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CONSENT AS A BAR TO FOURTH AMENDMENT SCOPE—A CRITIQUE OF A COMMON THEORY

MARTIN R. GARDNER*

INTRODUCTION

A leading commentator recently estimated that in the past twenty years "lawyers and judges have spilled more words over the Fourth Amendment than all of the rest of the Bill of Rights taken together."¹ This outpouring of attention to the law of searches and seizures can be attributed to the application of the exclusionary rule to the states,² which in turn necessitated a renewed attempt, "inescapably judgmental" in its nature, to give "concrete and contemporary meaning to [a] . . . brief, vague, general, unilluminating [fourth amendment] text"³ aimed at protecting the people from "unreasonable searches and seizures" by governmental officials.⁴ Given the amendment's open texture as well as the often passionate clashes of civil liberties and law enforcement values raised by many of its cases, it is not surprising that courts and commentators have encountered "inherent difficulties in developing a sound body of Fourth Amendment jurisprudence."⁵

Doctrinal disarray under the fourth amendment is vividly evidenced in the area of consent searches. While it is generally, but not always, agreed that voluntary consent by criminal suspects, and under certain conditions by third parties, to informational gathering intrusions by the government eliminates the necessity of supporting the intrusion with probable cause or a search warrant,⁶ it is less

clear why consent has this effect. As one scholar notes, "[t]he theory underlying the consent-search . . . is unclear."⁷ Some theorists take consent cases as instances of justified or excused warrantless governmental intrusions which nevertheless remain subject to the fourth amendment's standard of reasonableness.⁸ On this view, consent cases are viewed as permissible fourth amendment searches. More commonly, however, consent situations are seen as inherently reasonable non-searches, alto-

ment. *See, e.g.,* *Graves v. Beto*, 424 F.2d 524 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970), where the court held inadmissible for lack of a warrant a sample of defendant's blood extraction of which he had voluntarily consented to provide in response to a police request. In making their request, the police had misrepresented their purpose in seeking the sample, leading defendant to believe it was sought to determine alcoholic content while in fact it was sought to implicate defendant in a rape.

The vast majority of cases, however, hold the warrant requirement inapposite in consent contexts. *See, e.g.,* *United States v. Matlock*, 415 U.S. 164 (1974); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

⁷ *Amsterdam, supra* note 3, at 358. In the area of third-party consent "the United States Supreme Court has had remarkably little to say on the subject. In the relatively few third-party consent cases which have reached the Court, the theoretical underpinnings of such consent have not been the subject of close or detailed analysis." 2 W. LAFAVE, *supra* note 1, at 692.

⁸ Professor Saltzburg finds the basis for such a view in the majority opinion in *Schneekloth v. Bustamonte*, 412 U.S. 218:

[T]here remains a very straight-forward, powerful argument in support of the majority's result. That argument can be summarized as follows: The Fourth Amendment protects against unreasonable searches; prior decisions indicate that where the government wants to use power to force a search and seizure, the warrant clause is the basic definition of reasonableness; but where the government, rather than using coercive power to force and seize, asks people for their permission to conduct a search, the warrant clause is inapplicable; and, where the warrant clause is inapplicable, the basic test is reasonableness under the circumstances.

S. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 281 (1980). Similarly, Professor Yackle states: "[S]ome authorities view consent as merely another exception to the warrant requirement." Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 355 n.149 (1978).

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¹ W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* v (1978).

² *See Mapp v. Ohio*, 367 U.S. 643 (1961).

³ *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353-54 (1974).

⁴ The full text of the fourth amendment reads:

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

U.S. CONST. amend. IV.

⁵ 1 W. LAFAVE, *supra* note 1.

⁶ Not all cases exempt situations of voluntary consent to governmental intrusions from the warrant require-

gether removed from fourth amendment purview.⁹

Strictly speaking . . . [the categories of voluntarily inviting the state's entry or of severing all interest in the thing taken] are not 'exceptions' to the warrant rule. They are not allowable breaches of security, justified by some recognized form of exigency. These events are not breaches at all; the state does not invade secure places by consensual entry.¹⁰

These different conceptions of the role of consent searches in fourth amendment jurisprudence can be accounted for in large measure by the difficulty in defining the proper relationship of consent doctrine to the "expectation of privacy" rubric which has emerged as the test for determining the scope of the fourth amendment. Unlike most other exceptions to the warrant rule,¹¹ consent situations apparently manifest the absence of expectations of privacy and thus arguably remove the cases from fourth amendment purview altogether. This consequence, while generally unproblematical, can result in the restriction of sound doctrinal development.

This article examines and criticizes the prevalent theory of consent searches as invariably outside the scope of the fourth amendment. It will illustrate that the theory inadequately governs certain types of cases which evidence unreasonable governmental conduct notwithstanding the voluntary consent of the person searched and the absence of expectations of privacy. Clarifying the appropriate fourth amendment role of consent is important for its own theoretical sake and because consent is frequently used to support government intrusion into the private lives of citizens.¹²

GENERAL FOURTH AMENDMENT DOCTRINE

The fourth amendment, made applicable to the states through the due process clause of the fourteenth amendment,¹³ has proven notoriously difficult to interpret. Twenty years ago Justice Frankfurter stated, "The course of true law pertaining to searches and seizures . . . has not . . . run smooth."¹⁴ The present road is not without its doctrinal

bumps.¹⁵ The lack of clarity and consistency in fourth amendment decisions largely results from a judicial failure to articulate the amendment's underlying principles.¹⁶ Particularly important is the uncertainty about whether the proscription against unreasonable searches and seizures must be viewed from the perspective of individual citizens, with emphasis on vindicating the personal rights of the parties in particular cases, or whether the thrust of the amendment is more appropriately directed toward general regulation of government in fourth amendment contexts.¹⁷ The former "atomistic" view¹⁸ of the amendment focuses on the interests of those searched with little regard for the perspective of the searcher¹⁹ while the latter "regulatory" view²⁰ pays particular attention to the state of mind of the searcher with less attention to the concerns of those searched.²¹ While these two views may be complementary and need not be mutually exclusive,²² the recent judicial trend appears to be in the direction of emphasizing the atomistic and minimizing the regulatory view²³ despite the fact that the primary remedy for fourth amendment violation, exclusion of the fruits of illegal searches and seizures from admission into evidence against those whose rights have been violated,²⁴ is largely premised on a theory of regulating future governmental behavior.²⁵ The emphasis on the atomistic

¹⁵ For example, in agreeing with Professor Amsterdam that *Katz v. United States*, 389 U.S. 347 (1967), marks a "watershed of fourth amendment jurisprudence," Professor LaFare suggests that "it can hardly be said that the Court produced clarity where theretofore there had been uncertainty. If anything, the exact opposite has occurred." 1 W. LAFARE, *supra* note 1, at 228.

¹⁶ See Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529 (1978).

¹⁷ Others have also focused on this uncertainty in discussing consent searches. See generally *id.*

¹⁸ See Amsterdam, *supra* note 3, at 367.

¹⁹ Bacigal, *supra* note 16, at 530.

²⁰ Amsterdam, *supra* note 3, at 367.

²¹ Bacigal, *supra* note 16, at 530.

²² See generally *id.*

²³ *Id.* at 530-31. See also notes 29-59 & accompanying text *infra*.

²⁴ See generally Y. KAMISAR, W. LAFARE, & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 184-91 (4th ed. 1974); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & C. 343 (1980).

²⁵ [T]he Exclusionary Rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any

⁹ See generally Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974).

¹⁰ H. UVILLER, *CRIMINAL JUSTICE: INVESTIGATION AND ADJUDICATION* 218 (2d ed. 1979).

¹¹ See notes 69-86 & accompanying text *infra*, for a discussion of exceptions to the warrant rule.

¹² 2 W. LAFARE, *supra* note 1, at 612.

¹³ *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁴ *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

view, while perhaps generally sound,²⁶ has, as will be shown, unfortunate theoretical implications for consent searches.

Intrusions by law enforcement agents are not required by the amendment to be reasonable unless they are either searches or seizures that bear the requisite relationship to people and their security in their "persons, houses, papers, and effects."²⁷

benefits they might have gained from their illegal conduct.

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

Sometimes courts refer to the interest in maintaining judicial integrity as a basis for excluding illegally seized evidence. "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). See also *Elkins v. United States*, 364 U.S. 206, 222 (1960). But the courts seem uncommitted to the judicial integrity basis for excluding fruits of illegal searches and seizures since they permit convictions of defendants seized in violation of the fourth amendment to be upheld. See, e.g., *Frisbie v. Collins*, 342 U.S. 519 (1952). Clearly the deterrence rationale best explains the purpose of the exclusionary rule. See *Oaks, Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 666-72 (1970). But see *Sunderland*, *supra* note 24, at 348-51, 359-60.

²⁶ Thoroughgoing application of the regulatory view, with its emphasis on deterring future governmental violations of the fourth amendment, may result in exclusion of illegally obtained evidence only when it is seized in bad faith.

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

United States v. Peltier, 422 U.S. 531, 542 (1975). In objecting to this view, Justice Brennan said:

The new formulation obviously removes the very foundation of the exclusionary rule as it has been expressed in countless decisions. Until now the rule in federal criminal cases decided on direct review has been that suppression is necessarily the sanction to be applied when it is determined that the evidence was in fact illegally acquired. The revision unveiled today suggests that instead of that single inquiry, district judges may also have to probe the subjective knowledge of the official who orders the search, and the inferences from existing law that official should have drawn. The decision whether or not to order suppression would then turn upon whether, based on that expanded inquiry, suppression would comport with either the deterrence rationale of the exclusionary rule or "the imperative of judicial integrity."

Id. at 552-53 (footnotes omitted).

²⁷ *Amsterdam*, *supra* note 3, at 356. "Since we held that

Protection of personal privacy, while not specifically mentioned in its text, has emerged as the central value underlying the fourth amendment.²⁸ Not surprisingly, the definition of fourth amendment searches and seizures has thus been linked to invasions of personal privacy.

EXPECTATIONS OF PRIVACY

In *Katz v. United States*²⁹ the United States Supreme Court laid the foundation for defining the scope of the fourth amendment's protection of privacy. In rejecting earlier cases which had limited fourth amendment applicability to physical intrusions into protected areas like the home,³⁰ the Court held that any governmental intrusion which violates a person's justifiable reliance on privacy³¹ could trigger the amendment: "The . . . Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."³² Thus, the Court held that government interception of telephone conversations by placing an electronic monitoring device on a public telephone booth constituted a fourth amendment search and seizure.³³ Having concluded that the scope of the amendment extended to the case, the Court found the search and seizure "unreasonable" since it lacked a supporting warrant.³⁴ Justice Harlan, in a con-

the location of the evidence in question was not within the protection of the Fourth Amendment, the reasonableness of the search is not a relevant constitutional consideration." *Marullo v. United States*, 330 F.2d 609 (5th Cir.) (per curiam), *cert. denied*, 379 U.S. 850 (1964).

To determine whether a police intrusion constitutes a fourth amendment search is sometimes extremely difficult. See *Gardner, Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 Nw. U.L. REV. 803, 831 (1980). Much of this summary of general fourth amendment doctrine draws on this article.

²⁸ "[F]ourth amendment litigation . . . has centered on the privacy issue." *Bacigal*, *supra* note 16, at 534.

²⁹ 389 U.S. 347 (1967).

³⁰ Earlier cases had held that a physical trespass into a protected zone of privacy for the purpose of gathering material evidence was necessary to constitute a search and seizure. Thus, the fourth amendment was held inapplicable where federal officials intercepted conversations (no seizure of material things) through surreptitious wiretap (no search because no physical trespass). *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928).

³¹ 389 U.S. at 353.

³² *Id.* at 351-52.

³³ *Id.* at 355.

