CONSENT SEARCHES AND THE FOURTH AMENDMENT: VOLUNTARINESS AND THIRD PARTY PROBLEMS

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INTRODUCTION

A search of private premises by law enforcement authorities who lack a valid warrant issued upon probable cause is generally deemed to be per se unreasonable under the fourth amendment. In certain situations, however, where particular exigent circumstances exist or where valid consent to search is given, courts have sought to carve out special exceptions to the warrant requirement. An examination of the cases dealing with consent searches reveals that two basic problematic areas have evolved in the course of adjudicating their validity. The first major issue, present in all such searches, is the voluntariness of the consent or permission itself. The second problem arises when a party other than the accused permits a search, and therefore surrenders the rights of the defendant. Despite the difficulties that these searches present, however, until recently the Supreme Court of the United States had been able to decide several consent cases without generating the inconsistency and confusion that have resulted from its decisions in other areas of search and seizure law.[1] The Court's ability to avoid these difficulties is attributable less to the vigor of its analysis than to its failure to attempt a thorough exploration of the issues. Last term, however, in *Schneckloth v. Bustamonte*,[2] the Court finally analyzed in depth the question of voluntariness, and this term, in *United States v. Matlock*,[3] the Court reaffirmed its prior implicit acceptance of third party consents to search.[4]

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1 *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 473-84 (1971); Chimel v. California, 395 U.S. 752, 755-62 (1969), wherein the Court stated: "The decisions of this Court bearing upon [a search incident to an arrest] have been far from consistent . . . ." *Id.* at 755. *Compare* United States v. Harris, 403 U.S. 573, 580-83 (1971), *with* Spinelli v. United States, 393 U.S. 410, 418-20 (1969). *See generally* Miles & Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105, 112-32 (1972).

2 412 U.S. 218 (1973).

3 42 U.S.L.W. 4252 (U.S. Feb. 20, 1974).

4 *See* pp. 256-61 *infra*.

Bustamonte is a strained, self-contradictory opinion which not only represents a drastic departure from the Court's own previous cases, but also undermines a substantial body of prior federal case law which reflected a sustained and sometimes creative effort to develop a coherent consent-search doctrine.[5] In effect, this case eliminated the "waiver" requirement,[6] a concept which has emerged as a critical factor in Supreme Court decisions and which has been heavily relied upon by the lower federal courts. Rather, it adopted the "totality of the circumstances" test which was employed primarily by the California state courts[7] and which consisted of a more relaxed voluntariness standard than that employed by the federal courts. Further, the *Bustamonte* Court equated the "voluntariness" of consent obtained for a search in a non-custodial setting with the "voluntariness" of a confession elicited as the result of police interrogation.[8] In so doing, it applied to the fourth amendment consent issue a line of confession cases involving the problem of voluntariness which had been rendered obsolete by *Miranda v. Arizona*,[9] and arrived at the conclusion that a person could voluntarily waive fourth amendment rights even without knowledge that they existed.[10]

In *Matlock*, the Supreme Court for the first time specifically addressed itself to the issue of third party consents. Although the Court did not fully discuss the underlying constitutional problems implicit in this area, the prior underdeveloped assumption that third party consents were valid was upheld.[11] This decision conformed with a large body of lower court opinion which had held that a person with equal or superior right of possession and control over premises or effects could consent to the search of such property.[12]

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5 *See, e.g.*, Rosenthall v. Henderson, 389 F.2d 514 (6th Cir. 1968); Gorman v. United States, 380 F.2d 158 (1st Cir. 1967); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966).

6 412 U.S. at 246. The Court used the term "waiver" in its first consent case, Amos v. United States, 255 U.S. 313, 317 (1921). It also employed "waiver" language in later consent cases such as Stoner v. California, 376 U.S. 483, 489 (1964), and Johnson v. United States, 333 U.S. 10, 13 (1948). Subsequent to *Amos*, lower federal courts have also described consents as waivers. *See, e.g.*, Cipres v. United States, 343 F.2d 95, 97-98 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966); United States v. Kelih, 272 F. 484, 490-91 (S.D. Ill. 1921).

7 412 U.S. at 227.

8 *Id.* at 223-27.

9 384 U.S. 436 (1966).

10 412 U.S. at 249.

11 42 U.S.L.W. at 4256.

12 *See* pp. 254-55 *infra*. The *Matlock* Court added to the doctrine of possession and control criteria of valid third party consent the unexplained concept that a person may consent who had "other sufficient relationship to the premises or effect sought to be

The Court's resolution of the consent search issues raised in *Bustamonte* and *Matlock* undoubtedly had its genesis in the same factors which have, with increasing frequency, proved to be problematic in other search and seizure areas. There was little fourth amendment case law prior to the twentieth century, and fourth amendment concepts inherited from the eighteenth century and applied in the nineteenth century were broad and simplistic.[13] However, the increased emphasis on law enforcement in the twentieth century,[14] along with the Court's effort to deter police aggressiveness by means of an absolute exclusionary rule,[15] necessitated the development of well-defined search

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inspected." 42 U.S.L.W. at 4254 (footnote omitted). It is questionable whether this concept adds anything to the possession and control doctrine or whether it only serves to further confuse an already amorphous concept.

13 The major nineteenth century decision on search and seizure, Boyd v. United States, 116 U.S. 616 (1886), referred to few federal cases as precedent on fourth amendment law. Further, the commentaries on constitutional law which were relied upon discussed the fourth amendment in brief and general terms. The Court viewed the fourth and fifth amendments as all but merging on search and seizure issues where rights of privacy are impinged upon. *Id.* at 633. This is not to say that fourth amendment rights were lightly regarded. *Id.* at 625-29.

For typical examples of the fourth amendment principles espoused in early cases, see Stockwell v. United States, 23 F. Cas. 116, 121-23 (No. 13,466) (C.C.D. Me. 1870), *aff'd*, 80 U.S. (13 Wall.) 531 (1871); Stanwood v. Green, 22 F. Cas. 1077, 1079 (No. 13,301) (S.D. Miss. 1870); *Ex parte* Field, 9 F. Cas. 1, 3 (No. 4,761) (C.C.D. Vt. 1862). However, state courts during this period had greater occasion to deal with the kind of search and seizure issues which are frequently raised today. *See, e.g.*, Grumon v. Raymond, 1 Conn. 40 (1814); Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841); Sandford v. Nichols, 13 Mass. 232, 13 Tyng 286 (1816); Bell v. Clapp, 6 Am. Dec. 339, 10 Johns. 263 (N.Y. 1813).

14 During the twentieth century, the federal government greatly expanded the scope of its law enforcement activities. Previously, beginning with the period immediately after the adoption of the Constitution, the wellspring of federal power to partake in law enforcement was the "necessary and proper" clause, U.S. CONST. art. I, § 8. *See* A. MILLSPAUGH, CRIME CONTROL BY THE NATIONAL GOVERNMENT 45 (1937). Thus, federal activity was restricted to the protection of its own operations which were enumerated in the Constitution—*i.e.*, the collection of taxes, operation of the postal system, and the enforcement of federal statutes. As a result, state and local governments were left to carry out the bulk of police and crime prevention functions.

More recently, the broad construction given to the "commerce clause," U.S. CONST. art. I, § 8, permitting federal regulation of many new areas, has generated the need for a greater federal law enforcement capability. *See* A. MILLSPAUGH, *supra* at 50-51. Examples of statutes which resulted from the need for deeper federal involvement with interstate criminal activity include: Fugitive Felon Act, 18 U.S.C. § 1071 *et seq.* (1970); Lindbergh Act, 18 U.S.C. §§ 1201-02 (1970); Federal Bank Robbery Act, 18 U.S.C. § 2113 (1970); Motor Vehicle Theft Act, 18 U.S.C. §§ 2312-13 (1970); Mann Act, 18 U.S.C. § 2421 *et seq.* (1970). Furthermore, during the 1930's Congress provided for greater cooperation between the states by giving advance consent to those compacts or agreements which pertained to the prevention of crime. Previously, pursuant to U.S. CONST. art. I, § 10, each such agreement required separate congressional consent.

15 In Weeks v. United States, 232 U.S. 383 (1914), the Court fashioned a constitutional

and seizure guidelines. Sweeping language which had seemed adequate for nineteenth century problems only led to confusion when applied to the considerable variety of factual situations encountered in modern searches and seizures.[16]

Above all, the Court's difficulties in *Bustamonte* and *Matlock* exemplify the seemingly insuperable obstacles the Court faces in its efforts to accommodate the fourth amendment exclusionary rule with the problems faced by the state law enforcement officers in their day-to-day confrontations with criminal suspects. The application by the Court of the exclusionary rule to the states, by incorporation through the fourteenth amendment,[17] made this effort necessary. The complexities of this application had been noted by Justice Harlan:

> [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* and *Ker* 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.[18]

In *Bustamonte,* the Court chose to provide the states with some flexibility in the area of consent searches by sacrificing a substantial body of carefully developed federal case law.[19] In reversing a Ninth Circuit decision[20] it adopted, instead, a California state-court standard with some conceptual embellishments.[21]

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rule which enabled a criminal defendant in a pre-trial proceeding to prohibit the fruits of illegal searches and seizures which had been conducted by federal officers from being admitted into evidence at trial. *See id.* at 398.

16 *See, e.g.,* Chimel v. California, 395 U.S. 752, 755-62 (1969), in which Justice Stewart described the confusion and contradictions generated by the Court's earlier cases concerning searches incident to arrest.

17 Mapp v. Ohio, 367 U.S. 643, 655 (1961). *See also* Ker v. California, 374 U.S. 23, 30-31 (1963). The exclusionary rule was originally developed to ensure the federal government's compliance with fourth amendment standards. *See* note 15 *supra.*

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

19 *See* 412 U.S. at 223, 227. *See* note 5 *supra* and accompanying text.

20 Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971).

21 *See* 412 U.S. at 248-49. The primary California case relied upon by the Court was People v. Michael, 45 Cal. 2d 751, 753, 290 P.2d 852, 854 (1955), which held that

> [w]hether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.

Id. at 753, 290 P.2d at 854. For a cogent criticism of this and similar California cases see Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure,* 1961 U. ILL. L.F. 78, 115-19.

It is likely that *Bustamonte* will increase the difficulties faced by state and lower federal courts in resolving questions concerning voluntariness in consent searches. Additionally, the difficulties inherent in third party consent issues will remain, despite the decision in *Matlock*, because of the difficulties in applying the possession and control doctrine.[22] This article will examine both the voluntariness and third party consent issues and the vexing problems courts have faced in their interpretation and application. It will conclude with suggestions as to how each issue might be resolved without sacrificing either constitutional protections or legitimate law enforcement interests.

NATURE OF CONSENT

A court attempting to determine the validity of a consent search is forced to deal with an inherently evasive concept. It need not decide whether the fourth amendment applies or whether its requirements have been satisfied. Rather, the issue to be determined is whether the protections of the fourth amendment have, in fact, been waived by a party with authority or standing to do so. The answer to this problem is not to be found in the language of the fourth amendment itself. The ultimate issue is not whether the police have acted reasonably. At best, the legality of the officer's conduct can rest only in part on the manner in which he requests consent. If the officer acts reasonably in this respect, the validity of the search will then depend upon whether the individual nominally giving permission did so voluntarily. Thus, the question becomes whether the consenting party did in fact permit the search. In this respect a consent search differs from any other fourth amendment case, since its validity depends ultimately upon the consenting individual's state of mind. All other search and seizure issues are resolved by measuring police conduct against either the amendment's specific requirements—probable cause and the essentials of a warrant—or against the more general standard of "reasonableness." In the usual fourth amendment case, state of mind is irrelevant, even where it must be determined whether an individual's "reasonable expectation of privacy" has been violated.[23]

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22 *See* pp. 261-78 *infra*.

23 Justice Harlan, in his concurring opinion in Katz v. United States, 389 U.S. 347, 360 (1967), set forth a two-fold requirement "that a person have exhibited an actual (subjective) expectation of privacy" and that there be an "expectation . . . that society is prepared to recognize as 'reasonable.'" *Id.* at 361. However, it would appear that later cases have ignored the "subjective" test and have emphasized the criterion of objective reasonableness when analyzing the expectation of privacy. *See, e.g.*, United States v. White, 401 U.S. 745,

The legal problems inherent in resolving the validity of a consent are further aggravated by the factual determination which a court must make. Consent searches frequently result in courtroom contests involving conflicting testimony by the party who gave the alleged consent and the officer who purportedly obtained it. Reconstructing exactly what and how things were said may be even more difficult than determining whose account was the more credible one. The precise words used by the officer in asking for consent and those used by the subject in giving it are crucial. Yet, how often can anyone recall precisely what he has said, or what has been said to him? Additionally, physical influences, such as the tone of one's voice, may be of more significance than the words spoken. Obviously, the same words may be used by an officer to convey either full willingness to leave the decision up to the subject, or to create the impression of official firmness which leaves the person feeling that there was no choice but to consent. Yet, tone of voice, inflection, and the physical bearing of the officer are impossible to reconstruct in the courtroom. The same is true of the subject's response. The words "go ahead" can convey either defiant willingness based on one's confidence in his innocence or cleverness,[24] or an expression of a law-abiding citizen's desire to cooperate. Similarly, they may merely reflect grudging acquiescence to what is perceived as a command.

Because a valid consent obviates the need for a search warrant, most cases which have construed the fourth amendment are of little value in resolving the threshold issue of whether a consent was validly obtained or voluntarily given.[25] Until *Bustamonte* the most vexing

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).

24 *See, e.g.*, Channel v. United States, 285 F.2d 217, 220 (9th Cir. 1960) (where the defendant's alleged statement, "I have no stuff in my apartment and you are welcome to go search the whole place" was deemed not to convey consent but merely to evidence false bravado); United States v. Arrington, 215 F.2d 630, 634 (7th Cir. 1954) (where the defendant, apparently believing that his wife disposed of incriminating evidence, told postal inspectors: "Go ahead, look around").

Courts have rarely, if ever, posed the question why a rational individual who knows that he has the right to refuse would permit a search that he suspects might be incriminating. Courts have raised the issue of whether consent to search can ever be voluntary. "Intimidation and duress are almost necessarily implicit in such situations." Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). *See* Comment, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 131 (1967).

25 *See* note 69 *infra*. The voluntariness of consent raises certain questions: First, was the consenting party pressured into incriminating himself? Second, if his consent was not the result of his own free choice, have the police violated his due process rights under either the fifth or fourteenth amendments? Finally, should he be permitted to consult with

problem had concerned the definition and refinement of the elements necessary to constitute a valid waiver of fourth amendment rights.

CONSENT AND THE SUPREME COURT

Although the Supreme Court has reviewed the validity of consent searches in at least seven decisions during the past fifty years,[26] not until *Bustamonte* did it attempt to develop comprehensive criteria for determining voluntariness. Also, despite the *Matlock* decision, it still has not adequately explored the complex issues inherent in the area of third party consent.

An historical analysis of the Supreme Court's approach to consent searches necessarily begins in 1921 with an examination of *Amos v. United States*.[27] In that case, the Court made certain assumptions about the nature of consent searches which were subsequently developed by lower federal courts into a fairly coherent doctrine. Later, the Court appeared to deviate from these assumptions in two war-time cases that seemingly turned on "implied consent"[28] as well as the nature of the

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a lawyer before making such a critical decision? See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 240.2(3) (Proposed Official Draft No. 1, 1972). Although courts have not generally acknowledged these issues, they have been implicitly presented to the Supreme Court in recent cases concerning the fifth and sixth amendment rights of suspects questioned by police. *See* Orozco v. Texas, 394 U.S. 324, 326 (1969); Miranda v. Arizona, 384 U.S. 436, 467-79 (1966). It is noteworthy that the Court's first consent case, Amos v. United States, 255 U.S. 313 (1921), spoke of both fourth and fifth amendment rights. *Id.* at 315-16.

26 United States v. Matlock, 42 U.S.L.W. 4252 (U.S. Feb. 20, 1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Frazier v. Cupp, 394 U.S. 731 (1969); Stoner v. California, 376 U.S. 483 (1964); Davis v. United States, 328 U.S. 582 (1946); Zap v. United States, 328 U.S. 624 (1946), *rev'd mem.*, 330 U.S. 800 (1947); Amos v. United States, 255 U.S. 313 (1921). In United States v. Mitchell, 322 U.S. 65, 69-70 (1944), the Court, without discussing the issue, assumed that a valid consent had occurred. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), police obtained an incriminating firearm with the cooperation of the suspect's wife. The Court did not consider this a "police search." *Id.* at 487. In *Bustamonte,* however, Justice Stewart, who authored *Coolidge,* discussed that case as if it had been decided as a consent case. *See* 412 U.S. at 234 n.15, 245.

27 255 U.S. 313 (1921).

28 Davis v. United States, 328 U.S. 582 (1946); Zap v. United States, 328 U.S. 624 (1946), *rev'd mem.*, 330 U.S. 800 (1947).

The doctrine of "implied consent" has developed in a different context than that of a "consent search." Implied consent applies to persons who agree to regulatory inspections by entering a certain business (such as the sale of liquor) or engaging in an activity (such as driving a motor vehicle) that requires licensing by the government. In return for the privilege of engaging in the regulated business or activity, the person impliedly consents to intrusions by those authorized to enforce the regulations and who would otherwise be forbidden from doing so by the fourth amendment. No actual consent is necessary to validate an "inspection," which in reality may be a search of a person or premises covered by the "implied consent" rule. The distinction between consent and implied consent was

evidence seized. It is possible, nonetheless, to discern in the remaining pre-*Bustamonte* opinions a basic, although skeletal, consent search doctrine upon which the lower federal courts and several state courts have relied.

The Court's brief but instructive treatment of the consent issue in *Amos* arose out of a whiskey tax prosecution. Internal Revenue collectors, acting in the daytime but without a warrant, went to Amos' home. Not finding him there, they told his wife that they "had come to search the premises 'for violations of the revenue law.' "[29] After Amos' wife opened the adjacent store, they searched it and found illicitly distilled whiskey. They proceeded thereafter to search his home where they found more contraband liquor. Some of the liquor seized from the defendant's home was admitted into evidence.[30] The Court unanimously held that the admission was unlawful because the search was "in plain violation of the Fourth and Fifth Amendments to the Constitution of the United States."[31] The government had argued that Amos' wife had consented to the search and therefore the fruits of that search should have been admitted.[32] To this the Court retorted:

> The contention that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.[33]

Despite its brevity on the consent issue, *Amos* was significant in at least two respects. First, it implied that a valid consent to a search constituted a waiver of rights, although in deciding the validity of the wife's alleged consent it did not distinguish between the fourth and

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made by Justice White in United States v. Biswell, 406 U.S. 311 (1972):

> In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

Id. at 315. *See also* State v. Conners, 125 N.J. Super. 500, 311 A.2d 764 (Monmouth County Ct. 1973) (driver of motor vehicle held to have given "implied consent" for submission to breathalyzer test); Harlan v. State, ——N.H.——, 308 A.2d 856 (1973) (ninety-day suspension of driving privileges of driver who initially refused breathalyzer test but subsequently changed her mind based on "implied consent").

29 255 U.S. at 315.

30 *Id.*

31 *Id.* at 315-16.

32 *Id.* at 316-17.

33 *Id.* at 317.

fifth amendment rights which the search had violated. Secondly, the Court made it clear that the waiver of these rights was not to be lightly inferred. It found that the wife's acquiescence to the search was a consequence of "implied coercion" on the part of the agents, thus precluding any finding of waiver. However, the question of whether one's rights could be waived by another party without his knowledge or consent was left undecided.[34]

The next Supreme Court decision which can be considered a "consent" case, *Davis v. United States*,[35] involved a violation of World War II gas-rationing laws. Davis, a service station owner, was arrested as a black marketeer after his attendant made an illegal sale to investigating agents.[36] After obtaining the coupon box key from Davis and examining his gasoline storage tanks, the agents informed him that there was a discrepancy between the number of stamps and the quantity of fuel sold.[37] Although Davis assured the agents that he had the missing coupons in his inner office, during the course of an hour-long interrogation he refused to open the office door.[38] Not until he observed an agent shining a flashlight through a rear window of his inner office in an apparent attempt to forcibly open the window did he relent, saying: "He don't need to do that. I will open the damned door."[39]

Justice Douglas, writing for the Court, simply disregarded the *Amos* waiver approach while nominally distinguishing that case on its facts.[40] Far more concerned with the nature of the items seized and the character of the place searched—the coupons were government property and the place was a business premises—than he was with the subject's consent, Justice Douglas found a valid consent in Davis' rather grudging acquiescence.[41]

Government searches, as Justice Douglas explained, had been treated by the Court as involving "interplay" between fourth and fifth amendment rights. These decisions had "largely developed out of cases

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34 The implication in *Amos* that consent is a waiver issue, 255 U.S. at 317, coupled with the Court's failure to distinguish fourth amendment rights from other constitutional rights for purposes of determining the validity of the waiver, would subsequently have an impact on lower federal and some state court decisions. *See, e.g.*, Salata v. United States, 286 F. 125 (6th Cir. 1923); United States v. Kelih, 272 F. 484 (S.D. Ill. 1921); Meno v. State, 197 Ind. 16, 164 N.E. 93 (1925).

