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Larry I. Yellen

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THIRD PARTY CONSENT SEARCHES: THE RIGHT TO EXCULPATE

The fourth amendment protects individuals from governmental interference with private property by prohibiting unreasonable searches and seizures, and by requiring proof of probable cause before a search warrant will be issued.[1] The two clauses of the amendment have been construed to mean that the government must show probable cause in order to obtain a warrant, but that a warrant is not required to validate every search and seizure.[2] Exceptions to the warrant requirement recognize that in certain situations a search may be inherently reasonable.[3] For example, if an individual *consents* to a search or seizure of his property, the government's search is reasonable and does not violate the guarantees of the fourth amendment.

The consent exception to the warrant requirement includes situations in which a third party, not the owner of the premises searched or the property seized, is permitted to consent to the search because of his interest in the property.[4] Since the search and seizure is deemed reasonable without a warrant, there is no need to make the showing of probable cause required to obtain a search warrant. The issue in such cases is rather the authority of the third party to give his consent.

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[1] 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.

[2] "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted).

[3] Major exceptions to the warrant requirement include searches incident to a lawful arrest, searches conducted in "hot pursuit," searches of abandoned property, inventory searches, and consent searches. For a more complete listing of the exceptions to the warrant requirement, see W. RINGLE, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 202-05 (1972).

[4] Haddad & Zagel, *Arrest, Search & Seizure*, in SHORT COURSE FOR PROSECUTING ATTORNEYS 101 (1976) (Section I, ch. 13). Private searches must be distinguished from those in which the government is involved. If the third party in possession of a suspect's property conducts an entirely private search and then voluntarily turns the items over to the police, no fourth amendment analysis is required since the search or seizure involved no governmental participation. For example, in United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976), a shipping terminal manager discovered allegedly obscene books during an inventory and turned the books over to government agents. The court held that the search by the terminal manager was a private search, noting the "total absence of governmental involvement prior to completion of the search." *Id.* at 6 n.5. The transfer to the police of the items discovered in the search was completely voluntary.

> A consensual transfer is by definition not a seizure. . . . If a transfer is voluntary, then it is not a seizure and the fourth amendment's reasonableness standard is simply inapplicable.
>
> Thus we conclude that there is no seizure within the meaning of the fourth amendment when objects discovered in a private search are voluntarily relinquished to the government.

Id. at 7-8. Occasionally, a private search may be followed by a government seizure. The seizure must then be justified by the reasonableness standard. In United States v. Ogden, 485 F.2d 536 (9th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974), a warrantless search was justified by the exigent circumstances exception to the warrant requirement.

The issue of third-party consent arises when there has been sufficient governmental participation in the search itself to invoke the warrant requirement and the reasonableness standards of the fourth amendment. Generally, the test for determining whether the participation of the government agents is sufficient to invoke the fourth amendment is whether the private party, "in light of all the circumstances of the case, must be regarded as having acted as an instrument or agent of the state." Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). In *Coolidge*, while the defendant was at the police station, his wife had given certain items to the police after they asked if she had those items in her home. The actions by the wife were seen as a "spontaneous, good faith effort ...to clear him [the defendant] of suspicion." *id.* at 490, and the wife's private search therefore did not invoke the fourth amendment. Factors which are examined to determine the participation by the government in a search include governmental knowledge of and acquiescence in the search, and governmental presence at the time the search occurs. *See, e.g.*, United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976) (police viewing materials discovered by private citizen immediately after the search does not constitute a government search).

Early cases analyzing third-party consent relied on a theory of implied agency, suggesting that the third party was acting as an agent of the defendant when he consented to a search. According to the implied agency analysis, the person challenging the search is said to have appointed the third party as his agent with authority to waive his fourth amendment rights.[5] The implied agency, or "apparent authority" analysis, was rejected as a rationale for consent search in *Stoner v. California*.[6] In *Stoner*, a hotel clerk consented to the search of the defendant's hotel room. The Supreme Court held that the clerk did not have the authority to consent and that the search was therefore invalid. In dictum, the Court emphasized the need to avoid the use of an implied agency theory to resolve fourth amendment questions.

> [T]he rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority."
>
> . . . It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.[7]

More recent decisions have explained the third-party consent exception in terms of assumption of risk, suggesting that the defendant assumed the risk that the third party might consent to a search when he placed his property in the possession of the third party. Support for the assumption of risk theory is found in *Frazier v. Cupp*[8] in which the Supreme Court held that clothing seized from a duffel bag which the defendant shared with another party could be admitted as evidence at the defendant's trial. The Court in *Frazier* did not propose a general standard for third-party consent cases, but the decision was clearly based upon an assumption of risk theory.

> Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside.[9]

The assumption of risk theory still has some validity today, but has been largely overshadowed by a third-party consent doctrine formulated by the Supreme Court in *United States v. Matlock*.[10] The Court stated in *Matlock* that authority to consent will be found where the consenting party has a sufficient relationship to the property to authorize the consent.[11] Since *Matlock*, the problem in third-party consent cases has been the interpretation of the *Matlock* "sufficient relationship" standard. Courts have found it necessary to determine the relationship of a consenting party to the items which he allows to be searched, in order to determine whether or not the third party has the authority to consent to the search. Assumption of risk may reappear in this analysis, since the defendant's reasonable assumptions play a role in determining the relationship which the consenting party has to the premises or goods in his possession.[12]

[5] For a criticism of the implied agency analysis, see Comment, *The Effect of a Wife's Consent to a Search and Seizure of the Husband's Property*, 69 DICK. L. REV. 69 (1964); Comment, *Third Party Consent to Search and Seizure; A Reexamination*, 20 J. PUB. L. 313 (1971).

[6] 376 U.S. 483 (1964).

[7] *Id.* at 488-89.

[8] 394 U.S. 731 (1969).

[9] *Id.* at 740.

[10] 415 U.S. 164 (1974).

[11] *Id.* at 171.

[12] In United States v. Cook, 530 F.2d 145 (7th Cir. 1976), a defendant who shared a poultry shed with several other persons was held to have assumed the risk that they might consent to a search. Mathews, *Third Party Consent Searches: Some Necessary Safeguards*, 10 VAL. U.L. REV. 29, 31 (1976), suggests that the implied agency analysis maintains its vitality in third party consent situations. United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962), demonstrates the application of the implied agency theory in a third-party situation. In *Eldridge*, the defendant had loaned his car to a friend, Nethercott, and had given Nethercott the keys to the ignition and the trunk of the car. Police officers later searched the car with Nethercott's permission. The court held that the third party, Nethercott, could validly consent to the search:

> [F]or the time being Nethercott was clothed with rightful possession and control and could do in respect to the automobile whatever was reasonable and not inconsistent with its entrustment to him. No restriction was imposed on him except to return with the car by a certain hour. . . . In responding as he did to the police, Nethercott did not exceed the authority Eldridge had seemingly given him.

