Search by Consent

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PART III

Parent and Child

Frequently, a mother or father or both consent to a police search of the family dwelling house, which yields evidence incriminating a son or daughter residing therein. The question is whether or not a parent is empowered to give such consent. The response of the courts has been almost uniform. The consent is valid, and any evidence found admissible, so long as there is common access to the place or thing searched. A child living in the family home thus assumes the risk of a police search authorized by his parents.

The Federal decision of *United States* v. *Peterson*, 524 F. 2d 167 (4th Cir. 1975), cert. denied 423 U.S. 1088 (1976), is illustrative. Following a bank robbery in Alexandria, Va., six subjects returned to the home of the seventh co-conspirator's mother. Investigation led police to the residence where they sought and obtained consent to search from the mother. A search of an upstairs bedroom shared by her son, a defendant, and two brothers produced incriminating evidence. Though the son did not personally participate in the robbery, the government contended he was a co-conspirator who helped plan the crime and permitted the other defendants to use his mother's home as a "staying area before the robbery and as a sanctuary afterwards."

A major issue before the court in *Peterson* was the lawfulness of the mother's consent. Though the defense attack was aimed principally at the voluntariness of her consent, the court discussed at length the power of the mother to permit the search, and concluded that she possessed the requisite authority to consent:

> "At the time of the search, she had access to and complete control of the entire premises, including the bedroom used by her children. . . . Given the nature of the home as a family dwelling and the fact that the mother, as owner and head of the single-

family household, designated what use, if any, could be made of the premises including the bedroom in question, we think it was 'reasonable to recognize' that the mother had the authority 'to permit the inspection in . . . [her] own right.' . . . [Her] access and control over the entire premises . . . vested her with sufficient authority . . . to consent to a search of the room as against the rights of the codefendants. . . ." *Id.* at 180–181.

The Supreme Court of South Carolina reached a like result in *State* v. *Middleton*, 222 S.E. 2d 763 (S.C. 1976), vacated on other grounds 50 L. Ed. 2d 69 (1976). The defendant, charged with rape and armed robbery, was arrested. Two days after the crimes were committed and while the defendant was still in custody, police officers obtained from his father a consent to search a bedroom located in an apartment "provided and also occupied by his parents." The defendant, unmarried, shared the bedroom with a younger brother. Incriminating evidence was found, seized, and received in evidence. The court ruled that: (1) The key to a valid third-party consent is "common authority" over the premises; (2) the father possessed such authority in this case; and (3) his voluntary consent to the bedroom search therefore was lawful.

Other recent decisions which exemplify the general approach of the courts to parental consent are: *Owens* v. *State*, 309 So. 2d 70 (Fla. App. 1974), appeal dismissed 305 So. 2d 203 (Fla. 1974) (mother may consent to search of son's bedroom); *People* v. *Johnson*, 329 N.E. 2d 464 (Ill. App. 1975) (father residing with son may consent to search of commonly used bathroom); *State* v. *Johnson*, 319 So. 2d 786 (La. 1975) (mother with common authority over house may consent to search directed against son); *State* v. *Forbes*, 310 So. 2d 569 (La. 1975) (mother who is head of house and who had regular access to son's room could validly consent); *Chase* v. *State*, 508 S.W. 2d 605 (Tex. Crim. App. 1974), cert. denied 419 U.S. 840 (1974) (parents' consent to search rooms of 17-year-old son approved); *State* v. *Kelsey*, 532 P. 2d 1001 (Utah 1975) (mother's informed consent to search of 19-year-old son's bedroom shared with brothers is lawful). Note that age is not the critical factor—the legal status and position of the child controls. A child who has been emancipated should be considered a tenant in possession. For example, a child who works and is self-supporting, and who pays a regular rental to his parents for a room in the family home, would be afforded the constitutional protection to which a tenant, roomer, or renter would be entitled. (See Tenant.)

Three circumstances arise occasionally that should raise the caution flag for officers seeking consent to search a family home.

