaps more persuasively, the Supreme Court could hold that such contracts are void as against public policy because their sole intent is to exclude police from the premises (as opposed to other visitors, guests, business invitees, etc. of the co-occupants).

<sup>60</sup> See Comment, *supra* note 9, at 1110; Comment, *supra* note 8, at 32-34.



in assuming that there is no reason to discontinue the search. If one co-occupant objects to the search, however, that objection should alert the police to the fact that more than one person's rights are involved in the premises and the search. The search should not then proceed lest those rights be violated.

This argument seems to have had some effect on the Florida Supreme Court's decision in *Silva*.<sup>61</sup> Although the argument initially may seem appealing, it suffers from three major flaws. First, such a "police viewpoint" argument cannot be carried too far without raising the specter of fourth amendment protection so porous that almost any type of consent search will escape constitutional sanction . . . ."<sup>62</sup> If searches are validated merely because police think that they are reasonable, very few searches will be found constitutionally invalid.<sup>63</sup> Such a "police viewpoint" argument would

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<sup>61</sup> 344 So. 2d at 563.

<sup>62</sup> Comment, *supra* note 9, at 1110. This commentator addresses the "police viewpoint" argument generally rather than as support for reaching a different conclusion about the validity of a search depending upon the location of the defendant. Specifically, he states that a police viewpoint rationale is "undoubtedly" one factor that persuades courts to uphold the validity of third-party consent searches. *Id.*

[I]f the police obtain consent to search a house from someone who reasonably appears to them to be in control of the premises and in a position to authorize them to enter, it would be of little social utility for a court subsequently to rebuke the officers by excluding the evidence they obtained during the search . . . because they failed to observe a subtle distinction drawn by a defense attorney with 20/20 hindsight.

*Id.*

<sup>63</sup> Despite this problem with a "police viewpoint" approach to searches, there is some judicial support for the approach. For example, in *Stoner v. California*, 376 U.S. 483 (1964), the Supreme Court held that a search of a hotel guest's room based upon the consent of the hotel clerk was invalid. The Court mentioned, however, that the police had been given no basis to believe that the guest had authorized the clerk to allow police to search his room. *Id.* at 489. This could suggest "that the case might have gone the other way had the police been given reasonable grounds for such a belief." Comment, *supra* note 9, at 1093 n.27.

See also *United States v. DiPrima*, 472 F.2d 550, 551-52 (1st Cir. 1973) ("[w]e cannot pronounce a rule that will answer all cases, except to say that to some extent the police must be allowed to rely upon . . . general appearances"); *United States v. Martinez*, 450 F.2d 864, 865 (8th Cir. 1971) ("legal and possessory rights to the premises or items searched, [the consentor's] relationship to the subject of the search, and the circumstances as they objectively appear to the police at the time of the search are all to be considered . . . .") (emphasis added); *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955) ("in which the California Supreme Court held that a homeowner had authority to consent to the search of his tenant's room, on the ground that both the homeowner and the police entertained the (mistaken) belief that the homeowner had such authority." Comment, *supra* note 9, at 1093 n.28).

Most recently, the Supreme Court has ruled on a police "good faith" exception to the exclusionary rule in the context of searches made *with a warrant* (i.e. not consent or other warrantless searches). *United States v. Leon*, 104 S. Ct. 3405 (1984). In that case, the Court held that evidence obtained by police in reliance upon a warrant that later

thus defeat one of the main purposes of the fourth amendment: to ensure that someone other than the police at the scene makes the decision about the reasonableness of searches and seizures.<sup>64</sup>

Second, the same argument that police should know that more than one person's constitutional rights are involved can certainly be made in situations where the defendant is in police custody. Yet, the Court in *Matlock* treated the defendant's presence or absence at the time consent to search was sought as a matter of indifference. The facts that *Matlock* was in police custody and that the police obviously knew that *Matlock* had a stake in the occurrence of the search did not convince the Court that the search should be invalidated.<sup>65</sup>

Third, the "police viewpoint" argument is based on the idea that once police are alerted to the defendant's "rights" in the property, their search becomes unreasonable. This, however, assumes that the defendant's rights in the property are such that his or her objection should be sufficient to deter the police from their search. The "possession and control" test adopted by the Court in *Matlock* provides no support for the idea that the defendant has any right to prevent a police search of his or her jointly occupied premises when one of his or her co-occupants consents. Thus, there is no reason for the suspect's presence to make the police believe that their actions in searching the premises are unreasonable. Even if *Matlock* was neutral on the issue of the suspect's "right" to prevent a search, however, the fact is that the "police viewpoint" argument begs the question at issue by assuming that the suspect *does* have such a right. Thus, the "police viewpoint" argument does not provide solid support for treating a present, objecting defendant differently from the "absent" defendant in *Matlock*. The argument merely rests on unsubstantiated assumptions.

One final argument against the proposition that courts after

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proved defective could be admitted in court as long as the police were acting reasonably in relying on the warrant. *Id.*

Judicial support for a general consideration of the police viewpoint in evaluating the validity of searches, however, in no way negates the argument that the police viewpoint idea should not be used to validate searches occurring in the absence of the person at whom the search was directed. See *infra* notes 62-65 and accompanying text.

<sup>64</sup> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

*Johnson v. United States*, 333 U.S. 10, 13 (1948).

<sup>65</sup> See *supra* notes 14 & 36 and accompanying text.

