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## Hindsight Bias and Third-Party Consentors to Warrantless Police Searches\*

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Research on hindsight bias indicates that awareness of event outcome influences how individuals interpret information and form judgments. We extend this earlier work to suggest that the effect of this bias on lay perceptions of third-party consent to warrantless searches of residences may be contingent upon the presence versus absence of the search target (the suspect). A study using random assignment to experimental conditions in a between-subjects design explored this possibility. The experiment indicated that hindsight bias in perceived rights of the third-party consentor is influenced, not only by search outcome, but also by a web of overlapping and potentially competing social obligations and personal prerogatives, the salience of which is influenced by situational dynamics.

Every year, law enforcement officers throughout this country conduct a sizable number of warrantless searches (Van Duizend, Sutton, & Carter, 1985). After “stop and frisk” searches (*Terry v. Ohio*, 1968), consent searches are the most common type of warrantless search in Fourth Amendment case law (Ringel, 1989). Lacking evidence to justify a warrant—but having information sufficient to arouse their suspicions—or as a matter of mere convenience, police may choose to approach sites of suspected incriminating evidence and seek permission to enter and look around. If the suspect is not present, a third party, such as a cotenant, may be asked to permit entry. Numerous legal cases delineate the conditions under which a person may qualify as a third party with the right to consent to such a search, the consequences of consenting to such a search, the

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balance between the suspect's and the consentor's rights, and the permissible scope of such searches across a range of situations.

According to *United States v. Matlock* (1974)—the first U.S. Supreme Court decision to explicitly articulate third-party consent search as an exception to the Fourth Amendment's warrant requirement—an individual having "possession and control" of premises or an object can consent to a search, and evidence uncovered by that search can be used against anyone with "common authority" over the place of search. Conversely, an individual lacking such possession and control, in which the property is in the "exclusive use" of another individual, cannot grant valid consent.

The *Matlock* Court also articulated the presumption that individuals entering a common-authority arrangement (e.g., a shared apartment) accept the risk that any one of the cotenants might consent unilaterally, based on his or her independent right of consent, to a search of the commonly held property.

Previous studies of warrantless police searches initiated when permission to search was granted by a third party demonstrated that (a) the phrasing of police search requests influenced both perceived voluntariness and scope of consent to the requests (Kagehiro, 1988); and (b) lay subjects were unable to distinguish at the room level between exclusive-use and common-use areas within a shared residence. Lay subjects' perceptions, however, of common authority and the right of third parties to consent to such searches were strongly influenced by circumstances such as the presence or absence of the suspect (Kagehiro & Taylor, 1988).

The *hindsight bias* refers to distortions in individuals' judgments. When individuals are made aware of the outcome of an event, there is a tendency to overestimate the likelihood of occurrence of the event (compared to estimated likelihood in the absence of outcome knowledge) and to overestimate the extent to which others would predict the occurrence of the event outcome (Fischhoff, 1974, 1975, 1977; Hawkins & Hastie, 1990).

Previous studies of hindsight bias focused on judgments in nonlegal situations; only one study examined juror decision making (Casper, Benedict, & Perry, 1989). We extend hindsight bias research to instances of judicial decision making, to consider whether perceptions of third-party consent may be shaped by subsequent search elements, such as the ensuing police conduct and the outcome of the search. If these expectations are supported, it would suggest that the effects of hindsight bias influence judgments not only about police actions, but about consentor actions as well. It would also suggest that judges' decisions about the appropriateness of third-party consent may be likewise influenced (Saks & Kidd, 1986).

The hindsight bias literature suggests that the outcome of a search might in fact influence lay perceptions of the original third-party consent. When applied specifically to third-party consent searches, our focus here, this hindsight judgment may be dependent, however, upon the situational consentor-suspect dynamic. Our earlier work indicated that lay perceptions of consentor rights were highly contingent upon the presence or absence of the suspect. In instances where the suspect was present and protested the search, the consentor's right to permit entry was viewed as more limited. We did not, however, examine the effects of search outcome. The perceived right of the consentor to permit entry and search

of the common-authority areas in a shared residence may be contingent upon both the outcome and the presence of the suspect.

