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COMMENTS

THE UNSETTLED LAW OF THIRD PARTY CONSENT

Introduction

An often repeated maxim of fourth amendment law states that searches conducted without a warrant are "*per se* unreasonable . . . subject to a few specifically established and well-defined exceptions."[1] Most of those exceptions have been based on the proposition that necessity or "exigent circumstances" may justify a warrantless search.[2] But one exception, embracing warrantless searches validated by consent, requires no justification related to the urgency of the situation. Direct consent to a search by a defendant operates as a waiver of any right to be free from a warrantless intrusion.[3] Furthermore, the consent of a third party to a warrantless search may defeat a defendant's fourth amendment rights.

The validity of third party consents has become an increasingly common question in criminal trials of the past three decades. Early cases viewed consent as a waiver of a constitutional right and insisted that a third party consent be clearly voluntary and expressly authorized, so as to rise to the dignity of such a waiver. However, the authority required for a third party consent search expanded to include an *independent* right to consent to a police search by a joint occupant of premises or a joint user of personal effects. This recognition of independent authority to consent based on joint control marked a major conceptual shift away from the original delegated waiver approach. This change has been most often explained in terms of an "as-

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1. Katz v. United States, 389 U.S. 347, 357 (1967). *See, e.g.*, Jones v. United States, 357 U.S. 493, 499 (1958) ("jealously and carefully drawn"), *quoted in* United States v. Watson, 423 U.S. 411, 427 (1975) (Powell, J., concurring) ("there is no more basic constitutional rule in the Fourth Amendment area. . . .").

2. The major exceptions include: search incident to arrest, Chimel v. California, 395 U.S. 752 (1969) (reviewing fluctuations of permissible scope); stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968) (protection of officer); evidence being destroyed, Cupp v. Murphy, 412 U.S. 291 (1973) (blood under fingernails); evidence naturally dissipating, Schmerber v. California, 384 U.S. 757 (1966) (alcohol in bloodstream); probable cause search of vehicles on the highway, Carroll v. United States, 267 U.S. 132 (1925) (mobility of car creates exigency); or of impounded vehicles, Chambers v. Maroney, 399 U.S. 42 (1970) (no exigency necessary). Justice Harlan's dissent in *Chambers* stressed the importance of exigencies in evaluating warrantless searches, 399 U.S. at 61-65.

3. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (discussing fourth amendment waiver by consent).

sumption of risk" theory in which a defendant assumes the risk that a third party will consent to a search of jointly used property. This general rationale not only places a consent by a third party in joint control beyond a defendant's contrary instructions or expectations, but also permeates other third party consent issues. Such issues include resulting plain view seizure, private seizure, and the application of standing rules.

United States Supreme Court holdings in the third party consent area have been sparse and somewhat indefinite. While the *independent right to consent* theory has been generally accepted, various jurisdictions have taken divergent approaches to related third party consent issues. California courts pioneered a further shift of doctrinal focus, embodied by a standard requiring only proof of *apparent* authority to consent. The apparent authority approach focuses on a police officer's reasonable belief of authority to consent, as contrasted to the general joint control rule which centers on a consenter's actual authority. On the other hand, Illinois law has remained generally representative of the many jurisdictions adhering to the independent right or actual authority standard. Finally, the federal courts have experimented with various theories of general reasonableness and assumption of risk, which tend to relax the remaining strictures of the basic actual authority doctrine.

This comment will review the history of third party consent law from its strict beginnings, using Illinois law to depict the first fundamental shift of theory from waiver to independent authority. The California approach, requiring only apparent authority, will also be evaluated in the light of relevant Supreme Court decisions. Finally, modern developments of the independent or actual authority standard will be examined in the context of Illinois and federal case law.

The ultimate issue that this comment will consider is the applicability of the fourth amendment warrant requirement to seizures based on third party consent. Where the consenter does not have actual authority to consent, should the resulting search and seizure be subject to the fundamental maxim that warrantless action is *per se* unreasonable? If not, the limited validity of such a consent would suffice to satisfy the warrant requirement. This in effect would permit the gap of authority to be filled by an augmenting theory that stresses only the general reasonableness of the resulting search and seizure. In this manner the vanishing limits on consent searches stand in sharp contrast to the rigorous scrutiny once applied to warrantless searches supported by a claim of third party consent.

EARLY DEVELOPMENT OF THIRD PARTY CONSENT LAW

There Once Was A Question Of Waiver

The propriety of warrantless police searches and seizures, based on the consent of a person other than the challenging party, was considered in state and lower federal court decisions as long ago as 1850.[4] The Supreme Court's landmark ruling in *Weeks v. United States*,[5] formally introducing the fourth amendment exclusionary rule to the federal courts, summarily rejected a boarder's consent to police entry offered to justify a search of the landlord's private rooms in the house.[6]

The first Supreme Court decision to evaluate a third party consent in a family residential setting, *Amos v. United States*,[7] found a wife's acquiescence in a search of the home invalid on the ground of implicit coercion.[8] The *Amos* court, by expressly leaving open the issue of her authority to consent, perpetuated doubts as to the right of a wife to waive her husband's fourth amendment rights.[9] The Illinois Supreme Court followed *Amos* in *People v. Lind*,[10] ruling that the likelihood of coercion was too great where the husband was under arrest and the wife had not invited the police entry. The *Lind* court further noted that under the greater weight of authority, a wife could not waive her husband's right to be free from warrantless searches unless specifically authorized by him to do so.[11]

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4. Humes v. Taber, 1 R.I. 464 (1850), involved a trespass action against a state officer. The Rhode Island Supreme Court indicated that a wife had no implied authority to consent to the search of the marital home. *Accord*, United States v. Rykowski, 276 F. 866 (S.D. Ohio 1920). *Contra*, Grim v. Robinson, 31 Neb. 540, 48 N.W. 388 (1891) ("moral duty to consent"). *Humes* was overruled by State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948).

5. 232 U.S. 383 (1914).

6. *Id.* at 386. Another entry had been made when a neighbor showed agents where the extra key was hidden. The Court refused to entertain the argument that such consent redeemed the searches.

7. 255 U.S. 313 (1921).

8. *See* Fitter v. United States, 258 F. 567 (2d Cir. 1919) "[A] request [to search] was made which was acceded to by Fitter's wife. What was done was undoubtedly an arbitrary and unlawful violation of Fitter's constitutional rights." *Id.* at 574.

9. There were no aggravating circumstances in *Amos*, only implied acquiescence to the officer's authority, 255 U.S. at 315. *See* United States v. Linderman, 32 F. Supp. 123, 124 (E.D.N.Y. 1940) (submission to a mere request to search not valid consent). Despite the drive for women's emancipation and its limited success in the nineteenth amendment, the *Amos* court may have still considered a wife subordinate in the home, and her will easily overcome by the police in the absence of her husband.

10. 370 Ill. 131, 18 N.E.2d 189 (1938). Illinois began excluding illegally seized evidence in People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924).

11. 370 Ill. at 136-37, 18 N.E.2d at 191. *See* Annot., 58 A.L.R. 737 (1929). There were rare cases in which a husband's consent was offered against a defendant wife. Only one, People v. Weaver, 241 Mich. 616,

Amos and *Lind* implicitly recognized the general validity of a third party consent to search if clearly *voluntary* and expressly *authorized*.[12] But the Illinois Supreme Court carved an exception out of this express authority requirement in *People v. Shambley*.[13] Mrs. Shambley, victim of her husband's armed assault, invited a police search for the gun after his arrest. The court unsurprisingly held that the wife had exercised an *independent* right to consent to the search of the jointly occupied dwelling.[14] This approach relegated the arrested and removed defendant's constitutional right of privacy to irrelevance, as if forfeited. Under the circumstances, where the consenter had called for the police protection, the agency test requiring consent to be expressly authorized must have seemed unattractive and inapposite.[15]

The *Shambley* court expressly limited its "independent authority" standard to the "peculiar facts" of the case.[16] Obviously, those spouses crying out in distress invoke a duty of immediate police response. However, the *Shambley* exception soon engulfed the express authorization rule. In *People v. Perroni*,[17]

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217 N.W. 797 (1928), rejected a husband's consent as lacking authority. There the wife owned the searched premises and the husband had previously moved out.

12. The boundaries of valid consent in commercial tenancy and business contexts also developed along strict lines of proprietary authority requiring reservation or delegation thereof with express authorization to consent to a police search. *See, e.g.*, Klee v. United States, 53 F.2d 58 (9th Cir. 1931) (landlord consent invalid against casual occupant); Raine v. United States, 299 F. 407 (9th Cir.), *cert. denied*, 266 U.S. 611 (1924) (two judges found ranch caretaker's consent invalid); Driskill v. United States, 281 F. 146 (9th Cir. 1922) (garage lessor's consent as joint user). *See also* State v. Smith, 88 Wash. 2d 127, 559 P.2d 970 (1977) (dissent discusses employee consent extensively).

13. 4 Ill. 2d 38, 122 N.E.2d 172 (1954).

14. *Id.* at 42, 122 N.E.2d at 174. The court perceived the "independent right" standard as well established, although this approach had been at best infrequently and tentatively applied to a wife's consent. *See* Annot., 31 A.L.R.2d 1078 (1953) (discerning contrary rule). The court relied chiefly on Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied*, 334 U.S. 844 (1948) (same) and State v. Cairo, 74 R.I. 377, 60 A.2d 841 (1948) (police uninvited, wife's consent upheld).

15. The cry of distress, telephoned in *Shambley*, led to a third party consent spurred by exigent circumstances, though the police could have easily procured a warrant after the defendant's arrest. *See* Woodard v. United States, 254 F.2d 312 (D.C. Cir. 1958) (aged lessee found guest's gun). When *Shambley* was decided, many courts were critical of searches conducted without a warrant or clear exigencies necessitating warrantless action. *See, e.g.*, McDonald v. United States, 335 U.S. 451 (1948). *But cf.* United States v. Rabinowitz, 339 U.S. 56 (1950) (stressing only reasonableness of broad search incident to arrest). In United States v. Arrington, 215 F.2d 630 (7th Cir. 1954), the court of appeals stated that it was "high time that courts place their stamp of disapproval upon this increasing practice of . . . searching a home without a warrant on the theory of consent. . . ." *Id.* at 637.

16. 4 Ill. 2d at 43, 122 N.E.2d at 174.

17. 14 Ill. 2d 581, 153 N.E.2d 578 (1958), *cert. denied*, 359 U.S. 980, 1004 (1959). The court focused on the courtesy and thus the reasonable-

the Illinois Supreme Court upheld a trailer home search based on the consent of a merely cooperative spouse after the defendant's arrest, without discussing its departure from the implied coercion rule. The convenience of a third party consent search had triumphed over a central constitutional privacy right in Illinois,[18] despite the failure to obtain a proper warrant, despite the inability to establish exigent circumstances,[19] and despite the strong precedential skepticism about the voluntariness of consent to uninvited searches.[20] No longer would a defendant's right of privacy be relevant to the validity of a search where the consent of a competent joint occupant could be established. The risk of such a consent was placed fully on the sharer.

The validity of a search based on voluntary consent of a joint occupant of a dwelling gradually became the general rule in state and lower federal courts.[21] As the focus shifted to the authority necessary to exercise an independent right to consent, most

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ness of police conduct in effecting the search, rather than using the strict scrutiny that would have precluded any consent to an uninvited search by Perroni's wife. As an independent ground for its decision, the court held that Perroni lacked standing to complain of the search because he failed to allege ownership of the trailer or the tools seized. *Id.* at 593, 153 N.E.2d at 582. *See* text accompanying note 40 *infra*.

18. The preeminent sanctity of the home under the fourth amendment has been long recognized, *see* Boyd v. United States, 116 U.S. 616, 630 (1886). Therefore, limitations on the privacy of the home should apply *a fortiori* in other settings.

19. Where no compelling necessity can be shown, the loss of an individual's unwaived fourth amendment rights, because of a third party's independent consent to a search directed at the other, must mean that mere convenience has been granted priority over a fundamental constitutional right. This unpalatable result has been the source of continuing academic criticism. *See* note 21 *infra*.

20. *See* Catalanotte v. United States, 208 F.2d 264, 268 (6th Cir. 1953), Judd v. United States, 190 F.2d 649, 650-51 (D.C. Cir. 1951). *Cf.* Byrd v. State, 161 Tenn. 306, 30 S.W.2d 273 (1930) (consent by "ignorant" wife).