First, where a child has been granted sole and exclusive use of an area of the family house, the "common occupancy-joint possession" principle of *United States* v. *Matlock*, 415 U.S. 164 (1974), does not apply. The parent is no longer one who "possesses common authority" over the room and thus may not authorize "in his own right" an entry and search of the room by police. A case in point is *People* v. *Nunn*, 304 N.E. 2d 81 (Ill. 1973), cert. denied 416 U.S. 904 (1974), where the Illinois Supreme Court held that a mother could not lawfully consent to the search of a room in the family home set aside for the exclusive use of her 19-year-old son who had told the mother not to allow anyone to enter the room.

Second, though a parent generally can consent to a search of all the rooms of a family dwelling, including those occupied by a child residing therein, this authority may not extend to personal property located within the dwelling, such things as brief cases, suitcases, diaries, shaving kits, jewelry cases, handbags, wallets, etc. The question in each instance is whether the child retains sole and exclusive control over the personalty, that is, whether he has a reasonable expectation of privacy in the article searched. The distinction between consent to search a room and consent to search an item of personal property discovered inside is drawn in *Reeves* v. *Warden*, 346 F. 2d 915 (4th Cir. 1965) (mother who was tenant in daughter's home was without authority to consent to search of dresser in room occupied exclusively by son). See also *State* v. *Johnson*, 513 P. 2d 399 (N.M. App. 1973) (defendant's brother-in-law could consent to search of his premises, including areas occupied by defendant, but could not authorize a search of duffel bag possessed exclusively by defendant).

Third, police officers sometimes confront a situation with the roles reversed, that is, where a child is asked to consent to a search of the family home directed against a parent. The general view seems to be that a child residing in the family dwelling house provided by his parents does not possess common authority over the premises or effects within, and consequently cannot consent to their search. In short, the constitutional protection belongs to the parents, and in their absence may not be relinquished by a

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child. *State* v. *Malcom*, 203 A. 2d 270 (Del. Super. Ct. 1964) (16-year-old son); *Padron* v. *State*, 328 So. 2d 216 (Fla. App. 1976) (16-year-old son); *May* v. *State*, 199 So. 2d 635 (Miss. 1967) (15-year-old son).

Other Family Members

In the absence of a parent, can anyone else grant consent to search premises for evidence incriminating a child residing therein? While the answer to this question is by no means as clear as in the case of parents, the courts have sustained searches undertaken with consent of grandparents, aunts, cousins, brothers, and sisters.

Where a person resides permanently or temporarily in a home owned and occupied by his grandparents, or an aunt and uncle, the rule relating to parental consent is applicable. If the grandparent (or aunt or uncle) has control over the premises and there is common access to the place or thing searched, the consent of the grandparent binds the grandchild. *Addison* v. *State*, 243 So. 2d 238 (Fla. App. 1971) (search of room in grandmother's house occupied by 19-year-old grandson who was guest, lawful based on her consent); *Pennington* v. *State*, 478 S.W. 2d 892 (Tenn. Crim. App. 1971) (consent to search house in which nephew resided part-time was proper where given by aunt who lived in house and was in charge of the premises); *State* v. *Plantz*, 180 S.E. 2d 614 (W. Va. 1971) (warrantless search of premises of defendant's grandparents upon their consent valid against defendant who was residing there temporarily and was assigned no area of exclusive use).

As to siblings, the general approach taken by both Federal and State Courts has been to permit the search of premises jointly occupied. For example, in *Loper* v. *State*, 330 So. 2d 265 (Miss. 1976), officers investigating a recent rape went to the home of defendant, where he lived with his brother and mother, who was a joint owner of the property. The brother consented to the search of the backyard of the residence. Officers found there a pistol stolen from the victim at the time of the rape. The pistol was admitted into evidence at the defendant's trial.