Id. at 466. Dissenting Judge Boreman argued that the third party did not possess the authority to consent:

> Eldridge did not intend to confer authority

Several other factors may be important in determining the relationship of the third-party consenter to the goods or premises in his possession. For example, in a situation where two persons are joint occupants of an apartment, a court may examine the relationship between the parties to determine if one party can consent to a search of the co-occupant's bedroom. If the relationship is between parent and child, the court may allow the parent to, consent to the search.[13] However, between college roommates, the third party's consent may not be valid. School searches provide yet another example. A school principal may be allowed to consent to a governmental search of student lockers, while a teacher's consent in the same situation might not be held valid.[14] In such situations the authority to consent derives from (1) the third party's access to or possession of the property, in combination with (2) the third party's special relationship to the owner of the property. The parent's relationship with the child, in addition to the parent's access to the child's property, combine to provide the parent with authority to consent. Similarly, the school principal's access to school property, along with his special relationship to the students in his school, allows him to consent to a search of a student's locker.

In some instances, however, the third party's holding of property for another party may create a suspicion that the third party has been involved in some criminal activity. Ordinarily, this situation arises when the third party possesses property that has been given to him by a suspected criminal. If the third party lacks any other "special relationship" to the alleged criminal, he cannot easily explain why he is in possession of the suspect's property. Believing that he can prove his own innocence by consenting to a police search, the third party allows the police to search and seize the suspect's property. The government later asserts that the consent was authorized by the third party's exculpatory motive.[15] This comment will attempt to determine whether such an exculpa-

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> upon Nethercott to consent to a search of the car, nor is there any reasonable basis for the assumption that Nethercott had implied authority to consent to the search on behalf of Eldridge. . . . As before indicated, I do not think authority to consent to a police search can be remotely "implied" from a grant of permission to use a car for such a short time and such a limited purpose.

Id. at 467–68. For a discussion of the problems associated with the assumption of risk consent analysis, see Comment, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121, 131–32 (1973).

[13] *See, e.g.*, United States v. DiPrima, 472 F.2d 550 (1st Cir. 1973), where the court held that a mother could consent to a search of her son's bedroom. The mother was the head of the household, but the twenty-two year old son aruged that his room was exclusively his own.

> Finally, we remark that "exclusive" possession is not an absolute term. A hotel clerk may have a key to a room, and so may the cleaning staff, but the clerk will not have apparent authority to consent to a search. . . . [E]ven if [the son], living in the bosom of a family, may think of a room as "his," the overall dominance will be in his parents.

Id. at 551. A more complete list of individuals usually placed in the position of third-party consenters (not all of whom may validly consent) includes (a) landlords and hotel personnel; (b) school officials; (c) spouses, lovers and mistresses; (d) parents; (e) brothers' and sisters; (f) hosts and guests; (g) employers and employees; (h) bailees. J. HADDAD, A. MANUAL FOR PROSECUTING ATTORNEYS 102–05 (1976).

[14] In People v. Overton, 20 N.Y. 2d 360, 229 N.E. 2d 596 (1967), the vice-principal of a high school searched a student's locker after learning that detectives suspected marijuana might be in the locker. The principal used his master key to open the locker. The search was upheld on the ground that the principal could consent to the search because of the special relationship between a student and his school. In such a situation, the principal has a *duty* to search or consent to a search of the student's locker. Also, the student had given his combination to the school, an indication that the student did not have exclusive possession of the locker. *See also In re* Christopher W, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973), in which an assistant principal and principal required a student to open his locker in their presence. The search was upheld because prevention of the use of marijuana was clearly within the principal's duties and the actions taken toward that end were reasonable.

[15] The cases in which courts have examined the third party's motives underlying his consent include United States v. Botsch, 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967), and United States v. Diggs, 544 F.2d 116 (3d Cir. 1976), both of which will be examined in greater detail later in this comment. Other cases which have at least mentioned the third party's motive as a factor, although not holding the motive to be the most significant element supporting the consent search, include People v. Pranke, 12 Cal. App. 3d 935, 91 Cal. Rptr. 129 (1970) (neighbor sought to cooperate with police to prevent the possibility of criminal charges arising against him for possession of stolen property or aiding and abetting a burglary); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976) (mother sought to protect the integrity of her home); United States v. Gradowski, 502 F.2d 563 (2d Cir.

tory interest is a proper element of the third-party consent analysis.

EXISTING CASE LAW

The most significant decision by the Supreme Court in the area of third-party consent searches is *United States v. Matlock.*[16] In *Matlock,* a suspect in a bank robbery was arrested in the front yard of a house occupied by the suspect and a Mrs. Graff. Mrs. Graff admitted the police officers for a search of the residence during which they searched a bedroom jointly occupied by Mrs. Graff and Matlock. Since only Mrs. Graff had consented to the search of the premises occupied by the defendant, Matlock challenged the search and subsequent seizure of incriminating evidence as violating his fourth amendment rights. The Supreme Court held that consent to search could validly be "obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[17]

Matlock is essential to a discussion of third-party consent cases because *Matlock,* although not dealing with an exculpatory motive, did announce a standard to determine the validity of consent in third-party consent situations. The standard can apparently be met by a finding of *either* "common authority" over or "other sufficient relationship" to the defendant's property. In a footnote, the Court elaborated on the meaning of "common authority," distinguishing it from the traditional law of property:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[18]

The Court did not explain the phrase "other sufficient relationship." Some cases have found the "sufficient relationship" standard to be satisfied by the third party's fear of being implicated in criminal activity through mere possession of a suspect's goods. But an examination of two such cases, *United States v. Botsch*[19] and *United States v. Diggs,*[20] reveals the difficulties raised by using an exculpatory interest to satisfy the sufficient relationship standard.

In *United States v. Botsch,* the defendant was renting a small shack in order to store fraudulently acquired merchandise. The landlord, Stein, would usually pay for items delivered to the shack with money supplied him by Botsch. When postal authorities appeared at the shack to investigate Botsch's activities, Stein unlocked the shack and invited the postal officers to search the shack.[21] The search was conducted without a warrant and was later justified on the basis of Stein's consent. The Second Circuit held that the consent was valid and the search reasonable because Stein's intent was to exculpate himself from any involvement with the fraudulent activity of Botsch.

Motive was again considered to be a sufficient relationship to justify consent in *United States v. Diggs.* The Reverend Andrew Bradley received a locked metal box from his niece, Christine Malone, and her common-law husband, Alfred Diggs. Christine told Bradley and his wife that the box contained "'stocks and bonds and silver paper and important papers that they had saved up for the children.'"[22] The Bradleys were asked to hold the box so that Christine

1974) (consenter wanted to be rid of any connection with the defendant); United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972) (consenter sought to exculpate himself from suspicion); Leeper v. United States, 446 F.2d 281 (10th Cir. 1971), *cert. denied,* 404 U.S. 1021 (1972) (consenter knew she was in legal jeopardy and sought to avoid the risk of prosecution); United States v. Cataldo, 433 F.2d 38 (2d Cir. 1970), *cert. denied,* 401 U.S. 977 (1971) (consenter sought to show that he was not harboring a fugitive); United States v. Cecere, 333 F. Supp. 124 (E.D.N.Y. 1971) (consenter concerned with possible possession of stolen property); People v. Overton, 20 N.Y.2d 360, 229 N.E.2d 596 (1967) (lack of exculpatory motive indicated by dissent); State v. Edwards, 5 Wash. App. 852, 490 P.2d 1337 (1971) (consenter concerned that narcotics had been brought into his home).