21. Academic response to this shift away from strict waiver theory has been persistently negative. *See* Wefing & Miles, *Consent Searches & The Fourth Amendment*, 5 SETON HALL L. REV. 211, 283 (1974); Note, *Family Consent to Unlawful Search*, 28 WASH. & LEE L. REV. 207 (1971); Note, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 800-01 (1966) (expansion anomalous); Comment, *The Use of Evidence Obtained During a Search and Seizure Consented to by the Defendant's Spouse*, 1964 U. ILL. L.F. 653, 658 (marriage should not diminish right of privacy). But Lester v. State, 216 Tenn. 615, 393 S.W.2d 288 (1965), *cert. denied*, 383 U.S. 952 (1966) (upholding wife's consent to seizure of husband's coat), noted that since the A.L.R. survey in 1953, note 14 *supra*, only four cases had invalidated a wife's consent and only one for lack of authority, State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963), *overruled in* Yuma Co. Atty. v. McGuire, 111 Ariz. 437, 532 P.2d 157 (1975). Older decisions that required a wife's consent to be based on express authorization have been generally overruled. *E.g.*, Simmons v. State, 94 Okla. Crim. 243, 229 P.2d 615 (1951), *overruled in* Burkham v. State, 538 P.2d 1121 (Okla. Crim. 1975); *compare* Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952) *with* Lindsey v. State, 246 Ind. 431, 204 N.E.2d 357 (1965). *See also* Commonwealth v. Sebastian, 500 S.W.2d 417 (Ky. 1973) (rise of women's rights); State v. Blakely, 230 So. 2d 698 (Fla. App. 1970) (unemployed wife not in joint control).

courts agreed that one having coequal rights to access, use and occupancy could validly consent.[22] The United States Supreme Court steadily declined review while this new standard developed,[23] limiting itself to occasional rebuffs of consents by landlords.[24] Without express Supreme Court approval, the fourth amendment protection of the home, center of the personal right to freedom from official intrusion conducted without warrant or clear necessity,[25] had been breached by a broadly construed independent right to consent to entry and search vested in co-occupants. The requirement of an authorized waiver of a defendant's constitutional right had yielded to recognition of a general assumption of risk rationale based on the sharing of property.

Other Principles of Assumption of Risk

The independent right standard did not resolve all the problems of third party consent leading to *seizure* of another's property.[26] While consent to search may be entirely valid, authority to consent to a seizure may be lacking and further justification thus necessary to establish the admissibility of resulting evidence. If the seized property had not even been jointly used by the consenter, the consent alone clearly could not justify the seizure.[27]

Plain View

One solution to this dilemma has been to uphold the seizure of items in the "plain view" of police whose presence was based

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22. *See* United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839, 842-43 (3rd Cir. 1970) (reviewing rise of rule).

23. *Id.*

24. Lustig v. United States, 338 U.S. 74 (1949); United States v. Jeffers, 342 U.S. 48 (1951) (hotel managers); Chapman v. United States, 365 U.S. 610 (1961) (landlord with right of entry "to view waste"); Stoner v. California, 376 U.S. 483 (1964) (night clerk); Louden v. Utah, 379 U.S. 1 (1964) (per curiam) (innkeeper).

25. Several early decisions upholding a wife's consent to a search of the home carefully buttressed that position with exigent circumstaces. *E.g.*, United States v. Best, 76 F. Supp. 857 (D. Mass. 1948) (Army search in Austria during technical state of war). *Cf.* United States v. Sergio, 21 F. Supp. 553 (E.D.N.Y. 1937) (distillery might have blown up while officers sought warrant).

26. For particularized treatment of these problems, see text accompanying notes 82 & 145 *infra*.

27. *See, e.g.*, Holzhey v. United States, 223 F.2d 823, 826 (5th Cir. 1955) (locked cabinet in shared garage). One significant inroad on this limitation, or gap of authority, began in Botsch v. United States, 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967), on the theory of a gap-bridging "exculpatory interest", see text accompanying note 170 *infra*.

on a valid consent.[28] The essence of the plain view doctrine is that police, whose presence is lawful, have the right to seize evidence that they encounter.[29] This separate exception to the warrant requirement provides a convenient augmentation of the effective scope of a third party consent. Thus the plain view doctrine clearly expands the assumption of risk that is already associated with third part consent, by allowing seizure of property not jointly used by the consenter.

The recent notion that plain view should be inadvertent for the warrant requirement to be avoided would seem to limit this augmentation.[30] As is later noted, however, the inadvertency rule has not been generally applied to consent based plain view seizures.[31]

When the Supreme Court decided *Frazier v. Cupp*[32] in 1969, it expressly approved a third party consent search for the first time in its history. *Frazier* involved consent to the search of a

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28. *See, e.g.*, United States v. Eldridge, 302 F.2d 463, 466 (4th Cir. 1962) (effects in trunk of borrowed car).

29. Such seizures were limited to contraband, instrumentalities and fruits of crime until Warden v. Hayden, 387 U.S. 294 (1967) (5-4 on this issue). Since then any item of apparent evidentiary value has been subject to a proper plain view seizure. The majority in *Hayden* discarded the traditional distinction between contraband and other personal property as irrational. *Hayden* is a stark example of the modern focus on the right of privacy diminishing the traditional protection of proprietary security.

30. Coolidge v. New Hampshire, 413 U.S. 443, 466-71 (1971) (plurality opinion). Justice Harlan's decisive concurrence was somewhat "difficult," noting criticism of overemphasizing warrant requirements and indicating that the basic issue underlying the plurality's "inadvertent plain view" rationale was unresolved. *Id.* at 490-92. Justice White's dissent criticized the inadvertent plain view rule at considerable length. He noted that the rule was apparently to be applied to all plain view situations, including any legal police entry of premises, and argued that the rule would lead only to arbitrary results. He pointed particularly to the Court's failure to mention the inadvertency rule's relation to third party consent searches, where specific intent to search is commonplace, and suggested that an intentional plain view seizure in a third party consent search had been approved in Frazier v. Cupp, 394 U.S. 731 (1969). 403 U.S. at 510, 516-20. *But see* note 34 *infra*. Justice White's criticism of the rule's arbitrary results would seem to have particular force in relation to third party consent law. Once one accepts the *independent right to consent* theory, application of the inadvertency rule would tend to invalidate consent searches based on probable cause, while admitting the fruits of consent searches which resulted from purely arbitrary rummaging. But the source of this anomalous result is not so much the warrant oriented inadvertency rule, but rather the unique nature of the third party consent exception to the warrant requirement, which does not demand probable cause, compelling urgency, or consent by the object of the search.

31. *See* notes 164 & 194 and accompanying text *infra*.

32. 394 U.S. 731 (1969), *aff'g* Gladden v. Frazier, 388 F.2d 777 (9th Cir. 1968) (vacating habeas corpus relief on other grounds). The Ninth Circuit had found a valid plain view seizure, but also indicated that any error was harmless, 388 F.2d at 783. The Supreme Court stated that the challenge to the search could be "dismissed rather quickly," 394 U.S. at 740.

jointly used duffel bag which was owned by the defendant and temporarily shared by his cousin. The Court refused to consider "metaphysical subtleties" and held that Frazier had assumed the risk of a sharer's consent.[33] The Court seemed to justify the actual seizure of the defendant's bloodstained clothing on a plain view theory.[34] Despite this apparent ratification of an augmented independent right to consent, *Frazier* discussed the issue only briefly, without enunciating any clear standard and without referring to any relevant lower court precedent. Nevertheless, assumption of risk was clearly approved as the pragmatic basis for evaluating a seizure based on a sharer's consent.[35] The assumption of risk rationale has also been applied to third party seizures of a defendant's property.

Private Seizure

The problem of lack of authority to consent to search or seizure has been avoided where the facts showed a spontaneous delivery of the property by the third party.[36] In that situation, the private party has performed the initial conversion or theft without enough government involvement to trigger fourth amendment protection.[37] Both private and plain view seizures represent unprotected risks to an individual's otherwise shielded privacy. The private seizure rule places all moveable property

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33. 394 U.S. at 740. It was argued that the consenter only had permission to use one compartment of the bag and lacked the authority to consent to other parts. The Court refused to consider the issue of whether the party had authority only over a section of the duffel bag. However, at least one court has magnified this refusal to validate the search of another's separate bedroom by a joint occupant of the dwelling, United States v. Cataldo, 433 F.2d 38 (2d Cir. 1970) (alternate ground), *cert. denied,* 401 U.S. 977 (1971).

34. The stated purpose of the search was to obtain the *consenter's* clothing. The Court seemed to consider the discovery inadvertent, since it cited Harris v. United States, 390 U.S. 234 (1968) (inadvertent discovery of evidence in impounded vehicle) and Warden v. Hayden, 387 U.S. 294 (1967) (evidence encountered in hot pursuit).

35. *See* note 164 and accompanying text *infra.*

36. *Compare* Burdeau v. McDowell, 256 U.S. 465 (1921) (no police involvement until months after theft of defendant's papers) (Holmes and Brandeis, JJ., dissenting) *with* Coolidge v. New Hampshire, 403 U.S. at 487-90 ("inadvertent" inquiry as to arrested defendant's guns and clothing followed by "spontaneous" delivery by wife).

37. *Burdeau* held in effect that knowing receipt of stolen goods by police, with no intention of restoration to the owner, did not amount to a constitutional violation. *Coolidge* extended this principle to an innocent conversion of a spouse's personal property, despite the initial police questions about the specific items. Although the consenter offered the guns and clothing to police, the taking could have been readily interpreted as a decision to make a plain view seizure. But the approach chosen provided an alternative solution for similar situations, common in third party consent cases, where plain view was *intentional* and thus might be unacceptable under the inadvertent plain view doctrine. *See* Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965).

at the mercy of persons bold enough to exert unauthorized control over it and turn it over to police, whether seeking favor or merely taking justice into their own hands.[38] Personal effects therefore, enjoy less protection than the home or business premises, which cannot be validly searched or seized[39] on the basis of an unauthorized consent.

Standing

In addition to the risks of private and consent-based plain view seizures, criminal defendants have long been subject to the risk that evidence might be illegally seized under circumstances that precluded a defendant from establishing *standing* to challenge its admission at trial. Reasoning that the fourth amendment and its state constitutional equivalents embody personal rights, courts have generally refused to hear challenges to searches unless based on a violation of the petitioner's own right to security in his person or property.[40] Furthermore, a criminal defendant seeking to invoke such a right has long been required to make potentially incriminating standing allegations.[41] An owner or lessee of searched premises could rely on their relatively innocuous proprietary interests to establish standing,[42] but guests, visitors and occupants of dubious status were granted no proprietary standing and were generally obliged to assert a more incriminating interest in the seized property itself.[43] The effec-

38. Additionally, a defendant risks the meek, dutiful, blithely ignorant, self-exculpatory or fully hostile assistance of a third party to police by the private seizure of exclusively personal property.

39. Buildings and other real property may be considered as seized where government agents exercise an exclusive dominion over the area. *See* Newberry v. Carpenter, 107 Mich. 567, 65 N.W. 530 (1895) (mandamus to remove police guard from boiler room).

40. *See* Alderman v. United States, 394 U.S. 165, 174 (1969) (finding some merit in, but rejecting, broadened fourth amendment standing argument).

41. Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932) (Learned Hand, J.) (unsympathetic to the dilemma). The only contrary federal case before 1960 was United States v. Dean, 50 F.2d 905 (D. Mass. 1931) (possessory offense). A virtually universal rule permitted use of any such allegations as admissions in the prosecution's case in chief. *See, e.g.*, Heller v. United States, 57 F.2d 627 (7th Cir.), *cert. denied*, 286 U.S. 567 (1932); Monroe v. United States, 320 F.2d 277 (5th Cir. 1963), *cert. denied*, 375 U.S. 991 (1964). *Contra*, Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967) (harmless error). Simmons v. United States, 390 U.S. 377 (1968), abolished that rule, forbidding use of standing admissions on the issue of guilt. But impeachment of a testifying defendant's credibilty with such admissions remained a possibility, People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974).

42. However, the lack of a technical right to immediate possession of premises may preclude a lessor's standing. *E.g.*, People v. DeFilippis, 54 Ill. App. 2d 137, 203 N.E.2d 627 (1964) (garage lessor).

43. *See In re* Nassetta, 125 F.2d 924 (2d Cir. 1942) (noting unanimity of rule). An argument that a statute abolishing property rights in contraband eliminated even this perilous and narrow basis for standing was rejected in United States v. Jeffers, 342 U.S. 48, 52-54 (1951).

tive denial of dwelling privacy to all but formal occupants was mitigated by the Supreme Court in 1960, when standing was extended to any person lawfully present on the premises where the search occurred.[44] This partial relaxation reduced the general chilling effect of standing requirements on the assertion of challenges to third party consents.

Innovation in California: A Two Edged Sword

In 1955, when the California Supreme Court adopted the exclusionary rule for illegally seized evidence in criminal trials,[45] the general independent authority standard of consent by a joint user of premises or effects was becoming entrenched, and the standing dilemma was still in full force. The California court proceeded to abolish all requirements of standing to contest a search, eradicating that burden in favor of the interest in deterring illegal police searches.[46] As a consequence, California courts would entertain the broadest possible range of challenges to third party consent.[47]

At the same time, however, California departed from the traditional implicit coercion rule, choosing rather to consider the voluntariness of a consent based on the totality of the circumstances.[48] And in *People v. Gorg*,[49] the California Supreme Court ruled that the state need only establish a voluntary consent by one whom the police *reasonably believed* to have the necessary authority. This doctrine of "apparent authority" launched in *Gorg* was to enjoy a long reign in California law, and would represent a definite influence on the law of third party consent in other jurisdictions.