On appeal, the defendant argued that his brother had no authority in the presence of his mother to consent to the search. The argument was rejected. The Mississippi Supreme Court, citing *United States* v. *Matlock*, 415 U.S. 164 (1974), held the consent valid, reasoning that the yard was available for the common use of all occupants, and any person having joint access or control of the yard for most purposes could authorize the entry and search by the officers. To hold otherwise "would have the incongruous effect of granting one brother standing to object on the basis of his relationship to the premises, while denying the other the authority to consent based on an identical relationship. Such a paradox would be devoid of logic." The court also noted that there was no indication that the backyard was in any manner "the exclusive personal domain" of the defendant. *Loper* v. *State*, *supra*, at 267.

Consent searches by brothers and sisters have been sustained frequently by both Federal and State courts. See, e.g., *United States* v. *Boston*, 508 F. 2d 1171 (2d Cir. 1974), cert. denied 421 U.S. 1001 (1975) (search of jointly occupied apartment validated by consent of defendant's sister); *United States* v. *Mojica*, 442 F. 2d 920 (2d Cir. 1971) (brother, with whom defendant shared premises, fully competent to consent to search of area not specifically set aside for defendant's use); *People* v. *Robinson*, 116 Cal. Rptr. 455 (Cal. App. 1974) (defendant's sister lawfully consented to search of living room of her apartment where defendant was staying); *Lanford* v. *People*, 489 P. 2d 210 (Colo. 1971) (en banc) (consent of stepbrother held lawful); *Radkus* v. *State*, 528 P. 2d 697 (Nev. 1974) (sister staying in defendant's house with express permission had authority to consent to search thereof).

Employer and Employee

A consent search undertaken in the context of the employer-employee relationship raises two distinct problems: (1) Whether the employee can bind his employer by inviting police to search business premises; and (2) whether the employer may consent to the search of business premises (and personal property located therein) for evidence incriminating the employee. Decisions approving and condemning both such searches can be found. The result depends to a great extent on the particular facts of a case. Hence, it is difficult to formulate a general rule. Nonetheless, it is possible to describe the important factors considered in judging the validity of the consent.

Courts have approved the police search of a business establishment directed against an employer based on consent obtained from his employee. The key to the lawfulness of the consent is the degree of authority over the premises possessed by the employee. When an employer confers upon his subordinate authority to control, supervise, or otherwise exercise dominion over the business premises, he has for all practical purposes given up any reasonable expectation of privacy in the premises (but not in his personal belongings located inside). Accordingly, he cannot be heard to claim later that his fourth amendment rights were violated when the subordinate permitted police to search.

In *United States* v. *Grigsby*, 367 F. Supp. 900 (E.D. Ky. 1973), an employee of the defendant invited FBI

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Agents into a building belonging to the defendant and housing sound and recording equipment being used to violate Federal copyright laws. He also volunteered to escort them through the building. An Agent later testified that the employee was the sole occupant of the premises and was "apparently the person responsible for the activities being conducted in the building and had obvious control over the premises."

In response to the defendant's argument that the employee lacked authority to consent to the entry and search, the court held that "an employee, who concededly has a legal right to use the business premises, clothed with the apparent indices of control may consent to a warrantless search of the premises." The employer assumes the risk that his employee, so empowered, may "allow someone else to look inside."

The court noted three significant factors to be considered in determining the third party's (employee's) authority to consent: (1) His legal and possessory rights to the premises; (2) his relationship to the subject of the search (employer); and (3) the circumstances as they objectively appear to officers at the time of the search. *Id.* at 902. This same formula was adopted more recently in *United States* v. *Phifer*, 400 F. Supp. 719 (E.D. Pa. 1975), where the court sustained the search of an airplane on authority of an employee's consent.

Other cases illustrating circumstances wherein an employee may lawfully consent are: *United States* v. *Murphy*, 506 F. 2d 529 (9th Cir. 1974) (per curiam), cert. denied 420 U.S. 996 (1975) (where employee given key to warehouse by employer, defendant had "sufficient dominion" over the premises to grant consent to search; search not unreasonable where employer put the premises under immediate and complete control of employee); *United States* v. *Sells*, 496 F. 2d 912 (7th Cir. 1974) (per curiam) (employee having common authority over junkyard could lawfully consent to search thereof; evidence obtained may be used against employer-defendant).