35 328 U.S. 582 (1946).

36 *Id.* at 585.

37 *Id.* at 585-86.

38 *Id.* at 586.

39 *Id.* at 587.

40 *Id.* at 592-93.

41 *Id.* at 593.

involving the search and seizure of *private* papers."[42] In this case, however, the rationing coupons had never become the private property of the holder. They "remained at all times the property of the Government and subject to inspection and recall by it."[43] The defendant was merely the custodian of government property. Thus, the "permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand [was] one of right."[44]

The factual distinctions between *Amos* and *Davis* were not quite as clear as Justice Douglas made them appear. He characterized the *Amos* search as one of a private residence, and the seizure as one involving private property. Yet, the initial search was of Amos' business, and some of the agent's testimony concerned liquor seized from the business premises.[45] Furthermore, the contraband liquor was no more the private property of Amos than were the coupons the private prop-

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42 *Id.* at 587-88 (emphasis in original). This general characterization of earlier search and seizure cases failed to consider that under the "mere evidence" rule of Gouled v. United States, 255 U.S. 298 (1921), a companion case to *Amos*, private papers in which the government had no interest other than for their evidentiary value could not be seized at all.

> Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks Cases, supra*, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

Id. at 309.

43 328 U.S. at 588. *See* note 28 *supra*. The decision by the Second Circuit in United States v. Davis, 151 F.2d 140 (2d Cir. 1945), *aff'd*, 328 U.S. 582 (1946), drew a clearer distinction between the consent issue and the regulatory nature of the search. 151 F.2d at 142. Judge Learned Hand, speaking for the court, expressed "some doubt whether a consent obtained under such circumstances should properly be regarded as 'voluntary.'" *Id.* Nevertheless, while recognizing the judicial confusion concerning the permissible scope of a search incident to arrest, the court upheld the seizure of the coupons as a valid incident of Davis' arrest. *Id.* at 143-44.

Judge Frank's concurring opinion underscored the court's rejection of the government's contention that consent may automatically be implied in "regulatory" searches. *Id.* at 144. On appeal, the government's position was ultimately adopted by the Supreme Court. 328 U.S. at 588-89.

44 328 U.S. at 593 (emphasis added by the Court). For Judge Frank's rejection of this argument see note 43 *supra*.

45 255 U.S. at 315. Although *Amos* deals solely with evidence seized from a search of the home, the only consent indicated in the opinion was one which permitted a search of the *business* premises. *See id.*

erty of Davis.[46] Additionally, it would seem that the conduct of the agents in *Davis* implied greater coercion than did the government's "demand" to search in *Amos*.[47]

Although Justice Douglas took into account all the surrounding circumstances, it is clear that the nature of the business and the items sought were crucial to his analysis.[48] The real distinction between *Amos* and *Davis* must rest on the view that Davis, by engaging in a

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46 The notion that contraband cannot be legally possessed or owned by anyone except the state was discussed in Boyd v. United States, 116 U.S. 616, 623-24 (1886). Justice Bradley indicated:

> [T]he seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own Revenue Acts from the commencement of the Government.

Id. at 623 (footnote omitted). The Court, in dictum, further observed that

> in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment . . . .

Id. at 624.

Although *Boyd* also excludes contraband from the category of unreasonable searches and seizures, it does not, however, appear to except it from the warrant requirement. The fact that the government may have a statutory or common law right to possession of contraband articles does not, in itself, amount to a preemption of the warrant requirement. *See, e.g.*, United States v. Jeffers, 342 U.S. 48, 52-54 (1951); Agnello v. United States, 269 U.S. 20, 31-33 (1925).

47 Davis was under arrest and was the actual person against whom the search was directed. After explicit demands to search his office were not complied with, the government agent took certain actions at the office window which the Court found to constitute a threat to break in. 328 U.S. at 586-87. To the contrary, Amos' wife was not the one under arrest, and her consent to search was obtained after a single, seemingly polite request was made. 255 U.S. at 315. Also, unlike Amos' wife, Davis at first refused to permit the search, and acquiesced only when it seemed that his refusal would ultimately prove futile. 328 U.S. at 586-87.

The Court made it clear that the real distinction between the two cases rested on the nature of the items sought.

> Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in this situation is not protected against the production of incriminating documents . . . . The strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here. The right of privacy, of course, remains. But, as we have said, the filling station was a place of business, not a private residence. The right to inspect existed. And where one is seeking to reclaim his property which is unlawfully in the possession of another, the normal restraints against intrusion on one's privacy, as we have seen, are relaxed.

Id. at 593 (emphasis added by the Court) (citation omitted).

48 *See* note 47 *supra*.

business which involved the handling of documents considered to be government property, had yielded a large measure of his fourth and fifth amendment rights with respect to those papers. Thus, he had impliedly consented[49] to their governmental inspection.[50]

The concept that one who does business with the government may sacrifice some of his constitutional rights was emphasized more forcefully in *Zap v. United States*,[51] a companion case to *Davis*. Zap, a naval contractor, was charged with defrauding the government by "skimming off" on a contract.[52] He was expressly required under the terms of his contract to keep his books open to government inspection. F.B.I. agents conducted an inspection over Zap's protest that they had no such authority. The agents discovered an incriminating check which they seized.[53] Zap did not consent to the taking of the check, as the Court acknowledged, but as it also noted, "there was no wrongdoing in the method by which the incriminating evidence was obtained."[54] The Court found that Zap had waived his fourth and fifth amendment rights when he agreed to permit inspection of his accounts and records in return for obtaining government business.[55] Since the waiver in effect occurred at the time the contract was signed, and therefore prior

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49 The *Davis* decision may be considered as a bridge between the modern "implied consent" doctrine and the common law property concepts, which permitted a wider latitude in searches for property belonging to the searcher than for property owned by the person whose premises were being searched.

50 Justice Marshall, in challenging *Bustamonte's* reliance on *Davis*, emphasized that the "mere evidence" rule, although no longer viable, was critically important in shaping the outcome of that case. He also observed that the Court in *Davis* "explicitly disclaimed stating a general rule for ordinary searches for evidence" because the documents sought in that case were government property. 412 U.S. at 279 n.4 (Marshall, J., dissenting).

Judge Hand, in his Second Circuit opinion in *Davis*, found that the defendant did not forfeit any constitutional protections when dealing in a regulated business during a time of national emergency. He refused to uphold the search as a regulatory inspection because of the agents' failure to comply with procedural requirements for such inspections. He did, however, find the seizure of the coupons lawful since they were obtained during a search incident to an arrest. United States v. Davis, 151 F.2d 140, 143-44 (2d Cir. 1945).

51 328 U.S. 624 (1946), *rev'd mem.*, 330 U.S. 800 (1947).

52 *See* 328 U.S. at 626. Zap had a contract for experimental flight work with the Navy under which he was to be paid on a cost-plus basis. He paid a pilot approximately $2,500 for the flight tests and then certified to the government that he had paid the pilot $4,000. *Id.*

53 *Id.* at 627-28.

54 *Id.* at 630.

55 *Id.* The Court held that:

> The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts.

Id.

to the actual inspection, the Court recognized that the government could have compelled production of all Zap's records and documents related to the contract, including the check.[56]

Justice Frankfurter's dissent in *Zap* also recognized the government's right to search the defendant's records on the basis of a contractual waiver. Consequently, he found it unnecessary to consider the problem of voluntary consent. He distinguished, however, between the right to search and the government's purported right to dispense with fourth amendment requirements when making a seizure.[57]

Justice Frankfurter's dissent in *Davis*,[58] a classic explication of the fourth amendment's genesis and purpose,[59] took issue with the government's right to conduct a search and seizure. His discussion of the voluntariness issue was brief. Voluntariness, he said, means in law simply "what everybody else means by it."[60] He believed the test should have been "whether the consent obtained from Davis was, as a psychological fact, a voluntary act."[61] He emphasized that the real underpinning of *Davis* was the nature of the items sought rather than the nature of the consent obtained. To recognize a voluntary consent on such a basis would "distort familiar notions on the basis of which the law has heretofore adjudged legal consequences."[62]

The conceptual development of the elements of fourth amendment waiver was given further definition in *Johnson v. United States* (hereinafter *Johnson*).[63] Alerted by a confidential informer that persons were smoking opium in the hotel where Johnson was staying, several federal narcotics agents and a Seattle detective went to the hotel. The smell of burning opium in the hallway led them to Johnson's room. They knocked, and after a slight delay during which they identified themselves, Johnson opened the door. "The officer said, 'I want to talk to you a little bit.' " Johnson then " 'stepped back acquiescently and admitted [the officers].' "[64] Johnson was then arrested, and a sub-

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56 *Id.* at 628-29. *Zap* was subsequently reversed by the Court without opinion. 330 U.S. 800 (1947).

57 328 U.S. at 632 (Frankfurter, J., dissenting).

58 328 U.S. at 594-616. Justice Murphy joined in Justice Frankfurter's dissent. *Id.* at 594. Justice Rutledge, in a separate dissent, stated that "Davis' so-called consent was induced by [the flashlight-wielding officer's] apparent compulsion, the very kind of thing the Fourth Amendment was designed to prevent." *Id.* at 623.

59 *Id.* at 603-16.

60 *Id.* at 600.

61 *Id.*

62 *Id.*

63 333 U.S. 10 (1948).

64 *Id.* at 12.

sequent search of her room revealed opium.[65] The Court held that her acquiescence to the officers' entry was not consent:

> Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.[66]

The Court's discussion of the consent issue in *Johnson* was even briefer than the one in *Amos*.[67] The *Johnson* opinion, however, significantly added to the latter's characterization of consent as a waiver. *Johnson* required, in addition, that the waiver be "understanding and intentional."[68] In recognizing these elements, Justice Jackson, writing for the Court, did not mention the standard for waiver of rights at trial which had been established ten years earlier in *Johnson v. Zerbst* (hereinafter *Zerbst*).[69] However, his description of a valid fourth amendment waiver as "understanding and intentional" is similar to the *Zerbst* description of waiver as "an intentional relinquishment or abandonment of a known right or privilege."[70] Further, Justice Jackson's failure to cite or discuss either *Davis* or *Zap*, although those cases had been decided only two years earlier, adds weight to the argument that they should not be considered as typical consent search cases.[71]

The Court next passed on the validity of a consent search in a 1968 case, *Bumper v. North Carolina*.[72] The grandmother of a rape suspect "consented" to a search of her house, in which the suspect was

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65 *Id.*

66 *Id.* at 13. This paragraph comprised the Court's entire discussion of the consent issue.

67 *See* note 66 *supra.*

68 333 U.S. at 13.

69 304 U.S. 458 (1938). The issue in *Zerbst* was whether the defendant had waived his right to counsel. Justice Black, writing for the majority, reasoned that a waiver of fundamental constitutional rights had to be established by a clear showing of an intelligent and competent waiver under the "particular facts and circumstances surrounding [each] case." *Id.* at 464. He further observed that the Court does " 'not presume acquiescence in the loss of fundamental rights.' " *Id.* (quoting from Ohio Bell Telephone Co. v. Public Util. Comm'n, 301 U.S. 292, 307 (1937)).

70 304 U.S. at 464.

71 Justice Douglas, author of *Davis* and *Zap*, was one of five Justices who joined in Justice Jackson's majority opinion in *Johnson*. 333 U.S. at 11. Chief Justice Vinson and Justices Black, Reed, and Burton dissented without opinion. *Id.* at 17.

72 391 U.S. 543 (1968). Although Stoner v. California, 376 U.S. 483 (1964), was decided before *Bumper*, it did not turn upon the question of voluntariness. However, it did raise the issue of third party consent. The main thrust of that case was directed at whether a hotel clerk could permit police to search the room of a guest who was a robbery suspect. *Id.* at 487-88. For a more detailed discussion *see* pp. 257-58 *infra*. *Cf.* United States v. Jeffers, 342 U.S. 48, 49-52 (1951).

residing, after four law enforcement officers told her that they had a warrant to search.[73] Justice Stewart, writing for the majority, stated:

> The issue thus presented is whether a search can be justified as lawful on the basis of consent when the "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.[74]

Citing several lower federal court decisions, the Supreme Court stated for the first time that the prosecution "has the burden of proving that the consent was, in fact, freely and voluntarily given."[75] Relying upon both *Amos* and *Johnson,* Justice Stewart added:

> This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. . . .
>
> When 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.[76]

Bumper merely reiterated with approval the great weight of state and lower federal court authority[77] which had already decided the question of the validity of "consents" granted in response to overt assertions of official authority. However, the Court did add to the *Amos-Johnson* consent test by placing the burden of establishing a free and voluntary consent on the prosecution.[78]

Thus, *Amos, Johnson,* and *Bumper* each held invalid a "consent" that was no more than mere acquiescence to a demand under color of lawful authority. These holdings were consistent with the waiver approach to fourth amendment rights, and only *Bumper* failed to rest its holding explicitly on this waiver rationale.[79]

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73 391 U.S. at 546.

74 *Id.* at 548 (footnote omitted).

75 *Id.*

76 *Id.* at 548-50 (footnote omitted).

77 *See* pp. 227-40 *infra.*

78 391 U.S. at 548. The Court, however, was hampered by an ambiguous and contradictory record which indicated that the grandmother may have of her own volition consented to the search. *Id.* at 547 & n.8. It, therefore, did not apply a "totality of the circumstances" voluntariness standard.

Justice Black directed his vehement dissent in large part at the exclusionary rule. *Id.* at 560-61. Further, he would have applied the totality approach and have found her consent valid. *Id.* at 555-57. In so arguing, Justice Black placed heavy emphasis on the personality and disposition of the consenting individual. *Id.* at 556-57 & nn.5 & 6.

79 Perhaps the rationale behind the Court's failure to broach the possibility of apply-

The Court again confronted a possible consent issue in *Coolidge v. New Hampshire*,[80] but ultimately determined that the police activity in question was neither a search nor seizure.[81] Coolidge was under investigation for murder and had already discussed the case with the police. Two officers questioned his wife at the defendant's home[82] and asked her whether her husband had any guns. Unaware that Coolidge, who was then at the police station, had already shown three of his guns to other officers during a previous visit, she replied, " 'Yes, I will get them in the bedroom.' "[83] The police accompanied her to the bedroom, where she took four guns out of the closet. Indicating to the officers that she had nothing to hide, she surrendered the guns as well as several articles of her husband's clothing.[84]

Without once using the word "consent," Justice Stewart rejected the argument that Mrs. Coolidge acted "as an 'instrument' of the officials, complying with a 'demand' made by them."[85] The conduct of the officers was not "such as to make her actions their actions for purposes of the Fourth and Fourteenth Amendments and their attendant exclusionary rules."[86] The Court acknowledged the forces impelling the wife to cooperate with the police, particularly her desire to exonerate her absent spouse.[87] However, Justice Stewart reasoned that the exclu-

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ing a "totality of the circumstances" voluntariness test in these cases can be traced to the blatant assertion of authority by the police in each situation.

80 403 U.S. 443 (1971). Two years prior to *Coolidge*, the Court decided Frazier v. Cupp, 394 U.S. 731 (1969), which involved a third party consent issue. Although the issue was implicitly raised, however, the Court did not address itself to the voluntariness of the consent. Frazier's cousin Rawls was placed under arrest in his home for a murder for which Frazier was subsequently convicted. The police asked Rawls for his clothing, and were directed to a duffel bag that Frazier and Rawls had used jointly during their travels. *Id.* at 740. The Court simply noted, without explanation, that both Rawls and his mother consented to the search of the bag. *Id.* It might have been argued that Rawls, being under arrest, was inherently coerced into granting consent. The effect of the mother's consent, apparently given at the same time Rawls consented, might also have been considered coerced. Therefore, by not addressing these potential issues, the Court added little to the development of the law concerning the voluntariness test for consent searches. For a more complete discussion of *Frazier*, see pp. 258-59 *infra*.

81 403 U.S. at 489-90.

82 *Id.* at 446.

83 *Id.* at 486.

84 *Id.* at 486.

85 *Id.* at 487.

86 *Id.*

87 *Id.* at 487-88. Other motivations may have been her desire for

> openness and honesty, the fear that secretive behavior [would] intensify suspicion, and uncertainty as to what course [would] most likely . . . be helpful to the absent spouse.

Id. at 488.

sionary rule was not fashioned to bar evidence obtained as a result of these forces in the absence of official misconduct.[88] The wife's behavior was considered to be simply "a spontaneous, good-faith effort by [her] to clear [her spouse] of suspicion."[89] Thus, this episode was not treated by Justice Stewart as one involving a consent search because no consent to search was solicited. Nor was there a seizure since the wife relinquished the evidence of her own accord.[90]

Supreme Court case law on consent searches prior to May, 1973, might well be characterized as underdeveloped and uncomplicated. Content to rest its decisions on broad generalities, the Court had not yet undertaken the difficult task of providing the judiciary with specific guidelines. With the exceptions of *Davis* and *Zap,* the consent cases were free of the close decisions, inconclusive holdings, and term-to-term inconsistencies that have bedeviled the Court on other fourth amendment issues.[91]

A few general guidelines, however, did emerge in the developing body of Supreme Court case law. A valid consent was considered to represent a waiver of fourth amendment rights, with the government bearing the burden of showing that a waiver had been validly obtained. To be valid, the waiver had to be "understanding" and "intentional," and even implied coercion inherent in a show of governmental authority would invalidate the search.[92] Within these rather vague limits, lower federal courts were left free to innovate.

STATE CONSENT CASES

A review of state court decisions which dealt with consent searches prior to the *Amos* decision in 1921 indicates that these opinions did very little to formulate workable rules of law in this area. These early consent cases were based on a cause of action in trespass, and were resolved by submission of the consent question to the jury.[93] If a crim-

88 *See id.* at 489.

89 *Id.* at 490 (footnote omitted).

90 *Id.* at 489. It should be noted that *Bustamonte,* written by Justice Stewart, relied on *Coolidge's* "totality of the circumstances" test, for determining the voluntariness of a consenting party's cooperation with the police. 412 U.S. at 234 n.15.

91 *See* note 1 *supra.*

92 The Court has indicated, however, that the subject of the consent need not be free of all pressure, since even a party under arrest could conceivably furnish valid consent. *See, e.g.,* Frazier v. Cupp, 394 U.S. 731, 740 (1969).

93 *See, e.g.,* McClurg v. Brenton, 123 Iowa 368, 98 N.W. 881 (1904); Grim v. Robison, 31 Neb. 540, 48 N.W. 388 (1891). In *McClurg,* the Iowa supreme court overturned a directed verdict for the defendants based on the plaintiff's alleged consent to a nighttime search of

inal offense was charged, the issue would be conveniently disposed of on the ground that the validity of consent was immaterial since the evidence seized would still be admissible at trial.[94] It was not until after *Amos* that many state courts began a systematic analysis of consent searches, most of which arose in investigations of violations of prohibition under the Volstead Act.[95]

The Waiver Approach

One such carefully reasoned opinion was *Meno v. State*.[96] After being confronted with what turned out to be an invalid warrant to search his "dry beer" establishment, the defendant told state and federal officers, "go right on and search."[97] The Indiana court, influenced by *Amos* as well as by several lower federal and state decisions, held that the defendant's actions "did not constitute an invitation to search or a waiver of his rights under the Constitution against searches and seizures.[98]

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his premises. The court felt that the actions and testimony of the city officials who conducted the warrantless search raised a reasonable doubt as to the validity of the consent. 123 Iowa at 371-72, 98 N.W. at 882. In *Grim*, the Nebraska supreme court recognized consent to be a valid defense to a trespass action filed against the owner of stolen property seeking its recovery. 31 Neb. at 542-43, 48 N.W. at 389. In Smith v. McDuffee, 72 Ore. 276, 142 P. 558 (1914), these two decisions comprised part of a discussion dealing with the waiver of constitutional protection against searches and seizures. In *Smith*, voluntariness was found where the plaintiff's wife acted "like any other honest person" under the circumstances and permitted a search. *Id.* at 286-87, 142 P. at 561.