[16] 415 U.S. 164 (1974).

[17] *Id.* at 171.

[18] *Id.* at 171 n.7 (citations omitted).

[19] 364 F.2d 542 (2d Cir. 1966), *cert. denied,* 386 U.S. 937 (1967).

[20] 544 F.2d 116 (3d Cir. 1976).

[21] The court found that "Stein, without being urged, covered or imposed upon, invited the inspection." 364 F.2d at 548.

[22] 544 F.2d at 117 (quoting Transcript of Suppression Hearing at 75).

and her husband would not be tempted to spend the funds. When Reverend Bradley later learned of Diggs' arrest for bank robbery, he became concerned that the box in his possession was connected with the bank robbery. Bradley had not been given a key to the box. He contacted agents of the FBI who came to his house and, without a warrant, took part in a search of the box.

The district court in *Diggs* found that the warrantless search violated the fourth amendment since the Bradleys did not have authority to consent to a search of the locked box.[23] A three-judge panel of the Third Circuit affirmed the district court's ruling that the evidence should be suppressed.[24] The panel applied the the joint access and control standard of *Matlock* and found that the Bradleys lacked authority to consent because the defendant had retained the key to the box. Under such circumstances, the third party did not have joint access to the locked box and accordingly did not possess either common authority over the box or any other relationship sufficient to authorize consent. The panel rejected the Government's contention that Bradley's interest in exculpating himself from connection with the robbery could validate his consent.

> Reverend Bradley had a substantial interest in extricating himself from his unwitting and innocent involvement in the alleged crime. . . . But that interest vanished once Bradley notified the authorities of the existence of the metal box and the circumstances surrounding his possession of it. It therefore does not furnish an excuse for circumventing the warrant requirement.[25]

The full court did not agree with the panel, however, and the Third Circuit sitting *en banc* vacated the ruling of the district court and remanded for further findings.[26] Four judges of the ten-judge court decided that Bradley did possess sufficient authority to consent to a search of the box.[27] The basic premise of the plurality's opinion was that the third party's right to exculpate himself from involvement in the crime must prevail over the defendant's interest in privacy. Two judges concurred with the plurality's opinion, one finding the search to be reasonable under the circumstances and therefore valid, the other concluding that the search was valid as an inventory search by the FBI agents.[28] Four dissenters, in a single opinion, argued that the consent was invalid and that the search was therefore in violation of the fourth amendment.[29]

The *Botsch* and *Diggs* decisions represent the only clear instances in which courts have relied upon the right to exculpate as justification for a warrantless consent search.[30] The rationale employed in those two cases should be com-

[23] United States v. Diggs, 396 F. Supp. 610, 615 (M.D. Pa. 1975).

[24] 18 CRIM. L. REP. (BNA) 2316 (1976).

[25] *Id.*

[26] United States v. Diggs, 544 F.2d 116 (3d Cir. 1976). The remand was required because, as the plurality explained, six judges did not concur in a reversal. The plurality and one concurring justice favored reversal, but the sixth concurring justice favored a remand for further findings relevant to the property interests involved.

[27] *Id.*

[28] *Id.* at 123, 124 (Adams, J., and Gibbons, J., concurring).

[29] *Id.* at 127.

[30] A third case which relies upon a similar analysis but does not refer to a specific "right to exculpate" is People v. Pranke, 12 Cal. App. 3d 935, 91 Cal. Rptr. 129 (1970), decided after *Botsch* but prior to *Diggs* and *Matlock*. The case dealt with a defendant, Pranke, who had left several of his personal possessions in a neighbor's apartment. The neighbor, Denton, hearing the police knock at Pranke's door, told them that Pranke had moved. Denton then allowed the police to search the items that Pranke had left with Denton. The nature of the search in Pranke was described by the court:

> After the officers had identified themselves to Denton and explained the purpose of their visit, Denton informed them that appellant "had brought some property into his apartment and was leaving it there until he could move it to the apartment building where he was living at that time . . . and he invited us inside to check the property." Denton directed the officers to "two suitcases, a box, a large cardboard box." A jewelry case and an item of jewelry located therein matched the description of the stolen property listed in the Clahan burglary report.

Id. at 938, 91 Cal. Rptr. at 130. For procedural reasons, the *Pranke* court was never directly confronted with the validity of the police search described above, but the court did indicate "disagreement with appellant's premise that the undisputed evidence demonstrates such illegality as a matter of law." *Id.* at 942, 91 Cal. Rptr. at 133. Dissenting Judge Roth also addressed the issue:

> I am not persuaded by the majority that Denton had the legal authority to authorize the officers to search appellant's belongings. This right fashioned by the majority for Denton to cooperate as a citizen and thus lawfully authorize the search of appellant's property is an innovation for which the majority cites no authority and for which I find no support in logic or policy.

Id. at 948, 91 Cal. Rptr. at 137 (Roth, J., dissenting).

pared with the standard set forth in *Matlock* in order to determine if the right to exculpate is properly considered in third-party consent situations. This is necessary because *Matlock* contains the Supreme Court's guidelines for third-party consent cases, and in each case, a third party permitted a governmental search of effects or premises belonging to a suspected criminal. The question posed by those cases is whether or not, under *Matlock*, a third party may consent to a search merely because the party is seeking to exculpate himself from criminal suspicion.

Sources of Authority for Third-Party Consent

United States v. Matlock made clear that a third party's authority to consent depends upon a showing of "common authority over or other sufficient relationship to the premises or effects sought to be inspected."[31] In *Botsch* and *Diggs*, the third party's authority to consent seems to be founded upon two elements: (1) the mere fact of possession by the third party and (2) the interest of the third party in exculpating himself from criminal suspicion, an interest which arises from the possession of the suspect's goods and may be termed a "right to exculpate."

The mere possession of the suspect's goods by the third party is not, by itself, sufficient to comply with the *Matlock* standard of required authority for two reasons. First, if the bailment alone created a "sufficient relationship" with the goods to authorize consent, it would be necessary to rely upon the technical rules of property law in order to determine the validity of third-party consent searches. Yet the Supreme Court has clearly indicated that the technical rules of real and personal property should not be outcome-determinative in criminal law cases. In *Chapman v. United States*,[32] which held that a landlord could not authorize the search of a house he had rented to another individual, the court rejected the Government's argument that property law should be determinative.

> [I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.[33]

With respect to third-party consent searches in particular, the Court said in *Matlock* that the authority to consent should not depend upon distinctions made in the law of property.[34] A determination that possession alone justified a consent search would bring questions of property law into the arena of criminal law, a result which the Supreme Court has clearly sought to avoid.

A second reason why the bailment alone can not authorize the third-party consent is that such a finding would be inconsistent with the *Matlock* standard. *Matlock* requires the third party to have some common authority over the property, or some other sufficient relationship to the property which the police seek to search. In order to comply with *Matlock* in a bailment situation, it seems necessary to examine in some detail the restrictions the suspect might have placed upon the third party in order to determine the existence of some "common authority" or "sufficient relationship."[35] This conclusion is supported by the fact that in consent cases involving bailments the courts have consistently examined the nature of the bailment to determine the third party's authority to consent.[36]

[31] 415 U.S. 164, 171 (1974).