*Matlock* should still recognize a rule in which a present, objecting defendant could invalidate a third-party consent search is that such a rule would be futile. The police would either wait until their suspect was not at home and an unsuspecting co-occupant *was*, or would procure the "absence" of the suspect by arresting him or her.<sup>66</sup> If there is one co-occupant who will consent readily to a search, the only way to keep police from circumventing the rule against searching when one co-occupant is present and objects to the search would be to require police to obtain the permission of all co-occupants before conducting a search. Such a requirement clearly would contradict the Supreme Court's holding in *Matlock*.<sup>67</sup>

Given the previous analysis, the *Matlock* decision forecloses the possibility that the Supreme Court would accept a rule allowing a third-party consent search to be invalidated by the presence of an objecting co-occupant. In addition, the analysis presented above does not change if more than one co-occupant objects to the search. Thus, a third-party consent search would be equally valid where only one co-occupant gives his or her consent to the search and *more than one* of his or her fellow occupants objects. This result follows from the Supreme Court's focus in *Matlock* on the relationship of the consenter to the property. It also follows from the Court's failure in *Matlock* to address the third-party consent issue in terms of the whereabouts of the party at whom the search is directed. Additional support for the idea that one co-occupant's consent will validate a search made over the objections of multiple co-occupants comes from the Supreme Court's use of the plural in articulating the assumption of risk basis for the "possession and control" test: "[T]he *others* have assumed the risk that *one* of their number might permit the common area to be searched."<sup>68</sup>

In light of the broad scope of the third-party consent exception created by the Supreme Court in *Matlock*, it is important that the exception be evaluated carefully to ensure that it comports with the constitutional standards of the fourth amendment.

#### V. A CONSTITUTIONAL EVALUATION OF THE THIRD-PARTY CONSENT DOCTRINE AS DEVELOPED BY THE SUPREME COURT IN *MATLOCK*

When the Supreme Court carves out an exception to a general

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<sup>66</sup> See, e.g., Note, *Constitutional Law—Search and Seizure—Evidence Gained from Search to Which Wife Consented Admissible Against Husband*, 79 HARV. L. REV. 1513, 1518 (1966).

<sup>67</sup> See *supra* note 37 (discussion of *Haskett*).

<sup>68</sup> *Matlock*, 415 U.S. at 171 n.7 (emphasis added).

constitutional requirement and then devises a test for the application of that exception, as the Court has done with third-party consent searches, there are two levels of analysis that should be used to evaluate the Supreme Court's actions. First, the test adopted by the Court for applying the exception should be examined. If that test does not comport with constitutional standards, then a new test should be developed, although the exception may still stand. Second, if the test for application of the exception is in accordance with the principles of the Constitution, the rationale behind the exception itself must be examined. It is not sufficient to use a test that passes constitutional muster to apply an exception that does not also meet constitutional standards. Therefore, both the "possession and control" test and the third-party consent exception itself must be evaluated in light of fourth amendment standards.

A. THE "POSSESSION AND CONTROL" TEST AND THE FOURTH AMENDMENT

There are two general schools of thought with regard to the purposes of the fourth amendment. One is that the fourth amendment was "designed to ensure the security of private property."<sup>69</sup> The other view is that the fourth amendment guarantees a right to privacy that goes "beyond mere property concepts."<sup>70</sup>

These two conflicting views of the fourth amendment collided in the 1967 case of *Katz v. United States*.<sup>71</sup> In *Katz*, the Supreme Court addressed the issue of whether evidence obtained without a warrant, by attaching an electronic listening device to a telephone booth, should be regarded as having been obtained in violation of the fourth amendment. The majority in *Katz* adopted the broader privacy approach to the fourth amendment, saying that "the Fourth Amendment protects people, not places."<sup>72</sup> Justice Harlan, in a concurring opinion, developed a two-part "reasonable expectation of privacy" test for determining when the fourth amendment affords protection to a particular privacy interest: "[T]here is a twofold re-

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<sup>69</sup> Note, *supra* note 66, at 1516.

<sup>70</sup> *Id.* at 1519. See also Matthews, *supra* note 9, at 30; Comment, *supra* note 9, at 1091-92; Comment, *supra* 2, at 1057; Comment, *supra* note 3, at 798; Note, *supra* note 3, at 807.

<sup>71</sup> 389 U.S. 347 (1967).

<sup>72</sup> *Id.* at 351. The Court stated that "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Id.* at 353 (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)). But the Court refused to translate the fourth amendment "into a general constitutional 'right to privacy'," *id.* at 350, saying that the fourth amendment protects individual privacy against only certain types of governmental intrusion. *Id.*

quirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>73</sup> Justice Black, in a strongly worded dissent,<sup>74</sup> used a linguistic and historical analysis of the fourth amendment to support his view that the amendment was intended to protect the security of property, not individuals' rights to privacy.<sup>75</sup>

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<sup>73</sup> *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). Later cases have tended to ignore the subjective portion of Justice Harlan's test and "have emphasized the criterion of objective reasonableness when analyzing the expectation of privacy." *Wefing & Miles*, *supra* note 8, at 215 n.23 (citing *United States v. White*, 401 U.S. 745, 751-53 (1971); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); *Kirsch v. State*, 10 Md. App. 565, 568-69, 271 A.2d 770, 772 (Ct. Spec. App. 1970)).

<sup>74</sup> *Katz*, 389 U.S. at 364-74 (Black, J., dissenting).

<sup>75</sup> *Id.* Initially, it may seem that there is a good deal of merit in Justice Black's argument that the protections of the fourth amendment must be limited to tangible things and cannot be expanded beyond the words of the amendment to include intangible things like electronic eavesdropping. Justice Black stated that "[t]here can be no doubt that the Framers were aware of . . . [eavesdropping], and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, . . . they would have used the appropriate language to do so in the Fourth Amendment." *Id.* at 366. This historical/linguistic analysis when carried to its logical extreme, however, reaches unsatisfactory results. For example, the Framers surely knew that people had offices, yet the word "offices" is not included in the fourth amendment. Does that mean that offices may be searched by the government at will? Surely not—yet that is what Justice Black's analysis seems to suggest.

