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Reasonable Expectation of Privacy and Third-Party Consent Searches*

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Reasonable expectation of privacy is discussed in the context of searches conducted without the warrants usually required by the Fourth Amendment but with the consent of a third party, who is not the target of the search. Case law on this issue is neither consistent nor clear-cut. Psychological theory and research clarify this issue by establishing closer correspondence between legal concepts and assumptions and individuals' actual behaviors and social expectations. The key legal components of reasonable expectation of privacy are delineated, with regard to third-party consent: "common authority" areas versus "exclusive use" areas and the *assumption of risk* doctrine. Next, the psychological theory and research on interpersonal relations and human territorial functioning are reviewed as they relate to the legal components of privacy regulation. Taken together, the legal criticisms of this warrant exception category, and possible discrepancies between the legal assumptions concerning interpersonal and territorial functioning among co-residents and the actual behaviors and expectations suggested by psychological theory and research, raise questions about its validity.

This article discusses legal perceptions of *reasonable expectation of privacy* in third-party consent searches. We begin with a review of the legal assumptions concerning privacy expectations in third-party consent searches. In the next section, after considering some of the major court decisions concerning key components of reasonable expectation of privacy, we review the psychological theory and research on interpersonal relations and human territorial functioning as they

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apply to these issues. Finally, in the concluding section, we suggest areas of future psychological research on this topic.

LEGAL BACKGROUND

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by governmental agents (*Bivens v. Six Unknown Named Agents*, 1971; *Camara v. Municipal Court*, 1967; *Mapp v. Ohio*, 1961; *Weeks v. United States*, 1914; *Wolf v. Colorado*, 1949; or see, generally, Johnson, 1988). The Amendment indicates that searches conducted without warrants would be considered "unreasonable" because they would lack prior determination by judicial magistrates that probable cause existed to justify the invasions of privacy (Gardner, 1980; *Katz v. United States*, 1967).

In reality, most police searches are conducted without warrants (Van Duizend, Sutton, & Carter, 1985), but are deemed "reasonable" because they fall under exceptions to the warrant requirement carved out over the years by the United States Supreme Court (Comment, 1973). One type of exception to the warrant requirement is a search conducted with the consent of the suspect (*Schneckloth v. Bustamonte*, 1973) or with the consent of a third party, such as the suspect's spouse or common-law partner (*United States v. Matlock*, 1974).

Reasonable Expectation of Privacy

When analyzing legal standards for the validity of warrantless searches based on third-party consent, the questionable empirical basis for judicial assumptions about individuals' expectations of privacy in such situations becomes apparent. In the landmark 1967 case, *Katz v. United States*, a decision generally taken to stand for the proposition that the Fourth Amendment ensures a right to privacy that "protects people, not places" (p. 351), the Supreme Court, per Justice Harlan, articulated a two-pronged *reasonable expectation of privacy* test for deciding when a particular privacy interest should be afforded the protection of the Amendment: "There is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as reasonable" (p. 361).

Cases following *Katz* (1967) actually paid little attention to the subjective aspect of the test and instead emphasized the criterion of objective reasonableness (*United States v. White*, 1971; Wefing & Miles, 1974, p. 215 n.23). This objective standard, based on privacy expectations society is prepared to recognize (or more accurately, based on judges' assumptions of privacy expectations society is prepared to recognize) as reasonable or "legitimate" (*Smith v. Maryland*, 1979; *United States v. Miller*, 1976) has been instrumental in judicial development of a very broad exception to the Fourth Amendment's warrant requirement: third-party consent searches.

Although the practice had been the subject of dispute in numerous lower federal and state cases, the Supreme Court explicitly authorized third-party con-

sent searches for the first time in *United States v. Matlock* (1974), under the rationale of the *possession and control* or *access and control* doctrine:

> When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third-party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. . . . The authority which justifies the third-party consent . . . rests . . . 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 right that one of their number might permit the common area to be searched. (p. 171 & n.7)

The Court's test for binding voluntary consent by a third party hinged upon two notions. First, within shared premises, there were *common authority* areas, marked by joint access or control that gave each co-occupant an independent power to authorize a warrantless search. Second, with respect to these common authority areas, each co-occupant was presumed to operate under an objective *assumption of risk* of disclosure/access by any other co-occupant.

Common Authority Versus Exclusive Use

The test endorsed in *Matlock* (1974) for evaluating the validity of third-party consent was common authority. An individual having "possession and control" of premises or an object could consent to this search, and evidence uncovered by that search could be used against anyone, including others with "common authority" over the place of search (Comment, 1966). Conversely, an individual lacking such "possession and control," in which the property is in the "exclusive use" of another individual, cannot grant valid consent (Comment, 1966; Comment, 1984, p. 984 n.83). The limits of a third party's ability to grant valid consent, and the corresponding scope of the police officer's power to conduct a warrantless search, are thus dependent upon the on-scene ability to distinguish between common authority and exclusive use domains.