[32] 365 U.S. 610 (1961).

[33] *Id.* at 617 (quoting Jones v. United States, 362 U.S. 257, 266-67 (1958).

[34] 415 U.S. at 171 n.7.

[35] The problems of determining authority to consent by examining the nature of the bailment were highlighted by Judge Van Dusen, dissenting in *Diggs*, when he inquired, "Are the constitutional rights of the bailor to be dependent, for example, on whether he paid 25¢ for the bailment?" 544 F.2d at 32 (Van Dusen, J., dissenting). Williston states that a bailment is "the rightful possession of goods by one who is not the owner." 9 Williston, Contracts § 1030 (3d ed. W. Jaeger 1967). There are, however, various types of bailments, such as involuntary and voluntary bailments, and in each instance the duty of the party in possession may differ. It seems that it is distinctions just like these that the Court has sought to avoid in the area of criminal law.

[36] For examples of instances in which courts have examined the authority which the bailor has granted to the bailee, see United States v. Canada, 527 F.2d 1374 (9th Cir.), *cert. denied*, 429 U.S. 867 (1975) (bailee had sufficient control to consent to search of suitcase belonging to bailor); United States v. Men-

Since the bailment alone does not provide the third party with authority to consent, the courts in *Botsch* and *Diggs* searched for further indicia of authority which would justify the third party's consent. In both cases, the courts found that the third party's interest in exculpating himself from criminal suspicion was sufficient to justify the consent. In *Diggs*, the plurality suggested that the Bradleys' status changed significantly when they received the box from Diggs.

> When the defendant and Christine Mahone left the box containing the stolen money with the Bradleys for safekeeping they thereby involved the latter in the alleged crime. Therefore, by doing so they put the Bradleys in a position where they had a vital personal interest in the box, a sufficient relationship to it to entitle them to give such a permission for the search as would be binding on Diggs. This does not mean, of course, that it was a property interest which they were given.[37]

Similarly, in *Botsch*, the court found that the interest of the third party in exculpating himself was a significant factor in creating the authority to consent: "Because Stein's activities—though innocent—were inextricably intertwined with Botsch's alleged scheme and cast suspicion upon him, we believe his authorization of the inspection when viewed in its full context rendered the search reasonable."[38]

Both *Botsch* and *Diggs*, however, go beyond the mere suggestion that the consenting third party has an *interest* in exculpating himself which authorizes the consent. Each opinion elevates that interest to the status of a *right*, the "right to exculpate." In *Diggs*, this right to exculpate is seen as prevailing over a countervailing right of privacy:

> [T]he right of the custodian of the defendant's property who has been unwittingly involved by the defendant in his crime to exculpate himself promptly and voluntarily by disclosing the property and explaining his connection with it to government agents, must prevail over any claim of the defendant to have the privacy of his property maintained against a warrantless search by such agents.[39]

In *Botsch*, the direct conflict with the defendant's expectation of privacy is not highlighted, but the court does refer to a clear right to exculpate:

> Indeed, any individual under similar circumstances would have a *right* to promptly and voluntarily exculpate himself by establishing that his role in the alleged scheme was entirely innocent and passive.
>
> This *right to exculpate oneself* also decisively distinguishes the November 6 search from those condemned in the so-called "hotel" cases relied upon by our dissenting colleague . . . .[40]

The *Botsch* court obviously saw the right to exculpate as the key factor which would authorize consent in a *Botsch* or *Diggs* situation, and it saw the absence of that factor as determinative in other, similar, third-party consent situations. It thus seems clear that the primary source of authority for the third party's consent in both *Botsch* and *Diggs* is the third party's right to exculpate himself from criminal suspicion. Unfortunately, reliance upon this theory has three disadvantages: (1) the right is difficult to limit in its application, (2) the theory encourages police manipulation of third-party motives, and (3) the theory allows a third party to consent to searches without regard to the limiting standards set forth in *Matlock*.

It is fairly evident that a right to exculpate could be held to exist in a great number of cases where such a finding is clearly unwarranted. The determination of such an interest in the *Diggs* case was not possible until *after* the

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doza, 473 F.2d 697 (5th Cir. 1973) (bailee had complete and unrestricted control over property and could consent); Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969) (bailee's right to possession was not very formal or durable but there were sufficient indicia of ownership to authorize the search); United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962) (bailee with rightful possession and control and in possession of keys to auto could consent); United States v. Mazzella, 295 F. Supp. 1033 (S.D.N.Y. 1969) (truck driver, as bailee in possession, could consent); Wade v. Warden, 278 F. Supp. 904 (D. Md. 1968) (wife-bailee in lawful possession could authorize search); State v. Curley, 171 S.E.2d 699 (S.C. 1970) (bailee with keys to auto could, without further prohibitions consent); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964) (bailee in possession and control of auto could consent).

[37] 544 F.2d at 121-22.

[38] 364 F.2d at 548.

[39] 544 F.2d at 120-21.

[40] 364 F.2d at 547 (emphasis added).

box had been opened. Almost all cases involving locked suitcases, briefcases, automobiles and other "concealing" items would pose the same problem. If the box is opened with governmental participation, as in *Diggs,* and the box contains purely personal, non-criminal effects, the rationale for opening the box in the first place is gone. The third party has no exculpatory interest unless the property is tied to a crime; yet, the right to exculpate is used as a justification for a governmental search before there is any determination that the third party actually possesses stolen property in the first place. Such reasoning clearly would result in searches contrary to the dictates of the fourth amendment.

The same problem does not arise when a showing of probable cause is required before the issuance of a warrant. In that case, even if the search turns up nothing, the rights of the individual have been protected by the judicial determination of probable cause. The rationale for the search remains clear, even if the search is unsuccessful. "Prior authorization protects against 'hindsight justification' and preserves 'the effectiveness of post-search review.' "[41] The third-party consent situation involves no showing of probable cause, and if a box is opened because a party might have an interest in that box, the reasons for opening the box arise only *after* the box is opened and its contents disclosed. This is clearly "hindsight justification" which allows the third party to consent to numerous searches which are not in fact justified at all.

The problem is avoided, of course, where the third party conducts the search privately and then calls the governmental authorities. He has, on his own initiative and without governmental participation, determined that there is a need to turn the defendant's goods over to the police, and a voluntary transfer of the goods to the police raises no fourth amendment issues.[42] If, however, the police are informed prior to any investigation about the nature of the goods in the locked box, and the box is then opened jointly, the search clearly falls within the fourth amendment. The search must then be justified by a consent theory, but it has been undertaken without the necessity for exculpation which would support consent.

Furthermore, law enforcement officers could easily create an exculpatory interest where none had existed, and in doing so would "endow" the third party with authority to consent. In *Diggs,* for example, prior to any contact from the third party, the police might have traced the box to his home and indicated that he might be involved in a criminal undertaking. The third party, who previously had no knowledge of his possession of "hot" goods, would immediately be possessed of the exculpatory interest which provides a sufficient relationship to authorize consent. A joint search of the goods would follow, and the primary justification for the search would be the consent of a frightened third-party consenter. The potential for abuse is obviously inherent in any theory which so easily allows the state to create in a third party the authority to consent to a search.

