The Rights of the Accused

The Justices and Criminal Justice

Edited with introductions by

Kermit L. Hall

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The Supreme Court in American Society

Equal Justice Under Law

Series Editor

Kermit L. Hall

North Carolina State University

A Garland Series

Series Contents

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Series Introduction

The inscription carved above the entrance to the Supreme Court of the United States is elegant in its brevity and powerful in its directness: "Equal Justice Under Law." No other words have been more regularly connected to the work of the nation's most important judicial tribunal. Because the Court is the highest tribunal for all cases and controversies arising under the Constitution, laws, and treaties of the United States, it functions as the preeminent guardian and interpreter of the nation's basic law. There was nothing, of course, in the early history of the Court that guaranteed that it would do just that. The justices in their first decade of operation disposed of only a handful of cases. During the subsequent two centuries, however, the Court's influence mushroomed as it became not only the authoritative interpreter of the Constitution but the most important institution in defining separation of powers, federalism, and the rule of law, concepts at the heart of the American constitutional order.

Chief Justice Charles Evans Hughes once declared that the Court is "distinctly American in concept and function." Few other courts in the world have the same scope of power to interpret their national constitutions; none has done so for anything approaching the more than two centuries the Court has been hearing and deciding cases. During its history, moreover, the story of the Court has been more than the sum of either the cases it has decided or the justices that have decided them. Its story has been that of the country as a whole, in war and peace, in prosperity and depression, in harmony and discord. As Alexis de Tocqueville observed in *Democracy in America*, "I am unaware that any nation on the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people." That power, as Tocqueville well understood, has given the justices a unique role in American life, one that combines elements of law and politics. "Scarcely any political question," Tocqueville wrote, "arises in the United States that is not revolved, sooner or later, into a judicial question." Through the decisions of the Supreme Court, law has become an extension of political discourse and, to that end, the rule of law itself has been embellished. We appropriately think of the high court as a legal institution, but it is, in truth, a hybrid in which matters of economics, cultural values, social change, and political interests converge to produce what we call our constitutional law. The Court, as a legal entity, speaks through the law but its decisions are shaped by and at the same time shape the social order of which it is part. All of

which is to say that, in the end, the high court is a human institution, a place where justices make decisions by applying precedent, logic, empathy, and a respect for the Constitution as informed by the principle of "Equal Justice Under Law." That the Court has at times, such as the struggle over slavery in the 1850s, not fully grasped all of the implications of those words does not, in the end, diminish the importance of the Court. Instead, it reminds us that no other institution in American life takes as its goal such a lofty aspiration. Given the assumptions of our constitutional system, that there is something like justice and freedom for all, the Court's operation is unthinkable without having the concept of the rule of law embedded in it.

As these volumes attest, interest in the Court as a legal, political, and cultural entity has been prodigious. No other court in the American federal system has drawn anything approaching the scholarly attention showered on the so-called "Marble Palace" in Washington, D.C. As the volumes in this series make clear, that scholarship has divided into several categories. Biographers, for example, have plumbed the depths of the judicial mind and personality; students of small group behavior have attempted to explain the dynamics of how the justices make decisions; and scholars of the selection process have tried to understand whether the way in which a justice reaches the Court has anything to do with what he or she does once on the Court. Historians have lavished particular attention on the Court, using its history as a mirror of the tensions that have beset American society at any one time, while simultaneously viewing the Court as a great stabilizing force in American life. Scholars from other disciplines, such as political science and law, have viewed the Court as an engine of constitutional law, the principal agent through which constitutional change has been mediated in the American system, and the authoritative voice on what is constitutional and, thereby, both legally and politically acceptable. Hence, these volumes also address basic issues in the American constitutional system, such as separation of powers, federalism, individual expression, civil rights and liberties, the protection of property rights, and the development of the concept of equality. The last of these, as many of the readings show, has frequently posed the most difficult challenge for the Court, since concepts of liberty and equality, while seemingly reinforcing, have often, as in the debate over gender relations, turned out to be contradictory, even puzzling at times.

These volumes also remind us that substantial differences continue to exist, as they have since the beginning of the nation, about how to interpret the original constitutional debates in the summer of 1787 in Philadelphia and the subsequent discussions surrounding the adoption of the Bill of Rights, the Civil War amendments, and Progressive-era constitutional reforms. Since its inception, the question has always been whether the Court , in view of the changing understandings among Americans about equality and liberty, has an obligation to ensure that its decisions resonate with yesterday, today, tomorrow, or all three.