94 It was not until after the Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643, 655 (1961), that the states were bound under the federal exclusionary rule set out in Weeks v. United States, 232 U.S. 383, 398 (1914). Nonetheless, many states had already adopted statutory provisions to protect against abuses by their own law enforcement officers in the course of securing evidence. 367 U.S. at 652 n.7. *But see* State v. Griswold, 67 Conn. 290, 34 A. 1046 (1896); Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905). In *Tucker*, evidence found after police officers had accepted the invitation of defendant's mother to search the premises was admitted on the basis that no abuse of process had occurred, even though the search went beyond the limits of the original warrant. The lack of authority to consent to a search was found to be immaterial since a trespass by the police would give rise to a civil action. *Id.* at 468-70, 76 N.E. at 131. The Supreme Court of Errors of Connecticut in *Griswold* adopted the narrow view that the state constitutional limitation on searches and seizures restricted only legislative action and court rules, and did not apply to unauthorized, illegal police activity. Moreover, the court construed Boyd v. United States, 116 U.S. 616 (1886), as applying only to written incriminating evidence and not "mere inanimate goods" taken from the defendant. 67 Conn. at 305-07, 34 A. at 1047-48. For a discussion of *Boyd* see note 46 *supra*.

95 National Prohibition Act of 1919, ch. 85, tit. II, 41 Stat. 307 (repealed 1935).

96 197 Ind. 16, 164 N.E. 93 (1925).

97 *Id.* at 20, 164 N.E. at 94-95.

98 *Id.* at 24, 164 N.E. at 96. In circumstances such as these, where an improper display of authority preceded the consent, courts were generally protective of the rights of de-

Other state courts, realizing that a valid consent required more than the mere submission to a request to search, denied the admissibility of evidence obtained without a warrant where the suspect did not protest or indicate his lack of consent.[99] Thereafter, in many jurisdictions the waiver concept was raised to the level of a presumption against the relinquishment of basic constitutional protections; acquiescence would no longer suffice to abrogate personal rights of such magnitude. A strong statement of this principle was articulated by the Wyoming supreme court in *Tobin v. State*,[100] in which a consent search undertaken without a warrant was invalidated:

> First of all, we believe that a waiver of the citizen's fundamental constitutional rights must appear by clear and positive testimony, and, if the search and seizure are based upon the proposition that consent was given to the officers, there should be no question about it in the evidence submitted.
>
> . . . The courts do not put the citizen in the position of either contesting an officer's authority by force, or waiving his constitutional privileges.
>
> And therefore evidence obtained by search can only be used where the testimony clearly shows that the consent was really voluntary and with a desire to invite search, and not done merely to avoid resistance.[101]

Thus, from its inception, the acceptance of the waiver rationale expressed in *Amos* gained momentum in the state courts and became the prevailing view in a majority of states by the late 1930's.[102] Nevertheless, there remained a few jurisdictions which did not look beyond the mere act of acquiescence itself.[103]

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fendants. *See, e.g.*, People v. Reid, 315 Ill. 597, 146 N.E. 504 (1925); Morton v. State, 136 Miss. 284, 101 So. 379 (1924).

99 State v. Owens, 302 Mo. 348, 351-58, 259 S.W. 100, 101-02 (1924); People v. Jakira, 118 Misc. 303, 309, 193 N.Y.S. 306, 312 (Ct. Gen. Sess. 1922). In a fact situation almost identical to that in *Amos*, the Kentucky court of appeals in Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101 (1923), found that consent resulting from implied coercion was not effective. *Id.* at 842, 250 S.W. at 102. *Duncan* was subsequently overruled on other grounds in Commonwealth v. Sebastian, 500 S.W.2d 417, 419 (Ky. 1973).

100 36 Wyo. 368, 255 P. 788 (1927).

101 *Id.* at 373-74, 255 P. at 789. Other courts had recognized that a party may consent to a waiver of constitutional rights merely because the proposition is supported by the great weight of authority. *See, e.g.*, People v. Weaver, 241 Mich. 616, 619-22, 217 N.W. 797, 798 (1928); *cf.* Hampton v. State, 148 Tenn. 155, 158-59, 252 S.W. 1007, 1008 (1923).

102 *See* Note, *Searches and Seizures—Effect of Coercion—Waiver of Constitutional Privilege by Wife in Husband's Absence*, 37 MICH. L. REV. 1155, 1155 (1939).

103 *See, e.g.*, Smuk v. People, 72 Colo. 97, 209 P. 636 (1922); State v. Burney, 346 Mo. 859, 143 S.W.2d 273 (1940); State v. Bliss, 18 S.W.2d 509 (Mo. 1929).

Waiver by acquiescence maintained its vitality in Missouri until its recent rejection in

The Totality of the Circumstances Approach

California is the most notable of those jurisdictions which have not adopted the waiver language. That state's wide latitude toward a consent given to law enforcement officials has been the subject of critical comment.[104] *People v. Michael*[105] is one example of a prominent California decision which is notable for its failure to apply the waiver principle. Although significant in its own right for its effect upon the development of California consent search law, *Michael*, authored by Justice Traynor, takes on even greater importance because it became the touchstone for the Supreme Court's formulation of the "totality of the circumstances" test advanced in *Bustamonte*.[106]

The factual circumstances which gave rise to the "California rule" in *Michael* involved a request by police officers to the mother of a drug suspect for "any narcotics in the house."[107] The mother produced a bottle containing a narcotic drug and stated: "This is all [my daughter] has."[108] The defendant daughter thereupon admitted knowledge of the narcotic substance, and, after further questioning, produced additional drugs and related paraphenalia.[109] The *Michael* court reasoned that while a mere failure to resist a search is not consent, these individuals had not asserted their rights against a warrantless search and had submitted to a courteous request without any strong showing of authority. Therefore, the result was a unanimous finding of a valid consent by both women.[110]

The opinion emphasized the point, later exaggerated by the Supreme Court in *Bustamonte*, that a contrary holding would seriously hinder officers in performing official duties. The court reasoned that in order to defeat a prosecution, the suspect would merely have to voluntarily reveal all the evidence damaging to himself and then allege "that he acted only in response to an implied assertion of unlawful

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State v. Witherspoon, 460 S.W.2d 281, 287-88 (Mo. 1970). However, this result was undoubtedly presaged in State v. Young, 425 S.W.2d 177 (Mo. 1968), where the state supreme court readopted its prior standard announced in State v. Owens, 302 Mo. 348, 259 S.W. 100 (1924). *But see* note 126 *infra*.

104 *See* Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78, 115-18; Note, *Criminal Law: Search and Seizure: New Limitations on the California Doctrine of Consent to Search*, 51 CALIF. L. REV. 1010, 1010 (1963).

105 45 Cal. 2d 751, 290 P.2d 852 (1955).

106 412 U.S. at 227.

107 45 Cal. 2d at 752, 290 P.2d at 853.

108 *Id.*

109 *Id.*

110 *Id.* at 754, 290 P.2d at 854.

authority."[111] Although *Michael* did not allude to any "waiver" of constitutional rights, neither can it properly be read to exclude such an approach. No arguments were raised against the concept in the court's decision. The court merely recognized that the individual characteristics of the person granting consent should be considered in resolving the voluntariness of the consent question.[112]

The Warnings Approach

Prior to the Supreme Court decision in *Miranda v. Arizona*,[113] very few state cases had dealt with the question of whether a person had to be informed of his right not to consent before a consent could be valid.[114] The *Miranda* Court held that a suspect could validly waive his right to be free from self-incrimination and his right to counsel only if he had been specifically advised of these fifth and sixth amendment rights at the outset.[115] Subsequent to *Miranda*, state courts were faced with the question of whether similar warnings had to be given before a party consenting to a search could waive his fourth amendment rights.[116]

The post-*Miranda* state cases dealing with this question can be divided into two different categories. Some of the cases held that if *Miranda* warnings had been given to an in-custody suspect, it was unnecessary to give a separate warning advising him of his right to refuse consent to a search.[117] These courts relied on the reasoning that *Miranda* warnings adequately served to put the suspect on notice of his right not to consent.[118] Although this approach does not require special fourth amendment warnings, it nonetheless recognizes the need for some

111 *Id. See* 412 U.S. at 230 (quoting from People v. Michael, 45 Cal. 2d at 754, 290 P.2d at 854 (1955)).

112 45 Cal. 2d at 753, 290 P.2d at 854.

113 384 U.S. 436 (1966).

114 *But see, e.g.*, People v. Zeigler, 358 Mich. 355, 363-65, 100 N.W.2d 456, 461 (1960).

115 384 U.S. at 444-45.

116 *See generally* Comment, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967).

117 Sleziak v. State, 454 P.2d 252 (Alas.), *cert. denied*, 396 U.S. 921 (1969). The court observed:

> [W]e hold that it was not necessary to advise appellant of his fourth amendment rights *after* appellant had been advised of his right to remain silent and of his right to the presence of either retained or appointed counsel . . . .

454 P.2d at 259 (emphasis added). For further cases on this point see State v. Frisby, 245 A.2d 786 (Del. Super. Ct. 1968); State v. Leavitt, 103 R.I. 273, 237 A.2d 309, *cert. denied*, 393 U.S. 881 (1968).

118 These courts generally followed the rule set forth in Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967) that "an automatic second-warning system misunderstands and downgrades the warnings required by *Miranda*." *See* pp. 235-36 *infra*.

form of warning. Other courts simply regarded warnings as unnecessary,[119] but they failed, however, to develop a cogent rationale to justify treating a waiver of fourth amendment rights as inferior to fifth and sixth amendment rights.[120]

Although some courts, exemplified by *Michael,* have developed the "totality of the circumstances" test for determining the voluntariness of the consent, the majority of state courts, while not going so far as to adopt a specific warnings requirement, have embraced the waiver approach.[121] An application of this waiver theory requires that the government prove that the person voluntarily and intelligently consented to the search with the knowledge that he need not have done so. It is significant that this majority position paralleled the approach developed by most federal courts in dealing with consent searches.

Lower Federal Consent Cases

While the weight of state authority generally characterized consent to search as a waiver of fourth amendment rights, federal case law appears to have adopted an even stronger position regarding knowing

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119 *See* People v. Roberts, 246 Cal. App. 2d 715, 55 Cal. Rptr. 62 (Ct. App. 1966); State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968); People v. Ledferd, 38 Ill. 2d 607, 232 N.E.2d 684 (1967); State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967); State v. McKnight, 52 N.J. 35, 53 n.4, 243 A.2d 240, 250 (1968); State v. Lyons, 76 Wash. 2d 343, 458 P.2d 30 (1969).

120 *See, e.g.,* State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967), in which the court relies on the needs of law enforcement to justify consent searches without warnings:

> [T]he United States Supreme Court has not applied the Miranda test to searches and seizures. Until it does so, if it ever does, we should not further shackle law enforcement.

Id. at 761, 150 N.W.2d at 917-18. *But see* State v. McCarty, 199 Kan. 116, 119-20, 427 P.2d 616, 619-20 (1967), where the court draws a constitutional distinction between the purposes of the fourth amendment and those of the fifth amendment.

121 *See, e.g.,* State v. Leavitt, 103 R.I. 273, 237 A.2d 309, *cert. denied,* 393 U.S. 881 (1968). The court stated:

> We are unrestrainedly in accord with the proposition that an accused's consent to a search is a waiver of the protection guaranteed to him by the constitutions of this state and the United States.

103 R.I. at 289, 237 A.2d at 318. *See also* State v. Kananen, 97 Ariz. 233, 235, 237-38, 399 P.2d 426, 427, 429 (1965); Sayne v. State, —— Ind. ——, 279 N.E.2d 196, 202 (1972); People v. Kaigler, 368 Mich. 281, 295, 118 N.W.2d 406, 413 (1962); State v. Little, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967); Commonwealth v. Wright, 411 Pa. 81, 84, 190 A.2d 709, 711 (1963). *But see* State v. King, 44 N.J. 346, 209 A.2d 110 (1965). The New Jersey supreme court adopted the position that "[w]hen an accused consents to a search of his premises, he relinquishes the Fourth Amendment protection which prohibits unreasonable searches and seizures." *Id.* at 352, 209 A.2d at 113. The court refrained from using waiver terminology, but it did require, however, that the consent be voluntary and that it "be 'unequivocal and specific' and 'freely and intelligently given.' " *Id.* The court thus examined all the facts and determined the consent to be valid under the "totality of the particular circumstances." *Id.* at 353, 209 A.2d at 114.

waiver. Although early state court opinions on the consent issue frequently cited *Amos* as persuasive authority, the lower federal courts were of course bound by that decision.

Enforcement of prohibition through the Volstead Act[122] was the major stimulus to the development of federal consent search law. However, even before *Amos*, a federal court, finding a gun-point "invitation" to search a home to be involuntary, took note of the disturbing implications of aggressive law enforcement ushered in by the Volstead Act.[123] A federal district court, in another pre-*Amos* decision, found a consent necessarily to be "a waiver of constitutional rights."[124] The court held that the acquiescent invitation, "[a]ll right; go ahead," communicated to a prohibition agent flashing his badge, constituted no such waiver, "but, on the contrary . . . [this] peaceful submission to officers of the law" was merely obeisance to authority and did not qualify as a valid waiver.[125]

Federal decisions coming after *Amos* referred to consent as a waiver of rights[126] that was required to be shown by "clear and positive testimony."[127] The significance of the courts' reluctance in these earlier cases to find a valid consent in a mere statement of assent may, however, have been diluted by the fact that some of these cases tended to involve consent "requests" based on invalid warrants[128] or other blatant displays of authority.[129] As police requests were tendered in an increasingly sophisticated fashion, courts became more concerned with the circumstances surrounding the consent.[130] However, the waiver concept was not lost. Particularly after the decision in *Zerbst*, with its admonition that "[a] waiver is ordinarily an intentional relinquish-

122 National Prohibition Act of 1919, ch. 85, tit. II, 41 Stat. 307.

123 United States v. Marquette, 271 F. 120, 122 (N.D. Cal. 1920), *aff'd*, 270 F. 214 (9th Cir. 1921). The trial court commented that

> [t]he outlawing of liquor by the Eighteenth Amendment did not abrogate either the Fourth or Fifth Amendment to the Constitution, and the zeal of the enforcement officers in pursuing this recent outlaw cannot be permitted to carry them without warrant across the threshold of the home.

271 F. at 122.

124 United States v. Slusser, 270 F. 818, 819 (S.D. Ohio 1921).

125 *Id.*

126 *See, e.g.*, Ray v. United States, 84 F.2d 654, 656 (5th Cir. 1936); Farris v. United States, 24 F.2d 639, 640 (9th Cir.), *cert. denied*, 277 U.S. 607 (1928); United States v. Kelih, 272 F. 484, 490-91 (S.D. Ill. 1921).

127 United States v. Kelih, 272 F. 484, 490-91 (S.D. Ill. 1921).

128 *See, e.g., id.* at 488.

129 *See, e.g.*, Ray v. United States, 84 F.2d 654, 655-56 (5th Cir. 1936); Farris v. United States, 24 F.2d 639, 639 (9th Cir.), *cert. denied*, 277 U.S. 607 (1929).

130 *See, e.g.*, United States v. Arrington, 215 F.2d 630, 635-37 (7th Cir. 1954); Judd v. United States, 190 F.2d 649, 651-52 (D.C. Cir. 1951).

ment or abandonment of a known right or privilege,"[131] the waiver requirement gained status as a crucial issue in cases where consent involved relinquishment of constitutional rights.

In *Judd v. United States*,[132] a frequently cited pre-*Miranda* decision, the District of Columbia Circuit held that a simple verbal act of permission was inadequate to constitute a valid waiver.[133] Emphasizing that the consenting party was under arrest at the time he granted permission[134] and that the permission itself was a rather weak acquiescence,[135] the court held the consent void and reaffirmed the concept that consent requires an intelligent and uncoerced waiver.[136] In the court's view, even "false bravado" might well fall short of voluntary consent.[137] This case inferentially raises, but leaves unanswered, the question of whether a valid waiver requires a specific showing that the consenting party had been previously informed of his right to withhold consent.

The issue of whether a request for a waiver of fourth amendment rights need be preceded by advice of the right to refuse was later dismissed by the Supreme Court in *Bustamonte*, with the casual observation that this "suggestion . . . has been almost universally repudiated by both federal and state courts."[138] Although the Court referred to

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131 304 U.S. at 464.

132 190 F.2d 649 (D.C. Cir. 1951).

133 *Id.* at 651-52.

134 *Id.* at 651.

135 *Id.*

136 *Id.* at 652.

137 *Id.* at 651. In the subsequent decision of Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954), the same court made clear its skepticism concerning the validity of any apparent consent obtained from one who is the object of an investigation or prosecution.

138 412 U.S. at 231 (footnotes omitted). The Court, however, did recognize that some federal courts had construed the waiver concept as requiring specific warnings. *Id.* n.13. In United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966), for example, the court in dictum determined that the arresting officer's failure to apprise the suspect of his fourth amendment right while he was in custody invalidated the consent. *Id.* at 744. *Nikrasch* relied in part on United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966), which had expressly held that "[t]he Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth." *Id.* at 269. The *Blalock* court reasoned:

> To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation.

Id. at 269-70. Having decided that the absence of warnings automatically invalidated the possibility of a valid waiver, the court in *Blalock* found it unnecessary to reach the issue of voluntariness. *Id.* See discussion pp. 260-61 *infra.*

In a later case, United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968), the court, relying on *Nikrasch* and *Blalock*, held separate consent search warnings to be an absolute prerequisite to a valid waiver of fourth amendment rights, and discerned that *Miranda*

several federal appellate cases to support this far-reaching assertion,[139] analysis discloses that some of these cases did not reject the notion of warnings outright. In *Gorman v. United States*,[140] for example, the First Circuit stressed the fact that the arrested suspect had already received *Miranda* warnings,[141] but nothing in *Gorman* intimated that an unknown right could be validly waived. The court reasoned that implicit in the *Miranda* warnings was the admonition that items found in a search could be used against the suspect.[142] *Miranda* warnings were deemed adequate to place the suspect on notice of his right to withhold *any* information from the police. One warning at the outset sufficed for the interrogation, and a request for consent did not involve "a different order of risks . . . not . . . covered at the threshold" by the *Miranda* warnings.[143] Civilized police standards were the objectives of rules governing searches, and in the court's view, this objective was satisfied by *Miranda* warnings given at the outset of the arrest.[144] Thus, in this context, specific warnings of the right to withhold consent were not necessary.[145]

warnings did not offer adequate notice of the right not to consent to a search. 280 F. Supp. at 636. The court propounded the view that

> [l]acking an explicit warning as to his rights under the Fourth Amendment, it can never be known with certainty whether a defendant voluntarily waived those rights.

Id. (footnote omitted). Although the constitutional premise postulated in this line of cases has been questioned, criticized, and ultimately overruled in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), these decisions nonetheless demonstrate that some lower federal courts were in the process of developing a consent search standard which mandated the communication of specific fourth amendment warnings as a condition precedent to a valid waiver.

139 412 U.S. at 231 n.13.

140 380 F.2d 158 (1st Cir. 1967).

141 *Id.* at 161, 164.

142 *Id.* at 164. *Bustamonte's* ostensible reliance on United States v. Noa, 443 F.2d 144 (9th Cir. 1971), and United States v. Goosbey, 419 F.2d 818 (6th Cir. 1970) is misplaced for the same reason. 412 U.S. at 231 n.13. In both *Noa* and *Goosbey* the defendants had received adequate *Miranda* warnings. 443 F.2d at 147; 419 F.2d at 819. At a minimum, such warnings placed the subjects on notice that they had the right to remain silent. Such right arguably includes the right to withhold verbal assent to a request for a search.

143 380 F.2d at 164.

144 *Id.*

145 The *Gorman* court appears to have propounded two theories for rejecting the necessity of specific fourth amendment warnings. The first view perceives that threshold *Miranda* warnings protect against the same order of risks as is involved in the search of a suspect's premises. The alternate position interprets *Miranda* warnings as sufficient to maintain civilized police standards, thereby ostensibly satisfying the objective of reasonableness under the fourth amendment. *Id.*

Under either view, however, one can argue that the court did not intend to preclude the possibility of fourth amendment warnings being given where *Miranda* warnings were not applicable. This "no warning" decision, therefore, should be confined to the facts of this case.

Judge Coffin, the author of *Gorman,* had no difficulty in applying the *Zerbst* waiver standard[146] while nonetheless holding that a consent to search need not be entirely free from pressure to waive rights.[147] The case involved purported consents obtained from two robbery suspects.[148] Defendant Roche, although neither under arrest nor in custody, had been given *Miranda* warnings. After discussing his purported sales business, interviewing agents asked for permission to check his luggage. "Be my guest," he replied.[149] The court was of the opinion that the repeated warnings to the suspect by the police that he need not talk at all provided a good example of fair and efficient police investigative practices. It was true that he faced a dilemma; a search would lead to his arrest, while refusal to permit the search would harden the agent's already strong suspicions. But pressure from the realization that the "jig [was] up" did not render the apparent consent ineffective.[150] *Gorman,* therefore, is particularly significant in that the First Circuit required knowledge of the right to refuse cooperation[151] and found such knowledge here.[152] Knowing waiver was deemed sufficient to validate the consent, notwithstanding that such consent may well have been the product of pressure generated by the unhappy circumstances in which the consent subjects found themselves.