The contrary view may be seen in *United States* v. *Block*, 202 F. Supp. 705 (S.D. N.Y. 1962) (considering his age, experience, responsibilities, and activities, employee, who was handyman in retail store, did not have authority to consent to search of the store basement, where evidence incriminating employer was found); *People* v. *Smith*, 204 N.W. 2d 308 (Mich. App. 1972) (secretary's consent could not waive the constitutional rights of her employer as to employer's private office); *State* v. *Cundy*, 201 N.W. 2d 236 (S.D. 1972), cert. denied 412 U.S. 928 (1973) (employee without specific or delegated authority to authorize a warrantless search of employer's premises may not bind his employer by consenting to search) (dictum). What distinguishes these decisions from those above is the degree of control over the premises conferred upon the employee. There is also the hint that some courts will look less favorably on the consent where time and opportunity were available to obtain a warrant prior to the search. *United States* v. *Block*, *supra*, at 707.

Whether an employer may consent to the search of business premises for evidence incriminating his employee generally depends upon where the search is conducted. Cases before and after *Katz* have held that while the employer may permit police to search common areas within the business building, *United States* v. *Gargiso*, 456 F. 2d 584 (2d Cir. 1972) (superior with equal right of possession to place searched), he may not grant such authority as to places or things reserved for the exclusive use of the employee, i.e., where the employee has a "reasonable expectation of privacy."

An early Federal case addressed this problem and concluded, even before the *Katz* decision, that a government office employee possessed a constitutional right of privacy in a desk reserved for her exclusive use. The court noted:

> "Her official superiors might reasonably have searched the desk for official property needed for official use. . . . Her superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. *Their consent did not make such a search by the police reasonable.*" *United States* v. *Blok*, 188 F. 2d 1019, 1021 (D.C. Cir. 1951) [emphasis added].

In 1968, the Supreme Court held in *Mancusi* v. *Deforte*, 392 U.S. 364 (1968) that a union official had standing to object to warrantless search of the union office which he shared with others, and the seizure of union records therefrom. It is not clear from where inside the office the records were taken. But the Court seemed to recognize an employee does have some

expectation of privacy in his business office. And a stronger argument could be made for his "private desk," *Id.* at 377 (White, J., dissenting) and "files and drawers used exclusively." *Id.* at 377 (Black, J., dissenting).

Two other Federal decisions are instructive: *United States* v. *Kahan*, 350 F. Supp. 784 (S.D. N.Y. 1972), aff'd in part, rev'd in part 479 F. 2d 290 (2d Cir. 1973) (defendant's supervisor could not consent to the search of a trash basket located next to or under employee's desk and reserved for his exclusive use); *United States* v. *Millen*, 338 F. Supp. 747 (E.D. Wis. 1972) (president of law firm could not consent to the search of a lockbox set aside for the personal use of a member of the firm).

Where the facts suggest the employee does not have exclusive control or possession of the area of business premises searched, a contrary holding will result. Examples are: *United States ex rel. Williams* v. *Commonwealth of Pennsylvania*, 373 F. Supp. 1295 (E.D. Pa. 1974) (valid consent from principal of school to search storage and boiler rooms yielding evidence incriminating employee of school; areas searched not under sole dominion of employee); *Quaglione* v. *State*, 292 A. 2d 785 (Md. Ct. Spec. App. 1972) (part-time employee of store had no right of privacy in storage area of department store; consent of store manager to search such area lawful; evidence seized admissible against employee). Cf. *Braddock* v. *State*, 194 S.E. 2d 317 (Ga. App. 1972) (consent of truck owner-employer to search vehicle valid against driver-employee where latter has no reasonable expectation of privacy in truck).