Apparent Authority in California

Gorg and Early Applications

The defendant in *Gorg* was a law student originally arrested

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44. Jones v. United States, 362 U.S. 257 (1960).
45. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
46. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).
47. In addition to removing the chilling effect of required standing allegations, and recognizing privacy rights in casual occupants and visitors, the abolition of standing rules created a new variety of third party consent. Any consent by another, leading to evidence against a defendant who didn't have the faintest claim to the premises searched or property seized, became a challengeable third party consent. This new "impersonal" type of challenge did not involve any new questions of authority, but did increase the volume of law on the basic issues.
48. People v. Michael, 45 Cal. 2d 751, 290 P.2d 852 (1955), *approved in* Schneckloth v. Bustamonte, 412 U.S. 218 (1973). One motivation may have been strong pressure by indignant law enforcement officials. *See* People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956) (Carter, J., dissenting).
49. 45 Cal. 2d 776, 291 P.2d 469 (1955).

for shoplifting. Police went to the house where he lived and asked permission to search his room. A young man, who also occupied and happened to own the house, consented. Marijuana was subsequently discovered in a drawer.[50] Gorg claimed that he rented the room in exchange for gardening and sought to have the evidence suppressed.[51] The California Supreme Court refused to resolve this issue for Gorg under prevailing property and agency approaches,[52] holding that the reasonable belief of the officers in the live-in landlord's appearance of authority was enough to sustain the search.[53] Justice Traynor explained that it was not necessary to proscribe reasonable mistakes as to the extent of authority in order to serve the policy of deterring police misconduct.[54] Although the search could not be justified by an independent right to consent, the court did not consider the lack of exigency, the unexcused failure to obtain a warrant or the clear intent to search that prompted the police visit, in applying the new apparent authority rule.[55]

The focus of inquiry into third party consent thus underwent a second significant shift in *Gorg*. The early requirement of a waiver clearly attributable to the defendant had generally yielded to burgeoning independent right to consent theories; *Gorg* required only that police have a reasonable belief that authority to consent existed at the time of the search. The difficulty of requiring police to assess the correct status of consenting occupants of a dwelling, in the face of an expanding variety of

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50. *Id.* at 779, 291 P.2d at 471.
51. *Id.* at 778, 291 P.2d at 470.
52. *Id.* at 783, 291 P.2d at 473. If Gorg was recognized as a tenant, no existing precedent would have supported the landlord's consent. But the court could have treated Gorg as a guest and upheld the consent. *See* Calhoun v. United States, 172 F.2d 457, *cert. denied*, 337 U.S. 938 (1949) (guest's rights "ousted" by landlord consent).
53. The consenter claimed to be preparing the room for a visit by his father when the police arrived. Whether an arrested person's room should be subject to an increased right of consent by one with a general interest in the premises would seem to depend on the situation. A short or informal lease on a room or storage locker could lapse or be terminated, enabling a third party consent because of the arrestee's involuntary absence, *see* People v. Crayton, 174 Cal. App. 2d 267, 344 P.2d 627 (1959) (motel manager's consent). *Cf.* Hayes v. Cady, 500 F.2d 1212 (7th Cir. 1974) (arrestee's denial of occupancy validated landlady's consent). *But cf.* State v. Taggart, 7 Ore. App. 479, 491 P.2d 1187 (1971) (landlady's consent rejected).
54. It has been suggested that some mistakes as to authority may be treated as acceptable mistakes of fact. *See* note 76 *infra*. *Cf.* Hill v. California, 401 U.S. 797 (1971) (valid search incident to mistaken arrest of guest).
55. But since deterrence of misconduct serves as a safeguard for the basic value of constitutional privacy, fundamental policy is not served by allowing unauthorized consents. *See* Comment, *Two Years With the Cahan Rule*, 9 STAN. L. REV. 515, 532 (1957) (calling for narrow application of *Gorg*).

household arrangements,[56] was simply and effectively mitigated by the *Gorg* rule. Any future inquiry into the legality of such a search would turn on the probity of simple police testimony.[57] Moreover, the privacy of the home had been delivered into the power of any landlord, casual guest, trespasser or even burglar[58] capable of asserting apparent authority over the premises.[59]

Soon after *Gorg*, the search of a murder defendant's living quarters, supported by consents of the homeowner and caretaker, was held valid under the apparent authority rule. The status of the defendant in the house, whether as a tenant, servant or guest, was deemed irrelevant.[60] Shortly thereafter, however, the state supreme court suggested closer inquiry into the consenter's relation to the defendant and his property to evaluate the apparent authority of the consent to search. The court strongly implied that a dweller's right of privacy in rooms and effects might extend beyond the reach of even his wife's right to consent to a search.[61] Nevertheless, in another murder case an appellate court validated the consent of the defendant's babysitter obtained at the police station.[62] Although the consenter did not appear to exercise any authority other than that of a babysitter, her consent was held sufficient to allow an uninvited search of

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56. It would seem anomalous that an unconventional or informal arrangement might enjoy greater protection than socially approved family and commercial relationships.

57. The strong presumption of truth generally accorded police testimony works to make the official version of contested events dispositive in most cases, despite the somewhat self-serving nature of justifying a search. Notwithstanding the undoubtedly great reliability of police in general, the Seventh Circuit had warned that fourth amendment protection "should not be made dependent upon the probity of an officer attempting to justify a search of consent," United States v. Arrington, 215 F.2d 630, 637 (7th Cir. 1954).

58. The spectre of consent by a wholly unauthorized stranger, unlawfully on the premises, may be somewhat offset by the various uncertainties that reliance on such a consent would introduce. Doubts could arise as to the true source of seized evidence. An inference might arise that the helpful intruder was a police agent, and even if the searching police were unaware of that, the validity of the search would probably be vitiated. *Cf.* Whiteley v. Warden, 401 U.S. 560 (1971) (no laundering of probable cause).

59. Such an assertion need only amount to colorable acquiescence in police efforts. *See* People v. Yancey, 196 Cal. App. 2d 665, 16 Cal. Rptr. 766 (1961), *cert. denied*, 375 U.S. 369 (1963) (Douglas, J., would grant) (woman motioning with head); People v. Dominguez, 144 Cal. App. 2d 63, 300 P.2d 194 (1956) (pregnant wife; aware husband just arrested).

60. People v. Caritativo, 46 Cal. 2d 68, 292 P.2d 513 (1956).

61. People v. Carter, 48 Cal. 2d 737, 746-47, 312 P.2d 665, 670 (1957) (dictum) (search of husband's truck). An appellate court had already managed to reject the consent of a teenaged daughter after her father's arrest, People v. Jennings, 142 Cal. App. 2d 160, 298 P.2d 56 (1956) (harmless error).

62. People v. Misquez, 152 Cal. App. 2d 471, 313 P.2d 206 (1957). The defendant had asked the police to give his key to the sitter. They complied, but immediately asked the sitter to give the key back so that a search could be made.

the defendant's dwelling for evidence.[63] This questionable application of the *Gorg* rule perhaps reflected the lower courts' reluctance to suppress reliable evidence.[64]

Despite the potential scope of the *Gorg* rule, there have been no reported California cases involving the consent of a third party whose presence proved to be felonious. Perhaps the closest case to this controversial situation was the early decision of *People v. Howard*.[65] There an appellate court approved the consent of a girl who had climbed in a window of the defendant's dwelling to admit police. The troubling question posed by her lack of proper access, diminishing the appearance of her authority, was largely ignored by the appellate court.[66] Despite these questionable holdings, most early applications of the *Gorg* rule involved routine consents by joint occupants and reached results entirely consistent with the basic actual authority approach of other jurisdictions.[67]

The Consent of Building Managers: An Overextension of Gorg

In *People v. Roberts*,[68] the prosecution conceded that a hotel manager's consent and assistance to the entry of a rented room was without authority. But in *People v. Ambrose*,[69] an appellate court held that a hotel manager's consent to a room search was valid, and a state supreme court hearing was narrowly denied, Justice Traynor and two others dissenting. Several other appellate decisions reached similar results.[70]

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63. *Id.* at 479-80, 313 P.2d at 211. *Cf.* Butler v. Commonwealth, 536 S.W. 2d 139 (Ky. 1971) (babysitter's consent good against her guest). *Contra*, People v. Litwin, 44 App. Div. 2d 492, 355 N.Y.S.2d 646 (1973).

64. *See, e.g.*, People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (1961) (consent by college dormitory housemaster; felony investigation an "emergency").

65. 166 Cal. App. 2d 638, 334 P.2d 105 (1958). The police discovered stolen property. A factor influencing approval of the search may have been the defendant's failure to contest the girl's right of entry.

66. Similarly, an appellate court stated that a search based on the consent of a professedly casual occupant found alone in defendant's dwelling was "probably reasonable," People v. Herman, 163 Cal. App. 2d 821, 329 P.2d 989 (1958) (harmless error).

67. *See, e.g.*, People v. Ransome, 180 Cal. App. 2d 140, 4 Cal. Rptr. 347, *cert. denied sub nom.* Dean v. California, 364 U.S. 887 (1960) (sister-in-law cotenant); People v. Ingle, 53 Cal. 2d 407, 2 Cal. Rptr. 14, 348 P.2d 577, *cert. denied*, 364 U.S. 841 (1960) (wife); People v. Silva, 140 Cal. App. 2d 791, 295 P.2d 942 (1956) (co-occupant of hotel room).

68. 299 P.2d 313 (Cal. App.), *aff'd*, 47 Cal. 2d 374, 303 P.2d 722 (1956). The police claimed to have heard moans, presumably of distress, from within the room. The room was empty but the police searched anyway. There was speculation that the noise might have been made by pigeons. The courts ruled that the search was justified by these "exigencies." The case cannot be viewed as a third party consent by the pigeons but does suggest the possibility of valid consent to entry by an unseen parrot in California.

69. 155 Cal. App. 2d 513, 318 P.2d 181 (1957).

70. *See* People v. Williams, 189 Cal. App. 2d 29, 11 Cal. Rptr. 43 (1961)

In *People v. Stoner*,[71] the state chose not to rely on the hotel manager's consent, securing appellate affirmance on a *search incident to arrest* theory.[72] Since the arrest took place in another state thirty-six hours after the search, the state found itself falling back on an apparent authority theory before the United States Supreme Court. In the meantime, a California court had rejected a hotel manager's consent as lacking even apparent authority.[73] The Supreme Court's decision, *Stoner v. California*,[74] likewise rejected "unrealistic doctrines of 'apparent authority'" and reversed Stoner's conviction for armed robbery. Justice Stewart echoed the traditional doctrine of third party consent:

> It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only petitioner could waive by word or deed, either directly or through an agent.[75]

The Supreme Court, despite the arguably broad implications of this language, did not indicate disapproval of the general joint control test and avoided any definitive holding on the issue of apparent authority. The Court found that there was no basis for a police belief that the night clerk had been expressly authorized to consent by the defendant, so the apparent authority issue was not squarely raised.

Gorg's Ongoing Vitality

Whatever doubt *Stoner* may have cast on the general apparent authority approach by rejecting an improvident extension of it,[76] the basic vitality of *Gorg* continued to be recognized by California courts.[77] However, greater caution had already begun to

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(apartment manager); People v. Crayton, 174 Cal. App. 2d 267, 344 P.2d 627 (1959) (motel manager after checkout time); People v. Dillard, 168 Cal. App. 2d 158, 335 P.2d 702 (1959) (apartment manager); People v. Hicks, 165 Cal. App. 2d 548, 331 P.2d 1003 (1958) (hotel manager, storage room). *Cf.* Abel v. United States, 362 U.S. 217, 241 (1960) (upholding consent of hotel manager after defendant arrested and checked out by F.B.I.).

71. 205 Cal. App. 2d 108, 22 Cal. Rptr. 718 (1962), *rev'd*, 376 U.S. 483 (1964).

72. The appellate court held that failure to obtain a warrant was not fatal to the search, and that the police were not bound by the night clerk's statement that he knew the defendant was not there.

73. People v. Burke, 208 Cal. App. 2d 149, 24 Cal. Rptr. 912 (1962) (harmless error since police would have gotten evidence later).

74. 376 U.S. 483 (1964).

75. *Id.* at 489. Thus the Court refused to adopt an assumption of risk approach premised on a lessor's power of access.

76. A federal court once suggested that *Stoner* overruled the whole *Gorg* doctrine, Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1966) (civil rights action); but *Stoner* and *Gorg* have been harmonized as well. *See* Ferguson v. State, 488 P.2d 1032, 1036 (Alas. 1971); Lafave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L. F. 255, 322 (reasonable mistake of fact acceptable).