Another decision noteworthy for its emphasis on the elements of waiver was *Rosenthall v. Henderson.*[153] In that case, the Sixth Circuit, in affirming a grant of federal habeas corpus relief to a state prisoner, underscored the view that consent to a search "must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred."[154] Police failure to give warnings about the right to refuse consent is only one factor to be considered, and its weight varies.[155] Awareness of one's right to withhold consent

146 *Id.* at 163.

147 *Id.* at 165.

148 The first consent was given by defendant Gorman at the police station after he was arrested and had been given proper *Miranda* warnings. In response to a request by an FBI agent to search his motel room, Gorman replied: "Go ahead; look in the room." *Id.* at 161.

149 *Id.* at 162.

150 *Id.* at 165.

151 The fact that *Gorman* expressly indicated that knowing waiver was essential to valid consent, contrasts sharply with the Court's view in *Bustamonte* that an advice requirement would tend to destroy consent searches as an investigative aid. *Compare id.* at 163, *with* 412 U.S. at 231-32.

152 380 F.2d at 163.

153 389 F.2d 514 (6th Cir. 1968).

154 *Id.* at 515-16 (citing Simmons v. Bomar, 349 F.2d 365, 366 (6th Cir. 1965)).

155 389 F.2d at 516.

was considered to be the central issue in this case, and without such awareness, however obtained, there could be no valid consent.[156] The court in *Rosenthall* found nothing in the record " 'to indicate that petitioner was in fact aware of his right to refuse to give his consent.' "[157]

The approach of other circuits to consent searches on the particular issue of waiver do not appear to vary significantly from the reasoning of *Gorman* and *Rosenthall*.[158] While the circumstances surrounding the consent were explored in these cases, it was never hinted that a "totality of the circumstances" test could override an "intelligent relinquishment" requirement. In *Perkins v. Henderson*,[159] for example, the Fifth Circuit found invalid a consent to search obtained from a burglary suspect who was not in custody or under arrest, and who was, furthermore, the cousin of one of the interrogating officers.[160] The invalidity of the consent apparently rested on the failure of the officers to inform the suspect of his right to refuse consent. Referring to *Zerbst*, the court emphasized that fourth amendment rights must be knowingly and intelligently relinquished, commenting that "[a] simple admonition by the officers that the search could not and would not be conducted without [petitioner's] consent would have sufficed."[161] Significantly, in *Bretti v. Wainwright*,[162] the Fifth Circuit reaffirmed the critical importance of the knowledge factor. It was able to uphold the validity of a consent largely because the state robbery suspect was advised that he need not consent, despite the possibility that the voluntariness of the consent may have been tainted by coercion due to an unlawful arrest.[163] Thus, these cases demonstrate that the assertion that specific warnings do not constitute an absolute prerequisite was not as "universal" as the *Bustamonte* Court would have one believe.[164]

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156 *Id.*

157 *Id.* (quoting from the unreported memorandum opinion of the district court).

158 *See, e.g.*, United States v. Hayward, 471 F.2d 388, 389-90 (7th Cir. 1972); Rees v. Peyton, 341 F.2d 859, 862 (4th Cir. 1965); Burge v. United States, 332 F.2d 171, 173 (8th Cir.), *cert. denied*, 379 U.S. 883 (1964).

159 418 F.2d 441 (5th Cir. 1969).

160 *Id.* at 442.

161 *Id.*

162 439 F.2d 1042 (5th Cir.), *cert. denied*, 404 U.S. 943 (1971).

163 439 F.2d at 1045-46. The court specifically observed:

> In the instant case the presence of these [*Miranda*] warnings leads us to conclude that any coercion flowing from the possible illegality of appellant's arrest was dissipated.

Id. at 1046.

164 *See* note 138 *supra* and accompanying text. For cases contrary to the *Bustamonte*

The decisions of the Ninth Circuit are singularly illustrative of the general approach espoused by the federal circuits that a consent to search requires a clear showing of knowing waiver. No federal court of appeals had surpassed the Ninth Circuit in articulating the proposition that the waiver inherent in a consent search must be made with knowledge of the fourth amendment rights which the subject is waiving.[165] The requirement of a showing of such knowledge, on the part of either federal or state defendants, was stringently enforced by that court as to consent subjects not under arrest as well as to searches of places not generally considered as intrusive as the search of a residence.[166]

In *Cipres v. United States*,[167] customs agents asked a prospective airline passenger, whom they suspected of smuggling marijuana, if they could search her bags. Denying that they contained drugs, she answered, "Yes, I have nothing to hide," but claimed that she had left her keys in New York. The agents examined the bags, found them unlocked, and discovered the marijuana inside.[168] The court emphasized that the central issue was whether the suspect had waived her constitutional immunity from unreasonable search and seizure.[169] In reaching a determination of this issue, the court propounded the following standard:

> Waiver, in this context, means the "intentional relinquishment of a known right or privilege." . . . Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. . . . The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did.[170]

Although it remanded the case for further examination of the

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view, *see* United States v. Nickrasch, 367 F.2d 740 (7th Cir. 1966); United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).

165 *See* Bustamonte v. Schneckloth, 448 F.2d 699, 700 (9th Cir. 1971); Schoepflin v. United States, 391 F.2d 390, 398 (9th Cir.), *cert. denied*, 393 U.S. 865 (1968); Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966).

166 *See* Bustamonte v. Schneckloth, 448 F.2d 699, 700 (9th Cir. 1971) (search of an automobile belonging to a suspect not under arrest); Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966) (search of luggage owned by a suspect not under arrest).

167 343 F.2d 95 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966).

168 *Id.* at 97.

169 *Id.* at 98.

170 *Id.* at 97-98 (citation & footnotes omitted).

facts in light of this consent test, the court found a "number of circumstances [suggesting] that her assent may have reflected less than a free, deliberate, and unequivocal decision."[171] Thus, one can infer from its treatment of the consent issue that the court found no inconsistency between an absolute knowledge requirement at the threshold of a consent determination, and, once this threshold requirement had been satisfied, an application of a "totality of the circumstances" test to determine whether the consent was voluntary in other respects.

Three years later, in *Schoepflin v. United States*,[172] the same court placed even more emphasis on the actual knowledge requirement. It remanded a consent search case with instructions to the district court to make separate findings on the question of actual knowledge of the right to withhold consent, and on the issue of whether the "consent to the search was coerced or uncoerced."[173]

In deciding *Bustamonte v. Schneckloth*, a habeas corpus action, the Ninth Circuit found the California approach to consent searches unacceptable. The "totality of the circumstances" test developed in *Michael* was deemed insufficient to define the validity of a consent search:

> It would appear that the California courts, in addition to finding that the atmosphere was not coercive, have . . . . [R]easoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be inferred from assent.[174]

Although the Ninth Circuit may have gone further than most federal courts in explicitly requiring a showing of knowledge of the right to withhold permission to search, it could fairly be said that by the time *Bustamonte* was appealed to the Supreme Court, the federal courts had developed a coherent consent doctrine. The Ninth Circuit was clearly in line with the consensus that consent to search is a waiver of fundamental rights that must be knowing and intelligent. The California approach, on the other hand, represented a minority position even among the states.[175] Although the federal courts looked to the totality of the circumstances in determining whether a consent was voluntary, they did not treat the knowledge factor merely as a dispensable component of the "totality of the circumstances" test. Know-

171 *Id.* at 98.

172 391 F.2d 390 (9th Cir.), *cert. denied*, 393 U.S. 865 (1968).

173 391 F.2d at 399.

174 448 F.2d at 700.

175 For a discussion of state court decisions see notes 93-121 *supra* and accompanying text.

ing waiver was considered a threshold issue—a condition precedent to the question of voluntariness.

BUSTAMONTE—A BREAK WITH THE PAST

In *Schneckloth v. Bustamonte*,[176] the Supreme Court, after a full half-century of developing case law, attempted a definitive formulation of the requisite elements to a consent search. The facts of the case are not complex. An automobile driven by a party who had neither a driver's license nor identification was stopped for a minor traffic offense by a police officer. The petitioner was a passenger in the car.[177] In what the officer described as a "congenial setting," the six male occupants of the car were ordered to get out.[178] Although no one was under arrest or threatened with arrest, two additional police were soon on the scene.[179] None of the men owned the car, but one of the passengers, Alcala, said that it belonged to his brother. Asked whether the officers could search the car, Alcala replied, "Sure, go ahead," and actually assisted the officers in opening the trunk of the car.[180] The police discovered three stolen checks which were used as evidence in a trial in which Bustamonte was convicted of unlawful possession.

A California court of appeals found the consent valid and affirmed the conviction;[181] thereafter, the California supreme court denied review.[182] The United States Court of Appeals for the Ninth Circuit, however, set aside a federal district court order denying habeas corpus relief,[183] and, relying on prior case law,[184] held that the record was insufficient to establish the voluntariness of Alcala's consent.[185] It ap-

176 412 U.S. 218 (1973), *rev'g* 448 F.2d 699 (9th Cir. 1971).

177 412 U.S. at 220. While Bustamonte had no proprietary interest in the vehicle searched and was merely one of six passengers, he was the party aggrieved by the search, so he had standing to object to the admission of the evidence obtained as a result of the search. *See generally* Simmons v. United States, 390 U.S. 377, 389-94 (1968); Jones v. United States, 362 U.S. 257, 260-67 (1960).

178 412 U.S. at 220.

179 *Id.*

180 *Id.*

181 People v. Bustamonte, 270 Cal. App. 2d 648, 652, 76 Cal. Rptr. 17, 20 (Ct. App. 1969).

182 See 412 U.S. at 221 & n.2 where the Court acknowledges that the order of the Supreme Court of California is unreported.

183 448 F.2d 699, 701 (9th Cir. 1971).

184 *See* Schoepflin v. United States, 391 F.2d 390 (9th Cir.), *cert. denied*, 393 U.S. 865 (1968); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966). For further discussion of *Schoepflin* and *Cipres*, see notes 167-173 *supra* and accompanying text.

185 448 F.2d at 700-01.

peared to the Ninth Circuit that "the California courts, in addition to finding that the atmosphere was not coercive, have relied entirely on the verbal expression of assent."[186] The Supreme Court reversed, asserting that this approach "finds no support in any of our decisions that have attempted to define the meaning of 'voluntariness.' "[187]

The Supreme Court's holding in *Bustamonte* was purportedly a narrow one. For the first time, the Court drew a distinction between consent by a subject who is in custody and consent by a subject who is not. The decision applied only "when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent."[188] When the consent is made under these circumstances, its voluntariness

> is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.[189]

The Court reached this holding, limited to noncustodial consent situations, by adopting the "totality of the circumstances test," which had been developed in a long series of pre-*Miranda* cases dealing with the voluntariness of *confessions* obtained from in-custody defendants.[190] In the Court's view, the pre-*Miranda* cases recognized that a confession was voluntary if it was " 'the product of an essentially free and unconstrained choice by its maker.' "[191]

> [T]he totality of all the surrounding circumstances [include] both the characteristics of the accused and the details of the interrogation. . . .

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186 *Id.* The court continued:

> They have reasoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be inferred from assent. Yet, as we have noted, mere verbal assent is not enough. Further, in our view, the "implication" apparently relied upon by the California courts can hardly suffice as a general rule. Under many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.

Id.

187 412 U.S. at 229. In reversing the circuit court, the Court explicitly adopted the California view of voluntariness of consent and rejected the position developed in federal case law which the Ninth Circuit had espoused. *Id.* at 227-33. *See* pp. 230-31 *supra;* pp. 232-40 *supra.*

188 412 U.S. at 248.

189 *Id.* at 248-49 (footnote omitted).

190 *Id.* at 223-27.

191 *Id.* at 225 (quoting from Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

> The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion . . . . In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put.[192]

"Similar considerations" led the Court to apply the "totality of the circumstances" test to consent searches, under which knowledge of the right to refuse was not essential to an effective consent.[193] The same "two competing concerns" which had been reconciled in the pre-*Miranda* confession cases—"the legitimate need for such searches and the equally important requirement of assuring the absence of coercion"—were similarly harmonized by the Court in determining the nature of a "voluntary" consent.[194]

Police interest in such searches was deemed strong indeed. Officers operating on suspicion, but without probable cause, may have no other "means of obtaining important and reliable evidence."[195] Such evidence may not only lead to conviction of the guilty but exoneration of the innocent. Even if there is probable cause to arrest or search, a consent search may, if it turns up nothing, spare the subject of the search the "stigma and embarrassment" of an arrest or a far more extensive search pursuant to a warrant.[196]

With regard to coercion, the Court reasoned that consent searches must be subjected to "the most careful scrutiny" to assure that they are not the product of even "subtly coercive police questions" or of the subject's possible "vulnerable subjective state." Under this test, which the Court reasoned would filter out "searches that are the product of police coercion," the "continuing validity of consent searches" will be preserved. "In sum, there is no reason . . . to depart in the area of consent searches, from the traditional definition of 'voluntariness.' "[197] The Court was critical of the Ninth Circuit's requirement that consent must be affirmatively shown, since this arguably would enable

> [a]ny defendant who was the subject of a search authorized solely by his consent [to] effectively frustrate the introduction into evi-

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192 412 U.S. at 226-27. (citations and footnote omitted).

193 *Id.* at 227-34. These considerations include knowledge of the right to refuse, alternate means of obtaining evidence, and the presence or lack of coercion. *Id.* at 227-33.

194 *Id.* at 227.

195 *Id.* (footnote omitted).

196 *Id.* at 228.

197 *Id.* at 229.

dence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent.[198]

Justice Stewart observed that federal and state courts alike have "almost universally repudiated" the idea that the subject should be advised of his right to refuse. Again, as with the affirmative showing argument, Justice Stewart stressed the practical difficulties this would pose for the government. "Consent searches are part of the standard investigatory techniques of law enforcement agencies."[199] The need for them may arise spontaneously, in virtually any setting, frequently as a logical extension of investigatory questioning. These unstructured circumstances are not only far different from a formal criminal proceeding, but "are still immeasurably far removed from 'custodial interrogation' "[200] where *Miranda* warnings must be given. They fit within the general on-the-scene questioning or investigation, which *Miranda* explicitly exempted from the advice requirement.[201]

The Court's previous consent search decisions, Justice Stewart asserted, reflected a careful sifting of facts and circumstances of each particular case. An examination of instances of this "sifting" process developed in earlier decisions, led the Court to conclude that it was the nature of the items sought[202] and the officer's assertion of a valid warrant[203] which constituted the determinative "circumstances" on which the previous cases had turned. He then found that one need not know of the right to refuse as a prerequisite to an offer of a valid consent.[204]

Finally, Justice Stewart found a clear distinction between the waiver of fourth amendment rights accomplished by consent to search

198 *Id.* at 230.

199 *Id.* at 231-32.

200 *Id.* at 232.

201 *Id.*

202 *Id.* at 233. According to Justice Stewart, Justice Douglas in *Davis* looked to

"[t]he public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept . . . the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand . . . ."

Id. (quoting from Davis v. United States, 328 U.S. 582, 593-94 (1946)). It must be remembered that the property seized in *Davis* consisted of coupons which had never become the personal property of the defendant. *See* notes 35-50 *supra* and accompanying text.

203 412 U.S. at 234. To buttress this position he quoted *Bumper,* where the Court held 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. (quoting from Bumper v. North Carolina, 391 U.S. 543, 550 (1968)).

204 412 U.S. at 234.

and the kind of waiver that, under *Johnson v. Zerbst*,[205] requires "an intentional relinquishment or abandonment of a known right or privilege."[206] The latter requirement has "been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[207] The *Zerbst* test, Justice Stewart suggested, has most often been applied to a waiver of counsel or of the rights surrendered by a plea of guilty. Moreover, the Court has not permitted an accused to give up his rights of confrontation, jury trial, speedy trial, or freedom from double jeopardy without a knowing relinquishment. This same concern for a fair trial has led to the conclusion that counsel must be afforded at certain stages before trial such as post-indictment lineup and in-custody interrogation.[208]

Justice Stewart emphasized, however, that fourth amendment protections "are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial."[209] He further reasoned that the fourth amendment was intended to protect the values which have been placed on the right of an individual to be left alone. While it shelters the individual from arbitrary police intrusion, a search is not rendered unfair by the fact that it resulted from a person's consent to it:[210]

> [T]here is nothing constitutionally suspect in a person's voluntarily allowing a search. The actual conduct of the search may be precisely the same as if the police had obtained a warrant.[211]

Based on this premise, Justice Stewart deduced that the interests of society are actually served by consent to a search, since the search may yield evidence that leads to the solution of a crime thus protecting the

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205 304 U.S. 458 (1938).

206 412 U.S. at 235 (quoting from 304 U.S. at 464 (1938)). The Court also noted that in Johnson v. United States, 333 U.S. 10 (1948), the consent was invalid because the entry into Johnson's living room was " 'granted in submission to authority rather than an understanding and intentional waiver of a constitutional right.' " 412 U.S. at 243 n.31 (quoting from 333 U.S. at 13). It then concluded that although

> the Court spoke in terms of "waiver" it arrived at the conclusion that there had been no "waiver" from an analysis of the totality of the objective circumstances—not from the absence of any express indication of Johnson's knowledge of a right to refuse or the lack of explicit warnings.

412 U.S. at 243-44 n.31.

207 412 U.S. at 237 (footnote omitted).

208 *Id.* at 237-40.

209 *Id.* at 242.

210 *Id.* (citing Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966); Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

211 412 U.S. at 243.

innocent against mistaken charges.[212] He concluded by stating that it was virtually impossible to apply *Zerbst* waiver standards to consent searches, and that to require advice about one's right to refuse in the detail demanded by *Zerbst* would be out of the question.[213] Conversely, if a less detailed "diluted waiver" were found sufficient, "that would itself be ample recognition of the fact that there is no universal standard that must be applied."[214]

Misleading Treatment

Justice Marshall, in his dissent, raised three objections to the majority opinion.[215] He found that the Court's criteria for determining when a verbal assent is a valid consent was inconsistent with other cases and "not responsive to the unique nature of the consent-search exception." Second, he felt that the Court had applied a voluntariness standard that was "developed in a very different context" and which was based on different policy considerations. Third, he was of the opinion that the majority had mischaracterized "prior cases involving consent searches."[216]

With regard to his first criticism, Justice Marshall found the majority's analysis of the cases dealing with warrant requirement exceptions to be inapplicable when a search is justified solely by consent. Since the warrant requirement exceptions were based upon the existence of both probable cause and exigent circumstances, neither of which apply in the "consent" situation,[217] Justice Marshall felt that the majority's reasoning should not control:

> Thus, consent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential

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212 *Id.*

213 *Id.* at 243-45.

214 *Id.* at 245. Justice Stewart added that

> even a limited view of the demands of "an intentional relinquishment or abandonment of a known right or privilege" standard would inevitably lead to a requirement of detailed warnings before any consent search—a requirement all but universally rejected to date.

Id. n.33.

As authority for this assertion, Justice Stewart relied in part on *Gorman* which seems to offer no real support for this conclusion since *Gorman* applied the *Zerbst* waiver standard without finding consent warnings necessary. Furthermore, the court in *Gorman* found it significant that *Miranda* warnings had been given to the consenting parties prior to the search request. *See* note 145 *supra* and accompanying text.

215 412 U.S. at 280. Justice Marshall characterized the majority view as "misleading in its treatment of the issue." *Id.*

216 *Id.*

217 *Id.* at 282-83.

> to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights.[218]

Justice Marshall further reasoned that the majority had missed the case's central issue in failing to properly distinguish between coercion and consent. He found a crucial distinction between the fourth amendment rights waived by consent, and the freedom from "compulsion" or "coercion" protected by the fifth and fourteenth amendments, which cannot be waived. "[N]o sane person would knowingly relinquish a right to be free of compulsion."[219] Thus, a defendant's knowledge of his right to be free from compulsion is irrelevant in a confession case. Even information conveyed by advice concerning rights required by *Miranda* "is intended only to protect the suspect against acceding to the other coercive aspects of police interrogation."[220]

Justice Marshall criticized the majority's interpretation which found *Davis* and *Zap* to be supportive of a "totality of the circumstances" test. He concluded that *Davis* turned upon the *nature* of the evidence seized, and not upon the theory of implied consent, and reasoned that *Zap* had been decided on the notion of voluntary waiver derived from the defendant's status as a party to a government contract which had specifically provided "that his records would be open at all time [*sic*] to the Government."[221]

In rejecting the majority's approach to consent searches, Justice Marshall offered an alternative view. He described his interpretation as "straightforward and . . . obviously required by the notion of consent as a relinquishment of Fourth Amendment rights."[222]

> If consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police.[223]

Examination of both the Court's previous consent decisions and the pre-*Miranda* confession cases lends support to Justice Marshall's criticism.