³⁴ *Id.* at 354-59.

curing opinion, elaborated on the scope of the privacy interest protected by the fourth amendment: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" ³⁵ Although Justice Harlan later had second thoughts about this conception, ³⁶ it has become the primary judicial standard for defining fourth amendment searches. ³⁷

The relevance of a subjective expectation of privacy as a necessary condition for the invalidation of a search under the fourth amendment is questionable. It raises the specter of governmental circumvention of the fourth amendment in future *Katz*-like cases by simply notifying the public that monitoring devices would be regularly installed on telephone booths, thus defeating the expectations of privacy one may previously have had in phone booths. ³⁸ For this reason, a variety of commentators have urged abandonment of the subjective expectation formulation, ³⁹ and the Supreme Court has recently cautioned that in some situations it "provide[s] an inadequate index of Fourth Amendment protection." ⁴⁰ Nevertheless, a majority of the Court

continues to utilize the subjective expectation formulation. ⁴¹

The second of Justice Harlan's requirements, that the privacy expectation be recognized by society as reasonable, has also proven problematical. This supposedly objective test conceals a serious ambiguity. Whether the test is meant to be normative, one that defines justifiable expectations citizens have a right to assert against the government, or simply descriptive of those expectations reasonable people in fact possess, is not clear. Several post-*Katz* cases have resolved the ambiguity in favor of the descriptive interpretation by focusing on such considerations as whether reasonable people would have assumed risks of privacy violations in given situations or would have protected privacy by taking reasonable precautions. ⁴²

No doubt realizing the inadequacy of his *Katz* formula, Justice Harlan offered a different conception in *United States v. White*, ⁴³ in which he dissented from the plurality's holding that surveillance of the defendant's conversations by use of a monitoring device planted on a governmental informer who engaged the defendant in conversation did not constitute a search since the defendant assumed

³⁵ *Id.* at 361 (Harlan, J., concurring).

³⁶ 1 W. LAFAVE, *supra* note 1, at 230. Amsterdam, *supra* note 3, at 384; See text accompanying notes 43-45 *infra*.

³⁷ 1 W. LAFAVE, *supra* note 1, at 230 (1978 & 1980 Supp.); Amsterdam, *supra* note 3, at 384. See also Smith v. Maryland, 442 U.S. 735, 740 (1979).

³⁸ See Amsterdam, *supra* note 2, at 384.

³⁹ See *id.* See also 1 W. LAFAVE, *supra* note 1, at 230; Bagal, *supra* note 16, at 535-37.

⁴⁰ Situations can be imagined, of course, in which *Katz*' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a 'legitimate expectation of privacy' existed in such cases, a normative inquiry would be proper.

Smith v. Maryland, 442 U.S. at 740-41 n.5.

⁴¹ *Id.* at 740. Some commentators apparently favor the subjective expectation consideration.

[T]he implication of *Katz* . . . is that the will of the actual victim of the search is the matter of primary concern. . . . [T]he Court has defined certain risks which one must assume, regardless of intent, in conveying things or words to others. To have so quickly ended the effort begun in *Katz* to let citizens define for themselves a zone of privacy is regrettable.

Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 14 (1970).

⁴² On this view, one who fails to take sufficient precautions has assumed the risk that the government will intrude upon his activities. Thus, failure to pull one's curtains precludes reasonably expected privacy in a room observed by FBI agents through binoculars from a vantage point thirty-five feet away. *Commonwealth v. Hernley*, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), cert. denied, 401 U.S. 914 (1971). Under this theory, the defendant's expectation of privacy in *Katz* was reasonable not because people have rights to be free from government monitoring of their conversations, but because the defendant could have done nothing to protect himself from being monitored. See also *Jacobs v. Superior Court*, 36 Cal. App. 3d 489, 111 Cal. Rptr. 449 (1973) (police officer violated defendant's expectation of privacy by peering through a small crack in blinds after defendant had exhibited privacy expectations by closing the window and drawing the blinds); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 168 (1977).

⁴³ 401 U.S. 745 (1971).

the risk that his confidant might be untrustworthy.⁴⁴ Apparently disavowing the descriptive focus on privacy expectations spawned by his *Katz* concurrence and opting instead for a normative standard defining rights of privacy regardless of factual reliances, Justice Harlan said:

The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the custom and values of the past and present.

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

This question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.⁴⁵

Thus, to Justice Harlan and a number of others, the definition of fourth amendment searches and seizures requires a value judgment about what sense of security is worth constitutional protection and whether, and to what extent, it is threatened by a particular police practice.⁴⁶ While Justice Harlan's standard in *White* would balance the utility of the police practice as a law enforcement technique against the sense of security of the individual in the particular case at hand, others have opted for a broader formula in terms of "whether permitting the police regularly to engage in that type of practice, limited by nothing 'more than self-restraint by law enforcement officials,' . . . requires the 'people' to which the Fourth Amendment refers to give 'up too much freedom at the cost of privacy.'"⁴⁷

Such manifestations of the regulatory view may of course be inconsistent with an atomistic view of searches and seizures which requires a showing of

subjective privacy expectations by the person asserting the fourth amendment claim. There may be cases where police violate the spirit of the fourth amendment without offending anyone's actual privacy expectations.⁴⁸ Fortunately, to restrict the definition of searches and seizures to an atomistic approach is not theoretically necessary. While the *Katz* majority speaks in terms of justifiable reliances on privacy, this need not entail a requirement of actual reliance to trigger the fourth amendment. Rather, the privacy reliance described may be viewed as an interest citizens justifiably have rights to possess regardless of actual circumstances. Justice Harlan's ultimate rejection of the subjective expectation requirement reduces the force of his *Katz* concurrence. Moreover, while a view of the fourth amendment as protecting atomistic spheres of privacy is certainly suggested in *Katz*, the Court there also noted that the amendment's "protections go further, and often have nothing to do with privacy at all."⁴⁹ What non-privacy protections the

⁴⁸ Professor Amsterdam puts such a case:

Suppose that two men drive into Minneapolis and rent a hotel room, paying in advance for three nights. During the first night, they plan a bank robbery which they execute the next day. Following the robbery, they drive directly out of town, never returning to the hotel. Late that same evening, policemen go the rounds of the local cheap hotels, armed with a police artist's sketch of the unmasked half of one bank robber's face drawn from a bystander's description. The night manager tells the officers that the sketch looks like one of the guys in room 212. From outside the hotel, the officers observe that the lights in 212 are lit. The night manager informs them that the occupants checked in yesterday afternoon for three days. After obtaining the manager's permission, the officers break the door of room 212 in force with drawn guns. No one is there, of course; but the officers find and take away a penciled map of the bank area, parts cut from a stocking to make a stocking mask, and other items that are later sought to be used in evidence to connect the former occupants of the room with the bank robbery after their apprehension.

On the defendants' motion to suppress this evidence, the first question that the court will ask is whether any violation of the fourth amendment occurred. From the perspective of the occupants, room 212 was 'abandoned' and they had no constitutionally protected interest in it at the time of the search. From the perspective of the police, however, the room appeared to be occupied; they entered it upon that assumption; and it is difficult to imagine a more egregious case of the kind of police conduct that the fourth amendment was designed to prevent.

Amsterdam, *supra* note 3, at 368 (footnotes omitted). See, e.g., *United States v. Payner*, 100 S. Ct. 2439 (1980).

⁴⁹ 389 U.S. at 350.

⁴⁴ *Id.* at 752.

⁴⁵ *Id.* at 786 (Harlan, J., dissenting).

⁴⁶ See, e.g., 1 W. LAFAVE, *supra* note 1, at 231-33; Amsterdam, *supra* note 3, at 403; Bacigal, *supra* note 16, at 536.

⁴⁷ 1 W. LAFAVE, *supra* note 1, at 233.

Court had in mind is not clear,⁵⁰ but the general interest in regulating government power seems a plausible candidate.⁵¹ It should be emphasized, however, that expansive "regulatory" definitions of searches and seizures are at present largely the recommendations of commentators. The courts continue to apply an atomistic approach, focusing on actual expectations of parties in particular cases and the actual expectations of reasonable people, without considering the desirability of such expectations, whether citizens should be entitled to privacy rights not actually expected, or whether the fourth amendment requires regulating governmental intrusions not offending actual or reasonable privacy expectations.

STANDING

The "standing" requirement which restricts litigation of fourth amendment claims to those parties whose rights have been offended provides further evidence of the judicial preference for the atomistic mode of analysis. While the courts recognize the regulation of governmental practices which threaten fourth amendment interests as a relevant consideration, "the need for deterrence and hence the rationale for excluding the evidence [seized through an illegal search] are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."⁵² Fourth amendment rights are per-

sonal and can only be raised by those whose own "reasonable expectation[s] of freedom from governmental intrusion" have been violated.⁵³ To possess standing, the person seeking to challenge the legality of a search as a basis for suppressing evidence must show that he himself had a legitimate expectation of privacy in the area searched.⁵⁴

A recent Supreme Court decision, *Rakas v. Illinois*,⁵⁵ illustrates the standing issue. The Court held that passengers in a lawfully stopped car lacked standing to object to warrantless rummaging by the police under the seats and into the locked glove compartment which revealed weapons and ammunition implicating the passengers in a recent robbery. Although the passengers were in the car with the owner's permission, they did not assert property or possessory interests in the automobile or in the property seized. Relying on recent decisions finding lesser expectations of privacy in cars than in, *inter alia*, houses and apartments, the Court found that lawful presence in the car was itself insufficient basis for investing standing: "Passenger[s] *qua* passenger[s] simply . . . [do] not normally have a legitimate expectation of privacy" in the areas under the seat and in the glove compartment.⁵⁶ Moreover, those particular passengers failed to show any special privacy expectations in those areas.

Rakas is significant for present purposes because it merges the standing issue with the issue of fourth amendment scope. In rejecting the claim that it might serve some "useful analytical purpose to consider . . . [the principle that fourth amendment rights are personal and not vicarious] a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim," the Court concluded that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."⁵⁷

Rakas evidences the Court's continued commitment to a narrow, highly atomistic application of the *Katz* expectation of privacy rubric.⁵⁸ There is

⁵⁰ In a footnote the Court describes "open" seizures of property and public arrests of persons as supposedly "nonprivate" fourth amendment matters. *Id.* at 350 n.4. But if privacy is "the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others," A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967), or "control over when and by whom the various parts of us can be sensed by others," Parker, *A Definition of Privacy*, 27 *RUT. L. REV.* 275, 281 (1974), then it is difficult to categorize the open seizure or public arrest cases noted by the Court as nonprivate matters.

⁵¹ See Bagical, *supra* note 16, at 555.

⁵² *United States v. Calandra*, 414 U.S. 338, 348 (1974). There may, of course be cases where the standing requirement may arguably inhibit the regulatory interest. See, e.g., *Alderman v. United States*, 394 U.S. 165 (1969), which denies standing to defendant C to assert fourth amendment claims after the government illegally monitored a telephone conversation between A and B which implicated C in criminal activity. Arguably the police are encouraged by such doctrine to purposely violate the fourth amendment rights of people like A and B in order to catch the C's of this world. For this reason, California abolished standing in *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955), which holds that defendants in that state have standing even if allegedly illegal searches and seizures are directed at others.

⁵³ *Mancusi v. DeForte*, 392 U.S. 364, 367-68 (1968).

⁵⁴ *United States v. Salvucci*, 100 S. Ct. 2547, 2553 (1980). See Note, *Fourth Amendment—The Court Further Limits Standing*, 71 *J. CRIM. L. & C.* 567 (1980).

⁵⁵ 439 U.S. 128 (1978). See Note, *Fourth Amendment—Reasonable Expectations of Privacy in Automobile Searches*, 70 *J. CRIM. L. & C.* 498 (1979).