Finally, the terms and conditions of the employment contract may dictate the degree of privacy an employee may expect in a desk, locker, or office. In *United States* v. *Bunkers*, 521 F. 2d 1217 (9th Cir. 1975), cert. denied 423 U.S. 989 (1975), a postal employee convicted of mail theft complained that her fourth amendment right was infringed when evidence was seized from her assigned locker without warrant upon authority of the post office manager. The court rejected the argument, pointing out:

> "Bunkers' voluntary entrance into postal service employment and her acceptance and use of the locker subject to the regulatory leave of inspection and search [Part 643, Postal Manual] and the labor union's contractual rights of search upon reasonable suspicion of criminal activity amount to an effective relinquishment of Bunkers' Fourth Amendment immunity in her work connected use of the locker." *Id.* at 1221 [emphasis added].

See also *State* v. *Robinson*, 206 A. 2d 779 (N.J. Super. Ct. 1965).

Principal and Agent

Closely related to the consent search problem of an employer and employee is that concerning a principal and agent. An agent is one who acts for or in place of another by authority from him; he is a substitute, a deputy, appointed by a principal with power to do the things a principal may do. Black's *Law Dictionary* 85 (4th Ed. 1951). As such, the authority of an agent to act for his principal is generally broader than that of an employee acting for his employer. While an employee may also be an agent, the former is less likely to possess the authority necessary to validate a consent to search directed against his superior. See *United States* v. *Ruffner*, 51 F. 2d 579 (D. Md. 1931) (mere employee, as distinguished from agent, not empowered to consent). The problem is whether an agent can grant consent to search the premises of his principal.

> ". . . authority to consent depends upon the extent to which [the agent] has been given the right to possession and authority to act for his principal . . . "

A principal having the right to possess premises may appoint another to act in his stead for a special purpose or for all purposes. The agent thereby may exercise a right to limited possession or full possession of the premises according to the terms of the agency agreement. His authority to consent depends upon the extent to which he has been given the right to possession and authority to act for his principal, and where such authority exists, the agent's consent permits a search of the premises binding on the principal as well as himself. For example, the general manager of a corporation's regional office might be an agent cloaked with the power to permit inspection of the company's office and books. On the other hand, a real estate agent appointed by an absentee home owner for the sole and exclusive purpose of maintaining the property might have such limited authority as to preclude a consent to search.

In *Akin Distributors of Florida, Inc.* v. *United States*, 399 F. 2d 306 (5th Cir. 1968), cert. denied 394 U.S. 905 (1969), defendant corporation was convicted of allowing foods shipped in interstate commerce to become adulterated, a violation of Federal law. Responding to the argument that evidence was seized following an illegal entry and search, the court held the company's agent had sufficient authority to permit the search and his consent was given freely and voluntarily. See also *In re Fried*, 161 F. 2d 453 (2d Cir. 1947), cert. denied 331

U.S. 858 (1947) (consent of general manager of company to search plant and examine its business records lawful); *Reszutek* v. *United States*, 147 F. 2d 142 (2d Cir. 1945) (superintendent's voluntary consent to search cellar of apartment building valid against owner); *Raine* v. *United States*, 299 F. 407 (9th Cir. 1924), cert. denied 266 U.S. 611 (1924) (consent to search ranch valid when obtained from one left in general control); *Brown* v. *State*, 404 P. 2d 428 (Nev. 1965) (sheriff's search and seizure authorized by consent of defendant's attorney). Cf. *United States* v. *House*, 524 F. 2d 1035 (3d Cir. 1975) (search of records with consent of accountant lawful where defendant taxpayer gave unlimited authorization to accountant to deal with IRS in connection with audit).

For the officer faced with the difficult task of deciding who, if anybody, has authority to consent to the search of business premises, the preferred approach is to obtain permission to search from the highest ranking person available. Thus, the resident manager of a store, warehouse, garage, or factory ordinarily would be the individual from whom the consent is secured. *United States* v. *Maryland Baking Co.*, 81 F. Supp. 560 (N. D. Ga. 1948). See also *Lake Butler Apparel Co.* v. *Secretary of Labor*, 519 F. 2d 84 (5th Cir. 1975) (president of defendant corporation empowered to consent to inspection of manufacturing plant by Federal safety and health law compliance officer); *United States* v. *Piet*, 498 F. 2d 178 (7th Cir. 1974), cert. denied sub nom. *Markham* v. *United States*, 419 U.S. 1069 (1974) (acting warehouse foreman had authority to consent to search of common storage areas within warehouse).