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218 *Id.* at 283. Justice Marshall further observed that police convenience alone was never deemed sufficient to establish an exception to the warrant requirement. "Yet the Court . . . seems to say that convenience alone justifies consent searches." *Id.* at 282-83 n.9.

219 *Id.* at 281.

220 *Id.*

221 *Id.* at 279 n.4. Justice Marshall found that no other case had explicitly upheld a search on the basis of a defendant's consent. *Id.* n.5.

222 *Id.* at 284.

223 *Id.* at 284-85.

(1) The majority's reliance on the pre-*Miranda* criteria for determining the voluntariness of a confession and their obliteration of the consent-coercion distinction considerably weakens the strength of the *Bustamonte* opinion. Pre-*Miranda* decisions did not treat the issue of voluntariness as having anything to do with a waiver of rights because they had evolved from the common law rule that involuntary confessions were unreliable evidence which must be excluded from trial.[224] *Brown v. Mississippi*[225] was the first case in which the Court evaluated, under the fourteenth amendment's due process clause, confessions that had been admitted in state prosecutions.[226] The initial emphasis was on reliability, but the voluntariness test came to include scrutiny of

> practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rationale choice.[227]

These cases did not scrutinize confessions to see if the defendant had waived his constitutional rights, since at that time, an in-custody defendant did not have any recognized right to demand that he not be interrogated.[228] Furthermore, until 1964, a state defendant had no federally protected privilege against self-incrimination.[229] These cases were, in short, concerned with a "voluntariness" concept that was distinct from the subject's waiver of federal constitutional rights.

Pre-*Miranda* standards for determining whether a confession had been coerced had nothing in common with the Court's test for the validity of a consent search. This is dramatically illustrated by contrasting the facts of *Amos* and *Johnson* with those of confession cases. Some pre-*Miranda* confessions that had been reviewed by the Court were extracted after prolonged and intensive police questioning, and even then, some were found by the Court to be voluntary.[230] In *Amos*

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224 *Miranda* appears to be the first case to apply the privilege against self-incrimination to police interrogation. 384 U.S. 436, 506 n.2 (1966) (Harlan, J., dissenting); 384 U.S. at 526-30 (White, J., dissenting).

225 297 U.S. 278 (1936).

226 *Id.* at 279.

227 Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73 (1966). For a short analysis of this line of cases, see Miranda v. Arizona, 384 U.S. 436, 506-14 (1966) (Harlan, J., dissenting).

228 *See* note 224 *supra*.

229 This fifth amendment right was "incorporated" into the due process clause of the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1, 6 (1964).

230 Lisenba v. California, 314 U.S. 219, 238-40 (1941) (confession extracted after two

and *Johnson*, on the other hand, simple once-stated police "demands" were found to be invalid consents simply because they were made "under color of office." Justices willing to countenance intense pressure by interrogating police would not permit even a firm showing of authority to obtain a valid consent to search.[231]

(2) *Bustamonte's* assertion that confession and consent cases raise similar "competing concerns" was also fallacious.[232] An interrogation is typically a quest for an admission of guilt or an account of the details from a suspect who is neither under formal arrest or at least is in custody. Therefore, interrogation rarely occurs in the early stages of investigation. Police are seeking testimonial evidence that cannot usually be obtained without this type of questioning.

Justice Marshall observed that a search whose validity hinges on consent is hardly the product of "overriding needs of law enforcement."[233] If the police have probable cause to search, in addition to an overriding need to do so quickly, then they do not need consent to proceed without a warrant. In situations such as this, one of the "exigent circumstances" exceptions to the warrant requirement will apply.[234] If the police do not have probable cause, then "the needs of law enforcement are significantly more attenuated."[235]

The individual's interests are different in the consent situation, as the Court willingly acknowledged when it came to the question of whether a consent subject should have *Miranda*-type warnings.[236] The subject of custodial interrogation is a suspect whose "right to be let alone" has already been weakened or lost because of a finding of suffi-

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protracted incommunicado interrogations held voluntary where there was no evidence of promises or coercion by police); *cf.* Gallegos v. Nebraska, 342 U.S. 55, 60-68 (1951) (confession held voluntary where accused was detained for a total of 25 days before arraignment).

231 *Compare* the position of Justice Jackson on confessions in Ashcraft v. Tennessee, 332 U.S. 143, 159-63 (1944) (Jackson, Roberts & Frankfurter, JJ., dissenting) (while 36 hours of interrogation are "inherently coercive," admissibility of a confession thus obtained still requires an independent examination of the circumstances) *with* his position on consent searches in Johnson v. United States, 333 U.S. 10, 12-15 (1948) (smell of burning opium emanating from hotel room held not sufficient to justify a search without a warrant even with "consent" since demand was made under "color of office").

232 412 U.S. at 227.

233 *Id.* at 282-83.

234 Warden v. Hayden, 387 U.S. 294, 298 (1967) (search without a warrant held permissible because of "exigencies of the situation"); *cf.* United States v. Robinson, 94 S. Ct. 467 (1973) (search incident to an arrest); Carroll v. United States, 267 U.S. 132, 153 (1925) (high mobility of motor vehicles held sufficient to create "exigent circumstances").

235 412 U.S. at 283.

236 *Id.* at 246-48.

cient probable cause to believe that he has committed a crime.[237] Not until *Miranda* did the Court hold that a person in this position had a right not to be interrogated.[238] And, when this right was announced, the Court made it clear that in-custody suspects had to be put on notice that they were being interrogated.[239] Conversely, the person whose consent is sought for a search has an absolute right to forbid police intrusion. It follows that if there is any analogy between the consent and confession situations, it certainly must be closer to the post-*Miranda* requisites of police conduct than to those of the pre-*Miranda* era.

(3) The Court's formula for balancing the need for consent searches against the individual's right to freedom from coercion[240] fails, as Justice Marshall's cogent distinction between coercion and consent makes clear.[241] Even beyond the fact that the individual's fourth amendment rights, and not his freedom from coercion, are at stake, the Court exaggerates both the prosecutorial interest in consent searches and the burden the prosecution must bear under a requirement that it demonstrate that the subject knew of his right to refuse.[242] It may be true that Bustamonte's crime might never have been solved had it not been for the consent search, but this touches upon the argument that the Court has eschewed as constitutionally impermissible countless times before—that a search is justified by what it turns up.[243]

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237 Usually, the subject of custodial interrogation has already been arrested and subjected to the search and inventory procedures that follow an arrest. Even the interrogation of a person who is not under arrest does not become "custodial" until he has been deprived of his freedom in "any significant way" and/or is the focus of suspicion. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).

238 384 U.S. at 444.

239 *Id.* at 444-45.

240 412 U.S. at 227-34.

241 *Id.* at 282-84. *See* pp. 245-46 *supra.*

242 *Id.* at 284-89. Justice Marshall reasoned:

> I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know.

Id. at 287. It is significant to note that for years, federal law enforcement authorities have been able to cope with the waiver concept first articulated in Amos v. United States, 255 U.S. 313 (1921). *See also* Cipres v. United States, 343 F.2d 95 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966); Comment, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 143 (1967).

243 Justice Jackson, in United States v. Di Re, 332 U.S. 581 (1948), vigorously stressed that

> a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.

Id. at 595 (footnote omitted). *See also* Henry v. United States, 361 U.S. 98, 103 (1959);

In light of the fourth amendment, consent searches should be viewed as an exception to the warrant requirement and not as a general rule of police conduct. Although police may utilize consent searches as an investigative aid, consent should not become a convenient tool to circumvent the need for thorough preliminary investigation or to "short-circuit" the fourth amendment protections which otherwise apply. Several decisions reveal that consent searches which have yielded evidence have been frequently obtained by officers whose suspicions either would have ripened into probable cause or would have faded away upon further investigation.[244] Other cases indicated that consents are obtained by officers who already had probable cause and merely sought a shortcut to avoid the warrant requirement.[245]

(4) The Court, in predicting dire consequences should the Ninth Circuit's requirement of "knowing waiver" prevail, drastically escalated Justice Traynor's warning in the *Michael* case.[246] Justice Traynor expressed concern that a suspect's voluntary revelation of all evidence might be followed by a claim at trial or evidentiary hearing "that he acted only in response to an implied assertion of unlawful authority."[247] He did not, however, express any fear as to the possibility that a defendant's failure to testify that he had knowledge would preclude a government showing of consent.

(5) The Court's refusal to require an affirmative showing that the consenting person knew of his right to withhold permission to search also involved a distinction between the interests involved in the waiver of fourth amendment rights and a waiver of "fair trial" rights.[248] From this follows the Court's argument that neither the

Byars v. United States, 273 U.S. 28, 29 (1927); Gibbons, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 SETON HALL L. REV. 295, 299-306 (1972).

244 *See, e.g.*, Cipres v. United States, 343 F.2d 95, 96-99 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966).

245 *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13-14 (1948).

246 412 U.S. at 229-31. The Court asserted that any defendant could effectively frustrate the use of seized evidence by merely stating that he did not know that he had the right to refuse his consent to search. *Id.* at 230.

247 *Id.* at 230-31 (quoting from People v. Michael, 45 Cal. 2d 751, 754, 290 P.2d 852, 854 (1955)). Justice Traynor did not believe that a visit to a suspect's or witness' home for the purpose of conducting an interview was improper. However, he did hypothesize that a criminal could "defeat his prosecution by voluntarily revealing all of the evidence against him" and then, at trial, contend that such information was elicited under an assertion of authority. 45 Cal. 2d at 754, 290 P.2d at 854. Justice Traynor did not assert, as the Court implies, that the criminal might suppress evidence by contending that he did not know that he had the right to refuse to permit a consent search. 412 U.S. at 230.

248 For a discussion of the Court's distinction between waiver of "fair trial" and fourth amendment rights see pp. 243-45 *supra*.

detailed waiver inquiry suitable for a judicial hearing nor the detailed warnings required in a custodial interrogation would be appropriate for the usual consent request.[249] The observation, however, that the fourth amendment does not protect the integrity of the fact-finding process should not be dispositive of the issue. For one thing, the protections afforded the fourth amendment *are* fundamental. The Supreme Court applied the fourth amendment[250] and its exclusionary rule[251] to the states years before it found the rights to counsel,[252] silence,[253] speedy trial,[254] or jury trial[255] sufficiently important to merit the same status. In the Court's opinion, the fourth amendment and its exclusionary rule have been found to be important enough to allow the guilty to go free if law enforcement officers transgress their requirements, even where a good-faith effort to comply with these requirements has been made.[256] Why, then, should an alleged surrender of fourth amendment protections at police request be treated more lightly than a waiver of other rights?

Why Not Warnings?

Bustamonte appears disjointed and inconsistent with earlier case law, if considered from a purely precedential perspective. If one, however, integrates the Court's legal analysis with its expressed concern for the protection and expansion of law enforcement effectiveness, then the Court's reasoning ostensibly satisfies its societal objectives. This concern, particularly for law enforcement officials who must deal "with the rapidly unfolding and often dangerous situations on city streets,"[257] was also manifested in the Court's earlier sanctioning of protective "stop and frisk" procedures[258] and specific exceptions to the warrant

249 412 U.S. at 246-47.

250 Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

251 Mapp v. Ohio, 367 U.S. 643, 655-57 (1961).

252 Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963). As early as Powell v. Alabama, 287 U.S. 45 (1932), co-defendants facing a possible death sentence were held to have the right to counsel because such an advocate was essential to insure procedural due process. *Id.* at 68. The holding, however, was not based on the sixth amendment.

253 Malloy v. Hogan, 378 U.S. 1, 8 (1964).

254 Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

255 Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

256 *See, e.g.*, Spinelli v. United States, 393 U.S. 410, 416-20 (1969) (affidavit in support of warrant held invalid because no allegation that informant was "reliable" and no allegation of fact supporting conclusions that suspect was running an illegal bookmaking operation); Katz v. United States, 389 U.S. 347, 354-59 (1967) (evidence obtained through electronic surveillance held inadmissible, even though police acted reasonably, because wiretap authorization not properly obtained).

257 Terry v. Ohio, 392 U.S. 1, 10 (1968).

258 *See id.* at 30-31.

requirement that were necessitated by exigent circumstances.[259] It was not until *Bustamonte* that the Court saw fit to accommodate law enforcement needs by abruptly discarding traditionally respected personal liberties which had previously been jealously protected. It is submitted that even under the particular facts of *Bustamonte*, such a departure from the traditional waiver concept was not warranted. A consent search, even when conducted only after adequate warnings are conveyed to the subject, would not substantially impinge upon police effectiveness.

The complex inquiries that must be made of a defendant who pleads guilty,[260] or an accused who insists on trying his own case,[261] may be inappropriate in the informal setting of a consent search request. Similarly, a definitive *Miranda*-type warning might be too cumbersome to be practicable in a consent situation. These pragmatic considerations should not be permitted to justify the conclusion that the subject of a consent search can in ignorance waive the fundamental rights guaranteed by the fourth amendment. Moreover, there are several alternatives available to the state to demonstrate the subject's knowledge of the right to refuse consent. Such knowledge could be conclusively proved by simply showing that the subject was apprised of the right to refuse to give consent and that such refusal would be respected.[262] A warning of this nature could hardly be expected to alter the informality of the exchange between officer and subject, except as Justice Marshall observed "to alert the subject to a fact that he surely is entitled to know."[263]

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259 *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

260 *See, e.g.*, McCarthy v. United States, 394 U.S. 459, 466-67 (1969).

261 *See, e.g.*, Westbrook v. Arizona, 384 U.S. 150, 150-51 (1966).

262 412 U.S. at 286.

263 *Id.* at 287. The Model Code of Pre-Arraignment Procedure sets forth recommended warnings that should be given before a consent search request.

> (2) *Required Warning to Persons Not in Custody or Under Arrest.* Before undertaking a search under the provisions of this Article, an officer present shall inform the individual whose consent is sought that he is under no obligation to give such consent and that anything found may be taken and used in evidence.
>
> (3) *Required Warning to Persons in Custody or Under Arrest.* If the individual whose consent is sought under Subsection (1) is in custody or under arrest at the time such consent is offered or invited, such consent shall not justify a search and seizure under Section SS 240.1 unless in addition to the warning required by Subsection (2), such individual has been informed that he has the right to consult an attorney, either retained or appointed, or to communicate with relatives or friends, before deciding whether to grant or withhold consent.

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 240.2, at 61 (Proposed Official Draft No. 1, 1972).

The Federal Bureau of Investigation and the Bureau of Narcotics and Dangerous

WHO CAN CONSENT?

The second major issue concerning consent searches involves the determination of who can consent to a warrantless search. In many of the cases considered above the consent was not granted by the suspect, but by a third party. These cases include consents by wives for husbands, parents or grandparents for children, and landlords for tenants. Thus the issue of third party consent arises in many diverse situations. The purpose of this segment of the article is to examine these situations and to explore the underlying rationale used by courts to justify third party consent.

Prior to the decision in *Bustamonte*, consent to a search was generally considered a waiver of fourth amendment rights. Since the general rule prevented one from waiving another's constitutional rights,[264] the courts had developed various rationales to justify third party consent to warrantless searches. Although the Court in *Bustamonte* rejected the waiver theory in consent cases,[265] it is still necessary for the courts to develop a consistent and acceptable method of deciding whether or not the consent of a particular person is a reasonable justification for a warrantless search.

Three rationales which have been suggested to justify third party consent are:

(1) Implied agency—the court will imply, under certain circumstances, an agency relationship which supports the consent.
(2) Status relationship—the relationship between the parties (*e.g.*, husband and wife) gives one party the right to consent for the other.
(3) Possession and control—a person whose rights of possession and control over the premises or property that are equal or superior to those of the suspect may consent to a search.

Drugs maintain the practice of informing the suspect of his right not to consent. *Id.* at 195.

The Newark, New Jersey Police Department written consent form states:

> I, ———, having been informed of my constitutional right not to have a search made of the premises, hereinafter mentioned, without a search warrant and of my right to refuse to consent to such a search . . . .

Consent to Search form No. DPI: 1493, on file at the *Seton Hall Law Review*.

264 *See* United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970). Judge Gibbons, dissenting in that case, stated:

> Only an attorney realistically possesses implied authority to waive another's constitutional rights and in practical experience the legal niceties of the existence of implied authority are too complex to be pragmatically determined by a policeman in the field.

Id. at 845.

265 *See* 412 U.S. at 241-45.

The implied agency and status relationship theories have generally been rejected, while the possession and control theory has won general acceptance.[266]

Many of the early consent cases, especially those dealing with consent by wives for husbands, used the agency rationale to either accept or reject the validity of the search. Some cases have held that a wife was impliedly authorized by her husband to consent to a search, while others have been decided to the contrary.[267] The agency theory, which was not limited to the husband-wife situation, but included parent-child, partner-partner, landlord-tenant, etc., has now been generally repudiated and has been specifically rejected by the Supreme Court in several cases.[268] In *Stoner v. California,* the Court said:

> Our 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."[269]

Upon a superficial examination, some of the third party consent cases would seem to support the validity of the status relationship theory. They discuss situations such as a wife consenting for a husband

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266 For examples of cases in which courts have looked beyond the agency relationship to the question of actual possession or control, see United States v. Wixom, 441 F.2d 623 (7th Cir. 1971) (occupant of household with right of control equal to that of owner can give valid consent to search); Nelson v. People, 346 F.2d 73 (9th Cir. 1965) (consent is valid whether given by sole or joint occupant); United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954) (consent may be given by business partner with equal right of control); Nestor v. State, 243 Md. 438, 221 A.2d 364 (1966) (co-tenant's consent held valid even though other co-tenant was present and raised objection).

Cases concerning consent by spouses have also stressed the underlying possessory interests. *See, e.g.,* United States v. Stone, 471 F.2d 170 (7th Cir. 1972), *cert. denied,* 411 U.S. 931 (1973) (wife's right to use premises was valid ground for consent, regardless of agency); White v. United States, 444 F.2d 724 (10th Cir. 1971) (woman purporting to be wife may validly consent on basis of joint occupancy and possession); United States v. Alloway, 397 F.2d 105 (6th Cir. 1968) (wife's consent held valid to permit police to seize spouse's clothing); Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied,* 380 U.S. 980 (1965) (wife in control of jointly owned premises can give consent); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937) (wife found to be sufficiently in control of house to give valid consent); People v. Perroni, 14 Ill. 2d 581, 153 N.E.2d 578 (1958) (consent by wife to search a jointly owned trailer held valid); Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964) (wife as joint occupant can give consent which is binding on husband); State v. Hagan, 99 N.J. Super. 249, 239 A.2d 262 (App. Div. 1968) (paramour living at searched premises had authority to consent).

267 *Compare* United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937) *with* United States v. Rykowski, 267 F. 866 (S.D. Ohio 1920). *See generally* Annot., 31 A.L.R.2d 1078, 1091-96 (1953).

268 *See, e.g.,* Stoner v. California, 376 U.S. 483, 488 (1964). *See also* Chapman v. United States, 365 U.S. 610, 616-17 (1961).

269 376 U.S. at 488.

and vice versa, a child consenting for a parent and vice versa, a partner consenting for a partner, and an employer consenting for an employee. Closer scrutiny, however, reveals that almost without exception these cases are actually based on the third party's superior or equal right of possession and control over the searched premises. Thus a wife can validly consent to the search of a house in which she lives with her husband, not because she is married to him, but because her right to possession and control of the premises is equal to his.[270] In some instances the status relationship may be used to bolster a somewhat tenuous possession and control situation. For instance, a parent may not have actual possession, but his status as parent, coupled with an apparent right of control, may be enough to justify the consent.[271] But possession and control is almost universally the crucial factor.[272] For example, one court has held:

> [T]he consenting person has the authority, acting in his own behalf and not as agent for the nonconsenter, to permit a search of premises to which he has immediate right of possession and control . . . . Thus, where two or more persons have joint and equal possession and control of the premises, the prevailing rule is that any one of them may consent to a search; and the evidence thus disclosed may be used against any of them.[273]

The possession and control rule relies on the fact that the third party's right of possession should not be limited by the equal possessory rights of others.[274]

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270 In Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965), the court, after affirming a wife's right to consent to a search of jointly held premises, stated:

> It is not a question of agency, for a wife should not be held to have authority to waive her husband's constitutional rights. This is a question of the wife's own rights to authorize entry into premises where she lives and of which she had control.

332 F.2d at 896-97.

271 *See* Vandenberg v. Superior Court, 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (Ct. App. 1970) (parent-child relationship coupled with apparent right of control of premises justified right to consent). Arguably, the one area in which a status relationship still carries weight is the parent-child relationship. *See* Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12, 27-28.