⁵⁶ 439 U.S. at 148-49.

⁵⁷ *Id.* at 138-39.

⁵⁸ The Court implicitly reaffirms its approval of Justice Harlan's *Katz* concurrence. See *id.* at 143-44 n.12.

no mention in the majority opinion about whether passengers ought to be entitled to privacy expectations in the locked glove compartments of the cars in which they are riding. The Court simply concludes that, as a matter of fact, passengers do not generally possess such expectations.⁵⁹

THE WARRANT REQUIREMENT

Once the occurrence of a search or seizure has been shown, its reasonableness must be considered. As illustrated by the discussion of *Katz*, searches or seizures of evidence conducted without warrants are generally held to be unreasonable per se.⁶⁰ Search warrants are issued if a judge or magistrate concludes on the basis of probative evidence⁶¹ that probable cause, i.e., reasonable grounds to believe a crime has occurred or is occurring,⁶² exists both to link the items sought to criminal activity and to indicate that the items will be found in the place to be searched.⁶³

Several considerations justify the warrant requirement. Since a neutral judge or magistrate decides whether a search or seizure is justified, the decision is theoretically more impartial than if made by law enforcement officers.⁶⁴ In addition, since the warrant issues before the search and seizure, there is some assurance that the informa-

⁵⁹ The Court does leave open the possibility of a different result if the initial stop of the car had been illegal. To utilize the terminology of Professor Weinreb, while the *Rakas* passengers may not have had legitimate "privacy of place" expectations in the car, they no doubt had legitimate "privacy of presence" expectations in being secure in their persons from illegal governmental intrusions. See Weinreb, *supra* note 9, at 52-54. If the *Rakas* defendants had challenged the initial stop, they likely would have had standing since their personal freedom was intruded upon by the stopping of the car. 3 W. LAFAVE, *supra* note 1, at 59 (Supp. 1980).

⁶⁰ See also *United States v. Chadwick*, 433 U.S. 1, 7-11, 15-16 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 478-82 (1971) (plurality opinion); *Chimel v. California*, 395 U.S. 752, 762 (1969).

⁶¹ See 1 W. LAFAVE, *supra* note 1, at 465-76.

⁶² See *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

⁶³ 1 W. LAFAVE, *supra* note 1, at 441-43, 703-16. Whether determined prior to or after a search or seizure, probable cause may be established solely on the basis of hearsay or through information provided by credible and reliable informants. *Id.* at 469-70. See *United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

⁶⁴ The police are often perceived as having interests in conducting searches. The magistrate thus acts as a buffer between the police officer, who is "engaged in the often competitive enterprise of ferreting out crime," and the suspect. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

tion justifying the search did not initially come to light after, or as a consequence of, the search.⁶⁵ Finally, because the fourth amendment requires particularity in the description of the places to be searched and the persons or things to be seized, the scope of the search is limited by the warrant.⁶⁶

THE EXCLUSIONARY RULE

Brief mention of the consequences of finding substantive violations of the fourth amendment should be made. While such violations can be redressed in a number of ways, by far the most significant remedy is the exclusionary rule, which excludes the fruits of illegal searches and seizures from admission into evidence against those whose rights have been violated.⁶⁷ The exclusionary rule has come under increasing attack of late by various members of the Supreme Court,⁶⁸ raising some doubt regarding its future viability as the primary remedy for violations of the fourth amendment.

EXCEPTIONS TO THE WARRANT REQUIREMENT

Not all warrantless searches and seizures offend the fourth amendment. Apart from consent

⁶⁵ *Adams v. Williams*, 407 U.S. 143, 152 (1972) (Brennan, J., dissenting) (quoting Judge Friendly's dissent at the circuit court, 436 F.2d 30, 38-39 (2d Cir. 1970) (Friendly, J., dissenting)).

⁶⁶ See *Coolidge v. New Hampshire*, 403 U.S. at 467. While warrants are generally required for constitutional searches for and seizures of evidence, seizures of the person—arrests—ordinarily need not be based on a warrant and will be upheld so long as the arresting officer has probable cause to believe that a criminal offense has been committed and that the person to be arrested committed it. See *United States v. Watson*, 423 U.S. 411 (1976). The Court has recently held, however, that warrants are required if police must enter the home of a suspect to make an arrest. *Payton v. New York*, 100 S. Ct. 1371 (1980). See Note, *Fourth Amendment—Nonexigent Home Arrest Entries*, 71 J. CRIM. L. & C. 518 (1980). At least for crimes committed outside the offender's home, probable cause to believe that an offense is being committed in the presence of the arresting officer will always justify a warrantless arrest. *United States v. Watson*, 423 U.S. 411.

⁶⁷ See Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *supra* note 24, at 184-91; Sunderland, *supra* note 24.

⁶⁸ See, e.g., Chief Justice Burger's comments. The exclusionary rule "is both conceptually sterile and practically ineffective in accomplishing its stated objective," *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting), and thus "this judicially contrived doctrine" should perhaps be overruled. *Stone v. Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring). Justice White is prepared to "join four or more other Justices in substantially limiting the reach of the exclusionary rule. . . ." *Id.* at 537 (White, J., dissenting). See also Sunderland, *supra* note 24, at 353-65.

searches, which will be dealt with in detail later, two other types of exceptions to the warrant requirement exist: searches of criminal suspects in exigent circumstances which justify immediate police action or make obtaining a warrant impractical, and routine searches of nonsuspects in certain circumstances.⁶⁹

The exigent circumstance exceptions to the warrant rule involve instances where law enforcement officers confront criminal suspects or encounter criminal evidence in situations where resort to the warrant procedure would be fruitless or impractical. If a suspect has been lawfully arrested—that is, if probable cause exists to support the arrest—warrantless searches of the suspect's person are permitted.⁷⁰ A lawful search of areas within the suspect's immediate reach or control⁷¹ may also be made on the theory that, in the heat of the arrest situation, he may attempt to harm the arresting officer or to destroy evidence.⁷² Similarly, if a searching officer has probable cause to believe that a motor vehicle contains evidence, a warrantless search is constitutionally valid if resort to the warrant procedure would likely result in the loss of the evidence because of the vehicle's mobility.⁷³ Another recently articulated rationale for the vehicle exception to the warrant rule is that one has only a minimal expectation of privacy when riding in a motor vehicle; thus, warrantless searches in that context violate no substantial fourth amendment interest.⁷⁴

As in the case of searches incident to arrest and searches of vehicles, warrantless searches of houses for weapons used by escaping suspects, as well as for the suspects themselves, are justified if the searching officer is in hot pursuit of the suspect and has reasonable grounds to believe the suspect is in the home and is dangerous.⁷⁵ Given the inher-

ent dangerousness of the situation, it would be unreasonable to require officers in hot pursuit to obtain warrants prior to searching. Similarly, a limited body search of suspicious persons may also be made without a warrant if the officer has reasonable grounds, not necessarily rising to the level of probable cause, to believe that the person is armed and dangerous.⁷⁶ Such stops and frisks may not go beyond what is necessary to detect the presence of a weapon,⁷⁷ unless the suspect is placed under arrest.⁷⁸ Otherwise, the officer is entitled, in the interest of preventing violent crime, to confront and frisk the suspect in situations where probable cause is lacking or warrants could not possibly be obtained in time.⁷⁹

Finally, if an officer inadvertently comes upon contraband or other manifestly criminal evidence he may seize it without obtaining a warrant so long as it is in plain view, he views it from a place in which he is lawfully entitled to be,⁸⁰ and he reasonably believes the evidence to be incriminating when he first views it.⁸¹ The premise of the plain view exception to the warrant rule is that it is logically impossible to obtain a warrant to seize inadvertently discovered evidence prior to the moment of that discovery, and it is impractical to require a warrant afterwards because the evidence may be lost while the warrant is sought.⁸²

The second class of exceptions to the warrant rule involves instances where no reason exists to suspect particular persons of criminal activity, but public policy requires routine searches. Thus, warrantless searches are indiscriminately conducted of persons and objects entering the United States across international borders because of the special difficulty of enforcing customs and immigration

⁶⁹ *Sibron v. New York*, 392 U.S. 40, 63-64 (1968); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

⁷⁰ *Sibron v. New York*, 392 U.S. at 65-66; see also *Ybarra v. Illinois*, 444 U.S. 85 (1979).

⁷¹ *United States v. Robinson*, 414 U.S. at 234; *Adams v. Williams*, 407 U.S. at 147-49.

⁷² *Terry v. Ohio*, 392 U.S. at 20-26.

⁷³ *Coolidge v. New Hampshire*, 403 U.S. at 464-72.

⁸¹ There must "be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior" which is supplied for evidence lacking inherent criminal character by "cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. at 307. Sometimes, however, as in inventory searches, police are permitted to handle objects without regard to a present suspicion that they are evidence of crime. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976).

⁸² *Coolidge v. New Hampshire*, 403 U.S. at 467-68.

⁶⁹ Professor Amsterdam has so conceptualized the exceptions to the warrant rule. Amsterdam, *supra* note 3, at 358-60.

⁷⁰ *United States v. Robinson*, 414 U.S. 218, 235 (1973).

⁷¹ *Chimel v. California*, 395 U.S. 752, 763 (1969).

⁷² *United States v. Robinson*, 414 U.S. at 234-35; *Chimel v. California*, 395 U.S. at 763.

⁷³ *Coolidge v. New Hampshire*, 403 U.S. at 459-62; *Chambers v. Maroney*, 399 U.S. 42, 48-51 (1970); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

⁷⁴ *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976). But see *Delaware v. Prouse*, 430 U.S. 648 (1977), where the Supreme Court declared random police stops of vehicles driven on public streets unlawful, unless the police have reasonable suspicion that the driver or passengers have violated some law; Note, *supra* note 55.

⁷⁵ *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967).

laws without random border searches,⁸³ and airline passengers are routinely searched because of the unusually dangerous character of air piracy.⁸⁴ Inventory searches of vehicles properly taken into police custody are permitted in order to protect property inside the vehicle from loss.⁸⁵ Finally, the courts also permit warrantless searches of business premises licensed to distribute regulated items such as liquor or firearms.⁸⁶

An important feature of these exceptions distinguishes them from consent searches. With the possible exceptions of the automobile and plain view cases, all of the nonconsensual exceptions to the warrant rule are subject to two orders of scrutiny in terms of their fourth amendment rationality.⁸⁷ The first order is inherent in the definition of the exceptions themselves. Because each exception is a carefully crafted accommodation of law enforce-

ment and privacy interests, it is *prima facie* reasonable to permit warrantless searches and seizures whenever cases occur which fit within the definition of various exceptions. But apart from built-in rationality, each of the exceptions is potentially subject to a second order scrutiny of its reasonableness. Since the privacy expectations of the person searched are generally unaffected by the contexts of the various exceptions,⁸⁸ fourth amendment searches and seizures still exist notwithstanding the fact that they are permitted without warrants. The special circumstances supporting the exceptions to the warrant rule do not take the cases outside the purview of the fourth amendment. Thus, for example, the privacy intrusions in legitimate stop and frisk cases are still searches⁸⁹ that may arguably be unreasonable under second order scrutiny even though they occur in a *prima facie* reasonable context.

This double scrutiny can be illustrated by the following hypothetical: Suppose that Officer A has a reasonable suspicion that X is presently armed and about to rob a bank. Officer B, independently of A, suddenly happens upon the scene but has no reason to suspect X of any crime. Instead, B enjoys harassing X. Officers A and B jointly conduct a warrantless pat down of X (A to disarm a dangerous person, B to harass X) which turns up a weapon which they jointly and simultaneously remove from X's pocket. X is charged with carrying a concealed weapon. X moves to suppress the gun.