We anticipate the consentor's rights to be perceived as strongest when the suspect is absent and incriminating evidence is found. Subjects may reason that (a) the suspect was absent and thus not present to circumscribe the consentor's right to permit entry; and (b) based upon hindsight bias, the consentor "had" to let the police in so that suspicions surrounding the consentor might be dissipated and his or her probity established (*Commonwealth v. Latshaw*, 1978).

A second issue we investigate concerns procedural dynamics of the search. Courts have not held that police must seek consent from the suspect before relying on a third party's consent. When police intentionally bypass a suspect who is present and known by them to possess an equal or even superior privacy interest in the place of search, however, the validity of third-party consent is less certain, although most of the cases have ruled that the third-party consent is valid (see, e.g., *Hembree v. State*, 1976; *People v. Misquez*, 1957; *State v. Chicester*, 1987). Consent by an absent coresident has prevailed against a present, nonconsenting coresident (*People v. Veiga*, 1989; *State v. Frame*, 1980). In at least two instances, police officers appeared to decline to have third-party consentors present during warrantless residence searches (*People v. Misquez*, 1957; *United States v. Hendrix*, 1979). When a third-party consentor is absent from the search premises, for whatever reason, he or she has a diminished capacity to monitor and to guide the police during the search and is unable to inform them about acceptable common-authority search areas versus prohibited exclusive-use areas.

Assuming that social expectations reflect actual social perceptions and behavior in close personal relationships, it was expected that people would judge negatively an intimate partner's behavior violating social norms of interpersonal trust and concern. Applied to the present social judgment situation, it was expected that, based on psychological research on close personal relationships and territorial functioning (Bell, 1981; Hornstein, 1985; McAdams, Healy, & Krause, 1984; Mercer & Benjamin, 1980; Rempel, Holmes, & Zanna, 1985; Taylor, 1988; Taylor & Ferguson, 1980; Vaughan, 1987), subjects would perceive a warrantless search conducted in a suspect/coresident's presence and over his or her objections to be less appropriate than a warrantless search conducted in the suspect/coresident's fortuitous absence.

Based on the hindsight bias and social relationships literatures, we expected that subjects would think that the consentor "should have known better" than to permit the police entry and subsequent disruption of the partner's privacy and of the social fabric of their relationship. Thus, the hindsight judgment may be contingent upon the presence versus absence of the suspect versus the consentor.

## METHOD

### Design and Subjects

The laboratory experiment was a  $3 \times 2$  between-subjects, factorial design, with random assignment of subjects to experimental conditions. Three levels of

presence of suspect during the search (absence by chance, absence awaited by police, or present/protests) were crossed with two levels of presence of evidence (not found or found).

The voluntary subjects were 72 students (34 males and 38 females) enrolled in introductory criminal justice courses at a large, urban university. They received extra credit in their courses for their participation in the research study. (Demographic information on these subjects is available upon request.)

## Procedure

The experimental questionnaires were group-administered during class sessions. The questionnaire concerned the operating assumptions and expectations when people share a residence. Subjects in all experimental conditions read that the police suspect the presence of a certain piece of evidence in a residence, but do not have enough evidence to obtain a search warrant from a judge. A police officer goes to the residence, described as a condominium owned and occupied jointly by Resident A (the suspect) and Resident B. They have lived in the condominium for over a year. The shared residence consists of a living/dining area, a kitchen, a bathroom, A's bedroom, and B's bedroom.

Depending on experimental condition, subjects read that (a) the suspect/coresident was fortuitously absent during the warrantless search; (b) the police waited for the suspect/coresident's departure; or (c) the suspect/coresident was present and protesting during the warrantless search.