272 One commentator has observed:

> The rule most commonly employed to uphold third party consents to search is that one who has possession and control of premises or an object may consent to its search and evidence uncovered by that search may be used against anyone.

Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 804 (1966) (footnote omitted).

273 Jenkins v. State, 230 A.2d 262, 270-71 (Del. 1967).

274 *See, e.g.*, United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970),

The Supreme Court impliedly accepted this rule in *Bumper v. North Carolina*,[275] *Frazier v. Cupp*,[276] *Schneckloth v. Bustamonte*,[277] and specifically accepted the rule in *United States v. Matlock*.[278] The Court never questioned the validity of the searches in these cases and found no need to examine the underlying theory.[279] Although they are recent indications of an acceptance by the Court of the possession and control doctrine, those cases were not the first to have dealt with this unsettled area of the law.

Two early cases, *Weeks v. United States*[280] and *Amos v. United States*,[281] only touched upon the third party consent issue without closely examining its validity. In *Weeks*, the Court implicitly recognized that neither a boarder nor a neighbor could consent to the search of another's house.[282] In *Amos*, the Court specifically reserved the question of whether or not a wife could consent to a search (directed against her husband) of the family home, and, as already discussed, decided the cases on the voluntariness issue.[283]

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wherein the court referred to one justification for upholding the consent of a joint-possessor as the "undesirability of permitting the exercise of the right of one to be limited by the right of the other." *Id.* at 842.

Although the majority of courts that have faced this issue have upheld the rule allowing consent by a party with an equal or superior right of possession or control, a few lower courts have specifically rejected it. *Compare* note 347 *infra* with People v. Flowers, 23 Mich. App. 523, 179 N.W.2d 56 (1970), wherein the court, relying on *Stoner*, held that a parent, despite his right of possession of the premises, could not waive his son's fourth amendment rights where the parent had "no personal or punishable involvement in the crime suspected or charged." *Id.* at 526-27, 179 N.W.2d at 58.

Other courts, while following the majority view, have severely limited its extent. *See, e.g.*, Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955), where the court refused to hold that the "consent of the owner of the premises validates the search and seizure of the property of another found thereon" where the search entailed officers breaking into the locked personal effects of another. *Id.* at 826. *See also* United States v. Poole, 307 F. Supp. 1185 (E.D. La. 1969). That case held that an owner of premises could not waive the rights of a defendant as to "effects" or "enclosed spaces" over which the defendant had exclusive control. *Id.* at 1189-90.

275 391 U.S. 543, 548 n.11 (1968).

276 394 U.S. 731, 740 (1969).

277 412 U.S. 218, 245-46 (1973).

278 42 U.S.L.W. 4252 (U.S. Feb. 20, 1974).

279 This lack of examination was acknowledged in Note, *supra* note 271, at 12, where the author stated:

> Limitations upon the consents of third parties must ultimately rest upon the fourth amendment. But here, as in other areas, the Supreme Court has formulated only vague and general guidelines. In fact, it has not spoken at all on many important consent problems.

280 232 U.S. 383 (1914).

281 255 U.S. 313 (1921).

282 232 U.S. at 386, 398.

283 255 U.S. at 317. *See* Henry v. Mississippi, 379 U.S. 443, 449 & n.5 (1965).

In *Chapman v. United States*,[284] the Court held that a landlord may not consent to a search of a lessee's premises, even in a situation in which the officers smell a strong "odor of mash."[285] The State argued that the landlord's right to enter and view waste was sufficient to justify the consent.[286] The Court rejected that approach outright, refusing to accept the use of technical property concepts to justify invasion of a constitutionally protected right. The Court also recognized that such a technical argument was utilized merely as a subterfuge for a search,[287] concluding:

> [T]o uphold such an entry, search and seizure "wtihout a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords]."[288]

The Court's opposition to this variety of third party consent was further evidenced in *Stoner v. California*,[289] where it unanimously refused to uphold the validity of a hotel room search where consent was given by the hotel desk clerk.[290] Prior to the search, the police discovered a check book belonging to Stoner, a robbery suspect. The check stubs indicated that two of the checks had been made out to the Mayfair Hotel. The police went to the hotel and asked the clerk whether Stoner was registered. When he answered affirmatively, the police requested permission to enter the room. After an inquiry, the clerk consented to the search.[291] The Court said:

> It 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. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.[292]

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284 365 U.S. 610 (1961).

285 *Id.* at 611, 616-18.

286 *Id.* at 616.

287 *Id.* at 616-17.

288 *Id.* (quoting from Johnson v. United States, 333 U.S. 10, 14 (1948)). In his dissenting opinion, however, Justice Clark reached the opposite conclusion. He interpreted Chapman's act of distilling illicit whiskey as a breach of the lease's covenants. Justice Clark reasoned that upon the breach, Chapman, by operation of statute, ceased to be a tenant and the landlord acquired full right of possession. 365 U.S. at 621.

289 376 U.S. 483 (1964).

290 *Id.* at 487-88.

291 *Id.* at 484-85.

292 *Id.* at 489.

Thus, the Supreme Court in *Stoner* articulated the rule that a third party cannot waive another's constitutional right to be free from a warrantless search. Neither *Chapman* nor *Stoner* explicitly ruled out all third party consents, however, since there still remains a viable argument that some third party consents do not constitute waivers of other's individual rights.

In *Bumper*, the defendant's grandmother consented to a search, and, although the Court held the consent to be involuntary and thus improper, it recognized that since the grandmother "owned both the house [the place searched] and the rifle [the thing seized]" she controlled a sufficient interest in the property to support her consent to the search.[293] While that case turned on the voluntariness of the consent, it presupposed the validity of the third party consent. The Court, although expressly having refused to decide the issue of third party consent in *Amos*, implicitly accepted this concept in *Bumper* without analysis or explanation.[294]

During this period, many lower courts had accepted the doctrine of possession and control not yet articulated in any Supreme Court decision.[295] Both *Stoner* and *Bumper* can be reconciled if one accepts the premise that the Court in both cases was following the possession and control doctrine. The grandmother in *Bumper* had a right of possession and control superior to that of the defendant which justified her right to consent, while the hotel clerk in *Stoner* had no right superior to that of the guest.

Later Supreme Court cases prior to *Matlock* in which third party consents have been upheld add little to our analysis. For example, in *Frazier v. Cupp*,[296] the consent issue was treated as a "contention

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293 391 U.S. 543, 548 n.11 (1968). The defendant conceded that the third party (grandmother) had the right to give consent, which would be binding upon him, provided the consent was voluntary; the Court impliedly accepted this position. *Id.*

294 In both Henry v. Mississippi, 379 U.S. 443, 449 (1965), and Amos v. United States, 255 U.S. 313, 317 (1921), the Court specifically reserved decision on the third party consent issue. For example, the Court in *Henry* reasoned:

> Thus, consistently with the policy of avoiding premature decision on the merits of constitutional questions, we intimate no view whether the pertinent controlling federal standard governing the legality of a search or seizure . . . is the same as the Mississippi standard applied here, which holds that the wife's consent cannot validate a search as against her husband.

379 U.S. at 449 n.6 (citation omitted).

295 *See, e.g.*, Roberts v. United States, 332 F.2d 892, 896-97 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948); People v. Carter, 48 Cal. 2d 737, 746, 312 P.2d 665, 670 (1957).

296 394 U.S. 731 (1969).

[which] can be dismissed rather quickly."[297] The Court found no third party consent problem with the search of a duffel bag owned by Rawls, the cousin of the suspect defendant, and used by both parties. The Court held Rawls' consent valid, stating:

> Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. . . . 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.[298]

At the time of the search, the defendant was not yet a target of the search while Rawls was; Rawls, therefore, was consenting to a search which apparently had focused upon him.[299]

Coolidge v. New Hampshire[300] has also been used by the Supreme Court as a basis for justifying third party consents.[301] In that case a wife handed over articles belonging to her husband at the request of police officers.[302] The Court did not treat the transaction as a search[303] and therefore it was unnecessary to justify any waiver of constitutional rights. Thus, although there may be some argument as to the validity of the *Coolidge* opinion, it is quite clear that *Coolidge* should not be used as support to justify third party consents.[304]

In *Bustamonte,* the Court considered the issue of voluntariness in detail, while only touching upon the third party consent issue.[305] The owner of the searched vehicle was not present at the time of the search. The consent was obtained from his brother, who was merely a passenger in the car,[306] thus creating a clear-cut third party consent situation. The Court offered no justification for its decision to permit the owner's brother to waive the rights of the owner and the other passengers. The decision merely cites as authority *Coolidge, Frazier,* and *Abel v. United*

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297 *Id.* at 740.

298 *Id.*

299 *Id.*

300 403 U.S. 443 (1971).

301 For example, *Coolidge* was relied upon by the Court in both *Matlock* and *Bustamonte* to uphold its view in support of third party consents. 42 U.S.L.W. at 4254; 412 U.S. at 245.

302 403 U.S. at 446.

303 *Id.* at 489-90.

304 *See* People v. Nunn, —— Ill. ——, 304 N.E.2d 81 (1973), *cert. denied,* —— U.S. —— (Apr. 1, 1974). *But see* Note, *Evidence Gained From Search to Which Wife Consented Is Admissible Against Husband,* 79 HARV. L. REV. 1513, 1518 (1966).

305 412 U.S. 245-46.

306 *Id.* at 220.

States,[307] which offer no rationale for deciding the validity of third party consents.[308]

An analysis of Supreme Court decisions indicates an undeveloped but existing acceptance of the doctrine of possession and control as justification for third party consent.[309] This position was specifically adopted in *Matlock*.

In *Matlock* a paramour consented to a search of the house which she jointly occupied with both her parents and the defendant. She allegedly told the police that she shared a particular bedroom with the defendant, and upon searching that bedroom, the police discovered incriminating evidence which the defendant later sought to exclude at the pretrial suppression hearing.[310] The district court held that the government had to satisfy two tests before a third party consent could be deemed valid:

> [F]irst, that it reasonably appeared to the searching officers "just prior to the search, that facts exist which will render the consenter's consent binding on the putative defendant," and second, that "just prior to the search, facts do exist which render the consenter's consent binding on the putative defendant."[311]

The court thereby advanced both a subjective and objective standard for ascertaining the admissibility of the evidence discovered.

The central issue before the district court was whether the government could introduce the paramour's statements as evidence to satisfy the bifurcated standard set forth above. That court held the paramour's statements about her cohabitation of the bedroom with the defendant to be hearsay. Although such hearsay was admissible to prove that the officers reasonably believed that she could give permission to search, it was inadmissible to prove that she had authority to consent.[312]

Thus the main issue before the Court was whether the hearsay evidence was legally sufficient to support the government's burden of

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307 362 U.S. 217 (1960). *Abel* does not specifically justify third party consent. Rather, it merely permits a hotel manager to consent to a search after the former occupant has abandoned the premises. *Id.* at 241. *See* pp. 276-78 *infra*.

308 412 U.S. at 245.

309 See Note, *supra* note 271, at 13, where the author stated:

> The Supreme Court decisions seem to give support to the rule which has long been generally accepted; that is, one who does not have rights of possession and control in the premises searched cannot validly consent.

310 42 U.S.L.W. at 4252-53.

311 *Id.* at 4253.

312 *Id.*

sustaining the objective test.[313] In reaching this issue the Court recognized the validity of third party consents to search and said:

> [W]hen 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 effect sought to be inspected.[314]

The Court explicitly affirmed the generally accepted view that one with an equal or superior right over a premises may consent to a search. The Court emphasized that reliance upon traditional property concepts to define the possession and control doctrine was misplaced. Rather, authority for third party consent should rest 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.[315]

Matlock afforded the Court another opportunity to examine the third party consent issue and to explore the constitutional basis for its previous position of permitting such searches. The Court refrained, however, from a close scrutiny of the constitutional justification for this type of search and instead chose merely to perpetuate its uncritical acceptance of the third party consent search as enunciated in its prior decisions.[316]

Possession and Control

Although, as we shall later illustrate, we deem the constitutional implications of third party consent to be of paramount importance, it is initially necessary to explore the development of the possession and control doctrine which permeates the entire history of third party con-

313 *Id.* at 4252. The Supreme Court ultimately held that the hearsay evidence was admissible at the suppression hearing. "[T]he same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions . . . ." *Id.* at 4255.

314 *Id.* at 4254.

315 *Id.* at 4254 n.7.

316 The Court relied on *Frazier*, *Bustamonte*, and *Coolidge* to substantiate the validity of third party consent. 42 U.S.L.W. at 4254. As already indicated, none of these prior decisions include a thorough constitutional analysis of this issue. *See* pp. 258-59 *supra*.

sent case law. The tendency of lower courts is to divide the possession and control cases into various status relationships (*e.g.*, husband-wife, landlord-tenant, host-guest). Although this classification technique is somewhat inevitable, it unfortunately serves to perpetuate the concept that acceptance or rejection of a search based on consent depends upon status relationships rather than upon the possession and/or control of the person authorizing the search.

While it is a generally accepted doctrine that a person who has a superior or equal right of possession and control can consent to the search of a premises,[317] this rule requires further examination to define its limits. Courts have considered many factors in determining who has superior or equal right of possession and control. These include: legal title,[318] actual possession,[319] de facto control,[320] and familial,[321] monetary,[322] and employment relationships.[323] While these considerations become inextricably interwoven and confused, they are at least basically objective and can be factually ascertained. The situation is further confused by two other factors which are basically subjective in nature, and arise in a number of cases, *i.e.*, the belief of the officer making the search, and the attitude of the person giving the consent. The first deals with whether the police officer receiving the consent could validly assume that the person giving the consent had the right or the authority to do so; the second deals with the attitude of the person giving the consent. The latter factor can be further subdivided as follows:

(1) Agreement to consent out of antagonistic motives toward the person at whom the search is aimed, and

(2) consent by a person who has a limited right of possession and control but who wishes to exonerate himself of any implication of criminal conduct.

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317 Note, *Third-Party Consent to Search and Seizure—The Need for a New Evaluation*, 41 ST. JOHN'S L. REV. 82, 83 (1966). The author commented:

> The majority of courts have been liberal in finding that consent by a third party validates a search, thereby rendering evidence seized admissible over the objection of a non-consenting defendant. These decisions have usually been based upon the third party's *right of control* over the property where the evidence was seized, or his *actual control* of the property with the implied or apparent authority to consent to the search.

Id. (footnote omited) (emphasis in original).

318 *E.g.*, Anderson v. United States, 399 F.2d 753 (10th Cir. 1968).

319 *E.g.*, Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952).

320 *E.g.*, State v. Hagan, 99 N.J. Super. 249, 239 A.2d 262 (App. Div. 1968).

321 *See* notes 266-74 *supra* and accompanying text.

322 *E.g.*, State v. Blakely, 230 So. 2d 698 (Fla. Dist. Ct. App. 1970).

323 *E.g.*, United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

As we examine the various fact situations in which third party consents arise, these subjective and objective factors will be analyzed as they have been used or misused by the courts.

Landlord-Tenant

As already noted, the Supreme Court has specifically rejected the right of either a landlord or hotel clerk to consent to a search of a tenant's or guest's room.[324] The landlord has no valid right of possession or control during the period of the tenancy, lease, or rental. Even where the landlord has the right to enter his tenant's room for cleaning and similar purposes, he still does not have the right to consent to a search since his rights are limited to entry for those purposes only.[325] But in *United States v. Botsch,*[326] where the landlord was given a key and asked by the lessee to conduct certain activities at the scene which, unknown to the landlord, could have implicated him in criminal conduct, it was held that the landlord could consent to a search and waive the defendant's constitutional rights in order to extricate himself from any taint of criminal suspicion.[327] That raises the question whether an individual, who is the focus of an investigation, and who believes that evidence which could exonerate him is present in another's residence, could consent to the warrantless search of that residence. Obviously the answer to that question is "no." Thus it can be argued that the court ties together the landlord-tenant relationship with the desire of the landlord to extricate himself from implications of illegal conduct in order to justify the intrusion. Neither of these elements alone would suffice, but the courts apparently find that the combination of these factors validates the consent.

Justice Black, dissenting in *Bumper,* argued that the defendant's grandmother had voluntarily consented to the intrusion since "she actually wanted the officers to search her house—to prove to them that she had nothing to hide."[328] This suggests that in analyzing the validity of the consent it is necessary to psychoanalyze the motives of the person giving it; if one really intended to give the consent then it is valid, and if not, it is invalid. Both *Botsch* and the dissenting opinion in

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324 *See* Chapman v. United States, 365 U.S. at 616-18; Stoner v. California, 376 U.S. at 490.

325 Cunningham v. Heinze, 352 F.2d 1, 5 (9th Cir. 1965); State v. Warfield, 184 Wis. 56, 60, 198 N.W. 854, 856 (1924).

326 364 F.2d 542 (2d Cir. 1966).

327 *Id.* at 547-48.

328 391 U.S. at 556 (Black, J., dissenting).

Bumper have had the effect of injecting the motives of the person giving the consent into the discussion of its legitimacy.[329]

In *People v. Gorg*,[330] a 23-year-old law student was living rent-free in the home of Mr. Stevens in exchange for doing the gardening.[331] Stevens, after discovering marijuana plants in the student's room, permitted the police to search the room.[332] The court felt that Stevens believed he possessed at least joint control of the student's room which would justify him in permitting the police to search. In turn, the police had the right to assume that Stevens could consent to the search.[333] The court did not decide whether the student was a tenant, servant, or guest, and it additionally failed to answer the question of who had possession and control. Rather, it relied on the subjective beliefs of both Stevens and the officers conducting the search as to Stevens' authority to permit the search.[334] This case might better have been decided on a guest theory rather than on the broad-reaching doctrine involving knowledge or belief of the police, and thus much of the confusion in the law of consent searches might have been avoided.[335] It may be safely

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329 *See id.* at 557 & nn.6 & 7; *Botsch*, 364 F.2d at 547.

330 45 Cal. 2d 776, 291 P.2d 469 (1955).

331 45 Cal. 2d at 778, 291 P.2d at 470.

332 *Id.* at 779, 291 P.2d at 470-71.

333 *Id.* at 783, 291 P.2d at 473.

334 *Id.*

335 Aside from the landlord-tenant relationship, it is important to note other areas in which reliance is placed upon the beliefs of the authorities who had solicited consent from a party who apparently had authority to grant it. For an outstanding example of the use of this concept, one might look to Judge Gibbons' dissenting opinion in United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970), where he appears to adopt the rationale of *Gorg* and applies it to a husband-wife situation. In *Mazurkiewicz*, a married couple had stored their personal belongings in a garage which had been rented solely by the husband and to which he had the only key. *Id.* at 843-44. The majority held that the wife had no right to consent to a search. *Id.* at 844. Judge Gibbons disagreed, observing that

> Mrs. Cabey, as wife of the defendant, was superficially someone who could reasonably be assumed to enjoy full access to household items acquired as an incident of her marriage.

Id. at 846. According to Judge Gibbons, since Mrs. Cabey had the apparent right to possession, such right being a normal incident of the marital relationship, the police should not have been required to determine who had the technical right of possession and control, but could instead have relied upon the apparent circumstances. *Id.*

Both Judge Gibbons in *Mazurkiewicz* and the court in *Gorg* relied heavily upon the belief of the police officer conducting the search. Since the possession and control doctrine is basically a property-oriented approach, it may be inconsistent to rely upon a subjective test to decide who has the right of possession and control. For a thorough analysis of *Gorg* and of the development of the "California rule," see Note, *supra* note 271, at 32-34.

People v. Misquez, 152 Cal. App. 2d 471, 313 P.2d 206 (Dist. Ct. App. 1957) also involved the subjective beliefs of searching officials. The court allowed a babysitter's consent to justify

stated, however, that in the absence of unique situations like those presented in *Botsch* or *Gorg*, it has uniformly been held that a landlord's consent will not justify a search.[336]

Host-Guest

Hosts, as distinguished from landlords, are generally permitted to consent to the search of their premises even if guests are using them.[337] In *United States v. White*,[338] the court held that a lessee of premises, who gratuitously permitted another to use part of his apartment on visits, could consent to a search of the premises, and articles found therein could be admitted into evidence against the guest.[339] The court, however, did recognize that an area specifically set aside for a guest may attain a protected status.[340]

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a search and further examined the reasonableness of the apparent right of control as perceived by the police officer. The court indicated:

> Mrs. Baker [the babysitter] could reasonably suppose that possession of the key gave her some control over the premises and that she was authorized to permit the officer to enter. It was also reasonable for the deputy to suppose that since Mrs. Baker had the key she had the authority which she purported to have, and it was not unreasonable for him to act accordingly. Since he acted in good faith and with her permission in making the search, the evidence obtained thereby was not to be excluded because he might have made a mistake as to the actual extent of her authority.

Id. at 379-80, 313 P.2d at 211.