The case raises two orders of scrutiny: it appears to be both a legitimate warrantless intrusion (*prima facie* reasonable under first order rationality so far as A is concerned) and also an unconstitutional search (an unreasonable search by B under second order rationality notwithstanding the fact that the situation fits within the stop and frisk exception to the warrant rule). Under either analysis, a search occurs which must be reasonable to withstand fourth amendment scrutiny. Without hazarding an opinion on the outcome of this hypothetical case, the two-step scrutiny suggests an interesting aspect of the nonconsensual exceptions to the warrant rule: they define contexts which permit *prima facie* reasonable warrantless intrusions, which may nevertheless yield unreasonable searches.

⁸⁸ See Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 215 (1974).

⁸⁹ It was specifically so held in *Terry v. Ohio*, 392 U.S. at 16-17.

⁸³ *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977) (dictum); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973) (dictum).

⁸⁴ *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973); *United States v. Moreno*, 475 F.2d 44, 51 (5th Cir.), cert. denied, 414 U.S. 840 (1973). See Note, *Fourth Amendment—Airport Searches and Seizures: Where Will the Court Land?*, 71 J. CRIM. L. & C. 499 (1980).

⁸⁵ *South Dakota v. Opperman*, 428 U.S. at 368-72, 375-76.

⁸⁶ See, e.g., *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76 (1970) (liquor).

Also, noncriminal administrative inspections of residential and commercial premises for fire, health, and safety violations are subject to the general warrant requirement. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-25 (1978); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). In these cases, however, warrants may issue on evidence short of probable cause if reasonable administrative or legislative standards for conducting the proposed inspection exist. 3 W. LAFAVE, *supra* note 1, at 223.

⁸⁷ To the extent that the automobile exception is based on the theory that warrantless searches are permitted because people have lesser privacy expectations in cars than in other areas, see notes 73-74 & accompanying text *supra*, it may be removed from fourth amendment purview altogether. Thus no search occurs when police make intrusions within the scope of the automobile exception and the case is entirely without fourth amendment scope.

Similarly, when seizures are justified pursuant to the plain view doctrine, the actions of the officer prior to the discovery of the evidence are often held not to constitute a search for that particular evidence since the discovery was inadvertent. *Coolidge v. New Hampshire*, 403 U.S. at 466; *Harris v. United States*, 390 U.S. 234, 236 (1968). This conclusion may not be entirely sound, however, since it does not explain how the privacy expectations of the one searched are diminished or relinquished through the officer's inadvertent discovery.

THE CONSENT SEARCH

Against this background, the issue of consent searches as exceptions to the warrant rule can be examined. Extensive syntheses of the caselaw have been done by others⁹⁰ so much of that ground need not be covered here. But while consent doctrine may be stated relatively easily, its theoretical implications have yet to be fully explored by either the courts or the commentators.

Consent searches are categorically distinct from the other exceptions to the warrant rule.⁹¹ Apart from the necessity of establishing an initial expectation of privacy in order to trigger the fourth amendment, the state of mind of the person being searched is, unlike the consent search situation, irrelevant for purposes of the nonconsensual exceptions.⁹² Moreover, while the nonconsensual exceptions evolved from a process of measuring police conduct in each of the various areas against the demands of fourth amendment reasonableness, the consent exception generally finds its justification not from an accommodation of various conflicting interests, but rather from the view that consent in and of itself makes an intrusion reasonable under the fourth amendment.⁹³

⁹⁰ See, e.g., 2 W. LAFAVE, *supra* note 1, at 610-778; Bacigal, *supra* note 16, at 542-551; Wefing & Miles, *supra* note 88; Comment, *Consent to Search in Response to Police Threats to Seek or to Obtain a Search Warrant: Some Alternatives*, 71 J. CRIM. L. & C. 163 (1980).

⁹¹ Professor Amsterdam lists consent as a separate category of exception to the warrant rule. Amsterdam, *supra* note 3, at 354.

⁹² Wefing & Miles, *supra* note 88, at 215.

⁹³ "Consent can be characterized not as a waiver of an absolute right to prevent the search, but rather as conduct on the part of the occupant which renders the search reasonable. So viewed, the standard of reasonableness is arguably met by any uncoerced consent . . ." Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 147 (1967). "The law recognizes valid consent searches as an exception to the warrant requirement because of their 'inherent reasonableness.'" Comment, *Schneekloth v. Bustamonte: The Question of Noncustodial and Custodial Consent Searches*, 66 J. CRIM. L. & C. 286, 287 (1975); see also Note, *The Doctrine of Waiver and Consent Searches*, 49 NOTRE DAME LAW., 891, 899 (1974). "Since the [fourth] amendment is for the individual's own protection, once he effectively consents to a search the resultant invasion of his privacy is not unconstitutional. A 'consent,' then, is a legal term representing the conclusion that an individual has waived his fourth amendment right." Note, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260 (1964). See also Comment, *Consent Search: Waiver of Fourth Amendment Rights* 12 ST. LOUIS U.L.J. 297, 298 (1968). "[A]ny search or taking of evidence pursuant to his consent is not unreasonable." *People v. Gorg*, 45 Cal. 2d 776, 782, 291 P.2d 469, 472 (1955); see also *People v. Tremayne*, 20 Cal. App. 3d

Somewhat surprisingly, the soundness of the assumption that consensual searches are inherently reasonable has thus far escaped critical attention. After sketching an outline of consent doctrine in this section, the remainder of the article will, by posing a series of hypotheticals, expose the inadequacies of viewing consent searches as inherently reasonable and suggest a preferable alternative view.

Consent searches are particularly attractive law enforcement instruments because they permit intrusions in situations lacking probable cause to believe a search will reveal evidence of crime.⁹⁴ In fact, the searching officer need have no suspicion at all.⁹⁵ On the other hand, consent searches also often promote the consenter's civil liberties interests by providing a prompt mechanism for exonerating those mistakenly suspected of crime and convincing police that seeking a warrant to support more extensive and inconvenient searches is unjustified.⁹⁶

THE SUFFICIENCY OF CONSENT

The judicial definition of consent is not entirely certain. The cases clearly require some outward manifestation by the consenter giving the appearance of consent. Some courts go farther in requiring that the outward manifestation unambiguously reflect the consenter's intent to consent. Thus courts have concluded that "no sane man" would consent to a search certain to reveal incriminating evi-

1006, 1015, 98 Cal. Rptr. 193, 198 (1971) (consent establishes the "reasonable nature a search premised thereon").

⁹⁴ Policemen use consent searches for a variety of reasons. When the occupant himself is not a suspect, the premises may nevertheless contain evidence of the unlawful activities of others. In this situation, the consent search may often be used as a general investigative tool, much like on-the-scene questioning of witnesses to a crime. Moreover, police often undertake consent searches of a particular suspect's premises. An occupant may be suspected of concealing evidence of his crime within his home; if the police do not have sufficient evidence to constitute probable cause for securing a warrant, they may attempt to obtain his permission to conduct a search. Although this request has the disadvantage of putting the suspect on his guard and enabling him to destroy or better conceal any incriminating evidence, it also, on occasion, simplifies the task of the police. A refusal may reinforce suspicions concerning the occupant, causing the police to center their attention upon the particular suspect.

Note, 67 COLUM. L. REV., *supra* note 93, at 130-31.

⁹⁵ See, e.g., the discussion of *Schneekloth*, notes 100-17 & accompanying text *infra*.

⁹⁶ See *Schneekloth v. Bustamonte*, 412 U.S. at 228.

dence.⁹⁷ Whatever the person's permission may indicate, he does not consent unless he is unaware that the evidence would be discovered. Such a view does not command widespread approval,⁹⁸ but it does evidence the difficulty in determining consent in situations where its external manifestations are not entirely consistent with perceived intent to consent: "Consent is unequivocal and unquestioned only when it includes both [an 'internal' state of mind and an 'external' performance]."⁹⁹ These difficulties aside, the cases are clear that consent, however defined, must be voluntary in order to exempt the situation from the warrant requirement, assuming that the intrusion would be a search and seizure absent consent.

The leading case is *Schneckloth v. Bustamonte*¹⁰⁰ in which the Supreme Court held that consent by one not in police custody may be voluntary if it is given in the absence of undue coercion, even though it is not shown that the consentor actually knew he could legally withhold consent. In *Schneckloth*, a police officer stopped a vehicle because a headlight was defective and, upon learning that the driver was without a driver's license and that the car belonged to passenger Acala's brother, asked Acala if he could search the car. Under circumstances described by the officer as "congenial,"¹⁰¹ Acala gave permission and actually assisted in the search which revealed three stolen checks, wadded up under the left rear seat, which implicated fellow-passenger Bustamonte in the crime of possessing a check with intent to defraud.

The consent was upheld by the California courts which found that "voluntariness is a question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a con-

sent."¹⁰² But the United States Court of Appeals for the Ninth Circuit concluded that "it is an essential part of the State's initial burden to prove that a person knows he has a right to refuse consent."¹⁰³ In reversing the Ninth Circuit and siding with the California approach, the Supreme Court cautioned against "talismanic definitions" of voluntariness applicable to all situations.¹⁰⁴ Instead the consent issue should be resolved only after assessing the "totality of all the surrounding circumstances" and determining whether consent was coerced by explicit or implicit means, by implied threat or covert force.¹⁰⁵ "Where there is coercion there cannot be consent."¹⁰⁶ While a factor relevant to voluntariness, "proof of knowledge of a right to refuse . . . [is not] the *sine qua non* of an effective consent to a search."¹⁰⁷ To require such proof would be to jeopardize the continued viability of consent searches, legitimate and necessary law enforcement tools, because except in rare cases the prosecution would be unable to demonstrate that the subject of the search in fact had known of his right to refuse consent. The Court thought it "thoroughly impractical" to impose on the "informal and unstructured" conditions of the normal consent search a requirement that police advise persons of their right to refuse as a precondition for valid consent.¹⁰⁸ Although actual notice of constitutional rights is necessary in order to waive, among others, the right to counsel and to speedy trial,¹⁰⁹ the Court saw no need to implant the waiver of rights concept into the consent search situation. Unlike these other rights which protect trial fairness, the fourth amendment has nothing to do with promoting "the fair ascertainment of truth at a criminal trial," but instead protects the "security of one's privacy against arbitrary intrusion by the police."¹¹⁰ Thus "unlike those constitutional guarantees that protect a defendant at trial, it cannot be said [of consent searches that] every reasonable presumption ought to be indulged against voluntary relinquishment."¹¹¹ "[T]here is nothing constitutionally sus-

⁹⁷ [N]o sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by denial of guilt, do not show consent; at least in the absence of some extraordinary circumstance, such as ignorance that contraband is present. *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954). See also *United States v. Viale*, 312 F.2d 595, 601 (2d Cir.), cert. denied, 373 U.S. 903 (1963).

⁹⁸ "[T]he . . . ['no sane man'] approach has not gained general acceptance." 2 W. LAFAVE, *supra* note 1, at 665.

⁹⁹ Weinreb, *supra* note 9, at 55.

¹⁰⁰ 412 U.S. 218 (1973).

¹⁰¹ *Id.* at 221.

¹⁰² *Id.* at 223 (construing *People v. Tremayne*, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 193 (1971); *People v. Roberts*, 246 Cal. App. 2d 715, 55 Cal. Rptr. 62 (1966)).

¹⁰³ *Id.* (construing *Bustamonte v. Schneckloth*, 448 F.2d 699 (1971)).

¹⁰⁴ *Id.* at 224.

¹⁰⁵ *Id.* at 226-35.

¹⁰⁶ *Id.* at 234.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 231-32.

¹⁰⁹ *Id.* at 237.

¹¹⁰ *Id.* at 242.

