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SEARCH AND SEIZURE, THIRD-PARTY CONSENT: RETHINKING POLICE CONDUCT AND THE FOURTH AMENDMENT

Abstract: Two recent decisions offer different approaches for assessing police conduct in third-party consent cases. In *Illinois v. Rodriguez*, the United States Supreme Court held that police may rely on third parties' apparent authority to consent to a search so long as police reasonably believe in third parties' authority. In *State v. Leach*, the Supreme Court of Washington held that police cannot rely on third parties' consent when defendants are present and able to object, even if defendants did not object to the search. This Comment argues that courts should focus on police conduct, rather than on defendants' presence or on the reasonable belief of police. Courts should require police to justify their reliance on third parties' authority. If police can justify their reliance on third parties' authority, courts should allow police to rely on third parties' consent, regardless of defendants' presence or absence. This approach achieves an appropriate balance between individual and governmental interests by protecting individual rights without unduly impeding effective law enforcement.

When may police rely on third parties' consent to search? Two recent decisions provide dramatically different answers. In *Illinois v. Rodriguez*,¹ the United States Supreme Court held that police could rely on third parties' consent so long as police reasonably believed in third parties' authority. The Court held that third parties' apparent authority sufficed even when third parties did not have authority to consent and defendants² were present at the search. In *State v. Leach*,³ a sharply divided Supreme Court of Washington held that police could not rely on third parties' consent when defendants were present and able to object, even when third parties had authority to consent and defendants did not object to the search.

This Comment examines the significance of police conduct in conducting a search based on third parties' consent. First, it reviews the basic principles of third-party consent. Second, it analyzes *Rodriguez* and *Leach* and concludes that neither case appropriately resolved the issues surrounding third-party consent. Finally, it proposes an alternative analysis. Courts should focus on police conduct by requiring police to justify their reliance on third parties' consent. Justification requires police to exercise restraint and discretion. If police can justify their reliance on third parties' authority, courts should allow police to rely on third parties' consent regardless of defendants' presence or

1. 110 S. Ct. 2793 (1990).

2. This Comment refers to third parties' co-tenants as "defendants." This will not, of course, always be so. See, e.g., *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965).

3. 113 Wash. 2d 735, 782 P.2d 1035 (1989).

absence. This approach balances all interests by protecting individual rights without unduly restricting effective law enforcement.

I. THE DOCTRINAL FOUNDATION FOR THIRD-PARTY CONSENT

Competing interests lie at the heart of third-party consent. Consenting third parties have a right to act in their own self-interest. Defendants have a right to expect a reasonable degree of freedom from government intrusion. The government has an interest in suppressing crime. Courts face many problems in defining and resolving the tension between these competing interests.

A. *The Fourth Amendment and Consent*

The fourth amendment of the United States Constitution protects privacy rights by prohibiting unreasonable searches and seizures.⁴ The fourth amendment encompasses both individual and governmental interests.⁵ As a basic principle, it requires police to secure a search warrant based on probable cause before conducting a search.⁶ Without a search warrant, police should respect a citizen's right to be "let alone."⁷ Warrantless searches are generally unreasonable.⁸ However, courts recognize several exceptions to the requirement that police secure a warrant, for example, searches incident to lawful arrest,⁹ or exigent circumstance,¹⁰ or consent.¹¹

4. The fourth amendment provides:

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

U.S. CONST. amend. IV. The fourth amendment applies to the states through incorporation in the fourteenth amendment. *Ker v. California*, 374 U.S. 23, 30-34 (1963). Washington State's analogue to the fourth amendment is article I, § 7 of the Washington State Constitution which provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, § 7 is generally interpreted as according Washington State citizens greater protection than the fourth amendment. *See State v. Stroud*, 106 Wash. 2d 144, 148-49, 720 P.2d 436, 439 (1986). In the context of third-party consent, however, the limits of article I, § 7 are probably co-extensive with the fourth amendment. *See infra* note 32 and accompanying text.

5. *See, e.g., Junker, The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1107 (1989).

6. U.S. CONST. amend. IV.

7. *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).

8. *See, e.g., Maryland v. Buie*, 110 S. Ct. 1093, 1097 (1990).

9. *Chimel v. California*, 395 U.S. 752, 763 (1969).

10. *Cupp v. Murphy*, 412 U.S. 291, 295-96 (1973).

11. *Davis v. United States*, 328 U.S. 582, 593-94 (1946).

The fourth amendment only constrains government conduct.¹² The fourth amendment does not address private parties' conduct.¹³ Two tests exist to assess fourth amendment violations. First, some courts examine whether citizens' privacy interests or expectations are reasonable.¹⁴ Second, some courts assess the general reasonableness of police conduct.¹⁵ The traditional fourth amendment analysis under either test balances governmental and individual interests.¹⁶ When governmental conduct upsets the delicate balance between state and individual interests, the exclusionary rule suppresses evidence resulting from an illegal search and seizure.¹⁷ The exclusionary rule thus operates to ensure compliance with the fourth amendment.¹⁸

A search warrant is not required if an individual consents to a search.¹⁹ Third parties may consent to searches of areas shared with others.²⁰ Courts assess the validity of consent by looking at the total-

12. See, e.g., *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

13. See, e.g., *id.* at 115 (fourth amendment was not implicated where airport personnel who were not police opened package). States may broaden citizens' protections to encompass private parties' conduct. See, e.g., WASH. REV. CODE §§ 9.73.010-140 (1988).

14. See, e.g., *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (for discussion on reasonable expectations of privacy). State courts may interpret their respective constitutions as extending broader protections to citizens than rights recognized under the United States Constitution. See, e.g., *Utter, State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 27 (1989) (for discussion on new federalism).

15. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 9, 19-20 (1968). The general reasonableness test is closely associated with the exclusionary rule. *United States v. Leon*, 468 U.S. 897, 918-19 (1984); *Terry*, 392 U.S. at 13-15. The exclusionary rule's function is to deter lawless police conduct. See, e.g., *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). If police conduct is reasonable, it is not lawless. Therefore, some courts reason that there is no purpose in excluding evidence resulting from an illegal search or seizure as long as police conduct is reasonable, because excluding the evidence would serve no deterrent effect. See, e.g., *Leon*, 468 U.S. at 918-19. Some state courts reject the *Leon* Court's analysis on state constitutional grounds. See, e.g., *People v. Bigelow*, 66 N.Y.2d 417, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630, 634 (1985).

16. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

17. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Because the exclusionary rule suppresses evidence resulting from an illegal search and seizure, the rule operates as a remedy granting defendants relief from violations of their rights. But see *infra* note 113 and accompanying text. Federal statutory remedies are also available where federal agents violate citizens' rights under color of authority. See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980); *Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971). The Federal Tort Claims Act, as amended in 1974, also provides citizens with a remedy. See 28 U.S.C.A. § 2680 (h) (West Supp. 1990); S. REP. NO. 588, 93d Cong., 2d Sess. 3-4, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 2789, 2791.

18. A discussion of the exclusionary rule is beyond this Comment's scope. See *Oaks, Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). For criticism of the exclusionary rule, see Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635 (1982).

19. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

20. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

ity of circumstances.²¹ Courts focus on whether police unreasonably infringe upon defendants' rights, not whether defendants abandon a known right.²²

B. Theoretical Principles of Third-Party Consent

To determine which third parties may consent to a search, courts assess whether the third party has common authority over the searched area.²³ In *United States v. Matlock*,²⁴ the United States Supreme Court established the "common authority" test. In *Matlock*, the defendant was arrested for bank robbery in front of the house where he rented a room.²⁵ The defendant's girlfriend consented to a search of the defendant's room.²⁶ During the search, police found a diaper bag stuffed with cash.²⁷

The Court held that if the girlfriend possessed common authority over the room, her consent could validate the search.²⁸ The Court defined "common authority" as essentially a two-part test.²⁹ First, consenting parties must be able to permit a search in their own right.³⁰ This capacity to consent is based on third parties' "joint access or control for most purposes" over the searched area.³¹ Second, it must be reasonable for a court to find that defendants assumed the risk that third parties might permit a search.³²

In applying the common authority test, courts assess third parties' control over the searched area against defendants' reasonable expecta-

21. *Schneckloth*, 412 U.S. at 248-49 (1973).

22. *Id.*

23. For an overview of third-party consent, including prior analyses, see 3 W. LAFAVE, SEARCH AND SEIZURE § 8.3 (2d ed. 1987). For discussion on the development of third-party consent, see Comment, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121, 128-32 (1973).

24. 415 U.S. 164, 171 (1974).

25. *Id.* at 166-68.

26. *Id.*

27. *Id.* at 166-67.

28. *Id.* at 177-78. The Court remanded the case to the district court to reconsider the evidence regarding the girlfriend's common authority.

29. *Id.* at 171 n.7.

30. *Id.* The Court declined to address whether third parties' apparent authority would suffice. *Id.* at 177 n.14; see also Brief for United States at 11-17, *United States v. Matlock*, 415 U.S. 164 (1974) (No. 72-1355). In *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), the Court held that apparent authority sufficed to validate third parties' consent.

31. *Matlock*, 415 U.S. at 171 n.7.

32. *Id.* Washington adopted common authority as the test for determining third-party consent under article I, § 7 of the Washington State Constitution. *State v. Mathe*, 102 Wash. 2d 537, 543, 688 P.2d 859 (1984). This suggests that the limits of article I, § 7, in the context of third-party consent, are co-extensive with the fourth amendment.

tion of privacy.³³ Because the fourth amendment protects only reasonable expectations of privacy,³⁴ third parties' joint control over the property is the threshold issue for the common authority test. Defendants' expectation of privacy is reduced by sharing living or working space with third parties and, therefore, defendants assume the risk that third parties will consent to a search.³⁵ Defendants' assumption of risk is predicated on third parties' joint control.³⁶ Once joint control is found to exist, defendants' assumption of risk follows.³⁷ If the search unduly violates defendants' rights, however, courts typically will find no assumption of risk even though third parties share control.³⁸

Balancing third parties' control and defendants' privacy interests requires courts to determine whether third parties' or defendants' respective rights should control in any given case. Courts reach different results depending on what significance they attach to third parties' and defendants' respective interests.

The conflict between competing interests exists because the common authority test leaves several questions unresolved. Two issues merit particular attention. First, courts must determine what limits, if any, to place on third parties' authority once police are inside the premises. Because courts place different degrees of emphasis on third parties' control and defendants' assumption of risk, courts define the scope of common authority differently. Courts emphasizing defendants' assumption of risk broadly extend third parties' authority.³⁹ Courts emphasizing third parties' authority, however, limit the scope of permissible searches to common areas.⁴⁰ Between these two poles are

33. See, e.g., *United States v. Heisman*, 503 F.2d 1284, 1288 (8th Cir. 1974); *Mathe*, 102 Wash. 2d at 543.

34. See *supra* note 14 and accompanying text.

35. See, e.g., *Mathe*, 102 Wash. 2d at 543, 544 n.1.

36. *Id.* at 544 n.1. Courts have never fully articulated why defendants' assumption of risk should follow from third parties' joint control. Courts eschew property-based theories in resolving third party consent. See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

37. See e.g., *Mathe*, 102 Wash. 2d at 544 n.1.

38. See, e.g., *Tompkins v. Superior Court*, 59 Cal. 2d 65, 378 P.2d 113, 116, 27 Cal. Rptr. 889 (1963) (holding that an absent third party's consent is invalid where police broke into an apartment over defendant's objection).