Volume Introduction

American constitutional law is deliberately weighted in favor of persons who have been accused of crimes. Indeed, the framers of both the Constitution and the Bill of Rights realized, based on their experience under colonial rule, that appropriate procedural and substantive safeguards were critical to political liberty. The Bill of Rights, for example, makes the protection of such rights a principal theme. The Fourth, Fifth, Sixth, and Eighth Amendments deal in various ways with such essential matters as prohibiting unreasonable searches, freedom from double jeopardy, the right against self-incrimination, the right to a speedy trial, and a prohibition on excessive bail and the infliction of cruel and unusual punishments. These provisions, which originally applied only against the federal government, were subsequently extended through the process of incorporation to apply against the states under the Fourteenth Amendment provision that no state shall "deprive any person of life, liberty, or property, without due process of law." This process of incorporation, however, was profoundly controversial, since it meant that the states, which had historically exercised broad police powers over health, safety, morals, and welfare, found their actions during the twentieth century, and especially during the period of the Warren and Burger Courts, under constant scrutiny. Among the most controversial of these developments was the rise of the so-called exclusionary rule, a doctrine developed by the Court that prevented evidence that had been illegally seized from being used in a criminal trial.

These articles recount and assess the development of the rights of the accused. They also remind us that the justices have relied on more than just the Bill of Rights in dealing with criminal justice. The Constitution in its original form also placed strong emphasis on such matters. For example, the critical privilege of the writ of habeas corpus was guaranteed, and both bills of attainder and ex post facto laws were forbidden.

Throughout it's history the Court has had to struggle with two competing views of criminal justice. One, the due process model, favored by courts, has stressed the value of maintaining legal process at all costs as a way of reinforcing the civilized nature of the legal order in the face of uncivilized behavior, such as rape and murder. On the other hand, the crime control model, which is preferred by law enforcement officials and many politicians, stresses that civilization itself rests on being able to apprehend, try, and punish wrongdoers. As these essays remind us, the high court has invariably dealt with this division by attempting to strike a balance.

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COMMENTS

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

I. INTRODUCTION

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

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[1] The fourth amendment provides:

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

U.S. CONST. amend. IV.

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

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

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

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

fourth amendment "is a search that is conducted pursuant to consent."[5]

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

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

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

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

[6] *See, e.g.*, E. CORWIN, *supra* note 2, at 346; Note, *supra* note 3, at 808; Comment, *supra* note 3, at 800.

[7] *See, e.g.*, E. CORWIN, *supra* note 2, at 347; Note, *supra* note 3, at 808; Comment, *supra* note 3, at 801.

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

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

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

[11] 415 U.S. 164 (1974).

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

II. THE SUPREME COURT'S *MATLOCK* DECISION

The Supreme Court first expressly recognized the validity of third-party consent searches in *Matlock v. United States*.[13] The rela-

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

[13] 415 U.S. 164 (1974).

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

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

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

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

[15] *Id.* at 166.

[16] Wefing & Miles, *supra* note 8, at 261.

[17] 415 U.S. at 170.

[18] *Id.*

[19] 255 U.S. 313 (1921).

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

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

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

21 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

22 415 U.S. at 171 (citing *id.*).

23 *See infra* text accompanying notes 98-105.

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

25 The Court said:

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

415 U.S. at 171.

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

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

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

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

27 *See, e.g.*, People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1958); People v. Haskell, 41 Ill. 2d 25, 241 N.E.2d 430 (1968); People v. Walker, 34 Ill. 2d 29, 213 N.E.2d 552 (1966); Nestor v. State, 243 Md. 438, 221 A.2d 364 (1966); Commonwealth *ex rel.* Cabey v. Rundle, 432 Pa. 466, 248 A.2d 197 (1968); State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948); Burge v. State, 443 S.W.2d 720 (Tex. Crim. App.), *cert. denied*, 396 U.S. 934 (1969). *See generally* Annot., 31 A.L.R.2d 1078, 1086-88.

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

29 The Court stated:

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

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

30 *Id.* at 169-72.

31 *Id.* at 166.

32 Early in its discussion, the Supreme Court did say that previous cases indicate that

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

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

III. Some State and Lower Federal Court Decisions on Third-Party Consent Searches of Jointly Occupied Premises When One of the Co-occupants Who is Present Objects to the Search

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

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

[33] *See supra* note 26.

[34] *See supra* note 27.