Finally, reliance upon the "right to exculpate" theory would allow consent searches which clearly fall outside the standards set forth in *Matlock. Matlock* established that consent to search could validly be obtained from third parties who possess either "common authority over or other sufficient relationship to the premises or effects sought to be inspected."[43] The Court suggested that mutual use and joint access or control are indications of common authority.[44] But the third parties in the situations examined here acquired the right to exculp^te *before* the event of their mutual use or joint access was scrutinized. The exculpatory right can evidently arise from the third party's slightest fear of implication in the crime, or from mere possession of the suspect's goods, and permitting consent based solely on that "right" avoids any further examination of the third party's relationship to the items in his possession. This reasoning in effect, circumvents the analysis of common authority required by *Matlock.* Thus, in *Diggs,* the plurality apparently found that the "right to exculpate" arose when the third party was placed in possession of the suspect's box. It was at this time that the third party was "unwittingly involved by the defendant in his alleged crime."[45] Once

[41] United States v. Diggs, 544 F.2d at 130 n.18 (Van Dusen, J., dissenting) (quoting South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring)).

[42] *See* note 4 *supra.*

[43] United States v. Matlock, 415 U.S. 164, 171 (1974).

[44] *Id.* at 171 n.7.

[45] 544 F.2d at 119. The plurality later pointed out that, "When the defendant and Christine Mahone left the box containing the stolen money with the

the third party was unwittingly involved, he had the right to exculpate himself; the court did not determine whether the third party had the common authority necessary in order to give consent for a search.[46] In fact, there was no mutual use of or joint access to the property because the third party did not have a key to the box.[47]

The second element of the *Matlock* analysis, some type of "sufficient relationship," must therefore be the sole justification for finding that a third party without joint access has the authority to consent to a search.[48] The plurality in *Diggs* purported to find such a sufficient relationship rather than look for common authority. But the right to exculpate came into existence when the third party received the

Bradleys for safekeeping they thereby involved the latter in the alleged crime." *Id.* at 121-22.

[46] The *Diggs* plurality did refer to *Matlock,* quoting the "common authority" or "sufficient relationship" standard, and then suggested that the situation in this instance was similar to one of joint access to or control over the premises. Because of this similarity, the defendant Diggs could be held to have assumed the risk that the bailees might consent to a search "when they learned the facts which appeared to incriminate them." *Id.* at 122. But such an analysis avoids the basic issue of whether the bailees did have common authority over or a sufficient relationship to the items seized.

[47] The third party's possession of a key has proven decisive in several third-party consent cases to support a finding of authority to consent to a search. For example, in *Botsch,* the court, in validating the third party's consent to a search, stressed that:

> In the case before us, Stein not only possessed a key to the shack with Botsch's knowledge and approval, but Botsch expressly authorized him to use it for the purpose of accepting the deliveries which flowed from the fraudulent scheme.

364 F.2d at 547. *See also* United States v. Green, 523 F.2d 968 (9th Cir. 1975) (third party in constant possession of key had sufficient control and authority over leased premises to consent to search); United States v. Piet, 498 F.2d 178 (7th Cir.), *cert. denied,* 419 U.S. 1069 (1974) (warehouse foreman with one of two keys to storage area could consent to search of that area); United States v. Mallory, 460 F.2d 243 (10th Cir.), *cert. denied,* 409 U.S. 870 (1972) (third party who had key to auto could consent to search of that auto); Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968), *cert. denied,* 395 U.S. 977 (1969) (third party's possession of key to the trunk of the auto authorizes the third party to consent to a search of the trunk); United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962) (bailee who had keys to the auto could consent to search of the auto).

On the other hand, when the third party does not have a key, courts often hold the consent invalid. For example, in United States *ex rel* Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970), the third party was a wife whose husband had left her in possession of property but had kept the key himself. After his arrest the wife obtained the key from the police and assisted the police in a search. The court found that the key was the only means of access to the property and that the husband had intended to keep the key from his wife. Similarly, in United States v. Brown, 300 F. Supp. 1285 (D.N.H. 1969), a search was held invalid because the suitcases searched were locked and the consenting party did not have a key. The court pointed out that, "a limited consent cannot be vicariously extended to the opening of another person's locked attache case." *Id.* at 1288.

Diggs and several other cases suggest that a key is simply one factor indicative of control and need not be decisive. The plurality in *Diggs* argued, when comparing *Diggs* to *Botsch,* that:

> It is true, of course, that Stein had a key and unlocked the shanty for the inspectors [describing *Botsch*]. We do not think that this was of any significance with respect to the question with which we are concerned, however. For the part which Botsch induced Stein unwittingly to play in the unlawful scheme required that he open the shanty to receive the fraudulently obtained merchandise, whereas the part which Christine Mahone and the defendant, Diggs, induced the Bradleys unwittingly to play required them merely to keep the box containing the stolen money safely for them, not to open it.

544 F.2d at 121. Judge Van Dusen, dissenting in *Diggs,* argued that the third party's failure to possess a key to the box was significant:

> By retaining the key, Diggs and Chris indicated to all who came in contact with the box that they maintained an expectation of privacy in the interior of the sealed container. The Supreme Court's and this Circuit's cases hold that such a clearly asserted privacy interest is worthy of the protection of the Fourth Amendment.

Id. at 131 (footnotes omitted). For cases in which a search has been held valid even though the third-party consenter did not have a key to the property searched, see United States v. Long, 524 F.2d 660 (9th Cir. 1975) (husband switched locks on house to keep wife out, but wife could still consent to search because of joint access and control); United States v. Lawless, 465 F.2d 422 (4th Cir. 1972) (defendant's wife initiated search without a key to the premises, but her joint rights to the premises still allowed her to consent to a search).

It is thus evident that the third party's possession of a key can have very significant consequences, and failure to possess a key often proves lack of the control needed to authorize consent. But the presence of a key may not always be decisive, and other factors may prove joint access and control even where the consenting party has no key to the property or chattels being searched.

[48] South Dakota v. Opperman, 428 U.S. 364, 377 (1976) (Powell, J., concurring).

goods from the suspect. There was no special relationship with the goods which created the authority to consent. Rather, the mere possession of such goods, combined with the third party's apprehension, allowed the third party to consent to the warrantless search.

Is the mere possession of goods which may or may not be linked to the crime and may often be totally unidentified, as in *Diggs*, enough to create the sufficient relationship required under the second prong of the *Matlock* test? It is difficult, in light of the past search and seizure decisions of the Supreme Court, to argue that when a third party takes possession of goods belonging to a suspected criminal, he is immediately authorized to consent to a search. The result of such an approach would be to establish a constant rule which would allow the apprehensive third party to consent to a search of any items in his possession merely because they belonged to a suspect. The Court could not have intended this when it said in *Matlock* that the consenter must have "common authority or other sufficient relationship" to the effects searched in order to consent. Otherwise, possession plus some minimal apprehension combine to form a sufficient relationship and the third party who possesses a suspect's goods can always consent to governmental search and seizure despite the suspect's fourth amendment rights.