39. For example, in *People v. Posey*, 99 Ill. App. 3d 943, 426 N.E.2d 209 (1981), *cert. denied*, 456 U.S. 992 (1982), the third party and defendant shared a motel room which was deemed sufficient for the third party to consent to a search of defendant's suitcase. See also *United States v. Reeves*, 594 F.2d 536 (6th Cir. 1979) (where the door to the defendant's room is open and access to the room is not obstructed, the third party who shares the apartment can consent to a search of the defendant's bedroom), *cert. denied*, 442 U.S. 946 (1979).

40. For example, in *United States v. Bussey*, 507 F.2d 1096 (9th Cir. 1974), the defendant and third party shared a motel room. Unlike the court in *People v. Posey*, 99 Ill. App. 3d 943, 426 N.E.2d 209 (1981), *cert. denied*, 456 U.S. 992 (1982), the *Bussey* court held that the third party could consent to a search of the motel room, but not of the defendant's suitcase in the room. 507

courts that recognize some parts of the common area as falling within defendants' exclusive control, but only if defendants make some special effort to designate that area as under their exclusive control and not shared with third parties.⁴¹

Second, courts must determine whether common authority represents a waiver⁴² of third parties' fourth amendment rights or an implied waiver of defendants' rights. Some courts hold that consent searches represent waivers of third parties' fourth amendment rights.⁴³ Therefore, defendants' rights need not be analyzed, even if defendants are present and object to the search, because the search is predicated only on third parties' authority.⁴⁴ Alternatively, some courts hold that defendants impliedly waive their fourth amendment rights by living or working with others.⁴⁵ Under this analysis, defendants' presence is significant, particularly if defendants object to a search, because third parties cannot override defendants' fourth amendment rights. Courts applying the implied waiver analysis hold that common authority does not exist where defendants are present and objecting to a search.⁴⁶ This is based on the premise that defendants do not assume the risk that third parties will admit others when defendants are present and object to a search.⁴⁷

C. Recent Developments: A Doctrine Evolves

Consent searches are a valuable weapon for law enforcement. Consent searches, however, often infringe on citizens' fundamental privacy

F.2d at 1097; see also *United States v. Heisman*, 503 F.2d 1284 (8th Cir. 1974) (third party who leased commercial space with the defendant could consent to a search of the common area, but not to a search of the defendant's office, even though the office had no door and access to the office was not obstructed).

41. For example, in *United States v. Harrison*, 679 F.2d 942, 947 (D.C. Cir. 1982), the court upheld a search because the boxes seized were not "sealed or taped" and were not "marked in any way indicating [defendant's] ownership." See also *United States v. Sealey*, 830 F.2d 1028, 1031 (9th Cir. 1987) (seizure of pipes upheld where pipes were not marked or labelled to indicate defendant's exclusive control).

42. Waiver contemplates a voluntary and intelligent choice to relinquish a known constitutional right. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consent is not based on an intelligent choice to relinquish a known right. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). The word "waiver" is used here to connote which parties' rights are implicated in third-party consent searches.

43. See, e.g., *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979).

44. See, e.g., *United States v. Sealey*, 630 F. Supp. 801, 809 (E.D. Cal. 1986), *aff'd*, 830 F.2d 1028 (9th Cir. 1987); *People v. Cosme*, 48 N.Y.2d 286, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979).

45. See, e.g., *United States v. Impink*, 728 F.2d 1228, 1234 (9th Cir. 1984); *Lawton v. State*, 320 So. 2d 463, 464 (Fla. Dist. Ct. App. 1975).

46. See, e.g., *Impink*, 728 F.2d at 1232-34.

47. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 63 (1974).

rights. Third-party consent thus typifies the tension between suppressing crime and safeguarding individual rights. Two recent third-party consent cases illustrate the pressures between governmental and individual interests.

1. *Illinois v. Rodriguez: Apparent Authority Adopted*

The United States Supreme Court's most recent examination of third-party consent is *Illinois v. Rodriguez*.⁴⁸ The *Rodriguez* Court adopted the apparent authority analysis. The Court held that police may rely on third parties' consent when third parties do not possess common authority over the searched area as long as police reasonably believe that third parties' common authority exists.⁴⁹ A third party's apparent authority validates consent searches even when defendants are present during the search.⁵⁰

In *Rodriguez*, the defendant's girlfriend, Fischer, told police that Rodriguez had beaten her.⁵¹ The police went to Rodriguez's apartment to arrest him.⁵² The police assumed that Fischer shared the apartment with Rodriguez because she described it as "our" apartment and had a key to the door.⁵³ Because the police did not ask Fischer for details regarding the living arrangement, they did not know that Fischer did not live in the apartment and had taken the key without Rodriguez's knowledge.⁵⁴ Fischer went with the police to Rodriguez's apartment, unlocked the door, and let the police inside.⁵⁵ Once inside, the police found cocaine scattered throughout various rooms.⁵⁶ They awoke Rodriguez in his bedroom and arrested him.⁵⁷

The state trial court suppressed the evidence of seized cocaine because Fischer did not have common authority over the apartment.⁵⁸ The Appellate Court of Illinois affirmed, rejecting the state's argument that a police officer's reasonable belief in Fischer's common authority could validate the consent search.⁵⁹ The Illinois Supreme Court denied appeal.⁶⁰

48. 110 S. Ct. 2793 (1990).