In practical terms, the vagueness of the common authority/exclusive use dichotomy becomes apparent when it is realized that decisions about a third party's consent authority, and the permissible scope of police reliance upon that authority, may confront investigating officers many times during a single intrusion. The issue first arises during the initial *entry* to the premises and into different rooms or areas, followed by questions of authority to *search* within increasingly specific places and items of personal property. Procedurally, the opportunity provided to investigating officers to reassess the third party's authority to consent at progressively more intrusive stages of entry and search may account for the importance that some courts have placed on the physical presence of the third party at the time of search (*People v. Haskett*, 1982; *State v. Crevina*, 1970; *Tompkins v. Superior Court*, 1963).

Further complications are introduced if the police conduct a warrantless search based on the consent of a third party who appeared to have authority at the time, but who the courts subsequently decide did not. In most jurisdictions, the

courts have accepted a "good faith" misreading of the situation by the police and have allowed the *apparent authority* to render the consent valid, even if the third party is later found to have lacked *actual authority* under the possession and control test (*People v. Misquez*, 1957). In other jurisdictions, however, police have been held to a stricter standard of actual authority. Legal commentators have disagreed concerning which is the appropriate standard, their preference influenced by their law-enforcement versus civil-liberties leanings on the whole issue of consent searches (Comment, 1984, pp. 978–979 nn.62–63; Goldberger, 1984).

Whether viewed from the perspective of defining the privacy rights of defendants or of ascertaining the validity of a third party's consent authority, a clear understanding of the meaning of common use/exclusive use is an obvious and essential starting point. Yet, review of court decisions espousing the possession and control test reveals a bewildering array of vague and inconsistently applied indicators of common authority. In *Matlock* (1974), for example, the Court offered the following criteria for analyzing common authority: "mutual use" of the "property," "premises," "effects," or "common area," by persons "generally" having "joint access" or "control," for "most purposes" (p. 171, n.7). In addition to these generalities, third-party consent could also be based on "some other sufficient relationship to the premises or effects" being searched (p. 171). The Court failed to explain what constituted a "sufficient relationship."

Although courts have sometimes alluded to factors such as agency or ownership of property as indicators of consent power, the Supreme Court has specifically rejected them in favor of the more general use/possession/control test (*Stoner v. California*, 1964; *United States v. Matlock*, 1974). As a result, although most cases stress the need for superior or equal rights of "possession and control" (Wefing & Miles, 1974), an individual's right to prevent a warrantless search may be superseded by the consent of a third party who has no more, and sometimes even less, possessory interest in the premises or effects searched (*United States v. Airdo*, 1967), even if the individual is present and objects at the time to the search (*People v. Cosme*, 1979; *People v. Haskett*, 1982; *United States v. Canada*, 1975; *United States v. Sumlin*, 1977). A third-party consent may be equally upheld even if only one co-occupant consents and multiple other co-occupants object (*United States v. Matlock*, 1974, p. 171 n.7).

The complex nature of the concept of "common authority" and the judgments it requires police and lower courts to make are illustrated by the variety of search situations involved in appellate court rulings: a suitcase (*United States v. Watson*, 1976), a bureau within a family room (*Reeves v. Warden*, 1965), a footlocker (*United States v. Block*, 1978), a tool box (*In re Scott K.*, 1979), and a dresser drawer and cuff link case within it (*State v. Evans*, 1962). Within such case-specific rulings on particular search situations, the courts have been influenced by a variety of indicators of "common authority." Third-party authority to consent has been bolstered in some decisions by whether the third party owned or paid rent on the property searched (*Bumper v. North Carolina*, 1968; *State v. Kinderman*, 1965), or whether the third party's name appeared on the lease for shared premises (*United States v. Sumlin*, 1977).

As a consequence, lacking more systematic guidance on definitional limits of "common authority" or criteria to evaluate its validity, the imprecision of the "possession and control" standard is sufficient to defeat the reasonableness of a nonconsenting party's expectation of privacy in numerous situations. Court evaluations of third-party consent become a case-by-case, post hoc process in which the courts must superimpose their own perceptions as to whether "exclusive use" or "common authority" was manifested.