¹¹¹ *Id.* at 243.

pect in a person's voluntarily allowing a search."¹¹² In fact, "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense."¹¹³ Finally, the Court saw the waiver approach as inconsistent with decisions permitting third-party consent since third-party consenters clearly could not waive the constitutional rights of absent defendants.¹¹⁴ Rather than constituting a waiver of fourth amendment rights, the Court saw the issue in *Schneekloth* simply in terms of the voluntariness of the permission to search. Whether Acala made an enlightened choice was not in question. The issue was whether his choice was free. While the Court fleetingly intimated that fairness might somehow be promoted by assuring that consents are voluntarily given,¹¹⁵ clearly the avoidance of governmental coercion is the primary value promoted by *Schneekloth*.

Justice Marshall in dissent took another view, finding objectionable the Court's "result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search."¹¹⁶ In his view, voluntary consent entails not just the absence of coercion in permitting the intrusion but also awareness that the intrusion need not be permitted.¹¹⁷

THE NECESSITY FOR CONSENT

While *Schneekloth* indicates that voluntary consent is a sufficient condition to exempt searches

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 245. For a criticism of the Supreme Court's failure to recognize the waiver approach as applicable in *Schneekloth*, see Wefing & Miles, *supra* note 88, at 217–252.

¹¹⁵ Without elaborating more fully, the Court said in discussing the definition of voluntariness: "[T]he criminal law cannot be used as an instrument of unfairness, and . . . the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice." *Id.* at 225.

¹¹⁶ *Id.* at 277 (Marshall, J., dissenting).

¹¹⁷ The dispute between the majority ("free choice" means simply "uncoerced choice") and Justice Marshall in dissent ("free choice" means "uncoerced and knowledgeable choice") is reminiscent of the metaphysical dispute about free will between "soft determinists" who define free choice as "unconstrained choice" and "hard determinists" and others who define free choice as "choices which could have been otherwise than they were." See, e.g., R. TAYLOR, *METAPHYSICS* 42–45 (1963).

and seizures from the warrant requirement, at least in cases where the consent is clearly communicated to the searching officer at the time of the search, the case leaves unanswered the question whether actual consent is also a necessary condition to permit warrantless intrusions where the police reasonably, but mistakenly, believe consent has been given. Lower courts considering the issue have reached different conclusions. For example, in *United States v. Elrod*¹¹⁸ the Court of Appeals for the Fifth Circuit held that defendant's apparent consent to a search of his hotel room was invalid because he lacked mental capacity to consent even though the police reasonably believed consent was voluntarily and competently given.

No matter how genuine the belief of the officers is that the consenter is apparently of sound mind and deliberately acting, the search depending upon his consent fails if it is judicially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or unfounded. It is that the key to validity—consent—is lacking for want of mental capacity, no matter how much concealed.¹¹⁹

Other courts reject *Elrod's* atomistic conception and adopt an essentially regulatory view by defining the consent issue in terms of whether "the officers, as reasonable men, could conclude that defendant's consent was given."¹²⁰ Support for this position is based on the theory that the fourth amendment is only concerned "with discouraging unreasonable activity on the part of law enforcement officers."¹²¹ Attention is thus directed to the searcher's state of mind. Because waiver of a constitutional right is not involved, there is no special need to focus on the state of mind of the alleged consenter. Under this view, the fourth amendment does not confer a right in the consenter to be free from searches, or even to be free from warrantless searches, but

¹¹⁸ 441 F.2d 353 (5th Cir. 1971).

¹¹⁹ *Id.* at 356.

¹²⁰ *People v. Henderson*, 33 Ill. 2d 225, 229–30, 210 N.E.2d 483, 485 (1965). See also *People v. Lumpkin*, 64 Mich. App. 123, 235 N.W.2d 166 (1975) (police officer entitled to rely on defendant's unequivocal expression of consent regardless of defendant's fear of trouble if he refused consent).

For another example where actual consent is held unnecessary to support a consent search, see *People v. Hargrave*, 40 Misc. 2d 556, 243 N.Y.S.2d 771 (1963) (consent "implied" where an unconscious patient in a hospital is disrobed in preparation for emergency treatment, and a gun found on his person).

¹²¹ *People v. Gorg*, 45 Cal. 2d 776, 783, 291 P.2d 469, 473 (1955).

rather only a right to be free from unreasonable searches.¹²²

The difference in judicial opinion regarding the necessity of actual consent in situations where it reasonably appears to have been given is further illustrated by the third-party apparent authority cases. While third-party consent will be considered in some detail later, it is useful to consider the apparent authority doctrine here since it relates to the necessity of consent problem. Some courts, in the atomistic tradition of *Elrod*, have found fourth amendment violations in situations where police conduct searches permitted by persons whom they reasonably, but mistakenly, believe have power to authorize a search for evidence to be used against an absent party.¹²³ On the other hand, some courts reach the opposite conclusion based on the view that the fourth amendment is concerned with "discouraging unreasonable activity on the part of law enforcement officers," a concern not offended when police reasonably but mistakenly assume that third-party consent has been given.¹²⁴

AUTHORITY TO CONSENT

Although not usually conceptualized as a third-party consent case, *Schneekloth* may be so under-

¹²² See, e.g., *People v. Tremayne*, 20 Cal. App. 3d at 1015, 98 Cal. Rptr. at 198.

¹²³ For example, in *United States ex rel. Cabey v. Mazurkiewicz*, 431 F.2d 839 (3d Cir. 1970), a wife's voluntary consent to a police search of a garage, separately leased by her husband, was invalid against the husband since she lacked an equal right of access to the garage and thus lacked actual authority to consent even though she reasonably appeared to possess authority.

¹²⁴ See, e.g., *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469, where one Stevens gave permission to police to enter and search a room in Stevens' house occupied by the defendant. In upholding the search the court said:

Defendant was living in the Stevens home, and it is clear that whether he was in fact a tenant, servant, or guest, Stevens believed that he had at least joint control over his quarters and the right to enter them . . . and authorize a search thereof. Under these circumstances the officers were justified in concluding that Stevens had the authority over his home that he purported to have, and there was nothing unreasonable in their acting accordingly. In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. . . . [W]hen as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.

Id. at 783, 291 P.2d at 473.

stood. The evidence obtained by the police in that case was eventually used against Bustamonte, a passenger in the car at the time copassenger Acala consented to the search. While not addressing the issue, the Court was nevertheless on firm ground in permitting Acala's third-party consent to validate the seizure of the check admitted in evidence against Bustamonte.

A variety of theories have been advanced as foundations for third-party consent. Courts sometimes utilize an agency relationship, or its absence, between the consenter and the defendant as the basis for validating third-party consents.¹²⁵ More often, however, doctrines of assumption of risk by the defendant and the consenter's joint access or control with the defendant over the premises or effects sought to be inspected are employed.¹²⁶

The Supreme Court has recognized both the assumption of risk and joint access theories. In *Frazier v. Cupp*¹²⁷ the Court held that the defendant had assumed the risk that his cousin would permit someone to look inside a duffel bag, in which the two stored clothing, which was left in the cousin's possession.¹²⁸ Although the police in *Frazier* were investigating the cousin and not the defendant, and thus inadvertently came upon evidence in "plain view" in the bag implicating the defendant, the Court has made clear in other cases that consents may also validly be given even if the police seek third-party permission to search when they suspect another of crime. Thus, in *United States v. Matlock*¹²⁹ the Court upheld the consent of a Mrs. Graff to search a house in which she said she shared a room with the defendant, who had been arrested on the front lawn of the house immediately prior to Mrs. Graff's consent. Mrs. Graff's consent was valid since she possessed "common authority over . . . the premises or effects sought to be inspected."¹³⁰ The Court found third-party consent authority to rest,

on mutual use of the property by persons generally having joint access or control for most purposes, so

¹²⁵ See Bacigal, *supra* note 16, at 546; Wefing & Miles, *supra* note 88, at 253; Note, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 801 (1966).

¹²⁶ 2 W. LAFAVE, *supra* note 1, at 695-98. See *Stoner v. California*, 376 U.S. 483, 488 (1964), where the Court refused to permit "the rights protected by the Fourth Amendment . . . to be eroded by strained applications of the law of agency. . . ."

¹²⁷ 394 U.S. 731 (1969).

¹²⁸ *Id.* at 740.

¹²⁹ 415 U.S. 164 (1974).

¹³⁰ *Id.* at 171.

that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.¹³¹

The Court did not explain to whom and at what time it must be reasonable to recognize the co-habitant's right to consent. While the reference may refer to the reasonableness of the police perception of authority at the time of the intrusion, suggesting that apparent authority may sufficiently validate third-party consents in cases where police reasonably, but mistakenly, believe authority to consent exists,¹³² it may also, or alternatively, refer to the general reasonableness in light of the fourth amendment policy of recognizing valid consent in the situation regardless of the policeman's state of mind at the time of the intrusion.

The assumption of risk and joint access theories emphasize different perspectives. The former focuses on the circumstances as reasonably perceived by the defendant while the latter attends to the interests of the consentor to permit the intrusion "in his own right."¹³³ Thus, in cases where the consentor has actual rights of joint access which are unknown to the defendant, the assumption of risk and joint access theories may pull in opposite directions.¹³⁴

SCOPE OF CONSENT

Not all voluntary consents within the meaning of *Schneekloth* necessarily result in admission of the evidence seized pursuant to the search. Intrusions must not exceed express or implied limits or qualifications which establish the permissible scope of consent.¹³⁵ Evidentiary fruits derived from searches outside the scope of a given consent are ordinarily

excluded unless the police possessed warrants or the case is covered by other exceptions to the warrant rule.¹³⁶ Thus it is possible to relinquish areas of privacy by permitting limited searches while retaining privacy interests in areas outside the scope of consent: "A person's consent . . . is relevant only to the extent that he has a protected interest. Therefore, the scope of a search that consent legitimates is congruent with the realm of privacy that the consent waives."¹³⁷ While these considerations provide some inherent rationality for consent searches by checking unduly intrusive governmental actions, there may still be, as shown later, cases of unreasonable intrusions within the scope of consents voluntarily given.

While the consentor clearly has power to define the scope of consent, whether consent once given can be withdrawn is less clear. Some take the view that a search becomes reasonable the moment consent is given. Thus, the consentor "has no more right to obstruct it than any other reasonable search—by warrant or incidental to arrest for example."¹³⁸ Others, however, suggest that consents "may be withdrawn or limited at any time prior to the completion of the search."¹³⁹

THEORETICAL CONSEQUENCES OF VALID CONSENT

While the practical consequence of voluntary and valid consent of either the two- or three-party variety is the admission of evidence seized through the warrantless entries to which consent was given, the justification for this result is not clear. Most of the attention in the consent area has been focused on the problem of defining valid consents rather than on explaining why, once found, they justify warrantless intrusions. Perhaps explication of the theoretical consequences of consent searches is thought unnecessary because they are so obviously reasonable as fourth amendment matters that they require no discussion. So long as within the scope of the consent, nothing significant would seem to hinge upon whether consensual intrusions are conceptualized as permissible searches or nonsearches outside the purview of the fourth amendment. To the extent that opinion exists on the subject, however, the predominant view is that consent removes the case from the amendment's scope.¹⁴⁰

For example, in *Coolidge v. New Hampshire*,¹⁴¹ the Supreme Court found that no fourth amendment

¹³¹ *Id.* at 171 n.7.

¹³² The *Matlock* Court specifically left open the issue of the sufficiency of apparent authority as a basis for valid third-party consent. *Id.* at 177 n.14.

¹³³ See 2 W. LAFAVE, *supra* note 1, at 54 (Supp. 1980).