49. *Id.* at 2801.

50. *Id.* at 2796.

51. *Id.* at 2796-97.

52. *Id.* at 2797.

53. *Id.* at 2797-98.

54. *Id.*

55. *Id.* at 2797.

56. *Id.*

57. *Id.*

58. *Id.*

59. *People v. Rodriguez*, 177 Ill. App. 3d 1154, 550 N.E.2d 65 (1988) (mem.).

60. *People v. Rodriguez*, 125 Ill. 2d 572, 537 N.E.2d 816 (1989) (mem.).

The United States Supreme Court granted certiorari⁶¹ and reversed.⁶² The Court agreed that Fischer did not have common authority over the apartment.⁶³ The Court noted, however, that because Fischer had described Rodriguez's apartment as "our" apartment, and because she had a key to the door, the police might reasonably have believed that Fischer did have common authority.⁶⁴ The Court interpreted the fourth amendment to prohibit only unreasonable searches, and characterized the key issue as whether police unreasonably infringed on Rodriguez's rights, not whether Rodriguez's expectation of privacy was reasonable.⁶⁵ The Court held that if police reasonably believed in Fischer's common authority, they could rely on Fischer's consent.⁶⁶ The Court remanded for a determination of whether police reasonably believed that Fischer possessed common authority over the apartment.⁶⁷

Three justices dissented, criticizing the majority's analysis on two grounds.⁶⁸ First, the dissent observed that no exigent circumstance existed and that police could have obtained a search warrant.⁶⁹ Second, the dissent noted that third-party consent is predicated on defendants' assumption of risk.⁷⁰ The dissent argued that Rodriguez could not assume the risk that Fischer would consent to a search because Fischer had no control over the apartment.⁷¹

2. *State v. Leach: Limiting Third Parties' Authority*

*State v. Leach*⁷² is Washington's most recent case on third-party consent and contrasts dramatically with *Rodriguez*. In *Leach*, the defendant's girlfriend, Armstrong, told police that Leach had committed several burglaries.⁷³ To support her charge, Armstrong gave police items allegedly stolen by Leach.⁷⁴ She then signed a consent

61. *Illinois v. Rodriguez*, 110 S. Ct. 320 (1989). The state court had not clearly predicated its holding on state law. Therefore, under *Michigan v. Long*, 463 U.S. 1032 (1983), the United States Supreme Court assumed that the state court applied federal law in reaching its decision.

62. *Rodriguez*, 110 S. Ct. at 2801-02 (1990).

63. *Id.* at 2798.

64. *Id.*

65. *Id.* at 2798-2801.

66. *Id.* at 2801-02.

67. *Id.*

68. *Id.* at 2802 (Marshall, J., dissenting).

69. *Id.* at 2802-03.

70. *Id.* at 2804.

71. *Id.*

72. 113 Wash. 2d 735, 782 P.2d 1035 (1989).

73. 113 Wash. 2d at 737.

74. *Id.*

form authorizing police to search the business office where she worked with Leach.⁷⁵ The next day, Armstrong went to the office with the police and unlocked the door.⁷⁶ Upon entering, the police saw a copying machine that matched the description of one reported stolen.⁷⁷ They also saw Leach on the floor of an adjacent room.⁷⁸ They arrested Leach, searched the office, and recovered other stolen goods.⁷⁹ Leach neither protested his arrest nor objected to the police officers' entry and resulting search.⁸⁰

The trial court denied a suppression motion and subsequently entered a guilty judgment on three counts of second degree burglary and one count of second degree attempted theft.⁸¹ The Court of Appeals reversed.⁸² It questioned the search's validity in two respects. First, the court noted that the record was silent as to Leach's consent.⁸³ Second, the court observed that the trial court had not balanced Leach's and Armstrong's respective privacy interests.⁸⁴ The court remanded for a determination of these issues and the state appealed.⁸⁵

In a pronounced 5-4 split, the Supreme Court of Washington affirmed the Court of Appeals' decision.⁸⁶ The court held that Armstrong's consent could not validate the search because Leach was present when the police entered.⁸⁷ Leach's silence was insufficient to justify the search because the police were responsible for securing Leach's consent once they were aware of his presence.⁸⁸ The court held that if a defendant is "present and able to object," police must obtain the defendant's consent.⁸⁹ The court also noted that police had both time and sufficient probable cause to secure a search warrant, yet they neglected to do so.⁹⁰ The court remanded for a determination of whether Leach had, in fact, consented to the search.⁹¹

75. *Id.* at 737-38.

76. *Id.* at 737.

77. *Id.*

78. *Id.* at 747 (Dore, J., dissenting).

79. *Id.* at 737.

80. *Id.* at 737-38, 745.

81. *State v. Leach*, 52 Wash. App. 490, 491, 761 P.2d 83, 85 (1988).

82. 52 Wash. App. at 496-97.

83. *Id.*

84. *Id.*

85. *Id.*

86. *State v. Leach*, 113 Wash. 2d 735, 782 P.2d 1035 (1989).

87. 113 Wash. 2d at 744.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

A vigorous dissent argued that Armstrong's consent should have sufficed to validate the search under Washington law because she was a joint occupant of the office.⁹² The dissent further observed that police were not required to seek Leach's consent after lawfully arresting him, and that the search could be upheld as a search incident to lawful arrest.⁹³

II. RETHINKING POLICE CONDUCT AND THE FOURTH AMENDMENT

Third-party consent requires a flexible analysis in order to accommodate all competing interests. Neither *Rodriguez* nor *Leach* offers an adequate solution. *Rodriguez* ignores individual rights by allowing police to rely on third parties' consent even when third parties lack any authority to consent and defendants are present at the search. *Leach* undermines governmental interests by requiring police to obtain present defendants' consent even when defendants have not objected to the search and third parties with common authority have consented to the search.