Assumption of Risk

Once "common authority" is deemed to exist, the Supreme Court in *Matlock* (1974) asserted a conclusion that it regarded as requiring no explanation, that co-occupants assume the risk that any one of them might at any time consent to a search of their common area (see previous quote, p. 171, & n.7). A majority of courts have accepted this "assumption of risk" doctrine. The implications of their acceptance for police circumvention of the Fourth Amendment warrant requirement, nullifying express claims of privacy rights by nonconsenting suspects, are illustrated in the facts and findings of *People v. Cosme* (1979).

In *Cosme* (1979), the defendant shared an apartment with his fiancee. Following an argument, his fiancee called the police and told them Cosme had a gun and cocaine in the apartment. She met the police outside the apartment, gave them a key, and drew a diagram showing a closet which she shared with Cosme and in which the gun and cocaine were allegedly stored. The police entered the apartment where they encountered Cosme and another man. The police, with guns drawn, ordered the two men to "freeze," handcuffed them, and ordered them to lie face down on the floor. The court dismissed Cosme's argument that his objections when manacled demonstrated his refusal to consent to the ensuing search and seizure. Referring to the "common authority"/"assumption of risk" approach in *Matlock* (1974), the court ruled that

> [W]e are led to the conclusion that an individual who possesses the requisite degree of control over specific premises is vested in his own right with the authority to permit an official inspection of such premises and that this authority is not circumscribed by any "reasonable expectation of privacy" belonging to co-occupants. Whether the principle is characterized as an "assumption of risk" or a relinquishment of the "expectation of privacy" guaranteed by the Fourth Amendment, the fact remains that where an individual shares with others common authority over premises or property, he has no right to prevent a search in the face of the knowing and voluntary consent of a co-occupant with equal authority . . . [A]n individual who does not possess exclusive authority and control over premises has no reasonable expectation of privacy with respect to those premises. (p. 1322)

Thus, although under normal circumstances persons have a constitutional right to demand to see a search warrant before allowing police to enter and search (*United States v. Blalock,* 1966), such a right is effectively emasculated in third-party consent situations, due to the conclusion by appellate courts in a majority of jurisdictions that by sharing common authority with a third party over property that was later searched, defendants assumed the risk that the third party would consent to such a search.

Legal Criticisms

These sweeping limitations upon individual privacy rights, which the courts have been prepared to recognize and uphold as reasonable, have not gone uncontested within the legal community. Some commentators have noted the lack of any demonstrated empirical basis for judicial assumptions concerning individuals' expectations of privacy in shared residence arrangements and have questioned their validity (Comment, 1973; Comment, 1984; Goldberger, 1984):

> Whether the Court [in *Matlock* (1974)] was actually holding that society is not prepared to view as reasonable an expectation of privacy in this situation depends on whether, when the court said "recognize," it was acknowledging a commonly held view or merely was holding that this view was the correct one. If the Court was acknowledging a commonly held view, it presented no data or evidence to support its statement that the view is in fact commonly held. (Comment, 1984, p. 985, n.89)

Other commentators and, less frequently, judicial rulings have questioned the reasonableness of the *Matlock* (1974) common authority/assumption of risk approach—particularly the scope of the assumption of risk doctrine—which results in the override of an individual's constitutional right to be free from a warrantless search of his or her home by a third party who may have a lesser possessory interest in the place of search (American Law Institute, 1972; Comment, 1973; Comment, 1984; Goldberger, 1984; *People v. Haskett,* 1982; *Silva v. State,* 1977; *Tompkins v. Superior Court,* 1963; Wefing & Miles, 1974). Such intrusions, it has been argued, were incompatible with the personal nature of constitutional rights, which should be waived only by the individual against whom the search was directed (*Silva v. State,* 1977; Wefing & Miles, 1974). Commentators have also questioned the logic of an assumption that an individual has no reasonable privacy expectations in his or her residence because he or she chooses to share it with a third party (Comment, 1984; Goldberger, 1984; *Tompkins v. Superior Court,* 1963):

> That one's spouse or roommate may constitutionally authorize law enforcement officers to poke about in one's personal effects, looking, without a search warrant, for evidence of crime, would come as a surprise to most people, and it does not appear that the balance of social advantage lies in making this result a reasonably foreseeable consequence of entering into trusting relationships with others. (Comment, 1973, p. 1121)

Other critics of the possession and control doctrine have gone beyond conclusions that third-party consent should be superseded by a present and protesting co-occupant's refusal, arguing that a more rigorous standard than actual or presumed common authority should be applied before recognizing the reasonableness of third-party consent searches. Matthews (1975), for example, proposed that when a suspect is in police custody or otherwise available for questioning, consent searches should be upheld as valid only if the consent is provided by the suspect. Another commentator (Comment, 1973) has gone even further by insisting that no third-party consent search be upheld unless the police made a good-faith effort to obtain consent from all persons with a constitutionally protected interest in the premises or effects to be searched.