The above discussion indicates that the fourth amendment must protect more interests than its words, read literally, would imply. Even some rather early Supreme Court cases, although generally sympathetic to a property approach to the fourth amendment, recognize this fact. *See* J. HALL, *SEARCH AND SEIZURE* 25 (1982). For example, in *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court stated that the English case of *Entick v. Carrington*, 19 Howell's St. Tr. 1029, 2 Wils. (Eng. C.P.) 275 (1765), could be regarded as providing a good explanation of what is meant by the fourth amendment because "it may confidently be asserted that its propositions were in the minds of those who framed the Fourth Amendment." 116 U.S. at 626-27. The Court went on to say that

[t]he principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the *privacies of life*. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the *invasion of his indefeasible right of personal security, personal liberty and private property* . . . .

*Id.* at 630 (emphasis added).

Although the "reasonable expectation of privacy" test set up by the majority in *Katz* may not be the ideal way to identify that something more than mere property that is protected by the fourth amendment, it is surely a better attempt to protect the values that the Framers thought to be important when drafting the amendment than would be a rule limiting application of the amendment strictly to the words used, and the abuses of which the Framers were aware that fall within the literal meaning of those words. This seems especially true as technology advances and new and better ways of searching without breaking doors and rummaging drawers become available.

The "possession and control" test adopted by the Court in *Matlock* at first glance seems to be much more consistent with the property-oriented approach rejected by the Supreme Court in *Katz* than with the privacy-oriented approach that was adopted. The "possession and control" test is "founded upon the consenting party's relationship to the place searched."<sup>76</sup> The test appears to be place-oriented, not person-oriented<sup>77</sup> as would seem to be required by the Supreme Court's statement in *Katz* that "the Fourth Amendment protects people, not places."<sup>78</sup> In fact, *Katz* has been used to criticize the *Matlock* decision.<sup>79</sup>

It is possible, however, to reconcile the "possession and control" test, at least superficially, with the "reasonable expectation of privacy" test used in *Katz*.<sup>80</sup> This may be done by noting that the Court in *Matlock* defined the common authority over property that would give a third party the right to consent to a search in terms of a mutual use of the property that would make it reasonable to recognize that the non-consenting parties "have assumed the risk that one of their number might permit the common area to be searched."<sup>81</sup> This assumption of risk language could be interpreted to mean that the non-consenting parties no longer have any reasonable expectation of privacy in the property, and that their rights are therefore not violated when a search is made.<sup>82</sup> This interpretation

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<sup>76</sup> Matthews, *supra* note 9, at 35.

<sup>77</sup> *Id.* at 35-36.

<sup>78</sup> *Katz*, 389 U.S. at 351.

<sup>79</sup> See, e.g., Matthews, *supra* note 9, at 35-36; Wefing & Miles, *supra* note 8, at 281.

<sup>80</sup> See Wefing & Miles, *supra* note 8, at 280.

<sup>81</sup> *Matlock*, 415 U.S. at 171 n.7.

<sup>82</sup> See Wefing & Miles, *supra* note 8, at 280 (citing Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1, 16-17 (1971)). Wefing and Miles state that:

*Katz* . . . was specifically limited in *United States v. White*. In *White*, a person consented to have his conversation with defendant taped by officials, and the Court held that the evidence obtained was admissible. Additionally, the Court found that the assumption of risk doctrine survived *Katz* and therefore a person could still lose his expectation of privacy by confiding in another. Thus, the *White* reasoning could arguably support the contention that a person who lives with another has no right to assume that the other person will not turn over evidence or permit a search by police.

Wefing & Miles, *supra* note 8, at 281 (discussing *United States v. White*, 401 U.S. 745 (1971)) (footnotes omitted). Wefing and Miles argue, however, that the assumption of risk doctrine should not be extended from the "consent to tape a conversation" situation to a "consent to search" situation because the latter is inherently more intrusive. *Id.* Also, "[i]n a search situation, a person's loss of privacy is not limited to the statements openly made to others, but extends to information which the individual has attempted to keep confidential." *Id.*

Ultimately, Wefing and Miles conclude that "the assumption of risk doctrine does not adequately protect constitutional rights, and should therefore be rejected." *Id.* This

would bring the *Matlock* "possession and control" analysis into line with the privacy approach to the fourth amendment that was adopted in *Katz*.<sup>83</sup>

This reconciliation, however, is not entirely satisfactory if the practical results, as opposed to the abstract concept, of the "possession and control" test are evaluated in light of the "reasonable expectation of privacy" test. This dichotomy results from what the Court in *Matlock* allowed to serve as an assumption of risk for purposes of the third-party consent exception. There is nothing inherently "reasonable" in the notion that one's right to prevent a warrantless search of his or her home can be overridden by another with no greater possessory interest in that home.<sup>84</sup> The unreasonableness of such a position increases when the search involves premises shared by more than two occupants. In this situation, the Court's test would allow a single co-occupant's consent to override

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conclusion is sound, at least in the third-party consent situation. For a discussion of this point, see *infra* text accompanying notes 84-89.