Subjects in all experimental conditions read that the police officer searched a coat closet in the living/dining area (a common-authority area), Resident A's desk in the living/dining area (an exclusive-use area in a larger common-authority area), and Resident A's bedroom (an exclusive-use area). Subjects in the suspect present/protests experimental conditions read that Resident A continued to protest throughout the course of the search.

One half of the subjects in each experimental condition read that "no T-shirt which matches the crime description is found." The other half of the subjects in each experimental condition read that "a distinctive, custom-designed T-shirt which matches the crime description is found." For all experimental conditions, the third-party consentor was present throughout the search.

After reading their particular vignette version, subjects responded to five manipulation checks.

Our main dependent measures (Likert items with response scales of  $-4$  to  $+4$ , *very strongly disagree* to *very strongly agree*) concerned the third-party consentor's right to permit police entry and to permit police search of a common-authority area (the coat closet in the living/dining area). Other dependent measures (similar Likert items) concerned the third-party consentor's right to permit search of an exclusive-use area within a common-authority area (the suspect's desk in the living/dining area) and an exclusive-use area (the suspect's bedroom), subject's opinions of police search procedures and of the suspect's privacy rights and modes of civil redress, and demographic information about the subjects.

Upon completion of the experimental questionnaires, the subjects were given

an explanation of the purpose of the research project and information concerning means of obtaining results of the study, when completed. Experimental sessions lasted for less than one hour.

## RESULTS

### Probit Model

Analysis of the key dependent variables revealed that they were noticeably bimodal. Therefore, we dichotomized the dependent variables into binary measures, recoding  $-4$  to  $0$  as  $0$ , and  $+1$  to  $+4$  as  $1$ . We then analyzed these binary outcomes using a probit analysis, the appropriate analysis when assumptions of linear relationships between independent variables and dependent variables are not justified (Aldrich & Nelson, 1984; McFadden, 1982). A probit regression procedure provides estimates of the net effect of each independent variable on the probability that the dependent variable takes on a value of  $1$ .

A covariate, father's highest completed educational level, was included because it showed marginally significant correlations with several of the dependent measures. The three-category independent variable describing the suspect's presence during the search (absent by chance, absent after police waited, and present and protesting) was entered as two dummy variables. Target 1 contrasted the suspect's being absent by chance versus present and protesting; Target 2 contrasted the suspect being absent after a police wait versus present and protesting. The reference string, coded as  $0$  for both dummy variables, indicated that the suspect was present and protested.

The total model included father's educational level as a covariate, a main effect for evidence (found or not found), and the two dummy variables capturing the suspect's presence during search. In addition, two interaction terms (Target 1  $\times$  Evidence, and Target 2  $\times$  Evidence) were also included to explore the possibility that the effect of suspect's presence was contingent upon discovery of evidence.

### Consentor's Rights to Permit Entry and Search of Common-Authority Areas

Two items (the consentor's right to let the police officer in and to let the police officer search the common-authority area of the coat closet) yielded significant chi-squares,  $\chi^2(6, N = 72) = 12.95, p < .05$  and  $\chi^2(6, N = 72) = 19.52, p < .01$ , respectively. These results indicated that the total model explained a significant amount of outcome variance for each measure.

#### *Consentor's Right to Permit Entry*

A main effect for Target 1 was observed ( $b = -1.19$ ),  $t(65) = -2.06$ ;  $p < .05$ . If the suspect was away from the residence by chance, instead of present

during the search and protesting, subjects were less likely to agree that the consentor had a right to permit the police officer to enter.

This main effect was qualified by a significant Target 1  $\times$  Evidence interaction effect ( $b = 2.03$ ),  $t(65) = 2.31$ ;  $p < .05$ . The proportions are shown in Table 1. If evidence was uncovered, subjects were more likely to think that the consentor had the right to permit police entry when the suspect was absent by chance (92%) than when he or she was present and protesting (67%). When no evidence was uncovered, subjects were more likely to think that the consentor had the right to permit police entry when the suspect was present and protesting (83%) than when the suspect was absent by chance (42%).