Thus, when a court holds that a third party can consent to a search because he has a right to exculpate himself from his unwitting involvement in a crime, the court is in effect circumventing the *Matlock* standards. The court is replacing the tests of common authority and sufficient relationship with a theory of exculpation which can support a consent search without ever satisfying those standards. The test of common authority is avoided because the court can discover a right to exculpate without necessarily finding any common authority over the goods. Similarly, the mere possession of the suspect's goods creates the authority needed to consent to a search and seizure, because such possession itself creates the "right to exculpate."

Fourth Amendment Implications

Creating a right to exculpate which in some instances would authorize a third party to consent to a search and seizure of a suspect's possessions has significant implications in the fourth amendment area. The primary purpose of the fourth amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.[48] In many third-party consent cases, courts have accordingly sought to determine whether the suspect had a reasonable expectation of privacy in the goods given to the third party.[49] The privacy analysis fits in quite easily with other third-party consent approaches, since the defendant's expectation of privacy ordinarily would be affected by considerations of joint access, mutual use and common authority. If the defendant possessed a reasonable expectation of privacy in goods held by a third party, then the latter is not authorized to consent to a search or seizure of those items. If, however, the suspect does not seek to protect the privacy of the goods, but rather "knowingly expose[d them] to the public,"[50] then the consent was valid. This privacy analysis became popular after *Katz v. United States*,[51] which made clear that the fourth amendment protects a person's reasonable expectation of privacy.

> For the Fourth 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.[52]

Katz did not involve a consent search situation, and the privacy analysis has been used less

[49] *See, e.g.*, United States v. Novello, 519 F.2d 1078 (5th Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976) (no reasonable expectation of privacy when defendant knows others have general access to area); United States v. Piet, 498 F.2d 178 (7th Cir.), *cert. denied*, 419 U.S. 1069 (1974) (no reasonable expectation of privacy when warehouse foreman had keys to common storage area in which defendant had goods); Sartain v. United States, 303 F.2d 859 (9th Cir.), *cert. denied*, 371 U.S. 894 (1962) (defendant delivered briefcase and means of access to briefcase to friend and thereby largely surrendered right of privacy); State v. Curley, 171 S.E.2d 699 (S.C. 1970) (surrender of key to auto trunk by defendant forfeits expectation of privacy); State v. Edwards, 490 P.2d 1337 (Wash. App. 1971) (leaving of personal effects in another's residence prevents finding of reasonable expectation of privacy).

[50] Katz v. United States, 389 U.S. 347, 351 (1967).

[51] 389 U.S. 347 (1967).

[52] *Id.* at 351-52.

frequently in third-party consent situations since *Matlock*.[53] The reduced emphasis upon the suspect's privacy interests is largely due to *Matlock*'s emphasis upon the third party's relationship to the goods as the determining factor in third-party consent cases.

However, as *Diggs* demonstrates, the privacy interests of the suspect must still be considered, even under the *Matlock* standards. Those factors which are indicative of common authority also demonstrate, to some extent, the suspect's expectation of privacy. For example, when a suspect retains the key to a locked box but gives the box to a third party, the retention of the key indicates (1) that the suspect did not wish the third party to have access to the box, and (2) that the suspect still has an expectation of privacy as to the contents of the box.

The suspect, of course, does sacrifice to some extent his expectation of privacy when he surrenders possession of the goods to a third party. The extent to which the expectation of privacy is reduced depends largely upon the nature of the third party's control. If the third party is given a key to the trunk of a car and is told that he may use the key, the defendant certainly has a reduced expectation of privacy in the trunk area. In *People v. Pranke*, the court pointed out: "[h]ere we have a situation where a defendant delivers his briefcase and the means of access to it to another, thereby voluntarily surrendering to a large degree his right of privacy."[54]

The expectation of privacy analysis involves in every case an examination into the degree to which the defendant "surrendered" his expectation of privacy. If the property or premises searched could not reasonably be expected to remain private, then the search itself is reasonable and there is no need to rely upon a third-party consent analysis which examines the motives of the consenting party. But if the area searched is one which the defendant could reasonably have expected to be private, then it is necessary to inquire whether the exculpatory interest of the consenter should prevail over the suspect's fourth amendment interests. It is questionable whether such nonconstitutional rights as the right to exculpate should be balanced against fourth amendment protections, including the privacy interests of a suspect.[55]

The third-party consent exception to the warrant requirement permits police to search and seize property where such a search is "inherently reasonable." If the exception to the warrant requirement becomes too broad, however, the exception swallows the rule and the protection afforded suspects by the warrant requirement is reduced. In more and more cases, the constitutional rights of the suspect will depend upon the predicament of the third party who possesses property belonging to the suspect. Courts might be encouraged to create other such nonconstitutional rights which would allow third parties to authorize consent searches. For example, one court has already found that a third-party consenter's interest in protecting the integrity of the premises searched was enough to outweight a countervailing privacy interest.[56] Another interest which, it has been suggested, should prevail over a suspect's expectation of privacy is the interest of a third party in avoiding physical harm inflicted by the suspect.[57] A third party might also contend that he should be permitted

[53] F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CRIMINAL PROCEDURE—CASES AND COMMENTS 20 (1975 Supp.).

[54] People v. Pranke, 12 Cal. App. 3d 935, 91 Cal. Rptr. 129 (1970).

[55] One author has suggested that "countervailing interest[s]" should be used to "render the defendant's expectations of privacy unreasonable." Comment, *Thirty Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121, 134-35 (1973). The author suggests that a warrantless consent search is reasonable if the countervailing interest of the third party reduces the defendant's expectation of privacy. This analysis, however, seems flawed in that it is difficult to perceive what effect if any the third party's interests should have in defining a reasonable expectation of privacy. In effect, the countervailing interest is simply "outweighing" the defendant's privacy interests, and this balancing process substantially reduces the defendant's right to privacy, even though he had a reasonable expectation of privacy in the premises or property searched.

[56] In United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), a mother consented to a search of her son's bedroom. The court in a footnote indicated that the mother's "interest in the integrity of the premises was clearly superior to any privacy interest held by the codefendants." *Id.* at 181 n.23.

[57] "The most striking example of a countervailing interest that would render the defendant's expectations of privacy unreasonable exists where the defendant causes or threatens physical harm and the victim seeks police aid and involves them in a search." Comment, *Third Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121, 135-36 (1973). The

to consent to a search in order to avoid being called as a witness in the suspect's trial. The question would then be whether the third party may properly be motivated not only by a need to exculpate himself from criminal suspicion but also by a desire to extricate himself from any involvement at all.