<sup>83</sup> This argument may be even more convincing in the case of the "exclusive use" variant of the "possession and control" test. The "exclusive use" test essentially excludes from a third-party consent search any items that are under the sole control of the non-consenting party. Thus, one co-occupant could consent to the search of jointly occupied premises, but not to the search of the other co-occupant's handbag, or perhaps even the other co-occupant's bedroom if that room is reserved specifically for the use of the non-consenting co-occupant. This "exclusive use" test can be seen as wholly consistent with the "possession and control" test because if something is reserved for the exclusive use of one party, it is difficult to see how another party could have common authority over that same object. See Comment, *supra* note 8, at 37. The "exclusive use" concept also seems consistent with the "reasonable expectation of privacy" doctrine developed in *Katz*, because a person normally will have a greater "expectation of privacy" as to areas and things that are set aside for his or her exclusive use and a lesser "expectation of privacy" as to areas and things over which he or she shares common authority with others. See Note, *supra* note 3, at 810. The exclusive use concept was neither adopted nor rejected explicitly by the Supreme Court in *Matlock*, so its status in the Court is uncertain. Matthews, *supra* note 9, at 32. But the concept has been used by a number of courts as a part of the "possession and control" rationale. See, W. RINGEL, *supra* note 40, at § 9.5(d); Note, *Limitations on Third Party Consent to Search the Property of Another*, 20 S. TEX. L.J. 381, 386 (1980); Note, *supra* note 3, at 809; Comment, *supra* note 8, at 24 and the cases cited in these sources. See also *United States v. Robinson*, 479 F.2d 300, 307-08 (7th Cir. 1973) (Swygert, C.J., dissenting) and cases cited therein. *E.g.*, *United States v. Block*, 590 F.2d 535 (4th Cir. 1978); *United States v. Wilson*, 590 F.2d 883 (9th Cir. 1975), *cert. denied*, 429 U.S. 982 (1976); *Gurleski v. United States*, 405 F.2d 253 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969); *Reeves v. Warden*, 346 F.2d 915 (4th Cir. 1965); *Roberts v. United States*, 332 F.2d 892, 897 (8th Cir. 1964); *United States v. Poole*, 307 F. Supp. 1185 (E.D. La. 1967); *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957); *State v. Evans*, 45 Hawaii 622, 372 P.2d 365 (1972); *People v. Gonzalez*, 50 Misc. 2d 508, 270 N.Y.S.2d 727 (N.Y. Sup. Ct. 1966); *State v. McCarthy*, 20 Ohio App. 2d 275, 253 N.E.2d 789 (1969).

<sup>84</sup> See, e.g., Bender, *Third Party Consent to Search and Seizure: A Request for Reevaluation*, 4 CRIM. L. BULL. 343, 351 (1968); Wefing & Miles, *supra* note 8, at 280; Comment, *supra* note 9, at 1109; Comment, *supra* note 3, at 807; Note, *supra* note 3, at 813.

the objections of *all* the other co-occupants.<sup>85</sup>

Applying Justice Harlan's two-part test,<sup>86</sup> it is difficult to see how the Court could take the position that co-occupants have no objectively reasonable<sup>87</sup> expectation of privacy in their homes. A home may be shared by several occupants, but that does not necessarily mean that the co-occupants expect intrusions by police officers bent on making warrantless searches.<sup>88</sup> At best, the Court in *Matlock* could have been taking the position that the expectation of privacy in jointly occupied premises is not one that society is prepared to recognize as reasonable.<sup>89</sup> The Court does not, however, provide any support for this position. Absent any such support, it is difficult to conceive of why a person's right, vis-a-vis the government, to be free of unreasonable searches should be altered by the fact that he or she has chosen to live with others rather than alone.

Even if the "possession and control" test were completely reconcilable with the purposes of the fourth amendment as explicated in *Katz*, there remains the question of whether the third-party consent exception itself is consonant with fourth amendment principles.

#### B. THE THIRD-PARTY CONSENT EXCEPTION, THE GENERAL CONSENT EXCEPTION, AND THE FOURTH AMENDMENT

Logically, the third-party consent search exception to the fourth amendment should be regarded as part of the general consent search exception.<sup>90</sup> It is also logical, therefore, that the same

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<sup>85</sup> See *supra* text accompanying notes 67-68.

<sup>86</sup> See *supra* text accompanying note 73.

<sup>87</sup> See *supra* note 73 and accompanying text for a discussion of this standard. A subjective analysis, as originally suggested by Justice Harlan, would, of course, depend on the facts involved in each particular case.

<sup>88</sup> See, e.g., Comment, *supra* note 9, at 1121.

<sup>89</sup> This reading of the *Matlock* opinion is supported by the Court's statement that "it is *reasonable to recognize* that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." 415 U.S. at 171 n.7 (emphasis added). Whether the Court was actually holding that society is not prepared to view as reasonable an expectation of privacy in this situation depends upon whether, when the Court said "recognize," it was acknowledging a commonly held view or merely was holding that this view was the correct one. If the Court was acknowledging a commonly held view, it presented no data or evidence to support its statement that the view is in fact commonly held. If the Court was holding that this view was the correct one regardless of general opinion, it failed to present a principled basis for such a holding.

<sup>90</sup> See Note, *supra* note 3, at 808; Comment, *supra* note 8, at 37. To the best of this author's knowledge, no court or commentator has ever suggested that the third-party consent exception be separated from the general consent exception or justified as an independent exception to fourth amendment requirements. The Supreme Court certainly made no such suggestion in *Matlock*. In fact, the Court seemed to tie the two exceptions together. 415 U.S. at 171.



rationale supporting a general consent search exception to fourth amendment requirements also should support the third-party consent exception. Unfortunately, a comparison of the rationale supporting the general consent exception with the rationale supporting the third-party consent exception is very difficult because the Supreme Court has never explained clearly the theoretical underpinnings of either.<sup>91</sup>

The exemption of searches conducted pursuant to consent may possibly be regarded as an attempt by the Supreme Court to vitiate the harsh results of the exclusionary rule that bars the use, both in federal and state courts, of evidence obtained through an illegal search and seizure.<sup>92</sup> Because searches generally are held to be un-

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<sup>91</sup> See, e.g., Wefing & Miles, *supra* note 8, at 211; Comment, *supra* note 8, at 12. See also *infra* notes 99, 103, 104 and accompanying text.

<sup>92</sup> See, e.g., Wefing & Miles, *supra* note 8, at 214; Comment, *supra* note 9, at 1090-91. But see Comment, *supra* note 3, at 800 (suggesting that the need for effective law enforcement does not underlie the general consent exception to fourth amendment requirements).