336 *See, e.g.*, Klee v. United States, 53 F.2d 58, 61 (9th Cir. 1931), where the court stated:

> The right of a landlord to inspect the leased premises does not include the right to "permit" third persons, not shown to be his agents, to come and go over the premises on business other than the owner's.

See also State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963) (landlord reserved no right of re-entry); Fitzgerald v. State, 80 Okla. Crim. 43, 156 P.2d 628 (1945) (landlord consented to police entry to common areas of premises); State v. Warfield, 184 Wis. 56, 198 N.W. 854 (1924) (landlady's right of entry restricted to cleaning defendant's room).

It is important to note that in Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965), the court suggested that *Stoner* overruled *Gorg*. *Id.* at 21 n.6.

337 In Burge v. United States, 342 F.2d 408 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965), the court saw "nothing unreasonable" in the search by police of a shared bathroom upon the consent of the host in control of the premises. *Id.* at 413. State v. Plantz, 180 S.E.2d 614 (W. Va. 1971), held that consent given by grandparents was valid as to a defendant "staying temporarily at the home of the grandparents," and where no "particular part" of the residence had been assigned to defendant. *Id.* at 624-25. *See also* United States *ex rel.* Perry v. Russell, 315 F. Supp. 65 (W.D. Pa. 1970); McGee v. State, 2 Tenn. Crim. 100, 451 S.W.2d 709 (1969), *cert. denied*, 400 U.S. 842 (1970).

338 268 F. Supp. 998 (D.D.C. 1966).

339 *Id.* at 1000-01. *See* Calhoun v. United States, 172 F.2d 457 (5th Cir.), *cert. denied*, 337 U.S. 938 (1949), where the defendant, although permitted to use a particular room, was found to have "had no authority over [the] room when he was not personally occupying it." 172 F.2d at 458.

340 268 F. Supp. at 1002. *But see* Weaver v. Lane, 382 F.2d 251, 254 (7th Cir. 1967), *cert. denied*, 392 U.S. 930 (1968).

> For example, where a third party consents to the search of areas *specifically set aside* for the use of the defendant or to the search of his *personal effects*, such consent has been held invalid.[341]

This rationale was again applied in *United States v. Poole*,[342] where the court would not allow a host's consent to search a closed overnight bag left in a closet to be controlling against a guest.[343] The court stated:

> The rule which emerges is that a defendant may object to a search consented to by another where the defendant has exclusive control over a part of the premises searched or over an "effect" on the premises which is itself capable of being (and is) "searched." "Enclosed spaces" over which a non-consenting party has a right to exclude others, whether rooms or effects, are protected.[344]

This rule, limiting the right of a party to consent to the search of areas specifically set aside for or under the specific control of other persons, is not confined to host-guest situations. Justice Black, dissenting in *Bumper*, pointed out that a gun which had been excluded from evidence was "not found in petitioner's private room, nor in any part of the house assigned to him, but in the kitchen behind the door," and therefore he believed that it should have been admitted into evidence.[345] Thus, he impliedly recognized limitations on searches conducted in places under the defendant's exclusive possession or control and without his voluntary consent.[346]

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341 268 F. Supp. at 1002 (emphasis in original).

342 307 F. Supp. 1185 (E.D. La. 1969).

343 *Id.* at 1189-90.

344 *Id.* at 1189. The *Poole* court further observed:

> It is privacy, not ownership, that is protected. But the Fourth Amendment protects only "*reasonable* expectations" of privacy . . . and perhaps courts have made the social judgment that when a person leaves possessions in premises over which he had no control, or right to control, any expectation of privacy on his part is unreasonable. However if a room is set aside for a non-consenting party, and he does have a right to exclude others, a third party's consent to a search of this room would upset a reasonable expectation of privacy.

Id. (citation omitted) (emphasis added by the court). *See* Katz v. United States, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

345 391 U.S. at 555, 556 n.4 (Black, J., dissenting).

346 This principle has also been applied in the context of the marital relationship. In State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962), the court recognized the right of a wife to allow entry of officers into jointly-possessed property. However, it refused to allow the wife to consent to the search of personal items found in a cuff link case which was located in a dresser drawer clearly belonging to the defendant and not to his wife. *Id.* at 631-32, 372 P.2d at 371-72.

State v. McCarthy, 20 Ohio App. 2d 275, 253 N.E.2d 789 (1969), also decided that a wife could consent to the search of the family home, but the search should be restricted to the common areas of the home and should not extend to personal effects owned by the husband. *Id.* at 283-84, 253 N.E.2d at 795.

The theory of exclusive possession and control has also been used in both the employment relationship and the parent-child context. In Holzhey v. United States, 223 F.2d

FAMILIAL CONSENT

Children

In the parent-child situation, parents have generally been held to possess the authority to consent to the search of a child's room and effects.[347] For example, in *State v. Kinderman*[348] the court held that a father could consent to the search of his 22-year-old son's room.[349] The case involved an appeal from a robbery conviction in which a gun and certain clothing identified with the robbery were admitted into evidence over the defendant's objection. Kinderman contended that the evidence was unlawfully obtained from his bedroom because a father may not waive a son's constitutional right to be protected from unreasonable searches and seizures.[350] Although the court upheld the search and seizure because of the reasonableness of the police activities and the apparent authority of the defendant's father to authorize it, the language of the court might be construed as sanctioning the search because of (1) the father's possession and control of the property,[351] (2) the familial relationship,[352] and (3) the desire of the father to protect his property from use in criminal activity.[353]

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823 (5th Cir. 1955), even the familial relationship of mother and daughter, combined with the daughter's possession of the area involved, could not justify her consent to the search of locked personal effects belonging to her mother. *Id.* at 826.

The employer-employee relationship in United States v. Blok, 188 F.2d 1019, 1021 (D.C. Cir. 1951), together with the ownership of an area and a desk by the employer, did not give the employer the authority to consent to the search of his employee's desk, which was used exclusively by the employee.

347 *See, e.g.*, Maxwell v. Stephens, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965); People v. Clark, 252 Cal. App. 2d 479, 60 Cal. Rptr. 569 (Ct. App. 1967); Tolbert v. State, 224 Ga. 291, 161 S.E.2d 279 (1968); People v. Thomas, 120 Ill. App. 2d 219, 256 N.E.2d 870 (1969); State v. Schotl, 289 Minn. 175, 182 N.W.2d 878 (1971); State v. Williamson, 78 N.M. 751, 438 P.2d 161 (1968); Commonwealth v. Hardy, 423 Pa. 208, 223 A.2d 719 (1966); Sorensen v. State, 478 S.W.2d 532 (Tex. Crim. App. 1972); State v. Vidor, 75 Wash. 2d 607, 452 P.2d 961 (1969).

348 271 Minn. 405, 136 N.W.2d 577 (1965).

349 *Id.* at 412, 136 N.W.2d at 582.

350 *Id.* at 405-08, 136 N.W.2d at 578-80.

351 For example, the court stated:

> [I]t would appear that the validity of such searches and seizures rests upon the right of control over the premises by the one who gives the consent.

Id. at 410, 136 N.W.2d at 581.

352 In this regard, the court observed:

> We can agree that the father's "house" may also be that of the child, but if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of children who live in his house.

Id. at 409, 136 N.W.2d at 580.

353 This premise was recognized by the court when it stated:

> But in this case the consent was given by the father who did not wish to have

In *People v. Flowers*,[354] however, the Court of Appeals of Michigan refused to allow a father's consent to justify the search of his son's room.[355] This was true even though the child was only seventeen (he had, however, been arraigned as an adult) and the father owned the house.[356] The trial court combined the parent's right of control of the premises with his right of control over the youth in order to justify the consent.[357] The court of appeals, however, rejected the argument in light of *Stoner*. It asserted that the trial court failed to recognize the separation between the constitutional rights of father and son and held that the son's constitutional rights could not be waived by the father.[358]

The Illinois supreme court, in *People v. Nunn*,[359] adopted the "expectation of privacy" doctrine and found that a mother did not have the authority to consent to the search of her son's room.[360] The son was 19 years old and lived in his mother's house. He intermittently gave her small sums of money. He left home some ten days before the search, locked his room, and told his mother not to let anyone in.[361] The mother invited the police to make the search.[362] The supreme court, affirming the court below, held the search to be invalid on the ground that the mother had set the room aside for the defendant's exclusive use, subject only to her housekeeping activities and her care of his personal effects.[363]

These Michigan and Illinois decisions are representative of the

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property on his premises which did not belong there, and who joined with law enforcement officers in determining if such a fact were true.

Id. at 409, 136 N.W.2d at 580.

It should be noted that Justice Otis, who dissented in *Kinderman*, pointed out that the youth involved was not a juvenile and that the mere fact that a son lived with his parents should not have resulted in a loss of constitutional rights. More specifically he stated:

I find nothing in such parent-child relationship from which implied consent to a search and seizure of the kind here involved may be inferred. With or without the payment of rent, I submit the Constitution requires that defendant's privacy be respected and that his clothing located in living quarters exclusively occupied by him be insulated from intrusion without a warrant . . . .

Id. at 418, 136 N.W.2d at 585.

354 23 Mich. App. 523, 179 N.W.2d 56 (1970).

355 *Id.* at 526-27, 179 N.W.2d at 58.

356 *Id.* at 524-25, 179 N.W.2d at 57-58.

357 *Id.* at 526, 179 N.W.2d at 58.

358 *Id.* at 527, 179 N.W.2d at 58.

359 —— Ill. 2d ——, 304 N.E.2d 81 (1973), *cert. denied*, —— U.S. —— (Apr. 1, 1974). This decision reversed a long line of Illinois cases.

360 *Id.* at ——, 304 N.E.2d at 87.

361 *Id.* at ——, 304 N.E.2d at 83.

362 *Id.*

363 *Id.* at ——, 304 N.E.2d at 83, 86.

minority view; most courts accept the *Kinderman* approach with varying degrees of reliance upon the three rationales set forth above.[364]

Husband-Wife

The most common form of consent probably arises in the husband-wife relationship. The majority of recent decisions dealing with this relationship have allowed either spouse to consent to the search of jointly-held property.[365] Earlier cases, which primarily discussed the right of the spouse to consent in terms of agency principles, were split as to the validity of such consent.[366]

The more recent decisions which rely specifically upon the possession and control theory have generally permitted spousal consents to search.[367] Some cases, however, still reject this concept.[368] The Supreme Court of Arizona, in *State v. Pina*,[369] for example, held that a wife could not consent to the search of the apartment which she shared with her husband because "a third person cannot waive another's basic constitutional rights against unlawful searches and seizures unless specifically authorized."[370] The majority of cases, however, view the consent to search as a personal right—which one holds in his or her own behalf—and not as a waiver of another's rights.[371]

The cases which permit consent by a spouse in possession of jointly-held property frequently lack a concise definition of that term. Instead, they rely upon the generally accepted assumption that a wife is in joint possession with her husband without requiring an examination of deeds or leases to determine who in fact has legal title or right of possession.[372] However, in *State v. Blakely*,[373] the court held that

364 *See* Note, *supra* note 271, at 27-28 & nn.82, 84.

365 *See, e.g.*, United States v. Alloway, 397 F.2d 105, 109-10 (6th Cir. 1968); Roberts v. United States, 332 F.2d 892, 896-97 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965).

366 There would appear to be a conflict of opinion as to whether a wife has the implied authority to consent to the search and seizure of her husband's property while it is located on premises owned by him. *See* Annot., 31 A.L.R.2d 1078, 1091-96 (1953); 47 AM. JUR. *Searches and Seizures* § 72 (1943).

367 *See, e.g.*, 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).

368 *See, e.g.*, State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); People v. Gonzalez, 50 Misc. 2d 508, 270 N.Y.S.2d 727 (App. T. 1966).

369 94 Ariz. 243, 383 P.2d 167 (1963).

370 *Id.* at 247, 383 P.2d at 169.

371 *See* p. 255 *supra.*

372 *See, e.g.*, United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839, 846 (3d Cir. 1970) (Gibbons, J., dissenting); Roberts v. United States, 332 F.2d 892 (8th Cir. 1964), *cert. denied*, 380 U.S. 980 (1965); United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937).

373 230 So. 2d 698 (Fla. Dist. Ct. App. 1970).

where a husband and wife lived in an apartment together but the husband paid the bills, the wife had no right to consent to a search.[374] The court seemed to emphasize technical legal concepts of possession rather than actual possession and control. This case lacked understanding of the fairly typical husband-wife relationship in which the husband earns the money and pays the rent, while the wife cares for the home and family and is considered equally in possession and control of the premises. The majority of jurisdictions accept the rule of law set forth in *Dalton v. State*,[375] in which the court rejected the consent given by a wife to search a car which was registered in her name but which was actually used and controlled by her husband. The court recognized the importance of actual possession rather than title in deciding who had the right to consent to the search of the property.[376]

The Supreme Court of Tennessee, in *Kelley v. State*,[377] interjected another concept into the growing confusion surrounding third party consents in the husband-wife context. In that case, the court refused to decide whether a wife under normal conditions could consent to a search, but it did decide that since the wife was angry at her husband and knowingly acted against his best interests, her consent was invalid.[378] The language in that case suggests reliance upon the traditional status relationship argument:

> Her whole attitude was contrary to his interests, and it could not be said that she was acting in any sense in the family interest with any authority to waive rights which might otherwise properly arise out of the relationship.[379]

Thus, the court concluded that such relationship is meaningless when antagonism exists between the parties.[380]

A number of states have rejected this estrangement doctrine,[381] including New Jersey in *State v. Crevina*.[382] There, the court did not

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374 *Id.* at 700.

375 230 Ind. 626, 105 N.E.2d 509 (1952).

376 *Id.* at 632-33, 105 N.E.2d at 511-12.

377 184 Tenn. 143, 197 S.W.2d 545 (1946).

378 *Id.* at 146-47, 197 S.W.2d at 546.

379 *Id.* at 146, 197 S.W.2d at 546.

380 *Id.* at 146-47, 197 S.W.2d at 546. It should be noted that in this case the wife was the instigator of the action and had summoned the police. *Id.* at 144, 197 S.W.2d at 545. It would seem that *Kelley* rejects any argument that a wife's consent is based on her possession and control of the premises..

381 *E.g.*, *In re* Lessard, 62 Cal. 2d 497, 504, 399 P.2d 39, 43, 42 Cal. Rptr. 583, 587 (1965), where the court stated that an "allegation of an 'estrangement' between [husband and wife] does not destroy the consent."

382 110 N.J. Super. 571, 266 A.2d 319 (L. Div. 1970), *aff'd*, 119 N.J. Super. 50, 289 A.2d 801 (App. Div. 1972).

consider the motives of the consenting party to be important since the right to consent came from the wife's personal right and not from any waiver of another's rights.[383] The wife initiated the contact with the police by reporting to them that her husband was a thief and was keeping stolen property in their apartment. She requested that they remove the stolen merchandise. Without a warrant, the police accompanied the wife to her home where she took them to the bedroom and relinquished the stolen items.[384] Although the wife argued that she had called the police because of a feeling of guilt, it was later shown that she really did it because of her animosity towards her husband.[385] The court said:

> [W]e are not here dealing with such a waiver of another's rights or a consent in behalf of another, but rather with a written consent given in the wife's own behalf as an occupant of the apartment. In that consent the wife specifically requested the police to remove the alleged stolen articles from her apartment, and accompanied them there for that purpose.[386]

Thus, New Jersey joins the majority of states that have recognized the fact that husband-wife consent cases are merely examples of the general rule concerning jointly held property. Regardless of the marital or agency relationship, a person who has an equal or superior right of possession can consent to a search. Recognizing that spouses gain their right to consent from factors other than the marital relationship, it becomes apparent that the right of a paramour to consent also springs from a possessory right over the premises.

Paramours

In *United States v. Robinson*,[387] a police officer suspected of murder spent two or three nights a week with a paramour at her apartment. He stored certain personal items in two boxes which were located in a closet there. The police, with the permission of the paramour, opened the boxes and discovered items which were later to be used as evidence against the defendant.[388] The court held that the evidence was admissible, stating that " 'where two persons have equal rights to the use or occupation of premises, either may give [lawful]

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383 110 N.J. Super. at 574, 266 A.2d at 321.
384 *Id.* at 572-73, 266 A.2d at 320.
385 *Id.* at 573, 266 A.2d at 320-21.
386 *Id.* at 574, 266 A.2d at 321.
387 479 F.2d 300 (7th Cir. 1973).
388 *Id.* at 301.

consent to a search.' "[389] It then distinguished those cases in which courts had refused to allow consent by another when the accused had special rights over an object or thing in the room by finding that in the instant case the closet searched was used by both the woman and the man, and thus she could consent to the search.[390] Furthermore, since the cardboard boxes had been left behind when the defendant took many other objects with him, the court determined that the defendant could maintain no expectation of privacy.[391] There was, however, no showing of a true intentional relinquishment of control which would be necessary for an effective abandonment, or evidence that the defendant had no intention of returning. The court relied on the fact that he had removed other boxes and left the seized boxes behind. It added:

> If a spouse does not have complete expectation of privacy in his own home in view of the possibility of his mate's consent, the casual lover who drops in at his convenience can hardly expect more when he turns his part-time home over to the full-time dominion of his paramour and then places his belongings in unlocked, uncovered cardboard boxes in a closet frequented by her.[392]

Part of the difficulty in dealing with *Robinson* was caused by the somewhat unusual nature of the living arrangements. Other cases that have dealt with the rights of mistresses have also presented difficulties.[393] In the 1970's, with the changing life style of many members of society, the possession and control doctrine will become even more difficult to apply. Questions such as whether members of a commune will be permitted to waive the rights of other members are certain to arise.

Bailors and Bailees

The difficulties experienced by courts in applying the possession and control doctrine to jointly occupied premises are also evident in the

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389 *Id.* at 302 (quoting from United States v. Sferas, 210 F.2d 69, 74 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954)).

390 479 F.2d at 302.

391 *Id.* at 302-03.

392 *Id.* at 302.

393 *See, e.g.*, United States v. Wilson, 447 F.2d 1 (9th Cir. 1971) (girlfriend who lived with defendant had authority to consent to search because of equal rights to possession and occupancy); United States v. Airdo, 380 F.2d 103 (7th Cir.), *cert. denied*, 389 U.S. 913 (1967) (defendant living in adulterous circumstances had standing to challenge search, but search held valid since paramour had voluntarily consented); State v. Hagan, 99 N.J. Super. 249, 239 A.2d 262 (App. Div. 1968) (boyfriend who lived with defendant had authority to consent to search).

automobile search situation in which the vehicle is in the possession of someone other than the owner. Questions which arise include: (1) Does the owner (who has title and the right to possession) have the authority to consent to the search of the car while it is in another's actual possession? (2) Does the person in possession of the car (who does not hold legal title) have the authority to consent to a search? (3) Do both the bailor and the bailee have authority to consent? The courts are divided on these as well as other related issues.

In *Anderson v. United States*,[394] the court held that the owner of an automobile who was not in possession could consent to the search of the vehicle while it was in the possession of a bailee since the owner's right of possession was superior to the bailee's.[395] The court bluntly stated:

> [W]hen two people have a property interest in the property to be searched, the waiver of the personal Fourth Amendment rights of one party may act as a binding waiver of the personal rights of the other party.[396]

In contrast, *United States v. Eldridge*[397] dealt with the ability of the bailee of an automobile to consent to a search. The court permitted such a search which resulted in discovery of evidence adverse to the bailor.[398] While clearly allowing the bailee to consent to a search,[399] the court in *Eldridge*, by way of dictum, draws an analogy to the landlord-tenant situation in reaching the determination that a bailor could not do so.[400] This determination can be inferred from the court's reference to *Chapman v. United States*,[401] a landlord-tenant decision in which the Supreme Court held that a landlord could not consent to a search of a tenant's apartment.[402] Although the owner had the right to reclaim possession, he could not consent to a search until he had in fact done so.[403] Under this rationale, the bailor of the automobile who was not in possession would have no authority to consent to a search. An argument can be made, however, that the analogy to the landlord-tenant situation is misplaced and that a comparison with the host-guest situation is more appropriate. In most bailment situa-

394 399 F.2d 753 (10th Cir. 1968).
395 *Id.* at 756-57.
396 *Id.* at 756.
397 302 F.2d 463 (4th Cir. 1962).
398 *Id.* at 464-65.
399 *Id.* at 466.
400 *Id.* at 465.
401 365 U.S. 610 (1961).
402 *Id.* at 616-18.
403 302 F.2d at 465.

tions the person borrowing the automobile holds it with a lesser degree of control than does a tenant renting an apartment. This is particularly true in a situation where the bailment is made gratuitously. Using the host-guest rationale, a bailor who allows a person to use his automobile gratuitously would still have the authority to consent; the bailee, on the other hand, should not have the right to consent since by analogy a guest would not have that authority.