As to company business records, consent should be sought from the person authorized to have sole control of the office and records. This is generally the office manager, *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2d Cir. 1946), cert. denied 329 U.S. 742 (1946), but may be other officials of the firm. *Peel* v. *United States*, 316 F. 2d 907 (5th Cir. 1963), cert. denied sub nom. *Crane* v. *United States*, 375 U.S. 896 (1963) (consent from secretary-treasurer); *United States* v. *Culver*, 224 F. Supp. 419 (D. Md. 1963) (consent from corporation president).

Host and Guest

It is agreed that a guest or visitor, lawfully present, has a constitutional right to object to an unreasonable search of the premises when the fruits of the search are to be used against him. *Jones* v. *United States*, 362 U.S. 257 (1960); *United States* v. *White*, 268 F. Supp. 998 (D.C. 1966); *State* v. *Thibodeau*, 317 A. 2d 172 (Me. 1974). But this does not answer the question commonly posed in such cases: whether a voluntary consent to search, given by the host in possession of premises, is effective against the guest.

Prior to the *Katz* decision in 1967, the generally recognized rule declared that the host's waiver of the constitutional protection afforded his premises was effective against the guest or visitor. See, e.g., *Weaver* v. *Lane*, 382 F. 2d 251 (7th Cir. 1967), cert. denied 392 U.S. 930 (1968) (primary occupant of home lawfully consented to seizure of evidence from room being used by guest who was staying "a few days" until he found a place); *Burge* v. *United States*, 342 F. 2d 408 (9th Cir. 1965), cert. denied 382 U.S. 829 (1965) (tenant in possession gave valid consent to search of apartment binding on temporary guest); *United States* v. *White*, *supra* (lessee, principal user and occupier of premises, could give authorities consent to enter and search his premises, and evidence disclosed as a result thereof could be used against guest).

An exception to the general rule was recognized in *Reeves* v. *Warden*, 346 F. 2d 915 (4th Cir. 1965), where the defendant was not a temporary visitor but rather a more or less permanent guest in his sister's home. His mother, also a guest in the house, consented to a search of the room he occupied and a bureau located therein, both set aside for his sole use. The court found the search violative of the defendant's fourth amendment right. The mother was without authority to permit the search.

Has the holding of the Supreme Court in *Katz* changed things? Apparently not. In *United States* v. *Buckles*, 495 F. 2d 1377 (8th Cir. 1974), the defendant was convicted of transporting stolen securities (money orders) in interstate commerce. The evidence offered against him at trial consisted in part of a stolen money order found in a jacket located in the home of one Mrs. Eutzy. The jacket and money order were seized pursuant to her consent. The defendant and two of his companions were the overnight guests of Mrs. Eutzy at the time of the seizure. On appeal, the defendant claimed that the hostess' consent was improper.

> "'It has been held that a host can consent to a search of his premises occupied by a guest'."

The court disagreed, holding that the consenting party "had the primary right to the occupation of the premises. . . . It has been held that a host can consent to a search of his premises occupied by a guest." *Id.* at 1381 (citing *Weaver* v. *Lane*, *supra*; *Burge* v. *United States*, *supra*).

Other post-*Katz* decisions from the Federal courts which support the view that a host is authorized to consent to a premises search aimed at securing evidence against a guest are:

Bowles v. *United States*, 439 F. 2d 536 (D.C. Cir. 1970) (en banc), cert. denied 401 U.S. 995 (1971) (visitor in someone else's home is not protected by the fourth amendment from the risk that the owner will consent to the entry of the police; guest has no right to demand the hostess make her home a sanctuary); *Pasterchik* v. *United States*, 400 F. 2d 696 (9th Cir. 1968), cert. denied 395 U.S. 982 (1969) (hostess "fully empowered" to consent to search of bedroom within her home where defendant-guest left personal effects); *United States* v. *Reed*, 392 F. 2d 865 (7th Cir. 1968), cert. denied 393 U.S. 984 (1968) (defendant's stepfather had authority to consent to search of room in his home temporarily occupied by defendant and girlfriend); *United States ex rel. Perry* v. *Russell*, 315 F. Supp. 65 (W.D. Pa. 1970) (transient occupants of one-room apartment cannot preclude right of primary tenant to authorize or consent to search).

