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S. Matthew Cook

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THIRD-PARTY CONSENT UNDER THE UNITED STATES AND UTAH CONSTITUTIONS: SHOULD UTAH ADOPT THE FEDERAL STANDARD?

I. INTRODUCTION

A search conducted without a warrant is generally "per se unreasonable" under the Fourth Amendment[1] to the United States Constitution.[2] The United States Supreme Court, however, has recognized several exceptions that justify a warrantless search.[3] Consent by the person to be searched is

1. The Fourth Amendment to the United States Constitution reads:

> 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. Katz v. United States, 389 U.S. 347, 357 (1967). For the purpose of simplicity, this article discusses only searches and purposely omits any discussion of seizures. The Fourth Amendment does not distinguish between a search and a seizure in relation to the constitutional protections afforded a criminal defendant–both are considered unreasonable if conducted without a warrant. *See id.* The author recognizes, however, that there is a difference between the legal standard for determining when a search has occurred versus the standard for determining when a seizure has occurred. *See* Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring) (noting that a search protects citizens'"interest in maintaining personal privacy" while a seizure protects an individual's "interest in retaining possession of property"); *see also* California v. Ciraolo, 476 U.S. 207, 211 (1986) (recognizing that a search occurs when the police invade an area where the defendant has a "reasonable expectation of privacy") (quoting *Katz*, 389 U.S. at 360) (Harlan, J., concurring); United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."). The Utah Supreme Court recently discussed the potential difference between a consent search and consent seizure and whether to draw any distinction between the two. *See infra* note 4.

3. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (good faith exception); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search exception); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view exception); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest exception); Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances exception); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception). For a detailed list of the many recognized exceptions, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985). Because of the many exceptions to the

one such exception.[4] "It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."[5] The issue, then, is who is authorized to give valid consent to search the defendant's property—is the criminal defendant alone authorized or may third parties also give valid consent?

A line of Supreme Court decisions[6] answers this question by recognizing that, in addition to the criminal defendant, a third party who shares common authority over the property with the defendant may also give effective consent to a search of the defendant's property.[7] In *Illinois v. Rodriguez*,[8] the Supreme Court expanded the third-party consent doctrine by holding that a third party can give effective consent even though the third party has no actual authority to give consent.[9] As long as

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warrant requirement, Justice Scalia has argued that the Fourth Amendment is "basically unrecognizable." California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

When the government conducts a warrantless search under one of the recognized exceptions, it must still comply with the "reasonableness" prong of the Fourth Amendment. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 33 (5th ed. 1996) ("When an exception to the warrant requirement is applicable, only the reasonableness requirement must be satisfied.").

4. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Although Utah courts have long recognized consent to *search* as an exception to the warrant requirement, it is not necessarily true that consent to *seize* is likewise an exception. The Utah Supreme Court had an opportunity to distinguish between consent to search and consent to seize as an exception to the warrant requirement but declined to draw any distinction. The Court held:

> Inasmuch as the right against unlawful searches and the right against unlawful seizures are coupled within the same constitutional provision, it is only logical that if a person could expressly consent to one, he or she should be able to consent to the other. Whereas we have previously held that consent is an exception to the warrant requirement in the case of searches, we now hold that the consent is likewise an exception in the case of seizures. In other words, a warrantless seizure of property is valid if done pursuant to and within the scope of voluntary consent.

State v. One Hundred Seventy-Five Thousand Eight Hundred Dollars, 942 P.2d 343, 347–48 (Utah 1997) (citations omitted).

5. *Schneckloth*, 412 U.S. at 219.

6. *See infra* Part II.B.

7. *See* United States v. Matlock, 415 U.S. 164, 171 (1974) (holding that consent is valid if "obtained from a third-party who possessed common authority over . . . the premises or effects sought to be inspected"). For a more detailed discussion of common authority see *infra* Part II.B.3.

8. 497 U.S. 177 (1990).

9. *See id.* at 186.

the police officer reasonably believes that the consenting party has authority to give consent to the search, regardless of whether he in fact had such authority, the consent is valid.[10] Many have criticized this "apparent authority" doctrine, viewing it as an unacceptable erosion of Fourth Amendment protections.[11] As a result, several state courts have interpreted their state constitutions to give broader protection to criminal defendants in the area of third-party consent than those afforded by the United States Constitution.[12]

The Utah Supreme Court has never expressly decided whether to incorporate federal third-party consent law into the state constitution[13] or to interpret the Utah Constitution[14] in a way that offers more protection to criminal defendants.[15] The

10. *See id.*

11. *See infra* note 88 and accompanying text.

12. *See, e.g.*, State v. Lopez, 896 P.2d 889, 901 (Haw. 1995) (rejecting doctrine of apparent authority); State v. Wright, 893 P.2d 455, 460–61 (N.M. Ct. App. 1995) (same); State v. Will, 885 P.2d 715, 719 (Or. Ct. App. 1994) (citations omitted) ("Although apparent authority is now sufficient under the Fourth Amendment, actual authority to grant consent is still required under Article I, section 9 [of the Oregon Constitution]."). (citations omitted).

13. The United States Constitution acts as a floor, preventing the states from taking away certain fundamental rights. States are free to give more protection under their individual constitutional provisions than given by the United States Constitution. *See infra* note 167.

14. Article I, section 14 of the Utah Constitution reads:

> 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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

UTAH CONST. art. I, § 14.

15. The Utah Supreme Court has expressed a willingness to decide whether the Utah Constitution affords more protection than the United States Constitution with respect to third-party consent cases; however, it has never actually decided the issue because attorneys have failed to effectively brief and argue the issue. *See* State v. Brown, 853 P.2d 851, 854 n.1 (Utah 1993) (stating that even though the defendant raised a state constitutional claim, the court will not address it because the defendant did not adequately brief the issue; therefore, the state was unprepared to argue the matter). The Utah Court has repeatedly refused to "engage in a state constitutional analysis unless an argument for different analyses under the state and federal constitutions is briefed." *Id.* (quoting State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988), *aff'd*, 776 P.2d 631 (Utah 1989), *vacated on other grounds sub nom.* Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991)); State v. Arroyo, 770 P.2d 153, 154 n.1 (Utah Ct. App. 1989) ("[A] three line conclusory statement as to the greater scope of state constitutional protections is an insufficient briefing for us to embark on a state constitutional analysis . . . ."); *see also infra* Part III.C.

Utah Court has, however, recognized that given the similarity between the Fourth Amendment and Article I, Section 14 of the Utah Constitution,[16] courts should refrain from drawing distinc-tions "between the protections afforded by the respective constitutional provisions" and should consider "the protections afforded to be one and the same."[17] Nevertheless, the Utah Court has also acknowledged that this is merely a general policy and there will likely be appropriate times when local interests will compel an interpretation of the Utah Constitution that differs from the construction given to the United States Constitution.[18] In an effort to determine whether the Fourth Amendment and Utah Constitution are conterminous, Utah appellate courts have invited attorneys to brief and argue whether any difference exists between the state and federal constitutional provisions.[19]

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16. Whether there is (or should be) a *substantive* difference between the two constitutional provisions is a matter for the Utah Supreme Court to decide. The only *textual* difference between the two constitutional provisions is one of punctuation and grammar. *See* State v. Jackson, 937 P.2d 545, 548 n.2 (Utah Ct. App. 1997). *Compare* U.S. CONST. amend. IV ("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."), *with* UTAH CONST. art. I, § 14 ("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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.").

17. State v. Watts, 750 P.2d 1219, 1221 (Utah 1988); *see also* State v. Dunn, 850 P.2d 1201, 1216 n.11 (Utah 1993) (reiterating that "federal and state search and seizure provisions [are] 'identical'") (citing State v. Lee, 633 P.2d 48, 50 (Utah 1981)); State v. Contrel, 886 P.2d 107, 111 (Utah Ct. App. 1994).

18. *See Watts*, 750 P.2d at 1221 n.8.

> In declining to depart in this case from our consistent refusal heretofore to interpret article I, section 14 of our constitution in a manner different from the fourth amendment to the federal constitution, we have by no means ruled out the possibility of doing so in some future case. Indeed, choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts.

Id. The Utah Supreme Court has in fact departed from the United States Fourth Amendment on a few limited occasions. *See infra* Part III.B.3.

19. *See* State v. Bobo, 803 P.2d 1268, 1272 (Utah Ct. App. 1990) ("Until such time as attorneys heed the call of the appellate courts of this state to more fully brief and argue the applicability of the state constitution, we cannot meaningfully play our part in the judicial laboratory of autonomous state constitutional law development.")

This Comment addresses the doctrine of third-party consent and analyzes whether the Utah Supreme Court should part company with the federal standard. Part II outlines the history and current state of the law with respect to third-party consent according to the United States Supreme Court. It also addresses some of the relationships in which a third party has given valid consent to search the property of a criminal defendant. Part III looks at how Utah courts have applied federal third-party consent law and addresses the willingness of Utah courts to determine whether the Utah and United States Constitutions are conterminous with respect to third-party consent. Part IV analyzes the criteria that should be used to determine whether to formally adopt the federal standard, then applies the criteria to critique the federal law. This Comment concludes that Utah should adopt the federal standard with respect to third-party consent generally, but should not completely incorporate the federal apparent authority standard. Instead, Utah should adopt a modified version of the apparent authority doctrine.

II. THIRD-PARTY CONSENT UNDER THE UNITED STATES CONSTITUTION

A. Consent Searches Authorized by the Criminal Defendant

To fully understand third-party consent doctrine, one must first understand the fundamental aspects of non-third-party consent searches—those that are personally authorized by the criminal defendant. As previously noted, even though a search conducted without a warrant is generally "per se unreasonable"[20] and thus invalid, a search authorized by consent is "wholly valid."[21] For the defendant's consent to pass constitu

(citations and footnotes omitted); *see also* Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 J. CONTEMP. L. 267 (1991) ("Despite numerous and explicit invitations to brief Utah constitutional provisions, and a demonstrated willingness to reach state constitutional questions, practitioners continue to ignore the courts' admonitions. This delinquency hinders development of Utah constitutional law.") (footnotes omitted); *infra* Part III.C.

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

21. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); *accord* Florida v. Jimeno, 500 U.S. 248, 250–51 (1991) ("[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have

tional muster, the prosecution has the burden of proving[22] that the consent was voluntarily given.[23] "The question whether [a defendant's] consent . . . was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances . . . ."[24]

The Supreme Court has enunciated several factors under this totality of circumstances test that courts may use to determine whether a defendant's consent was in fact voluntary.

> Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.[25]

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been permitted to do so.").

22. *See* United States v. Mendenhall, 446 U.S. 544, 557 (1980); Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."); United States v. McCurdy, 40 F.3d 1111, 1119 (10th Cir. 1994); United States v. Zapata, 997 F.2d 751, 758 (10th Cir. 1993); United States v. Nicholson, 983 F.2d 983, 988 (10th Cir. 1993).

23. *See* Florida v. Bostick, 501 U.S. 429, 438 (1991) ("'Consent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."); *Schneckloth*, 412 U.S. at 225–26 (stating that the test for "voluntariness," at least in the context of confessions, is whether the confession is a "product of an essentially free and unconstrained choice by its maker" or whether the "defendant's will was overborne" in making the confession); United States v. Glover, 104 F.3d 1570, 1584 (10th Cir. 1997) ("Evidence obtained by a consent-based search is admissible only if the government (1) produces clear and positive testimony that the consent was unequivocal, specific, and freely given, and (2) proves that the consent was given without duress or coercion, express or implied."); *Nicholson*, 983 F.2d at 988 (holding that the "government must show that there was no duress or coercion, express or implied, that the consent was unequivocal and specific, and that it was freely and intelligently given").

24. *Mendenhall*, 446 U.S. at 557 (citations omitted); *see also Schneckloth*, 412 U.S. at 226; United States v. Doyle, 129 F.3d 1372, 1377 (10th Cir. 1997) ("Whether or not a party has voluntarily consented to a search is a question of fact that the district court must evaluate in view of the totality of the circumstances."); *McCurdy*, 40 F.3d at 1119; *Zapata*, 997 F.2d at 758.

25. *Schneckloth*, 412 U.S. at 226 (citations omitted); *accord Mendenhall*, 446 U.S. at 558–59; United States v. Watson, 423 U.S. 411, 424–25 (1975); *Glover*, 104 F.3d at 1583–84 (holding that courts should look at factors such as physical mistreatment, use of violence, promises or inducements, deception or trickery, and the mental condition of the defendant).

None of the factors listed are independently dispositive; instead, a judge should analyze all of them together to determine whether a constitutional violation has occurred.[26]

One factor, in particular, has received considerable attention—knowledge by the defendant of his right to refuse consent. Specifically, some have argued that a consenting criminal defendant must first know that he has the right to refuse consent before his consent is valid. The Supreme Court addressed this issue in *Schneckloth v. Bustamonte*[27] and concluded that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent."[28] Thus, unlike the *Miranda*[29] line of cases in which a criminal defendant can effectively waive his rights to counsel and remain silent if he has given both a knowing and voluntary waiver, *Schneckloth* and its progeny expressly refute this notion for consent cases.[30] As a result, voluntariness is the touchstone

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26. *See Schneckloth*, 412 U.S. at 226 (stating that none of the consent cases cited by the court "turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances").

27. 412 U.S. 218 (1973).

28. *Id.* at 227; *see also* Florida v. Rodriguez, 469 U.S. 1, 6–7 (1984) ("[T]he State need not prove that a defendant consenting to a search knew that he had the right to withhold [] consent, . . . knowledge of the right to refuse consent could be taken into account in determining whether or not a consent was 'voluntary.'"); LARRY E. HOLTZ, CONTEMPORARY CRIMINAL PROCEDURE § 3.6 at 337–38 (5th ed. 1997).

29. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made *voluntarily, knowingly and intelligently.*

Id. (emphasis added) (footnotes omitted); *cf. Schneckloth*, 412 U.S. at 237 ("Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.").

30. Professors Saltzburg and Capra have suggested "a very straight-forward, powerful argument in support" of the *Schneckloth* holding:

> The Fourth Amendment protects against unreasonable searches; prior decisions indicate that where the government wants to use power to force a search and seizure, the warrant clause is the basic definition of

of consent doctrine, and knowledge of the right to refuse consent is just one of many factors used to determine voluntariness.[31]

These considerations represent the backdrop the Supreme Court has used to craft its third-party consent doctrine. However, the focus in this area has not been on whether the *criminal defendant* has voluntarily consented; instead, courts have addressed issues such as whether the *third party*

> reasonableness; but where the government, rather that using coercive power to force and seize, asks people for their permission to conduct a search, the warrant clause is inapplicable; and when the warrant clause is inapplicable, the basic test is reasonableness under the circumstances. And a search pursuant to voluntary consent is reasonable.

See SALTZBURG & CAPRA, *supra* note 3, at 350.

31. The voluntariness standard, based upon the totality of the circumstances, is a difficult standard to measure. "'The notion of "voluntariness," Mr. Justice Frankfurter once wrote, 'is itself an amphibian.'" *Schneckloth*, 412 U.S. at 224. Due to the ambiguity inherent in the voluntariness standard, some have argued that the Supreme Court should move away from the voluntariness standard in favor of a bright-line rule similar to that adopted in *Miranda*. In fact, this was the argument asserted in *Schneckloth*. The Supreme Court has refused to adopt a bright-line rule similar to *Miranda*, however, because "[t]he considerations that informed the Court's holding in *Miranda* are simply inapplicable" to consent cases. *Id*. at 246.

The Model Code of Pre-Arraignment Procedure requires *Miranda*-type warnings to be given to the consenting party before the police can conduct a consent search. The warning requires the police to inform the consenter that he has the right to refuse consent or limit the consent after a search has begun. *See* 1 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE, § 8:2, at 383 (2d ed. 1991). The Model Code reads in relevant part:

> (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.

Id. at § 8:2, at 383 n.10 (quoting ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 240.2(2) (1975)).

Utah defendants have also advanced the argument that a *Miranda*-type police warning should be issued prior to a consent search. *See, e.g.*, State v. Bobo, 803 P.2d 1268 (Utah Ct. App. 1990). In *Bobo*, the defendant proposed that the following *Miranda*-type warning should be given to persons asked to consent to a search:

> You have the right to refuse permission for any search. If you withhold consent, we would be required to request a search warrant from a judge, which warrant would only issue if we could show the judge probable cause to believe [the item sought] will be found. If you consent to the search, any incriminating evidence found can and will be used against you.

Id. at 1272 n.3. The court rejected the argument in favor of the federal standard. *See id*. at 1272–73.

voluntarily consented to the search[32] or whether the third party who authorized the search had common authority over the property.[33]

B. Third-Party Consent Under the United States Constitution

Although third-party consent doctrine has received much exposure by legal commentators and has been frequently litigated in the lower courts, the United States Supreme Court has addressed third-party consent doctrine in just a handful of cases over the past forty years.[34] Like many other Fourth Amendment doctrines, the Court's handling of third-party consent doctrine has been an evolutionary process, beginning in the early 1960s with *Chapman v. United States*[35] and culminating in the controversial *Illinois v. Rodriguez*[36] decision. Although the Court seemed to accept the notion that a third party could give consent to a search that would be effective against a criminal defendant, its cases illustrate that the Court has had a difficult time deciding on a test or rationale to govern third-party consent cases.

During the early years of third-party consent development, the Court rejected notions of property law as a theoretical basis for valid third-party consent; instead, the Court relied on a mixture of agency law and Fourth Amendment policy considerations to invalidate searches authorized by a landlord/innkeeper.[37] During this same period, the court also reaffirmed the basic requirement that third-party consent is not valid if the consenting party involuntarily authorizes the search.[38] By the mid-1970s the Court finally articulated the modern test to determine the validity of third-party consent. The test focuses on whether the third party and the defendant

32. *See infra* Part II.B.2.

33. *See infra* Part II.B.3.

34. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.3(a), at 714 (3d ed. 1996) ("Although third-party consents have been litigated in the lower courts with considerable frequency and have been the subject of repeated attention by legal commentators, the United States Supreme Court has had remarkably little to say on the subject.").

35. 365 U.S. 610 (1961).

36. 497 U.S. 177 (1990).

37. *See infra* Part II.B.1.

38. *See infra* Part II.B.2.

share common authority over the property to be searched.[39] Finally, in its most recent opinion on the issue, the Supreme Court expanded the modern rule by formally adopting the doctrine of apparent authority to validate a search authorized by an individual who did not have actual authority to consent to the search.[40]

1. Early development

Chapman and *Stoner v. California*[41] represent the Supreme Court's first substantial third-party consent cases.[42] In both cases, a landlord/innkeeper gave the police permission to search the residence of a tenant/guest and evidence gathered from the warrantless searches was used to convict the defendants.[43] The Court was then called upon to decide whether the consent by a landlord/innkeeper was effective against the defendant tenant/guest. In both cases, the Court held that the respective searches violated the defendant's Fourth Amendment right to be free from an unreasonable search.[44]

Two common ideas that appear throughout the *Chapman* and *Stoner* decisions shaped the early stage of third-party consent doctrine.[45] First, the Supreme Court soundly rejected the idea that traditional property law doctrines should play a

39. *See infra* Part II.B.3.

40. *See infra* Part II.B.4.

41. 376 U.S. 483 (1964).

42. *See* HALL, *supra* note 31, § 8:6, at 389 ("The first real third-party consent search case decide by the Court was Chapman v. United States in 1961 . . . . The Court later articulated the constitutional bases of third-party consent in Stoner v. California . . . .").

43. In *Chapman*, the owner/landlord of a rental home stopped by to invite his new tenant to attend church with him. 365 U.S. 610 (1961). After arriving, he smelled a "strong odor of whiskey mash coming from the house." *Id.* at 612. After determining that the tenant was not home, the owner called the police and gave them permission to enter the home through an unlocked window and search for evidence. Relying upon the consent, the police conducted a warrantless search and gathered evidence to convict the tenant of federal liquor law violations. *See id.* at 610–12. *Stoner*, on the other hand, involved consent by a hotel clerk to search the room of one of his guests. The police approached the clerk because of their suspicion that an armed robber was staying at the hotel and asked the clerk for permission to search the suspect's room. The clerk gave permission and the police conducted a warrantless search, gathering evidence used to convict the guest. *See Stoner*, 376 U.S. at 484–86.

44. *See Stoner*, 376 U.S. at 490; *Chapman*, 365 U.S. at 617–18.

45. Professor LaFave argues that these cases, especially *Chapman*, tell "us little about what the theoretical basis for third-party consent is, but [do] say something about what it is not." LAFAVE, *supra* note 34, § 8.3(a), at 715.

role in determining whether the third-party consent was valid. The government in both cases argued that property law theories justified the consent by the landlord/innkeeper.[46] In both cases, the court responded by stating that

> it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.[47]

Although the Supreme Court's third-party consent jurisprudence has changed over the years, the Court has retained the idea that property law is an invalid theoretical basis for third-party consent law.[48]

The second common feature found in both *Chapman* and *Stoner* is the concern that if the Court allowed a warrantless search based on the consent of a landlord/innkeeper, it would be reducing the Fourth Amendment "to a nullity and leave [tenants'] homes secure only in the discretion of [landlords]."[49] In short, the constitutional right to be free from unreasonable searches would "disappear if it were left to depend upon the unfettered discretion"[50] of an individual from whom the defendant rents his living quarters. The Court seemed to arrive at this conclusion due to its incorporation of agency principles: Fourth Amendment rights are personal in nature and only the potential defendant can waive them by consent. Even though

46. *See Chapman*, 365 U.S. at 616 (arguing that because a landlord has an absolute right to enter rented premises to view whether a tenant is committing waste, the landlord may delegate that right to law enforcement officers); *Stoner*, 376 U.S. at 488 (arguing that state law gives hotel proprietors "blanket authority to authorize the police to search the rooms of the hotel's guests").

47. *Chapman*, 365 U.S. at 617 (quoting Jones v. United States, 362 U.S. 257, 266–67 (1960) *overruled on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980)); *see also Stoner*, 376 U.S. at 488.

48. *See infra* text accompanying note 71.

49. *Chapman*, 365 U.S. at 616–17 (quoting Johnson v. United States, 337 U.S. 10, 14 (1948)).

50. *Stoner*, 376 U.S. at 490.

waiver can come "either directly or through an agent,"[51] the Court concluded that the police had no basis to believe that the landlord/innkeeper was "authorized by the [defendant] to permit the police to search the [defendant's] room."[52]

Thus by the mid-1960s, the Supreme Court had rejected traditional property law doctrines as an appropriate tool to evaluate third-party consent cases. Instead, the Court focused on Fourth Amendment policies, based on agency theories, to invalidate consent when it appeared that the consent depended upon the discretion of a third party who was not authorized to waive the defendant's rights. At the time, some commentators argued that these cases taken together "sounded the death knell for almost all third-party consent searches."[53]

2. Voluntariness: a required aspect of third-party consent

The touchstone of traditional consent doctrine is voluntariness.[54] Until *Bumper v. North Carolina*,[55] however, the Supreme Court had never expressly incorporated the voluntariness standard found in traditional consent cases into third-party consent cases. The defendant in *Bumper*, the suspect in a rape prosecution, lived with his grandmother in her home. The police arrived at the home to search for evidence, presented a search warrant to the defendant's grandmother, and asked for permission to enter the home to conduct the search. She complied with the officers' request and allowed them to enter her home. The search resulted in the discovery of evidence used to convict the defendant.[56] When the defendant moved to have the evidence suppressed, the prosecutor told the

51. *Id.* at 489.

52. *Id.*

53. LAFAVE, *supra* note 34, § 8.3(a), at 717 (arguing that nearly all third-party consent searches would be invalidated if courts interpreted *Stoner* to say that there must be an actual principal-agent relationship between the defendant and third party because agency principles are "generally inapplicable to the situations within which most search and seizure issues arise") (quoting Steven H. Bowen, Comment, *Relevance of the Absent Party's Whereabouts in Third-Party Consent Searches*, 53 B.U. L. REV. 1087, 1104 (1973)).

54. *See supra* Part II.A; *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE, § 89[A], at 178; HALL, *supra* note 31, § 8:1, at 382 ("The ultimate question in any consent search is whether the consent was voluntary."); *id.* at §§ 8:12–8:30.

55. 391 U.S. 543 (1968).

56. *See id.* at 544–46.

trial court that the state was not relying on the search warrant to justify the search; instead, the prosecutor relied exclusively on the consent granted by the defendant's grandmother.[57] The issue before the Supreme Court was whether "a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant."[58]

The Supreme Court incorporated the voluntariness standard into third-party consent cases to hold that under these facts, the consent was not voluntary and thus the evidence gathered from the search should have been suppressed.[59] The Court reasoned that when an officer presents a search warrant to the occupant of a home, he is essentially saying that the occupant has no right to resist the search.[60] Because the occupant faces no choice whether to grant consent, the consent cannot be considered "freely and voluntarily given."[61] *Bumper*, then, stands for the proposition that the prosecution must prove that the third party voluntarily consented to the search without any coercive techniques employed by the police.[62]

3. Modern third-party consent analysis

Even after *Bumper*, the Court still had not clearly articulated a specific test or rationale to be used in all third-party consent cases. Instead, there were a handful of disjointed cases that suggested that as long as the consenting third party was an agent of the defendant and voluntarily consented, the search would be valid (but no Supreme Court case had directly held such a search was valid).

In *Frazier v. Cupp*,[63] the Court seemed to shift its rationale from the agency analysis used in *Stoner* to an assumption-of-

57. *See id.* at 546 n.7.

58. *Id.* at 548.

59. *See id.* at 550.

60. *See id.*

61. *Id.* at 548–49. The Court stated that "[w]here there is coercion there cannot be consent." *Id.* at 550.

62. *See id.* at 548 ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").

63. 394 U.S. 731 (1969).

risk rationale. In *Frazier*, the police obtained consent from the defendant's cousin to search a duffel bag that they jointly used. The defendant argued that his cousin did not have authority to consent to a search of the bag because he was authorized to use only one pocket of the bag. The Court's response brought about a new rationale in third-party consent cases: because the defendant allowed his cousin to use the bag, he "assumed the risk that [his cousin] would allow someone else to look inside" the bag.[64]

After *Frazier*, many thought that the Court totally rejected the *Stoner* rationale that only an agent of the defendant could give effective third-party consent.[65] For the next several years, uncertainty existed as to which rationale was appropriate for third-party consent cases.[66] The Supreme Court resolved the dispute in *United States v. Matlock*,[67] and for the first time, the Court articulated a clear rule for third-party consent cases.