In summary, questions about the permissible scope of the third-party consent exception to the Fourth Amendment's warrant requirement and about the possession and control test approved by the Supreme Court in *Matlock* (1974) have generated considerable disagreement among lower courts and legal commentators. The empirical basis for judicial conclusions and assumptions about the nature and relationship of the legal concepts of common authority and assumption of risk, however, has not been subjected to scrutiny from a psycholegal research perspective. Accordingly, we now review psychological theory and research on interpersonal relations and human territorial functioning as a framework for discussing their implications for the validity of the third-party consent exception.

PSYCHOLOGICAL VERSUS LEGAL VIEWS OF SOCIAL RELATIONSHIPS AND HUMAN TERRITORIAL FUNCTIONING

Psychological theories of interpersonal relations, such as social exchange theories (Kelley, 1979; Kelley & Thibaut, 1978), social penetration theory (Altman & Haythorn, 1967; Altman & Taylor, 1973; Altman, Taylor, & Wheeler, 1971; Altman, Vinsel, & Brown, 1981), and equity theories (Hatfield & Traupmann, 1981; Walster, Walster, & Berscheid, 1978) are concerned with the patterns and mechanisms of interdependence, shared access, and mutual disclosure that develop between individuals. Human territorial functioning refers to interlocking cognitions, sentiments, and behaviors concerned with controlling access to and activities within particular delimited locations, and expressing involvement in those locations (Taylor, 1978, 1988). These locations can range in extent from a portion of a shelf to rooms, a house, or even an entire street block. Discrepancies between legal assumptions concerning individuals' social and territorial behaviors and what the psychological research has uncovered about these behavioral activities contribute to and buttress the legal criticisms of third-party consent.

Discrepancies Concerning the Exclusive Use/Common Authority Dichotomy

1. *Intimate social relationships and human territorial functioning involve and are expressed through more mechanisms than are typically recognized by the courts.* Psychological theories of interpersonal relations generally conceptualize such relationships as progressing from less to greater intimacy and self-disclosure (Altman & Chemers, 1980; Altman & Haythorn, 1967; Altman & Taylor, 1973; Altman et al., 1971; Chapple, 1940; Goffman, 1959; Hays, 1985; Kendon, 1967; Prager, 1986; Watson, 1958; Werner, Altman, & Oxley, 1985; Wolff, 1950). Interactions between close friends or spouses reflect considerable richness of social exchange, with use of a wide range and variety of verbal, nonverbal, and environmental behavioral mechanisms. Movement across topical areas and into intimate areas of each partner's personalities is facile and fluid (Altman & Taylor, 1973; Bell, 1981).

By contrast, judicial analyses of the legitimacy of third-party consents to

warrantless searches recognize or take into account a more restricted range of privacy-regulation mechanisms. For example, the courts are understandably most comfortable with clear physical indicators of reasonable expectation of privacy or of exclusive use, such as a locked room or locked container (*United States v. Block,* 1978; *United States v. Robinson,* 1973). This focus on a restricted range of mechanisms may result in erroneous determinations that an individual did not demonstrate a reasonable expectation of privacy in the place or item of search.

2. *Attributions/judgments of social relationships by observers such as police and judges involve a different perspective.* The wide range of verbal, nonverbal, and environmental mechanisms used by partners in social relationships to regulate interactions lends accuracy, speed, and versatility to communication exchanges (Altman & Taylor, 1973). But as noted by Blumer (1969) and Rapoport (1982), such mechanisms communicate effectively only if the cues can be understood. If the "language" of the cues is not shared or understood, then there is no effective communication. The social situation of the courts' review of the legal appropriateness of third-party consents to warrantless searches involves attributions and judgments made by outside observers of the behavioral processes of an intimate social relationship. Not only does this psychological task involve a different perspective in judging the social reality of the situation, but the outside observers are likely to be of a different social class or background from the consentors or target-persons of the searches, adding to the difficulty.

For example, researchers have noted the common occurrence of cross-ethnic misinterpretation by white, middle-class counselors of the nonverbal behaviors of their minority clients (Atkinson, Morten, & Sue, 1979; Pedersen, Lonner, & Draguns, 1976). Altman and Chemers (1980) have discussed the many subcultures of U.S. society, based on ethnic, regional, religious, and socioeconomic dimensions, each with its own residential arrangements and interaction style. Judges are likely to come from middle-class or upper-class backgrounds (Ryan, Ashman, Sales, & Shane-Dubow, 1980; Wice, 1981). The type of privacy regulation they would be most familiar with is that occurring in detached, single-, and nuclear-family dwellings, characterized by a sufficient number of rooms so that most, if not all, family members can be assigned an exclusive territory, with enough rooms left over for various special-function uses (e.g., family/recreation room, den). Their perceptions and interpretations of privacy regulation may be in sharp contrast to the privacy regulation in the dwellings of other U.S. subcultures, particularly those of lower socioeconomic levels. Members of the latter are more likely to be the targets of warrantless searches. In these cases, smaller interior space is utilized for functions by a larger household.