¹³⁴ *Id.* Cases may exist where the assumption of risk and joint access theories are at odds. Suppose, for example, that X rents part of a house to A but rents no portion of a barn to anyone. A, however, leads B to believe that A has exclusive control over the barn. B reasonably relies on A's representation and stores marijuana in the barn. X, in fact the possessor of exclusive control over the barn, gives police permission to search it. While it is difficult to see how B assumed the risk of X's consent since he had no reason at all to anticipate X's action, X, as possessor of access to the barn clearly has an interest in her own right in consenting. X's interest, however surprising to B, is held to control and the evidence is admissible against B. See *Commonwealth v. Latshaw*, 481 Pa. 298, 392 A.2d 1301 (1978), *cert. denied*, 441 U.S. 931 (1979).

¹³⁵ See 2 W. LAFAVE, *supra* note 1, at 624-32.

¹³⁶ *Id.*

¹³⁷ Weinreb, *supra* note 9, at 54.

¹³⁸ Note, 67 COLUM. L. REV., *supra* note 93, at 157.

¹³⁹ 2 W. LAFAVE, *supra* note 1, at 634.

¹⁴⁰ See note 93 *supra*.

¹⁴¹ 403 U.S. 443 (1971) (plurality opinion).

search or seizure occurred when police went to the home of an incarcerated defendant and questioned his wife about his possession of guns, and she, on her own initiative and out of a desire to help her husband and to cooperate with the police, turned over to them a weapon and some clothing which, unbeknownst to her, implicated her husband in a kidnapping and murder. The Court found that "[t]o hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal suspect has constitutional protection against the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion."¹⁴² The Court's conclusion is not specifically based on a consent theory, but rather on the view that if any search occurred, it was by the wife, a private person incapable of imbuing the situation with the state action necessary to trigger the fourth amendment.¹⁴³ But consent theory, while not discussed by the Court, would seem to provide an alternative basis for its decision. *Coolidge* is cited by the *Schneekloth* Court as bolstering the view that legitimate, voluntary consent may be given in the absence of knowledge of a right to refuse consent.¹⁴⁴ Indeed, except for the fact that Mrs. Coolidge herself participated in the actual finding of the evidence, a fact of little significance since the police had initiated the intrusion, the *Coolidge* situation seems indistinguishable from *Schneekloth*. At the time they were encountered by the police, both Acala and Mrs. Coolidge had expectations of privacy which they relinquished by voluntarily assisting the police in their discovery of evidence. In both cases, the fact of consent would seem to vitiate the pre-existing privacy interest, thus removing both cases from the scope of the fourth amendment.

SUMMARY OF CONSENT DOCTRINE

Schneekloth indicates that voluntary consent, defined as noncoerced consent, removes the warrant requirement where consent is unambiguously communicated to the searcher. Whether actual consent is also a necessary condition for such removal is not clear. Cases such as *Elrod* hold that actual consent is necessary while other cases hold that reasonable belief by the searcher that consent exists is sufficient, even if actual consent is not given. Third-party consent is valid in situations where the de-

fendant can be said to have assumed the risk that it would be given or where the consenter has sufficient access to and control of the premises to consent in his own right. To be effective, consent searches must not exceed their express or implied scope as set by the consenter. Consent searches are generally viewed as avoiding fourth amendment scope.

Left unanswered by the cases and the commentators are a variety of important questions. Among the more theoretically interesting are the following: Exactly, what does the consenter relinquish when he voluntarily consents to a police intrusion? Does he simply relinquish his right to be free from warrantless searches, or, as Justice Marshall intimates in his *Schneekloth* dissent, does the consenter relinquish his right to be free from unreasonable searches as well? Does it matter which of these conceptions is adopted so long as the search is conducted within the scope of the consent? Could there be unreasonable searches within the scope of voluntary consent?¹⁴⁵ Since the consenter invariably relinquishes privacy expectations, is the state of mind of the searching officer in any way relevant once it is found that voluntary consent is given?

These questions and others may be subsumed under a general inquiry into the soundness of the conclusion that searches and seizures within the scope of a voluntarily given consent are necessarily reasonable. The remainder of this article will critique this conclusion.

CONSENT SEARCHES AS "INHERENTLY REASONABLE"—A CRITIQUE

While generally unproblematic in its practical effect, the view that voluntary consent to a search invariably renders the intrusion reasonable for fourth amendment purposes is unsound theoretically and prevents correct resolution of some consent problems. This unsoundness can be illustrated by consideration of a series of hypotheticals, representing instances of consent freely given in non-coercive settings.¹⁴⁶

¹⁴⁵ This question is raised briefly in Comment, *Consent Search: Waiver of Fourth Amendment Rights*, 12 St. Louis U. L.J. 297, 298 (1968).

¹⁴⁶ I seek to avoid the problem of determining when, and what type of, coercion, subtle or otherwise, may cast doubt upon the voluntariness of consents. Most consent search litigation deals with this problem. For an excellent summary of such cases, see 2 W. LAFAVE, *supra* note 1, at 610-77. By the same token, I am not here concerned with problems of who can, or should be able to, consent in third-party situations. Again, these problems are the subject of a rather rich body of caselaw ably summarized in *id.* at 691-778. For a discussion of problems generated by the caselaw, see Weinreb, *supra* note 9, at 58-64; Note,

¹⁴² *Id.* at 489-90. For a similar case holding there was no search because state action was lacking, see *Ritter v. Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970).

¹⁴³ The Court rejected the argument that Mrs. Coolidge became an agent of the police when she brought the evidence to the police. 403 U.S. at 487.

¹⁴⁴ 412 U.S. at 234 n.15.

THE PARADIGM REASONABLE CONSENT SEARCH

Most consent searches conducted within the scope of consent raise no serious fourth amendment problems. Consider this case: The police suspect Krook of dealing in illegal drugs but lack sufficient evidence to make an arrest or obtain a search warrant. Officer Kopp decides to confront Krook and to question him, hoping to be invited into his home where Kopp suspects the drugs are kept. Kopp, in full police uniform, goes to Krook's home, speaks briefly and amicably with him on his front porch and asks if he might enter the house and look around the living room. Krook, a former law student well-versed in fourth amendment lore, knows that he need not permit police entry in this situation but, after a moment's thought and a recollection that no drugs are in the house, nevertheless invites Kopp into the house.¹⁴⁷ Unfortunately for Krook, he has forgotten about a marijuana plant, obviously identifiable as such, he has growing in his living room in plain view of Kopp. Kopp arrests Krook for illegally growing marijuana and seizes the plant.

Upholding Krook's actions and admitting the plant into evidence presents little problem. While Krook legitimately expects to be free from unwanted and warrantless governmental intrusions into his living room, he relinquishes his privacy expectations by consenting to the intrusion. Since there are no longer expectations of privacy *vis-a-vis* Kopp and the living room, no search occurs when Kopp enters and looks around the room. Seizure of the plant, in plain view of Kopp, is thus permis-

sible. No reason exists to regulate this kind of governmental conduct nor to protect an atomistic privacy interest in Krook.

UNREASONABLE SEARCHES BEYOND THE SCOPE OF CONSENT

Under the same facts suppose that, instead of remaining in the living room, Kopp barges into Krook's bedroom and discovers the plant. The scope of Krook's consent extends only to the living room. He thus retains privacy expectations in the bedroom which are violated by Kopp's intrusion. Hence, an unreasonable fourth amendment search and seizure occurs when Kopp enters, looks around the room and confiscates the plant. Because he has no right to be in the bedroom when he sees the plant, the plain view exception is inapposite. Not only is a protected realm of privacy violated but an undesirable police action, to be deterred in the future if possible, occurs. For both atomistic and regulatory reasons, the evidence should be excluded.

Significantly, this example does not call into question the thesis that consent searches are invariably reasonable since the search here occurs outside the scope of consent. Had Kopp remained in the living room, within the area of consent, no fourth amendment intrusion would have occurred.

UNCOMMUNICATED ACTUAL CONSENT

Consider the following variation on the same theme: Suppose that when Kopp asks if he might enter Krook's home to visit, he does not hear Krook's spoken invitation into the house. When the invitation is spoken Krook whirls and enters the house. Thus to Kopp it appears that no consent is given and, indeed, that Krook intends an immediate termination of the conversation. Kopp nevertheless follows Krook into the living room, sees the marijuana plant, arrests Krook, and seizes the plant.

Technically, it appears that Krook consents to the intrusion.¹⁴⁸ He manifests his intent to consent through his external performance of speaking the invitation.¹⁴⁹ The situation is free from coercion, especially if Krook assumes that Kopp hears his invitation to enter the house, thus indicating voluntary consent under *Schneekloth*. The intrusion occurs within the scope of the consent. Krook

¹⁴⁸ There appear to be no reported cases dealing with the problem of uncommunicated consent.

¹⁴⁹ See note 99 & accompanying text *supra*.

Third-Party Consent Searches: An Alternative Analysis, 41 U. CHI. L. REV. 121 (1973). I neglect these matters because others have treated them and because I am concerned here with the issue of the theoretical consequences of valid consents once they are given and not with problems of determining their existence.

¹⁴⁷ Krook's actions in these circumstances are not necessarily against his interests even if he knows Kopp suspects him of dealing in drugs and even if he has drugs stashed in the house.

[A] freely given consent may serve to dispel ... [police] suspicion and ... clear the occupant. ... Since the criminal realizes that consenting to the search will divert police suspicions, he may consent, hoping either that the police will not bother to search at all or, if they do, will not find the carefully hidden evidence. ... Finally, the less sophisticated criminal may consent to the police search because he has reasoned, rightly or wrongly, that if the police have enough on him to want to search, the 'game is up' and the best course is to curry favor by cooperating with them.

Note, 67 COLUM. L. REV., *supra* note 93, at 131.

permits Kopp's entry into the living room and has thus relinquished his privacy expectations *vis-a-vis* that room and that invitee. No search occurs even though from Kopp's perspective the case has all the earmarks of a blatant violation of privacy.

Viewing such a case as totally outside the fourth amendment's scope is troubling. While from an atomistic point of view no fourth amendment interests appear to be offended, the regulatory point of view may demand that the undesirable police behavior be measured by fourth amendment reasonableness.

Nevertheless, there are problems with seeking to regulate this kind of police conduct through the exclusionary rule,¹⁵⁰ especially if the hope is to deter its future occurrence. After all, if Kopp is not deterred in the instant case by the belief that his actions offend Krook's fourth amendment rights, why should he be any more deterred in the future if the evidence seized in Krook's house is held inadmissible? As Professor Amsterdam has observed in the context of his similar hypothetical: "[I]f a policeman is not deterred from conducting a search by the knowledge that he will lose its fruits on the facts as he thinks they are, he will certainly not be deterred by the unanticipated contingency of losing its fruits on the facts as he thinks they aren't."¹⁵¹ Excluding the marijuana plant seems inefficacious to specially deter Kopp since he appears to be an incorrigible violator of fourth amendment rights. Moreover, excluding the plant appears unnecessary to deter other police officers from following Kopp's example. If the evidence is held to be admissible, other officers will receive little incentive to tread upon fourth amendment rights in hopes that unknown consent has been given. Such cases will surely be rare. In most instances, following Kopp's example will result in obvious violations of the fourth amendment and the exclusion of evidentiary fruits derived therefrom.

The position of Justice White, joined by Justices Harlan and Stewart, in his dissent to a dismissal of

certiorari in *Massachusetts v. Painten*¹⁵² is relevant to the present problem.

The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates all of his later behavior. . . . The expanded exclusionary rule applied in the opinions below would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements.¹⁵³

Yet, there remain reasons for concern if Kopp's actions are not stamped as illegal. Some inducement to violate real fourth amendment interests in the future is provided if Kopp's actions are upheld since the police will know that some apparent violations of the fourth amendment will nevertheless be sustained if unknown consent has fortuitously been given. Perhaps the deterrent purpose of the exclusionary rule requires its invocation in any case where failure to exclude evidence presents any inducement to violate the fourth amendment in the future.