State courts have adopted a similar approach. See *Jones* v. *State*, 333 So. 2d 210 (Ala. Crim. App. 1976) (search of bedroom occupied by guest lawful upon consent of host); *State* v. *Cromeans*, 472 P. 2d 42 (Ariz. 1970) (mere guest may not object to warrantless search of premises where one with possessory right consents; "all the recent cases are to the contrary"); *State* v. *Grandmaison*, 327 A. 2d 868 (Me. 1974) (lessee in possession may lawfully consent to search aimed at guest); *State* v. *Thibodeau*, *supra* (while guest had standing to object, host-tenant had sufficient control of premises to bind guest by his consent to search); *Varner* v. *State*, 518 P. 2d 43 (Nev. 1974) (parents' consent to search room occupied by son lawful where son merely a guest at sufferance of parents who retained full right of control over premises); *Mares* v. *State*, 500 P. 2d 530 (Wyo. 1972) (rule seems well-established that mere guest on premises of another may not object to warrantless search where owner has given consent thereto).

The majority of cases appears to sanction searches of premises made with consent of the host. However, courts have recognized that such authority does not extend to areas reserved for the exclusive use of the guest or to his personal effects. *Reeves* v. *Warden, supra; Holzhey* v. *United States*, 223 F. 2d 823 (5th Cir. 1955); *United States* v. *White, supra.*

The issue of whether a temporary guest may consent to the search of his host's premises has been considered, but rarely. The better view is that the guest acquires no possessory right in the premises which supersedes the right of the host. *United States* v. *Pagan*, 395 F. Supp. 1052 (D.P.R. 1975), aff'd 537 F. 2d 554 (1st Cir. 1976), is illustrative. In *Pagan*, the Federal court held that "the weight of authority stands firmly against consent" by a temporary guest to a search of the host's house. The guest has "neither actual or implied authority to act as agent for the defendant [host] and consent to the search."

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The result can be different where the guest is something more than a transient visitor. In *United States* v. *Turbyfill*, 525 F. 2d 57 (8th Cir. 1975), the consenting party had been staying in the house of the defendant "for several weeks and had the run of the house. He was an occupant of indefinite duration rather than a casual visitor." The court concluded that such a person had common authority over and joint possession of the residence and had authority to authorize entry to the premises.

Secondary School Officials and Students

In recent years, crime spawned on city streets has spilled over to the classroom. It has brought not only fear and trepidation to parents and students, but also problems of control for school officials and law enforcement officers.

School officials are primarily responsible for maintaining order and discipline in secondary schools. The discharge of this duty means at the same time the investigation of criminal offenses—possession of narcotics and weapons, receiving stolen property, etc. Once the disciplinary problem becomes a criminal matter, law enforcement officers are frequently contacted for advice and assistance. It is essential at this point that officers be mindful of the constitutional issues which can arise pursuant to the schoolhouse search.

It is quite clear from both Federal and State court decisions that a student is entitled to the protection of the fourth amendment in his person, effects, and school locker. The New York Court of Appeals, reflecting the general view in a 1974 decision, concluded:

> "High school students are protected from unreasonable searches and seizures, even in the school, by employees of the State whether they be police officers or school teachers." *People* v. *D.*, 315 N.E. 2d 466, 467 (N.Y. 1974).

See also *Picha* v. *Wilgos*, 410 F. Supp.

1214 (N.D. Ill. 1976) (student possesses settled, undisputed constitutional right against unreasonable search in the school environment).