This interaction term indicates that hindsight bias did influence subjects' views of the third party's right to permit entry and that the influence of the bias interacted with presence versus absence of the suspect. As anticipated, subjects thought the consentor had the most rights when the suspect was absent and the evidence was found (92%). When evidence was found, but the suspect had objected to the search, the consentor's rights were diminished (67%).

When evidence was not found, it appeared that the consentor did have a right to permit entry, even if the suspect was present and protesting. In other words, the consentor had a right to override the suspect's objections if the outcome of the search was negative. Subjects may have regarded the suspect's rights of privacy as superseded by the consentor's rights to avoid guilt by association (i.e., to avoid becoming implicated in the criminal investigation by permitting entry).

#### *Consentor's Right to Permit Search of Common-Authority Area*

The pattern of results for this item mimicked those for the above item. A main effect for Target 1 indicated that if the suspect was away by chance, instead of

**Table 1. Subjects Agreeing with Statements for Interactions between Discovery of Evidence and Suspect Presence**

Item: "Based on social expectations and understandings in our society, Resident B has the right to permit the police officer to enter the shared residence."

Suspect presence	Discovery of evidence	
	Not found	Found
Absent by chance	42%	92%
Present and protesting	83%	67%

Item: "Based on social expectations and understandings in our society, Resident B has the right to permit the police officer to search the coat closet in the living/dining area."

Suspect presence	Discovery of evidence	
	Not found	Found
Absent by chance	58%	83%
Present and protesting	92%	67%

present and protesting, subjects were less likely to agree that the consentor had the right to let the police officer search the common-authority area of the coat closet ( $b = -1.19$ ),  $t(65) = -2.07$ ;  $p < .05$ .

But, again, this main effect was qualified by a Target 1  $\times$  Evidence interaction, although in this case it was only marginally significant ( $b = 1.70$ ),  $t(65) = 1.89$ ;  $p < .10$ . The pattern of proportions was exactly as observed for the consentor's right to permit police entry (see Table 1). Again, most subjects perceived the consentor as having a right to permit the search when evidence was found and the suspect was absent (83%); when the guilty suspect was present and protesting, the consentor's rights were diminished. If evidence was not found, the consentor had a right to override the protests of the present suspect, perhaps to demonstrate his or her own innocence. Thus, hindsight bias did influence perceived rights of the consentor and was contingent upon presence versus absence of the suspect.

Subjects may have felt that the consentor was justified in allowing a police search of a common-authority area if the suspect was present and protesting, on grounds of "harmless error" (the violation of the suspect's privacy did not really matter) or of happy outcome (the coresident's status of "suspect" was removed thereby), because no evidence was uncovered. Similarly, the consentor was justified if the suspect was absent by chance and guilty, because evidence was uncovered. In the latter case, respondents may have viewed the suspect's rights as weaker, and the subjects may have focused on the consentor's interests in avoiding police suspicion.

Of course, alternative explanations of these patterns of results are possible. But we ground our interpretations in our past work on the complex social pressures and obligations involving consentors and suspects in these situations. It will be the role of future research to weigh the explanation proposed here versus others. The important point, for the present purposes, is that in a random assignment experiment with a fully between-subjects design we find respondent perceptions of consentor rights as contingent upon outcome and consentor-suspect dynamics.

### Miscellaneous

The other dependent measures, concerned with the suspect's rights and modes of redress, police search of exclusive-use areas, and appropriate police conduct, yielded no consistently patterned differences. In general, subjects thought that (a) a warrant should be obtained prior to search when possible ( $M = 4$ ), (b) the consentor did not have the right to permit police search of the suspect's exclusive-use areas of the desk ( $M = -3$ ) or bedroom ( $M = -3$ ), (c) any evidence uncovered by the search should not be admissible ( $M = 2$ ), and (d) a civil suit by the suspect against the police for invasion of privacy should be decided in the suspect's favor ( $M = 2$ ).