The Supreme Court itself has observed that the strictness of the exclusionary rule may lead courts to dilute constitutional protections in order to protect the efficiency of law enforcement:

[o]ne is now faced with the dilemma . . . of choosing between vindicating sound Fourth Amendment principles at the possible expense of state concerns, long recognized to be consonant with the Fourteenth Amendment before *Mapp* [v. Ohio, 367 U.S. 643 (1961)] . . . came on the books, or diluting the Federal Bill of Rights in the interest of leaving the States at least some elbow room in their methods of criminal law enforcement.

*Chimel v. California*, 395 U.S. 752, 769 (1969) (Harlan, J., concurring) (citation omitted).

The exclusionary rule, see *supra* text accompanying note 92, bars "the use of evidence secured through an illegal search and seizure." E. CORWIN, *supra* note 2, at 360. The rule was first developed by the Supreme Court for application in federal courts in *Weeks v. United States*, 232 U.S. 383 (1914). The rule was later applied to the states through the fourteenth amendment in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The exclusionary rule has been the object of much criticism in recent years, from both judges and commentators. See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 413-19 (1976) (Burger, C.J., dissenting); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Harlan, J., concurring) ("until we face up to the basic constitutional mistakes of *Mapp* . . . no solid progress in setting things straight in search and seizure law will, in my opinion, occur." *Id.* at 498-99). See also S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977); Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 266 (1961); Miles, *Decline of the Fourth Amendment: Time to Overrule Mapp v. Ohio*, 27 CATH. U.L. REV. 9 (1977); Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939 (1966); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?*, 62 JUDICATURE 404 (1979); Wilkey, *A Call for Alternatives to the Exclusionary Rule*, 62 JUDICATURE 351 (1979); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV.

constitutional when conducted without a warrant,<sup>93</sup> police normally must go through the process of obtaining a warrant, which can be issued only upon probable cause,<sup>94</sup> or run the risk that the evidence they obtain will be suppressed in court. It would simplify the job of police officers enormously if they could make a valid search in cases where no objection to the search is or would be forthcoming, without the necessity of obtaining a search warrant based upon probable cause.<sup>95</sup>

Exceptions to fourth amendment requirements, however, cannot be created whenever such an exception would simplify police work. The specific intention of the Framers of the fourth amendment was to limit the freedom of government officers to intrude upon the "persons, houses, papers and effects"<sup>96</sup> of people in an unchecked crusade to enforce the law.<sup>97</sup> Therefore, if an exception to the fourth amendment were created every time the operation of the amendment limited officers in their ability to enforce the law quickly and efficiently, there would soon be no situation still subject to fourth amendment requirements.

Given the limited value of an argument that a general consent exception was created to increase police efficiency, then, there must be some other, additional reason to support such an exception.

One promising rationale for the general consent exception might be that "[l]ike other important rights, the rights to be free from unreasonable searches and seizures can be waived."<sup>98</sup> Thus, voluntary consent to a police search could be regarded as a waiver of one's fourth amendment rights. In fact, several early Supreme

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736 (1972); Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507 (1975).

The debate over the exclusionary rule has centered around its efficacy as a deterrent against police misconduct because this has become the Supreme Court's primary basis for supporting the exclusionary rule. For a history of this development, as well as further information regarding the exclusionary rule, see J. HALL, *supra* note 75, at 573-93; W. RINGEL, *supra* note 40, at § 1.5.

<sup>93</sup> See *supra* notes 2-3.

<sup>94</sup> See U.S. CONST. amend IV.

<sup>95</sup> See J. HALL, *supra* note 75, at 92. See also *Schneckloth v. Bustamonte*, 412 U.S. at 228 (1973), where the Supreme Court described the practical benefits of the consent search exception.

<sup>96</sup> U.S. CONST. amend IV.

<sup>97</sup> See, e.g., *Matthews*, *supra* note 9, at 42; Comment, *supra* note 9, at 1091-92; Comment, *supra* note 2, at 1057; Comment, *supra* note 3, at 798.

<sup>98</sup> E. CORWIN, *supra* note 2, at 367. See also R. DAVIS, *FEDERAL SEARCHES AND SEIZURES* 171 (1964); E. FISHER, *SEARCH AND SEIZURE* 104 (1970); W. RINGEL, *supra* note 40, at § 9.1; Bender, *supra* note 84, at 343; Comment, *supra* note 9, at 1089, 1098; Comment, *supra* note 2, at 1060; Comment, *supra* note 3, at 800; Note, *supra* note 3, at 808; Comment, *supra* note 8, at 12.

Court consent search decisions may be read as supporting this waiver approach to the consent issue.<sup>99</sup>

Basing the general consent exception to fourth amendment requirements upon a waiver theory would have troublesome implications for the third-party consent exception. If a consent to a search directed at one's self is regarded as a waiver of one's constitutional rights, then how else can a consent to a search directed at another be regarded except as a waiver of that other person's constitutional

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<sup>99</sup> For example, the Supreme Court seemed to rely upon a waiver approach in *Amos v. United States*, 255 U.S. 313 (1921). In *Amos*, the Court considered the validity of a wife's consent to search a home that she shared with her husband, and held that implied coercion on the part of the Internal Revenue Service collectors conducting the search precluded a finding of waiver by consent. *Id.* at 317. A waiver approach to consent searches also seemed to underlie the decision in *Johnson v. United States*, 333 U.S. 10 (1948). In *Johnson*, the Supreme Court held that when Johnson allowed narcotics agents to enter her apartment after they knocked on her door and said they wanted to speak with her, her actions were to be regarded as a "submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13 (emphasis added).