A better approach is to focus on police conduct, instead of on defendants' presence or the reasonable belief of police.⁹⁴ Courts should require police to justify their reliance on third parties' consent. If police can justify their reliance on third parties' authority, courts should allow police to rely on third parties' consent regardless of defendants' presence or absence. The current test of common authority, supplemented by existing fourth amendment doctrine, provides the conceptual tool that is needed to effect a proper resolution to third-party consent.

A. *Rodriguez Undermines Individual Rights*

The United States Supreme Court erred in adopting the apparent authority test.⁹⁵ *Rodriguez* is flawed for five reasons. First, *Rodriguez*

92. *Id.* at 749-50. Prior Washington decisions have not annulled third parties' consent because of defendants' presence. See, e.g., *State v. Smith*, 88 Wash. 2d 127, 559 P.2d 970, cert. denied, 434 U.S. 876 (1977); *State v. Chichester*, 48 Wash. App. 257, 738 P.2d 329 (1987).

93. *Leach*, 113 Wash. 2d at 748-49.

94. Other authors have proposed various government-oriented models to assess fourth amendment issues. See, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416-28 (1974); Matthews, *Third-Party Consent Searches: Some Necessary Safeguards*, 10 VAL. U.L. REV. 29 (1976).

95. For a prior critique of apparent authority see Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U.L. REV. 1087 (1974). This Comment differs in analysis but agrees that apparent authority, on its own, is an inadequate test for third-party consent.

severs citizens' rights from the fourth amendment. The apparent authority test ignores that the fourth amendment's purpose is to protect citizens. The fourth amendment restrains police from acting unreasonably in order to shield citizens' privacy interests from government intrusion.⁹⁶ *Rodriguez* transforms the fourth amendment into an instrument that restrains police from acting unreasonably in order that they may act reasonably. Under *Rodriguez*, there is no fourth amendment violation as long as police reasonably believe in third parties' authority.

Second, *Rodriguez* uses an incorrect standard to assess fourth amendment violations. *Rodriguez* subjects citizens' rights to a test predicated on an objective standard existing within the particular profession of law enforcement.⁹⁷ If police reasonably believe their conduct is proper, they may invade citizens' privacy. Few citizens, however, would reasonably believe that police could enter and search their homes or offices based on a stranger's consent simply because police reasonably believed that the stranger possessed common authority over the searched area. If the fourth amendment's test is an objective standard, the test should embody general societal norms⁹⁸ and not the objective standards unique to a particular profession.

Third, *Rodriguez* underemphasizes the practical realities that attend search and seizure cases. Police engaged in the "competitive enterprise of ferreting out crime"⁹⁹ will necessarily believe that their conduct is proper, and will shape their testimony accordingly.¹⁰⁰ Police wrestle with a difficult, perhaps impossible, mission. It is problematic whether police will squelch a possible search because of doubts regarding third parties' authority.

Fourth, the apparent authority test sets no limits on police conduct. Reasonable belief requires no initial predicate to justify the belief that third parties possess common authority. Police are not expected to ask any questions to ascertain third parties' authority. The apparent

96. See, e.g., *Katz v. United States*, 389 U.S. 347, 350–51 (1967).

97. The objective standard of *Rodriguez* ostensibly represents that of a reasonable person and is not restricted to police officers' reasonable belief. Reasonableness is assessed, however, by focusing on principal agents' acts or omissions. Police are the principal agents in third-party consent. For example, *Rodriguez* knew that no one else shared his apartment, yet it was not reasonable for him to assume that police could not search his apartment based on a stranger's consent. Therefore, the objective standard inherent in the *Rodriguez* analysis specifically addresses police objective standards and not general public standards.

98. See e.g., *Oliver v. United States*, 466 U.S. 170, 182–83 (1984); Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 194 (1986).

99. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

100. See, e.g., *Oaks*, *supra* note 18, at 699.

authority test encourages police to stay silent and assume that third parties have the authority to consent, rather than risk confirming any doubts regarding third parties' authority by asking questions.¹⁰¹

Finally, *Rodriguez* effectively destroys the common authority test. Before *Rodriguez*, third-party consent required common authority. After *Rodriguez*, however, third-party consent requires only an officer's reasonable belief that third parties possess common authority. The practical effect is that courts will ignore the common authority test and concentrate instead on the reasonable belief of police.

B. Leach Undermines Governmental Interests

Leach's present-absent distinction imposes two correlated mandates. First, third parties may consent only when their co-tenants are absent.¹⁰² Second, if defendants are present and able to object, police must obtain defendants' consent, regardless of whether defendants are objecting to the search or not.¹⁰³ The Supreme Court of Washington erred in imposing this present-absent distinction. The *Leach* rule is flawed for five reasons.

First, *Leach*'s present-absent distinction misstates the issue of defendants' assumption of risk. The present-absent distinction rests on the premise that nonobjecting, present defendants have not assumed the risk that third parties might permit a search.¹⁰⁴ The problem with this premise is that defendants' assumption of risk is predicated on third parties' joint control.¹⁰⁵ Once joint control exists, defendants' assumption of risk follows.¹⁰⁶ If defendants assume the risk that their co-tenants might permit entry, this assumption of risk

101. The dynamics of litigation will quickly stretch "reasonable belief" beyond comprehension. Good prosecutors thoroughly prepare police witnesses. The pressures of ensuring a conviction will spur after-the-fact reconstructions of circumstances attending third parties' consent. See, e.g., *id.*

102. *State v. Leach*, 113 Wash. 2d 735, 744, 782 P.2d 1035 (1989).