77. *See, e.g.*, People v. Smith, 63 Cal. 2d 779, 48 Cal. Rptr. 382, 409

find expression.[78] In *Tompkins v. Superior Court*,[79] the state supreme court held that the consent of a cotenant was unavailing if the defendant was present and objected to the search. Justice Traynor analyzed the nature of joint tenancy and concluded that a tenant could not be reasonably considered as empowered to allow a search over a cotenant's interposed objection.[80] A definite actual authority standard, slightly limiting third party consents to dwelling searches,[81] proved to be definitive of the reasonable extent of apparent authority.

Similarly, the state supreme court rejected the extension of a consent search to the luggage of a guest.[82] Since the police were told that the luggage belonged to others, apparent authority could not be established.[83] The court in *People v. McGrew*,[84] in like manner refused to apply *Gorg* to validate an airline employee's consent to the search of a shipped footlocker. The bare majority of the state supreme court again found careful consideration of the underlying actual authority standard necessary, and determined that the authority of the airline was insufficient to render the consent objectively reasonable.[85]

P.2d 222 (1966), *cert. denied*, 388 U.S. 913 (1967) (consent by girlfriend).

78. *See* People v. Frank, 225 Cal. App. 2d 339, 37 Cal. Rptr. 202 (1964) (defendant's presence in room terminated landlady's apparent authority); Castenada v. Superior Court, 59 Cal. 2d 439, 30 Cal. Rptr. 1, 380 P.2d 641 (1963) (consent after efforts to mislead involuntary); Bielicki v. Superior Court, 57 Cal. 2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962) (spypipe in ceiling of amusement park restroom with consent of owner held unlawful). Despite *Bielicki*, a split panel of the Ninth Circuit upheld a similar consent surveillance, suggesting the applicability of *Gorg's* apparent authority rule, Smayda v. United States, 352 F.2d 251, 259 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

79. 59 Cal. 2d 65, 27 Cal. Rptr. 889, 378 P.2d 113 (1963). *Contra*, People v. Smith, 183 Cal. App. 2d 670, 6 Cal. Rptr. 866 (1960).

80. 59 Cal. 2d at 68-69, 27 Cal. Rptr. at 892, 378 P.2d at 116. The "reasonable belief" of the officers was simply held unreasonable as a matter of law. This approach made it clear that the belief had to be *objectively* reasonable. Despite *Gorg*'s focus on deterrence of unreasonable conduct, *Tompkins* showed that subjective good faith was not enough. This position is perhaps best explained by the potential unmanageability of a subjective standard.

81. The narrowness of the *Tompkins* limitation in California was shown in People v. Linke, 265 Cal. App. 2d 297, 71 Cal. Rptr. 371 (1968) (defendant present and not complaining can't raise objection later), and People v. Vermouth, 20 Cal. App. 3d 746, 98 Cal. Rptr. 65 (1971) (suitcase claimed by nonarrestee held validly searched as incident to arrest of car's driver). *See* Vandenburg v. Superior Court, 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (1970) (minor's objection ineffective against father's consent).

82. People v. Cruz, 61 Cal. 2d 861, 40 Cal. Rptr. 841, 395 P.2d 889 (1964).

83. But for that notice, a purported consent might have prevailed, even if the consenter had no key or other proper access to the locked effect, provided there was a reasonable belief in his authority. *See* note 65 and accompanying text *supra*.

84. 1 Cal. 3d 404, 82 Cal. Rptr. 473, 462 P.2d 1 (1969), *cert. denied*, 398 U.S. 909 (1970).

85. Imputing notice of the airline's limited authority (a matter of public record) to the summoned officers would vitiate their reasonable

Despite its preoccupation with appropriate limitations, the California Supreme Court took occasion to defend the basic *Gorg* rule, noting that it had been consistently reaffirmed.[86] That flexible application of the apparent authority doctrine retained some vitality was demonstrated by an appellate court in *People v. Amadio*.[87] That decision condoned the consent of an arrested third party to the search of a car in which he had only an informal interest, lacking both immediate control and coequal joint use, the court analogizing these facts to a cotenancy.[88] In another flexible application, the state supreme court avoided the clear limitation barring nonoccupant landlord consents, upholding a lessor's consent because the defendant's duplex was "apparently abandoned."[89] These cases strongly indicated that caution in using the apparent authority rule had not led to its practical demise.

The California Supreme Court returned to its practice of careful scrutiny of authority in *Burrows v. Superior Court*.[90] In *Burrows*, a bank had relinquished its records of customer transactions to police. The court held that the defendant's reasonable expectation of privacy in those records could not be defeated by the bank's voluntary consent to the seizure.[91] Since the court was once again determining a basic actual authority standard, apparent authority was not discussed. The potential scope of the

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belief of any greater authority to consent. As in *Cruz*, the right of privacy in a locked effect prevailed over the consent of a mere custodian. Comparable federal decisions have been generally contrary, *see* note 163 *infra*.

86. People v. Hill, 69 Cal. 2d 550, 72 Cal. Rptr. 641, 446 P.2d 521 (1968), *aff'd*, 401 U.S. 797 (1971).

87. 22 Cal. App. 3d 7, 98 Cal. Rptr. 909 (1971).

88. *Id.* at 14, 98 Cal. Rptr. at 913. The consenter had neither title nor possession of the car, only a right of occasional use. Approval of his consent might have been better rationalized by a theory of a conspirator's right to consent. *See* note 168 *infra*.

89. People v. Carr, 8 Cal. 3d 287, 104 Cal. Rptr. 705, 502 P.2d 513 (1972). As the occupant eluded arrest, his landlord exercised his right of reentry for the search. *But see* Chapman v. United States, 365 U.S. 610 (1961) (landlord's right of entry insufficient).

90. 13 Cal. 3d 238, 118 Cal. Rptr. 166, 529 P.2d 590 (1974).

91. The unanimous court (Clark, J., dissented from denial of rehearing) saw its result as entirely consistent with California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974) (bank's challenge to statute requiring certain records to be available held premature) and United States v. Miller, 500 F.2d 751 (5th Cir. 1974) (bank's voluntary consent invalid), *rev'd*, 425 U.S. 435 (1976) (records *belong* to bank; assumption of risk). After the Supreme Court reversed the Fifth Circuit's decision in *Miller*, *Burrows* remained good law in California. Carlson v. Superior Court, 58 Cal. App. 3d 13, 129 Cal. Rptr. 650 (1976) (state allowed to provide greater protection than minimal constitutional standard). The *Burrows* limitation relied less on strict property and authority concepts than the analogous *McGrew* common carrier rule, but rather attempted to blunt the threat of massive invasions of financial privacy without judicial authorization. *See* California Bankers Ass'n v. Schultz, 416 U.S. 21, 78 (1974) (Powell, J., concurring).

Gorg doctrine was again limited by the reasonable extent of actual authority.[92]

Ten years after the United States Supreme Court rejected a loose extension of the *Gorg* rule, apparent authority remained the governing standard of third party consent in California. Whether because an overriding federal constitutional standard was never formulated, or because California was allowed to be a laboratory for testing a new standard, or because California's preoccupation with limiting that standard inhibited review, the *Gorg* rule continued to survive.

United States v. Matlock & Beyond

Federal prosecutors proffered the basic *Gorg* rule to the United States Supreme Court in *United States v. Matlock*.[93] In that case, a young woman had consented to the search of an apparently shared room that the robbery defendant rented from her parents.[94] The district court applied a "two-prong test" requiring proof of *both* apparent and actual authority. The court found that actual authority had not been established and held that apparent authority alone was insufficient to validate the search.[95] On appeal by the government, the Seventh Circuit af-

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92. This limitation on third party consent, based on confidentiality alone, has been extended to one other confidential relationship by the California courts. People v. McKunes, 51 Cal. App. 3d 487, 124 Cal. Rptr. 126 (1975), upheld a right of privacy in telephone company records of calls made. *But cf.* People v. Elder, 63 Cal. App. 3d 71, 134 Cal. Rptr. 212 (1976); (identity of telephone and gas company subscribers not private).

93. 415 U.S. 164 (1974). Since *Stoner*, the Supreme Court had approved a reasonable mistake of fact corollary of *Gorg* in Hill v. California, 401 U.S. 797 (1971). Three cases based on *Gorg* had come up on federal habeas corpus petitions without eliciting a clear rejection of the apparent authority rule. People v. Cunningham, 188 Cal. App. 2d 606, 10 Cal. Rptr. 604, *cert. denied*, 368 U.S. 933 (1961), was attacked collaterally in Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965) (remand for hearing), *cert. denied*, 383 U.S. 968 (1966). The dissenter from the Ninth Circuit panel thought that the trial judge "was entitled to rely" on a landlady's apparent authority, 352 F.2d at 7. The majority did not discuss apparent authority. People v. Nelson, 218 Cal. App. 2d 359, 32 Cal. Rptr. 675 (1963), survived collateral review in Nelson v. California, 346 F.2d 73 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965) (consenter had evident actual authority). The third case, People v. Bustamonte, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969), culminated in Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (third party consent to search of car), which merely approved California's voluntariness test for consent searches and rejected the Ninth Circuit's requirement of a *Miranda* type fourth amendment warning. Apparent authority advocates may also have been encouraged by language in United States v. Hughes, 441 F.2d 12, 15 n.3 (5th Cir. 1971) and United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839, 844-47 (3rd Cir. 1970) (Gibbons, J., dissenting) (citing A.L.I. endorsement).

94. 415 U.S. at 165-66.

95. *Id.* at 167.

firmed.[96] The Supreme Court did not reach the question of apparent authority[97] but reversed on hearsay rulings, suggesting that actual authority had been properly established.[98] The Court's treatment of the lower courts' "two-prong" test was somewhat equivocal,[99] but no Justice took the opportunity to champion the apparent authority rule.

A California appellate court noted *Matlock* but expressly applied *Gorg* in *People v. Reynolds*,[100] upholding a wife's consent to the search of her husband's padlocked darkroom and the seizure of photographs and other effects.[101] Noting similarities to the facts of *Matlock*, the court held that the police had no duty to consult the arrested (and thus available) defendant about the search, and rejected the contention that seizure of his effects was beyond his wife's power to authorize.[102] The court devoted considerable attention to actual authority issues, perhaps guided by prior California Supreme Court cautiousness and the possible implication of *Matlock* that actual authority was a necessary element of a proper consent.[103]

Another recent appellate decision, *People v. Howard*,[104] upheld police entry into the halls of a locked apartment building, partly on the ground that the manager had once given the police a key,[105] although entry was effected without key or specific con-

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96. 476 F.2d 1083 (7th Cir. 1973). The court noted that an apparent authority test alone would allow the consent of an impostor, remarking that "[s]tatement of the argument is largely its own refutation." *Id.* at 1086.

97. 415 U.S. at 177-78 n.14.

98. *Id.* at 178.

99. Since the prosecutor argued that apparent authority was the proper standard and the defendant was willing to tolerate its use as an *additional* element while insisting on actual authority as well, that "prong" was not at issue. The Court's opinion cited *Gorg* without disapproval in a list of "common authority" cases. *Id.* at 170 n.6.

100. 55 Cal. App. 3d 357, 127 Cal. Rptr. 561 (1976).

101. The court reasoned that the darkroom might have been locked to prevent damage to film, and that others would have occasional access. Reynolds' wife in fact told police where the key was kept.

102. *Cf.* State v. Gordon, 23 Ore. App. 587, 543 P.2d 321 (1975) (suitcase in shared closet; paramour's consent valid). *But cf.* State v. Fitzgerald, 19 Ore. App. 860, 530 P.2d 553 (1974) (private room, daughter's consent rejected), State v. Matias, 51 Haw. 62, 451 P.2d 257 (1969) (private room, cotenant's consent rejected).

103. *Matlock*'s intimation that the burden of proof on the prosecution on these issues need be only the preponderance of the evidence may have influenced the *Reynolds* court as well. *See* note 191 *infra*. *But see* People v. James, 19 Cal. 3d 99, 137 Cal. Rptr. 447, 561 P.2d 1135 (1977) (consent provable by preponderance; any contrary suggestion in *Reynolds* disapproved).

104. 63 Cal. App. 3d 249, 133 Cal. Rptr. 689 (1976), *cert. denied*, 45 U.S.L.W. 3802 (June 14, 1977).

105. *Id.* at 254, 133 Cal. Rptr. at 691. *See* People v. Chong Wing Louie, 149 Cal. App. 2d 167, 307 P.2d 929 (1957) (use of outer key obtained in earlier case).

sent.[106] The court also held that the defendant's expectation of privacy implicit in the building's controlled access meant nothing where police wished to "talk" with him, even if their conduct amounted to a trespass.[107] The obscure third party consent and its uncertain governing standards were relegated to an alternate ground as the court fashioned a rule not dependent on consent.[108]

Although these recent California decisions seem to show ambivalence concerning the strength of the apparent authority standard, perhaps they more clearly reflect the sense of caution used in the application of *Gorg* to borderline situations. There has not yet been any clear repudiation of the basic *Gorg* doctrine, either by the California courts or the United States Supreme Court.