The defendant in *Matlock* was arrested in his front yard for robbing a federally insured bank. At the arrest, several officers went to the front door of the home and asked the defendant's girlfriend, who lived in the home with the defendant, for permission to search the house for the stolen money. The girlfriend agreed and allowed the officers to search the home. Subsequently, the officers found the stolen money and used it as evidence to convict the defendant.[68]

In addressing whether the consent by the defendant's girlfriend was constitutionally permissible, the Court reiterated the assumption-of-risk rationale first stated in *Frazier*,[69] to hold 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

64. *Id.* at 740; *see also* HALL, *supra* note 31, § 8:34, at 432-33.

65. *See* LAFAVE, *supra* note 34, § 8.3(a), at 718 (quoting Michael E. Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 14 (1970)).

66. *See id.*

67. 415 U.S. 164 (1974).

68. *See id.* at 166–67.

69. *See supra* text accompanying note 64.

> possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.[70]

At that point, the Court inserted an important footnote to explain what it meant by the term "common authority."

> 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.[71]

After *Matlock*, there was little doubt that the Court rejected the agency rationale and instead opted for the "common authority" rule. In addition, it again rejected the notion that traditional property law should play a role in determining the validity of third-party consent.[72] Thus, under the modern rule, third-party consent is effective if the prosecution can show that first, the "consenting party could permit the search 'in his own right,'"[73] second, the defendant "'assumed the risk' that a co-occupant might permit a search,"[74] and third, the consent is voluntary.[75]

4. Illinois v. Rodriguez: *the adoption of the apparent authority standard*

The *Matlock* Court did not clarify every uncertainty of third-party consent law. It expressly left open the question whether consent by a third party would be valid if the searching officers reasonably believed the person to have authority over the premises, regardless of whether the third party had actual

70. *Matlock*, 415 U.S. at 171.
71. *Id.* at 171 n.7 (citations omitted).
72. *See supra* notes 46–47 and accompanying text.
73. LAFAVE, *supra* note 34, § 8.3(a), at 720.
74. *Id.*
75. *See* Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

authority to consent.[76] That issue was not resolved until 1990 when the Supreme Court handed down the controversial *Illinois v. Rodriguez*[77] decision.[78]

In *Rodriguez*, the police gained access to the defendant's apartment via the consent and assistance of a woman who had previously lived with the defendant, but had since moved out of the apartment. The woman claimed that the defendant beat her earlier that day, so when officers requested that she take them to the apartment, she consented. While driving to the defendant's apartment, she referred to the premises as "our apartment." When they arrived, she opened the door with her key, allowing the officers to enter and search for the defendant. As the officers walked about the apartment, they saw in plain view several stashes of drug paraphernalia. Thus, they arrested the defendant for possession of illegal drugs.[79] At his suppression hearing, the defendant argued that the woman who gave consent did not have common authority over the apartment and was thus unable to give valid consent.[80]

The Supreme Court agreed with the defendant that the woman did not meet the *Matlock* common authority test and thus had no actual authority to consent to the search.[81] But, since the officers relied on the woman's assertions to conclude she did have common authority, the Court had to determine whether the officers' reasonable belief justified the search.[82] The Court ultimately adopted the apparent authority standard, holding that if police officers reasonably believe that the third party shares common authority over the property with the defendant, and thus can give effective consent to a search, the third-party consent is valid, regardless of whether the individual actually shares common authority with the defendant.[83]

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76. *See Matlock*, 415 U.S. at 177 n.14.

77. 497 U.S. 177 (1990).

78. *See* WILLIAM E. RINGEL, SEARCHES & SEIZURES ARRESTS AND CONFESSIONS § 9.5(c)(1), at 9–47 (Sept. 1998).

79. *See Rodriguez*, 497 U.S. at 179–80.

80. *See id.* at 180.

81. *See id.* at 181. The Court added that "[o]n these facts the State has not established that . . . [the girlfriend] had 'joint access or control for most purposes.'" *Id.* at 182.

82. *See id.*

83. *See id.* at 188-89. The *Rodriguez* Court did not decide whether the officers'

The test articulated by the Court to determine whether effective consent was given is: "[W]ould the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises?"[84] If the officer answers this question in the negative, then a warrantless search is unlawful unless the consenter had actual authority. On the other hand, if the answer is in the affirmative, the warrantless search is valid.[85]

The basic underpinning of the Court's analysis in *Rodriguez* is that the Fourth Amendment's reasonableness clause governs factual determinations by police officers, including determinations whether a third party has authority to consent to a search. The Court held that reasonableness does not always require an officer's factual determinations to be correct; it only requires that his determination be reasonable.[86] As a result, the Court concluded that

> [t]he Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.[87]

Many commentators criticized the *Rodriguez* holding, arguing that the Supreme Court's interpretation of the Fourth Amendment in this way unnecessarily eroded defendants' rights.[88] Nonetheless, the doctrine of apparent authority has

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belief in this case was reasonable. Because the Court of Appeals did not address the issue, the Supreme Court remanded the case so the lower court could determine whether the officers' determination that the third party had common authority was reasonable. *See id.* at 189.

84. *Id.* at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (ellipsis in original)).

85. *See id.* at 188–89.

86. *See id.* at 185.

87. *Id.* at 186 (citations and footnotes omitted).

88. *See, e.g.*, Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 6 (1991) (arguing that the Rehnquist Court has interpreted the reasonableness clause of the Fourth Amendment in a way that diminishes defendants' rights); Tammy Campbell, Note, *Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. Colo. L. Rev. 481 (1992) (arguing that the apparent authority doctrine cannot protect

quickly become a common doctrine used by federal courts to uphold warrantless third-party consent searches.[89]

C. Relationships That May Give Rise to Effective Third-Party Consent

1. Why relationship matters

When a third party consents to a search of the defendant's property, *Matlock* requires that the consenting party have joint access or control over the property for "most purposes," so that the third party can consent to the search "in his own right."[90] When courts apply the *Matlock* common authority test, they necessarily embark on a discussion of the relationship between the consenting party and the defendant. However, the relationship between the defendant and the third party is not the central issue in deciding whether the third party had authority to consent to the search; instead, the relevant inquiry is whether the third party had a sufficient relationship with the property to be searched to justify effective consent.[91] "[A]s *Matlock* makes clear, the relevant analysis in third-party consent cases focuses on the relationship between the consenter and the property searched, not the relationship between the consenter and the defendant."[92]

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defendants' Fourth Amendment rights); Nancy J. Kloster, Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third-Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99, 122–23 (1996) ("[T]he United States Supreme Court has moved further and further away from the original purpose of the Fourth Amendment, which was to protect individual rights."); Michael C. Wieber, Comment, *The Theory and Practice of* Illinois v. Rodriguez*: Why an Officer's Reasonable Belief About a Third Party's Authority to Consent Does Not Protect a Criminal Defendant's Rights*, 84 J. CRIM. L. & CRIMINOLOGY 604 (1993).

89. *See, e.g.*, United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997); United States v. Brazel, 102 F.3d 1120, 1148 (11th Cir. 1997); United States v. Jenkins, 92 F.3d 430, 438 (6th Cir. 1996); United States v. Elliot, 50 F.3d 180, 187 (2d Cir. 1995).

90. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

91. *See* United States v. Gambina, No. 96-1732, 1997 WL 383493, at **2 (2d Cir. July 9, 1997) ("In the case of third-party consent, the issue is whether the consenting party possessed a sufficient relationship to the searched premises to validate the search."); United States v. Elliot, 50 F.3d 180, 185 (2d Cir. 1995) ("The question with respect to a third-party authorization is whether the third party possessed 'a sufficient relationship to the searched premises to validate the search.'") (quoting United States v. Trzaska, 859 F.2d 1118, 1120 (2d Cir. 1988)).

92. United States v. McAlpine, 919 F.2d 1461, 1464 (10th Cir. 1990).

At first blush, this language would suggest that the relationship between the consenting party and the defendant is totally irrelevant; however, courts have not gone that far. Courts recognize that the relationship between the consenting third party and the defendant is relevant for two reasons. First, the relationship is relevant to the extent that it bears "on the nexus between the consenter and the property."[93] In other words, when analyzing whether the third party has a sufficient relationship to the property to be searched, it is appropriate to look at the relationship between the third party and the defendant. Second, courts routinely address the relationship between the consenting third party and the defendant to determine whether (and to what extent) the defendant had a reasonable expectation of privacy in the property that was searched.

The defendant's expectation of privacy is relevant for two reasons. First, the police cannot commit a Fourth Amendment violation if the defendant has no reasonable expectation of privacy in the property that was searched. For example, if the defendant has no reasonable expectation of privacy that society is willing to accept, then it is likely that no Fourth Amendment violation has occurred.[94] Second, the primary rationale justifying third-party consent searches is assumption of risk.[95] "For a third party to have 'authority' over a space he does not own, the owner must have assumed the risk that the third party would consent to a search."[96] Thus, courts have recognized that the relationship between the consenting third party and the defendant directly bears on the degree of privacy the defendant expected to maintain and the degree to which the defendant assumed the risk that the third party would consent to a search.

2. Different rules for different relationships

93. *Id.*

94. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (arguing that for the Fourth Amendment to apply, the person searched must first have a subjective "expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'").

95. *See Matlock*, 415 U.S. at 170–71; *see also* Frazier v. Cupp, 394 U.S. 731, 740 (1969).

96. United States v. Jenkins, 92 F.3d 430, 436 (6th Cir. 1996).

Because the parties in some relationships have a reduced expectation of privacy, courts impose somewhat different standards for determining the validity of third-party consent depending on the nature of the relationship.[97] Thus, the nature of the relationship directly bears upon the difficulty in proving assumption of risk and common authority.[98] For example, the Seventh Circuit Court of Appeals recognized that

> it would be incorrect to treat spouses . . . the same as any two individuals sharing living quarters. Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another. The same might hold for an adult child living at home. These situations, as a general rule, involve privacy expectations greater than those inherent in a marriage, making it more difficult to demonstrate common authority. In the context of a more intimate marital relationship, the burden upon the government [to prove common authority] should be lighter.[99]

Because the nature of the relationship is an important factor in determining the validity of third-party consent, this Part will address, by way of example, some of the common relationships litigated in the federal courts to illustrate the different standards that are applied depending on the relationship between the consenting third party and the criminal defendant.[100]

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97. For a brief discussion of different relationships involved in third-party consent cases and numerous citations to state and federal courts' treatment of the different relationships, see CHARLES E. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 173 (13th ed. 1997).

98. *See* United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997) ("A third-party consent is also easier to sustain if the relationship between the parties—parent to child here, spouse to spouse in other cases—is especially close.").

99. United States v. Duran, 957 F.2d 499, 504–05 (7th Cir. 1992) (citations omitted).

100. This Comment addresses a handful of the relationships that are often litigated in the courts and is by no means exhaustive. Courts have addressed numerous other relationships to determine whether the consenting third party possessed the requisite authority to consent to the search. For example, courts have addressed whether a parent can consent to the search of a child's room, *see* LAFAVE, *supra* note 34 at § 8.4(b), whether a child can consent to a search of the family living quarters, *see id.* at § 8.4(c); Matt McCaughey, Note, *And a Child Shall Lead Them: The Validity of Children's Consent to Warrantless Searches of the Family Home*, 34 U. LOUISVILLE J. FAM. L. 747 (1995), whether a bailor or bailee can consent on behalf

a. Marital relationship. When two spouses live together, courts have presumed that "one spouse has the authority to consent to a search of [the] premises jointly occupied by both spouses."[101] As noted above, prosecutors have an easier burden in proving common authority when there is a marital relationship than in other types of relationships because of the reduced expectation of privacy and increased assumption of risk.[102]

However, the same courts that recognize the spousal presumption, also recognize that it is a rebuttable presumption. "[T]he nonconsenting spouse may rebut this presumption only by showing that the consenting spouse was denied access to the particular area searched."[103] To rebut the presumption, courts generally require "something more specific" such as proof that the "consenting spouse was denied access" to the property searched.[104] If a spouse has access to property, but chooses not to use the property, she still has authority to consent to the search.[105]

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of the other, *see* LAFAVE, *supra* note 34, at § 8.6(a) & (b), whether a host can consent to a search of his guest and vice versa, *see id.* at § 8.5(d) & (e), and whether an educational institution can consent to a search of students' property, *see id.* at § 8.4(e). In addition, courts are often called upon to grapple with third-party consent cases that do not fit neatly under any one of the categories listed in this article. For instance, in *United States v. McAlpine*, 919 F.2d 1461 (10th Cir. 1990), the Tenth Circuit Court of Appeals had to determine whether a kidnap victim who was held in the defendant's trailer for several months had authority to consent to a search of the defendant's property. The court validated the consent, holding that the defendant had no reasonable expectation of privacy since the victim cohabitated the trailer with the defendant and had mutual access to the property. *See id.* at 1465. *But see* United States v. Johnson, 22 F.3d 674, 686 (6th Cir. 1994) (holding that a fourteen-year-old kidnap victim did not have authority to consent to search of apartment).

101. *Duran*, 957 F.2d at 503; *see also* Coolidge v. New Hampshire, 403 U.S. 443, 489–90 (1971) (holding that one spouse may give effective consent to the common areas of house); United States v. Betts, 16 F.3d 748, 755–56 (7th Cir. 1994); 68 AM. JUR. 2D *Searches and Seizures* § 100 (1993).

102. *See Duran*, 957 F.2d at 505. Some courts, however, have had a difficult time validating a consent search when the consenting spouse was not on amicable terms with the other spouse. *See* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:56, at 4-206 to 4-207 (3d ed. 1996); HALL, *supra* note 31, § 8:38, at 437–38; LAFAVE, *supra* note 34, § 8.3(b), at 720–23.

103. *Duran*, 957 F.2d at 505.