103. 113 Wash. 2d at 744.

104. *Id.* at 740, 744. The *Leach* court relied on Professor Weinreb's interpretation of *Matlock* that the common authority test only operates where absent, nonconsenting defendants are involved. See *id.* at 740; Weinreb, *supra* note 47, at 62 n.45. The actual language in the *Matlock* opinion, however, seems nothing more than a reference to another case where the defendant happened to be absent. See *United States v. Matlock*, 415 U.S. 164, 170 (1974). Courts have not construed *Matlock* as distinguishing between present or absent defendants. See, e.g., *United States v. Sumlin*, 567 F.2d 684, 687-88 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978).

105. See *supra* notes 35-37 and accompanying text.

106. See *id.*

should remain constant regardless of nonobjecting defendants' presence or absence.¹⁰⁷

Second, the *Leach* rule inadequately safeguards individual rights because it is founded on a degree of chance ill-suited to qualify as meaningful protection. *Leach* does not require police to secure nonobjecting defendants' consent if defendants are absent, even when defendants are in custody and police could readily secure their consent.¹⁰⁸ Nonobjecting defendants' rights should not hinge on their fortuitous presence at a search.¹⁰⁹

Third, the present-absent distinction conflicts with contemporary definitions of consent. The *Leach* rule requires police to secure consent from present, nonobjecting defendants who are able to object. Consent, however, is assessed by the totality of the circumstances. Consent is not based on whether defendants willingly abandon a known protection, but whether unreasonable police conduct infringes upon defendants' rights.¹¹⁰

Fourth, the *Leach* rule compounds courts' tasks in resolving search and seizure issues. The present-absent distinction spawns numerous questions in an area of law already plagued with factual quirks. Courts must determine when defendants are absent or able to object. Courts must determine when defendants' rights are implicated because it is not clear how "present" defendants must be before the present-absent distinction is triggered.

Finally, the bright line painted by *Leach* creates numerous practical problems for police. Police will find it difficult, if not impossible, to meaningfully integrate the present-absent distinction into routine field operations. Although the present-absent distinction does not mandate that police locate defendants' whereabouts, the practical effect requires that they do so. At the very least, police cannot risk responding to a call, entering a home or office, encountering defendants inside, and having to leave.¹¹¹ Additionally, if more than two individuals are involved, it will not be cost-effective to require police to trace, identify,

107. See, e.g., *Sumlin*, 567 F.2d at 688 (defendant's refusal to consent did not reduce his assumption of risk).

108. See *Leach*, 113 Wash. 2d at 740.

109. See, e.g., Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 280 (1974).

110. See *supra* note 22 and accompanying text.

111. This assumes, moreover, that police are operating with some clear idea of who they are looking for or what they are attempting to accomplish. More typically, as the *Schneckloth* court observed, consent searches arise spontaneously in reaction to rapidly developing circumstances and facts. *Schneckloth v. Bustamonte*, 412 U.S. 218, 232 (1973).

and locate each of several possible defendants before soliciting consent.

C. *An Alternative Analysis: Discretionary Restraint*

Courts could achieve a better result in assessing third-party consent by focusing on police conduct. Courts should require police to justify their reliance on third parties' consent rather than concentrating on defendants' presence or the reasonable belief of police. Courts should limit police discretion in conducting third-party consent searches in two ways. First, police should comply with the fourth amendment's warrant clause. Second, police should adhere to institutional self-restraint in warrantless situations. Institutional self-restraint embodies the common authority test. This proposal is called discretionary restraint.

1. *Foundation: Why Focus on Police Conduct?*

Courts should focus on police conduct. Remedies define rights.¹¹² The fourth amendment remedy¹¹³ is the exclusionary rule which focuses on police conduct.¹¹⁴ There is no fourth amendment violation if police conduct is reasonable because if police conduct is reasonable the exclusionary rule will not suppress evidence.¹¹⁵ Therefore, a starting place for assessing third-party consent is examining police conduct.¹¹⁶

Focusing on police conduct is different from focusing on police belief. The *Rodriguez* standard of police belief cannot be objectively verified by referencing any external facts. Police conduct is objectively verifiable because it represents what the police actually did or said as opposed to what they thought or believed.

112. See, e.g., O. HOLMES, *THE COMMON LAW* 169 (M. Howe ed. 1963) ("Just so far as the aid of the public force is given a man, he has a legal right . . ."). Where citizens have no adequate remedy, their rights are empty promises void of content. See Oaks, *supra* note 18, at 755-57 (discussing the importance of defining new fourth amendment remedies).

113. The exclusionary rule is referred to here as a remedy. Traditionally, however, the rule is not concerned with the "wronged" defendant, but rather with deterring lawless conduct by the government. See, e.g., *United States v. Calandra*, 414 U.S. 338, 347-48 (1974); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335.

114. *Calandra*, 414 U.S. at 347-48.

115. See, e.g., *United States v. Leon*, 468 U.S. 897, 918-19 (1984); see also *supra* notes 15-18 and accompanying text. Civil remedies will probably also fail if police conduct is reasonable because of the doctrine of qualified immunity. See, e.g., *Mark v. Williams*, 45 Wash. App. 182, 724 P.2d 428 (1986) (for discussion on police conduct and civil remedies).

116. The government presented a conceptually indistinguishable analysis in *Matlock* in arguing for apparent authority's adoption. Brief for United States at 14, *United States v. Matlock*, 415 U.S. 164 (1974) (No. 72-1355).