3. *Distinctions between exclusive-use and common-use areas are fluid, not static.* The psychological research clearly indicates that people do distinguish between exclusive-use and common-use areas within shared residences (Sebba & Churchman, 1983; Taylor & Stough, 1978). The exclusive use/common use dichotomy is, however, much more fluid and dynamic than is typically recognized by the courts. For example, a study by Scheflen (1971) investigated territorial functioning in black, Hispanic, and Italian lower-income households. Cameras were placed in the household apartments, and thousands of hours of interaction

were taped and subsequently coded. Analyses of these interactions indicated that there were no relatively enduring distinctions between common authority and private areas within the household. Rather, who actually got to occupy a particular space was a complex function of time of day, time of week, nature of the activity in progress, and others present.

a. There are between-group and within-group variations in territorial functioning. Research has indicated that there is considerable variation in how territorial arrangements operate. Significant variation across subcultural groups has been observed. For example, in the Scheflen (1971) study, the researchers observed that ethnic groups defined various spaces in the apartment differently. In black households, as compared to Italian and Puerto Rican households, the female head of household was more likely to define the living room as a "front" region (Goffman, 1959) for formal interaction, where the household could put its best foot forward when interacting with important others from outside the household.

Considerable variation in territorial arrangements *within* a particular subcultural group have also been observed. For example, Altman, Nelson, and Lett (1975) surveyed middle-class households and observed two "styles" of territorial functioning in interior residential settings. An "open" style might be characterized by highly flexible and shared use by family members of areas within the home and high levels of accessibility and contact among family members. A "closed" style might be characterized by family members having recognized areas of exclusive control within the home, which are used to regulate interaction. Boundary maintenance may be more salient; doors may be frequently closed to restrict contact (Altman & Chemers, 1980; Simmel, 1971).

b. Territorial arrangements exist at macro-levels and micro-levels and are not always supported by the physical barriers preferred in judicial analyses. The distinction made by courts between exclusive-use and common-use areas is most readily applied and supported if it is made at a macro-level, that is, if it applies mainly to particular rooms. In this situation, the investigating officer would have the clearest guidance.

Results from several studies show, however, the widespread use of micro-level territorial strategies, that is, residents distinguish at the sub-room level between which areas are primarily for their use and which are not (Altman et al., 1971; Rosenblatt & Budd, 1975; Scheflen, 1971; Sebba & Churchman, 1983). Even finer micro-level strategies are sometimes employed concerning parts of particular objects (e.g., one side of a shelf or one side of a closet).

c. Territorial arrangements vary over time. The Scheflen (1971) study also revealed how claims to spaces within the household are constantly in flux in lower-income households. Enduring macro-level territorial arrangements were not likely, given the high-density living conditions. Mere physical occupancy could outweigh any standing claim.

The time-dependent nature of territorial arrangements was also revealed in an isolation study using Navy recruits (Altman et al., 1971). Placed in isolation for periods of time up to three weeks, the researchers observed that, as the mission wore on, individuals differed in the extent to which they laid exclusive claim to particular chairs, beds, or sides of a table.

Thus, in a practical sense, it is unrealistic to expect investigating police officers to be able to discriminate easily and accurately between these two types of areas. In addition, in a theoretical vein, the use of common authority versus exclusive use area concepts in judicial analyses, *without* substantial elaboration of these concepts and recognition of their complexity, seems simplistic at best, and at worst, seriously flawed.

Discrepancies Concerning the Concept of Third-Party Consent

Disclosure of self to the intimate partner and permitted access to personal territory to the partner do not imply willingness to permit the partner to extend the same disclosure/access to outsiders. Such rights of access permitted to a partner, as an indicator of the intimacy of their relationship, are not generally regarded as "transferable." For a partner to permit an outsider access to a secret or to the exclusive territory of an intimate would be regarded as a betrayal of trust (Bell, 1981; Benn, 1971; Derlega & Chaikin, 1977; Goffman, 1959; Vaughan, 1987). Thus, the legal notion of third-party consent appears to be incongruent with our understanding of the processes of interpersonal relations.

Discrepancies Concerning the Assumption of Risk Doctrine

Courts expect that people anticipate a possible breach of privacy when they enter into shared living arrangements with others. But interior residential dwelling spaces are locations where people have the highest levels of control and privacy (Taylor, 1988). It is extremely unlikely, given the nature of territorial functioning within residential units, that people assume any of the risks the courts assume they do.