104. *Id.* at 504 ("[W]e leave open the possibility that one spouse may maintain exclusive control over certain portions of the family homestead."); LAFAVE, *supra* note 34, § 8.4(a), at 762.

105. *See Duran*, 957 F.2d at 505 ("One can have access to a building or a room but choose not to enter."); LAFAVE, *supra* note 34, § 8.4(a), at 762.

Thus, in *Duran*, the court upheld a search when the wife consented to a search of the barn which her husband exclusively used as a gym. The court deemed irrelevant the fact that she had no personal effects in the barn and never used the building. Because the wife could have accessed the building any time she wished, but instead chose not to, there was enough to establish the requisite authority to consent.[106] According to Professor LaFave, this reasoning suggests that the only real way to prevent one spouse from giving effective consent to a search of the other's property is for the property to be under the exclusive control of the nonconsenting spouse and for the nonconsenting spouse to completely deny access to the consenting spouse.[107]

b. Landlord-tenant/ innkeeper-guest relationship. Generally, the owner of leased property has no authority to give effective consent to search his tenant's property.[108] As discussed in Part II.B.1, the Supreme Court's early third-party consent cases involved a landlord consenting to a search of his tenant's property. These cases illustrate that even though a landlord may have a legal right to enter the leased premises (to view waste, for example), that right does not grant him the authority to consent to a search of the premises;[109] otherwise, the privacy interest of any lessee would be subject to the "unfettered discretion" of the landlord.[110] The Supreme Court has also repeatedly affirmed that third-party consent is not based on aspects of property law "with its attendant historical and legal refinements."[111]

Courts do recognize some limited exceptions to the general rule that a landlord has no authority to consent to a search of the leased premises. For instance, if the landlord shares mutual use and access to the property with the defendant, he may give

106. *See Duran*, 957 F.2d at 505.

107. *See* LAFAVE, *supra* note 34, § 8.4(a), at 762; *see also* HALL, *supra* note 31, § 8:44, at 445–46; RINGEL, *supra* note 78, § 9.5(d), at 9-54.1.

108. *See* Stoner v. California, 376 U.S. 483, 489–90 (1964) (invalidating consent by hotel clerk to search room of guest); Chapman v. United States, 364 U.S. 610, 616–18 (1961) (invalidating consent by owner/lessor to search tenant's leased premises); 68 AM. JUR. 2D *Searches and Seizures* § 95 (1993).

109. *See supra* Part II.B.1.

110. *Stoner*, 376 U.S. at 490.

111. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

effective third-party consent to a search.[112] Thus, a landlord may give effective consent over common areas shared by all tenants, such as hallways or a common basement.[113] Another situation in which courts have recognized a landlord's right to consent to a search is when the leased premises have been vacated or abandoned.[114] In that situation, courts have held that "a tenant who abandons the property loses any reasonable expectation of privacy he once had."[115]

Courts are also more willing to allow third-party consent when the lessee sub-leases the property to another individual, as long as the lessee maintains control over and access to the property. In normal tenant/sub-tenant relationships, courts follow the general landlord/tenant rule and hold that the tenant cannot consent to a search of the sub-tenant's property.[116] However, if the tenant has a right to access the property at will, and the sub-tenant's actions show a decreased expectation of privacy such that he assumed the risk that the tenant could consent to a search, the search will be held valid.[117]

c. Cotenant or roommate relationship. Relationships involving roommates or cotenants generally receive more protection than those involving intimate relationships like husband-wife or parent-child.[118] The rationale for requiring

112. *See* United States v. Jenkins, 92 F.3d 430, 437 (6th Cir. 1996) ("[I]f the landlord asserts that he stores property or occasionally lives with the tenant, then a reasonable officer may be justified in assuming that the consenter has common authority.") (citing cases); United States v. Elliot, 50 F.3d 180, 186 (2d Cir. 1995) ("[I]f the landlord has joint access or control over certain areas of his apartment building for most purposes, he may validly consent to a search of those areas.") (citing cases); United States v. Chaidez, 919 F.2d 1193, 1201 (7th Cir. 1990) ("Use of and access to the property are the touchstones of authority."); LAFAVE, *supra* note 34, § 8.5(a), at 777 ("The lessor's consent may be effective, however, when it is given with respect to a portion of the premises which is not then in the exclusive possession of the lessee.").

113. *See* United States v. Kellerman, 431 F.2d 319, 324 (2d Cir. 1970).

114. *See* LAFAVE, *supra* note 34, § 8.5(a), at 780.

115. United States v. Brazel, 102 F.3d 1120, 1148 (11th Cir. 1997) (citing Abel v. United States, 362 U.S. 217, 241 (1960)).

116. *See Chaidez*, 919 F.2d at 1201.

117. *See* United States v. Kim, 105 F.3d 1579, 1582 (9th Cir. 1997); *Chaidez*, 919 F.2d at 1202.

118. *See supra* notes 98–99 and accompanying text; *see also* LAFAVE, *supra* note 34, § 8.5(c), at 789 ("In attempting to identify the areas or zones of exclusive use in a joint occupancy situation, it is useful at the outset to determine the character or nature of the joint occupancy, for this may reveal much about the justified expectations of the occupants.").

more evidence to prove common authority over the property in roommate situations is the increased expectation of privacy shared by the cotenants.[119] Therefore, as a general rule, one cotenant may give valid consent to search the property of the other tenant only if the consenting party has a right to access the property "in his own right" and the other tenant assumed the risk that his roommate would consent to the search.[120] Even if the nonconsenting roommate is present and objects to the search, most courts will hold that the other roommate may give valid consent to a search of the defendant's property if the requisite right to access exists.[121]

Some third-party consent cases involving cotenants are relatively easy to decide because they involve searches of areas normally thought of as common areas such as shared bathrooms, kitchens, living rooms, hallways, yards, and so forth.[122] Courts have a more difficult time when the consent involves the more private areas and containers possessed by the nonconsenting roommate. For instance, in *United States v. Salinas-Cano*,[123] the Tenth Circuit Court of Appeals held that although one roommate had the authority to give valid consent to search the defendant's living quarters, she did not have the authority to consent to a search of his closed but unlocked suitcase. Thus, the court concluded that "[a] homeowner's consent to a search of the home may not be effective consent to

119. *See* United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997) ("Third party consents to search the property of another are based on a reduced expectation of privacy in the premises or things shared with another. When an apartment, for example, is shared, one ordinarily assumes the risk that a co-tenant might consent to a search . . . ."); United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995) ("We agree that the primary factor is the defendant's reasonable expectations under the circumstances. Those expectations must include the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry.").

120. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974); *see also* DARIEN A. MCWHIRTER, SEARCH, SEIZURE, AND PRIVACY 10 (1994).

121. *See Morning*, 64 F.3d at 536; Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684, 687–88 (6th Cir. 1977). *But see* United States v. Impink, 728 F.2d 1228, 1234 (9th Cir. 1984) (stating that the consenting party's "authority to consent in her own right 'does not go so far as to outweigh an equal claim to privacy by a co-occupant on the scene'").

122. *See* LAFAVE, *supra* note 34, § 8.5(c), at 790–91 (citing cases).

123. 959 F.2d 861 (10th Cir. 1992).

a search of a closed object inside the home."[124] What these cases illustrate is that if a defendant wants sole authority to consent to a search, he should "live[] alone, or at least [have] a special and private space within the joint residence."[125]

d. Employer-employee relationship. The employer-employee relationship can arise in two different situations relevant to third-party consent law. The first arises when an employee attempts to consent to a search that will be used against the employer. The second is the opposite situation that arises when an employer attempts to consent to a search to be used against the employee.

(1) Employee consents to a search of employer's property.[126] Courts tend to be reluctant to apply the third-party consent doctrine when it comes to an employee consenting to a search of property owned by his employer.[127] Although the *Matlock* test is relevant in determining whether the employee's consent is valid, courts are not completely satisfied that the test fully determines the issue. As a result, courts have used several factors to determine whether the employee had authority to consent to a search of his employer's property, including the amount of control the employee exercised over the property,[128] the degree to which the employer assumed the risk that the employee would let others search the property,[129] the level of access the employee enjoys over the property,[130] and the grant

124. *Id.* at 863 (quoting United States v. Karo, 468 U.S. 705, 725–26 (1984) (O'Connor, J., concurring)).

125. *Morning*, 64 F.3d at 536.

126. *See generally* HALL, *supra* note 31, § 8:50, at 453–54.

127. *See generally* LAFAVE, *supra* note 34, § 8.6(c).

128. *See* United States v. Jenkins, 46 F.3d 447, 456 (5th Cir. 1995) (holding that the search authorized by the employee was reasonable because the employer personally "put the premises under the immediate and complete control of" his employee) (quoting United States v. Murphy, 506 F.2d 529, 530 (9th Cir. 1974)).

129. *See id.* at 459 ("[G]iven the extent of [the employee's] dominion and control over the videotapes, [the defendants] clearly assumed the risk that [the consenting employee] would view them, and therefore had a diminished expectation of privacy in their contents. [W]hen [the defendants] assumed the risk . . . they also necessarily assumed the risk that [the employee] would allow someone else to view the videotapes.") (footnotes omitted).

130. *See id.* at 456 (validating an employee's consent because the employee had "unlimited access to the videotapes, absolute dominion and control over the videotapes and no direct supervision, or indeed any fellow employees in the geographic vicinity"); United States v. Jenkins, 92 F.3d 430, 437 (6th Cir. 1996) (validating the consent by an employee truck driver because he was routinely allowed to enter the trailer on

of authority the employer places upon the employee.[131] Although none of these factors is dispositive in validating an employee's voluntary consent to search his employer's property, if, under the totality of the circumstances, it appears that the employer assumed the risk that his employee would consent to a search, the search will be valid.

(2) Employer consents to a search of employee's property.[132] Courts employ the *Matlock* test when employers attempt to consent to a search of the employee's property. Thus, employers are generally barred from giving effective consent to a search of an employee's property when that employee has a reasonable expectation of privacy.[133] If the employer has common authority over the property to be searched such that the employee's reasonable privacy interest is not violated, the employer's voluntary consent will be held valid.[134] Thus, an employer could give effective consent to a search of a storage area where an employee hid stolen goods because the employer had joint access to the area and had the right to occupy the area.[135] On the other hand, an employer's consent to search the private desk of his employee, even though the employer owned the desk, was held invalid because the employee had exclusive right to use the desk.[136]

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several occasions and for various reasons).

131. *See Jenkins*, 92 F.3d at 437 (finding that the driver of a rig had authority to consent to a search used against his employer because "[t]he generic relationship between the owner of a rig and its driver is characterized by a considerable grant of authority to the driver"). Professor LaFave adds additional factors to those listed in this article, including the type of responsibilities the employee has in relation to the property being searched, the status of the employee, the nature of the items to be searched, and so forth. *See* LAFAVE, *supra* note 34, § 8.6(c), at 814–16 (citing cases).

132. *See generally* HALL, *supra* note 31, § 8:49, at 451–52.

133. *See* JOEL SAMAHA, CRIMINAL PROCEDURE 340 (2d ed. 1993) (citing, e.g., Gillard v. Schmidt, 579 F.2d 825 (3d Cir. 1978)).

134. Professor LaFave notes other considerations courts address, including "(i) the extent to which the particular area searched may be said to have been set aside for the personal use of the employee; and (ii) the extent to which the search was prompted by a unique or special need of the employer to maintain close scrutiny of employees." LAFAVE, *supra* note 34, § 8.6(d), at 818.

135. *See* United States v. Gargiso, 456 F.2d 584, 586–87 (2d Cir. 1972).

136. *See* United States v. Blok, 188 F.2d 1019, 1021 (D.C. Cir. 1951).

III. THIRD-PARTY CONSENT LAW IN UTAH

The Utah Supreme Court has not had vast exposure to third-party consent cases. The few cases considered by the supreme court involved relatively simple issues and straightforward application of the rules set forth by the United States Supreme Court.[137] This Part addresses how the Utah Supreme Court has applied federal third-party consent law to the cases that have come before it. It illustrates that each of the cases decided by the Utah Court was resolved exclusively under the Fourth Amendment without reference to Article I, Section 14 of the Utah Constitution. This Part also addresses how the Utah Court has treated the textual similarity between the two constitutional provisions and analyzes the instances in which the Utah Court has explicitly decided to depart from the respective federal standard to give Utah defendants more protection than provided under the Fourth Amendment. Finally, this Part examines how Utah appellate courts have invited local attorneys to brief and argue whether any distinction should be drawn between the Utah Constitution and the United States Constitution with respect to third-party consent law.

A. Application of Federal Third-Party Consent Law in Utah

Although Utah courts are free to part from the federal third-party consent standard and provide defendants with more protections than those afforded by the United States Constitution,[138] Utah courts have relied exclusively on the Fourth Amendment analysis outlined in *Matlock* to decide the third-party cases that have come before them. The Utah Supreme Court has had three substantial occasions to discuss third-party consent. These cases will be discussed below to illustrate how the Utah Supreme Court has applied federal third-party consent standards.

137. *See infra* Part III.A.
138. *See infra* note 167.