2. *How Discretionary Restraint Works*

Discretionary restraint is founded on two premises. First, police should comply with the fourth amendment's warrant clause. If police can obtain a warrant, courts should not allow them to rely on third parties' consent, absent some compelling or exigent circumstance. Enforcing the warrant clause would protect individual rights because it interposes an impartial magistrate between individuals and the government. Enforcing the warrant clause would also enhance effective law enforcement because it reduces the risk of having evidence suppressed.¹¹⁷

Discretionary restraint's second premise addresses warrantless situations. When a warrant cannot be secured because of exigent circumstances or lack of probable cause, discretionary restraint employs the existing common authority test, but with a slightly different focus. Courts grappling with the common authority test attempt to reconcile both defendants' and third parties' respective reasonable expectations of privacy.¹¹⁸ Discretionary restraint argues that the threshold test for determining reasonableness should focus on police conduct. Courts should examine the factors that made police reliance on third parties' consent reasonable. Courts should determine what steps police took to ascertain third parties' authority to consent and how police assessed the limits of third parties' authority once police were inside the premises. An initial focus on police conduct protects individual rights because it ensures that courts will review the actual exercise of police discretion. A focus on police conduct also enhances effective law enforcement because it encourages the development of discretionary guidelines.¹¹⁹

a. *The Warrant Clause as an Initial Check on Discretion*

Probable cause is the most significant factor in defining what is or is not reasonable. If the goal is to limit or frame police conduct within a working set of discretionary checks, police should not readily circumvent the warrant clause.¹²⁰ Therefore, the first premise of discretionary restraint is that soliciting third parties' consent where probable cause exists and there is no exigent circumstance contravenes the war-

117. See, e.g., Amsterdam, *supra* note 94, at 417–29.

118. See *supra* note 33 and accompanying text.

119. See, e.g., Oaks, *supra* note 18, at 678–81, 708, 711–12, 753 (1970) (discussing possible implications that result when judicial scrutiny of police conduct is heightened). Regarding the benefits of police-promulgated guidelines, see Amsterdam, *supra* note 94, at 417–29.

120. See e.g., *Chimel v. California*, 395 U.S. 752, 758–62 (1969).

rant clause and is unreasonable.¹²¹ If the police can secure a search warrant, courts should not permit them to rely on third parties' consent, absent some compelling or exigent circumstance.

b. Reviewing Police Discretion in Warrantless Situations

Discretionary restraint's operation is best examined in the context of warrantless searches. Courts are split in determining what limits, if any, they should place on third parties' authority once police are inside the premises.¹²² Discretionary restraint recommends that courts address two issues. First, courts should determine how police assessed third parties' authority to consent. Second, courts should examine how police assessed the extent of third parties' authority once police were inside the premises.¹²³

Apparent authority should suffice for assessing third parties' authority to consent and for determining the limits of third parties' authority inside the searched area. Police act on the basis of appearance. To safeguard against abuses, however, there should be a presumption that third parties lack authority. This presumption should be rebuttable only by asking basic questions that establish third parties' authority. This presumes some level of ongoing, if informal, questioning both before a search begins and as it progresses.¹²⁴ Without some determination of third parties' authority to consent and the limits of this authority inside the premises, courts should not allow police to enter and search an area.

c. Factoring in Presence-Absence

The parties' presence or absence is important in framing workable checks on police discretion. When third parties are present, police have a reasonable means of ascertaining the extent of third parties' control over the premises. So long as police have made initial attempts

121. See, e.g., *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984); *State v. Leach*, 113 Wash. 2d 735, 744, 782 P.2d 1035, 1040 (1989).

122. See *supra* notes 39-41 and accompanying text.

123. A comparable analysis is found in Note, *Third Party Consent to Search and Seizure*, 1967 WASH. U.L.Q. 12. Both authority to consent and authority to search are defined by reference to the existing common authority test. Authority to consent requires "mutual use or access for most purposes." *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). Authority to search extends to areas of mutual use, called "common areas," where it is reasonable for courts to find that defendants assumed the risk. *Id.*

124. *Rodriguez* implicitly rejects any requirement that police ask questions before proceeding. An earlier Seventh Circuit decision expressly dismissed an argument that police should be required to ask questions before searching. *United States v. Richardson*, 562 F.2d 476, 480 (7th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978).

to ascertain third parties' authority, it should be incumbent upon present defendants to assert their privacy rights. If both third parties and defendants claim possession or dispute access, a presumption should arise in defendants' favor.¹²⁵ More weight should be accorded defendants who are present if third parties are absent. In this situation, courts should require police to explain the purpose of the search and who has consented to it.¹²⁶

Focusing on whether third parties are present or absent, rather than whether defendants are present, raises a new distinction. This distinction is justified for two reasons. First, when third parties are absent, police have no means of ascertaining third parties' control over the area. Without such means, it should be unreasonable for police to search. Second, even if police have some means of determining third parties' authority, such as a description from absent third parties of the searched area,¹²⁷ it should be considered presumptively unreasonable for police to proceed without third parties. Defendants cannot know whether, or under what circumstances, absent third parties consented to the search.

3. *Advantages of Discretionary Restraint*

There are three advantages to discretionary restraint. First, it encourages government restraint without needlessly eroding effective law enforcement. Police are not absolutely barred by defendants' presence, yet police are expected to exercise their discretion both before and during a search based on third parties' consent.