Apparent Authority As An Essential Element

Assuming for a moment that the actual authority requirement, as found in virtually all other jurisdictions, represents a distinct federal constitutional standard, the California approach could be criticized as constitutionally infirm for not requiring proof rising to that standard.[109] The defect would be failure to require actual authority, not the use of the apparent authority rule itself. While California might at some time be forced to conform to the actual authority standard, its courts would presumably be free to require proof of apparent authority as well.[110]

The rule announced in *Gorg* has persisted as the test for third party consent to search in California. While the rule's flexibility has been abused, the state supreme court has steadily recurred to limitations derived from underlying standards of actual authority. The importance of a reasonable police belief as to the authority of the consent, recognized in *Gorg*, was perhaps epitomized in the case of *People v. Murillo*.[111] There an appellate court rejected a girlfriend's consent to the search of the defendant's locked attache case. As a co-occupant, she had validly invited the police into the apartment. She told them that the case

106. 63 Cal. App. 3d at 254, 133 Cal. Rptr. at 691. *Contra*, United States v. Carriger, 541 F.2d 545 (6th Cir. 1976).

107. 63 Cal. App. 3d at 255, 133 Cal. Rptr. at 692. His purported consent to the police entry was implicitly viewed as a ratification overcoming any defect in the building entry. It is perhaps surprising that a more substantial body of ratification theories has not developed as an adjunct to the agency aspects of third party consents.

108. *See also* People v. Eastmon, 61 Cal. App. 3d 646, 132 Cal. Rptr. 510 (1976) (reasonable belief of consent by third party as condition of probation; any taint held purged).

109. *See* Ker v. California, 374 U.S. 23 (1963) (federal standards applicable, but some flexibility in local rules permissible).

110. *See, e.g.*, Cooper v. California, 386 U.S. 58, 62 (1967).

111. 241 Cal. App. 2d 173, 50 Cal. Rptr. 290 (1966).

was Murillo's but didn't *mention* that she had a key to it.[112] Actual authority was shown, but the appellate court reversed for failure to satisfy the apparent authority requirement.[113] This isolated example of judicial zealousness[114] exemplifies *Gorg*'s focus on the reasonableness of police conduct. As such, the *Gorg* rule has led to an *additional* apparent authority requirement in jurisdictions other than California, and its focus on general reasonableness has provided an influence on courts still grappling with the basic *independent right to consent* standard.

Third Party Consent In Illinois

Actual Authority Requirements

In 1958, Illinois adopted the actual authority standard, recognizing consents by competent persons in joint control or custody of premises and effects.[115] The scope of valid third party consent searches was enhanced by Illinois' refusal to be bound by the traditionally strict approach to the question of voluntariness. Like California, Illinois embarked on a permissive approach to the issue, showing a deference to police testimony which reduced the role of voluntariness in the assessment of the legality of such searches,[116] thus leaving the actual authority requirement as the primary limitation on warrantless consent searches.

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112. *Id.* at 177, 50 Cal. Rptr. at 293.

113. *Id.*

114. More typical decisions resolving borderline cases in favor of apparent authority include People v. Superior Court, 3 Cal. App. 3d 648, 83 Cal. Rptr. 732 (1970) (consent of evicting landlady); People v. Howard, 166 Cal. App. 2d 638, 334 P.2d 105 (1958) (locked-out girl friend climbed in window to admit police), and People v. Herman, 163 Cal. App. 2d 821, 329 P.2d 989 (1958) (consent of professedly casual occupant alone in room "probably reasonable"). The apparent authority rule has recently been characterized as merely a "good faith mistake" adjunct to the actual authority doctrine. People v. Smith, 67 Cal. App. 3d 638, 136 Cal. Rptr. 764 (1977) (invalidating owner's consent to placement of beeper in rented airplane).

115. *See* text accompanying notes 17-20 *supra*.

116. *See* People v. Goolsby, 45 Ill. App. 3d 441, 359 N.E.2d 871 (1977) (valid consent by chronic schizophrenic); People v. Fleming, 36 Ill. App. 3d 612, 345 N.E.2d 10 (1976) (valid consent after police entered with guns drawn); People v. Gorsuch, 19 Ill. App. 3d 60, 310 N.E.2d 695 (1974) (valid consent by fourteen year old); People v. Harvey, 48 Ill. App. 2d 261, 199 N.E.2d 236 (1964) (reversing finding of involuntariness); People v. Speice, 23 Ill. 2d 40, 177 N.E.2d 233 (1961) (wife denied consenting). There have been two Illinois cases where involuntariness of a consent to a search was established on appeal. In People v. Haskell, 41 Ill. 2d 25, 241 N.E.2d 430 (1968), the Illinois Supreme Court reversed the trial court's finding of voluntariness where the police had testified that they told the consenter to go get a gun and further explained that it was necessary to turn it over to them. In People v. Cassell, 101 Ill. App. 2d 279, 243 N.E.2d 363 (1968), an appellate court held that a consent procured after an illegal arrest was coerced.

After routinely approving consents by various co-occupants of dwellings[117] and properly rejecting a hotel manager's consent,[118] Illinois courts began to show signs of increased sensitivity to the limitations of the actual authority standard. In *People v. Rodriquez*,[119] an appellate court reached out to reject a part-time occupant's consent to the search of the defendant's rented room, despite the fact that the consenter reasonably appeared to be defendant's wife. Similarly, the Illinois Supreme Court expressly rejected a strong apparent authority argument in *People v. Miller*,[120] holding that a reasonable mistake of fact as to the ownership of a car vitiated a search authorized by the apparent owner.[121]

The strictness of actual authority requirements for searches of the home was demonstrated in *People v. Weinstein*.[122] In that case, the father of a murder victim, who was the administrator of the estate, secured a probate order barring the accused wife from her home and authorized police searches on the strength of his key and right of entry. The trial judge rejected the father's consent, finding he lacked coequal rights in the premises, and the appellate court affirmed.[123]

However, Illinois did not interpret the actual authority standard as requiring coequal rights to consent to the search of personal property. Mere custody of or access to personal effects, without any sharing of use, was held sufficient to authorize

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117. People v. Walker, 34 Ill. 2d 23, 213 N.E.2d 552 (1966) (sister), People v. Voleta, 57 Ill. App. 2d 279, 206 N.E.2d 737 (1965) (brother), People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236 (1962) (defendant's tenant; common area).

118. People v. Bankhead, 27 Ill. 2d 18, 187 N.E.2d 705 (1963).

119. 79 Ill. App. 2d 26, 223 N.E.2d 414 (1967). The court considered the full trial record to reverse the result of the pretrial motion hearing, which was concededly correct on the facts presented.

120. 40 Ill. 2d 154, 238 N.E.2d 407 (1968). The court held that apparent authority was an inadequate basis because the defendant's constitutional right was "at stake." *Id.* at 157, 238 N.E.2d at 408-09.

121. *But cf.* Hill v. California, 401 U.S. 797 (1971) (reasonable mistake of fact in arresting wrong person does not vitiate incidental search); People v. Henderson, 33 Ill. 2d 225, 210 N.E.2d 483 (1965) (reasonable belief of *fact* of consent).

122. 105 Ill. App. 2d 1, 245 N.E.2d 788 (1968). Weinstein's conviction for murdering her husband had been previously overturned, 35 Ill. 2d 467, 220 N.E.2d 432 (1966), *rev'g* 66 Ill. App. 2d 78, 213 N.E.2d 115 (1966).

123. But when a wife, convicted of the attempted murder of her husband, challenged his consent to a search by arguing that marriage should not result in a loss of her fourth amendment rights, the Illinois Supreme Court termed her contention "entirely spurious," and thus strongly reaffirmed the general independent right to consent of any joint occupant. People v. Koshiol, 45 Ill. 2d 573, 262 N.E.2d 446 (1970), *cert. denied*, 401 U.S. 978 (1971). *But see* Note, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 800-01, 813 (1966); Comment, *The Use of Evidence Obtained During a Search and Seizure Consented to by the Defendant's Spouse*, 1964 U. ILL. L.F. 653, 658.

police intrusion leading to seizure.[124] The rationale for allowing seizure of goods on the basis of third party consent was never clearly articulated in Illinois cases, but could be supported by theories of plain view or general assumption of risk.[125] Nevertheless, the notion that a person could have a reasonable expectation of privacy in his own room, beyond the power of consent by a joint occupant of the dwelling, finally found expression in *People v. Nunn.*[126]

In *Nunn*, the Illinois Supreme Court rejected a mother's formal consent to the search of the defendant's locked bedroom, holding that the defendant's *exclusive* use of the room precluded third party consent to search.[127] The *Nunn* court expressly overruled the entire body of Illinois precedent insofar as it was inconsistent with its principles, an action that indicated a dramatic limitation on third party consent searches.[128] This recognition of a residual expectation of privacy in a shared dwelling seemed to establish a broad principle that could logically extend to protect a defendant's rights in exclusively used personal property as well as unlocked but clearly private rooms.

Despite the implications of *Nunn*, however, fourth amendment protection would not be extended by Illinois courts to places or possessions not guarded by a lock. As in earlier cases, mere access by a joint occupant of a dwelling proved sufficient to validate a third party consent search. The strongly personal nature of bedroom drawers and effects such as letters would not prove private enough to evoke the protection of the *Nunn* holding.[129] Moreover, the solicitude of *Nunn* boomeranged in *People v. Fleming*,[130] where a defendant was denied standing to contest the consent search of a co-defendant's separate locked bedroom in the house they shared, because the other's right of privacy was exclusive.

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124. *See, e.g.*, People v. Marino, 5 Ill. App. 3d 778, 284 N.E.2d 54 (1972) (possessions stored in former home).

125. The extent of the general plain view rule in Illinois may be discerned from People v. Ciochon, 23 Ill. App. 3d 363, 319 N.E.2d 332 (1974) (window peeping with binoculars by police not necessarily unreasonable). *See* People v. Wright, 41 Ill. 2d 170, 242 N.E.2d 180 (1968) (window peeping from public property held justified by probable cause).

126. 55 Ill. 2d 344, 304 N.E.2d 81 (1973), *cert. denied*, 416 U.S. 904 (1974), *aff'g* 7 Ill. App. 3d 60, 288 N.E.2d 88 (1972). The Illinois Supreme Court dissenters found the defendant's privacy rights irrelevant and the search reasonable, 55 Ill. 2d at 355, 304 N.E.2d at 87-88. *See In re* Salyer, 44 Ill. App. 3d 854, 358 N.E.2d 1333 (1977) (delinquency proceeding) (mother's consent to search of fifteen year old child's padlocked bedroom valid).

127. 55 Ill. 2d at 346, 304 N.E.2d at 83.

128. *Id.* at 349, 304 N.E.2d at 84.

129. *See, e.g.*, People v. Johnson, 32 Ill. App. 3d 36, 335 N.E.2d 144 (1975) (brother's consent); People v. Stacey, 58 Ill. 2d 83, 317 N.E.2d 24 (1974) (post conviction petition) (wife's consent to seizure of shirt).

130. 36 Ill. App. 3d 612, 345 N.E.2d 10 (1976).

Illinois Responses to United States v. Matlock

Although the final decision in *Matlock* did not decide the validity of either the actual authority standard involved or the additional apparent authority requirement,[131] the United States Supreme Court's incidental treatment of those issues had distinct effects on third party consent law in Illinois. The Court stated that its few prior cases at least supported the validity of a third party consent based on "common authority over or other sufficient relationship to the premises or effects sought to be inspected."[132] Subsequent Illinois decisions have consistently referred to this somewhat vague formulation of the actual authority standard.[133] This influence of *Matlock* has resulted in some undermining of the Illinois rule requiring *coequal* rights in the premises for a third party consent to search.