1. State v. Kent[139]

Although decided before *Matlock*, this case is similar to *Stoner* because it involved the question of whether a hotel operator could give effective consent to search the room of a guest. Officers from the Salt Lake City Police Department suspected Mr. Kent and his wife of possessing and using illegal drugs while living in a local hotel. The officers obtained the consent of the hotel manager to spy on the defendant and his wife from a hidden point in the attic. By peering through a ventilator in the ceiling, the officers observed the couple over a two-day period and witnessed them using illegal drugs. As a result, officers entered the hotel room without a warrant and arrested the couple.[140]

The defendant, Mr. Kent, argued that the evidence obtained should have been suppressed under the Fourth Amendment because it unlawfully invaded his privacy.[141] In response, the state argued that because there was no physical invasion by the police, the evidence should not be suppressed.[142] The Utah Supreme Court, citing *Stoner* and *Chapman*, held that "the consent of a landlord or hotel or motel manager would not be sufficient to justify an officer to make a search of the tenant's premises without a warrant."[143] The court justified its holding on the basis that when the defendant and his wife rented the hotel room, they "obtained exclusive right to use it, which included the right to privacy."[144] Therefore the hotel manager had no authority to consent to the search.

2. State v. Johnson[145]

The next major case arose under a completely different set of circumstances. In *Johnson*, a parole officer conducted a warrantless search of the home which the defendant occupied with his mother. The defendant had given written consent to a warrantless search as a condition of his parole agreement;

139. 432 P.2d 64 (Utah 1967).
140. *See id.* at 65.
141. *See id.*
142. *See id.*
143. *Id.* at 66.
144. *Id.* at 69.
145. 748 P.2d 1069 (Utah 1987).

however, when the officer began to search, the defendant's mother apparently objected. The Utah Supreme Court was then faced with the question whether the officer violated the defendant's or his mother's Fourth Amendment right to be free from unreasonable searches.[146]

The defendant argued that although his parole agreement allowed for warrantless searches, the search was still unconstitutional because it invaded the right of privacy held by his mother. The court disposed of this argument, stating that those who choose to live with a parolee have a reduced expectation of privacy due to the consent to search granted by the parolee.[147] However, when a parolee lives with other tenants, officers are limited by the cotenancy as to the areas they are allowed to search.[148] Thus, "[t]he scope of consent impliedly given by a cotenant is limited to those parts of the premises where the tenants possess 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.'"[149] As a result, the court upheld the search because the officers limited their search to the common areas (such as the hallway) and did not disturb any area under the exclusive control of the defendant's mother.[150] Thus, there was no Fourth Amendment violation.

3. State v. Brown[151]

In the latest third-party consent case to come before the Utah Supreme Court, police officers were called to an employer's place of business to investigate an assault. The company owned several trailers which it used to house its employees. One of the trailers had a dual use—it was used to store food and two-way radios for the employees and was also used as the defendant's residence. After the defendant was taken to jail, police officers obtained consent from the employer to search the trailer for evidence. The evidence gathered from the search was used to convict the defendant.[152]

146. *See id.* at 1071.
147. *See id.* at 1073.
148. *See id.*
149. *Id.* (quoting United States v. Matlock, 415 U.S. 164, 171 (1974)).
150. *See id.* at 1074.
151. 853 P.2d 851 (Utah 1992).
152. *See id.* at 854–56.

The Utah Supreme Court addressed the question whether the consent by the employer was valid against the employee under the Fourth Amendment.[153] Applying the *Matlock* common authority test, the court upheld the consent search because the employer had authority to give effective consent to the common area of the trailer that was searched. Since any employee (or the owner) could enter the trailer at any time to access the refrigerator or company radios, the owner had authority to consent to a search of that common area.[154] However, the Court seemed to recognize that the owner could not give effective consent to all parts of the trailer in question; he had authority to consent only to the common areas enjoyed by all employees.[155] Since the officers searched only the common areas and did not invade the defendant's private area, the search was upheld as constitutional.[156]

4. Summary

Each of the three cases discussed above expressly followed the federal third-party consent standard under the Fourth Amendment as interpreted by the United States Supreme Court. None of the Utah cases resolved the third-party consent issue by resorting to Article I, Section 14 of the Utah Constitution. The only case that mentioned the applicable provision of the Utah Constitution was *Brown*, where the defendant made a passing reference to the Utah Constitution in his brief. However, the Utah Supreme Court refused to address the defendant's state constitutional argument because the defendant failed to analyze the issue and the state did not respond to the argument.[157] Because the Utah Supreme Court

153. *See id.* The court specifically limited its holding to the requirements of the United States Constitution. The defendant attempted to have the court address whether the Utah Constitution provided more protection than the Fourth Amendment, but the court refused to address the issue because the defendant did not properly raise the issue on appeal. *See id.* at 854 n.1.

154. *See id.* at 855–56.

155. *See id.* at 856 (noting as important that the only areas searched were common areas and that nothing in the "sole possession of the defendant such as in a drawer, sleeping bag, container, or footlocker" was searched).

156. *See id.*

157. *See id.* at 854 n.1 ("[W]e will not engage in a state constitutional analysis unless an argument for different analysis under the state and federal constitutions is briefed.") (quoting State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988)).

has discussed third-party consent only while applying Fourth Amendment standards, the aforementioned cases have no bearing on the protections afforded by the Utah Constitution other than to suggest what biases the Utah Supreme Court may have toward the federal third-party consent standards.

B. Is There a Substantive Difference Between the United States and Utah Constitutions?

Even though the Utah Supreme Court has never decided whether the Utah Constitution mirrors the United States Constitution with respect to third-party consent law, the Utah Supreme Court has expressed a willingness to depart from federal courts' interpretation of other substantive Fourth Amendment areas.[158] In addition, Utah appellate courts have expressed a desire to decide whether there is any difference between state and federal third-party consent law.[159] Since Utah courts have expressed a willingness and inclination to depart from federal Fourth Amendment law, there is a reasonable chance that the Utah Supreme Court would do the same with respect to third-party consent doctrine, especially the apparent authority doctrine.

1. Textual similarity between the Fourth Amendment and Utah Constitution: State v. Watts

On its face, Article I, Section 14 of the Utah Constitution is nearly identical to the Fourth Amendment.[160] The Utah Constitution uses identical words[161] in the exact same order as the Fourth Amendment. The only real distinction between the provisions is their different use of punctuation.[162] Because of

158. *See infra* Part III.B.3.

159. *See infra* Part III.C.

160. *See supra* note 16.

161. The author recognizes that the Fourth Amendment to the United States Constitution uses the plural form of "persons or things to be seized" while the Utah Constitution uses the singular form "person or thing to be seized." Because the root words are the same and merely take on a different form, the author considers the two phrases to be identical. *See supra* note 16.

162. For an example of the differences in punctuation, see *supra* note 16. *See also* State v. Jackson, 937 P.2d 545, 548 n.2 (Utah Ct. App. 1997) (noting that the Utah search and seizure constitutional provision and the "Fourth Amendment differ[] only in punctuation and grammar"). The author recognizes that differences in punctuation are not irrelevant. Punctuation can have an impact on the decision

the close textual similarity between the two constitutional provisions, the Utah Supreme Court has adopted the general rule that the two provisions should mirror each other substantively. In *State v. Watts*,[163] the Utah Supreme Court held that "Article I, section 14 of the Utah Constitution reads nearly verbatim with the fourth amendment [sic], and thus this Court has never drawn any distinctions between the protections afforded by the respective constitutional provisions. Rather, the Court has always considered the protections afforded to be one and the same."[164] Thus, as a general rule, the Utah Supreme Court will not draw a distinction between the constitutional provisions because of their textual similarity. But, the Court has recognized that this rule does not completely bar Utah courts from parting company with the United States Supreme Court's interpretation of the Fourth Amendment; instead, as the next section shows, this is a default rule which may be disregarded in certain circumstances.

2. *When to depart from the* Watts *rule*

The *Watts* Court recognized that although the Fourth Amendment and Article I, Section 14 of the Utah Constitution are "nearly verbatim," there likely will be situations justifying the Utah Court in making a substantive interpretation that differs from the federal counterpart. The Court cautioned that

> [i]n declining to depart in this case from our consistent refusal heretofore to interpret article I, section 14 of our constitution in a manner different from the fourth amendment to the federal constitution, we have by no means ruled out the possibility of doing so in some future case. Indeed, *choosing to give the Utah Constitution a somewhat different construction*

whether the reasonableness clause should be construed as independent of the warrants clause or whether, due to the way the sentences are crafted, the reasonableness clause is an integral part of the warrants clause. *See* SALTZBURG & CAPRA, *supra* note 3, at 33 ("[T]he [Fourth] Amendment has two parts, the first dealing with unreasonable searches and the second dealing with warrants. Because the term 'unreasonable' is used first, it might be thought to predominate so that all searches and seizures satisfy its command, whereas the warrant clause would come into play only when a warrant is sought to justify government action.").

163. 750 P.2d 1219 (Utah 1988).

164. *Id.* at 1221. Since the Utah Supreme Court made this statement, it has decided three cases where it chose to depart from the federal standard in spite of the textual similarity. *See infra* Part III.B.3.

> *may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts.*[165]

After the *Watts* decision, Utah appellate courts were free to draw distinctions between the Utah and federal constitutions if the interpretations by the federal courts were so inconsistent that Utah should adopt a decision resolving the inconsistency. Utah appellate courts, however, have generally refrained from making any distinction and have left the task to the Utah Supreme Court.[166]

3. *The Utah Supreme Court is willing to depart from federal Fourth Amendment law*

Since the *Watts* decision, the Utah Supreme Court has decided to part company from the federal Fourth Amendment standard on two occasions. Thus, in these two discrete areas, Utah defendants enjoy more protection under Article I, Section 14 of the Utah Constitution than under the federal counterpart.[167] In *State v. Larocco*,[168] the Utah Supreme Court

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165. *Watts*, 750 P.2d at 1221 n.8 (emphasis added) (citations omitted); *accord* State v. Hygh, 711 P.2d 264, 273 (Utah 1985) ("The federal [search and seizure] law as it currently exists is certainly not the only permissible interpretation of the search and seizure protections contained in the Utah Constitution. If after consideration, we conclude that we can strike a balance between the competing interests involved so as to better serve them all, then we should not hesitate to do so.") (Zimmerman, J., concurring) (footnote omitted).

166. *See* State v. Larocco, 742 P.2d 89, 95 n.7 (Utah Ct. App. 1987) (refusing to depart from the Fourth Amendment standard because such a decision "should be announced by our state's supreme court, not this Court"), *rev'd on other grounds*, 794 P.2d 460 (Utah 1990); *see also* State v. Jackson 937 P.2d 545, 549 (Utah Ct. App. 1997) (holding that the Utah Constitution does not offer more protection than the Fourth Amendment in garbage can searches because the federal standard is a fairly clear, workable rule); State v. Contrel, 886 P.2d 107, 111 (Utah Ct. App. 1994) (relying on *Watts* in refusing to hold that the Utah Constitution requires knowing consent).

167. States are free to adopt their own constitutional standards that provide more protection than the federal Fourth Amendment, but "they may not provide less." Simmons v. South Carolina, 512 U.S. 154, 174 (1994); *see also* California v. Ramos, 463 U.S. 992, 1013–14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); Michigan v. Mosley, 423 U.S. 96, 120 (1976) (Brennan, J., dissenting) ("In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the [majority's] decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the

took an expansive view of the Utah Constitution to hold that when a police officer, under nonemergency circumstances, opens a car door to look for the vehicle identification number, he commits a search and violates the Utah Constitution if he does not possess a warrant.[169] This holding represented a departure from traditional Fourth Amendment law as outlined by the United States Supreme Court.[170] The Utah Supreme Court justified its decision to give defendants broader protection on the basis that the automobile exception to the Fourth Amendment, as articulated by the federal courts, was too confusing and inconsistent.[171] Therefore, this decision attempted to "simplify, if possible, the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures."[172]

Federal Constitution."); Sims v. Collection Div. of the Utah State Tax Comm'n, 841 P.2d 6, 10 n.9 (Utah 1992) ("There is no question that a state constitution must provide at least the same scope of protection as the federal constitution. Despite our borrowing a Fourth Amendment analysis in this case, we obviously reserve the option to provide broader protections under the state constitution in the future."); ROBERT F. WILLIAMS, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 68–69 (1988); William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (arguing that state court judges should scrutinize federal constitutional decisions by federal courts and adopt them only if they are persuasive, well-reasoned, and appropriately take into account the underlying constitutional principles).

168. 794 P.2d 460 (Utah 1990).

169. *See id.* at 469–70.

170. *See id.* at 464–65 ("Were we deciding this case under federal law, we would hold that a search was conducted within the meaning of the fourth amendment. Instead of relying on federal law, however, we analyze this question under the Utah Constitution.").

171. *See id.* at 469 ("This expansion [of the automobile exception] and the vacillation between the warrant approach and the reasonableness approach have resulted in significant confusion about federal search and seizure law regarding automobiles.").

172. *Id.* The Utah Supreme Court arguably parted company a third time in *Sims*. In *Sims*, the court, in a plurality opinion, attempted to extend the exclusionary rule found in *Larocco* to civil tax forfeiture proceedings: "We hold that illegally seized evidence must be excluded under article I, section 14 of the Utah Constitution where the proceeding in which exclusion is sought is quasi-criminal in nature or where there is a particularized need for deterrence to restrain improper law enforcement activities." *Sims*, 841 P.2d at 14–15. However, it should be noted that the opinion of the Court "represents the views of only two justices . . . and is therefore not the law of the state." *Id.* at 15 (Stewart, J., concurring). Because *Sims* is a plurality opinion, I have excluded it from this section of the article dealing with Utah cases that have

The other case in which the Utah Supreme Court decided not to follow the federal standard is *State v. Thompson*.[173] In *Thompson*, the court ruled that defendants have the right to be free from unreasonable searches and seizures of their bank statements.[174] This decision directly contradicted the United States Supreme Court's holding in *United States v. Miller*[175] in which the Court held that the government can seize bank records without a Fourth Amendment violation because a bank depositor has no reasonable expectation of privacy.[176] The Utah Supreme Court justified its holding on the grounds that several commentators had heavily criticized *Miller*[177] and other states that had faced the issue had also rejected the *Miller* holding based upon their state constitutions.[178]

These cases illustrate the Utah Supreme Court's willingness to address the issue whether there are any substantive differences between the Fourth Amendment and Article I, Section 14 of the Utah Constitution. Without this willingness, it would be futile for a defendant to argue that such a difference exists because the argument would be heard by a court content to follow any interpretation of search and seizure law proffered by the United States Supreme Court. These cases give hope to defendants in a third-party consent case because they show that the Utah Supreme Court will depart from the federal standard when the appropriate criteria are met.[179] In fact, as the next section shows, Utah courts have pleaded for attorneys to appropriately brief and argue whether Utah should adopt an independent third-party consent standard so the courts can answer the question.