Two later cases, *Zap v. United States*, 328 U.S. 624 (1946), *rev'd on other grounds*, 330 U.S. 800 (1947), and *Davis v. United States*, 328 U.S. 582 (1946), are cited occasionally as examples of the waiver approach being applied to consent searches. See, e.g., Comment, *supra* note 9, at 1089 n.12; Comment, *supra* note 2, at 1059 n.23.

*Zap* involved government contracts with a waiver provision which provided that the contractor's records were open for inspection by the government . . . . *Davis* involved a violation of wartime gasoline rationing laws where Davis' gas station employee sold gas at Davis' direction without coupons and over ceiling price. When the officers measured his tanks, they alleged a shortage of the required coupons. Davis claimed he had them, but he first refused to produce them. The officers persisted on the ground the coupons were government property of which Davis was merely the custodian. Davis produced the coupons but did not have enough to justify the amount of gasoline in his tanks, and he was charged.

J. HALL, *supra* note 75, at 94-95 (footnotes omitted).

Both *Zap* and *Davis* actually are departures from the standard waiver approach, however, because in each case, the Court failed to examine carefully the nature of the defendant's consent. A waiver of a constitutional right usually requires a knowing and intelligent waiver of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). See also E. CORWIN, *supra* note 2, at 367. Such a knowing and intelligent waiver requirement was not imposed in either *Zap* or *Davis*. In *Zap*, the defendant did not consent to the seizure of the records, yet the Court held that "there was no wrongdoing in the method by which the incriminating evidence was obtained." 328 U.S. at 630. In *Davis*, the Court "simply disregarded the *Amos* waiver approach while nominally distinguishing that case on its facts." Wefing & Miles, *supra* note 8, at 219.

Commentators have offered various explanations for the holdings in *Zap* and *Davis*. See, e.g., J. HALL, *supra* note 75, at 95 n.2; 2 W. LAFAVE, SEARCH AND SEIZURE § 8.1(a), at 613 (1978). Perhaps the best explanation is that both cases turned on an "implied consent" that was created when the defendants did business with the government. As mentioned above, *Davis* engaged "in a business which involved the handling of documents considered to be government property," and *Zap* "agreed to permit inspection of his accounts and records in return for obtaining government business." Wefing & Miles, *supra* note 8, at 221-22. Thus, *Davis* and *Zap* "should not be considered as typical consent search cases." *Id.* at 224.

Another case that may support the waiver approach to consent searches is *Stoner v. California*, 376 U.S. 483 (1964). See *infra* note 103 for a discussion of this case.

rights?<sup>100</sup>

The waiver by one person of another's constitutional rights, absent an express agency relationship, generally is considered unacceptable.<sup>101</sup> Utilizing the waiver theory to support the general consent exception to the fourth amendment, therefore, not only does not support the third-party consent exception, but in fact seems to make support of such a third-party consent exception extremely difficult.<sup>102</sup>

The fact that in some early cases, the Supreme Court appeared to be leaning towards adopting a waiver approach to consent searches may thus explain why, in early cases involving searches consented to by third parties, such searches were held invalid.<sup>103</sup>

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<sup>100</sup> See *Bender*, *supra* note 84, at 350; *Matthews*, *supra* note 9, at 33; *Wefing & Miles*, *supra* note 8, at 278; *Comment*, *supra* note 9, at 1089; *Comment*, *supra* note 3, at 801; *Note*, *supra* note 3, at 808; .

<sup>101</sup> See *Stoner v. California*, 376 U.S. 483, 489 (1964); *United States ex rel. Cabey v. Mazurkiewicz*, 431 F.2d 839, 845 (3rd Cir. 1970). See also *C. BERRY, ARREST, SEARCH AND SEIZURE* 95 (1973); *R. DAVIS*, *supra* note 98, at 5, 200; *E. FISHER*, *supra* note 98, at 119; *N. SOBEL*, *supra* note 40, at 130; *Bender*, *supra* note 84, at 350; *Matthews*, *supra* note 9, at 33; *Wefing & Miles*, *supra* note 8, at 278; *Comment*, *supra* note 9, at 1089; ; *Comment*, *supra* note 3, at 801; *Note*, *supra* note 3, at 808.

<sup>102</sup> It could be argued that third-party consent is consistent with a waiver theory because the third party is waiving only his or her own rights in the property over which he or she has common authority. This analysis, however, cannot avoid the problem that the third party is also committing a *de facto* waiver of another's rights. See *Bender*, *supra* note 84, at 350; *Matthews*, *supra* note 9, at 33; *Wefing & Miles*, *supra* note 8, at 278; *Comment*, *supra* note 9, at 1089; *Comment*, *supra* note 3, at 801; *Note*, *supra* note 3, at 808. The view that the third party is waiving only his or her own rights appears particularly strained in the situation where another party with an equal interest in the property is present and objects to the search.

<sup>103</sup> For example, in *Weeks v. United States*, 232 U.S. 383 (1914), the Court recognized the invalidity of house searches based upon the consent of boarders or neighbors. *Id.* at 386, 398. In *Chapman v. United States*, 365 U.S. 610 (1961), which has been described as "[t]he first real third party consent search case decided by the Court," *J. HALL*, *supra* note 75, at 96, a search was invalidated on the grounds that the consent of a landlord is not sufficient to allow a search of his tenant's premises. 365 U.S. at 616-18. The government had attempted to uphold the search on the grounds of a landlord's property right to enter and view waste. *Id.* at 616. The Court declined, however, to impose technical property law distinctions of "largely historical" validity upon "the law surrounding the constitutional right to be free from unreasonable searches and seizures . . . ." *Id.* at 617. The Court also noted that the search involved in the case required the landlord to force open a window, which was not a part of his right to view waste. The landlord's purpose in entering was not really to view waste at all, said the Court, but rather to search for evidence of a crime. *Id.* at 616. Ultimately, the Court concluded that "to uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" *Id.* at 616-17 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)) (inserts by the Court).