One recent appellate decision refused to find "other sufficient relationship" where the defendant's brother, a non-occupant, authorized a search of the family dwelling, despite the consenter's close ties, access and storage of belongings at the house.[134] However, in *People v. Baughman*,[135] another appellate panel upheld the consent search of a barn owned by the state but used by the tenant, on the theory that the state *could* have used the barn for storage. The state's agent was held to lack authority to consent to the search of the informal tenant's dwelling. The prevailing opinion distinguished the two searches by finding a lesser expectation of privacy in the barn.[136] Since the state did not have a clear coequal right to use and occupy the house or the barn, the decision may indicate a new sense of flexibility, fostered by the indefinite description of the actual authority standard in *Matlock*.[137]

On the other hand, the fact that the additional apparent authority element survived Supreme Court review has led one Illinois appellate district to adopt the two-prong test of authority. In *People v. Miller*,[138] that court announced the new test in the course of adhering to the traditional rule that incidental rights of access do not give a lessor the right to authorize a police search. The court held only that actual authority was lacking,

131. *See* note 99 and accompanying text *supra*.
132. 415 U.S. at 171.
133. *See, e.g.*, People v. Stacey, 58 Ill. 2d 83, 317 N.E.2d 24 (1974).
134. People v. Taylor, 31 Ill. App. 3d 576, 333 N.E.2d 41 (1975).
135. 47 Ill. App. 3d 209, 361 N.E.2d 1149 (1977).
136. *Id.* at 214, 361 N.E.2d at 1152.
137. *Id.* at 214-15, 361 N.E.2d at 1152-53 (Trapp, J., dissenting). Judge Trapp felt that this case did not fall within *Matlock*'s focus on mutual use as the basis for a defendant's assumption of risk. 415 U.S. at 171 n.7.
138. 19 Ill. App. 3d 161, 310 N.E.2d 808 (1974).

perhaps implying that the police reasonably believed the consent proper due to uncertainty about the lessor's rights.[139] However, in *People v. Taylor*[140] that court relied on police uncertainty to find a lack of apparent authority, buttressing its holding that a non-occupant family member could not consent to a dwelling search, and reaffirming its adoption of the two-prong test. The fourth appellate district has not yet been confronted with a case involving actual but not apparent authority. Such a case would test the vigor of that district's two-prong standard of third party consent.

These Illinois cases, despite recent indications of erosion of actual authority requirements and divergence of approach, still show that narrow limitations, respecting secondary but exclusive rights of privacy, may prevail over third party consent based on general joint occupancy or power of access. This approach is similar to that developed by the California courts under the apparent authority rule. While the inner protection of rooms and effects within a dwelling is not as great as that accorded the dwelling itself, yielding to a proper right of access as opposed to a coequal right of occupancy, that residual protection reflects the survival of some purely personal rights of privacy after general expansion of the scope of valid third party consent.

Federal Modifications of the Actual Authority Standard

After a general acceptance of the basic joint control standard, the development of federal third party consent law has not been notably clear or consistent. For the purpose of discussion, modern federal case law has been broken into three segments. First to be considered is the varied federal response to theories that serve to augment consents based only on limited authority. These gap-filling theories range from express assumption of risk and intentional plain view to conspiratorial and exculpatory powers of consent. Next the Seventh Circuit's experience with the application of broader theoretical approaches, embodied by tests of general reasonableness and actual plus apparent authority, will be examined. Finally, the collision of reasonableness-based theories with the more traditional warrant oriented scrutiny in a selected recent case will illustrate the unresolved philosophical conflict that leaves the law of third party consent in a state of continuing uncertainty.

Filling in the Gaps of Authority

The privacy limit of the inner sanctum and private effect,

139. 19 Ill. App. 3d at 170, 310 N.E.2d at 815.
140. 31 Ill. App. 3d 576, 333 N.E.2d 41 (1975).

gradually acknowledged in California and recently introduced in Illinois under differing rules, was first articulated by federal courts.[141] More recent federal court decisions have given only sporadic support to this secondary limitation on third party consent,[142] preferring to concoct an assortment of theories with which to circumvent the obstacles to valid search and seizure. This general tendency aggravates the inconsistencies that stem from the variety of distinguishable factual situations and complicates the task of orderly analysis of federal law in this area.

Perhaps the clearest synthesis of third party consent law may be found in an understanding of the limitations that a general *assumption of risk* doctrine imposes on an individual's fourth amendment expectations of security and privacy. For example, one assumes the risk that his own waiver of rights will lead to adverse evidence.[143] And crucial to modern third party consent doctrine is the risk that a joint occupant of premises or a sharer of personal property will exercise an independent right of consent to a police search or seizure.[144] These fundamental risks represent inroads on an individual's otherwise reasonable expectation of freedom from warrantless searches unjustified by the demands of exigent circumstances.

Since assumption of risk serves as a broad conceptual basis for the validity of third party consents, it may be a useful tool for evaluating the federal courts' response to claims of consent based on third party interests amounting to less than joint occupancy or use, the area in which the most turmoil persists. Further risks imposed by the federal courts fall into two general categories. The first to be considered involves seizure of personal property based on the consent of a third party who has only a limited right to possession and perhaps no right to the use of the goods. The other area of erosion and dispute involves consent to entry and search of premises by persons lacking coequal rights to occupancy and use.

The Risk of Casual Interest Consent Seizures

Two early federal cases rejected seizures based on third party consents by persons with joint rights in the premises. In *United States v. Blok*,[145] it was held that a government employee's su-

141. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (private desk).
142. *See, e.g.*, United States v. Brown, 300 F. Supp. 1285 (D.N.H. 1969) (suitcases).
143. *See, e.g.*, Leavitt v. Howard, 462 F.2d 992 (1st Cir. 1972). *But cf.* Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954) (doubting voluntariness where knowledge of damaging evidence).
144. *See* note 33 and accompanying text *infra*.
145. 188 F.2d 1019 (D.C. Cir. 1951).

perior could not authorize a police search of a desk exclusively used by the employee, despite the concession that the superior could have properly looked through the desk for official papers. *Blok* recognized that a mere right of access into another's private domain did not necessarily create a right to authorize a police search.[146] The court in *United States v. Holzhey*[147] ordered suppression of the contents of a locked cabinet stored in a jointly used garage, rejecting the cotenant's consent because the cabinet was exclusively controlled by the defendant. These cases suggest a general rule that exclusively used personal property lies beyond the effective reach of a third party consent despite some degree of access. Such a rule would be consistent with the line of Supreme Court decisions rejecting the consents of various lessors, whose access for limited purposes could not be expanded to include the right to permit searches.[148]

However, the proposition that a casual right of access for a limited purpose does not confer authority to consent to a search, as held in *Blok*, was repudiated by a divided Fourth Circuit panel in *United States v. Eldridge*.[149] In *Eldridge* a third party who had borrowed defendant's car for the day was found to have authority to consent to a search of the car's trunk because he had the keys and might have had occasion to open the trunk while using the car. The seizure itself was justified by the subsequent plain view of the gun that the police were seeking.[150] Thus the defendant was held to assume the risk that the borrower's incidental access would support a search fully exploiting that access.

The inadequacy of casual custody as authority for consent to the search of a locked container, as recognized in *Holzhey*, failed to protect a locked accordion case secreted in defendant's parents' attic in *United States v. Rees*.[151] Because the parents claimed never to have seen the case before, the district court held that they had the right to find what was inside by allowing police to force it open.[152] The Fourth Circuit upheld the search

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146. *Accord*, United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972) (wastebasket). *Contra*, Shaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972) (policeman's locker); People v. Tidwell, 133 Ill. App. 2d 1, 266 N.E.2d 787 (1971) (jail guard's locker).

147. 223 F.2d 823 (5th Cir. 1955).

148. *See* note 24 *supra*.

149. 302 F.2d 463 (4th Cir. 1962).

150. The majority in *Eldridge* found it significant that the police did not rummage through the trunk, although such action presumably would have been within the scope of the borrower's implied access.

151. 193 F. Supp. 849 (D. Md. 1961) (federal kidnapping charge).

152. A tag on the case bore the name and address of an unknown person, who was contacted *later*. The contents included a gun, which was admitted into evidence, and various drawings, which were excluded as "mere evidence."

in a related case, partly relying on the theory that the mysterious accordion case was *apparently* abandoned and stressing general reasonableness.[153] The *Rees* cases leaned toward an apparent authority rationale without expressly adopting it, adding the risk that seizure of exclusively personal property could be validated by uncertainty as to ownership on the part of a third party in custody.[154]

After extending such broad validity to third party consents, however, the Fourth Circuit appeared to take a more restrictive approach in *Reeves v. Warden*.[155] In *Reeves*, the court ordered suppression of a note seized from the defendant's bedroom dresser drawer after a consent search authorized by his mother. The trial court had suppressed clothes seized from the dresser but had not suppressed the note because of uncertainty as to whom it belonged.[156] The *Reeves* panel seemed to reject the mother's access-based consent, but the decision actually may have been grounded on the mere evidence rule,[157] which at this time limited seizures to contraband, instrumentalities and fruits of crime. In any event, despite some broad language from the Supreme Court in *Stoner v. California*,[158] many other contemporaneous federal decisions were beginning to find third party consent doctrine flexible enough to permit casual interest consents to the search and seizure of unshared personal property.

In *Maxwell v. Stephens*,[159] Justice (then Judge) Blackmun, writing for the majority of an Eighth Circuit panel, condoned a consent to the seizure of the defendant's coat by his mother, solely because she had proper access to it.[160] The police had come without a warrant for the express purpose of getting the coat as evidence against the arrested defendant. The lack of any demonstrated need to act quickly was brushed aside by the majority's apparent recognition of a third party right to consent to the seizure of another's personal property in a shared area.[161]

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153. Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965) (state murder conviction challenged).

154. *Cf.* Driskill v. United States, 281 F. 146 (9th Cir. 1922) (defendant denied owning trunk, joint user of garage invited removal by police).

155. 346 F.2d 915 (4th Cir. 1965).

156. This result was apparently due to acceptance of the co-occupant mother's access as proper, which vitiated defendant's standing to suppress the note, unless it was shown to belong to him.

157. This explanation would be consistent with the court's apparently erroneous citation of United States v. Rees, 193 F. Supp. 849 (D. Md. 1961). *See* note 152 *supra*.

158. *See* note 75 and accompanying text *supra*.

159. 348 F.2d 325 (8th Cir. 1965).

160. The dissenter had serious doubts as to the voluntariness of the consent and also would have required a warrant for the intentional seizure. *Id.* at 338-39.

161. *Id.* at 337-38. While the result could also be explained as an intentional plain view seizure, the court seemed to imply that a spon-

The Ninth Circuit took this assumption of risk approach a step further in *Marshall v. United States*.[162] Marshall had stored an unlocked briefcase with his landlady and instructed her not to give it to anyone. But the landlady had already been contacted by the F.B.I., and she opened the briefcase and summoned agents. Although she acted outside her limited authority, a divided panel upheld the consent on an express theory of assumption of risk. However, the Ninth Circuit sitting en banc soon overruled *Marshall* in the course of rejecting a common carrier's consent to the search of a sealed package.[163]

Despite occasional adherence to the rule that limited access for incidental purposes did not support a third party consent to police search and seizure, a significant trend toward disregarding the right of security in personal effects had begun in the federal courts. The basic *independent right to consent* standard, originally premised on *coequal* rights of joint custody or control, was becoming broadened and augmented by an indefinite *assumption of risk* doctrine. That doctrine essentially permitted warrantless and *intentional* plain view seizures where police presence was based on a lawful third party consent, even if actual authority to consent to the search and seizure of an item was clearly lacking. More recent federal cases have tended to preserve this result, enlarging the risk that exclusively personal effects may fall into the scope of a casual interest consent.[164]

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taneous delivery of the coat had occurred, despite a clear request (at the very least) for it. *Cf.* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (delivery of clothing after mere questions).

162. 352 F.2d 1013 (9th Cir. 1965), *cert. denied*, 382 U.S. 1010 (1966). A dissenter argued that the consent was invalid because the bailee had not initiated the contact with police, a distinction used to distinguish *Holzhey* in Sartain v. United States, 303 F.2d 859 (9th Cir. 1962). *See* Comment, *Third Party Consent Searches: An Alternate Analysis*, 41 U. CHI. L. REV. 121 (1973) (discussing this distinction). *See also* Nugent v. United States, 409 U.S. 1065 (White, Douglas & Brennan, JJ., dissenting from denial of certiorari) (upholding landlord's consent with respect to a stored trunk).

163. Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). Subsequent federal cases have reached generally contrary results on various theories. *E.g.*, United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975) (finding common law duty of carrier to inspect suspicious packages); United States v. Groner, 494 F.2d 501 (5th Cir. 1974) (no standing); United States v. Echols, 477 F.2d 371 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973) (carrier search for "identification purposes"); Wolf Low v. United States, 391 F.2d 61 (9th Cir. 1968) (private seizure). The narrow situation of a carrier checking damaged cartons, seeing pornography and calling the F.B.I. has led to a recent conflict of circuits. United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976), invalidated such a consent, focusing on the official seizure as unauthorized, not inadvertent and a prior restraint on first amendment rights. The Ninth Circuit squarely refused to follow *Kelly* in United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976) (en banc hearing). For an attempt at reconciliation of these and other similar cases, see United States v. Haes, 551 F.2d 767 (8th Cir. 1977).

164. *See, e.g.*, United States v. Buckles, 495 F.2d 1377 (8th Cir. 1974)

The Risk of Semi-Authorized Consent Entry

As the federal courts began a general relaxation of strictures on consent-based seizures, some erosion of the principles governing third party consent to the entry and search of private premises also appeared. One case went so far as to validate consent to the entry of a dwelling by an eight year old girl.[165] The fact that the only clear line of Supreme Court precedent relating to third party consent had consistently rejected searches based on the authority of a landlord with only incidental rights of access[166] did not prevent some federal courts from finding ways to uphold such searches.