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departed from the federal interpretation of the Fourth Amendment.

173. 810 P.2d 415 (Utah 1991).

174. *See id.* at 418.

175. 425 U.S. 435 (1976).

176. *See id.* at 442.

177. *See Thompson*, 810 P.2d at 417.

178. *See id.* at 417–18 (noting that Illinois, Colorado, Pennsylvania, and California rejected the federal rule).

179. *See supra* Part III.B.3.

C. Utah Courts Ask Attorneys to Brief and Argue the Third-Party Consent Rule

Utah Courts consistently refuse to address whether Article I, Section 14 of the Utah Constitution should be construed differently from the Fourth Amendment because attorneys fail to appropriately brief and argue the matter.[180] "Where a defendant fails to support his state constitutional argument with analysis or legal authority, this court will not address it."[181] Thus, if a defendant wants a Utah appellate court to hold that Article I, Section 14 of the Utah Constitution grants him more protection than does the Fourth Amendment when a third party consents to a search of his property, he needs to ensure that he fully briefs and argues his position. Otherwise, the court will summarily reject his claim.

Utah attorneys do not appear to be getting the message. They continue to argue for a different state standard, but fail to brief the court on a rationale that would justify the argument.[182] Frustrated by these repeated unsupported arguments, courts have asked attorneys to fully brief and argue the state constitutional issue so the court can make an appropriate decision. In *State v. Bobo*,[183] the Court of Appeals chided the defendant for making a "nominal allusion"[184] to state constitutional rights without supporting the argument with legal authority. The court warned that "[u]ntil such time as attorneys heed the call of the appellate courts of this state to

180. *See, e.g.*, State v. Dunn, 850 P.2d 1201, 1216 n.11 (Utah 1993) ("Utah appellate courts generally will not address a state constitutional argument made for the first time on appeal."); State v. Ham, 910 P.2d 433, 438 n.6 (Utah Ct. App. 1996) (refusing to engage in a state constitutional analysis because the defendant provided "no separate analysis for the state constitutional argument"); State v. Bean, 869 P.2d 984, 988–89 (Utah Ct. App. 1994) ("If a party fails to support his or her state constitutional arguments with analysis and legal authority the appellate court will not address them."); State v. Arroyo, 770 P.2d 153, 154 n.1 (Utah Ct. App. 1989) ("[A] three line conclusory statement as to the greater scope of state constitutional protections is an insufficient briefing for us to embark on a state constitutional analysis and we, therefore, refuse to do so.").

181. State v. Carter, 812 P.2d 460, 462 n.1 (Utah Ct. App. 1991).

182. *See* Wallentine, *supra* note 19, at 267 (arguing that the Utah bar should quit ignoring the "numerous and explicit invitations to brief Utah constitutional provisions" and begin briefing and arguing the same).

183. 803 P.2d 1268 (Utah Ct. App. 1990).

184. *Id.* at 1272 (quoting State v. Johnson, 771 P.2d 326, 328 (Utah Ct. App. 1989)).

more fully brief and argue the applicability of the state constitution, we cannot meaningfully play our part in the judicial laboratory of autonomous state constitutional law development."[185]

IV. ANALYSIS: SHOULD UTAH ADOPT THE FEDERAL STANDARD?

A. Criteria Applicable in Deciding Whether Federal Third-Party Consent Law Should be Incorporated as Part of Utah Constitutional Law

As previously expressed, the Utah Supreme Court has shown a willingness to depart from federal courts' interpretation of the Fourth Amendment and particularly a desire to determine whether to do so in third-party consent cases.[186] To make a sound legal argument in favor of departing from federal third-party consent law, an attorney must first know the criteria that a Utah court is likely to apply in deciding the matter. This Part proposes that Utah courts, in determining whether to adopt the federal third-party consent standards, should address whether courts in other states have adopted the federal standard,[187] the degree to which the federal standard is inconsistent or confusing,[188] and the amount of criticism that has been directed at the federal standard.[189] These factors are drawn from suggestions offered by Utah appellate courts[190] and from criteria used by the Utah Supreme

185. *Id.* (citations and footnotes omitted). The Utah Supreme Court has also encouraged attorneys to fulfill their role in educating the court about state constitutional issues. *See* State v. Earl, 716 P.2d 803, 806 (Utah 1986) ("It is imperative that Utah lawyers brief [Utah courts] on relevant state constitutional questions.").

186. *See supra* Part III.B.3. & III.C.

187. *See infra* Part IV.A.1.

188. *See infra* Part IV.A.2.

189. *See infra* Part IV.A.3.

190. In *State v. Bobo*, 803 P.2d 1268, 1272–73 n.5 (1990), the Utah Court of Appeals suggested three areas that attorneys should analyze when arguing "for an innovative interpretation of a state constitutional provision [that is] textually similar to a federal provision." Although these criteria seem to speak directly to an article like this one, for the reasons discussed below, I have chosen to adopt only one of the criteria as part of my analysis. *See infra* Part IV.A.1

The first point the *Bobo* Court suggested, that I do not address, is an invitation to counsel to "offer [an] analysis of the unique context in which Utah's constitution developed, which is particularly germane in the search and seizure context." *Bobo*, 803 P.2d at 1272–73 n.5. I have decided not to use this criteria because it appears

Court in those cases in which the supreme court has already parted company with the federal Fourth Amendment standard.

This Part concludes by applying the proposed criteria to federal third-party consent law[191] to suggest that the Utah Supreme Court should adopt the general federal third-party common authority consent standard as part of the Utah Constitution,[192] but should not completely incorporate the apparent authority doctrine.[193] Instead, the Utah Supreme Court should adopt a limited version of the apparent authority doctrine that requires police to conduct a thorough investigation before they can rely on the apparent authority of a consenting third party.

1. Other states have departed from federal Fourth Amendment law

Before a Utah court decides whether to depart from federal search and seizure standards and adopt its own more protective

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that subsequent appellate courts have refused to apply it as a valid basis for finding a distinction between the Utah and United States Constitutions. For instance, in *State v. Jackson*, 937 P.2d 545, 548–49 (Utah Ct. App. 1997), the defendant argued that Article I, Section 14 of the Utah Constitution offered more protection than the United States Constitution in relation to police searches of garbage cans set outside the curtilage of a home. To justify this position, the defendant referred to the history of Utah's Mormon settlers. He argued that since they suffered a long history of persecution and invasions of privacy by government sponsored agents, the framers of the Utah Constitution had a "heightened appreciation for, and valuation of, the privacy rights in personal effects and, particularly, in the right to be secure in one's own home." *Id.* at 549. The Court rejected this argument, noting that each time the Utah Supreme Court has chosen to depart from federal Fourth Amendment interpretations, it has done so "for the purpose of establishing a more workable rule for police and trial courts than exists under confusing federal case law." *Id.* Because the Utah Court of Appeals has rejected this argument, so does the author.

In addition, the author will not address the *Bobo* Court's second area of analysis. The court suggested that attorneys should "demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from federal interpretations of the United States Constitution and that it is entirely proper to do so." *Bobo*, 803 P.2d at 1272-73 n.5. This Comment has already discussed the willingness the Utah Supreme Court has shown in interpreting Article I, Section 14 differently than the Fourth Amendment. *See supra* Parts III.B.2 & III.B.3. Based on that discussion and given the Utah Supreme Court's recent cases that move away from the federal search and seizure standards, this Comment assumes that the Court would do so in the area of third-party consent if a case came before it that merited that conclusion.

191. *See infra* Part IV.B.

192. *See infra* Part IV.C.

193. *See infra* Part IV.C.1.

standards, the court should first research whether other states with similar constitutional provisions have expressly reached the issue. This criteria was explicitly recommended by the court in *State v. Bobo*.[194] The court stated that when attorneys argue for "an innovative interpretation of a state constitutional provision"[195] that differs from the federal counterpart, they should refer to "authority from other states supporting the particular construction,"[196] paying special attention to "those states whose constitutions served as models for the Utah Constitution."[197]

In the two cases in which the Utah Supreme Court has chosen to make an independent determination of state search and seizure law that departed from the federal courts' interpretation of the Fourth Amendment, the Court explicitly relied in part on the fact that other states had done likewise.[198] For instance, in *Larocco*,[199] the Utah Court interpreted Article I, Section 14 of the Utah Constitution to mean that police may not open a car door to inspect the vehicle identification number unless they have a warrant (or there are exigent circumstances). This holding differed from federal courts' interpretation of the Fourth Amendment.[200] The Court justified its departure from federal interpretation in part because states like Oregon, Hawaii, New Hampshire, and New York each rejected the federal standard in favor of an approach that gave defendants more protection.[201]

Obviously, Utah courts should not blindly follow the determinations of other state courts but should scrutinize the other holdings with the same intensity applied to the federal interpretation. Similarly, Utah courts should not merely add up the number of other state courts that have departed from the federal rule and follow the reasoning of the majority. Instead, this factor should be used in conjunction with the other two

194. 803 P.2d 1268 (Utah Ct. App. 1990).

195. *Id.* at 1272–73 n.5.

196. *Id.*

197. *Id.*

198. *See* State v. Thompson, 810 P.2d 415, 417–18 (Utah 1991); State v. Larocco, 794 P.2d 460, 465–66 (Utah 1990); *see also* Sims v. Collection Div. of the Utah State Tax Comm'n, 841 P.2d 6, 11–13 (Utah 1992).

199. 794 P.2d 460.

200. *See id.* at 469–71.

201. *See id.* at 465–66.

criteria[202] and should not be independently dispositive. Thus, if the federal standard is relatively clear and has received no real criticism, then the Utah court deciding the matter ought to interpret the state constitution the same as the Federal Constitution, so as to avoid creating confusion for lower court judges, the police, and the bar.[203] Conversely, if the federal standard is unclear and heavily criticized, the Utah court should be willing to depart from the federal standard, even though it is the first state court to address the particular issue.

2. Inconsistent or confusing interpretations of federal Fourth Amendment law

One of the most important factors used by the Utah Supreme Court to justify its departure from federal search and seizure law in the past has been the degree of confusion the area of law imposes on the police, the defendant, and society.[204] The *Watts* court eloquently expressed the idea that in those situations in which the Fourth Amendment is too confusing, the Utah courts would be justified in simplifying the law under Article I, Section 14 of the Utah Constitution: "[C]hoosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts."[205] In fact, one of the primary reasons the Utah Supreme Court decided to interpret Article I, Section 14 differently than the Fourth Amendment, with respect to automobile searches, is the "significant confusion about federal search and seizure law regarding automobiles."[206] Thus, if a Utah Court determines that there is a high degree of confusion with respect to third-party consent searches, that court is justified in interpreting

202. *See infra* Part IV.A.2. and Part IV.A.3.

203. *See Larocco*, 749 P.2d at 469 (justifying the departure from federal search and seizure law as an effort to simplify the rules "so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures").

204. *See id*.

205. State v. Watts, 750 P.2d 1219, 1221 n.8 (Utah 1988); *see also supra* Part III.B.

206. *Larocco*, 794 P.2d at 469.

the Utah Constitution in a way that eliminates confusion, even if that means going against Fourth Amendment interpretation.

3. Criticism aimed at the federal standard in light of search and seizure policy considerations

Before a state court decides whether to depart from a particular federal Fourth Amendment standard, the court should examine the extent to which the federal decision has been criticized by judges and commentators. In the most recent Utah case departing from federal Fourth Amendment standards, the Utah Supreme Court relied, in part, on the fact that the federal standard had "been roundly criticized."[207] The *Thompson* court cited several leading commentators who condemned the United States Supreme Court's ruling that "a depositor has no legitimate expectation of privacy in his bank records."[208] As a result, the Utah Supreme Court declined to adopt the federal standard and chose, instead, to interpret Article I, Section 14 in a way that protected bank records.[209]

In the third-party consent context, Utah courts should particularly focus their attention on arguments that attack the primary rationales for consent searches. For instance, courts should examine whether federal third-party consent doctrine unduly relies on traditional notions of property law,[210] whether it leaves a defendant's right to be free from unreasonable searches to the "unfettered discretion" of a third party,[211] whether the doctrine takes account of the defendant's assumption of risk,[212] or whether the third-party consent doctrine unfairly tramples on the defendant's reasonable expectation of privacy.[213] In addition, courts should also determine whether the criticisms of third-party consent doctrine attack the underlying policy considerations of the Fourth Amendment generally, considering for example, whether the doctrine leaves the decision to conduct a search in the hands of an officer charged with "ferreting out crime,"

207. State v. Thompson, 810 P.2d 415, 417 (Utah 1991).
208. *Id.*
209. *See id.* at 418.
210. *See supra* notes 46–47 and accompanying text.
211. *See supra* notes 49–52 and accompanying text.
212. *See supra* Part II.B.3.
213. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

instead of a "neutral and detached decision maker,"[214] or the degree to which the doctrine gives an officer the incentive to conduct a search instead of procuring a search warrant.[215]

B. Application of the Proposed Criteria to Federal Third-Party Consent Law

1. Other states have departed from federal Fourth Amendment law

a. Matlock *common authority standard.* Modern third-party consent law, governed by the *Matlock* common authority test has proved to be a workable, useful test. Consequently, state courts have chosen to incorporate the federal standard into third-party consent analysis based on state constitutional law.[216] These state courts have adopted the *Matlock* test generally because they have had little problem implementing the standard when faced with the question whether the third party had authority to consent to a search of the defendant's property. In addition, there is little or no debate over what constitutes common authority since the inquiry is essentially

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214. Johnson v. United States, 333 U.S. 10, 13–14 (1948).