Much of the research on interpersonal relations has indicated that the active mutual monitoring of the partners' behaviors, which is characteristic of early stages in the relationship, often ceases as intimacy is established. As social relationships progress in intimacy, there is a shift in focus away from assessments involving specific behaviors to evaluation of dispositions and characteristics attributed to the partner (Kelley, 1979; Kelley & Thibaut, 1978; Walster et al., 1978). Trust is placed in the person, not his or her specific actions; this becomes a less effortful substitute for constant monitoring (Bell, 1981; Vaughan, 1987). In addition, any social relationship will eventually encounter stresses that could not have been anticipated and for which no past interactive experiences of the partners could reasonably correspond. Partners in a relationship are therefore required to make a "leap of faith," by setting aside doubts about each other, even though confirmation warranting such emotional risks may be lacking (Rempel, Holmes, & Zanna, 1985).

Thus, the law's assumption of risk doctrine may not correspond with actual assumptions and attributions of intimate partners—quite the opposite, perhaps. Instead of an assumption of risk between intimates there may be instead an assumption of *no* risk, an assumption that the other partner would never knowingly do anything to injure the other.

It might be argued that third-party consents are merely instances of misplaced trust in a significant other and that these things happen in life. This argument assumes that third-party consent is always given with complete awareness of all the legal ramifications following from the consent. But unintended and undesired invasions of privacy—unintended and undesired even by the consentor—can easily occur in the case of third-party consent searches because the legal standard for the voluntariness of consent is absence of governmental coercion, not informed consent (*Schneckloth v. Bustamonte*, 1973; *United States v. Katz*, 1965; *United States v. Watson*, 1976). Officers need not inform an individual either of the distinction between a warrant search and a consent search or that a warrantless search cannot be made without consent (*Schneckloth v. Bustamonte*, 1975; *United States v. Watson*, 1976). Nor are they required to inform an individual that the scope of the search may be limited or that consent may be withdrawn at any time. Consent is not regarded as coerced if officers suggest that, due to withheld consent, they will attempt to obtain a warrant (*Hamilton v. North Carolina*, 1966; *United States v. Boukater*, 1969). Consent is not invalidated by emotional upset at the time of consent if the upset is not caused by any coercion on the part of the officers; their mere presence is not regarded as coercive (*United States v. Stone*, 1972) (see generally Israel & LaFave, 1984). As a policy issue, it may not be wise to permit society's agents to disrupt the ongoing social relationships of citizens based on a psychological (although not illegal) deception or misunderstanding.

IMPLICATIONS FOR PSYCHOLOGICAL RESEARCH AND THEORIES

Previous investigations of privacy invasions of residences focused on burglary (Brown & Altman, 1981, 1983; Korosec-Serfaty, 1985; Waller & Okihiro, 1978). The consent search experience is parallel to, and perhaps more serious than, the burglary experience. Victims of burglary have described the experience as analogous to a state of defilement, with specific psychological and affective impacts on an individual's orientation towards other members of his or her society. The act of burglary, in a sense, destroys an individual's inside/outside boundaries, damages social trust, converts private locations to public ones, and violates self-identity: it is an appropriation of one's dwelling by strangers (Korosec-Serfaty, 1985).

Conceptually, third-party consent searches may be as consequential in impact as the burglary experience, if not more so. The intruders are heretofore trusted governmental authority figures, and the victims—in confusion, ignorance, or naivete—acquiesce to the intrusions. And, more concretely, such searches may damage trust established within ongoing social relationships, a concern alluded to by Justice Harlan in *United States v. White* (1971), in which he predicted "a deleterious effect upon the public's confidence and sense of security in personal relationships, which have traditionally been a characteristic of life in a free society" (p. 787).

Lay Perceptions of "Common Authority"

As a first step in subjecting legal assumptions surrounding consent searches to empirical scrutiny, Kagehiro and Taylor (1988) investigated lay perceptions of common authority for purposes of third-party consent in two different legal situations: when the co-resident (the suspect) was absent and when the co-resident was present and protested the search. Lay perceptions were highly contingent upon the surrounding social circumstances. In the absence of the co-resident/suspect, subjects (college students) felt that the third party had independent consent power. When the co-resident/suspect was present and protested, subjects tended toward a perception of required joint consent power for a warrantless search of the shared residence. Thus, lay perceptions of third-party consent power in the absence of the co-resident/suspect are consistent with judicial interpretations; lay perceptions of required joint consent if a co-resident is present and protests are inconsistent with most judicial rulings on third-party consent authority. With respect to the law's "enclosed spaces" of search, the determining factor in subjects' perceptions of third-party consent power was the specific item of search, not its location in an exclusive use or common authority area of the shared residence. A co-resident was not perceived as having third-party consent power over another individual's personal container. Thus, lay perceptions appear to correspond with court rulings that a co-tenant cannot give valid consent to a warrantless search of another's personal effects located in an area of common authority (*People v. Reynolds*, 1976; *State v. Evans*, 1962; *United States v. Bussey*, 1974; *United States v. Poole*, 1969).