In *United States v. Cudia*,[167] the Seventh Circuit upheld the consent of a building lessor who asserted a right of reentry because the rent was a month overdue. That result can possibly be distinguished from the mass of contrary controlling precedent on the unarticulated ground that the consenter, a convicted co-defendant, had a conspirator's right of entry strong enough to authorize breaking the lock to the storage building.[168] The panel, however, simply held that the lessor had equal rights in the premises without clear delineation of the risks that a lessee of a locked building could be held to assume.[169]

This indefinite approach was supplemented by a novel theory of the right to consent in *United States v. Botsch*.[170] Botsch had rented a small shack for an office and given the lessor a

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(coats); United States v. Hayles, 492 F.2d 125 (5th Cir. 1974) (car); United States v. Ellis, 461 F.2d 962 (2d Cir. 1972) (clothing); United States v. White, 444 F.2d 724 (10th Cir. 1971) (zipper bag); Clarke v. Neil, 427 F.2d 1322 (6th Cir. 1970) (coat at dry cleaner), *cert. denied*, 401 U.S. 941 (1971), *criticized in* Note, *Was the Right of Privacy Taken to the Cleaners?*, 73 W. VA. L. REV. 364 (1971). *See also* note 194 *infra*. *But see* United States v. Wilson, 536 F.2d 883 (9th Cir. 1976) (consent search of another's suitcase invalid, harmless error); United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974) (same). The Second Circuit once raised but avoided this "intriguing question": whether consent to a room search "willy-nilly" validates a search of all its contents, United States v. Pravato, 505 F.2d 703 (2d Cir. 1974).

165. Davis v. United States, 327 F.2d 301 (9th Cir. 1964). The little girl also gave valid permission for an officer to use the bathroom, where more evidence was discovered. In a curious shift of proof burden, the court stated that the defendant had failed to show that the eight year old did not customarily greet and accommodate visitors.

166. *See* note 24 *supra*.

167. 346 F.2d 227 (7th Cir.), *cert. denied*, 382 U.S. 955 (1965).

168. *See* United States v. Gunter, 546 F.2d 861 (10th Cir. 1976), *cert. denied sub nom.* Haynes v. United States, 45 U.S.L.W. 3649 (Mar. 31, 1977) (unindicted conspirator's consent, no key); United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945) (Learned Hand, J.) (dicta suggesting wife's consent valid as that of conspirator). *But see* United States v. Poindexter, 325 F. Supp. 786 (S.D.N.Y. 1971) (rejecting cohort's consent where no key was involved).

169. *Cf.* Weaver v. Lane, 382 F.2d 251 (7th Cir.), *cert. denied*, 392 U.S. 930 (1968) (owner's consent "ousts" right of informal tenant).

170. 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967).

key so that delivered packages could be put inside. The lessor was informed by police of a mail fraud scheme and consented to a search of the shack, providing the key. A divided Second Circuit panel validated the consent due to the incidental right of access and the lessor's "exculpatory interest" in permitting the search.[171] Judge Smith bemoaned this rationale, perceiving a serious inroad made into fourth amendment protection.[172] *Botsch* furnished a ground for validating consent searches based on insufficient actual authority, an independent "exculpatory" power that extended to redeem unauthorized cooperation with uninvited police.[173] Failure to secure an available warrant, a factor militating against the validity of a questionable consent, receded into unimportance in the consideration of the "overall" reasonableness of the search.

Recent Theorizing in the Seventh Circuit

The Reasonableness Test

In 1967, the Seventh Circuit suggested a broad reformulation of third party consent theory that tended to harmonize the inconsistent federal approaches to the conceptual problems raised by consent seizures of another's property. Rather than focusing on the nature of the agency connecting the consenter, defendant and seized property, the court in *United States v. Airdo*[174] found the most relevance in "the reasonableness, under all the circumstances, of a search consented to by a person having *immediate* control and authority over the premises or property searched."[175] Since a conceptually fatal lack of coequal authority was thereby relegated to the lesser status of a factor affecting overall reasonableness, such a test allowed greater flexibility in approving

171. The landlord's cooperation would support his role as an unwitting accomplice. This exculpatory interest, unavailing as it might be, is based on two subjective factors: the actual or apparent suspicion of police and the desire of third parties to cooperate in technical violation of another's property rights.

172. 364 F.2d at 550-51 (Smith, J., dissenting). He saw the majority's reasoning as applicable to any situation involving casual access and cooperative consent where refusal might broaden police suspicions. Despite the majority's disclaimers, Judge Smith saw no clear limit on the application of *Botsch* to otherwise inadequate third party consents.

173. *See* United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972) (cartons in basement); United States v. Cataldo, 433 F.2d 38, 40 n.2 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971); United States v. Mazzella, 295 F. Supp. 1033 (S.D.N.Y. 1969) (rented truck); United States v. Thoresen, 281 F. Supp. 598 (N.D. Cal. 1967) (boxes in garage). *But see* United States v. Heisman, 503 F.2d 1284 (8th Cir. 1974) (exculpatory consent to office search rejected); United States v. Poindexter, 325 F. Supp. 786 (S.D.N.Y. 1971) (third party rented apartment but had no key; exculpatory consent argument rejected).

174. 380 F.2d 103 (7th Cir.), *cert. denied*, 389 U.S. 913 (1967).

175. *Id.* at 106-07 (emphasis added).

third party consents, although it would also provide a basis for reliance on vitiating factors that had not been directly implicated by the independent right and agency standards of actual authority.[176]

A divided panel found one such vitiating factor to be the implied scope of consent given, where a wife's consent to a search for narcotics led to examination and seizure of defendant's account books.[177] Judge Swygert called for a guarded approach to third party consents because resulting searches were not governed by probable cause or exigency requirements.[178] Thus, exemption from the fundamental terms of the fourth amendment should lead to strict scrutiny of the reasonableness of such searches.

When the Seventh Circuit routinely ruled that the wife of an arrested defendant could consent to the search of their dwelling in *United States v. Stone*,[179] Judge Swygert dissented from the panel decision, making a comprehensive analysis of the factors relevant to the reasonableness of a third party consent.[180] He saw a basic inconsistency in the view that a person assumed the risk of a co-occupant's consent, but could invalidate such a consent if present and objecting.[181] Judge Swygert stated that even under the risk approach, the reason for a defendant's absence became an important factor in determining reasonableness. If arrested, the defendant would be reasonably available for

176. Hostility to the defendant, motivating an *independent right* consent, has occasionally troubled courts. *See, e.g.*, McCravy v. Moore, 476 F.2d 281 (6th Cir. 1973) (reversing district court's rejection); State v. McCarthy, 20 Ohio App. 2d 275, 253 N.E.2d 789 (1969) (estranged wife); Kelly v. State, 184 Tenn. 143, 197 S.W.2d 545 (1946) (estranged wife's consent rejected). But the attitude of the consenter is irrelevant to the question of authority to consent, *see* United States v. Lawless, 465 F.2d 422 (4th Cir. 1972); Commonwealth v. Martin, 358 Mass. 282, 264 N.E.2d 366 (1970) (authority does not vary with warmth of relations).

177. United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971).

178. *Id.* at 129 n.1. Justice (then Judge) Stevens dissented on the ground that the district court's findings were not clearly erroneous.

179. 471 F.2d 170 (7th Cir. 1972).

180. *Id.* at 174-78.

181. *See* note 79 and accompanying text *supra*. This minor limitation on consent searches was accepted by the Ninth Circuit in Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1968) (civil rights action), the only federal holding on point. *See also* Carlton v. United States, 391 F.2d 684, 686 n.4 (8th Cir. 1968) (dictum). *Cf.* United States v. Poole, 307 F. Supp. 1185 (E.D. La. 1969) (invalidating search where consent not sought). State courts have generally recognized the limitation. *See* Lawton v. State, 320 So. 2d 463 (Fla. App. 1975); Commonwealth v. Platou, 455 Pa. 258, 312 A.2d 29 (1973); Dorsey v. State, 2 Md. App. 40, 232 A.2d 900 (1967) (objections valid). *Contra*, State v. Clemons, 552 P.2d 1208 (Ariz. App. 1976) (objection ineffective). Judge Swygert thought that this right to countermand an independent right of consent revealed a "fatal flaw" in the assumption of risk approach. If the right were truly independent, it should prevail. But the general risk approach is probably flexible enough to accommodate the position that a person assumes the risk of joint occupants consenting in his absence.

solicitation of his own consent; while if the defendant were at large, there would be a more convincing case for a third party consent. However, situations involving a defendant present and objecting to a third party consent search can be avoided by police[182] and no court has found an arrested defendant's availability particularly relevant. On the other hand, no court has answered Judge Swygert's reasoning.

The court in *United States v. Robinson*[183] approved a consent search of boxes in a shared closet. The defendant was still at large, but Judge Swygert once again dissented, since the boxes were not jointly used and the defendant had not disappeared until after the first search.[184] The majority's rationale vaguely intermingled apparent authority and assumption of risk rationales, stating that the defendant "impliedly disavowed his expectation of privacy by disappearing. . . ."[185] The result in *Robinson* clearly shows that the reasonableness test can be used to extend assumption of risk doctrine to validate third party consents of questionable authority. Nevertheless, the *Robinson* decision also implied the relevance of apparent authority to the reasonableness of a consent search.

The Two-Prong Test

In *United States v. Matlock*,[186] the Seventh Circuit panel approved the district court's requirement that both apparent and actual authority be proved, over the prosecution's contention that apparent authority was enough.[187] The court of appeals stated that Judge Doyle's formulation of the two-prong test correctly reflected the principles governing third party consent to search, though previously the test "had never been clearly articulated."[188] While the general reasonableness test was not disavowed, apparent authority seemed to have emerged as the major criterion of reasonableness beyond the basic actual authority standard. On review, the Supreme Court reversed, but did not reject the two-prong test.[189]

Matlock brought the question of a co-occupant's consent to the search of a dwelling before the Supreme Court for the first time since *Amos*, over fifty years earlier. The Court noted that the parties below had accepted the underlying principle em-

182. Query the result if loss of opportunity to object resulted from an illegal arrest.
183. 479 F.2d 300 (7th Cir. 1973).
184. *Id.* at 303-08.
185. *Id.* at 302.
186. 476 F.2d 1086 (7th Cir. 1973), *rev'd*, 415 U.S. 164 (1974).
187. 476 F.2d at 1086.
188. *Id.* at 1087.
189. *See* note 99 and accompanying text *supra*.

bodied in the independent right to consent standard, which had become the rule in state and lower federal courts, and gave a short formulation of that standard.[190] The Court did not directly address the authority issue, but did indicate that the burden of proof on the prosecution to establish the authority for a third party consent was a minimal preponderance of the evidence.[191] Thus one effect of *Matlock* was to validate a controverted consent on the strength of police testimony that would suffice even if not clear and convincing.[192] This new weakening of limitations on third party consents, coupled with the refusal to reject the claim that apparent authority alone was enough, suggests that the sympathy of the Supreme Court rests with a more flexible approach.

The Seventh Circuit has persisted in applying the two-prong test to third party consents. But its appellate panels have demonstrated a degree of flexibility with respect to each prong. Where apparent authority was established by consents of a defendant's former cotenant and his landlady, but actual authority seemed to be lacking, the panel decision seized on the defendant's denial that he lived there to hold that the right of consent "reverted" to the landlady.[193] Where actual authority was established by a landlady's right of access to a henhouse used for storage, but apparent authority was questionable due to police failure to ascertain her proprietary rights, another panel decision relied on the fact that the henhouse was closer to the consenter's house than the defendant's adjacent dwelling to uphold the search.[194] This result seems justifiable only under *Matlock*'s

190. 415 U.S. at 170 & n.7. A looser formulation appeared in United States v. Gradowski, 502 F.2d 563 (2d Cir. 1974) (per curiam), in which the court stated that, "consent to a search by one with access to the area searched, and either common authority over it, a substantial interest in it or permisssion to exercise that access, express or implied, alone validates the search." *Id.* at 564.

191. 415 U.S. at 177-78 & n.14. The Seventh Circuit had interpreted "greater weight" to mean "a reasonable certainty," and stated that such a standard was not subject to "abstract criticism." 476 F.2d at 1086.

192. Even before *Matlock*, some federal courts had apparently taken this approach. *See, e.g.*, White v. United States, 444 F.2d 724 (10th Cir. 1971) (consent by arrested girl friend, eight months pregnant, to search of defendant's zipper bag). *But cf.* United States v. Abbott, 546 F.2d 883 (10th Cir. 1977) (requiring clear and convincing evidence of *fact* of consent).