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Id. (footnotes omitted).

215. *See* United States v. Leon, 468 U.S. 897, 957–58 (1984) (Brennan, J., dissenting) (arguing that the good-faith exception to the warrant requirement will "undermine the integrity of the warrant process" because it does not give the police adequate incentive to prove probable cause to a magistrate).

216. *See generally* Petersen v. People, 939 P.2d 824, 827–30 (Colo. 1997) (adopting *Matlock* test); Saavedra v. State, 622 So.2d 952, 957 (Fla. 1993) (same); State v. Ratley, 827 P.2d 78, 81 (Kan. 1992) ("After reviewing *Matlock*, cases from other jurisdictions, and Kansas case law, we hold that in Kansas, spousal consent to search cases should be approached on a case-by-case basis using a common authority or sufficient relationship test."); *In re* Tariq A-R-Y, 701 A.2d 691, 695 (Md. 1997) ("Seizing upon the language in *Frazier*, *Coolidge*, and *Matlock*, Maryland courts have generally held that one who shares with others access to, ownership of, or possessory rights over property necessarily enjoys a diminished expectation of privacy therein.").

whether the third party had such a relationship with the property that he could have consented to a search of it "in his own right."[217] Once that criteria is met and there is no evidence of coercion, state courts generally hold that the third-party consent is valid.

b. Rodriguez *apparent authority standard*. The *Rodriguez* apparent authority standard, however, has not fared as well among the state courts. Because of the intense criticism that followed the Supreme Court's decision in *Rodriguez*, some states have decided to move away from the federal "apparent authority" standard and adopt a different standard under their state constitutions.[218] For instance, relying on its state constitution, the Hawaii Supreme Court in *State v. Lopez*[219] rejected the concept of apparent authority and held that a third party can give effective consent to a search of the defendant's property only if he has actual authority to do so.[220] Given the hostility many commentators feel toward the *Rodriguez* holding,[221] it is likely that other state courts will also reject apparent authority under their state constitutions in favor of a standard that offers more protection to criminal defendants.

2. *Inconsistent or confusing interpretations of federal Fourth Amendment law*

a. Matlock *common authority standard*. The *Matlock* test is a relatively clear test that courts have had little trouble

217. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

218. So far, three states, Hawaii, New Mexico, and Oregon, have rejected the federal apparent authority doctrine. *See* State v. Lopez, 896 P.2d 889, 903 (Haw. 1995); State v. Wright, 893 P.2d 455, 460–61 (N.M. Ct. App. 1995) (rejecting doctrine of apparent authority); State v. Will, 885 P.2d 715, 719 (Or. Ct. App. 1994) ("Although apparent authority is now sufficient under the Fourth Amendment, actual authority to grant consent is still required under Article I, section 9 [of the Oregon Constitution]."") (citation omitted); Kathleen M. Wilson, *State Constitutional Law—New Mexico Rejects Apparent Authority to Consent as a Valid Basis for Warrantless Searches:* State v. Wright, 26 N.M. L. REV. 571 (1996). *But see* State v. McCaughey, 904 P.2d 939, 944 (Idaho 1995) (explicitly adopting the *Rodriguez* apparent authority standard); Myers v. State, 564 N.E. 2d 287, 290 (Ind. 1990) ("Because our courts have in the past followed United States Supreme Court precedent in this area, we will continue to do so and apply the *Rodriguez* analysis to the case at bar.") (citation omitted).

219. 896 P.2d 889 (Haw. 1995).

220. *See id.* at 903.

221. *See* articles cited *supra* note 88.

applying. Although the common authority standard is fairly straightforward and easy to apply in most situations, Professor LaFave raises several issues that show that the common authority standard does not adequately handle all possible situations.[222] For instance, how should a court, applying *Matlock*, decide whether third-party consent is valid when the defendant specifically instructs the third party to not grant consent,[223] when the defendant is present and objects to the search,[224] or when one spouse grants consent to a search of the other's property during a time of marital hostility.[225] These issues are not readily answered by a simple application of the *Matlock* test,[226] but they do raise important questions about whether such a test can answer all third-party consent cases. In spite of these questions (that do not have clear answers), the *Matlock* common authority test has proven to be a useful and effective test to determine the validity of third-party consent.

b. Rodriguez *apparent authority standard*. The *Rodriguez* apparent authority doctrine, however, has not been as easy to apply. The standard necessarily requires courts to conduct an intense factual inquiry to determine whether the officer "reasonably (though erroneously) believe[d] that the person who has consented" to the search had authority to do so.[227] This factual determination leads to another potential problem—determining what qualifies as a reasonable but mistaken belief by an officer as to the third party's authority depends upon who is evaluating the facts. The standard is so fraught with subjectivity that there is a potential for two separate courts to make opposite findings given nearly the same set of facts.[228] Consequently, the Utah Supreme Court

222. *See* LAFAVE, *supra* note 34., at § 8.3(c). The issues and hypotheticals raised by Professor LaFave seem to be more of an academic critique of the the Supreme Court's third-party consent cases and less of an examination into actual flaws in the test from actual court cases.

223. *See id.*

224. *See id.* at § 8.3(d).

225. *See id.* at § 8.4(a); *see also supra* note 102.

226. These issues are also outside the scope of this article. For a look at how some courts have resolved these issues, see LAFAVE, *supra* note 34, at § 8.3.

227. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990).

228. *Compare* United States v. Brokaw, 985 F.2d 951, 954 (8th Cir. 1993) (validating consent search by the defendant's landlord, even though the defendant was home at the time) *with* United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (invalidating a consent search by the defendant's landlord).

should critically examine the apparent authority doctrine to determine the areas that cause confusion and craft a rule that clears up that confusion.[229]

3. Criticism aimed at the federal standard in light of search and seizure policy considerations

a. Matlock *common authority standard*. The common authority doctrine as outlined in *Matlock* has received little or no criticism from judges, practitioners, or commentators. Since its inception in 1974, state and federal courts have applied the test with relative ease to determine the validity of consent by a third party. Although the *Matlock* test does not effectively address all third-party consent issues,[230] it has proved to be a workable and logical framework to judge the validity of third-party consent cases.

b. Rodriguez *apparent authority standard*. Unlike the holding in *Matlock*, the United States Supreme Court's ruling in *Illinois v. Rodriguez* has been heavily criticized by commentators.[231] Those who have criticized the Court's "apparent authority" doctrine have focused their attacks on the notion that it unduly tramples on Fourth Amendment protections. Chief among the criticizers were the *Rodriguez* dissenters, Justices Marshall, Brennan, and Stevens. They contend that the majority began with the wrong premise. According to the dissenters, third-party consent cases prior to *Rodriguez* were decided outside of the reasonableness clause of the Fourth Amendment because they were based on the notion that the defendant "voluntarily has relinquished some of his expectation of privacy by sharing access or control over his property with another person."[232] Thus, by basing its apparent authority decision on the reasonableness prong, the majority relies on an entirely "different constitutional footing" from that

229. *See* Wieber, *supra* note 88, at 619–632 (criticizing the *Rodriguez* apparent authority standard in part because of the confusion generated in the lower courts).

230. *See supra* notes 222–26 and accompanying text.

231. *See generally* articles cited in footnote 88. This article does not purport to give an exhaustive summary of the substantive criticisms waged against the apparent authority doctrine. The purpose of this Part is twofold: first, to highlight the major criticisms and second, to illustrate that the apparent authority standard has been heavily criticized.

232. Illinois v. Rodriguez, 497 U.S. 177, 194 (1990) (Marshall, J., dissenting).

underlying traditional third-party consent cases.[233] Other commentators have also attacked the majority's analysis of the reasonableness prong, arguing that it "strays a long way from the traditional understanding of Fourth Amendment reasonableness."[234]

The *Rodriguez* dissenters also attack the majority opinion because it "ignores the legitimate expectations of privacy on which individuals are entitled to rely."[235] This is due, in part, because the Court's holding shifts the focus away from the individual defendant's privacy interest to the individual officer's conduct.[236] This change of focus and resulting denigration of defendants' privacy interest is viewed as unacceptable to many legal commentators.[237]

Finally, some commentators have opined that the *Rodriguez* apparent authority doctrine gives the police a negative incentive: instead of investigating the facts to determine whether the consenting party has authority to grant effective consent, police officers have the "incentive to remain ignorant of [the third party's] true status."[238] The argument rests on the notion that since police are allowed to conduct a search if the information about the party's authority to consent is objectively reasonable, then officers will not inquire into the true nature of the consenting party's authority. As long as the officers can demonstrate "'reasonable belief,'" the argument goes, "there is no incentive to take further measures to determine whether the person who claims shared authority has actual authority over the premises."[239]

Given the host of criticism waged against the *Rodriguez* holding, state courts should be wary about incorporating the decision into their state constitutional framework without scrutinizing its rationale. Because many critics of the apparent authority doctrine have a view of the Fourth Amendment that

233. *Id.*

234. Davies, *supra* note 88, at 59; *see also* Wieber, *supra* note 88, at 619 (arguing that the Supreme Court's decision in *Rodriguez* "significantly changed the 'reasonableness' landscape").

235. *Rodriguez*, 497 U.S. at 198 (Marshall, J., dissenting).

236. *See* Davies, *supra* note 88, at 25.

237. *See id.* at 25–45.

238. Campbell, *supra* note 88, at 499.

239. Wieber, *supra* note 88, at 620.

fundamentally differs from the majority of the Supreme Court, they will likely not be satisfied unless *Rodriguez* is completely overruled. This Comment does not espouse that position. Instead, it suggests that the *Rodriguez* holding be scaled back so that it provides more protection to defendants, gives police the proper incentives, and reduces the ability of judges to use the "apparent authority" doctrine as a tool to avoid the harsh effects of the exclusionary rule.[240]

C. Recommendation

The Utah Supreme Court should incorporate the *Matlock* standard into Article I, Section 14 of the Utah Constitution. The *Matlock* standard has been in use for over two decades, and during that time, courts have successfully applied it to numerous fact situations and have generally arrived at correct results. Also, as discussed above, the *Matlock* test has been accepted by state and federal courts and has proved to be a workable standard that takes account of general Fourth Amendment principles. In addition, the *Matlock* standard has received no substantial criticism. Given these facts, the Utah Court should not create confusion by rejecting the *Matlock* test or changing its application in any significant way.

The *Rodriguez* standard, however, should not receive the same treatment. Several state courts have expressly refused to adopt it as part of their state constitutional search and seizure law, opting instead for the actual authority standard found in *Matlock*. In addition, the apparent authority standard is often difficult to apply because of the intense factual analysis required and the extremely subjective nature of the rule. Finally, the doctrine has been heavily criticized by judges and commentators.

In the past, when these same negative factors were present, the Utah Supreme Court has departed from the federal Fourth Amendment standard and has instead given more protection

240. *See* State v. Hygh, 711 P.2d 264, 272 (Utah 1985) ("In many cases, the exclusionary rule, adopted by the federal courts as the sole remedy for fourth amendment violations, appears to have influenced, if not controlled, the scope of the constitutional right it was designed to further. Many of the arcane rules developed to justify warrantless searches seem to have been fashioned solely to avoid the consequences of the exclusionary rule.") (Zimmerman, J., concurring).

under the Utah Constitution.[241] With the presence of these adverse elements in the apparent authority context, it is likely that the Utah Court will not adopt the test wholesale. The Court will thus have two options: first, it may follow Hawaii, Oregon, and New Mexico and simply refuse to recognize the doctrine;[242] or, second, it may simply limit its application. This Comment argues that the latter is the better approach because it allows the police to rely on a reasonable but mistaken fact, but only after they have done all they can reasonably be asked to do to remove any doubt that the consenting third party has actual authority to grant valid consent. Inherent in this proposal is the notion that the doctrine of apparent authority is a beneficial tool used by the police as long as it is applied in a way that comports with the Fourth Amendment.[243]

1. Proposal

The Utah Supreme Court should not completely reject the apparent authority doctrine and instead should adopt a limited version of the federal standard. The revised standard should allow officers to reasonably rely on mistakes of fact proffered by the consenting third party, but only after the officer has made a deliberate and thorough examination of the consenting person to determine whether he does have authority. In other words, before an officer is permitted to search the property of a defendant based on consent by a third party, the officer must first thoroughly question the third party to determine the party's authority to grant the consent. If, after such a query, a reasonable officer would have no reasonable doubt that the person granting consent has authority to do so and none of the surrounding facts or circumstances would lead a reasonable officer to believe otherwise, the search is permissible, even if it later turns out that the consenting party did not have the authority to consent.[244] If, on the other hand, a reasonable

241. *See supra* Part III.B.3.

242. *See supra* note 218 and accompanying text.