Three years after *Chapman*, in the case of *Stoner v. California*, 376 U.S. 483 (1964), the Supreme Court again invalidated a search based on the consent of a third party. In *Stoner*, the government tried to validate a search of the defendant's hotel room on the

More recent cases, however, implicitly recognized the validity of third-party consent searches without expressly rejecting the waiver approach to the general consent exception.<sup>104</sup> The viability of the

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basis of the consent of a hotel clerk who gave the police access to the defendant's room. *Id.* at 487-88. The Court rejected this theory with the statement that "[o]ur decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'." *Id.* at 488. The Court also seemed to regard the consent to search as a waiver: "[i]t is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." *Id.* at 489.

In all of these cases, the person who consented to the search was neither the party at whom the search was directed nor the party with full control over the property being searched.

<sup>104</sup> In *Bumper v. North Carolina*, 391 U.S. 543 (1968), the Court considered the validity of a search that was based on the consent of the suspect's grandmother. The grandmother's consent was obtained after police informed her that they had a warrant to search her house. The Court held that the search was invalid because the grandmother's consent was not truly voluntary. It stated that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 550. The Court impliedly recognized, however, that had the consent of the grandmother been voluntary, the search would have been valid, despite the fact that the search was not directed at her, because she "owned both the house [the place that was searched] and the rifle [the object that was seized]." *Id.* at 548 n.11. The Court stated that "the petitioner concede[d] that her [the grandmother's] voluntary consent to the search would have been binding upon him," *id.*, and made no argument against that position.

Wefing and Miles note that the holding in *Bumper* is consistent with the waiver approach to fourth amendment rights, and that *Bumper* is the only one of the three cases involving acquiescence to a "demand under color of lawful authority" (*Amos and Johnson* being the other two cases, see *supra* note 99) that "failed to rest its holding explicitly on the waiver rationale." Wefing & Miles, *supra* note 8, at 225. Perhaps the Court's failure to utilize the waiver rationale in *Bumper* was due in part to a perceived inconsistency between that rationale and a recognition of the constitutional validity of third-party consent searches.

*Frazier v. Cupp*, 394 U.S. 731 (1969), involved a slightly different situation than did *Bumper*. In *Bumper*, the party giving consent had legal title to the property being searched, but was not the person at whom the search was directed. In *Frazier*, the party who consented to the search was the one at whom the search was directed, but the object searched (a duffel bag) belonged to his cousin (petitioner in the case). *Id.* at 740. The duffel bag was being used jointly by the petitioner and his cousin Rawls, and had been left by petitioner in Rawls' home. While the police were in the process of arresting Rawls, they asked for his clothing. They were told that it was in the duffel bag, and both Rawls and his mother consented to a search of the bag. *Id.* The Court "dismissed rather quickly" the petitioner's argument that clothing of his that had been found in the duffel bag should have been excluded from evidence at his trial:

Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it . . . . Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphys-

waiver approach was thus cast into doubt.

Finally, in 1973, the Supreme Court in the general consent case of *Schneckloth v. Bustamonte*<sup>105</sup> once again had the opportunity to address the question of whether consent to search is a waiver of constitutional rights. As mentioned above, a finding that the general consent search exception is based upon a waiver theory would mean that third-party consents could not be encompassed easily in that general consent exception. A finding that the general consent exception is not based upon a waiver theory would leave that exception without an articulated rationale.

The Supreme Court, perhaps recognizing its dilemma, delivered a "strained, self-contradictory opinion"<sup>106</sup> in *Schneckloth*. The opinion never fully addressed the question of the theoretical basis for the general consent exception. The Court merely stated that a search conducted pursuant to consent is a "well settled" exception to fourth amendment requirements,<sup>107</sup> mentioned the practical benefits of a consent exception,<sup>108</sup> and then proceeded to decide whether the consent in the case was sufficiently voluntary to fall under the consent search exception.

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ical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case.

*Id.* (citations omitted).

*Coolidge v. New Hampshire*, 403 U.S. 443 (1971), has also been cited as a case upholding the validity of a third-party consent search. See *Matlock*, 415 U.S. at 171; *Schneckloth*, 412 U.S. at 245. See also J. HALL, *supra* note 75, at 97. In *Coolidge*, however, a wife at the request of police turned over items belonging to her husband. 403 U.S. at 446. The Court did not treat this as a search. *Id.* at 489-90. Therefore, there is some question as to the precedential effect of this case on third-party consent issues. See Wefing & Miles, *supra* note 8, at 259; Comment, *supra* note 9, at 1093.

Note that *Bumper* and *Frazier* are the only cases decided prior to 1973 in which the search by police was treated by the Supreme Court as a "search" for purposes of review and third-party consent was impliedly held to validate the search. In both cases, the consent was given by one who either owned and controlled the property being searched or by the one at whom the search was directed. These cases were thus distinguishable from prior cases in which third-party consents were invalidated. Therefore, these two cases did not necessarily represent a rejection of previous Supreme Court holdings on (or the waiver approach to) the question of third-party consent searches. Nor do these two cases contain any discussion of an alternative theoretical basis for the consent search exception to the fourth amendment.

<sup>105</sup> 412 U.S. 218 (1973)

<sup>106</sup> Wefing & Miles, *supra* note 8, at 212.

<sup>107</sup> 412 U.S. at 219. The Court cites *Davis v. United States*, 328 U.S. 582 (1946), and *Zap v. United States*, 328 U.S. 624 (1946), as support for this "well settled" exception. Yet, as was pointed out *supra* note 99, these two cases really seem to have been decided on the basis of an "implied consent" to a search conducted by government officials on the part of an individual doing business with the government.

<sup>108</sup> 412 U.S. at 227.