State decisions are also in conflict as to the question of whether a bailee may consent to a search. The Ohio supreme court, in *State v. Bernius,*[404] specifically rejected *Eldridge* in holding that a bailee *may not* consent to a search.[405] After discussing *Stoner,* the court concluded:

> [D]ecisions of the Supreme Court of the United States require this court to hold that where the owner of an automobile entrusts the possession and control thereof to another, a search thereof with the consent of the one so entrusted but without the express consent or authorization of such owner is, as against such owner, prohibited by the Fourteenth Amendment to the Constitution of the United States as an unreasonable search.[406]

The later Virginia supreme court case of *Henry v. Commonwealth,*[407] however, rejected the approach of *Bernius* and allowed the bailee of an automobile to consent to a search which yielded evidence against a passenger in the car.[408]

The variety of factual situations which have been presented in bailor-bailee consent search cases have prevented uniformity of legal analysis. Upon closer examination, however, one may conclude that reasonableness, in the fourth amendment sense, provides the common thread.

In *Anderson,* the defendant borrowed an automobile after he had robbed a bank. The police apprehended him in the borrowed car, at which time he was interrogated and arrested, and the vehicle was impounded. The police, although not securing a search warrant, did obtain written consent to search from the vehicle's owner.[409] The court upheld the search and admitted into evidence both clothing and an incriminating note which were found in the vehicle.[410] The

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404 177 Ohio St. 155, 203 N.E.2d 241 (1964).
405 *See id.* at 157-58, 203 N.E.2d at 243.
406 *Id.*
407 211 Va. 48, 175 S.E.2d 416 (1970).
408 *Id.* at 51, 175 S.E.2d at 418.
409 399 F.2d at 754.
410 *Id.* at 756-57.

decision, although containing language normally associated with waivers of constitutional rights, merely concludes:

> [I]t seems clear that at the time consent was given for the search the property right of the owner, Miss Martinez, who was either in possession or entitled to possession, was superior to the property right of the appellant.[411]

Although when broadly construed the decision appears to authorize a bailor's consent to automobile searches, it may also be read as turning upon its own particular facts. Because of the defendant's arrest and the subsequent impoundment of the car, the bailment relationship could be considered terminated. Therefore, under the circumstances, the owner could be deemed to have had a greater right to possession and control than any other person.

The defendant in *Eldridge* had permitted his friend to use his car. Upon a report, the police investigated the automobile, saw a rifle through the window, and left to obtain a search warrant. When they returned, the police, without showing the warrant, asked the bailee for permission to search the car. Permission was voluntarily granted and, during the officers' search, two firearms (including a rifle) were discovered in addition to a knife and two Coast Guard radios. The guns were owned by the defendant, but the radios were stolen.[412] The court held that while the bailee was in rightful possession he "could do in respect to the automobile whatever was reasonable and not inconsistent with its entrustment to him."[413] When the bailor-owner handed the key to the bailee, he reserved no exclusive right of privacy. Thus, since access to the trunk is a normal incident to the use of an automobile, under all the circumstances, the bailee could reasonably consent to a search of the trunk. The court recognized that although the bailee's right of possession may not have been as great as a tenant's, it was sufficient to justify the search.[414]

In *Bernius*, the police searched the defendant's automobile after the driver, a bailee, had been stopped and taken into custody. Miss Young, the bailee, had given the car keys to the police who broke open a suitcase which they found in the trunk.[415] The state argued that Miss Young had consented to the search and that she possessed the implied authority to do so. The court rejected this argument and found that

411 *Id.*

412 302 F.2d at 464.

413 *Id.* at 466.

414 *Id.* at 465-66.

415 177 Ohio St. at 156-57, 203 N.E.2d at 242-43.

under all the circumstances Miss Young did not have the authority to permit either entry into the trunk or a search of the suitcase.[416]

In *Henry,* the police spotted the defendant, a robbery suspect, while he was riding in the back seat of a Pontiac driven by Massey.[417] Massey said that his brother-in-law owned the car but " 'it was in his [Massey's] possession.' "[418] Massey agreed to a search of the automobile at which time the police found a pistol in the back seat.[419] Although Massey, the bailee, consented to the search, the conflict in this case was not between the bailor and bailee, but between the bailee and a passenger. The bailee apparently had a greater right of possession than did the passenger. "Massey had the right to possess the Pontiac belonging to his brother-in-law, whereas Henry had no possessory right."[420] Therefore, Massey's consent to search the back seat of the car was reasonable.

The reasonableness approach can also be seen in *Bustamonte.* The Supreme Court in that case did not deal with the third party consent issue, yet the case was factually similar to *Henry* in that (1) the owner was not present; (2) the person consenting was related to the owner; and (3) although the defendant was present, his consent was neither solicited nor obtained.[421] Therefore, the same basic reasoning which led the *Henry* court to believe that under all the circumstances the search was reasonable could also be applicable here.

While in a strictly theoretical sense the bailor-bailee cases are contradictory, from a reasonableness perspective they are harmonious. Confusion only arises because of an initial attempt to force these cases into a rigid possession and control analytical framework. An ad hoc approach, combined with the utilization of a "reasonableness under the circumstances" test, yields a more acceptable and congruous resolution of the issues.

ABANDONMENT

Another aspect of third party consent evolves from the concept of abandonment. The Supreme Court decided in *Abel v. United States*[422] that, after a room has been vacated by a tenant, a hotel owner may consent to its search. Specifically, the Court ruled:

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416 *See id.* at 157-58, 203 N.E.2d at 243.
417 211 Va. at 49, 175 S.E.2d at 416-17.
418 *Id.*, 175 S.E.2d at 417.
419 *Id.*
420 *Id.* at 51, 175 S.E.2d at 418.
421 412 U.S. at 220.
422 362 U.S. 217 (1960).

> [A]t the time of the search petitioner had vacated the room. The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made. . . . So far as the record shows, petitioner had abandoned these articles. . . . There can be nothing unlawful in the Government's appropriation of such abandoned property.[423]

The abandonment approach flows out of the possession and control doctrine. When such possession and control reverts back to the original possessor, that possessor can consent to a search.[424] Traditionally, this approach had been based on strict property concepts. *United States v. Wilson*,[425] however, stands for the proposition that

> [t]he proper test for abandonment is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned.[426]

The facts in *Wilson* reveal that the tenant-defendant was a number of weeks behind in rent payments. Someone had told the landlord that Wilson was not returning, and the door to his apartment had been left open. Upon entry, the landlord noticed explosive devices and subsequently informed the police. The court held that the landlord had the right to consent to an entry by the police officers. Although defendant under state law had not been lawfully evicted and therefore retained legal right of possession, the court refused to be bound by technical property concepts.[427] It justified the consent by employing the reasonable "expectation of privacy" doctrine found in *Katz v. United States*.[428] The tenant could not reasonably expect that, after a two week abandonment without paying rent, an investigation would not be made.[429]

Wilson demonstrates one court's rejection of formal property concepts to define the scope of third party consent and the adoption of the more modern "expectation of privacy" approach. Ultimately, this

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423 *Id.* at 241.

424 *See, e.g.*, United States *ex rel.* Puntari v. Maroney, 220 F. Supp. 801, 806 (W.D. Pa. 1963), wherein the court stated:

> Relator was not living at the home of his parents at the time of the search; he had terminated his temporary visit on . . . the day of the robbery; he then had no possessory interest in the premises either as a guest or invitee.

425 472 F.2d 901 (9th Cir. 1972).

426 *Id.* at 902.

427 *See id.* at 902-03.

428 389 U.S. 347 (1967). *Katz* stands for the proposition that the fourth amendment protects persons, not places. *Id.* at 351.

429 472 F.2d at 903.

"expectation of privacy" doctrine must rely upon an individual court's interpretation of reasonableness. As we have seen, the possession and control doctrine has not been consistently and uniformly applied, and it appears unlikely that the "expectation of privacy" doctrine will provide a viable alternative.

UNDERLYING CONSTITUTIONAL QUESTIONS

In the preceeding analysis, no attempt was made to set forth all of the possible relationships or factual situations in which third party consents arise, or to set forth all the related law. Rather, the intent was to examine some of the theories which the courts have developed to grapple with this convoluted issue. These cases are typical of the complexities involved, and illustrate the difficulty encountered by the judiciary in its attempt to develop a logical, consistent policy toward consent searches.

Some courts and commentators have either suggested or implied that no third party consent search should be permitted.[430] That solution would certainly end the difficulty of applying the rule. However, the mere difficulty surrounding the rule's application should not result in its elimination if it serves a necessary function and does not violate any constitutional protections.

Of principal concern are the constitutional implications of third party consent. As already indicated, consent to search constitutes a waiver of a person's constitutional rights, even accepting the position set forth in *Bustamonte* that it is not a waiver in the traditional sense.[431] Although such rights may normally be waived only by the

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430 In his dissent in United States v. Stone, 471 F.2d 170 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), Judge Swygert stated that

> [o]nly where a true agency may be shown, in the strictest legal sense of that term, may a third party consent to a waiver of another's rights under the Fourth Amendment. . . . This is a corollary of the long settled rule that constitutional rights may be waived by their holder and none other.

471 F.2d at 175 (citation omitted). *Accord*, State v. Matias, 51 Hawaii 62, 68, 451 P.2d 257, 260 (1969). *See also* People v. Gonzalez, 50 Misc. 2d 508, 270 N.Y.S.2d 727 (App. T. 1966); Comment, *The Effect of a Wife's Consent to a Search and Seizure of the Husband's Property*, 69 DICK. L. REV. 69, 80 (1964); Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 812 (1966); Comment, *The Use of Evidence Obtained During a Search and Seizure Consented to by the Defendant's Spouse*, 1964 U. ILL. L.F. 653, 656; Note, *Third-Party Consent to Search and Seizure—The Need for a New Evaluation*, 41 ST. JOHN'S L. REV. 82, 90 (1966); Note, *Effective Consent to Search and Seizures*, 113 U. PA. L. REV. 260, 277 (1964). *But see* Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12, 40-41.

431 *See* 412 U.S. at 235-46. *See also* pp. 243-45 *supra*.

defendant,[432] it has often been held, without adequate discussion, that a person with an equal or superior right of possession to the goods or premises in question could consent to a search, regardless of the rights possessed by the person against whom the search was directed.[433] This possession and control theory has been strongly attacked as being based on property concepts and therefore inconsistent with the modern constitutional perspective of protecting the individual's right to privacy.[434] Two reasons have been advanced, however, to rationalize the application of this waiver to persons not present at the situs of the search: (1) the third party is waiving his own rights and not those of the defendant; and (2) the person against whom the search is directed has assumed the risk that the third person will waive his constitutional rights.[435]

In analyzing the first rationale, it must be recognized that the fourth amendment confers a personal right. If two people live in the same house, each has the constitutional right to be free from a warrantless search. Each also has the "right" to waive that right. The question presented is: can one person waive his own fourth amendment rights when to do so means that he automatically waives the identical rights of another? This can be viewed as a clash of rights between the consenting and non-consenting parties. The rights, however, are not of equal magnitude. The clear constitutional right to be free from a warrantless search, when balanced against the "right" to waive the warrant requirement, must prevail in every instance. At least two decisions have indicated that when two joint tenants are involved and one consents and the other refuses to consent, the refusal takes priority.[436] Therefore, a person against whom a search is directed should not lose his

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432 *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 529 (1972) (right to speedy trial); Miranda v. Arizona, 384 U.S. 436, 475-76 (1966) (right to remain silent); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (right to confrontation); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (right to trial by jury); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (right to counsel).

433 *See* pp. 254-55 *supra* and accompanying notes.

434 *See* United States v. Matlock, 42 U.S.L.W. 4252, 4254 n.7 (U.S. Feb. 20, 1974). *See generally* Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 807-09 (1966) and cases cited therein.

435 United States v. Matlock, 42 U.S.L.W. 4252, 4254 (U.S. Feb. 20, 1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969); Marshall v. United States, 352 F.2d 1013, 1015 (9th Cir. 1965), *cert. denied*, 382 U.S. 1010 (1966); State v. McCarthy, 20 Ohio App. 2d 275, 284, 253 N.E.2d 789, 795-96 (1969).

436 Tompkins v. Superior Court, 59 Cal. 2d 65, 68-69, 378 P.2d 113, 116, 27 Cal. Rptr. 889, 892 (1963). *See* Lucero v. Donovan, 354 F.2d 16, 20-21 (9th Cir. 1965). *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 240.3, Comment (Proposed Draft No. 1, 1972), where the authors stated: "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."

fourth amendment rights simply because he is not fortuitously present at the time consent was requested.[437]

The assumption of risk doctrine, which evolved from the *Katz* decision, has also been used to justify third party consents.[438] The Supreme Court, by emphasizing that the fourth amendment protects "people, not places," minimized the impact that formal property concepts had upon the determination of whether fourth amendment rights had been usurped.[439] Under *Katz,* the fourth amendment guarantees each individual a reasonable expectation of privacy which transcends mere property law concepts and extends to at least some public places.[440] Logically, the *Katz* rationale would imply a rejection of the possession and control theory and the adoption of an expectation of privacy theory. The question can, therefore, be posed whether an individual's expectation of privacy can be destroyed by another, simply because the latter enjoys equal property rights in the place or thing searched. One commentator has even argued that the expectation of privacy as enunciated in *Katz* can be safeguarded only if the courts use predictable property concepts such as possession and control to determine the validity of third party consent.[441] According to this view, the theory of possession and control would not be inconsistent with the expectation of privacy expressed in *Katz;* rather, it would provide a method of intelligently applying that premise. A person who lives

437 *See* Note, *Family Consent to an Unlawful Search,* 28 WASH. & LEE L. REV. 207, 220 (1971), wherein the author concludes:

> To argue that an individual, absent temporarily from his home, can without his knowledge or consent, have his constitutional rights vicariously waived by a member of his family is to subjugate an individual's personal constitutional rights to the control of another. Likewise, to base such an argument on the third party's right of possession and control of the premises is to deflect attention from the real issue. The fourth amendment defines an individual's right and only the individual should be allowed to waive it.

438 *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969).

439 389 U.S. at 351-53.

440 *Id.* at 350-53.

441 In his recent article, Professor Fernand [Tex] Dutile argued:

> In third-party consent cases, then, it is precisely the agency and property points which the Court should bear in mind. These considerations present the most predictable and ascertainable standards consistent with safeguarding justifiable expectations of privacy. Faced with a third-party consent allegation, the Court should inquire as to whether the third party had sufficient authority to allow the entry from the point of view of either the third-party's property interest or his express or implied delegation of power from another with such power. Such an approach would be possible whether the third-party consent situation concerns landlord-tenant, innkeeper-guest, wife-husband, child-parent, teacher-student or any other.

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) (footnote omitted).

with another, or in the same house of another, would have a valid expectation of privacy except as against the person with whom he has chosen to live. If one wishes to allow a warrantless search, a roommate is deemed to have assumed the risk of such acquiescence.

Katz, which has been relied upon to criticize the possession and control rationale,[442] was specifically limited in *United States v. White.*[443] In *White,* a person consented to have his conversation with the defendant taped by officials, and the Court held that the evidence obtained was admissible.[444] 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.[445] 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 the police. However, *White* is questionable even if limited to its facts, and since a consent to search would seem to be more intrusive on constitutional rights than a consent to the taping of a conversation, *White* is inappropriate to support such an extension of the assumption of risk rationale. In 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. Justice Harlan, in his dissenting opinion, predicted that *White* would have a deleterious effect upon the public's confidence and sense of security in personal relationships, which have traditionally been a characteristic of life in a free society.[446] For these reasons, the assumption of risk doctrine does not adequately protect constitutional rights, and should therefore be rejected.

The constitutional ramifications inherent in third party consent cases have been virtually ignored by the courts. This judicial acquiescence will undoubtedly continue as long as such searches are deemed to be a necessary and vital part of police investigation. Criminal detection obviously becomes easier if third parties can authorize a search in the absence of the person against whom the search is directed, even where that person would deny consent. It is submitted that this reason-

442 United States v. Stone, 471 F.2d 170, 174-78 (7th Cir. 1972) (Swygert, C.J., dissenting), *cert. denied,* 411 U.S. 931 (1973); People v. Smith, 19 Mich. App. 359, 172 N.W.2d 902, 910 (1969); Comment, *Third-Party Consent Searches: An Alternative Analysis,* 41 U. CHI. L. REV. 121, 126-27 (1973); Note, *supra* note 437, at 219.

443 401 U.S. 745 (1971).

444 *Id.* at 746-47, 749.

445 *Id.* at 751-53.

446 *Id.* at 787 (Harlan, J., dissenting).

ing was primarily responsible for the refusal by the Court to require consent search warnings in *Bustamonte*.[447] The circumstances under which such searches occur, however, militate against the adoption of a consent rule based upon police convenience. Furthermore, since the existence of an emergency obviates the need for third party consent, it is not necessary in emergency situations.[448] If there is probable cause and no emergency, the police can get a warrant. If there is no probable cause, it is doubtful whether the search should be permitted. The police still have other investigative techniques that can be used to obtain probable cause and thereafter a warrant. At the very least, the police should be expected to wait until the person against whom they wish to direct the search is available to give or withhold consent. The rejection of third party consent would not affect cases such as *Frazier*, where a search consented to by the person against whom it was directed elicited evidence against another.[449] In such situations, the evidence would generally be admissible under the "plain view" rule.[450]

In *Matlock*, Justice Douglas' dissenting opinion reaffirmed the need for a warrant as a strict prerequisite for a search in the absence of a genuine emergency situation. He cautioned that a loose interpretation of the warrant requirement could result in the fourth amendment's becoming nothing but "empty phrases."[451] It appears that fourth amendment interests, absent exigent circumstances, would best be served by assuring freedom from warrantless searches, unless

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447 *See* 412 U.S. at 227.

448 In a true emergency, the fourth amendment will not be violated if a warrant is not obtained prior to the search and/or seizure. Schmerber v. California, 384 U.S. 757, 770-71 (1966); *see* McDonald v. United States, 335 U.S. 451, 454-55 (1948) (dictum). *See also* Miles & Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105, 107 (1972).

449 394 U.S. at 740.

450 In Harris v. United States, 390 U.S. 234, 236 (1968), the Court stated:

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure . . . .

Accord, Ker v. California, 374 U.S. 23, 42-43 (1963); Coates v. United States, 413 F.2d 371, 373 (D.C. Cir. 1969); State v. McKnight, 52 N.J. 35, 56, 243 A.2d 240, 252 (1968). See Murray & Aitken, *Constitutional Limitations on Automobile Searches*, 3 LOYOLA U.L.A.L. REV. 95, 98 (1970). Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971), added the requirement of inadvertence to the "plain view" doctrine.

451 42 U.S.L.W. at 4259. Justice Douglas observed:

> [I]ndeed, the provisions of the Fouth Amendment carefully and explicitly restricting the circumstances in which warrants can issue and the breadth of searches have become "empty phrases" . . . . This was not a case where a grave emergency, such as the imminent loss of evidence or danger to human life, might excuse the failure to secure a warrant. . . . It is inconceivable that a search conducted without a warrant can give more authority than a search conducted with a warrant.

Id.

there is a personal waiver by the individual against whom the search is directed.[452]

CONCLUSION

The Supreme Court in *Matlock,* relying primarily upon the reasoning in *Bustamonte* and its rejection of the waiver approach to consent, reaffirmed its prior underdeveloped case law which accepted the validity of third party consent. The public policy upon which *Bustamonte* was based was derived from the apparent necessity of utilizing consent searches to meet the demands of effective and efficient law enforcement. This demonstrates the Court's increasing emphasis upon the public's right to be secure from unlawful criminal activity and evidences a departure from a concern for the individual's freedom from unreasonable police intrusion. The proliferation of violence and the rise in crime rates mandate that law enforcement officials have the obligation to use all legitimate investigative methods to combat crime, but these methods must exist within permissible constitutional boundaries. Constitutional guarantees are best preserved by recognizing that consent to search is a waiver of personal constitutional rights. This waiver should only be exercised by the person against whom the search is directed; and then, only when knowingly, intelligently, and voluntarily made.

452 It may be argued that this rule is overly restrictive in situations where the third party is not merely acquiescing to the search, but has affirmatively requested the police to conduct the search. In such situations, it may be more desirable to admit the evidence seized. However, even in these cases, the informaton presented by the third party would generally constitute sufficient probable cause to obtain a warrant. *But see* Comment, *Third-Party Consent Searches: An Alternative Analysis,* 41 U. CHI. L. REV. 121 (1973), where the author suggests distinguishing between those cases in which the police initiate the search and those cases in which private parties inaugurate the police contact by requesting the police to make a search. The author would reject the validity of police initiated searches but would condone searches carried out by the police at the request of a private party when that party has a "countervailing interest" which would give rise to a right to consent. *Id.* at 134-43.