193. Hayes v. Cady, 500 F.2d 1212 (7th Cir. 1974) (habeas corpus petition).

194. United States v. Cook, 530 F.2d 145 (7th Cir.), *cert. denied*, 426 U.S. 909 (1976). The court justified the intentional plain view seizure, relying on United States v. Piet, 498 F.2d 178 (7th Cir. 1974) (warehouseman's consent to inspection of labels on stored boxes); Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974) (seizure of goods left by trespasser); and United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974) (sister allowed police to use phone in defendant's bedroom; inadvertent plain view). *Cf.* Commonwealth v. Latshaw, 363 A.2d 1246 (Pa. 1976) (owner's consent to search of barn used by tenants). Noted as holding

relaxation of proof burden, and casts some doubts on the significance of the Seventh Circuit's additional apparent authority requirement. A subsequent decision has found apparent authority lacking in the consent of a person known by police to be merely a casual occupant. That holding, however, was only cumulative since the state likewise failed to establish actual authority.[195]

The Seventh Circuit's continued use of the two-prong test indicates that the *reasonableness of police conduct* approach of the apparent authority rule may be easily combined with the *independent right to consent* theory of the actual authority rule. Ideally, each element acts as a reasonable limit on the indefinite assumption of risk doctrine that has given vitality to third party consents. Requiring apparent authority tends to assure a responsible police assessment of a consenter's rights, perhaps avoiding the risk of unjustifiably hasty action. Actual authority standards help to define the reasonable extent of apparent authority, and the actual authority requirement guards against the risk of third party consents breaching reasonable expectations of privacy and security. Although the two-prong test may represent an optimal approach to the policies, interests, and constitutional rights involved in a third party consent, the true measure of its vitality must be found in its application. The application of the two-prong test, like other approaches to the problem of third party consent, reflects the tension between society's demand for reliable evidence in criminal trials and the fundamental constitutional right enshrined in the fourth amendment.

United States v. Diggs: A Clash of Theories

The problem of a suspicious private bailee consenting to the search of a locked box after calling the F.B.I. recently baffled the Third Circuit in *United States v. Diggs*.[196] The district court

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to the contrary in *Cook* was United States v. Heisman, 503 F.2d 1284 (8th Cir. 1974) (seizure of box in defendant's doorless office invalidated; cotenant not joint user of office space). More clearly contrary is Niro v. United States, 388 F.2d 535 (1st Cir. 1968) (divided warehouse). The *Cook* court's acceptance of an intentional plain view seizure based on third party consent may be contrasted with the Seventh Circuit's application of the inadvertency rule to plain view during a search incident to arrest, United States v. Griffith, 537 F.2d 900 (7th Cir. 1976). The clearly intentional plain view seizure in United States v. Matlock, 415 U.S. 164 (1974) (police stated that they were looking for the money and guns), was not in issue and thus passed over without any comment beyond Justice Douglas' insistent dissent that a warrant should have been required under the circumstances.

195. United States v. Harris, 534 F.2d 95 (7th Cir. 1976).

196. 544 F.2d 116 (3d Cir. 1976) (en banc), *vacating* 18 Cr. L. Rptr. 2316 (Jan. 14, 1976) (3d Cir. 1975), *aff'g* 396 F. Supp. 610 (M.D. Pa. 1975).

had ordered the contents suppressed for lack of authority to consent, plain view being inapplicable.[197] However, on rehearing en banc, the Third Circuit remanded for further findings as the court split four ways.[198] A plurality opinion of four judges held that either the warrantless seizure was reasonable and based on probable cause, or the bailee's exculpatory interest gave him the right to consent to the breaking of the lock.[199] One judge concurred, finding the circumstances unique and unsuited to application of the exclusionary rule.[200] The decisive swing vote dictated the result of requiring more findings to see if a proper inventory search could be shown.[201] Judge Van Dusen, speaking for the four dissenters, insisted that a warrant should have been sought and exposed the precedential and conceptual weakness of "exculpatory interest" consents.[202] He criticized the use of a general reasonableness standard without reference to the warrant requirement, stating that "[u]nder such an unconfined analysis, fourth amendment protection in this area would approach the evaporation point."[203]

Diggs clearly illustrates a basic conflict in principles that has long muddled the law of third party consent to search and seizure. Essentially the lingering question has been whether the reasonableness clause or the warrant clause should dominate fourth amendment inquiry.[204] *Diggs* narrowly inclined toward reasonableness. The plurality relied directly on reasonableness, supporting their position with recognition of an exculpatory right to consent. The exculpatory interest theory itself represents a form of pseudo-authority that serves to validate a consent lacking sufficient actual authority in the name of reasonableness.[205]

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197. 396 F. Supp. 610 (M.D. Pa. 1975).
198. 544 F.2d at 123.
199. *Id.* at 119-22.
200. *Id.* at 123-24.
201. *Id.* at 124-27.
202. *Id.* at 132-33 & n.24. *Botsch* had relied on Marshall v. United States, 352 F.2d 1013 (9th Cir. 1965), *overruled in* Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (en banc), and United States v. Rabinowitz, 339 U.S. 56 (1950), *limited in* Chimel v. California, 395 U.S. 752 (1969). *Botsch* had distinguished Chapman v. United States, 365 U.S. 610 (1961), because the consenter had a key, unlike the situation presented in *Diggs*. The exculpatory interest at stake is only that of consenting *promptly* to a warrantless search, rather than consenting and then waiting a few hours for a warrant to be obtained.
203. *Quoting* United States v. United States Dist. Court, 407 U.S. 297, 315 n.16 (1972) (wiretap case).
204. The fourth amendment states:
> 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.

205. *See* note 171 and accompanying text *supra*.

The plurality's citation of *Stone v. Powell*[206] serves as a forcible reminder that the current Supreme Court views the fourth amendment exclusionary rule as primarily based on the deterrence of police misconduct, thus seeming to endorse the focus on reasonableness rather than technical warrant requirements.[207] Another judge in *Diggs* found similar significance in the Supreme Court's further relaxation of standards governing warrantless automobile searches and therefore excused the unjustified failure to obtain a warrant, reasoning that a bailee in bare possession could pass that limited interest to police.[208] He stated that the opening of the box was valid if it be found that the intent was to inventory and not search the contents.[209]

The dissent in *Diggs* found the lack of a warrant fatal to the search. They noted a number of factors which weighed against upholding the warrantless search and seizure of the locked box. First, the strict actual authority required for valid consent to the search was lacking. Second, a plain view augmentation would be neither inadvertent nor even applicable to the contents of the box. Finally, the police action could not be justified by any exigencies.[210] To uphold the search would be to cast doubt on any definite limitation on third party consents, and to rely simply on a vague reasonableness standard to protect the constitutionally mandated security of the home and personal possessions. Since *Diggs* clearly poses the issue that splits the foundation of third party consent law, it could ultimately be an apt vehicle for Supreme Court resolution in this expanding area of divergent standards and inconsistent results.[211]

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206. 428 U.S. 465 (1976) (terminating collateral review of fourth amendment claims).

207. *Id.*

208. Under an inventory theory, the agents could be said to have opened the box in order to catalog the contents, protecting the owner against possible pilferage and protecting themselves against a possible claim of pilferage by the owner. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search of car); People v. Clark, 32 Ill. App. 3d 898, 336 N.E.2d 892 (1975). However, these fanciful considerations add nothing to the validity of the original seizure, which Judge Gibbons justified by relying on a narrow version of the exculpatory interest theory. 544 F.2d at 125.

209. The dissenters noted that there was nothing to suggest that the agents intended anything but an investigative search. 544 F.2d at 133.

210. The parties had stipulated that there was no reason that a warrant could not have been obtained.

211. A case that may shed some light on this issue is United States v. Chadwick, 532 F.2d 773 (1st Cir. 1976), *aff'd*, 45 U.S.L.W. 4797 (June 21, 1977) (search incident to arrest of a double locked footlocker in open car trunk invalid). Chief Justice Burger's majority opinion in the Supreme Court rejected the government's argument that general reasonableness standards should govern searches that did not intrude on the home, office or private communications. *See also* 45 U.S.L.W. 3713 (May 3, 1977) (summary of argument).

CONCLUSION

Early third party consent law focused on the actual authority required to *waive* another's constitutional right of privacy, requiring an express authorization by the defendant and clear voluntariness. The rise of the independent right to consent standard extended validity to consents of persons in joint control or custody of dwellings and personal effects, displacing the strict waiver standard. Scrutiny of the voluntariness of a consent gradually dwindled to relative insignificance.[212] But the newer actual authority rule still fell short of validating many arguably reasonable searches on what could be described as technical grounds.

The now prevailing view that the primary function of the fourth amendment exclusionary rule is to deter police misconduct was the basis for Justice Traynor's formulation of California's apparent authority doctrine. That doctrine represents a straightforward acceptance of reasonableness rather than exigency as the basic consideration in evaluating third party consent searches. But the apparent authority rule was not carte blanche for the police, as the California courts demonstrated by repeated recurrence to underlying standards of actual authority to determine *objective* reasonableness.

Thus, despite the minimal demands of the apparent authority rule, California courts have given substance to some limitations on third party consent searches. California recognized the validity of an objection interposed between consent and search, and other jurisdictions have generally agreed.[213] However, since no court has held that the police should request consent from an available arrested defendant,[214] the principle stands as little more than a somewhat anomalous nicety. California rejected a common carrier's consent to the search and seizure of bailed goods, and denied a bank's right to surrender customer records, but both approaches remain contrary to subsequent federal decisions rendered under standards theoretically more demanding.

Perhaps the most important California limitation on third party consents is that where the police know that closed containers do not belong to a person giving consent to search, apparent

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212. One remaining rule of voluntariness is that a claim of consent will not salvage a search executed with an invalid warrant, Bumper v. North Carolina, 391 U.S. 543 (1968).

213. *See* note 181 *supra*.

214. The availability of a person whose rights are circumvented by a third party consent search, even if not wholly irrelevant to the exercise of an independent right of consent, remains a factor submerged in the totality of circumstances of a given case. This situation was criticized in 39 U. CIN. L. REV. 807, 814 (1970).

authority becomes inapplicable. If there is no other compelling justification for immediate action, any claim of third party consent will fail as insufficiently authorized. Illinois has belatedly recognized a similar rule respecting exclusive rights of privacy, but the federal courts have extensively undermined such a rule with a mixture of plain view, assumption of risk, exculpatory interest and general reasonableness theories.

The unsettled state of the federal law of third party consents, dramatized in *Diggs*, is due in some measure to the general lack of Supreme Court resolution and guidance on issues going to the core of fourth amendment theory. *Stoner v. California* was the last in a series of rebuffs to landlord consents. Erosion of its principles has gone largely unchecked.[215] *Frazier v. Cupp* lent credence to the assumption of risk approach without analyzing its implications.[216] *Coolidge v. New Hampshire* embraced a broader assumption of risk approach by holding that no seizure occurred when a wife produced and surrendered her husband's personal effects upon police inquiry.[217] Finally, *United States v. Matlock* appeared to tolerate a two-prong test of apparent and actual authority, while minimizing the burden of satisfying those standards and refusing to resolve even the conflicts of approach that were within the reach of the Court.

The Supreme Court has never clearly decided which standards should govern the law of third party consents to search and seizure. While the great variety of possible factual situations complicates the formulation of definite limitations, the sheer volume of unsettled law in this area provides the basis for full consideration of the alternatives and cries out for resolution as well. A fundamental question as to the importance of a warrant, where the actual authority of a third party consenter falls short of defeating a defendant's reasonable expectations of privacy and freedom from warrantless seizure, has been squarely posed by the split decision of the Third Circuit Court of Appeals in *Diggs*. An answer by the Supreme Court could mean a long step toward harmonizing the disordered federal law of third party consent.

The California apparent authority doctrine, like the Illinois actual authority approach, has coherently recognized a core of privacy in private rooms and personal effects. California's conceptual focus on reasonableness may ultimately point to a contrary conclusion, as the general trend in federal cases and the appellate result in *Diggs* suggest. Under a general reasonable-

215. *See* notes 168 & 173 *supra*.
216. *See* note 33 and accompanying text *supra*.
217. *See* note 37 *supra*. *See also* 79 HARV. L. REV. 1513 (1966) (commenting on *Coolidge* in the state courts).

ness approach, effective fourth amendment protection against casual and unauthorized third party consents may well, to use Judge Van Dusen's term, evaporate.

The triumph of a general reasonableness approach over a stricter warrant oriented scrutiny, in conjunction with focus on police misconduct rather than actual rights of privacy, would imply that the minimum constitutional requirements are satisfied by a simple standard of apparent authority less demanding than that developed in California. Such a standard could incorporate both standing requirements and flexibility of seizure that California has disdained, and magnify the risks to constitutional privacy created by third party consent law even further than most courts have been willing to attempt. The law presently is centered on assumption of the risk of consent to search by a person in joint control of premises or effects, but has been riddled with inconsistencies and uncertainty. The third party consent exception to the fourth amendment warrant requirement does not seem true to the fundamental maxim that such exceptions are to be specifically established, well-defined and jealously drawn.

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