These results, although exploratory, provide an empirical basis for further legal discussion about these issues. They also demonstrate the applicability of psychological theory and research to legal concepts and assumptions. These legal concepts should be refined to become more congruent with actual behavior patterns, and this refinement must be driven by additional research.

FUTURE RESEARCH

1. Detailed longitudinal research is needed on the developmental process of various social relationships in situ (e.g., cohabiting couples, families, recently moved households, different households combined through remarriages) and on intimate partners' use of verbal, nonverbal, and environmental mechanisms of privacy regulation. Such research may provide significant insights into the factors influencing the various levels of privacy discussed in this paper (see next section, below). As examples, two possible factors are the degree of control different household members exercise over different types of territories in the residential setting and the temporal duration of occupancy of various territories (Altman, 1975; Taylor & Stough, 1978).

In addition, individuals may differ from the courts in the cues they rely on to gauge varying levels of privacy. The former draw on everyday experiences in

privacy regulation and territorial functioning, whereas the latter uses legal principles and precedents.

These investigations should attend particularly to households from lower social strata, inasmuch as such households are most likely to be the targets of warrantless searches (*Lankford v. Gelston,* 1966). The investigations should also examine in detail how members of the household respond to intrusions by outsiders, e.g., welfare workers, housing inspectors, landlords, police, and researchers. Such research must be carefully conducted, since the behavioral arena to be investigated is very private, by definition.

2. Two issues raised within this discussion need to be confirmed empirically. It was hypothesized that outside observers, such as police and judges, would have difficulty in interpreting easily and accurately the privacy regulation processes and territorial arrangements of co-residents. This surmise requires empirical verification because of its serious legal implications. If an observer, such as a police officer, is unable to determine independently and accurately the privacy regulation and territorial arrangements within a shared residence, then he or she must rely on the report of the consenting third party, who may be hostile to the interests of the nonconsenting and/or absent co-resident/suspect. The good faith exception accorded to police searches in some jurisdictions may mean that errors made during the subsequent search (i.e., evidence found in a suspect's exclusive use area, over which the third party had no actual consent authority) will not be corrected by the courts (i.e., the evidence will still be used against the suspect).

3. The second hypothesis within this discussion concerned the assumption of risk doctrine. Courts assume that people assume their privacy can be compromised by the persons with whom they share their residence. Research on the relative strengths of territorial functioning within interior residential spaces suggests the assumption is not true, but, as yet, no one has directly investigated this assumption in situ (see, however, Kagehiro & Laufer, 1990; Taylor & Kagehiro, 1988).

Increased Generalizability and Refinement of Theories

Psycholegal research, such as investigations of the case law, can also serve as a means of refining psychological theories by revealing gaps in our conceptual analyses or by pinpointing overlooked factors deserving attention. Case law refers to "judge-made" law developed through precedents set in previous judicial decisions of cases neither covered nor directly addressed by statutes. It is derived not from fixed rules, but rather from broad, flexible principles influenced by the changing social values of the community, as perceived by the judiciary. Thus, case law relevant to our topic can contribute to a better understanding of privacy regulation. As an example of the above, Altman's (1975) privacy model is reconsidered to suggest that a theoretical analysis of privacy regulation should also include the concept of *expected level of privacy,* along with desired and achieved levels of privacy. The specifics of this suggested refinement are as follows.

According to Altman's (1975) model, individuals seek a desired level of privacy, the level of interaction with or accessibility to others that they would like to

have. This desired level of privacy will vary over time and across situations. Achieved level of privacy is whatever level individuals actually attain in the face of the social stimulation around them.

Case law on consent searches suggests that expected privacy is also a key element of individuals' privacy regulation. *Expected level of privacy* refers to how much privacy an individual "ought" to have in a given situation—that is, a widely shared societal norm of what level of privacy an individual has a right to expect or a perceived entitlement to some level of privacy (Melton, 1983; Warren & Brandeis, 1890). *Desired level of privacy* may be viewed as determined by the individual. *Achieved level of privacy* may be viewed as determined by the interaction of the individual, the social context, the characteristics of the setting, and any other persons involved in the social situation.