The potential for the proliferation of a third party's rights which might prevail over the suspect's fourth amendment interests raises a question to what extent the recognition of such "rights" should be encouraged. The Supreme Court has at times vigorously emphasized the need for cooperation of the public in solving crimes, and it can be cogently argued that when a third-party consenter permits the search of a suspect's goods, he is merely cooperating with law enforcement officials in their investigation of crimes. Reliance upon the right to exculpate might further cooperation in law enforcement. The right to exculpate is perhaps analogous to the informant's "right" to supply police with information related to criminal activity.[58]

> [C]ourts have countenanced and encouraged the use of paid informants and undercover agents since time immemorial. The responsible citizen who presents the police with evidence of a crime should be no less encouraged for it is no part of the policy underlying the Fourth and Fourteenth amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.[59]

Reliance upon the right to exculpate, or a "right to become uninvolved" or a "right to protect the integrity of the premises" would increase the ability of each citizen to cooperate with the police.

The *Diggs* plurality balanced the interest in exculpation against the suspect's right of privacy and held that the third party's interest in exculpating himself should prevail. Similarly, in *People v. Pranke*,[60] the third party's right to cooperate[61] prevailed over the suspect's rights because the suspect had a substantially lessened expectation of privacy. In both *Diggs* and *Pranke*, it is clear that the suspect's rights are being balanced against the consenter's right to exculpate; in each case, the court finds that the right to exculpate should prevail over the suspect's right to privacy.

Such nonconstitutional rights should not prevail over the guarantees of the fourth amendment. Although the fourth amendment does not demand that a warrant be obtained for every search and seizure in which the government plays a role, exceptions to the warrant requirement are meant to be "jealously and carefully drawn."[62] The exceptions are not based on a *balancing* of interests, but rather on the recognition that in certain situations a search may be inherently reasonable.[63] The fact that a third party wishes to exculpate himself should not make a search of the suspect's property inherently reasonable.[64] Furthermore, to allow a third party to exculpate himself whenever he is in possession of a suspect's goods, by consenting to a search, would significantly expand the consent exception—ever increasing numbers of third parties would be able to consent to searches based solely upon their own desire to exculpate themselves. Vesting such broad power in the third party is inconsistent with a narrow and careful delineation of exceptions to the warrant requirement.

Placing more power to consent in the hands of the third party will also seriously undermine another major objective of the warrant requirement, the determination by a neutral magistrate regarding the need for a governmental search and seizure. In often quoted language, the Supreme Court has described the role of the magistrate in the search and seizure situation:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not

author of this article suggests that such a countervailing interest on the part of the third party may in certain instances justify the consent search.

[58] For an excellent discussion of an informer supplying police with information related to criminal activity, when the informer is not a paid or hired informer but a volunteering citizen, see Thompson & Starkman, *The Citizen Informant Doctrine*, 64 J. CRIM. L. & C. 163 (1973).

[59] *Id.* at 172 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)).

[60] 12 Cal. App. 3d 935, 91 Cal. Rptr. 129 (1970).

[61] *Id.* at 947, 91 Cal. Rptr. at 136 (Fleming, J., concurring).

[62] Jones v. United States, 357 U.S. 493, 499 (1958).

[63] See note 3 *supra*.

[64] Factors which do make a search inherently reasonable are those covered by the exceptions to the warrant requirement. See note 3 *supra*. The exceptions create a category of situations in which a warrant need not be obtained because the search is

> that it denies law enforcement the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[65]

In theory, the magistrate authorizes searches on the basis of demonstrated probable cause, regardless of the third party's relationship to the property. The consent exception recognizes that the third party's relationship to the property may itself justify a consent search. But if the authority to consent is based on the consenter's exculpatory motives, the magistrate's neutral determination may be avoided even though the third party has no real relationship to the property.

Allowing the third party to determine the need for a governmental search is little better than allowing "zealous officers" to do so—in both cases, the determination as to whether the search is reasonable is in the hands of an individual who might be under intense pressure and subject to undesirable influences. In *United States v. Botsch,* for example, the postal agents confronted the third party with the suspect's activities and the third party, "without being urged, coerced or imposed upon, invited the inspection."[66] The third party in *Diggs* consented to the search after learning of the suspect's arrest.

> He became suspicious that the box in his possession might contain stolen property. Becoming more and more distraught, he reached a point where he could not take it any longer, contacted FBI agents and insisted that they come to his home immediately, even thought [*sic*] it was late at night, so that the box might be opened in their presence and the truth as to the contents thus publicly revealed.[67]

In both *Botsch* and *Diggs,* the third party is drawing inferences from the evidence,[68] inferences which result in a governmental search[69] and seizure of the suspect's goods. It may be suggested that the suspect *chose* the third party himself, and thus should be required to accept the consequences. But such an argument implies that the third party has complete liberty to do as he wishes with the property in his possession. Ordinarily, the law does not conclude that the suspect's surrender of possession is a surrender of his right to control the third party's disposition of the property.[70]

Where a third party is motivated, as in *Botsch* and *Diggs,* by a desire to exculpate himself from involvement in the crime, review of the reasonableness of that desire would provide some protection.[71] Without an examination of the third party's decision to exculpate himself, the suspect's fourth amendment privacy rights are almost entirely controlled by the third party. In too many situations, the third party may be making a decision that fails to reflect the protections guaranteed by the fourth amendment.

It is apparent that the "right to exculpate" poses a threat to the fourth amendment protections in general. Any number of similar rights might be developed which would be balanced against, and might prevail over, an individual's privacy interests. Although such rights may carry with them important policy considerations, it is necessary to carefully define and limit the exceptions to the warrant requirement. It also seems undesirable to allow a third

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clearly reasonable and therefore within the fourth amendment.

[65] Johnson v. United States, 333 U.S. 10, 13-14 (1948) (footnotes omitted).

[66] 364 F.2d at 548.

[67] 544 F.2d at 119.

[68] The plurality in *Diggs* points out how the third parties can draw their own inferences when it says that the consenters, "might, when they learned the facts which appeared to incriminate them, disclose its contents in order to exculpate themselves." *Id.* at 122.

[69] See the discussion of private searches in note 4 *supra.*

[70] White, *The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock,* 1974 SUP. CT. REV. 165, 224.

[71] In *Diggs,* concurring Judge Gibbons stated the issue as involving a third party who did have reasonable cause to believe he possessed contraband. 544 F.2d at 124 (Gibbons, J., concurring). But the plurality never specifically argues that the third party was reasonable in his belief that he was in possession of contraband. It is suggested, however, that the third parties were aware of "facts which appeared to incriminate them." *Id.* at 122.

Courts have not completely refrained from examining the third party's decision to exculpate himself, and thus a call for further examination of the third party's decision to consent would not involve the courts in an entirely new process in which they have little experience. See note 15 *supra.*

party's inferences, without more, to create the authority to consent to a search. The suspect may have given up the power to consent to a search. The suspect may have given up the power to prevent *all* searches consented to by the third party, but it is unreasonable to suggest that he gave the third party complete, unrestricted freedom to consent.

A Suggested Solution

The right to exculpate doctrine, which allows third parties to consent to searches when they fear they have been implicated in a crime, overemphasizes the nonconstitutional rights of the third party, thus providing inadequate protection for the suspect whose fourth amendment privacy interests are threatened. These two competing interests could be accomodated if the government were required to demonstrate the third party's "standing" to assert the right of exculpation.