But apart from considerations of deterrence, a fundamental principle seems offended if Kopp's actions are upheld. Why should he be permitted to benefit, by obtaining an arrest and conviction, from his attempted wrongdoing? Are there not dangers in permitting purposeful disregard of constitutional protections by governmental officials to be so rewarded? Should not such irrational conduct be officially condemned by the fourth amendment rather than viewed as extraconstitutional matters?

The wisdom of one commentator seems appropriate here:

It is . . . imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional

¹⁵⁰ See *Feguer v. United States*, 302 F.2d 214, 248-50 (8th Cir.), cert. denied, 371 U.S. 872 (1962), where the court held admissible evidence obtained from a room police believed the defendant was occupying but which had in fact been abandoned by the defendant. While the fourth amendment might well have been violated had the facts been as the police believed them to be, because defendant had abandoned the premises the search "could not possibly have violated any constitutional right of the defendant." *Id.* at 250.

¹⁵¹ See note 48 *supra*; Amsterdam, *supra* note 3, at 369.

¹⁵² 389 U.S. 560 (1968) (cert. dismissed as improvidently granted).

¹⁵³ *Id.* at 564-65 (White, J., dissenting).

guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies.¹⁵⁴

But if regulatory interests demand scrutiny of Kopp's actions, such scrutiny is impossible if Krook's consent has removed the case from the fourth amendment's scope.¹⁵⁵ Unlike the stop and frisk hypothetical posed above, where a *prima facie* reasonable search was nevertheless subjected to a second order of rational scrutiny, such second-order scrutiny of Krook's case is theoretically impossible if his consent renders Kopp's intrusion a non-search.

It may well be that Kopp's actions would survive attack under the fourth amendment. Courts of an atomistic bent considering such cases may, in light of pressing law enforcement interests and the trend toward limiting the application of the exclusionary rule, carve out further exceptions to the warrant rule so as to permit warrantless searches in such cases of actual, but uncommunicated, consent. However, such cases might be viewed as unconstitutional intrusions. The point is that scrutiny of cases of arguably unreasonable police intrusions into otherwise protected areas of privacy should not be foreclosed altogether simply because consent was given.

UNAPPARENT ACTUAL CONSENT

A variant of the uncommunicated actual consent problem can be posed in a third-party setting. Suppose that when Kopp goes to Krook's house the door is answered not by Krook, but by Earl, a man in a uniform with "Earl's TV Repair" written across its front. An "Earl's TV Repair" truck is parked outside the house. Kopp asks Earl if Krook is at home. Earl replies in the negative and, after telling Kopp that he must hurry back to his repair work on Krook's TV, invites Kopp into the living room to wait for Krook's return. Kopp accepts Earl's invitation, waits in the living room for Krook to arrive, arrests him for growing the marijuana, and seizes the plant. From all appearances Earl is a mere invitee in Krook's home. In fact, he is a co-

tenant of Krook who owns his own TV repair business and happened to be repairing his cotenant's TV at the time Kopp happened along.

From Kopp's perspective, Earl lacks authority to consent to the entry into the living room.¹⁵⁶ But actually Earl is clothed in authority by virtue of his right of joint access and control of the premises.¹⁵⁷ Moreover, Krook may be held to have assumed the risk of Earl's consent.¹⁵⁸

As with the analogous apparent authority cases, where police reasonably, but erroneously, believe authority to consent exists, courts may split in deciding the validity of Earl's consent where police reasonably but erroneously believe authority to consent does not exist. Courts following *Elrod*¹⁵⁹ would seemingly have little problem in sustaining Earl's consent since it actually existed under *Frazier* and perhaps also under *Matlock*.¹⁶⁰ Moreover, Krook's expectation of privacy is diminished to the extent he shares the premises with Earl.¹⁶¹ Thus, Kopp apparently makes no search or seizure since the consent renders the intrusion reasonable. On the other hand, those courts adopting the apparent authority doctrine¹⁶² may, for the reasons discussed in connection with the uncommunicated consent case, be inclined to view the unreasonableness of Kopp's action as a basis for excluding the evidence.¹⁶³ However, to the extent that the apparent

¹⁵⁶ See, e.g., *United States v. Harris*, 534 F.2d 95 (7th Cir. 1976).

¹⁵⁷ See notes 129-31 & accompanying text *supra*.

¹⁵⁸ See notes 127-28 & accompanying text *supra*.

¹⁵⁹ See notes 118-19 & accompanying text *supra*. It appears that no reported cases deal with the problem of unapparent actual consent.

¹⁶⁰ *Frazier v. Cupp*, 394 U.S. 731; *United States v. Matlock*, 415 U.S. 164. The *Matlock* standard does not clearly indicate whether Earl's consent would be valid. See notes 131-33 & accompanying text *supra*.

¹⁶¹ See Comment, *Third Party Consent Searches: The Right to Excuse*, 69 J. CRIM. L. & C. 92, 101-02 (1978).

¹⁶² See note 123 & accompanying text *supra*.

¹⁶³ The apparent authority rule rests upon the proposition that 'the regulation of police behavior is what the fourth amendment is all about'; suppression based upon a hindsight determination that there was not actual authority would have no deterrent effect, for in future cases the police can only act upon what reasonably appears to be true. This being so, it is in no sense inconsistent to suggest that if the police did not have a reasonable belief that the consenting party had authority (whatever the truth of the matter may later be determined to be), then the evidence should be suppressed for the purpose of deterring the police from acting upon similar appearances in the future and, in all probability, violating real fourth amendment interests.

2 W. LAFAVE, *supra* note 1, at 724.

¹⁵⁴ Oaks, *supra* note 25, at 756.

¹⁵⁵ In addition to the problem of fourth amendment scope, Krook may also have standing problems if his consent is seen as vitiating his privacy expectations. See notes 52-57 & accompanying text *supra*.

authority doctrine is based on an accommodation to law enforcement interests, as an expression of judicial reluctance to deprive society of evidentiary fruits gleaned in situations where police conduct is reasonable,¹⁶⁴ it does not follow that courts embracing the doctrine would necessarily be led to deprive society of fruits gathered from obviously guilty persons' houses simply because officers act unreasonably in attempting to enter homes without consent.¹⁶⁵

In any event, the unapparent actual consent situation exposes an arguably unreasonable search occurring within the scope of a valid consent. The case thus seems an appropriate candidate for fourth amendment scrutiny. The point here, as in the preceding hypothetical, is not that Kopp necessarily performs an unreasonable search and seizure by accepting Earl's invitation to enter the house, but rather that examination of the fourth amendment meaning of his unreasonable action should not be foreclosed simply because Earl consented.

¹⁶⁴ To a large extent, such a theory underlies the apparent authority cases.

When the police are engaged in the difficult and sometimes dangerous business of solving crime, actions which they take in a good faith attempt to do their job should not be reviewed by courts against a holier-than-thou standard of exceeding technical complexity which the police officers cannot realistically be expected to administer. In other words, judicial determinations of the 'reasonableness' of third party consent searches cannot properly ignore the circumstances of the search as they appeared to the police at the time the decision to search was made. Specifically, if the police obtain consent to search a house from someone who reasonably appears to them to be in control of the premises and in a position to authorize them to enter, it would be of little social utility for a court subsequently to rebuke the officers by excluding the evidence they obtained during the search on the ground that the person whose consent they accepted in good faith was the 'general householder' rather than the 'exclusive possessor.'

Reinforcing this line of reasoning is the consideration that the fourth amendment exclusionary rule rests upon a 'police misconduct' rationale: that is, unlawfully seized evidence is excluded from trials in order to deter the police from engaging in unlawful conduct. If this deterrent effect exists at all, it quite clearly is of no effect when the police, believing that they are acting lawfully, conduct a search which later turns out to be 'unlawful' because they failed to observe a subtle distinction drawn by a defense attorney with 20/20 hindsight.

Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U.L. REV. 1087, 1110 (1973).

¹⁶⁵ See note 150 *supra*.

THE UNIDENTIFIED INTRUDER

A final version of the Kopp-Krook scenario is useful in examining the inherent rationality of consent searches. Suppose that instead of appearing in police uniform, Kopp poses as an encyclopedia salesman whom Krook invites into his living room to discuss a possible purchase. Upon entering the room Kopp sees the marijuana which he seizes after identifying himself as a police officer and arresting Krook.

While Krook's entry is facilitated by deception, it is not necessarily characterized by coercion. Indeed, his entry is probably permitted by existing caselaw. Not only does *Schneekloth's* emphasis on consent as the absence of coercion not condemn it, but other cases give it actual support. For example, in *Hoffa v. United States*,¹⁶⁶ Partin, an acquaintance of Hoffa's, became an undercover government informer and, after frequent visits to Hoffa's hotel room, gave incriminating evidence against Hoffa gathered from the visits. In rejecting a claim that the informer's failure to disclose his role as a government agent "vitiated [Hoffa's] consent" to the numerous entries,¹⁶⁷ the Court said:

In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved . . . Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing . . . Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.¹⁶⁸

Similarly, the Eighth Circuit Court of Appeals in *United States v. Raines*¹⁶⁹ upheld the actions of a police officer who gained entry to the defendant's home, and subsequently obtained evidence against him, by posing as a concerned friend of an acquaintance of the defendant who had been arrested for buying heroin from the defendant earlier that evening. The Court found that although the consent to the officer's entry had been obtained by ruse, defendant's fourth amendment rights were

¹⁶⁶ 385 U.S. 293 (1966).

¹⁶⁷ *Id.* at 300.

¹⁶⁸ *Id.* at 302.

¹⁶⁹ 536 F.2d 796 (8th Cir.), *cert. denied*, 429 U.S. 925 (1976).

not violated since no search or seizure occurred even though the officer went to defendant's home intending to gather evidence against him.¹⁷⁰

Other courts have found consent unaffected by the fact that police gain entry to defendants' homes by impersonating printing press operators,¹⁷¹ German chemists,¹⁷² hippies,¹⁷³ and real estate customers¹⁷⁴ and to defendant's private hospital room by posing as a porter responsible for cleaning the room.¹⁷⁵ While some courts have invalidated consent precipitated by police ruse,¹⁷⁶ it more generally appears that consent given

to another to intrude into an area or activity otherwise protected by the Fourth Amendment . . . is not vitiated merely because it would not have been given but for the nondisclosure or affirmative misrepresentation which made the consenting party unaware of the other person's identity as a police officer or police agent."¹⁷⁷

The fourth amendment ramifications for both innocent citizens and guilty offenders are startling.

If the government is authorized to enter private premises through the use of any ruse, much has been gained for law enforcement. Similarly, owing to the general openness with which Americans manage their private premises, the government could maintain almost constant interior surveillance of private areas previously protected under the amendment. A greater compromise of the fourth amendment could hardly be envisioned. . . . With very little imagination, but some planning and control, government authorities could employ a host of . . . schemes to gain entry on a repeated basis to practically any private area. Having established a legally permissible vantage point, it would seem senseless for the officials to worry about procuring a neutral magistrate's authorization for a search. A building inspector's or meterman's uniform would be far more convenient than obtaining a search warrant. Besides,

¹⁷⁰ *Id.* at 800-01.

¹⁷¹ *United States v. Guidry*, 534 F.2d 1220 (6th Cir. 1976).

¹⁷² *United States v. Hagen*, 397 F.2d 460 (7th Cir. 1968), *cert. denied*, 396 U.S. 1027 (1970).

¹⁷³ *Bickar v. Gray*, 380 F. Supp. 804 (N.D. Ohio 1974).

¹⁷⁴ *State v. Anglada*, 144 N.J. Super. 358, 365 A.2d 720 (1976).