Expected level of privacy is determined by the societal group to which the individual belongs. Viewed in this way, an environmental psychological concept of expected level of privacy corresponds roughly to the legal concept of reasonable expectation of privacy.

Expected level of privacy, or reasonable expectation of privacy, is another factor in privacy-regulation behavior. As is the case with the other types of privacy, it also varies over time and across sociocultural context. It provides normative guidelines about what level of desired privacy individuals are justified in seeking, and it plays a role in what level of privacy individuals actually achieve. But ordinarily, it does not play a major role in individuals' everyday privacy regulation vis-à-vis significant others. When, however, an individual's everyday privacy regulation becomes entangled with legal privacy issues, expected level of privacy does become more salient. The law of search and seizure provides examples of the operation of these three components of privacy regulation.

Police searches can be viewed as instances where the societal group has determined that its interests are sufficiently important to override an individual's privacy interests in preventing the search. In effect, the societal group asserts that its group member has no perceived right to resist the invasion of privacy (i.e., in legal terms, there is no reasonable expectation of privacy; in environmental psychological terms, there is a lower expected level of privacy). Achieved level of privacy matches expected level of privacy, which is lower than desired level of privacy.

In terms of this conceptual analysis, a warrantless search of an individual's dwelling unit and/or personal effects by an invader claiming societal or governmental authority, resulting in evidence instrumental in the prosecution of the invaded defendant, may be viewed as the achieved level of privacy. A defense request that the court rescind the negative legal consequences of the successful invasion of privacy—that is, the application of the exclusionary rule (*Mapp v. Ohio*, 1961; *Weeks v. United States*, 1914)—may be viewed as supporting the defendant's desired level of privacy (which is higher than the achieved level of privacy). To obtain such redress, the defendant must persuade the court—placed by law in the role of articulator of societal norms—that his or her desired level of privacy conforms more closely to the expected level of privacy than it does to the achieved level of privacy (the successful police search). If the court sides with the

defendant, it will hold that the defendant did have a reasonable expectation of privacy which the court will protect; in effect, the defendant's desired level of privacy was what he or she had a right to expect. If the court sides with the prosecution, it will hold that the defendant had no reasonable expectation of privacy to be protected; in effect, the defendant's desired level of privacy was greater than what he or she had a right to expect. The invocation of expected level of privacy—societal norms as supporting formal law—becomes another defense maneuver in privacy regulation, albeit a post hoc one.

Thus, in general terms, this is a suggested refinement of a widely used theoretical model in environmental psychology. The conceptual elaboration of Altman's (1975) privacy model is the inclusion of the concept of expected level of privacy. As a result of this theoretical development, a closer law-psychology correspondence emerges: The legal principles articulated by the courts in the consent search cases are paralleled by psychological principles.

CONCLUSION

In summary, the psychological research indicates that interpersonal relations and territorial functioning within residential units is at variance with the courts' assumptions, assumptions that are central to their justification of a legal doctrine with profound implications for police practices and the scope of the protection afforded individual privacy rights under the Fourth Amendment's prohibition against unreasonable searches and seizures. People use a variety of territorial arrangements, at varying scales of operation. The use of micro-level territorial arrangements is widespread. The more intimate the social relationship of the co-residents and/or the more complex or congested the household, the more fluid are the territorial arrangements. In addition, there are no clear-cut, invariant spatial distinctions drawn in households, particularly within the households most likely to be the targets of warrantless searches. Rather, territorial distinctions are likely to be highly contingent upon time of day, day of week, type of activity, and so on. These differences are evident across and within social strata and subcultural groupings.

Threats to individual privacy rights affect a wider range of people than just villains and criminals and occur more readily than one might imagine. For example, in *Lankford v. Gelston* (1966), citizens sought injunctive relief against the police commissioner of Baltimore to prevent further invasions of their right to privacy. The invasions of privacy stemmed from a police search for two black suspects wanted in the shooting of two police officers. During a 19-day period, the Baltimore police conducted searches of over 300 houses, most of them private dwellings. These searches were based in almost every instance on unverified anonymous telephone tips and were conducted at all hours of the day and night. In none of them did the police have search warrants (the searches were conducted pursuant to arrest warrants for the two fugitives) (compare *Allee v. Medrano,* 1974; *Rizzo v. Goode,* 1976).

In view of (a) the serious legal consequences of third-party consent searches, (b) their potentially damaging impact on intimate social relationships, and (c) the discrepancies between legal assumptions concerning interpersonal and territorial functioning among co-residents and their actual behaviors and expectations, the psycholegal analysis and the previous criticisms of legal commentators suggest that consideration should be given to possible reform of the third-party consent search exception to the Fourth Amendment's warrant requirement.

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