The government would be required to meet two tests before the third-party consent search would be held to comply with the *Matlock* standards. First, the government should demonstrate that an "exculpatory relationship" existed by showing that the consenter knew that the goods in his possession were in some way connected to the suspected criminal activity. Second, the government should show that the government agents involved in the search were reasonable in their belief that the third party sought to exculpate himself. This two-part standard is meant to insure that the third party is, in fact, exculpating himself by consenting to a search of the suspect's goods.[72]

The first element of the standard—the showing of the exculpatory relationship to the goods—may in many respects be seen as satisfying the requirement for all searches, as stated in *Warden v. Hayden*:[73]

> There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.[74]

The consenting third party might be able to show that the goods he possesses are related to the crime in several ways. He could suggest that the circumstances under which he received the goods indicate that they are related to the crime. Similarly, he could describe the goods and in doing so demonstrate that they are tied to the suspect's criminal activity. If the third party could demonstrate that he holds contraband or instrumentalities related to the crime, his consent would have been supported by some actual evidence that exculpation was necessary.

The application of the "standing" requirement suggested here would be administratively practical and would to a great extent solve the problems created by an unlimited right to exculpate. The rule would clarify for law enforcement agents the "sufficient relationship" standard which is applicable in the third-party exculpation situations.[75] For example, assume that a party has two trunks given him by a friend who has recently been arrested for a jewelry theft. The third party in possession calls the police and they appear in order to assist in a search. If the third party opened one of the trunks before the police arrived, and discovered it was full of jewels, a consent search of the second trunk would be proper.

[72] The standing concept suggested here is in many ways similar to the standards required for use of information supplied by informers in obtaining a search warrant. The government, in its application for search warrants, must demonstrate the reliability of the informers under the rulings of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). Although *Aguilar* and *Spinelli* have increasingly been viewed as applicable to professional informers only, the same type of analysis is appropriate for third-party consent. The government, in order to prove that the third-party consent was valid, must prove to some extent that the consenter was truly trying to exculpate himself and had valid reasons to believe that a need for exculptation existed. This serves to establish the "reliability" of the third party's belief in exculpation as a motive, and once such proof exists, the consent to the search can be held valid.

[73] 387 U.S. 294 (1967).

[74] *Id.* at 307.

[75] See text accompanying notes 16–18 *supra*. As indicated earlier, the *Diggs* plurality relied upon the sufficient relationship standard because the third party clearly did not have common authority over the box. It is difficult to conceive of situations where a third party would have common authority over goods for which he is serving as bailee, as in *Diggs*. If the third party believes that he is in possession of goods which belong to a wrongdoer, it is unlikely the third party would himself admit to having common authority over the goods. Thus, if the common authority test is not satisfied, the sufficient relationship standard of *Matlock* must be applied, as was done in *Diggs*.

The third party could properly assert that the goods in his possession were related to the suspect's alleged criminal activity. If the trunks were both locked, but had been dropped off a few minutes after the robbery, and in a hurried manner, the third party would again be able to consent to a search. But where the third party had obtained possession weeks after the crime, and had no idea what the trunks contained, a consent search would not be allowed. Thus if the third party knows he possesses contraband, or instrumentalities of the crime, he will have the necessary standing to assert his "right to exculpate," and a consent search is proper.

The burden on the police in such situations is fairly light. In each instance, they must ask the third party why he suspects that the goods are connected to the alleged illegal activity. Based upon the information supplied, the police must judge whether the third party has "standing" to assert the right to exculpate. The decision in each case will depend upon the ability of the third party to tie the goods in his possession to the crime.

Limiting the right of the third party to exculpate himself will greatly solve the major problems posed by the right to exculpate. By requiring the third party to demonstrate his "sufficient relationship" to the goods *before* finding that the right to exculpate exists, the courts will be complying with the *Matlock* analysis, rather than evading it by finding that the right to exculpate arose from mere possession of the suspect's goods. A prior showing that the property in his possession is connected with the crime would avoid a hindsight justification.[76] For example, in a *Diggs* situation, it is not known if the third party needs to exculpate himself until after consent is given and the sealed box is opened. Under the proposed analysis, the third party would have to indicate that the goods in his possession were connected to the crime; if such a showing could be made, the need to exculpate would be clear. The "backward" analysis required under the current rules could be avoided.

The third problem associated with the right to exculpate, that of police manipulation of the third party's motives, would be reduced but not entirely eliminated by the standing requirement. Police can presently influence a third party in order to make him believe that exculpation, and thus consent, is necessary. Under the proposed standard, the police would still be able to aid the third party in making the needed connection between the goods and the alleged criminal activity. The potential for abuse, however, is more serious as the law presently stands because police can influence a third party's motives and convince him of the need to exculpate even though the police have little if any knowledge of his real connection to the crime. Under the suggested analysis, the third party could not consent unless the goods had been tied to the crime being investigated. If the third party possessed a locked suitcase, the police would not be able to describe to the third party the nature of the goods inside the suitcase unless the police had such knowledge previously. Under the right to exculpate analysis, the police, without any knowledge of the contents of the suitcase, can pressure the third party into believing that he should exercise his right to exculpate. Under the proposed interpretation, the third party's consent would not be valid unless he could describe the contents of the suitcase and connect the suitcase to the suspect's alleged criminal activity.

Application of the proposed standing requirement would also discourage the "creation" of similar nonconstitutional rights which would prevail over the constitutional right of privacy. The third party's interest in cooperating with police, for example, might be limited in the same manner that the exculpatory interests are limited. A party might be required to demonstrate his "standing to cooperate" before being allowed to take an action that might infringe upon a suspect's constitutional rights. Furthermore, restricting the third party's right to consent would result in more situations in which police would have to obtain a search warrant. In those situations where the third party could not establish "standing to exculpate," the police would be forced to rely upon the meaningful intervention of a neutral magistrate to determine if probable cause for a search existed.

Such a limitation on the third party's ability to consent would not significantly interfere with police investigations. The police would still be able to obtain as much information as possible from the third party and would actually be encouraged to elicit such information

[76] See text accompanying note 41 *supra*, with respect to such hindsight justifications.

in order to determine whether the third party had standing to exculpate himself. If a warrant were necessary, the third party's information could aid in the determination of probable cause. Thus, the police will not be seriously hindered in their efforts to investigate the suspect's alleged criminal activity; they simply will not be entitled to possession of the suspect's goods because the third party seeks to exculpate himself.

The interests of the third party in exculpating himself are certainly significant, and the courts in *Botsch* and *Diggs* expressed a major concern for those interests. But it seems wrong to place those interests on a par with constitutional rights. The emerging right to exculpate oneself from implication in criminal activity should be limited because the expansion of this new "right" seriously threatens the fourth amendment right to be free from unreasonable searches and seizures. An equitable result, in light of the competing interests involved, can be achieved by requiring that the government make some showing of the third party's actual need to exculpate before being allowed to conduct a consent search. Such a requirement is administratively feasible and would not hinder, to an undesirable extent, the investigation of crimes. Yet the concurrent benefits to the suspect would be significant, and the standing requirement would fit easily into the Supreme Court's present third-party consent analysis. The theoretical and practical benefits of the standing requirement warrant the adoption of such a standard in third-party consent situations where the third party seeks to exculpate himself from criminal involvement.

LARRY I. YELLEN