It was at this point that the *Schneckloth* decision became complicated. One of the arguments against a holding that the consent in question was valid was that consent was a "waiver" of fourth amendment rights<sup>109</sup> that, under *Johnson v. Zerbst*,<sup>110</sup> must be shown by the State to be "an intentional relinquishment or abandonment of a known right or privilege."<sup>111</sup> The Court rejected this argument in *Schneckloth*. To support its decision, the Court tried to explain why its references, in prior cases, to consent searches as "waivers" did not really mean "waivers" in the *Zerbst* sense.<sup>112</sup> The Court also noted that the requirement of "an intentional relinquishment or abandonment of a known right or privilege"<sup>113</sup> previously had been applied mostly to those rights that guarantee a fair criminal trial, and then stated that the requirement thus should not be expanded to cover consent searches, which are "of a wholly different order."<sup>114</sup> The Court ultimately held that the *Zerbst* standard need not be met in consent searches, and that consent will serve to validate a search if the consent is determined to be voluntary in view of all the circumstances of the case.<sup>115</sup>

The reason that this decision complicates any analysis of the theoretical bases of the general consent search exception is that although the Court clearly rejects the waiver approach for evaluating the validity of particular consent searches, it does not evaluate the ramifications of that holding for a waiver approach as the basis for the general consent search exception. Some of the Court's language suggests that consent still may be regarded as some sort of waiver, despite the Court's holding that consent to search is not the type of waiver that must be knowing and intelligent to be effective: "[o]ur cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection."<sup>116</sup> Other language, however, suggests that a waiver theory cannot serve as the basis of the general consent search exception: "a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third-party consents'."<sup>117</sup>

Thus, *Schneckloth* at the very least casts serious doubt upon the

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<sup>109</sup> *Id.* at 235.

<sup>110</sup> 304 U.S. 458 (1938).

<sup>111</sup> *Id.* at 464.

<sup>112</sup> 412 U.S. at 243 n.31.

<sup>113</sup> 304 U.S. at 464.

<sup>114</sup> 412 U.S. at 242.

<sup>115</sup> *Id.* at 248-49.

<sup>116</sup> *Id.* at 235.

<sup>117</sup> *Id.* at 245. This approval was by implication only. See *supra* note 104.

continued validity of a waiver theory as the basis for the general consent exception to fourth amendment requirements. Perhaps the Court's statement in *Matlock* that "[m]ore generally, in *Schneckloth v. Bustamonte*, we noted that our prior recognition of the constitutional validity of 'third-party consent' searches . . . supported the view that a consent search is fundamentally different in nature from the waiver of a trial right,"<sup>118</sup> taken together with *Matlock*'s explicit recognition of the validity of third-party consent searches, constitute the best evidence that the Supreme Court has indeed abandoned the waiver theory as a basis for the general consent search exception to fourth amendment requirements.<sup>119</sup>

To review then, the general consent exception and the third-party consent exception are logically related, and thus should share a common rationale. Both exceptions can be supported by arguments based on the convenience and efficiency of law enforcement officers. Efficiency, however, should not be a sufficient excuse for abandoning fourth amendment protections.

The main theory that has been used to support the general consent search exception—the waiver theory—does not support, and may be directly contrary to, recognition of a third-party consent exception. If the waiver theory is the basis for the general consent exception, then the third-party consent exception cannot be regarded as part of that general exception because the two concepts cannot be supported by the same rationale. But if the third-party consent exception is to be regarded as a separate, independent exception to fourth amendment requirements, the Supreme Court certainly failed to mention that fact in *Matlock*.<sup>120</sup> The Court also failed to provide a theoretical basis for such an independent exception so that the exception could be evaluated in light of the purposes of the fourth amendment and so that its parameters could be determined.

If, however, the Supreme Court rejected the waiver theory as a basis for the general consent search exception in *Schneckloth*, as seems probable, then the Court has left us with no theory at all to support either the general consent exception or the third-party consent exception.

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<sup>118</sup> 415 U.S. at 171 (citations omitted).

<sup>119</sup> Many commentators feel that even if the Supreme Court has abandoned the waiver theory as a rationale for the general consent exception, it should not ignore the fact that third-party consent searches operate as a *de facto* waiver of another's rights. See Bender, *supra* note 84, at 350; Matthews, *supra* note 9, at 33; Wefing & Miles, *supra* note 8, at 278; Comment, *supra* note 9, at 1089; Comment, *supra* note 3, at 801; Note, *supra* note 3, at 808.

<sup>120</sup> In fact, the Court tied the third-party consent exception to the general consent exception. See *supra* text accompanying note 118.



## VI. CONCLUSION

The Supreme Court's decision in *Matlock v. United States*<sup>121</sup> for the first time explicitly recognized the validity of searches based upon the consent of someone other than the person at whom the search was directed. The test adopted by the Court for analyzing third-party consent searches would allow valid searches to be made pursuant to the consent of one co-occupant of a premises who is present at the time of the search and over the objection of one or more co-occupants who are also present at the time of the search. Because the scope of the third-party consent exception is so broad when the test adopted by the Court is used to apply the exception, it is questionable whether the test used by the Court comports with the purposes and requirements of the fourth amendment.

Even if the test utilized by the Court does comport with the purposes of the fourth amendment, however, the scope of the exception is so broad that the exception itself should have a strong basis in constitutional principles. Yet the Court has not provided a theory that would logically embrace both the general consent exception *and* the third-party consent exception, which clearly seem to be related. Nor has the Court explained why the third-party consent exception can stand independently as a proper exception to fourth amendment requirements. Until the Supreme Court provides such explanations, both the purposes of the third-party consent exception and its parameters will necessarily remain in doubt, to the detriment of fair and effective administration of the fourth amendment.

SHARON E. ABRAMS

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<sup>121</sup> 415 U.S. 169 (1974).