### DISCUSSION

We found that suspect-consentor dynamics and search outcome influenced perceived rights of the consentor at the beginning of the search (these findings

were replicated in a second study, which we conducted, that also examined the influence of police conduct subsequent to obtained consent). Our study extends the range of situations in which hindsight bias might be investigated and opens up a previously unexplored area of the law in which to test and refine psychological theory. It reveals an area of applied behavior demonstrating the interconnectedness of different psychological research literatures, that of hindsight bias, social relationships, and human territoriality and privacy regulation. The findings are consistent with other recent investigations of hindsight bias, which have gone beyond examinations of its effect on event likelihood estimates to investigate its influence on judgments such as personal attributions (Goggin & Range, 1985; Janoff-Bulman, Timko, & Carli, 1985; Mitchell & Kalb, 1981) and juror decision making (Casper et al., 1989). Subjects engaged in a hindsight analysis of third-party consent to police search. The operation of hindsight bias was contingent, however, not only upon the search outcome, but upon other situational dynamics.

When the outcome of the search was fruitless, the third-party consenter was perceived as more justified in permitting entry and search when the suspect was present and protesting, contrary to our predictions. The objections of the suspect were perceived as inconsequential, and the consenter perceived as merely exercising a personal right to allow entry and access to common-authority areas within the shared residence.

But if evidence was uncovered, matters were viewed differently. The suspect's objections were heeded more when he or she was present than when he or she was absent. When the suspect was away from the residence by chance and was seemingly guilty, as suggested by the uncovered evidence, the vast majority of subjects perceived the third-party consenter as more justified in permitting police entry and search. To put it another way: When the consenter's rights were unhampered because the coresiding suspect was elsewhere and it may have been important for the consenter to establish innocence and avoid guilt by association with the suspect, laypersons' hindsight analysis was most likely to accord the consenter such latitude. Any evidence uncovered as a result of the search can be used against anyone, including the consenter (Comment, 1966; *United States v. Blue*, 1966; *United States v. Crews*, 1980). Laypersons were most likely to agree that the consenter had a right to let the police enter and search a common-authority area.

By contrast, if evidence was not found, the suspect appeared to be innocent, and the suspect was unable to protect his or her rights due to absence, many subjects indicated that the consenter did not have the right to permit entry. Protecting the innocent and vulnerable coresident against intrusions by misinformed or overzealous police may have been perceived by respondents as a salient obligation for the consenter. This interpretation would be consistent with subsidiary findings of Kagehiro (1988), indicating that a third-party consenter's decision to permit or not to permit a warrantless search was a result of concerns about the privacy interests of both coresidents, rather than a result of perceived coercion.

The means when the search yielded evidence were similar to observations in an earlier study. In Kagehiro and Taylor (1988), we found that when the suspect/coresident was away, the consenter/coresident was perceived as having indepen-

dent consent power; the absent suspect had diminished rights. Another similarity of these results to earlier results was that the third-party consentor's domain was circumscribed. There were limits to the effect of awareness of outcome on perceptions of the search. The independent variables did not influence subjects' perceptions of the suspect's rights and modes of redress or their views of the appropriateness of police conduct. The results suggested that the operation of hindsight bias was influenced not only by the search outcome, but also by the intersection of potentially competing social obligations and personal prerogatives.

The case law on third-party searches focuses on the suspect's rights and interests rather than the consentor's rights and interests. The results suggest that this approach inadequately conceptualizes the social psychology of consent. By consenting to a search, the consentor and, by default, the suspect "agree" to forego their right to require the state to prove adequate justification to conduct the search (cf. *Illinois v. Rodriguez*, 1990). For these reasons, lay judgments, which reflect a willingness to consider the interests of both coresidents, merit further investigation by the courts, as they express social expectations of privacy and interpersonal relations in shared living arrangements (Kagehiro & Laufer, 1990).

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