¹⁷⁵ *People v. Manieri*, 83 Misc. 2d 798, 373 N.Y.S.2d 504 (1975).

¹⁷⁶ *See, e.g., United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977): "It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the . . . [government] agent."

¹⁷⁷ 2 W. LAFAVE, *supra* note 1, at 680.

search warrants require probable cause; undercover ruses . . . do not. Thus, the warrant requirement would be resorted to only for searches and seizures in which undercover work would be physically or economically unfeasible.¹⁷⁸

Surely, an overly rigid consent doctrine should not preclude examination of unidentified police intruder cases such as the encyclopedia salesman ruse. Far from being inherently reasonable consent situations, such cases beg for fourth amendment scrutiny.

This not to say that all unidentified intruder cases are necessarily violative of the fourth amendment. The courts might recognize the important law enforcement value undercover police agents provide¹⁷⁹ and strike compromises in these cases, perhaps finding valid consent if, and only if, the defendant admits the undercover officer solely for the purpose of participating in a crime¹⁸⁰ or only when police agents choose to become such after the defendant has committed a crime rather than being planted prior to its commission.¹⁸¹ But such

¹⁷⁸ Warner, *Governmental Deception in Consent Searches*, 34 U. MIAMI L. REV. 57, 92-93 (1979). Apart from the fourth amendment problems touched on here, the police deception cases raise a number of first, fifth, and sixth amendment issues, as well as such nonconstitutional matters as entrapment and trespass. For treatment of these problems, *see generally id.*; Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975).

¹⁷⁹ *See* sources cited in Warner, *supra* note 178, at 58-59 nn.5-6.

¹⁸⁰ *See* Warner, *supra* note 178, at 97-98. One advantage of such a compromise is to "free innocent persons from intrusions into their privacy, for the deceptive assertion of an interest in participating in illegal activity is unlikely to result in continued association with a person bent upon only law-abiding activity." 2 W. LAFAVE, *supra* note 1, at 682.

¹⁸¹ [T]here are critical differences between the cases in which the actual employee or maid or meterman chooses to cooperate as a police agent and those in which he or she is from the beginning a plant. In the first place, the planting procedure will produce in gross a larger number of intrusions and increase the sense of general vulnerability to such exposure. Second, to validate domestic espionage would radically change the sort of relationship a person may have with those with whom he deals in the ordinary course of living. Instead of asking how likely it is that this independent person, this ordinary secretary or maid or meterman, may be persuaded to act for the police, he must ask how likely it is that this apparent secretary or meterman or maid is really an official in disguise. This requires him to make a judgment about others wholly different from any we normally think of ourselves as having to make, for one must not only assess the likelihood that such-and-such a person will prove loyal, but the like-

compromises are not possible if consent, whenever given, removes the situation from the fourth amendment's scope.

TOWARDS A REGULATORY CONSENT THEORY

The tendency to treat consent searches as inherently reasonable results from bringing only the atomistic view to such situations. Perhaps, from the perspective of the consentor, voluntary consent invariably negates privacy expectations although *Hoffa* and the other unidentified intruder cases suggest the contrary.¹⁸²

lihood that the person with whom one is dealing is a skilled professional dissembler, able to manufacture the usual indicia of reliability. This would uproot one's confidence to estimate risks, judge character, and protect by good social judgment one's privacy even while working in a cooperative or communal way. And this sense of sudden uncertainty is introduced into the lives not only of those engaged in crime but those in whose activities the police may be thought to have any interest, including political and social organizations. One way to define what would be protected here is to call it an interest in the ordinariness of social life. Finally, there is another important distinction between the two classes of cases, based on the interests of the reporter. In the case where a person has decided to help the police rather than the suspicious person with whom the prior relations exist, both we as the public and he as a person have a strong interest in having his freedom of choice protected, just as we do with that of the joint occupant. The third person added to the drama has claims and interests that arise independently of the struggle between the defendant and the officer. In the 'plant' case those interests disappear. We have only the officer, whose interest is in investigating crime in an official way, and he has no independent interest in a freedom to choose how to exercise a power that has come upon him in the course of his ordinary experience.

White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 229-30.

¹⁸² To argue that the unidentified intruder situations evidence merely "misplaced confidence" and not privacy intrusions seriously perverts the concept of privacy. See note 50 *supra*. Apparently, under the *Hoffa* Court's view, the individual has two choices: keep silent or speak at the risk of telling the world. This view fails to realize that "consent to reveal information to a particular person or agency, for a particular purpose, is not consent for that information to be circulated to all or used for other purposes." A. WESTIN, *supra* note 50, at 375. "The Court [in *Hoffa*] thus did not appear to recognize that one's expectations about what government is doing may legitimately differ from one's expectations about what associates are or will be doing as private citizens." Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause and the Warrant Requirement*, 69 J. CRIM. L. & C. 425, 433 (1978).

But, as shown by the Krook-Kopp hypotheticals, the atomistic view inadequately illuminates consent situations where the police have no reason to believe consent, in fact given, exists, or where consent is given because of police deception. Such cases evidence fourth amendment unreasonableness if the regulatory perspective is brought to bear. After all, it is one thing to say that one relinquishes his right to be free from warrantless searches by consenting to a search, but quite another to say he also relinquishes his right to be free from unreasonable searches within the scope of his consent. The right to be free from unreasonable governmental actions may well be viewed as an absolute, inalienable interest and thus incapable of being relinquished.¹⁸³ The remainder of this article will suggest an approach which accommodates atomistic and regulatory views within existing consent theory.

REDEFINING CONSENT

One way to permit the regulatory perspective to operate in situations of arguably improper intrusions occurring within the scope of voluntary consent would be to modify the definition of valid consent to include considerations of the reasonableness of police conduct as well as the degree of coerciveness experienced by the consentor. Such an approach is presently reflected in the apparent authority doctrine which finds police reasonableness to be a sufficient basis for consent where it is not actually existing. By the same token, those courts which invalidate consents induced by deception are redefining consent by carving out exceptions to the general voluntary consent rule. Similar redefinition could exempt from the category of consents cases involving uncommunicated and unapparent consent where police lack reason to believe actual consents exist.

But adopting the redefinition approach presents problems. First, such redefinitions may be inconsistent with Supreme Court decisions. If the absence of coercion is the essence of valid consent, as *Schnecko* says repeatedly, it is difficult to avoid the conclusion that consents deceptively induced

¹⁸³ In his *Schnecko* dissent, Justice Marshall makes a similar point in conjunction with his discussion of the right to be free from coerced confessions: "Because of the nature of the right to be free of compulsion, it would be pointless to ask whether a defendant knew of it before he made a statement; no sane person would knowingly relinquish a right to be free of compulsion." 412 U.S. at 281 (Marshall, J., dissenting).

or unperceived by the searcher are, nevertheless, consents. While police entries into homes by impersonating encyclopedia salesmen may be inappropriate or even unfair, they hardly seem coercive.¹⁸⁴ Although a single oblique reference in *Schneekloth* refers to the interest in maintaining fairness in consent situations, the Court did not indicate that it intends to upset earlier cases like *Hoffa* which recognize no constitutional unfairness in deceptively obtaining consent.¹⁸⁵ Nevertheless, *Schneekloth* leaves open the possibility of analyzing the fairness as well as the coerciveness of consent searches. If fairness is interpreted broadly to entail the appropriateness, in terms of fourth amendment interests and values, of the actions of the police as well as the injustice to the particular consenter, adequate accommodations, on a case-by-case basis, of atomistic and regulatory interests are possible.¹⁸⁶

CONSENTS AS "SEARCHES"

A second approach to the problem of unreasonable consent searches would leave unaltered the definition of consent but would expand the definition of searches and seizures from its present narrow focus on actual and reasonable privacy expectations to include normative assessments of the reasonableness of police behavior. Thus if searches are defined in terms of the desirability of permitting a given police intrusion to go unhindered, cases of police misconduct may be regulated even though voluntary consent has been given. Cases where the consenter unambiguously communicates his consent to a known governmental agent would continue to be conceptualized as inherently reasonable non-searches since neither atomistic nor regulatory considerations require fourth amendment scrutiny. But all other consent cases could be thought of as searches and seizures because the desirability of permitting the unreasonable police conduct in those cases to go unregulated is questionable. Under this view, voluntary consent, like reasonable suspicion that a person is

armed and dangerous in the hypothetical above, provides *prima facie* evidence of a reasonable intrusion which might nevertheless be negated by a second-order assessment of the reasonableness of the search. These second-order assessments, as with the redefinition of consent approach, would permit a case-by-case analysis of unreasonable consent situations with exclusion of the evidentiary fruits of such searches where appropriate.

Again, as with the redefinition of consent approach, liberalizing the definition of searches and seizures poses problems in light of existing doctrine. For one thing, it seemingly calls into question the standing requirement. If the consenter has actually permitted the intrusion, it is difficult to see him as a victim even though the police act unreasonably from a regulatory perspective. But on the other hand, if standing issues are to be merged with issues of whether or not searches and seizures occur, as *Rakas* suggests, defendants are searched, and thus have standing, when police engage in undesirable conduct notwithstanding the defendant's relinquishment of privacy expectations through his consent. In addition to considerations of standing, the expanded definition of searches and seizures in terms of the desirability of the police conduct as well as the privacy interests of the defendant may be difficult to implement in light of the judicial reluctance to move beyond narrow definitions based solely on factual privacy expectations.

Hence, both the redefinition of consent and the consents as searches approaches require some stretching of existing doctrine to accommodate regulatory concerns. But without such stretching, cases of unreasonable consent searches such as those identified in this article, will, unfortunately, remain immune to fourth amendment scrutiny.

CONCLUSION

This article has examined, and found wanting, the view that voluntary consent to an intrusion by governmental agents invariably renders the situation reasonable for fourth amendment purposes. Some intrusions, particularly those where consent is uncommunicated, unapparent, or the product of police deception, raise serious fourth amendment difficulties which should not be left beyond its pale simply because the intrusions occur within the scope of voluntary consent. These situations can be subjected to fourth amendment scrutiny by either expanding the definition of voluntary consent to include factors other than the coerciveness of the

¹⁸⁴ See *Kamisar, Brewer v. Williams, Massiah, and Miranda: What is 'Interrogation'? When Does it Matter?*, 67 GEO. L. J. 1, 5-6, 48-51 (1978). Coercion results only if the suspect is aware that he is talking with, and being talked to by, the police.

¹⁸⁵ See, e.g., the post-*Hoffa* case, *White v. United States*, 401 U.S. 745 (1971), discussed in text accompanying notes 43-47 *supra*.

¹⁸⁶ Professor LaFare suggests expanding the definition of consent to include unfairness as the means of resolving the problem of consents induced by police deception. 2 W. LAFARE, *supra* note 1, at 689.

consent or by expanding the definition of searches and seizures to include considerations of the desirability of the particular police conduct in addition to inquiries into actual privacy expectations of the consenter. Either of these approaches will inject much needed regulatory perspectives into a scope doctrine presently captivated by narrow atomistic concerns.

To a large extent, the problem of reconciling the regulatory and atomistic views in consent searches is symptomatic of the problem which has plagued the development of a sound body of fourth amendment doctrine in general. Defining the scope of the fourth amendment is the most difficult and impor-

tant problem in its jurisprudence.¹⁸⁷ Much of the difficulty can be attributed to an inability to accommodate within a system which does not unduly shackle society's interest in law enforcement, the atomistic interest in vindicating actual violations of privacy with such regulatory concerns as preventing their future violation and insisting that government be principled in its law enforcement actions. Although this article will not solve these problems for fourth amendment jurisprudence in general, it is hoped that their solution will be advanced in the area of consent searches.

¹⁸⁷ See Amsterdam, *supra* note 3, at 377; Yackle, *supra* note 8, at 355.