In the context of a consent search, the issue is whether a student in the school environment can give up the protection he enjoys in his person, effects, and locker by permitting police or school officials to search. A related and no less important problem is whether a school official may consent to a police search of the student's property.

So long as his decision is the result of a free, voluntary choice, the student, like any other individual, can consent to a police search. For example, in *State* v. *Stein*, 456 P. 2d 1 (Kan. 1969), a student suspected of burglary was confronted by police at his high school. In the presence of the principal, he was asked for consent to open his locker. He agreed and further authorized the officers to look through the contents found inside. A key was uncovered which led to the later discovery of property taken in the burglary. In considering the student's consent, the Kansas Supreme Court found there was nothing to suggest it was "coerced or other than voluntary," and noted:

> "We think it clear from the record that Stein agreed to the search without a word of complaint or objection and in a setting which is not to be equated with the aura of oppressiveness which often pervades the precincts of a police station." *Id.* at 2–3.

The burden of proving the voluntariness of the consent rests with the State, and it is probably fair to say that this burden increases as the age and maturity of the student diminishes.

Suppose in *State* v. *Stein, supra*, it was the school principal who consented to the police search of the locker. Would such consent be lawful? The answer may be found in an oft-cited New York Court of Appeals decision.

Detectives with a search warrant describing two students and their lockers went to a local high school, where they presented the order to the vice principal. The students were summoned and searched, but nothing evidentiary was found. A subsequent search of the defendant-student's locker, however, yielded marihuana. Though the warrant was later found defective, the trial court refused to suppress the evidence, concluding that the seizure was justifiable on an independent ground, that the vice principal had consented to the search of the locker. The court of appeals agreed.

In *People* v. *Overton*, 229 N.E. 2d 596 (1967), vacated and remanded 393 U.S. 85 (1968), reheard and approved 249 N.E. 2d 366 (1969), the New York court was presented with two issues: (1) Whether the school official could authorize the search of a student's locker; and (2) whether his consent was voluntary.

Regarding the official's right to consent, the court pointed out that the students provided school authorities with their locker combinations and were "well aware" that school officials possessed duplicate combinations. Furthermore, regulations had been issued concerning what could be kept in the lockers, with the school reserving the authority to "spot check" to insure compliance. The court concluded that while the students may have the right of exclusive possession with respect to their fellow students, they have no such rights as against school authorities. And because of the nonexclusive nature of the locker (i.e., joint possession), the school official is empowered to consent to the search by police officers. *People* v. *Overton*, 229 N.E. 2d at 598. The court also held that given the distinct relationship between school authorities and students and the hazards inherent among teenagers in a school environment, the authorities have an affirmative obligation to investigate charges that students are using or possessing narcotics.

As to the claim that the vice principal's consent was involuntary, the court, after examining all the relevant facts, rejected the argument and found his decision free of coercion. *People* v. *Overton*, 249 N.E. 2d at 368. The *Overton* decision was cited with approval in a later New York decision, *People* v. *Jackson*, 319 N.Y.S. 2d 731 (App. Div. 1971).

What *Overton* teaches is that a State may justify a school locker search by police based on consent of a school official where a policy has been adopted, promulgated, and practiced in which the school withholds from a student the total and exclusive right to possession of the locker. This nonexclusivity may be demonstrated by publishing an appropriate school regulation, by securing an agreement or understanding from the student at the time of the issuance of the locker, and by retaining duplicate combinations or locker keys. It should be noted that *Overton* deals only with the school locker problem and would not justify the search of the student himself or items in his possession, at least not on the basis of "joint possession" or "nonexclusivity."

Overton is consistent with the line of Supreme Court decisions applying the "assumption of risk" principle to searches undertaken with third-party consent. Where two or more persons (student and school official) mutually possess and exercise common authority over a place or thing (school locker), each assumes the risk that one of the joint possessors will consent to its search. *Frazier* v. *Cupp*, 394 U.S. 731 (1969). (See also Joint Tenants and Common Occupants).

(Continued Next Month)

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