243. *See infra* Part IV.C.3.

244. The author recognizes that, often times, determining the facts surrounding a consent search can be difficult. When a court is called upon to decide whether the defendant or third party actually gave consent, the primary source for evidence of the facts is based on the testimony of the parties involved: the police officer who requested the consent and the defendant or third party who supposedly gave the

officer would harbor some doubt as to the person's authority to grant consent, and the officer cannot justify the search under another exception to the warrant clause, the officer must either conduct further inquiry into the party's authority[245] or obtain a warrant.[246] In sum, the apparent authority rule would excuse a third-party consent search only in those situations in which the officer cannot be faulted for the mistake about the person's authority to consent.

2. Justifications for limited adoption of apparent authority

Incorporating the apparent authority standard as limited by the aforementioned proposal will resolve some of the concerns expressed by critics of the rule. In addition, the proposed limitations on the rule are justified by the four arguments that follow.

a. The proposed standard is closer by analogy to the so-called "good faith" exception. In a series of cases beginning

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consent. Because "[c]onsent cases often come down to a credibility determination between the officer's account of what happened and the defendant's account of what happened," courts "routinely find officers to be more credible than defendants" or third parties. SALTZBURG & CAPRA, *supra* note 3, at 362. Thus, it is often difficult for the consenting party to prove exactly how the officer extracted consent and whether an officer conducted an adequate interrogation prior to conducting the consent search. Because police are generally considered to be more credible by the courts and they have an interest in ensuring that evidence they have gathered is not suppressed, some have suggested that police officers regularly lie on the stand. *See id.* at 362–63. In fact, one report asserts that "perjury is so 'prevalent in the [New York City Police] Department that it has its own nickname: 'testilying.' " *Id.* at 363 (quoting Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, April 22, 1994, at A1). This Comment purposely omits a proposal regarding this issue as it is outside the scope of this Comment.

245. The *Rodriguez* case, 497 U.S. 177 (1990), provides an appropriate factual backdrop to illustrate the types of questions police officers should ask to test a third party's authority to consent to a search of the defendant's property. The officers in *Rodriguez* could have asked the consenting woman questions like: "Do you live in the apartment?" "When was the last time you were in the apartment?" "Did the defendant give you the key to the apartment?" "Are any of your possessions in the apartment?" "Did the defendant kick you out of the apartment and tell you never to return?" "Who is paying rent for the apartment?" "If you no longer live in the apartment, how often do you visit and did the defendant give you free access to his apartment when he gave you the key?" "Do you regularly stay overnight or for extended periods of time?"

246. Obviously, if the officer can find another basis on which to validate the warrantless search without the party's consent (like in an exigent circumstance, for example) he is justified in doing so. This proposal addresses only those situations in which the search is based solely on valid consent.

with *United States v. Leon*,[247] the United States Supreme Court has adopted what has become known as the "good faith" exception. The Court's good faith rule essentially refuses to apply the exclusionary rule[248] to evidence gathered from unconstitutional searches when the officer conducting the search reasonably relied on a neutral third party. The purpose of the exclusionary rule is to deter combative, illegal tactics by police;[249] but, in situations where the police reasonably rely on a neutral third party, like a magistrate,[250] the legislature,[251] or a computer document generated by court authority[252] for their authority to search, the justification for the exclusionary rule does not apply because judges and legislatures cannot be deterred by application of the exclusionary rule. As a result, the Supreme Court has applied the good faith exception in the limited situations in which the officers reasonably relied on an intermediary that would not be deterred by application of the exclusionary rule.[253]

The proposed apparent authority standard articulated in this Comment excuses police conduct for a reason similar to that which justifies the Supreme Court's good faith exception to the exclusionary rule.[254] In both situations, the police are

247. 468 U.S. 897 (1984).

248. The exclusionary rule "commands that where evidence has been obtained in violation of the search and seizure protections guaranteed by the U.S. Constitution, the illegally obtained evidence cannot be used at the trial of the defendant." BLACK'S LAW DICTIONARY 564 (6th ed. 1990). The United States Supreme Court held that the states must adhere to the exclusionary rule. *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961).

249. *See* Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.").

250. *See Leon*, 468 U.S. at 900.

251. *See* Illinois v. Krull, 480 U.S. 340, 349–55 (1987) (refusing to apply the exclusionary rule when the police reasonably relied on a law passed by the state legislature allowing for warrantless searches because a legislature cannot be deterred by the exclusionary rule).

252. *See* Arizona v. Evans, 514 U.S. 2, 10–16 (1995) (refusing to apply the exclusionary rule when the police arrested the defendant based on a warrant that erroneously showed up on the officer's computer due to a clerical error).

253. *See* SALTZBURG & CAPRA, *supra* note 3, at 454–58.

254. However, even though third-party consent cases are similar to the good faith exception in that they both rely on a third party, there is a critical difference: in the good faith exception, the officer is allowed to make a reasonable mistake of fact because he is relying on a *neutral and detached* third party (like a judge, or in some cases, even the legislature). In most third-party consent cases, the third party giving

excused where they rely on a third party for information, but only after they take "every step that could reasonably be expected of them."[255] Similarly, in both the proposed apparent authority standard and the good faith exception, the police cannot be faulted in situations where no reasonable officer would conclude the facts to be anything other than what they appear to be to the officer. The police should not be penalized for performing their duty when all evidence points to the validity of the consent proffered by the third party.

b. The proposed standard gives police officers the proper incentives. The proper incentive in Fourth Amendment jurisprudence should be for officers in doubt to get a warrant, not for them to "remain ignorant as to the important factors that may be determinative of whether a third party possesses the requisite common authority to consent to a search."[256] The proposed apparent authority standard, by tightening the restrictions on the ability of police to conduct a search based on third-party consent, gives police officers this proper incentive: if there is any reasonable doubt as to the authority of a third party and the officer cannot justify the search under another exception to the warrant clause, the officer may not rely on the apparent authority and should instead obtain a warrant.

Under the Supreme Court's current apparent authority doctrine, officers have little or no incentive to ask specific questions to determine the authority of the person granting

consent can hardly qualify as neutral and detached. By definition, the consenting party purportedly shares access to the property with the defendant and has a relationship with the defendant that a neutral and detached decision maker does not have. The third-party consenter knows something about the property to be searched because he has authority (or at least the apparent authority) to grant consent to search the property "in his own right." United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). As a result, officers should not be able to rely on the consent of a third party if there is any reasonable doubt, after an interrogation of the third party, that the consenting party has authority to grant effective consent.

255. Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984).

256. Campbell, *supra* note 88, at 500.

consent; in fact there is the opposite incentive. Because they do not have to query the consenting party's authority unless "the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises,"[257] they can assume that the person granting authority has the authority. This assumption is not one that will often (if ever) lead to a judge's chambers in an effort to procure a warrant.

The proposed standard, on the other hand, requires the officer seeking consent from a third party to take "every step that could reasonably be expected"[258] of him to ascertain the authority of the consenting party, and then he may proceed forward with the search. In effect, the proposed rule creates a mild presumption that a third party has no authority; this presumption can be overcome with a showing that the officer conducted a thorough investigation of the third party. Thus, the proposed rule is the better approach because it safeguards the defendant's privacy interest and also gives the officer the incentive to obtain a warrant if there is doubt as to the authority of the third party.

c. The proposed standard invigorates the warrant requirement. The United States Supreme Court has, on occasion, refused to justify a warrantless search because the officers had ample time to secure a warrant, and there was no immediate threat that justified the warrantless search. The Utah Supreme Court has adopted the same attitude and has essentially held that when there is time to obtain a warrant and no emergency, officers should obtain a warrant. In *Larocco,*[259] the Utah Supreme Court reaffirmed its commitment to require a warrant, noting the relative ease with which an officer can obtain one.[260] The Utah court mandates a warrant unless there is probable cause *and* exigent circumstances.[261]

257. Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (quoting Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).

258. *Sheppard*, 468 U.S. at 989.

259. State v. Larocco, 794 P.2d 460 (Utah 1990).

260. *See* State v. Hygh, 711 P.2d 264, 272 (Utah 1985) (arguing that warrantless searches should only be allowed to protect officer safety or prevent destruction of evidence because "[s]uch a requirement would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute") (Zimmerman, J., concurring).

261. *Larocco*, 794 P.2d at 470. As an example of the ease with which an officer

Applying this reasoning to the proposed apparent authority standard, if the officer harbors any doubt as to the authority of the consenting party in granting consent, the police should be required to either find out for certain whether the person has authority, or alternatively, obtain a warrant.

d. The proposed standard is similar to other bright-line tests adopted in the Fourth Amendment arena. The proposed standard will also end some of the confusion that surrounds the federal apparent authority rule because it clarifies an officer's duty with respect to obtaining valid third-party consent. In that respect, the proposal is closer to a bright-line test:[262] If the officer shows that he has taken all steps that could have reasonably been taken to ensure the authority of the third party and nothing points to the absence of authority, then the search is justified, even if it later turns out that the person lacked the requisite authority. This standard emphasizes that an officer is not justified under the apparent authority doctrine unless he has conducted an extensive interrogation of the third party to assess the party's authority to consent. Because police officers would know they have the duty to investigate before assuming apparent authority, this rule would help clear up some of the confusion surrounding third-party consent and make application of the apparent authority doctrine more predictable and easier for police to follow. Additionally, this standard comports with one of the reasons the Utah Supreme Court has decided to shun federal Fourth Amendment standards in the past, namely to simplify the law and to end confusion among judges, the bar, and police officers.

3. The apparent authority standard has merit

The proposal as suggested in this Comment is based on the assumption that the apparent authority doctrine is not so

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can obtain a warrant, the Utah Supreme Court cited to the Utah statute that allowed for "the issuance of a search warrant based on the sworn telephonic statement of the officer seeking the warrant." *Id.* (citing UTAH CODE ANN. § 77-23-4(2) (1982)).

262. This is not to suggest that the proposed standard is a *new* bright-line test. Instead, the proposal accepts the Supreme Court's analysis and justification of the apparent authority standard, but adds an additional prerequisite: the officer must conduct a thorough examination of the party to test the party's authority to consent. If that initial requirement and the other elements of *Rodriguez* are met, then the search is justified.

offensive to Fourth Amendment principles that it should be completely abandoned. Instead, it is based on the assumption that it has its place in the investigative process and benefits both the police and those who are targets of police investigations.[263] The proposed standard simply draws the line in a different place than the United States Supreme Court has chosen to draw it and thus strikes a balance between the total abolition of the doctrine espoused by some courts and commentators and the near freedom of officers to rely on apparent authority that the Supreme Court seems to adopt.

By adopting a limited version of the apparent authority doctrine, the Utah Supreme Court would promote the efficiency that is inherent in consent searches in general. In addition, the proposed standard does not punish police officers for doing their job. If officers take "every step that could reasonably be expected of them"[264] to ensure that the third party consenting to the search has authority to grant the consent, the evidence obtained from the search should not be suppressed because it later turns out that the consenting party did not have actual authority to consent. Finally, it preserves the constitutional requirement that all searches be conducted reasonably. If, after conducting a thorough examination of the third party, the police have no doubt as to the person's authority, then the police can be said to have acted reasonably—which is all the Utah Constitution and the United States Constitution require.

V. CONCLUSION

Consent by the defendant to search his property has long been recognized as a valid exception to the warrant requirement; however, under the United States Supreme Court's interpretation of the Fourth Amendment, the defendant is not the only person authorized to consent to a search of his property. Others who share common authority over the property may also grant valid consent to conduct a search. In

263. Police officers attempt to obtain consent for several reasons, foremost among them being that the officer knows he lacks probable cause and thus cannot get a warrant. *See* HOLTZ, *supra* note 28, § 3.6, at 337; *see also* SAMAHA, *supra* note 133, at 335. In addition, an officer may want to conduct a consent search because even though he has probable cause, it is inconvenient to secure a warrant, or because no magistrate is available at the time and any delay might damage the investigation. *Id.*

264. Massachusetts v. Sheppard, 468 U.S. 981, 989 (1984).

fact, the Supreme Court has held that even if the consenting person does not have actual authority to consent, the consent is valid against the defendant if the police reasonably believe the party has authority.

This doctrine of apparent authority has spawned numerous criticisms from commentators and has forced states to look closely at whether they should follow the federal standard or provide defendants in their state with more protection by interpreting their individual constitutions to offer broader protections. The Utah Supreme Court has expressed a willingness and desire to determine whether to depart from federal third-party consent doctrine, in spite of the textual similarity between the United States and Utah Constitutions.

Based upon criteria used by the Utah Supreme Court in cases in which the Court decided to adopt its own search and seizure standard, this Comment argues that the Utah Supreme Court should incorporate the *Matlock* common authority test into the Utah Constitution, but should decline to fully adopt the federal apparent authority standard. But, unlike other states that have completely rejected the doctrine of apparent authority, the Utah Court should adopt a limited, more restrictive version of the controversial doctrine that requires police officers to conduct a thorough examination of the consenting third party to test the consenting party's authority before they may conduct the search. Doing so will allow those truly reasonable mistakes of fact to pass state constitutional muster, will reinvigorate the warrants clause, and will end the confusion and misapplication associated with the federal apparent authority standard. By adopting the proposed standard, Utah will fulfill Justice Zimmerman's desire to simplify search and seizure law in Utah.[265]

S. Matthew Cook

265. *See Hygh*, 711 P.2d at 272 (arguing that simpler rules "might provide the public with greater and more consistent protection against unreasonable searches and seizures by eliminating many of the confusing exceptions to the warrant requirement that have been developed in recent years").