Second, discretionary restraint avoids the dilemma of defining substantive fourth amendment rights in the amorphous context of third-party consent. Although defendants' and third parties' respective reasonable expectations of privacy are the lynchpin in assessing third-party consent,¹²⁸ fourth amendment substantive protections resist definition.¹²⁹ Because it is difficult to define the fourth amendment's substantive protections, unpredictable decisions result.¹³⁰

125. Courts should require a strong showing of third parties' authority to rebut defendants' claims.

126. *See, e.g.,* *Tompkins v. Superior Court*, 59 Cal. 2d 65, 378 P.2d 113, 116, 27 Cal. Rptr. 889 (1963).

127. *See, e.g.,* *Government of Canal Zone v. Sierra*, 594 F.2d 60, 64 (5th Cir. 1979).

128. *See supra* note 33 and accompanying text.

129. *See, e.g.,* *Amsterdam*, *supra* note 94, at 415; Comment, *supra* note 98, at 194-95 (1986). More troubling is the susceptibility of substantive rights to "retransformation." *See* Junker, *supra* note 5, at 1118-24, 1166-69.

130. *See, e.g.,* *Katz v. United States*, 389 U.S. 347, 370-74 (1967) (Black, J., dissenting); *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

The danger of unpredictable decisions is exacerbated by two factors in third-party consent. First, although courts speak of privacy rights and have avoided tying the fourth amendment to property concepts, property and privacy are difficult to distinguish.¹³¹ It is difficult to determine where third parties' property rights begin and where defendants' reasonable expectations of privacy end. Second, the shifting nature of personal and professional relationships is difficult to translate into traditional fourth amendment dialogue.¹³² Many relationships are subjective in nature. The fourth amendment protects reasonable expectations of privacy, yet individuals living and working together can, and will, structure their privacy in "unreasonable" ways.¹³³

Searches and seizures, however, are delimited by clear procedural aspects. First, a case-by-case approach is required because of the variable facts and circumstances that are adjudicated.¹³⁴ Uniform principles best serve this case-by-case approach.¹³⁵ Second, police should not readily circumvent the warrant clause.¹³⁶ A procedural approach consistent with discretionary restraint enables courts to impose flexible restraints on police conduct and thus avoid the dilemma of defining substantive protections in amorphous contexts.

The third advantage of discretionary restraint is that courts could apply it with little variation from existing standards of police conduct or judicial methodology. Discretionary restraint is conceptually consistent with current assessments of police conduct within third-party consent.

Courts now implicitly examine police conduct in third-party consent along a sliding scale of exigency. When exigent circumstances exist, defendants' presence at the search is rarely considered important and courts accord police great deference in the exercise of police discretion.¹³⁷ When the facts border on exigency, defendants' presence is

131. See Weinreb, *supra* note 47, at 52, 59.

132. See, e.g., Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1611-13 (1987).

133. See Weinreb, *supra* note 47, at 61-62.

134. See, e.g., *California v. Carney*, 471 U.S. 386, 400 (1985) (Stevens, J., dissenting).

135. See White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 169.

136. See *supra* notes 120-21 and accompanying text.

137. For example, in *United States v. Hendrix*, 595 F.2d 883 (D.C. Cir. 1979), the court upheld a search conducted over the defendant's protest. In *Hendrix*, the defendant abused his wife in a "violent day-long argument," and police intervened at the wife's request to seize the defendant's shotgun. *Id.* at 885; see also *People v. Cosme*, 48 N.Y.2d 286, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979).

factored into the analysis and courts carefully assess police conduct.¹³⁸ Absent any compelling or exigent circumstances, defendants' presence is accorded great weight in the overall analysis and courts strictly scrutinize police conduct.¹³⁹ The exigent-nonexigent factor implicit in current case law indicates that discretionary restraints can be crafted and applied in a manner that both recognizes flexibility and fosters consistency. Discretionary restraint adequately recognizes doctrinal flexibility while imparting a measure of consistency that is readily incorporated into existing standards of police conduct and judicial methodology.

III. CONCLUSION

Discretionary restraint urges courts to assess police conduct as a threshold inquiry into the validity of third-party consent. If the fourth amendment is a dual-interest instrument, both individual and governmental interests should be examined. Rather than relying solely on an assessment of defendants' and third parties' substantive rights, courts should incorporate the rights and duties of the government into the analysis.

Under discretionary restraint, *Leach* was correctly decided because the police needlessly circumvented the warrant clause. The government has no justifiable purpose for relying on third parties' consent when a warrant can be secured. By raising a present-absent distinction, however, the Supreme Court of Washington erred. The present-absent distinction conflicts with contemporary definitions of consent and is founded on a degree of chance ill-suited to qualify as a meaningful protection.

Discretionary restraint suggests that *Rodriguez* reached an incorrect result. Apparent authority is theoretically sound in principle, but is stretched to its limits in *Rodriguez*. Apparent authority ignores both individual rights and the practical realities of police operations. Courts should focus on police conduct to avoid the problems posed by *Leach* and *Rodriguez*.

Ultimately, the validity of any third-party consent search hinges on the totality of the circumstances. The multiple variables that comprise

138. See, e.g., *United States v. Lopez-Diaz*, 630 F.2d 661, 666 (9th Cir. 1980) (search of van upheld where defendant was present but did not object); *United States v. Canada*, 527 F.2d 1374, 1377-79 (9th Cir. 1975) (airport search of defendant's suitcase upheld where third party consented to search and defendant was present but did not object), *cert. denied*, 429 U.S. 867 (1976).

139. See, e.g., *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984); *Lawton v. State*, 320 So. 2d 463, 464 (Fla. Dist. Ct. App. 1975).

the totality cannot be pared away or arranged in an ordered set analogous to a periodic table. The variables can, however, be arrayed within a flexible analysis that attempts to balance both governmental and individual interests. Discretionary restraint is one means of achieving this goal.

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